

EXPLANATORY MEMORANDUM TO

The Cross-Border Mediation Regulations (Northern Ireland) 2011

SR No. 157

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department of Finance and Personnel (“the Department”) to accompany the above-named Statutory Rule which, subject to negative resolution, is laid before the Northern Ireland Assembly.
- 1.2 The Statutory Rule is made under Section 2(2) of the European Communities Act 1972, as amended.
- 1.3 The Rule is due to come into operation on 18 April 2011.

2. Purpose

- 2.1 The purpose of the Statutory Rule is to give effect to Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (“the Directive”).

3. Background

- 3.1 The Directive deals with certain aspects of mediation in civil and commercial matters. In order to comply with the Directive, Member States must, by 21 May 2011, have made provision in respect of certain identified fundamentals of mediation. The overall aim is to promote the use of mediation as a means of resolving cross-border disputes (i.e. where at least one of the parties is domiciled or habitually resident in a different Member State).
- 3.2 The following six primary requirements are imposed by the Directive—
 - **Mediation/mediator quality and awareness:** States must encourage mediators to operate under published voluntary codes of conduct and encourage the training of mediators (**Article 4**).
 - **Recourse to mediation:** States must ensure that it is possible for a court to invite parties to use

mediation in order to settle a dispute or to invite the parties to attend an information session on the use of mediation, if such sessions are held and easily available (**Article 5**).

- **Enforceability of mediated settlements:** States must ensure that written agreements negotiated through mediation are capable of being made enforceable, if all the parties involved agree to this being done (**Article 6**).
- **Mediation confidentiality:** Subject to specified exceptions, mediation providers cannot be compelled to give evidence in civil proceedings (**Article 7**).
- **Prevention of the expiry of limitation or prescription periods during mediation:** States must ensure that no party can be prevented from initiating proceedings because a limitation or prescription period has expired during the mediation process (**Article 8**).
- **Information for the general public:** States must encourage the availability, particularly on the internet, of information on how to contact mediation providers (**Article 9**).

3.3 Most of the above requirements have already been met or can be met via administrative action. However, there are a number of limitation periods which must be amended in order to ensure compliance with the fifth requirement. The Regulations will effect the required amendments and reinforce the point about non-compellability.

4. Matters of Special Interest to the Committee on Finance and Personnel

4.1 None

5. Consultation

5.1 The Department has not consulted on the Regulations as they implement an EU Directive, which was already the subject of consultation.

6. Position in Great Britain

6.1 Similar Regulations have been made in Scotland and will be made in England and Wales.

7. Equality Impact

7.1 An equality screening exercise has been conducted and no adverse impact on any of the section 75 groupings has been identified.

8. Regulatory Impact

8.1 A regulatory impact assessment has not been prepared for the Regulations as they will not impose any costs on business, charities or voluntary bodies.

9. Financial implications

9.1 There are no financial implications. The Directive encourages, rather than directs, mediation.

10. Section 24 of the Northern Ireland Act

10.1 The Department believes the Regulations are compatible with Section 24 of the Northern Ireland Act 1998.

11. E.U implications

11.1 The Regulations will ensure compliance with the Directive. A transposition note has been prepared.

12. Additional Information

12.1 None

THE CROSS-BORDER MEDIATION REGULATIONS (NORTHERN IRELAND) 2011

TRANSPOSITION NOTE

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008 ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 1	<p>1. The objective of the Directive is to facilitate access to alternative dispute resolution procedures and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a 'balanced relationship' between mediation and judicial proceedings.</p> <p>2. The Directive shall apply in cross-border disputes, to civil and commercial matters except those rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend in particular to revenue, customs, or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (known as <i>acta iure imperii</i>).</p> <p>3. In this Directive, the term 'Member State' shall mean all Member States with the exception of Denmark.</p>	<p>Mediation is readily available in Northern Ireland. Parties are free to mediate in all appropriate cases and court cases can be adjourned while mediation is attempted.</p>	<p>1. The existing provision for mediation in Northern Ireland is compatible with the general objective of the Directive and will be enhanced by the provisions detailed below in line with that objective.</p> <p>2. The Cross-Border Mediation Regulations (Northern Ireland) 2011 transpose Articles 7 and 8 of the Directive.</p> <p>Regulations 4 to 12 amend statutory provisions which apply to specific kinds of disputes, which are considered to be civil or commercial for the purposes of the Directive</p> <p>3. Not transposed.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 2	<p>1. For the purposes of this Directive a cross-border dispute shall be one in which <u>at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date of which:</u></p> <p>(a) The parties agree to use mediation after the dispute has arisen;</p> <p>(b) Mediation is ordered by the court;</p> <p>(c) An obligation to use mediation arises under national law; or</p> <p>(d) For the purposes of article 5 (below), an invitation is made to the parties.</p> <p>2 Notwithstanding paragraph 1, for the purposes of Articles 7 and 8, a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).</p> <p>3 For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No. 44/2001.</p>		<p>The Cross-Border Mediation Regulations (Northern Ireland) 2011 will apply to cross-border disputes as defined in Article 2.</p> <p>Regulation 2 of the 2011 Regulations applies the definitions in the Directive and the provisions which are to be inserted on foot of regulations 4 to 12 contain a definition of “relevant cross-border dispute”.</p>
Article 3	<p>For the purpose of this Directive the following definitions shall apply:</p> <p>(a) ‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by</p>		<p>The Cross-Border Mediation Regulations (Northern Ireland) 2011 apply the definitions of “mediation” and “mediator” in the Directive.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
	<p>themselves, on a voluntary basis to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.</p> <p>It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the court of judicial proceedings concerning the dispute in question.</p> <p>(b) 'Mediator' means any third party who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.</p>		<p>The provisions which are to be inserted on foot of regulations 4 to 12 also refer to the definition of "mediation" and "mediator" in the Directive.</p>
Article 4	<p>1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.</p>	<p>In general, mediation service providers are self-regulated, having several membership/accreditation organisations.</p> <p>The Northern Ireland Executive has recently funded training for family mediators in order to increase the number of accredited family mediation service providers in Northern Ireland.</p>	<p>Administrative implementation as detailed in comments section.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
	<p>2. Member State shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial, and competent way in relation to the parties.</p>	<p>The Executive will continue to encourage the application of quality control mechanisms and ongoing training for mediators.</p>	
Article 5	<p>1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.</p> <p>2. The Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.</p>	<p>The civil courts in Northern Ireland already have the power to invite parties to consider using mediation in order to settle a dispute and the Rules of Court have been amended to take account of the Directive.</p>	<p>Not transposed in the Cross-Border Mediation Regulations (Northern Ireland) 2011 as the courts already have the powers required by Article 5.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 6	<p>1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made of the law of that Member State does not provide for its enforceability.</p> <p>2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.</p> <p>3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with the above parts of article 6.</p> <p>4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.</p>	<p>Written settlements negotiated through mediation are capable of being made enforceable through the courts.</p>	<p>Article 6.1, 6.2 and 6.4 are not transposed in the Cross-Border Mediation Regulations (Northern Ireland) 2011 as mediation agreements can already be made enforceable as set out in comments section.</p> <p>Article 6.3 was implemented by providing information to the Commission via UK government officials.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 7	<p>1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process except:</p> <p>(a) Where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or</p> <p>(b) Where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.</p> <p>2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.</p>	<p>This reflects current practice and confidentiality is generally reflected in agreements to mediate, which are signed before a mediation takes place. However, confidentiality of mediation is not currently guaranteed by legislation.</p>	<p>Regulation 3 of the Cross-Border Mediation Regulations (Northern Ireland) 2011.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 8	<p>1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.</p> <p>2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.</p>		Regulations 4 to 12 of the Cross-Border Mediation Regulations (Northern Ireland) 2011.
Article 9	Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.	<p>The Northern Ireland Executive recently funded the production of leaflets on family mediation and information on family mediation is available on the NIDirect website.</p> <p>In addition, information leaflets on mediation are available in courts and other public places.</p>	Administrative Implementation as detailed in the comments section.
Article 10	The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).		<p>No transposition.</p> <p>This relates to the role of the Commission and does not impose an obligation on Member States.</p> <p>Article 6.3 (to which Article 10 refers) was administratively implemented as detailed above.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 11	<p>Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the EU and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.</p>		<p>No transposition.</p> <p>This relates to the role of the Commission and does not impose an obligation on Member States.</p>
Article 12	<ol style="list-style-type: none"> 1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof. 2. When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States. 3 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive. 	<p>21 May 2011 is the deadline by which the Directive must be given effect.</p>	<p>The Cross-Border Mediation Regulations (Northern Ireland) 2011 will come into operation on 18 April 2011.</p> <p>The regulations refer to the Directive.</p> <p>Article 12.3 will be implemented by provision of information to the Commission via UK government officials.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 13	This Directive shall enter into force on the 20 th day following its publication in the Official Journal of the EU.	The Directive was published on 24 May 2008 (O.J. L 136, 24.5.2008, p3).	No transposition
Article 14	This Directive is addressed to the Member States		No transposition