

EXPLANATORY MEMORANDUM TO
THE CROSS-BORDER MEDIATION (EU DIRECTIVE) REGULATIONS 2011
2011 No. 1133

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Cross-Border Mediation (EU Directive) Regulations 2011, made under powers contained in section 2(2) of the European Communities Act 1972, form part of the implementation of 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 (“the Directive”). They amend various provisions in primary and secondary legislation in relation to Article 8 (effect of mediation on limitation and prescription periods) of the Directive. They also make substantive provision on mediation evidence in relation to Article 7 (confidentiality of mediation) of the Directive, the procedural rules on mediation evidence having been included in the Civil Procedure (Amendment) Rules 2011 (S.I. 2011/88) (Amendment Rules 2011) and in the Family Procedure Rules 2010 (S.I. 2010/ 2955).

2.2 The other elements of implementation are regulations made under devolved powers for Scotland and Northern Ireland, respectively laid in the Scottish Parliament on 2 February 2011 (The Cross-Border Mediation (Scotland) Regulations 2011), and in the Northern Ireland Assembly on 24 March 2011 (The Cross-Border Mediation Regulations (Northern Ireland) 2011). Paragraphs 7.9 to 7.12 provide further information about those regulations.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The UK is required to implement the Directive, which seeks to harmonise certain aspects of mediation in relation to EU cross-border disputes, with an ultimate aim to promote its use in certain EU cross-border disputes.

4.2 In order to comply with the Directive, Member States must, by 21 May 2011, have made provisions in respect of certain identified fundamentals of mediation. The scope of the Directive does not extend to domestic mediations or to mediations between parties based within the separate jurisdictions of the United Kingdom (namely those of England and Wales; Northern Ireland; and of Scotland).

- 4.3 The current arrangements for mediation in England and Wales already comply with Articles 4 (ensuring the quality of mediation), 5 (recourse to mediation), and 9 (information for the general public) of the Directive. Therefore, no further implementation work was required. Article 6(3) (requirement to provide the Commission with information about courts competent for the purposes of Article 6(1) and (2)) was complied with on 19 November 2010. The Transposition Note, which is annexed to this document, provides further information.
- 4.4 However, there are a number of other Articles, namely, Articles 6, 7 and 8 which require amendments to Rules of Court and to other legislation. In relation to Scotland and Northern Ireland, these are principally made under the regulations explained in paragraphs 7.9 to 7.12, but this instrument does amend the Prescription and Limitation (Scotland) Act 1973 as well as legislation which extends to the whole of the UK.
- 4.5 In relation to Article 6 (enforceability of agreements resulting from mediation), the main provisions have already been made, in a new section III to Part 78 of the Civil Procedure Rules (“the CPR”), and in particular, rules 78.23 and 78.25 are relevant. In relation to Article 7, (confidentiality of mediation) the main procedural provisions are also contained in Part 78 of the CPR, in particular rules 78.26 to 78.28. These provisions have also been reflected in Part 35 of the Family Procedure Rules 2010 (“the FPR”).
- 4.6 Substantive provision in relation to Article 7 is made in this instrument, as explained further below.
- 4.7 In relation to Article 8, there are a number of limitation and prescription periods in domestic law which must be amended in order to ensure compliance with this Article. Consequently, this instrument amends legislation to ensure that if a limitation or prescription period in domestic law expires while mediation is ongoing, parties are not subsequently prevented from seeking a remedy for that dispute through the courts or through arbitration if the mediation fails.
- 4.8 The Directive has been before the Select Committee on the European Union, which initially notified the Department on 9 May 2007 that the Directive did not clear scrutiny and further information was requested. The Committee felt the application of this proposal should not apply to mediations which are internal to a Member State, but should apply only to those having cross-border implications. The Committee confirmed that the proposal had been cleared from scrutiny on 24 October 2007. The only outstanding issue which remained from the Committee’s perspective was the Directive’s impact on arbitration, which was referred to the Department for Business, Innovation and Skills (Department for Business, Enterprise and Regulatory Reform at the time) which has policy responsibility for arbitration, to consider further. Final Cabinet Committee clearance was received on 7 November 2007.

5. Territorial Extent and Application

- 5.1 Part 1 of these regulations extends to the whole of the United Kingdom
- 5.2 Part 2 of these regulations extends to England and Wales.
- 5.3 Parts 3 and 4 of these regulations have the same extent as the provisions that they amend.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly, has made the following statement regarding Human Rights:

“In my view the provisions of the Cross-Border Mediation (EU Directive) Regulations 2011 are compatible with the Convention rights.”

7. Policy background

England and Wales

- 7.1 Article 7 of the Directive requires Member States to ensure that neither mediators nor those involved in the administration of the mediation process should 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. This is subject to the following exceptions:
 - a) if the parties agree;
 - b) if it is necessary for overriding considerations of public policy; or
 - c) if it is necessary for implementation of an enforceable mediation agreement.
- 7.2 This instrument includes the substantive rule of mediation evidence, which defines the rights of the mediator/administrator to resist giving mediation evidence. The procedural rules on this aspect are already contained in the CPR and FPR.
- 7.3 Article 8 of the Directive requires Member States to ensure that, if a limitation or prescription period in domestic law expires while mediation is ongoing, parties should not be subsequently prevented from seeking a remedy for that dispute through the courts or through arbitration if the mediation fails. Not all limitation periods will be affected: a limitation or prescription period will only be affected if it relates to a dispute that is within the scope of the Directive.
- 7.4 The approach adopted to implement Article 8 of the Directive has been to make the minimum necessary legislative changes to ensure implementation. To this end,

this instrument amends legislation in relation to limitation and prescription periods, so that parties are not prevented from initiating proceedings or arbitration simply because a limitation or prescription period expired during the course of mediation.

- 7.5 The Regulations make individual rather than generic amendments to legislation on limitation and prescription periods, on the grounds that if a general amendment approach had been adopted, it might have led to legal uncertainty, since it would have been very difficult to establish clearly which legislation or measures would have been affected.
- 7.6 The policy approach that has been adopted to implement Article 8 of the Directive is to postpone the effect of expiry of limitation periods. This means that if the limitation period expires while mediation is ongoing, the effect of its expiry (that a person loses the right to litigate) is delayed until a certain specified time after the mediation ends.
- 7.7 In relation to limitation periods that are 6 months or more, the delayed expiry period has been set as eight weeks after the date on which the mediation ends. Where the limitation period is less than 6 months, the delayed expiry period will be correspondingly shorter. The purpose of this is that in the event of a cross-border mediation not settling, the delayed expiry period will ensure that parties have sufficient time to initiate judicial proceedings or arbitration, without building in a disproportionate delay.
- 7.8 This instrument also includes a clear definition of when a mediation starts and ends, with the latter being used to determine when the delayed expiry period begins in the event of a cross-border mediation not settling.

Scotland

- 7.9 Regulation 3 of the Cross-Border Mediation (Scotland) Regulations 2011 implements Article 7 of the Directive by providing that a mediator or person involved in the administration of mediation in relation to a cross-border dispute to which the Directive applies cannot be compelled to give evidence or produce anything about the mediation in civil proceedings or at an arbitration hearing.
- 7.10 Regulations 4 to 9 of the Cross-Border Mediation (Scotland) Regulations 2011 implement Article 8 of the Directive by amending prescription and limitation periods in primary legislation. The effect of these Regulations is to ensure that if a prescription or limitation period, would have otherwise expired during the mediation process, or within 8 weeks after the mediation has ended, the period will be extended until 8 weeks after the end of the mediation, allowing parties sufficient time to initiate judicial proceedings or arbitration.

Northern Ireland

- 7.11 Regulation 3 of the Cross-Border Mediation Regulations (Northern Ireland) 2011 implements Article 7 of the Directive by providing that a mediator or person involved in the administration of mediation in relation to a cross-border dispute to which the Directive applies cannot be compelled to give evidence or produce anything about the mediation in civil proceedings or at an arbitration hearing.
- 7.12 Regulations 4 to 12 of the Cross-Border Mediation Regulations (Northern Ireland) 2011 implement Article 8 of the Directive by amending prescription and limitation periods in primary legislation. The effect of these Regulations is to ensure that if a prescription or limitation period, would have otherwise expired during the mediation process, or within 8 weeks after the mediation has ended, the period will be extended until 8 weeks after the end of the mediation, allowing parties sufficient time to initiate judicial proceedings or arbitration.

8. Consultation outcome

- 8.1 A formal public consultation exercise was not necessary prior to the implementation of Articles 7 and 8, as the Directive was already the subject of consultation. However, the Ministry of Justice held discussions with members of the judiciary and key stakeholders. This included some members of the judiciary within the Family Procedure Rule Committee that developed Part 35 of the FPR in relation to the family mediation aspects of the Directive. In addition, the Civil Mediation Council, Centre for Effective Dispute Resolution, as well as the devolved administrations and other government departments have contributed to the development of the Directive. The Department continued discussions during the planning of the implementation of the Directive and took the views of key stakeholders into account on the implementation options.

9. Guidance

- 9.1 Her Majesty's Courts and Tribunals Service (HMCTS) has been given guidance on relevant impacts on civil and family procedure. Key stakeholders have also been informed of the forthcoming implementation of the Directive. The Ministry of Justice will also continue to provide relevant information that will assist those participating in cross-border mediations.

10. Impact

- 10.1 The impact on business, charities, voluntary bodies as well as the public sector is negligible.
- 10.2 An Impact Assessment was not necessary for this instrument because the UK is obliged to implement the provisions of the Directive which only applies to cross-

border mediations and the current volumes of such mediations represent a very small minority of the UK mediation workload.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 The use of mediation in cross-border disputes will remain voluntary. If a dispute falls within the scope of the Directive, small businesses will have the option to use mediation to resolve a cross-border dispute. However, there is no obligation to use it as the process remains completely voluntary.

12. Monitoring & review

12.1 Article 11 of the Directive requires the Commission by 21 May 2016 to submit a report to the European Parliament, the Council and the European Economic and Social Committee on the application of the Directive. The Ministry of Justice will provide feedback on the application of the Directive for the UK.

13. Contact

Tajinder Bhamra at the Ministry of Justice (Tel: 020 3334 3161 or email: tajinder.bhamra1@justice.gsi.gov.uk) can answer any queries regarding the instrument.

THE CROSS-BORDER MEDIATION (EU DIRECTIVE) REGULATIONS 2011

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.

Part 1 of the Cross-Border Mediation (EU Directive) Regulations 2011 extends to the whole of the UK. However, Scotland and Northern Ireland have made tailored regulations, namely the Cross-Border Mediation (Scotland) Regulations 2011 and the Cross-Border Mediation Regulations (Northern Ireland) 2011 that apply to their respective jurisdictions. This Transposition Note also therefore provides information on the relevant regulations laid in the Scottish Parliament on 2 February 2011, and Northern Ireland Assembly on 24 March 2011.

TRANSPOSITION NOTE

ARTICLE	PROVISION	COMMENTS	IMPLEMENTATION
Article 1	<p>The objective of the Directive is to facilitate access to alternative dispute resolution (ADR) 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>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>In this Directive, the term 'Member State' shall mean all Member States with the exception of Denmark.</p>	<p><u>England and Wales.</u></p> <p>Under the Civil Procedure Rules (CPR), the courts are required to actively manage cases, which include encouraging the use of ADR methods, such as mediation. Parties are also able to mediate in all appropriate cases because court cases can be temporarily adjourned ("stayed") while mediation is attempted.</p> <p>A questionnaire called the Allocation Questionnaire is also sent out to parties at the early stages of case management. The questionnaire ask parties whether they would either like to use the in-house small claims mediation service, or for higher value cases, whether they would like the court to arrange a mediation for them (via the National Mediation Helpline (NMH)).</p>	<p><u>England and Wales</u> <u>Civil and Family Mediation</u></p> <p>In relation to both civil and family mediation we have implemented articles by way of the Cross-Border Mediation (EU Directive) Regulations 2011 ("the Mediation Regulations 2011") (for details please see below). For this purpose, Part 1 of the Mediation Regulations 2011 contains definitions that relate back to the scope of the Directive.</p> <p><u>Scotland</u></p> <p>The existing provision for mediation in Scotland is compatible with the general objective of the Directive.</p> <p>The Cross-Border Mediation (Scotland) Regulations 2011</p>

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		<p>Relevant court leaflets also encourage parties to try and resolve their dispute out of court. Advice agencies provide parties with information on the alternatives to court and, where necessary, will sign-post them to other sources of advice and help.</p> <p><u>Civil Mediation</u> In relation to civil mediation, we have inserted new provisions into the CPR to implement various articles of the Directive (for details see below). For this purpose, definitions have been included that relate back to the scope of the Directive.</p> <p><u>Family Mediation</u> In relation to family mediation, we have adopted the definitions contained within Article 1 in the rules of court in relation to family justice (namely, the Family Procedure Rules ('FPR') 2010.</p> <p><u>Scotland</u> Mediation is readily available in Scotland. There is no bar to parties being able to mediate in all appropriate cases and it is open to all parties who wish to use it. Court cases can be temporarily suspended ("sisted") at the request of the parties while mediation is attempted.</p> <p><u>Northern Ireland</u> 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>transpose Articles 7 and 8 of the Directive. Regulations 3 to 6 make provision which will apply only to disputes to which the Directive applies.</p> <p>Regulations 7 to 9 amend statutes which apply to specific kinds of disputes, which are considered to be civil or commercial for the purposes of the Directive</p> <p><u>Northern Ireland</u> The existing provision for mediation in Northern Ireland is compatible with the general objective of the Directive.</p> <p>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>

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Article 2	<p>For the purposes of this Directive a cross-border dispute shall be one in which <u>at least one</u> of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date of which:</p> <p>(a) The parties agree to use mediation after the dispute has arisen; (b) Mediation is ordered by the court; (c) An obligation to use mediation arises under national law; or (d) For the purposes of article 5 (below), an invitation is made to the parties.</p> <p>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>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><u>England and Wales</u></p> <p><u>Civil Mediation</u> In relation to civil mediation, we have adopted the definitions contained in Article 2 in the CPR.</p> <p><u>Family Mediation</u> In relation to family mediation, we have adopted the definitions contained in Article 2 in the FPR.</p>	<p><u>England and Wales</u> <u>Civil and Family Mediation</u> The Mediation Regulations 2011 will apply to cross-border disputes as defined in Article 2. Please see comments column.</p> <p><u>Scotland</u> The Cross-Border Mediation (Scotland) Regulations 2011 will apply to cross-border disputes as defined in Article 2.</p> <p><u>Northern Ireland</u> The Cross-Border Mediation Regulations (Northern Ireland) 2011 will apply to cross-border disputes as defined in Article 2.</p>
Article 3	<p>(a) ‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by 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</p>		<p><u>England and Wales</u></p> <p>The Mediation Regulations 2011 adopt the definitions of “mediation” and “mediator”. The definitions are also adopted in amendments to legislation that are made by the Mediation Regulations 2011.</p>

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	<p>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><u>Civil Mediation</u> In relation to civil mediation, we have adopted the definitions contained in Article 3, in the CPR.</p> <p><u>Family Mediation</u> In relation to family mediation, we have adopted the definitions contained in Article 3, in the FPR.</p> <p><u>Scotland</u></p> <p>The Cross-Border Mediation (Scotland) Regulations 2011 apply the definitions of “mediation” and “mediator” from the Directive.</p> <p>Regulation 2 applies definitions of “mediation” and “mediator” for the purpose of regulation 3 and regulations 5 to 9 insert definitions into other statutes.</p> <p><u>Northern Ireland</u></p> <p>The Cross-Border Mediation Regulations (Northern Ireland) 2011 apply the definitions of “mediation” and “mediator” in the Directive.</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</p>

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			Directive.
Article 4	<p>Member State 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>Member States 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><u>England and Wales</u></p> <p><u>Civil Mediation</u> For civil mediation, the Ministry of Justice encourages providers to be accredited by the Civil Mediation Council, which is an independent body with the remit to promote civil and commercial mediations as alternatives to litigation.</p> <p>The National Mediation Helpline (a government sponsored service) only accepts mediation providers who are accredited by the Civil Mediation Council. Also, access to court referrals is only possible via the National Mediation Helpline. For mediation providers in England and Wales to have access to those referrals, they must hold the Civil Mediation Council accreditation.</p> <p>The accreditation process establishes a minimum set of criteria for providers of mediation services, in terms of training, insurance, codes of conduct, continuing professional development (CPD), complaints handling and administration.</p> <p>All mediation providers publish their Codes of Conduct on their websites and adhere to appropriate training standards.</p> <p>In addition, the Ministry of Justice also</p>	<p><u>England and Wales</u> Please see comments column.</p> <p><u>Scotland</u> Please see comments column.</p> <p><u>Northern Ireland</u> Please see comments column.</p>

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		<p>introduced the Small Claims Mediation Service. The service, which deals with disputes under £5,000, helps court users who already have an on going small claims case in the county court. The mediators are all trained by an external mediation training provider and receive on-going training.</p> <p><u>Family Mediation</u> The family mediation sector is self-regulating. There are a number of family mediation membership bodies in operation in England and Wales – recently, they came together to form the Family Mediation Council (FMC) to, amongst other things, represent the profession in one voice, and to provide an overarching regulatory structure. The FMC requires that those who provide family mediation services be members of one of its constituent bodies (and therefore to adhere to their codes of conduct and to meet their quality standards).</p> <p><u>Scotland</u> In general, the profession is self-regulating, having several membership/accreditation organisations.</p> <p>The Scottish Government carries out activities to encourage the development of quality control mechanisms and training for mediators. These include funding and assisting in the setting up of the Scottish Mediation Register (SMR) with the aim of encouraging effective quality control</p>	

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		<p>assurance regarding mediators and mediation services. Individuals and Organisations can only become SMR registered members if they meet minimum standards in the areas of training, initial mentoring, CPD, Codes of Conduct, complaints handling processes and indemnity insurance. Members of the public are therefore able to identify which mediators meet these standards and which might not.</p> <p><u>Northern Ireland</u></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. The Executive will continue to encourage the application of quality control mechanisms and ongoing training for mediators.</p>	
Article 5	<p>5.1 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>5.2 The Directive is without prejudice to</p>	<p><u>England and Wales</u> <u>Civil and Family Mediation</u> The current practice in relation to civil and family mediation, already accords with Article 5.</p> <p><u>Civil Mediation</u> Please see comments in relation to Article 1.</p>	<p><u>England and Wales</u> Please see comments column</p> <p><u>Scotland</u> Please see comments column</p> <p><u>Northern Ireland</u> Please see comments column</p>

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	<p>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><u>Family Mediation</u> There is a similar encouragement to mediate in the Family Procedure Rules 2010 (“the FPR”) (Part 3). It is currently possible for courts to adjourn proceedings to enable parties to find out about ADR methods including mediation e.g. Parts 3 and 4 of the FPR. Also, a Practice Direction accompanying the FPR provides for prospective court applicants in relation to certain family proceedings to have first attended a meeting to learn about family mediation before they issue court proceedings. Furthermore, the Children Act 1989 enables the family courts to direct parties to contact disputes to attend a ‘contact activity’ which may include a meeting to learn about mediation.</p> <p><u>Scotland</u> The civil courts in Scotland (the Court of Session and sheriff courts) already have power to invite parties to consider using mediation in order to settle a dispute in operating under the Rules of the Court of Session 1994 as amended and the procedural rules which apply in the Sheriff Court.</p> <p>There is explicit provision for referral to mediation in certain cases. This includes referral to mediation in family actions (under rules 33.22 and 33A.22 of the Sheriff Court Ordinary Cause Rules and under rule 49.23 in the Rules of the Court of Session).</p>	

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		<p>In addition in divorce and civil partnership dissolution cases where there is a reasonable prospect of reconciliation, the court must continue the case to allow attempts to effect such a reconciliation (see section 2 of the Divorce (Scotland) Act 1976 and section 118 of the Civil Partnership Act 2004). Such attempts at reconciliation could be made through mediation.</p> <p><u>Northern Ireland</u> 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>	
Article 6	<p>6.1 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 States where the request is made or the law of that Member States does not provide for its enforceability.</p> <p>6.2 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 States where the request is made.</p>	<p><u>England and Wales</u> Written settlements negotiated through mediation are capable of being made enforceable through the courts.</p> <p><u>Civil Mediation</u> In relation to civil mediation, the Ministry of Justice has amended the CPR to make it clear that the content of a mediated settlement that falls within the scope of the Directive can be made enforceable by a party (or parties). Where there are existing proceedings, the application should be made by way of a Part 23 application; and where there are no existing proceedings, the application should be made by a Part 8 claim form. The mediation settlement can be made enforceable by way of a new type of order called a 'mediation settlement</p>	<p><u>England and Wales</u> Implementation has been by way of the CPR and FPR (please see comments column).</p> <p>In relation to Article 6.3 (including for Scotland and Northern Ireland), please see comments in relation to Article 10.</p> <p><u>Scotland</u> <u>Article 6.1, 6.2 and 6.4 not transposed in the Cross-Border Mediation (Scotland) Regulations 2011. Mediation agreements can already be made enforceable as set out in comments section.</u></p> <p><u>Northern Ireland</u></p>

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	<p>6.3 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>6.4 Nothing in this article shall affect the rules applicable to the recognition and enforcement in another Member States of an agreement made enforceable in accordance with paragraph 1.</p>	<p>enforcement order'. The substantive provisions on this are contained in Section III of CPR Part 78.</p> <p><u>Family Mediation</u> Courts already have the ability to make “consent orders” in family proceedings, making (within the constraints of national law) enforceable the content of an agreement reached between parties, thus meeting the requirements of Article 6. Minor additional provisions were required in the FPR to ensure that the procedural requirements of Article 6 were satisfied.</p> <p><u>Scotland</u></p> <p>Written settlements negotiated through mediation are capable of being made enforceable, either through the courts or in an authentic instrument.</p> <p>Where a mediation agreement is self-proving in terms of the Requirements of Writing (Scotland) Act 1995, it may be registered for execution in the Books of Council and Session, which are held by the Keeper of the Registers of Scotland or in Sheriff Court Books. This will make the agreement an authentic instrument, in the sense that an extract of the document can then be issued and relied on as a basis for diligence (the process for civil debt recovery) without further recourse to a court.</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>

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		<p>Alternatively, the Court of Session or a Sheriff Court can be asked to interpose its authority to a minute of agreement, setting out the terms of the mediation agreement.</p> <p>Both approaches give the agreement similar force to a court decree.</p> <p><u>Northern Ireland</u> Written settlements negotiated through mediation are capable of being made enforceable through the courts.</p>	
Article 7	<p>7.1 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 on 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>7.2 Nothing in paragraph 7.1 above shall</p>	<p><u>England and Wales</u></p> <p>A mediator or <i>‘those involved in the administration of the mediation process’</i> may be compelled to give evidence in the following cases:</p> <ul style="list-style-type: none"> a) if the parties agree; b) if it is necessary for overriding considerations of public policy; or c) if it is necessary for implementation of an enforceable mediation agreement. <p><u>Civil Mediation</u> In relation to civil mediation, the substantive rule of mediation evidence is included in the Mediation Regulations 2011. The procedural rules on mediation evidence are included in Section III of Part 78 of the CPR (see in particular rules 78.26 to 78.28).</p> <p><u>Family Mediation</u></p>	<p><u>England and Wales</u> The substantive provisions on evidence (which are supported by the procedural provisions in the CPR and FPR) are contained in Part 2 of Mediation Regulations 2011.</p> <p><u>Scotland</u> Regulation 3 of the Cross-Border Mediation (Scotland) Regulations 2011</p> <p><u>Northern Ireland</u> Regulation 3 of the Cross-Border Mediation Regulations (Northern Ireland) 2011.</p>

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	<p>preclude Member States from enacting stricter measures to protect the confidentiality of mediation.</p>	<p>In relation to family mediation, along with the substantive rule of evidence referred to above, rules 35.3 and 35.4 in the FPR make procedural rules on mediation evidence.</p> <p><u>Scotland</u> While this reflects current practice, and confidentiality is generally reflected in agreements to mediate that are signed before a mediation takes place, confidentiality of mediation is not currently guaranteed by any legislation.</p> <p><u>Northern Ireland</u> 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>Article 8</p>	<p>8.1 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>8.2 Article 8.1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.</p>	<p><u>England and Wales</u></p> <p><u>Civil Mediation</u> Not all limitation periods will be affected. A limitation or prescription period will only be affected if it relates to a dispute that is within the scope of the Directive.</p> <p>The Ministry of Justice has made the minimum necessary legislative changes to ensure implementation of this article, by way of the Mediation Regulations 2011. This statutory Instrument is made under powers contained in section 2(2) of the European Communities Act 1972, and</p>	<p><u>England and Wales</u> Implementation is by way of amendments to relevant time limits contained in primary and secondary legislation. The amendments are contained in Parts 3 and 4 of the Mediation Regulations 2011.</p> <p><u>Scotland</u> <u>Regulations 4 to 9 of the Cross-Border Mediation (Scotland) Regulations 2011</u></p> <p><u>Northern Ireland</u></p>

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		<p>enables both primary and secondary legislation to be amended by way of statutory instrument.</p> <p>Part 3 of the Mediation Regulations 2011 amends primary legislation in relation to limitation and prescription periods, so that neither party is prevented from initiating proceedings simply because a limitation or prescription period expired during the course of mediation. Part 4 makes corresponding amendments to relevant pieces of secondary legislation.</p> <p>In relation to the actual limitation periods, the approach is to “postpone the effect of expiry of limitation periods”. This means that if the limitation period expires while mediation is ongoing, the effect of its expiry (that a person loses the right to litigate) is delayed until a certain specified time after the mediation ends.</p> <p>In relation to limitation periods that are 6 months or more, the specific delayed expiry period is set as eight weeks after the date on which the mediation ends. Where the limitation period is less than 6 months, there is a correspondingly shorter delayed expiry period. The purpose of this is that in the event of a cross-border mediation not settling, the delayed expiry period will ensure that parties have sufficient time to</p>	<p>Regulations 4 to 12 of the Cross-Border Mediation Regulations (Northern Ireland) 2011.</p>

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		<p>initiate judicial proceedings or arbitration.</p> <p><u>Family Mediation</u> Article 8 requires no provision specific to family proceedings, as no limitation or prescription periods have been identified in legislation relating to family proceedings.</p>	
Article 9	<p>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>	<p><u>England and Wales</u> In relation to both civil and family mediation, much information about mediation is already available to the public through the websites of the Ministry of Justice; the government-wide website 'DirectGov'; Her Majesty's Courts and Tribunals Service (HMCTS), the Advice Services Alliance; the Civil Mediation Council; the Family Mediation Council; the National Mediation Helpline, the Community Legal Advice Helpline (which may put callers in touch with family mediators that are local to them), individual mediation organisations' websites and so on.</p> <p><u>Scotland</u> The Scottish Government funded the setting up of the Scottish Mediation Register which allows members of the public to search on the internet for a mediator in a specific area of work, in the geographical location of their choice and to see whether the mediator or mediator organisation meets minimum standards in the areas of training, initial mentoring, CPD, codes of conduct, complaints handling</p>	<p><u>England and Wales</u> Please see comments column.</p> <p><u>Scotland</u> Please see comments column.</p> <p><u>Northern Ireland</u> Please see comments column.</p>

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		<p>processes and indemnity insurance</p> <p>The family law website (www.scotland.gov.uk/familylaw) and publications (available on the website) also contain links to family mediation organisations. The publications have been distributed widely.</p> <p>‘Relationships Scotland’ is a voluntary organisation which receives funding from the Scottish Government and has an active website which advertises what they offer nationally and locally, including details of local services. They aim to promote the delivery of counselling, mediation and family support for Scotland's people</p> <p><u>Northern Ireland</u> 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>	
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>A list of competent courts and Authorities which relate to the separate jurisdictions of the UK, namely England & Wales, Scotland and Northern Ireland was sent to the Commission on 19 November 2010.</p> <p><u>England and Wales</u></p>	<p><u>England and Wales; Scotland; and Northern Ireland</u> No transposition. This relates to the role of the Commission and does not impose an obligation on member States. Please see comments column.</p>

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		<p>In terms of the relevant courts for England and Wales, the Ministry of Justice considers these will be the courts that can currently make court orders.</p> <p><u>Civil Mediation</u> In relation to civil mediation, these are the High Court and specialist courts, and the county courts.</p> <p><u>Family Mediation</u> In relation to family mediation, these are the High Court and County Courts, and the magistrates' courts (including the family proceedings courts).</p>	
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><u>England and Wales; Scotland; and Northern Ireland</u></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	<p>12.1 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.</p> <p>12.2 When they are adopted by Member</p>	<p><u>England and Wales; Scotland; and Northern Ireland</u></p> <p>The Directive must be implemented by 21 May 2011.</p> <p>The Ministry of Justice is responsible for notifying Scotland's, Northern Ireland's and Gibraltar's implementation to the Commission.</p>	<p><u>England and Wales</u></p> <p>The Mediation Regulations 2011 will come into operation on 20 May 2011.</p> <p><u>Civil and Family Mediation</u></p> <p>The CPR amendments and FPR provisions, which support the implementation of Articles 6 and 7</p>

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	<p>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.</p> <p>12.3 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>		<p>of the Directive, came into force on 6 April 2011.</p> <p><u>Scotland</u></p> <p>The Cross-Border Mediation (Scotland) Regulations 2011 will come into force on 6 April 2011.</p> <p><u>Northern Ireland</u></p> <p>The Cross-Border Mediation Regulations (Northern Ireland) 2011 will come into operation on 18 April 2011.</p>
Article 13	This Directive shall enter into force on the 20 th day following its publication in the Official Journal of the EU.	<p><u>England and Wales; Scotland; and Northern Ireland</u></p> <p>The Directive was published on 24 May 2008 (O. J. L 136, 24.5.2008, page 3)</p>	<p><u>England and Wales; Scotland; and Northern Ireland</u></p> <p>No transposition.</p>
Article 14	This Directive is addressed to the Member States		<p><u>England and Wales; Scotland; and Northern Ireland</u></p> <p>No transposition.</p>