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## **Mediation in administrative law – Polish regulations in the light of the European recommendations**

### **Introduction**

This paper contains an analysis of the provisions on mediation included in the Recommendation of the Committee of Ministers to member states Rec(2001)9 of 5 September 2001 on alternatives to litigation between administrative authorities and private parties<sup>1</sup> and in the Act of 14 June 1960 – the Code of Administrative Procedure<sup>2</sup>.

The research question set in this paper is whether and to what extent the provisions that regulate mediation on the grounds of the CAP implement the guidelines presented in Recommendation Rec(2001)9.

The research hypothesis formulated by the author is as follows: the provisions of CAP implement in whole the guidelines laid down in Recommendation Rec(2001)9.

The research methods used in this paper include the doctrinal and comparative methods.

### **The concept and essence of administrative mediation**

Mediation is a dispute resolution method which is regulated also under administrative procedure. One of the basic objectives of mediation, i.e. support in considering divergent interests of the parties under administrative proce-

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<sup>1</sup> Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (adopted by the Committee of Ministers on 5 September 2001 at the 762<sup>nd</sup> meeting of the Ministers' Deputies), <https://rm.coe.int/16805e2b59> (accessed: 10.11.2023), hereinafter „Recommendation Rec(2001)9”.

<sup>2</sup> Consolidated text: Journal of Laws of 2021, item 735 as amended, hereinafter „the CAP”.

edings provided by an impartial mediator (who cannot be an employee of the authority before which these proceedings are conducted) means that this method is a manifestation of privatisation of public tasks<sup>3</sup>, which is based in particular on the principle of civil society and the principle of decentralisation, and above all on the statutory provision that gives a legal basis for the performance of certain public tasks by a private party or for the delegation of certain public tasks by an administrative authority to a private party.

Administrative mediation is an alternative method of amicable settlement of disputes (also referred to as ADR – alternative dispute resolution) which might occur during administrative proceedings, consisting in creating an opportunity for participants (parties, as well as the authority conducting the proceedings) to present their own arguments and allegations, to become acquainted with the arguments and allegations of the other participants, to discuss the presented circumstances, and make an attempt to work out such dispute resolution (within the limits of the binding law) which will be acceptable for the parties in conflict before mediation.

If participants in mediation reach an agreement, its content will be reflected in an administrative decision issued in the case or in a settlement agreement made by the parties (subject to subsequent approval by the authority)<sup>4</sup>, or the party concerned will withdraw the letter submitted to the authority.

The instrument of mediation in administrative proceedings can be used in particular in cases where

- there are multiple parties,
- a settlement may be made,
- an appellate measure has been brought forward (in this case the authority resolving the case in the first instance becomes a party in mediation),
- it is possible to enter into an administrative agreement<sup>5</sup>.

An important characteristic distinguishing administrative mediation from mediation carried out in civil, economic, employment or criminal cases is its

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<sup>3</sup> In the material and temporal scope covered by mediation, administrative proceedings are no longer conducted before the authority, but a private entity.

As emphasised by J. Zimmermann, privatisation of public tasks means the resignation from the performance of tasks by public administration authorities operating in the forms provided under public law for the benefit of non-public entities. J. Zimmermann, *Prawo administracyjne* [The Administrative Law], Warsaw 2016, p. 211.

<sup>4</sup> See: M. Wilbrandt-Gotowicz, [in:] A. Wróbel, M. Jaśkowska, M. Wilbrandt-Gotowicz, *Kodeks postępowania administracyjnego. Komentarz* [The Code of Administrative Procedure. A Commentary], Warsaw 2020, pp. 528–531; T. Moll, *Postępowanie mediacyjne na gruncie ustawy Prawo o postępowaniu przed sądami administracyjnymi* [Mediation Proceedings under the Law on Proceedings before Administrative Courts], „Kwartalnik ADR” 2015, No. 2(30), p. 39.

<sup>5</sup> Cf. A. Szpor, *Mediacja w prawie administracyjnym* [Mediation in Administrative Law], [in:] E. Gmurzyńska, R. Morek (eds.), *Mediacje. Teoria i praktyka* [Mediation. Theory and Practice], Warsaw 2018, p. 429 et seq.

subject matter which belongs to the tasks of public administration. The subject matter of mediation defined this way (administrative mediation in its strict sense) is related to the principle of formality and the rule of law, both binding in administrative procedure<sup>6</sup>.

It means that in administrative mediation the principle of formality, being contrary to the principle of disposition, is of primary importance<sup>7</sup>. It should be noted that “(...) at present none of the models of proceedings pursues in whole only one of the afore-said principles, but always one of them prevails, being toned down by elements of the other one”<sup>8</sup>.

The principle of formality stems from the provisions of the CAP as a whole, under which a public administration authority may initiate the proceedings, also in such matters where an application of a party is required, decides on the “limits” of the proceedings, on the scope of the proceedings to take evidence, is obliged to collect and examine the whole evidence, and also is entitled to continue the proceedings despite the withdrawal of the party’s application, and in the case of appeal proceedings it is possible to issue a decision adverse to the appealing party’s claim, as well as refusing to allow the appeal to be withdrawn<sup>9</sup>.

When conducting proceedings in a specific case, public administration authorities specify, based on substantive administrative law, by way of a binding decision, the legal situation of the addressee specified by name<sup>10</sup>. According to the principle of legality, as expressed in Article 7 of the CAP, public

<sup>6</sup> Cf. T. Moll, *Postępowanie mediacyjne...*, pp. 39–40.

<sup>7</sup> In accordance with the principle of disposition the party enjoys the right to dispose of its matters under civil proceedings, which embodies the possibility to initiate civil proceedings (except for non-litigious proceedings, which in the events specified under statutory regulations can be initiated *ex officio*) and in the possibility to decide about its subject matter, since the civil court examines only claims advanced by the parties. The principle of disposition also comprises the plaintiff’s right to withdraw the lawsuit and the right to waive or limit the claim – E. Plocha, [in:] G. Jędrejek (ed.), *Postępowanie cywilne po nowelizacji. Vademecum* [Civil Procedure after the Amendment Act. Vademecum], Warsaw 2020, p. 52.

The legal literature distinguishes formal disposition (relating, among others, to filing denials, bringing charges and appellate measures) and material disposition (referring to the range of actions comprising the initiation of proceedings, the limits of pursued legal remedies, changing the request for granting legal remedies, withdrawing a lawsuit) – W. Broniewicz, A. Marciniak, I. Kunicki, *Postępowanie cywilne w zarysie* [Outline of Civil Procedure], Warsaw 2016, p. 71; M. Sorysz, *Kontrola czynności dyspozytywnych w sprawach z zakresu prawa pracy i ubezpieczeń społecznych* [Supervision of Dispositive Activities in Matters of Labour Law and Social Security], „Studia z Zakresu Prawa Pracy i Polityki Społecznej” 2017, Vol. 24, No. 4, p. 312.

<sup>8</sup> M. Wierzbowski, A. Wiktorowska, [in:] M. Wierzbowski (ed.), *Postępowania administracyjne – ogólne, podatkowe, egzekucyjne i przed sądami administracyjnymi* [Administrative Proceedings – General, Tax, and Enforcement Proceedings, and Proceedings before Administrative Courts], Warsaw 2017, p. 22.

<sup>9</sup> *Ibidem*, p. 22.

<sup>10</sup> Z.R. Kmieciak, *Postępowania administracyjne, postępowanie egzekucyjne w administracji i postępowanie sądowniczoadministracyjne* [Administrative Proceedings, Enforcement Proceedings and Administrative Court Proceedings], Warsaw 2019, p. 38.

administration authorities – during administrative proceedings – are obliged not only to act based on the provisions of law, but also to control whether the parties and other participants comply with the law<sup>11</sup>.

It should be added however that the subject matter of mediation does not always correspond to the subject matter of administrative proceedings (administrative mediation in the broad sense), since, as rightly noted, the initial field of mediation is not always marked out by legal provisions and factual circumstances relevant for the future settlement or administrative decisions, but by different positions of the parties that can be expressed, e.g., by wrong evaluation of certain state of fact or events, which in effect go beyond the scope of the given administrative proceedings<sup>12</sup>.

## European regulations on mediation

Legal commentators stress the importance of mediation in Europe, which is reflected, among others, in an increased interest in this construct, the advantages of which were noticed by the Council of Europe and by the European Union. Mediation has become the subject of numerous recommendations of the Council of Europe on family mediation, mediation in criminal cases, in consumer and civil cases, which will not be discussed in detail, considering the topic of this publication<sup>13</sup>.

Also, it is worth noting an informal document adopted at a conference in Brussels on 2 July 2004 by the European Commission - the European Code of Conduct for Mediators<sup>14</sup>, which sets out a number of principles to which individual mediators can voluntarily decide to commit, under their responsibility. However, it is intended to apply to mediation in civil and commercial matters.

An act of the European Union, which is of major importance for administrative mediation is the Recommendation of the Committee of Ministers to member states Rec (2001)9 of 5 September 2001 on alternatives to litigation between administrative authorities and private parties. This act aims to establish uniform legal regulations to encourage the use of mediation for the handling of administrative matters and thus to improve the fulfilment of the principle of examining cases within a reasonable time and bringing the administration closer to the public, as the administrative court procedure is not always the most appropriate in practice for resolving administrative disputes.

<sup>11</sup> Ibidem, p. 54.

<sup>12</sup> Ibidem, p. 434–435.

<sup>13</sup> See: S. Kordasiewicz, *Historyczna i międzynarodowa perspektywa mediacji* [Historical and international perspectives on mediation], [in:] E. Gmurzyńska, R. Morek (eds.), op. cit., pp. 52–54.

<sup>14</sup> <https://www.gov.pl/attachment/063a46c0-f9e2-453c-8e23-590e573cf793> (accessed: 10.11.2023).

One of the main objectives of Recommendation Rec(2001)9 is to make procedures simpler and more flexible, allowing for a speedier and less expensive resolution of disputes between public administration authorities and other entities (private parties), which can be conducted before courts or out of court, before the initiation of, or during, court proceedings, according to the principles of:

- voluntariness – mediation is an alternative for proceedings before administrative bodies and courts in the categories of matters which can be resolved by way of agreements, or in which making an agreement will substantially shorten the period of administrative or court proceedings. The Parties should not be forced to participate in mediation, even when the case was referred to mediation “*ex officio*”;

- equity – under which disputes should be resolved not only in accordance with the provisions of substantive administrative law, but also subject to the principles arising from the constitutional law and the law of the European Union, one of the objectives of which is to guarantee that human and civil rights will be respected, as well as to embody the principles of democratic state under the rule of law<sup>15</sup>;

- equality and impartiality – the parties to mediation proceedings are in an equivalent position and the mediator should equally support each of them so that they would be able to work out a satisfactory settlement. Furthermore, the mediator must not have any relationship with the parties in mediation or its subject matter which could affect his/her impartiality.

- confidentiality – it assumes that both the course of mediation proceedings and the proposals and other statements made by participants to mediation should be kept confidential;

- respect for the rights of the parties – comprising the protection ensuring that administrative bodies will respect the rights of the parties to proceedings, and also that authorities will fulfil the obligations provided for by the provisions of the law;

- simplicity, speediness and cost-effectiveness – in many cases mediation makes it possible to work out, in a short period of time, a solution that is satisfactory for both parties, thanks to the use of a simpler and cheaper procedure, as compared to administrative and administrative court procedures;

- fair mediation – the use of mediation should not serve administrative authorities or other entities (private parties) as a means of avoiding their obligations provided for by the law;

- judicial review – enabling courts to review the legality of agreements made through mediation;

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<sup>15</sup> The principle of equity is discussed among others in K. Konieczna, *Zasada słuszności jako przesłanka odpowiedzialności władzy publicznej* [Liability of public authorities based on the principle of equity], „*Studia Prawnoustrojowe*” 2019, No. 44, p. 225 et seq.

– promoting and respecting ADR good practice – recommending that actions should be taken to promote mediation among public administration authorities and other entities (private parties), and concurrently that the principles of good practice appended to Recommendation Rec(2001)9 should be embodied in the legislation that governs ADR.

Appendix to Recommendation Rec(2001)9 presents assumptions to be fulfilled by provisions governing ADR. Recommendation Rec(2001)9 applies to disputes arising between public administration authorities and other entities, and also to the situations before a potential dispute occurs, where mediation may serve to prevent any such dispute or its escalation. Regulations on mediation can be general, i.e. apply to administrative matters as a whole, or specific, i.e. comprise enumerated types of cases. Referring cases for mediation can be obligatory or optional – the parties decide whether the dispute which has arisen between them should be resolved by way of mediation proceedings.

The parties should be appropriately informed about the possibility of conducting mediation in their case, and mediation itself should be conducted within a reasonable time (it should be closed within the time limit established in the provisions of the law) by independent and impartial mediators, with respect for the rights of the parties and the principle of equality, confidentiality and such legal nature of the settlement concluded before a mediator, to ensure that it may be executed. In addition, the use of ADR will be subject to judicial review.

## Mediation under the Code of Administrative Procedure<sup>16</sup>

Mediation was introduced to the Polish administrative law, more specifically to the CAP, under Article 1(20) of the Act of 7 April 2017 on Amending the Code of Administrative Procedure and Certain Other Acts<sup>17</sup>. This Act introduced amendments to the Act of 14 June 1960 – the Code of Administrative Procedure by adding, among others, Chapter 5a “Mediation”, after Chapter 5 in Part II, comprising Articles 96a to 96n. Before the AACAP entered into force, mediation had not been applied to administrative proceedings, except for matters for which the provisions of substantive administrative law provided for such form<sup>18</sup>.

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<sup>16</sup> Zob. T. Moll, *Mediacja w postępowaniu administracyjnym* [Mediation in Administrative Proceedings], [in:] J. Jaskiernia, K. Spryszak (eds.), *Nowe wyzwania i rozwiązania w polskim systemie ochrony praw człowieka* [New Challenges and Solutions in the Polish Human Rights Protection System], Toruń 2018, p. 218.

<sup>17</sup> Journal of Laws, item 935, hereinafter “the AACAP”.

<sup>18</sup> Pursuant to Article 47(2) of the Act of 13 October 1995 – the Hunting Law, Journal of Laws of 2015 item 2168 [the provision repealed on 1 January 2017], where there has arisen a dispute between the owner or holder of grounds and the lessee or manager of a hunting zone

As it was noted in the grounds for the bill, “mediation may constitute a significant element of investigative proceedings, in particular in complex cases (e.g. issuing zoning approvals or building permits, especially in the case of large and socially controversial infrastructural projects, determining the acceptable way of using a building structure), it may have a preventive nature (avoiding the referral of a case to an administrative court by explaining the premises and legal basis for the case resolution), and finally it may constitute an amicable way of reaching a resolution of the case through entering into an administrative agreement”<sup>19</sup>.

By introducing mediation into the Code of Administrative Procedure the legislator interfered with the catalogue of general principles of the said procedure. The provision that was modified and extended is Article 13 of the CAP, according to which in appropriate cases, public administration authorities shall endeavour to amicably resolve controversial issues and to ascertain the rights and obligations being the object of the proceedings relating to matters falling within their powers, by undertaking actions:

- 1) with a view to persuade the parties to reach a settlement, in matters involving parties of opposing interests; and
- 2) that are necessary to carry out mediation (§ 1).

Public administration authorities shall, at a given stage of the proceedings, undertake actions enabling the conduct of mediation or settlement, and they shall provide explanations as to the possibility and benefits of an amicable settlement of the matter (§ 2).

The amended Article 13 of the CAP, in addition to the principle of amicable resolution of administrative matters, contains the principle of mediation. This principle may be implemented, provided that the following circumstances are met: 1) a controversial issue occurs, 2) the nature of such matter permits authorities to ascertain the rights and obligations being the subject matter of the case, and to resolve it amicably.

It should be stressed that the principle of mediation does not entail a limitation in the form of plurality of the parties to proceedings or the existence of conflicting interests between parties.

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with respect to the amount of compensation for damage [see Article 46 of the Hunting Law] caused to crops and agricultural produce by wild boars, moose, red deer, fallow deer and roe deer, including damage caused by the said animals in case of their coverage by the all-year protection, referred to in (...), the parties may refer the matter to the commune authority with a jurisdiction over the location where the damage was caused for mediation in order to amicably resolve the dispute. In the event of a dispute between the owner or holder of grounds and the lessee or manager of a hunting zone with respect to the amount of compensation for damage, the mediator was the commune authority with a jurisdiction over the location where the damage was caused. It should be emphasised that despite the legal basis for mediation proceedings was included in the norm of administrative law, it concerned a civil case – a compensation for damage.

<sup>19</sup> Grounds for the Governmental Bill Amending the Code of Administrative Procedure and Certain Other Acts, Parliamentary Paper No. 1183.

The lack of limitations with respect to the subject to proceedings in Article 13 of the CAP creates an opportunity to use mediation in the broadest scope, both horizontally (between the parties to proceedings) and vertically (between the parties to proceedings and the public administration authority, before which the proceedings are conducted)<sup>20</sup>.

As regards the limitations with respect to the subject to proceedings, it should be noted that to initiate mediation proceedings it is not required for the parties to have conflicting interests (as in the case of settlements), however it is required for the case to involve controversial issues. Controversial issues mean issues included in the case, as to which the participants are not in agreement, and which are of major importance for the ascertainment of their rights and obligations in the matter.

The existence of the said controversial issue in fact limits the substantive scope of mediation only to the participants being in dispute.

## Principles of mediation proceedings

The most important principles of mediation proceedings expressed in the Code of Administrative Procedure include:

1) The principle of voluntariness (cf. Article 96a § 2 of the CAP). Voluntariness means that no-one can be forced to participate in mediation, including to make a settlement<sup>21</sup>. Article 96b § 1 of the CAP stipulates that the public administration authority shall, ex officio or upon application by a party, notify the parties and the authority referred to in Article 106 § 1 – where the said authority has not taken a position – that mediation may be conducted. According to the principle of voluntariness, mediation shall not be conducted, if consent for mediation has not been granted within fourteen days of the date when the notification was served (Article 96c in conjunction with Article 96b § 3 of the CAP). In the notification with respect to mediation the public administration authority requests that: the parties give their consent for mediation, and the participants in mediation appoint a mediator – within fourteen days of the date when the notification is served. An essential part of the notification is an instruction on the rules of conducting mediation and related costs. The said instruction serves to ensure informed consent for mediation by explaining the legal grounds on which this procedure is based, as well as the related benefits and any possible negative effects for its participants. If mediation is

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<sup>20</sup> Ibidem.

<sup>21</sup> Cf. P. Telenga, *Komentarz aktualizowany do art.183(1) Kodeksu postępowania cywilnego* [Revised comments to Article 183(1) of the Code of Civil Procedure], [in:] P. Telenga (ed.), *Kodeks postępowania cywilnego. Komentarz aktualizowany* [The Code of Civil Procedure. Commentary updated], 2019, Lex.



initiated by the party to proceedings, the name of the proposed mediator can be an optional element of the application to that effect (cf. Article 96b § 2 of the CAP). The Code of Administrative Procedure does not specify the form of an application for mediation, it seems however that due to the principle of written form, expressed in Article 14 thereof, it should be filed in writing, by telegraphic means, by telefax or as an oral statement recorded in the minutes, as well as by other means of electronic communication through an electronic public-administration filing service created under the Act of 17 February on the Computerisation of Operations of Entities Performing Public Tasks. A written application for mediation should include at least the indication of the sender, his/her address, the request to conduct mediation, and the signature of the applicant. In case of oral application, it is necessary to prepare minutes comprising its content, which should be signed by the applicant and by the person that prepared the minutes.

The matter can be referred to mediation, provided that its participants have granted their consent for mediation. Referring the matter to mediation should be in the form of a decision issued by a public administration authority (cf. Article 96d § 1 of the CAP). The afore-said decision will be served on the parties and the authority referred to in Article 106 § 1 of the CAP. The decision to refer the matter to mediation shall state the name of the mediator appointed by the participants in mediation and, if such mediator has not been selected by the parties, the name of the mediator appointed by the public administration authority; the mediator shall have appropriate knowledge and skills to conduct mediation in matters of a given type (Article 96d § 2 of the CAP).

2) The principle of confidentiality is expressed in Article 96j § 1 of the CAP, which stipulates that mediation is not open to the public. The principle of confidentiality means, on the one hand, an obligation to keep the facts disclosed during mediation, the contents of discussions, allegations, declarations and settlement proposals within the circle of the persons participating in mediation, and on the other hand, a prohibition to disclose – without the consent of the participants – any information of which they have been informed in connection with the mediation proceedings. Article 96j § 3 of the CAP stipulates that settlement proposals, disclosed facts or statements made in the course of the mediation shall not be used after the termination of mediation, except for the determinations contained in the minutes of mediation. It should be stressed that a mediator may not testify as to facts which came to his knowledge in connection with the conducted mediation unless he/she is released from the obligation to keep mediation secret by the participants in the mediation (Article 83 § 4 of the CAP). The principle of confidentiality relates to the principle of mediator's right of access to the necessary personal data of participants in mediation and to case files. To make it possible to conduct mediation proceedings, the public administration authority shall immediately transmit

to the mediator the contact details of the participants in mediation and of their attorneys, in particular their phone numbers and email addresses, if they are known to the public administration authority (Article 96h of the CAP). Providing this data is a prerequisite for the mediator to take any steps; the lack of the said data constitutes an obstacle making it impossible to conduct mediation. The principle of mediator's right of access to case file is conditional in nature, stemming from Article 96i of the CAP, under which the mediator should consult the case files and may take notes, make duplicates or certified copies of the case files, unless a participant in mediation objects to it within 7 days of the day when the mediation referral decision was announced or served. Consulting the files does not constitute a *sine qua non* prerequisite for mediation, due to mediator's role which consists in assisting the participants in finding a common position, not in deciding on its merits of the case. In view of the foregoing, lack of access to case files is not an obstacle for mediation, nor does it lead to its termination<sup>22</sup>.

3) The principle of impartiality and neutrality. The principle of impartiality assumes equal treatment of participants in mediation by prohibiting to favour of one of them. The principle of impartiality is also expressed in objective assistance provided to participants in mediation in seeking the acceptance of the findings which will make it possible to resolve the matter under the law in force. One of the guarantees of a mediator's impartiality is his/her obligation to immediately disclose to participants in mediation and to the authority any circumstances which could raise doubts as to his/her impartiality<sup>23</sup> (cf. Article 96g § 1 of the CAP). Any doubts raised as to the mediator's impartiality shall result in the mediator's obligation to refuse to conduct mediation and to promptly notify the participants in mediation and the public administration authority of this fact, if it is not a participant in mediation (see Article 96g § 2 of the CAP). Article 96g § 1 of the CAP, in addition to the principle of impartiality, seems to express also the principle of neutrality, meaning objectivity concerning the subject matter of mediation. This means that the obstacles relating to the person conducting mediation pertain both to the participants and the subject matter of mediation. The regulation of the mediator's impartiality, as adopted in the Code of Administrative Procedure, is much more restrictive than the one adopted in the Code of Civil Procedure, since in the light of Article 183<sup>3</sup> § 1 of the CCP a mediator shall remain impartial when conducting mediation and shall promptly disclose to the parties any circumstances that might cause reasonable doubt regarding his/her impartiality. Nevertheless, the Code of Civil Procedure does not provide for an obligation to refuse to conduct mediation in case of any doubts arising as to his/her impartiality.

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<sup>22</sup> Grounds for the governmental Bill Amending the Code of Administrative Procedure and Certain Other Acts, Parliamentary Paper No. 1183.

<sup>23</sup> *Ibidem*.

4) The principle of acceptability is related to the requirement under which it is necessary to familiarise the participants in mediation with the rules of conducting and incurring the costs of mediation, as well as to give consent for mediation (cf. Article 96a § 2 in conjunction with Article 96b § 3(1) and Article 96b § 4 of the CAP). In case of denying consent for mediation, this alternative way of resolving disputes may not be used (cf. Article 96c of the CAP).

### **Purpose of mediation**

In accordance with Article 96a of the CAP, the purpose of mediation is to clarify and examine the factual and legal aspects of the matter and to make determinations as to its disposal under the law in force, including by way of a decision or settlement. This provision defines the scope of mediation (examination of the factual and legal aspects) and the form of the consensus (determination), which must be reached within the limits of the law in force.

Mediation should result in resolving doubts and considering facts relevant for the content of the disposal of the matter, as well as legal circumstances regarding the legal basis for the disposal. The clarification and consideration of the factual and legal aspects of the matter will allow the mutual acceptance of the settlement proposal submitted during mediation. The Code of Administrative Procedure does not specify who should safeguard, in the course of mediation proceedings, that the determinations made by the participants regarding the disposal of the matter are compliant with the law in force. It seems that this obligation rests primarily with the person conducting mediation proceedings, and only after that with the participants.

It should be emphasised that the parties' determinations regarding the disposal of the matter do not terminate the administrative proceedings. The proceedings under which mediation was carried out are not terminated based on the determinations regarding the disposal of the matter but based on an administrative decision or a settlement approved by the authority or as a result of the party's withdrawal of the letter submitted to the authority. This means that the obligation to evaluate whether the determinations regarding the disposal of the matter are compliant with the law in force rests with the public administration authority.

### **Participants in mediation**

Pursuant to Article 96a § 4 of the CAP the parties to mediation may include the authority conducting the proceedings and the party or parties to these proceedings. Therefore, the circle of participants in mediation may consist

not only of the party (parties) to administrative proceedings, but also the authority, which creates a mediation opportunity between the parties to the proceedings alone and between the party (parties) to the proceedings and the public administration authority.

Where the public administration authority as a host of the proceedings is also a participant, the determinations made with respect to the disposal of the matter within the limits of the law in force shall result in issuing an administrative decision, which should consider the common position worked out in the course of mediation. As regards mediation, in which the participants are only parties having conflicting interests, if they reach an agreement, may result in entering into a settlement agreement or issuance of an administrative decision by the authority. If the participants being the parties to the proceedings fail to reach an agreement, the matter shall be resolved by the authority by way of decision<sup>24</sup>.

Furthermore, pursuant to Article 96b § 1 of the CAP the authority referred to in Article 106 § 1 may be a participant in mediation, where such has not taken a position.

The parties being in dispute may be the only participants in mediation (inaction of the other parties should not make it impossible to carry out mediation and resolve controversial issues). Since horizontally an administrative authority is also a participant in mediation, the Code of Administrative Procedure uses the term “participant in mediation”, to differentiate it from the term “party” within the meaning of Article 28 of the CAP<sup>25</sup>.

## Mediator

Pursuant to Article 96f § 1 of the CAP a natural person having full capacity to perform acts in law and full public rights may serve as a mediator, in particular a mediator entered on the list of permanent mediators or included in the register of institutions and persons entitled to conduct mediation proceedings kept by the president of a regional court.

The Code of Administrative Procedure does not impose on the mediator any obligation to prove under the administrative proceedings that he/she specified qualifications. Only employees of the public administration authority before which the proceedings have been pending may not serve as a mediator (Article 96f § 2 of the CAP). This solution does not seem to be proper, as it creates an opportunity to “appropriate” mediation by the employees of public

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<sup>24</sup> See: M. Wilbrandt-Gotowicz, [in:] A. Wróbel, M. Jaśkowska, M. Wilbrandt-Gotowicz, *op. cit.*, pp. 500–503.

<sup>25</sup> Grounds for the governmental Bill Amending the Code of Administrative Procedure and Certain Other Acts, Parliamentary Paper No. 1183.

administration authorities, who, in the order to refer the matter to mediation indicate – if the participants do not elect a mediator – a mediator having appropriate knowledge and skills to conduct mediation in matters of a given type. The provisions currently in force do not specify standards of trainings for mediators in matters belonging to the sphere of public administration tasks, which seems to make the employees of public administration authorities “best” candidates to conduct such mediation.

Pursuant to Article 96k of the CAP, the mediator shall conduct mediation striving for an amicable settlement of the dispute, also by assisting the participants in mediation in the formulation of settlement proposals. This norm means that CAP adopted a facilitative concept of mediation meaning that the mediator does not necessarily need to be an expert on the subject matter of mediation, he/she may have any qualifications, which does not release him/her from the obligation to professionally prepare for resolving conflicts. The objective of a mediator is to assist in resolving a conflict through the creation of conditions enabling the conflicted parties to reach a mutually acceptable agreement<sup>26</sup>.

Mediation in administrative proceedings may be terminated in several ways, namely through:

- a) entering into a settlement agreement between the parties to the proceedings,
- b) withdrawing or modifying an application by a party,
- c) resigning from the application of an appellate measure or withdrawing the same,
- d) resolving the matter by way of administrative decision<sup>27</sup>.

Duties of a mediator include preparation – in each case – minutes of mediation specifying: 1) the time and place of mediation; 2) the forenames and surnames (business names) and addresses (registered offices) of the participants in mediation; 3) the forename and surname and address of the mediator; 4) the determinations made as to the disposal of the matter; and 5) the signatures of the mediator and the participants in mediation, and if any of the participants is not able to sign the minutes, a note shall be made on the reasons for the absence of signature (Article 96m of the CAP).

The mediator shall immediately submit the prepared minutes of mediation to the public administration authority for them to be entered in the records and he/she shall deliver a copy of the minutes to the participants in mediation.

Documents and other materials, which are not contained in the case, and which have been disclosed during mediation by the participants, shall not be entered in the records, if such documents and materials do not constitute the

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<sup>26</sup> See: M. Tański, *Mediacja facylitatywna* [Facilitative Mediation], <http://www.mediacje.lex.pl/czytaj/-artykul/mediacja-facylitatywna> (accessed: 10.11.2023).

<sup>27</sup> Grounds for the governmental Bill Amending the Code of Administrative Procedure and Certain Other Acts, Parliamentary Paper No. 1183.

grounds for the disposal of the matter according to the determination included in the minutes of mediation (Article 96n of the CAP).

If, because of mediation, determinations are made regarding the disposal of the matter under the law in force, the public administration authority shall resolve the matter in accordance with such determinations included in the minutes of mediation (Article 96n § 1 of the CAP).

### **Date of initiation of mediation and duration of mediation**

If the nature of the matter so permits, mediation may be conducted only during administrative proceedings (Article 96a § 1 of the CAP). This means that it is impossible to conduct mediation prior to the initiation of administrative proceedings regarding a given matter. Actions aimed to carry out mediation may be initiated by way of a request regarding that matter, included in the party's petition to initiate administrative proceedings. A decision issued by the public administration authority to refer the matter to mediation would then constitute the first procedural action in administrative proceedings.

Moreover, there are no obstacles preventing mediation from being conducted before a decision is issued in the case, to try to persuade the parties to accept the decision to be issued. Last but not least, mediation may be initiated after a party has filed an appeal.

Carrying out mediation has an impact on the actual period necessary to resolve the matter, however, its duration is not included in the time limits specified for disposing of matters in administrative proceedings (cf. Article 35 § 5 of the CAP). Upon referring the matter to mediation, the public administration authority shall suspend the examination of the matter for a period of two months (Article 96e § 1 of the CAP). Upon a joint application of the participants in mediation or for other material reasons, the afore-said period may be extended, however by not more than one month.

The expiry of the time limit for mediation results in imposing on the public administration authority an obligation to issue a decision terminating the mediation and in the conclusion of the matter.

### **Conclusions**

In Europe mediation is becoming an increasingly significant form of dispute resolution, also those deriving from administrative law relationships. As an alternative way of resolving conflicts, mediation has also been recognised by the Council of Europe and the European Commission, as reflected in do-

cuments issued by these bodies for the purpose of creating general principles for mediation to contribute to ensuring high quality of this method.

The purpose of introducing mediation to the administrative law was to create solutions to contribute to a peer-to-peer approach of administration to citizens using amicable resolution of disputes and conciliatory methods of resolving issues, as well as to streamline the administrative proceedings and shorten their duration.

One of primary assumptions of mediation in administrative law was to bring administration nearer the society and ensure a possibility to shape administrative law relationships in such a way, to increase the impact of the parties on the subject matter of the proceedings. Mediation proceedings in administration require bringing administration nearer the society, ensuring a possibility to shape administrative relationships in such a way, to increase the impact of the parties on the course of the proceedings and on the way of resolving issues, including the issues which are important for the society.

The current provisions on mediation, included in the CAP are in line with Recommendation Rec(2001)9, which is reflected primarily in Chapter 5a “Mediation”. Nevertheless, CAP regulations do not provide for the possibility to conduct mediation outside the course of proceedings, which – considering the nature of administrative law – is the right solution. Furthermore, it can be said that one of the positive aspects of mediation is the possibility for the public administration authority before which the proceedings are pending to participate in mediation, as this creates conditions for the clarification and consideration of the factual and legal aspects of the matter, in a horizontal approach, already as part of administrative proceedings.

It seems that considering the subject matter of administrative mediation (which arises from the provisions of substantive administrative law) it is advisable to adopt regulations to specify the qualifications of mediator necessary to conduct mediation proceedings in administrative matters.

The European Code of Conduct for Mediators – which involves mediation in civil and commercial matters – contains a principle regarding qualifications of mediators, according to which: mediators must be competent and knowledgeable in the process of mediation. Relevant factors include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes. Mediators must verify that they have the appropriate background and competence to conduct mediation in each case before accepting the appointment, and, upon request, disclose the information concerning their education and experience to the parties.

Referring to these principles it should be noted that it was formulated in a very general way, emphasising the importance of mediator’s qualifications,

but leaving the evaluation as to their practice and mediation in specific matters mainly to the mediators themselves.

Substantive preparation of mediators will determine the promotion and effectiveness of this alternative method of resolving administrative law disputes not only in the society, but also among public administration officers, who often decide to refer certain matters to mediation (in the case of the so-called vertical mediation they can also participate in it). At present the legislator does not impose on mediators any obligations to prove that they have specified qualifications, placing emphasis only on the role of mediators entered on the list of permanent mediators or included in the register of institutions and persons entitled to conduct mediation proceedings kept by the president of a regional court. The specific nature of administrative proceedings, under which mediation is carried out (an administrative matter) and the purpose of mediation, which is formulated in Article 96a § 3 of the CAP – clarification and consideration of the factual and legal aspects of the matter and making determinations as to the disposal of the case under the law in force – as well as the role of the mediator which consists in assisting the participants in mediation in the formulation of settlement proposals or proposals regarding the provisions of the administrative agreement, result in the fact that a reliable mediation procedure and preparation of the minutes specifying the determinations made in respect of the way of disposing of the matter require knowledge and practical experience in the sphere of administrative law.

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## Summary

### Mediation in administrative law – Polish regulations in the light of the European recommendations

**Keywords:** administrative law, administrative procedure, alternative dispute resolution, mediation, settlement.

This text concerns mediation in administrative proceedings, which was introduced by Article 1, point 20 of the Act of 7 April 2017 amending the Act – Code of Administrative Procedure and certain other acts. The aim of the introduction of mediation in administrative proceedings is to create solutions that will contribute to a more partnership approach of the administration to citizens, by using the methods of amicable dispute resolution and conciliatory mode of settling cases, as well as to improve administrative proceedings and shorten their duration. The institution of mediation in administrative proceedings can find a wide range of applications, starting from its perception as an important element of the investigation procedure, which can be applied in particular in complicated cases, through its preventive character, manifested

in the reduction of the number of disputes referred to the administrative court, and ending with an amicable way of reaching a settlement of administrative proceedings.

## Streszczenie

### **Mediacja w prawie administracyjnym – polskie regulacje w świetle zaleceń europejskich**

**Słowa kluczowe:** prawo administracyjne, postępowanie administracyjne, alternatywny sposób rozwiązania sporu, mediacja, ugoda.

Niniejszy tekst dotyczy mediacji w postępowaniu administracyjnym, która została wprowadzona na mocy art. 1 pkt 20 ustawy z dnia 7 kwietnia 2017 r. o zmianie ustawy Kodeks postępowania administracyjnego oraz niektórych innych ustaw. Celem wprowadzenia mediacji w postępowaniu administracyjnym jest stworzenie rozwiązań, które przyczynią się do bardziej partnerskiego podejścia administracji do obywateli, przez wykorzystanie metod polubownego rozstrzygania sporów i koncyliacyjnego trybu załatwienia spraw, a także pozwolą usprawnić postępowanie administracyjne oraz skrócić czas jego trwania. Instytucja mediacji w postępowaniu administracyjnym może znaleźć szerokie zastosowanie, począwszy od postrzegania jej jako istotnego elementu postępowania wyjaśniającego, co może mieć zastosowanie w szczególności w sprawach skomplikowanych, poprzez prewencyjny charakter, przejawiający się zmniejszeniem liczby spraw kierowanych do sądu administracyjnego, na polubownym sposobie dojścia do rozstrzygnięcia postępowania administracyjnego kończąc.