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Mediation as a new form of settling administrative matters in Poland

Mediacja w sprawach administracyjnych w Polsce

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Summary

The adoption of new legal solutions in 2017 resulted in the appearance of the institution of mediation in Polish administrative proceedings, which was unheard of until then as a method in which public administration operates. The lawmakers decided to introduce mediation as a method of establishing facts and conducting interpretations of the law in matters ending in an administrative decision being issued. This article is an attempt to analyse the consistency of the solutions adopted with the system of settling administrative cases that had been in force to date. The most important finding made in the analysis is that of a fundamental conflict of the objectives of mediation with the essence of Polish administrative procedures. This is related to the lack of dispute at this stage of the proceedings, which rules out the ability to use mediation as a form of non-dispute settlement of a matter. The remaining systemic conflicts found in the analysis confirm the argument about the inability to use mediation in the practice of settling administrative matters.

Key words: administrative matter, administrative proceedings, amicable resolution of a case, mediation, mediation in administrative proceedings, mediation between the parties to proceedings, mediation between parties and the authority resolving an administrative matter

Streszczenie

W wyniku przyjęcia nowych rozwiązań prawnych w roku 2017 pojawiła się w polskim postępowaniu administracyjnym instytucja mediacji, która nie była znana dotąd jako metoda działania administracji publicznej. Mediację ustawodawca postanowił uformować jako metodę ustalania faktów oraz dokonywania wykładni przepisów prawa w sprawach kończących się wydaniem decyzji administracyjnej. Niniejszy artykuł jest próbą dokonania analizy spójności przyjętych rozwiązań z dotychczas obowiązującym systemem załatwiania spraw administracyjnych. Najważniejszym ustaleniem dokonanym w ramach przeprowadzonej analizy jest stwierdzenie fundamentalnej sprzeczności celów mediacji z istotą polskiego postępowania administracyjnego. Jest to związane z brakiem sporu na tym etapie postępowania, co wyklucza możliwość zastosowania mediacji jako formy niespornego załatwienia sprawy. Pozostałe, stwierdzone w ramach analizy sprzeczności systemowe, potwierdzają tezę o braku możliwości zastosowania mediacji w praktyce załatwiania spraw administracyjnych.

Słowa kluczowe: sprawa administracyjna, postępowanie administracyjne, polubowne załatwienie sprawy, mediacja, mediacja w postępowaniu administracyjnym, mediacja pomiędzy stronami postępowania, mediacja pomiędzy stronami a organem załatwiającym sprawę administracyjną

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Introduction

Mediation, as a method of settling disputes in administrative matters, was introduced into the Polish legal order on 1 June 2017, and in theory completely changed the method Polish administrative authorities applied to resolve matters through an administrative decision handle proceedings. In such cases, administrative decisions are still issued, although the method of establishing the facts and interpreting the provisions of the law has, at least in theory, been completely reorganized. The administrative authority, which was the authoritative and unilateral representative of the public authority applying substantive law until the day the above amendment became effective, became — at least formally — the partner of the addressees of decisions, regarding the formation of the final content of the decision. As a result of the adoption of that solution, it became possible to conduct mediation between the party to the proceedings (the addressee of the administrative decision) and the administrative authority which was to settle the

matter. This amounts to the acceptance of a completely new, even revolutionary structure that reverses the roles of the individual participants of administrative proceedings. The body of public administration became the potential partner with which the party to the proceedings (the addressee of the decision) can essentially negotiate its individual aspects and its final shape. Before the amendment became effective, such an approach could constitute grounds for allegations and could lead to the criminal liability of both the person representing the party in the proceedings and the authorized employee of the administrative authority. Regardless of the above form of preliminary mediation in the relationship between the party and the authority, mediation can also take place between parties with disputed interests. The arguments supporting such far-reaching changes were based on the need to assure partnership relations between the administration and the parties, while reducing the formalism and strictly perceived authority in handling administrative cases. An additional argument was the desire to avoid excessive periods spent on handling administrative matters. The efficiency of public administrative activities directly translates into the assessment of the quality of operation of the whole system of bodies of public administration, while increasing the level of the entity's trust in the state.

Specifics of Polish administrative procedures

As early as 1961 the Polish lawmakers decided to adopt a new structure of the general jurisdictional regulation of administrative proceedings in the national legal order, assuming, at the same time, the possibility of introducing separate and detailed regulations. A reasonably common use by the lawmakers of these exceptions (as separate and special solutions) at the turn of the Centuries resulted in the current status being referred to in the legal doctrine as the decoding of Polish administrative procedures (Zimmermann, 2013).

However, the lawmakers decided to stop the decodification trend by introducing a number of amendments to the Administrative Procedures Code, the objective of which was to raise its importance. Until the announcement of the consolidated text of the Administrative Procedures Code (APC), there were 43 cases of normative interferences in the wording of this Act modifying not only its wording, but also the specifics and nature of its provisions. These are both more significant amendments aimed at modification of the administrative procedure (such as those made in 2011 and 2017) and amendments introduced while amending substantive law (e.g. by the Act on the amendment of personal identity cards and certain other Acts of 6 December 2018) and even separate branches of law (e.g. by the Act on the management of a sole proprietor's business by succession) or cross-sectional amendments, such as those made by the Act on the amendment of certain Acts in connection with the assurance of the application of Regulation 2016/679 (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

The main objective of creating the Administrative Procedures Code as a set of procedural norms is the need to accept an orderly system of rules and principles on which administrative authorities should rely when resolving an administrative matter and when performing activities in simplified procedures. The objective of this is to create a fixed, certain and repeatable formula of operation of administrative authorities, which are to settle an administrative matter by making an administrative decision, through a procedural formalism specified by statute. All participants of procedures that take place are able to take advantage of this formalism, because the protection of their rights that it guarantees is the foundation of the general administrative procedure.

It was initially assumed that the creation of a uniform model of general administrative procedures will enable its application in all types of administrative matters other than special cases of matters with exceptionally special specifics requiring special procedural regulation. However, even in these special procedures, the model of general administrative procedures was supposed to apply in matters not otherwise regulated by the special provisions. The Administrative Procedures Code currently constitutes a normative model of forming relations between the individual and the public administration in the process of concretizing the norms of administrative law, which ends with an administrative decision being issued. At the same time, the codified administrative procedure is a guarantee of legal and procedural certainty with respect to these relationships. The main subject matter of the regulations of the Administrative Procedures Code is the general administrative procedure, namely a formalized procedure conducted by the bodies of public administration, the objective of which is to authoritatively define the individual's legal situation in administrative law terms. The provisions of the code were formed in such away as to enable the bodies of public administration to correctly specify the rights or duties of the individual addressee. An important role in this respect is played by the general rules of conduct, especially the principle of the rule of law, as well as the principle of objective truth, the implementation of which during the administrative procedure is secured by a number of procedural guarantees. The essence of the guarantee of the correct resolution of an individual matter is the right of a party to the proceedings to actively participate in procedural activities before the judgment is issued and then to subject this judgment to administrative and court control.

The historic development of the administrative procedure indicates that the fundamental motive of codification was the establishment of a system of procedural legal measures as an instrument of protection of the individual in a state governed by the rule of law. The model of the jurisdictional procedure created by the provisions of the Code currently encounters the allegation of failing to adapt to the

implementation of certain tasks set for the modern public administration. In particular, it is observed that the procedural solutions of the Code favour extended periods spent by the bodies of public administration on procedural activities, excessive formalism of the procedures and the abuse of strictly perceived authority when reviewing and settling administrative matters.

Assumptions to the amendment of the Administrative Procedures Code of 2017

Objectives and expectations of the lawmakers

The lawmakers reacted to the imperfection of the regulation on the method of operation of the bodies of administration diagnosed in this way by attempting to modify the administrative procedure in order to streamline and accelerate proceedings while guaranteeing a greater partnership approach of the administration to the citizens. This latter assumption also became the main motive of the amendment to the Code of 1 June 2017. New normative solutions were introduced into the system of administrative procedures, addressing the above assumptions by modifying the system of measures for preventing inactivity of the authorities, establishing the institution of the tacit resolution of matters and simplified proceedings in the procedure regarding jurisdiction, as well as the acceptance of the principle of settling doubts as to the legal and factual status of the case in favour of protecting the valid public interest. Furthermore, the dissemination of the concept of alternative methods of settling legal disputes has also resulted in the introduction of an undisputed method of settling administrative matters through mediation into administrative proceedings.

The lawmakers acknowledged that mediation, as a non-authoritative method of bringing about the resolution of a matter with the involvement of an impartial mediator, is an expression of legal relations being established with the active and participative involvement of the addressees of the decision, ending the administrative proceedings. Therefore, new wording of Article 13 of the Code was adopted, under the assumption that the essence of mediation boils down to the aim towards the amicable settlement of all disputed matters during the proceedings, as well as the establishment of the rights and duties of the parties in this way. The assumption was also made that the idea of mediation would be implemented as a method of operation of the authority, leading to the amicable development of a resolution of the case through the approval and confirmation of an administrative settlement or by issuing an administrative decision. Administrative authorities are able to take up activities intended to amicably settle the matters in dispute in every case, the nature of which allows for this, and at every stage of the proceedings.

Shape of the accepted structure of mediation and realistic scope of its application

The adoption of new solutions resulted in the appearance of the institution of mediation in Polish administrative proceedings, which was unheard of until then as a method in which public administration operates. Interestingly, mediation did not become one of the methods of operation of the administration out of all of the differentiated public tasks performed as a result of the amendment. Mediation only became a method of establishing facts and conducting interpretations of the provisions of the law in matters ending in an administrative decision being issued. This is an exceptionally narrow assumption and, in my opinion, completely wrong in terms of the types and nature of the public tasks regarding a partnership approach and conciliation.

The introduction of mediation into administrative procedures is also interesting in that the lawmakers admitted the possibility of conducting it between both parties with conflicting interests, as well as between the authority handling the proceedings and the party (or parties) to those proceedings. Therefore, this is a special case with respect to court procedures, which always features contradiction that is simply missing from administrative cases in many types of procedures. Therefore, the introduction of such a form of mediation gives rise in studies to huge controversies, so this article will be limited to an analysis and the assessment of this aspect thereof.

An administrative authority, which was required to settle a matter authoritatively and unilaterally to date, may be a party to mediation, which can directly affect its interests in the specified way of settling the matter (in particular, if it is simultaneously, for instance, the possessor of the resources for the award of which the proceedings are being conducted). Therefore, the question arises of whether the involvement of the authority in mediation will mean that it will appear in the proceedings as an entity interested in a specific procedural settlement, which appears to be in conflict with the principles of proportionality and impartiality (Article 8 APC), and adjudication on the basis of objectively existing facts (Article 7 APC). Is the administrative authority within mediation still a body fulfilling statutory responsibilities or is it a participant of a dispute trying to achieve a specific procedural effect in the form of a settlement which is most beneficial for it? Is this still the application of the law by a body of public administration or is it the power to define the addressee's legal situation in a free and discretionary manner? These questions were missing from the national debate on the amendment in question, which significantly weakened the practical effect of the introduction of the new legal structure into the Code. The authors of the studies on this matter, together with a team that was specially appointed by the President of the Supreme Administrative Court of 10 October 2012 for developing a concept of modifying administrative procedures, restricted themselves to purely the positive assessments of the use of mediation in the legal

orders of the Netherlands, Switzerland, Germany, Italy and Spain (J. Wegner-Kowalska, 2017). Likewise, the lawmakers did not think of asking themselves such relatively fundamental questions, either before the adoption of the bill or during the enactment of the amendment. It is also surprising that, in the twenty-first Century, by introducing the relatively revolutionary solution of mediation between the authority and the party to the proceedings, the lawmakers are unable to first analyse the types and nature of cases in which mediation could realistically be applied. This is emphatically shown by the adopted formula dedicated to mediation in 'matters, the nature of which allows for this'. This method of conduct appears to demonstrate that the process of introducing mediation as a method of operation of contemporary Polish public administration was not prepared properly. In a certain sense, this is confirmed by the practice of operation of the administrative authorities. In fact, after more than two years from the moment it became effective, not one case of mediation with the involvement of the administrative authority has been publicized.

Obviously, these doubts should be resolved in the context of the general principle of the rule of law (Articles 6 and 7 APC), which means that matters whose nature allows for conducting mediation between the authority and the party, are limited exclusively to those regulations in which the lawmakers gave the bodies of administration a certain amount of freedom of adjudication (e.g. with the help of administrative discretion). In the case of settlements based on the structure of the authority being bound by the law, mediation appears to be — essentially — completely useless.

Earlier procedural regulations only provided for the institution of an administrative resolution as the only form of amicable settlement of a dispute between parties of proceedings being conducted. However, it was the authority that — after concluding that such a resolution is consistent with the law — approved it in a procedural form, thereby superseding its own authoritative decision. It also therefore had its own element of contradiction in proceedings being handled by the administrative authority and the parties could, within the limits of the applicable law, reach an understanding on the final shape of the mutual relations. The introduction of mediation in cases of this type essentially changed the method of operation exclusively to the extent that it will be the mediator and not the administrative authority who will encourage the parties to conclude the proceedings amicably.

In summary, the extent of actual application of mediation in administrative proceedings is relatively small. This arises from the specific nature of administrative proceedings, which, by their essence, involve settling an individual matter on the basis of the provisions of substantive law. Cases of this type are in the majority and administrative authorities most frequently handle such cases. Cases in which parties with conflicting interests are involved are most frequently matters that are essentially of a civil law nature, for which only the administrative form of resolution was provided for (such as, for instance, the investment and construction process or the breach of water relations). The provisions on mediation may be applicable to such cases with regard to the amicable settlement of disputes between the parties. In individual matters, in which one party to the proceedings takes part, concerning a decision that awards a right or imposing an obligation, mediation will only be possible if — exceptionally — the lawmakers award the authority discretion in adjudication, which is the situation that arises most frequently in the case of monetary performances, as well as the application of tax relief and exemptions.

Mediation as an idea in administrative proceedings

Changes in the forms and method of operation of the administration, mainly related to the fulfilment of the public tasks of the state, a member of the European Union, are forcing a new approach to handling proceedings, which is open and oriented towards the involvement of its various participants, a friendly unit which is as deformalized as possible. The lawmakers acknowledged that one of the measures for achieving these objectives is precisely the institution of mediation.

Mediation, in its essence, is of the nature of a voluntary conciliation procedure constituting one of the basic forms of alternative dispute resolution (A. Zienkiewicz, 2007). It is based on universal principles, namely voluntariness, good faith, autonomy of the conflict, respect, impartiality and neutrality, confidentiality and deformalization (A. Kalisz, 2016). Mediation rather corresponds to the specifics of private law, in which autonomy of will, the interests of the parties to the dispute and a balance between them, as well as contradiction or the principle of *volenti non fit iniuria*, which originates from Roman times, are important. The principles of mediation have the objective of consolidating the model of conduct, according to which it is a tool that is favourable to the parties, has no formalized features, where the party interested in resolving the dispute (and hence the party) is not just a passive observer of what is happening around him, but a creator of the course of the proceedings, in which he can specify his claims and decide on what concessions he is willing to agree to.

And that is where the first conflict in terms of mediation in administrative proceedings lies, because it assumes the resolution of a dispute between the parties to a conflict. This is because, in principle, administrative proceedings are non-dispute proceedings because they constitute a sign of public activity involving the application of legal norms by the administrative authority. This is because the subject matter of administrative proceedings is the establishment of the objective facts of the case, which should take place on the basis of evidence. Next, in the state of the facts established in this way, the authority resolving the administrative case assigns the norm of substantive law (subsumption) and applies it by making a decision in the case. In such a case there is no room for a dispute to take place — either between parties or between the authority and a party. The overriding

principle of administrative proceedings is the principle of objective truth specified in Article 7 of the Code. In this light, during the administrative proceedings, the administrative authorities are required to take up all activities that are necessary to clarify the fact *ex officio* or on request. The objective of these proceedings must therefore be to establish the actual situation (the facts) based on proven facts and circumstances. Both the judgements of the administrative courts and the legal doctrine also suggest that the principle in question imposes two obligations on the bodies of public administration — first, the *ex officio* specification of which evidence is necessary to establish the facts of the case, and second, the taking of evidence *ex officio* to establish the facts of the case (B. Adamiak, Wrocław 2011). The need to take evidence *ex officio* to establish the facts of the case was additionally emphasized in Article 77 § 1 of the Code, which requires the bodies of public administration to gather and consider all the evidence. Therefore, the investigation should be handled until all the facts related to the given administrative case are exhaustively analysed, its actual picture reconstructed and the grounds for the correct application of the provision of the law obtained. Only an assessment of all the evidence gathered in the case, and therefore materials enabling the establishment of facts that are consistent or close to the facts, can constitute the basis for a non-defective administrative decision in every case. This means that proceedings on taking evidence cannot end until the authority establishes whether the facts provided for in the legal norm took place or not in the case under consideration. Therefore, under this assumption, there is really no room for a dispute, as there can only be one set of facts — the set that is reflected in the evidence gathered. It should be remembered that the principle of the active involvement of the parties in the proceedings guarantees the ability to submit requests to take evidence from each of the parties to the proceedings, while the authority is required to gather all evidence and then consider it. The authority establishes the facts when assessing the whole of the evidence.

It is also difficult to find a dispute at the stage of applying a norm of substantive law, to which the established facts are objectively subordinated. This is because the authority is required to act on the basis and within the limits of the applicable law and therefore only the applicable norm and its corresponding state of the facts of the case can be applied.

The fundamental principle of mediation is also its voluntary nature. Only parties to the proceedings are exclusively entitled to decide on what they want, so as to aim towards resolving the dispute which divides them, through a settlement. Even if one of the parties were to opt for such a solution, the other party or parties cannot be forced to involve in the mediation. Furthermore, each party, even the one requesting mediation, may withdraw from this form of dispute resolution at any time, without being obliged to give a reason. The same principle applies to the choice of the mediator, who must be accepted by each of the parties. In the case of a change of mind, each party may request the replacement of the mediator with another authorized person.

Looking at the above assumption of voluntariness, it appears to be natural and obvious that the Polish lawmakers regulated these in a similar way in the Administrative Procedures Code. However, the problem remains that there is no dispute, in principle, in administrative proceedings, and therefore there is simply no opportunity to apply that assumption.

The next principle of mediation is the assumption of its impartiality and objective nature. This applies to both the course of the mediation and — in particular — the mediator who should be an impartial and neutral person. His actions should objectively take into account the legitimate interests of the parties and their objectives, as well as pursue the primary goal of mediation itself, which is to clarify and consider the factual and legal circumstances of the case and to make arrangements to settle it within the limits of the applicable law. The mediator should not impose his own decisions on the parties or express his personal views on the matter during the mediation procedure. The mediator's role is to assure the parties of such conditions of the discussion in which they are able to freely and comfortably express their expectations and proposals, which, in turn, will lead them to adopt a single solution to a given dispute. The lawmakers explicitly provided for the mediator's duty to remain impartial and ordered the immediate disclosure of circumstances which could raise doubts as to his impartiality, including circumstances of being close to the case or close to either party. In case of doubt as to impartiality, the mediator is required to inform the participants of the mediation and the body of public administration forthwith, as well as refuse to conduct the mediation.

The problem of objectivity and impartiality of the mediation in administrative cases appears on a different plane, which has already been mentioned, namely when the administrative authority, which is required to settle an administrative matter, is to be a participant of the mediation. The assumption that the authority suddenly becomes a party to a dispute, which is to be settled by an external mediator, appears to be in conflict with the procedural and competence role of the administrative authority, which has the task of correctly applying the norms of substantive law. When acting on the basis and within the limits of the law, as well as when making factual and legal findings, in principle, the administrative authority does not have a platform for potential mediation. A potential dispute which could appear in such a case may apply to either the imagination of what the facts are to be, which the given entity is unable to prove, or the expectations of the wording of the provisions of the law, which do not coincide with the applicable law. In accordance with the principles of the rule of law and the objective truth, the first of these issues cannot be resolved through mediation. As for the second issue, this is an example of a dispute not so much with the administrative authority, but rather with the lawmakers and, as such, that also rules out the possibility of amicably resolving a case.

These doubts as to the possibility to conduct objective and impartial mediation with the involvement of the authority also apply to the matter of the settlement by an administrative authority with regard to administrative

discretion. Purely a superficial assessment of this type of structure could lead to the assumption that, in such cases, the authority has full freedom with regard to the resolution, whereas this is not the case. Even so, even in the case of the potential right to full freedom of adjudication, the administrative authority is never in dispute with the party. Firstly, because it would need to previously express a negative assessment of the party's procedural expectations, which would mean that it would need to be accepted that the authority had already made and issued its decision in the case (even if it only did so orally). Until the authority expresses its position in the matter, it cannot be assumed that it has no specific interest in it, all the more so that it is required to balance disputed interests.

Meanwhile, secondly, the authority cannot withdraw from the consolidated practice of adjudicating in the same factual and legal situation. This means a situation in which the authority that is resolving the administrative case is obliged to make the same decisions in the same factual and legal situations as that of the case. A differentiation of the decisions as a result of the mediation conducted would lead to a gross breach of the principle of the rule of law.

Thirdly and finally, the authority that adjudicates as a part of the administrative acknowledgement is limited with regard to the method of proportionally balancing interests, while its decisions cannot bear signs of arbitrariness. This applies to both the method of establishing the facts and the application of substantive law. The principle of objective truth imposes the obligation on the authority handling the proceedings to comprehensively analyse the matter in factual terms. Therefore, an administrative decision (even issued after holding the mediation), which is issued in proceedings in which the facts of the case have not been properly clarified, cannot be considered compliant with procedural law. The administrative authorities are entitled to freely assess evidence, although this assessment cannot bear signs of discretion. The evidence should be assessed together, while the assessment of the evidence should be full and detailed. When resolving a case, a body of public administration cannot be content with making only a cursory and selective assessment of the evidence, because if such an assessment were to be examined by an administrative court, it should be disqualified as an element that cannot constitute the factual grounds for applying a norm of substantive law.

The administrative body most frequently has a great deal of independence in forming the content of the decision when resolving discretionary decisions, whereby the administrative body's exclusive competence to adjudicate is expressed in the independent formation of the wording of the decision within the area of judgmental authority granted by the lawmakers, provided that it acts within the limits and on the basis of the law and does not abuse its authority. This means the obligation to carefully balance the interests of the citizens and the public interest. This is particularly important in the case of a conflict of these interests. The fundamental principle of equality with respect to the law requires all interests that appear in the given case to be balanced. The obligation to balance all interests that appear in a given case is inseparably combined with the requirement to reliably and comprehensively clarify and consider the circumstances of the case and issue a decision in compliance with the applicable legal order. A potential conflict of interests requires the authority to specify the public interest in the given case and to demonstrate that it is important (particularly important public interest), it is real, it exists at the time of adjudication and it is not a potential interest. Administrative acknowledgment cannot bear signs of discretion but must arise from unambiguously specified premises justifying the content of the decision made.

It is therefore very difficult for the body of public administration to achieve a state of impartiality and objective operation within the framework of mediation and, in my opinion, it is impossible to find an example of proceedings in which the authority could participate in mediation without breaching the remaining general principles.

The next fundamental principle of mediation is its confidentiality, which appears to be completely understandable and fully acceptable. The essence of mediation is its confidential nature, while the mediator is required to keep confidential everything he learned during its course, unless the participants of the mediation decide otherwise. This principle has the objective of creating optimal conditions for the parties in which it will be possible to settle doubts about all aspects of the proceedings being conducted without being concerned that it will be possible to use any information later, against any participant of the mediation. It was even accepted in administrative proceedings that no proposals of settlements, disclosed facts or declarations made during the mediation may be used after the end of the mediation, with the exception of the arrangements contained in the minutes of the mediation. Hence the solution in which the mediator cannot be a witness of circumstances about which he learned during mediation.

Mediation as a method (procedural measure) of resolving an administrative matter

The lawmakers decided to regulate the subject matter of mediation in the Administrative Procedures Code in a quite surprising way. This is because although the objective of mediation in civil proceedings is to enter into a settlement ending the dispute, in administrative cases the objective was considered to be the following: (1) to clarify and consider the factual and legal circumstances of the case, and (2) to make arrangements for resolving it within the limits of the applicable law, including by issuing a decision or entering into a settlement.

According to the principle of the objective truth, the administrative authority is obliged to perform all activities that are necessary to precisely clarify the facts and to resolve the matter. This obligation should be fulfilled by collecting and reviewing all the evidence. The combination of these requirements suggests a certain dependency — the authority is supposed to clarify and objectively establish the facts of the

matter, while the actual circumstances should be confirmed with evidence. Meanwhile, the regulations regarding mediation stipulate that it should be held in order to 'clarify the actual circumstances'. Therefore the regulation that was introduced constitutes a deviation from the above rules, in which the authority is exempted from the obligation to take the steps that are necessary for clarifying the facts and gathering evidence to confirm the existence of the facts. In this place, the lawmakers anticipated the 'clarification of the actual circumstances'. It is unclear whether this linguistic separateness of notions was introduced deliberately ('clarify the facts' — 'clarify the actual circumstances'), although the principles of correct interpretation require the acceptance that rational lawmakers deliberately introduce an important exception here from the obligation to establish the facts in favour of their clarification (making them understandable) without the need to prove them. This is a particularly intriguing structure, all the more so in the context of Article 75 § 2 of the Code, providing for the ability of the party to make a declaration regarding the facts or the legal situation, which is made under the sanction of liability for giving false testimony. This possibility applies to all cases in which a provision of the law does not require official confirmation of specific facts or the legal situation by way of a certificate. Therefore, since the party has such far-reaching evidence enabling it to make a declaration both regarding the facts and regarding the legal situation, it is impossible to clarify which premises the lawmakers followed, which anticipates the ability to clarify the actual circumstances in mediation.

According to the principle of legality of the actions of the bodies of public administration, they are obliged to act exclusively on the basis of the applicable provisions of the law. This principle is related to the constitutional principle of acting on the basis of the law, which is expressed in Article 7 of the Polish Constitution, as well as the principle of a democratic state governed by the rule of law, expressed in Article 2 of the Polish Constitution, from which the principle of the rule of law also arises, which is of a broader nature and which includes the principle of legality. The obligation of the bodies of public administration to apply the provisions of the law in force on the date on which the administrative decision is issued to the facts established as at the date of issue of that decision, arises from the principle of legality. Derogations from this principle may arise from the intertemporal regulations, which can rule out or restrict the application of a new statute to legal events that took place before they became effective. The legal norm that was applied should not only apply at the time of adjudication, but should also be correctly applied, in accordance with the objective and function of all of the substantive law regulations from which it was interpreted.

The application of the provisions of substantive law frequently requires their interpretation, which requires reaching out to the principles of interpretation and their related interpretation directives. Therefore, the correct application of a provision of substantive law constitutes a rather complicated process which requires the application of a set of rules. The legal norm that should be applied appropriately arises as a result of the correct interpretation. In this context, the assumption about mediation understood as 'the consideration of the legal circumstances of the case' should be assessed as incomprehensible. This most probably applied to the fact that, following the interpretation, two concepts of norms can fundamentally be accepted: one that is friendlier for the party or one that is less friendly for it. And the considerations regarding which legal norm to apply to all of the circumstances should be conducted within the framework of the mediation. Here again, such an action appears to compromise the principle of equality and the prohibition of derogating from the consolidated method of adjudicating in the same factual and legal situation.

The adoption of the code's assumption on the conciliatory method of determining the method of handling an administrative matter in which an administrative body is to participate, appears equally surprising. As has already been demonstrated, regardless of the structure of the competence norm, the authority handling the administrative case is obliged to apply the applicable law and, in this respect, it does not have the freedom to choose how to resolve the case (this notion should probably be simply understood as the content of the decision). This is because the method of resolving a matter is regulated by the Code in Article 104 § 1, stipulating that the 'body of public administration resolves the matter by issuing a decision, unless the provisions of the code provide otherwise'. Therefore, since there is no separate form and method of resolving a matter in the regulations, this matter cannot be the subject of mediation.

Even so, it is worth drawing attention at this point to one more aspect: namely, to the legal form of the final decision, which, likewise in the case of the use of mediation, the lawmakers anticipate exclusively as being an administrative decision. However, this is a special decision because the body of public administration resolves the case in accordance with the arrangements on resolving cases (within the limits of the applicable law) conducted within mediation.

The acceptance of the legal form of the decision for a case in which mediation was conducted carries with it certain procedural consequences. Such a decision does not finally end the proceedings, as in the case of a court-approved settlement in civil cases. The parties are entitled to file an appeal against that decision, whereas a party cannot effectively waive this right at the stage of mediation. In other words, even if the party attempted to waive the right to file an appeal during mediation, this would not result in civil or procedural law effects. Therefore, even the party which agreed to a specific method of resolution, within mediation arrangements and clarifications about the actual and legal situation, will be entitled to contest such a decision. This is a bizarre situation, suggesting some significant inconsistency in the activities of the lawmakers. This is because if two parties to proceedings are able to become involved in such complicated arrangements in mediation, it would be rational to assume that this appears to be a certain value to the extent to which a specific objective can be achieved, especially from the point of view of the authority. This applies to the ability to end pending proceedings with a guarantee that the decision ending the proceedings is final and binding.

However, for some reason, the lawmakers accepted that an agreement, which was initially supposed to end proceedings in mediation, should not be the procedural end of administrative proceedings.

Mediation in administrative proceedings as an effective solution?

The legal structure of mediation adopted in the Code gives rise to material institutional and procedural doubts, while the practice to date indicates that it is the appropriate instrument to be used in new types of public tasks performed within the framework of administrative proceedings.

In the first instance, it should be pointed out that, in principle, from the formal point of view, the introduction of the institution of mediation into the legal order regarding broadly-understood public matters should be assessed as the right direction where a method of public participation is being sought in the performance of public tasks. Especially since the regulations that were introduced are based on standards of mediation arising from European law. The introduction of mediation into proceedings before administrative authorities is directly related to recommendation Rec (2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties. This recommendation specifies that the provisions governing alternative measures should assure the parties of the receipt of appropriate information on the ability to apply them, independence and impartiality of mediators, fair proceedings (especially by observing the principle of equality of the parties), transparency of the use of alternative measures and a certain level of flexibility of the decision and the effective enforcement of the decisions reached with the use of alternative measures. The amendment to the Code introduced in 2017 contains an extended principle of aiming towards the amicable settlement of a matter at every stage of the proceedings. Therefore, just as courts to date, administrative authorities not only need to search on their own initiative and find whether it is possible to come to an arrangement, but also need to encourage the parties to take up mediation or enter into a settlement. It is worth emphasizing that the justification of the draft amendment mentions that the provisions should create the ability to take advantage of this institution 'earlier than to date, namely at the stage of administrative proceedings, among other things precisely so that the difference in views on the method of resolving the case between the party to the proceedings and the body of administration can be clarified amicably at the earliest possible phase of decision-making, and therefore to prevent the initiation of administrative court proceedings.

This aspect of transferring mediation to the decision-making stage appears to be the most controversial because it was not preceded by more careful thought. This is because the cited European regulations indicate that the role of mediation is an alternative to court disputes between the administration and the citizen. Meanwhile, this aspect fully satisfies the modified formula of mediation in proceedings before administrative courts (which was also modified in 2017, even though it formally applied from 1 January 2004), which is a real alternative to court proceedings. There can only be talk of a dispute between the party and the body of administration that issued a final decision in the matter at the stage of proceedings before the court. This is because, in principle, the party had the opportunity to express its position earlier on the resolution of its case as a part of the contesting measure which is, in principle, an appeal. However, in a certain sense, the decision of the body of appeal which is contested in court is a response to the expectations and allegations raised by the addressee of the decision. Therefore, filing a complaint with a court means a lack of acceptance of the method in which administrative authorities resolve cases and can be referred to as a unique form of initiation of a dispute with the administration.

However, the introduction of mediation between the authority and the party at the stage at which the decision is being issued appears to be in conflict with the essence and objective of Polish administrative proceedings as authoritative and unilateral action in which one cannot talk about a dispute.

The next issue that gives rise to doubts as to the method of regulating the institution of mediation is the conflict between the assumptions of the authors of the bill and the choice of the method of achieving them. This mainly applies to the issue of public participation in the performance of public tasks and the new shape and nature of these tasks. However, the problem is based on the fact that most of these activities are not performed by way of a decision (as, for instance, the award of co-financing with European funds). Therefore, the regulation of mediation in Section II of the Administrative Procedures Code titled 'Proceedings' clearly restricts the ability to use it only to those contacts between the public authority and the citizen which take place by issuing an administrative decision. In my opinion, this is the least appropriate position of the regulation regarding the amicable resolution of disputes, as it has a limiting attribute. The lawmakers do not provide the legal possibility to take advantage of the institution of mediation in many cases in which real disputes can arise between the public authority and the citizen. Such cases may arise, for instance, when awarding public funds from European programmes and other non-returnable programmes. A similar situation may arise in the case of changes made in the organization of road traffic with regard to junctions of public roads with internal roads, or together with communications or explanations of bodies of central government administration, which cannot be contested in any way.

This assumption is procedurally dangerous, as it eliminates the possibility of amicably resolving significant problems, with respect to which an appeal cannot be filed successfully, while the legal process of pursuing claims is very limited. In precisely such cases, the institution of mediation (or in-depth consultation with the involvement of an independent mediator) between the authority and the individual could have a real impact on public participation in the fulfilment of public tasks.

Conclusions

The lawmakers assumed that mediation, as a non-authoritative method of bringing about the resolution of a matter with the involvement of an impartial mediator, is a new form of expression of the formation of legal relations with the active and participative involvement of the addressees of the decision ending the administrative proceedings. Its introduction into administrative proceedings was also supposed to achieve the effect of accelerating administrative proceedings.

As mentioned above, mediation does not satisfy the above assumptions, because no cases of its application in practice have been reported. It appears that the issue in question obviously requires further research and analysis, although attention can already be drawn today to several circumstances that certainly do not help achieve the planned statutory objectives.

The first of these is the method of ending mediation, as assumed by the lawmakers. The mediation procedure being handled ends with a decision being issued by the administrative authority — a decision that can then be contested before a higher authority or administrative court. This means that the application of mediation does not allow for the achievement of certainty of the law in an administrative matter. There is no procedural difference between a decision issued in a procedure in which mediation was applied and a procedure that does not use this form. Meanwhile, had the lawmakers anticipated the form of an agreement (or settlement) for resolving a matter, this would have enabled the achievement of the objective in the form of the end of these proceedings and the resolution of the matter. This is because, in principle, an appeal cannot be filed against an agreement or settlement. And this is its greatest asset — it enables the completion of processing of a given case. However, this solution was abandoned in the Polish model of administrative proceedings.

The second issue that can significantly reduce interest in mediation in administrative proceedings is the reasonably extensively developed legal liability of the public officials adjudicating in administrative matters. The risk of taking into account the interest of a party, which the supervisory authority could consider inadequate, can lead to criminal or disciplinary liability and liability for compensation of the authority, its manager or an employee of the authority who decided to resolve the matter through mediation, taking the interests of the party into account too broadly. Meanwhile, the essence of mediation is that its success depends on each party withdrawing from some of its own demands or expectations. In the case of an official, this limit of reasonable and adequate concessions is related to the partial withdrawal from the protection of the public interest, which can lead to his liability.

This can already happen by the mere possibility of admittance to mediation in administrative proceedings. The involvement of an authority in mediation requires that it is handled by a professional mediator, who is entered onto the list of court mediators by the president of a competent voivodship court. This professional is entitled to a fee for handling the proceedings. Therefore, since — in proceedings conducted by the authority — it is the authority that establishes the facts and interprets the law, the question may arise about the legitimacy of commissioning these activities to the mediator and exposing the authority to additional costs. This will be all the more important if, for instance, the objective of the mediation cannot be achieved. Therefore, since the authority is able to handle the proceedings itself, the justification of additionally spending public funds on tasks that the authority should perform on its own could be called into question.

All of the above circumstances create significant doubts in finding a justification for the implementation of the assumptions of the lawmakers to finding a formula for civic participation in dealing with the resolution of administrative matters and accelerating proceedings.

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