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CEPEJ GUDELINES FOR MEDIATION RESOLVING ADMINISTRATIVE DISPUTES – A COMPARISON BETWEEN COUNCIL OF EUROPE STATES AND UKRAINIAN PERSPECTIVES

Abstract. The status of Ukraine as a candidate country for the European Union membership reinforces the need for comparative analysis between Ukrainian regulations and law of other EU Member States as well as European regulations. One of the fields of comparative law is a development of mediation for disputes covered by administrative law. It has already been a subject of interest and promotion to both – The EU and the Council of Europe, since European standards of democracy provide for state cooperate with citizens/individuals.

The aim of this article is, to examine the main provisions, recommendations and best practices of the CoE member states, and to analyse the current practice and existing gaps in Ukraine in order to develop a proposal for effective implementation in the light of the most recent CEPEJ *Guidelines* promoting mediation to resolve administrative disputes. A comparative overview of this type of mediation regulations may be considered as *novum*. As for methodology, the paper is dominated by the logical-linguistic and comparative method.

So far – though Ukrainian legal system is quite compatibile with the examined CEPEJ gudelines and provide for inter-branch solutions – the development of administrative and court-administrative mediation is quite resilient and there is still much to be done not solely with legal regulations, but also „mediation culture" in such field.

Keywords: mediation on administrative disputes, CEPEJ guidelines, European law, Ukrainian law

WYTYCZNE CEPEJ DOTYCZĄCE ROZWIĄZYWANIA SPORÓW ADMINISTRACYJNYCH ZA POMOCĄ MEDIACJI – PORÓWNANIE PERSPEKTYWY PAŃSTW RADY EUROPY I UKRAINY

Streszczenie. Status Ukrainy jako kraju kandydującego do członkostwa w Unii Europejskiej wzmacnia potrzebę analizy porównawczej regulacji ukraińskich z prawem innych państw członkowskich UE oraz regulacjami europejskimi. Jedną z dziedzin prawa porównawczego jest rozwój mediacji w sporach objętych prawem administracyjnym. Był on już przedmiotem

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zainteresowania i promocji zarówno UE, jak i Rady Europy, ponieważ europejskie standardy demokracji przewidują współpracę państwa z obywatelami/jednostkami.

Celem niniejszego artykułu jest zbadanie głównych przepisów, zaleceń i najlepszych praktyk państw członkowskich Rady Europy oraz przeanalizowanie obecnej praktyki i istniejących luk w Ukrainie w celu opracowania propozycji skutecznego wdrożenia w świetle najnowszych wytycznych CEPEJ promujących mediację w celu rozwiązywania sporów administracyjnych. Przegląd porównawczy tego typu przepisów, dotyczących mediacji, można uznać za *novum*.

Słowa kluczowe: mediacja w sporach administracyjnych, wytyczne CEPEJ, prawo europejskie, prawo ukraińskie

1. INTRODUCTION

One of the challenges that Ukraine – as a candidate country for the European Union (the EU) membership – is about to face is the regulation of the institution of mediation, which is a subject of interest to the EU legislator (and so to the Council of Europe – the CoE – as another pillar of European integration).

As for **the EU** – it started with the soft law of Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (COM, 2002, 196 final) and concluded with binding secondary law of the EU: directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.05.2008, pp. 3–8); directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR –r OJ L 165, 18.06.2013, pp. 63–79) and regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR OJ L 165, 18.06.2013, pp. 1–12).

Even more extensive in this respect is the *acquis* of **the CoE** – restricting only to normative regulations of a *lex generalis* nature, these are worth-too-mention recommendations: R (81) 7, referring to (78) 8; R (86) 12 and the resolution no. 1 (2000). A for *lex specialis* nature see recommendations no.: R (87) 18 concerning the simplification of criminal justice; R (99) 19 concerning mediation in penal matters; R (98) 1 on family mediation; R (2001) 9 on alternatives to litigation between administrative authorities and private parties; R (2002) 10 on mediation in civil matters. Another soft law document is a *European Code of Conduct for Mediators* (CEPEJ 2018).

Thus, the subject of interest and promotion is not solely the most "natural" – a private law mediation, but also mediation in public law, including in administrative cases. European standards of democracy provide for the state to cooperate with citizens as individuals.

The goal of this article is to examine the main provisions, recommendations and best practices of the CoE member states, and to analyse the existing gaps in Ukraine in order to develop a proposal for effective implementation in the light of Council of Europe European Commission for the Efficiency of Justice (CEPEJ) *Guidelines* promoting mediation to resolve administrative disputes in Council of Europe member states. The fact, that they are quite recent, dated Dec. 2022 (though they were preceded by previous guidelines on mediation matters) brings the "novelty of the discussion."

As far as methodology is concerned – the present research is based on the referenced literature, internet resources, legal acts, as well as comparative method. The paper is dominated by the logical-linguistic method, although some conclusions were drawn on the basis of participant observation, i.e. the authors' own mediation practice.

2.1. The CoE legal framework for administrative mediation

As noted, the introduction of alternative forms of dispute resolution (including mediation) involving the state and its administrative bodies is in line with the *soft law* legislation of the Council of Europe.

Recommendation no. R (2001) 9 "On alternatives to litigation between administrative authorities and private individuals" states that the legislation regulating alternative means should ensure: that the parties receive adequate information about their possible use; independence and impartiality of mediators (conciliators and arbitrators); fairness of the proceedings (in particular, by respecting the principles of equality and impartiality, as well as the rights of the parties); transparency of the use of alternative means and a certain level of discretion; and the possibility of effective enforcement of decisions made as a result of the settlement. Also, Recommendation no. R (81) 7 "On measures to facilitate access to justice" and Recommendation No. R (86) "On measures to prevent and reduce excessive court workload" relate, in particular, to court proceedings in administrative cases. It points to the need to introduce conciliation and mediation procedures as a means of reducing the burden on the courts by shortening and streamlining court proceedings and recommends the use of mediation both before and during court proceedings.

Recommendation (2001) 9 of the Committee of Ministers of the Council of Europe on alternatives to litigation between administrative authorities and private parties of 5.09.2001 states that "the widespread use of alternative methods of settling administrative disputes will allow to approach the solution of these problems and bring administrative authorities closer to the public," which will be strategically important for Ukraine in the conditions of war and in the post-war period.

However, according to a study by the **CEPEJ** Working Group on Mediation (CEPEJ-GT-MED), only a few member states either used or even knew about administrative mediation tools.

Taking into account the findings of the study, CEPEJ-GT-QUAL developed a guide on administrative mediation Promoting mediation to resolve administrative disputes in Council of Europe member states CEPEJ (2022)11 of December 7, 2022. It is worth to give it a closer examination.

The manual contains a section on definitions and principles, and attention is drawn to the novelties, namely the term "administrative mediation" and a new classification of its forms (institutional, conventional and jurisdictional or para-jurisdictional), although it is noted that the mediation process is not specific to administrative disputes, which certainly requires further scientific study.

The section on the benefits of mediation in administrative disputes focuses on the importance of establishing a dialogue and improving the quality of relations between citizens and public authorities, given that the parties to an administrative dispute are not on equal terms. Mediation is more accessible to citizens and facilitates communication between citizens and public authorities to prevent new conflicts.

The scope of mediation in administrative disputes, according to the CEPEJ document, is very broad and covers the following types of administrative disputes:

– contractual and obligation disputes;
– disputes over legality;
– *lex specialis* disputes (arising in connection with urban planning decisions or documents – for example, when several persons dispute a building permit or document; social assistance disputes – which usually concern people in difficulty who primarily need clarification of certain decisions that they are unable to understand; and disputes arising from contracts concluded by public authorities (contract and concession agreements); disputes between citizens and local authorities regarding the functioning of local public services (water supply, electricity, Internet access, etc.); disputes between insured persons and social security authorities; disputes between the administration and civil servants – when the nature of these conflicts affects the normal functioning of the service; requiring technical expertise (e.g., disputes between sports federations regarding the organization of sports events) and is effective in resolving issues related to the administration's failure to comply with court decisions. Undoubtedly, such a broad approach to the use of mediation to resolve administrative disputes is a solid ground for building partnerships between citizens and the state.

The section on recommendations on measures that can be taken to promote the use of administrative mediation focuses on recommendations in three important areas, such as availability, accessibility and awareness.

Strengthening the availability of mediation in administrative disputes is proposed to avoid conceptual uncertainty and to cover all existing mechanisms

that meet the basic elements of successful mediation Adopt a broad definition of administrative mediation. To choose the forms of institutional, jurisdictional or purely conventional mediation. For improved efficiency, it is proposed that different types of processes coexist. Develop a legal framework that clearly defines the rules and scope of mediation in administrative cases. Introduce mediation from the pre-trial stage. An important element is the creation of a list of mediators who are qualified and specialize in resolving administrative disputes, given the availability and accessibility of professionals in this field.

To ensure the accessibility and development of mediation, the availability of financial resources is an important factor. Because the state's assistance in training judges, administrations, lawyers and persons who are to become mediators in this area and ensuring the availability of legal aid for all mediation procedures is a significant factor in ensuring that citizens have access to the opportunity to establish a dialogue with citizens. Attention should be paid to addressing couple of important aspects: establishing a link between court proceedings and the mediation process and developing procedural legislation to suspend and interrupt appeals and limitation periods.

The development of mediation is possible only if public authorities, courts, lawyers, and state-owned companies are involved and have quality information on mediation – that means the need for increasing the awareness. The fact that public authorities are still not ready for a dialogue with citizens, lawyers still do not sufficiently understand the essence of the mediation process, and there is distrust, which, of course, hinders the spread of mediation.

Therefore, social policy should provide for measures to widely disseminate the culture of mediation, such as information and communication campaigns for all mediation actors. Research of figures that give an idea of the practice of administrative mediation and the difficulties encountered in its implementation.

2.2. The "mediation culture" in particular CoE member states

As mentioned, mediation corresponds rather with the nature of private law, with its autonomy of will; with its apprach that the individual interests of the parties to the dispute and the balance between them matters; as well as with its adversariality. It is an institution that combines the resolution of various types of disputes and therefore works "across" the boundaries between various branches of law. In the sphere of state and public administration, the presence of mediation is associated with the increasing role of the state and its bodies in social life, but at the same time with democratisation of contemporary society. This is why mediation in administrative and court-administrative cases is recommended and promoted by the CoE (and the EU). Such promotion, however, falls on different types of ground and results with various outcomes.

Analysing these best practices and national legislation in the field of mediation, it should be noted that mediation practices in administrative cases in the CoE member states, that are currently 46 (including the 27 EU members), vary. They can be split into two groups.

The first (quite a small) group includes countries such as: Andorra, Armenia, the Republic of Cyprus, the Czech Republic and North Macedonia, **where regulations on for administrative disputes are absent**. However, some of these Member States do have provisions for mediation in civil matters.

The second group of Member States has a legislative framework and/or practice of mediation in administrative disputes.

Among them, France, Germany, Latvia, Lithuania, Monaco, the Netherlands, Spain, Switzerland and the United Kingdom have both a legal framework and quite established practice. In Spain, there is no national act regulating mediation in administrative disputes, but some autonomous communities have adopted a so-called *protocol* defining specific rules applicable to mediation in administrative disputes (Canary Islands, Catalonia, Madrid, Murcia, and Valencia).

In Azerbaijan, Bulgaria, Croatia, Portugal and Ukraine – but also Poland, despite the existence of a legal possibility and framework, it is rarely used in practice. In spite of the promoting efforts mediation, particularly administrative and court-administrative, does not enjoy sufficient use neither among citizens nor public authorities or judges.

At the same time, in Luxembourg, in the absence of a legal framework, the Administrative Court has a broader vision of its role, which is not limited to the application of the law, but also extends to dispute resolution, also – if possible – through mediation between the parties.

It should also be noted that the adopted solutions and practice of mediation in administrative disputes differ from one EU member state to another. In some countries, institutional mediation is the only type available, such as in Switzerland, where each *canton* has a cantonal ombudsman known as the Bureau Cantonal of Administrative Mediation (BCMA n.d.). In Spain, mediation is considered a "jurisdictional" process and is conducted by judges who are mediators. In other EU member states, mediation is linked to the court, as in Germany, Latvia and Spain. The mediation process in such cases is initiated and sometimes conducted by a judge. There are also countries with a "hybrid" system, such as France, Lithuania and the Netherlands, where mediation can be conducted by jurisdictional, out-of-court or institutional.

Despite the fact that Recommendation no. R (2001) 9 on alternatives to litigation between public authorities and private persons was adopted in 2001 and the importance of such factors as improved relations between citizens and the administration, reduction of court appeals, more efficient and cost-effective dispute resolution, and confidential approach to conflict resolution, the actual use of mediation in administrative disputes remains low.

It is important to note that there are differences in the understanding of the mediation process among the CoE member states. There are significant differences in definitions and terms. In most countries, mediation can be carried out by professional mediators or by judges, but in Switzerland it is considered exclusively a process carried out by an institutional body. The terminology used to define the process that can be falling within the broad concept of mediation also varies: in France – it is stated as "mediation," in Germany – "conciliation," in Lithuania – "conclusion of a peace agreement," in Luxembourg – "amicable settlement," etc.

Analysing the various examples in the Council of Europe signatory states, it is worth to note the main obstacles. One of them is not a specific legal framework due to the presence of a special subject (such as state bodies). Another important factor is the lack of a clear link between the mediation procedure and court proceedings.

However, the main obstacle to the development of mediation in administrative disputes remains the mental barriers – low "culture of mediation" as well as low "mediation consciousness" among both representatives of administrations and legal professions, which is why they rarely consider participation in mediation to be appropriate.

All these factors contribute to the low rates of mediation practice in administrative cases. One of the priority tasks is to develop mediation in administrative cases in the CoE member states to provide a broad definition to unify different concepts and promote a "culture of mediation."

3. CURRENT PRACTICE AND PERSPECTIVES OF *GUIDELINES* IN UKRAINE – CONCLUSIONS

It worth to start with the remark that legal system in Ukraine is not incompatibile with the examined CEPEJ gudelines and provide for inter-branch solutions. A bit worse picture, though, is emerging from analysis of the mediation practice.

The national legislation of Ukraine provides for mediation and the institution of dispute resolution with the participation of a judge in the Code of Administrative Proceedings of Ukraine (Verhovna Rada (Parliament) of Ukraine 2005). Mediation is defined as an out-of-court, voluntary, confidential and structured procedure in which the parties, with the help of a mediator (or co-mediators), try to prevent or resolve a conflict (legal dispute) through negotiations (Verhovna Rada (Parliament) of Ukraine 2021) and is based on the principles of voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equality of rights of the parties to the mediation (Verhovna Rada (Parliament) of Ukraine 2021).

Although, as mentioned, the mediation process is not peculiar to administrative disputes, it covers a special subject, one of the parties to such a dispute is always a representative of a public authority (Verhovna Rada (Parliament) of Ukraine 2005).

One of the central reasons for the lack of clear legal regulation of mediation in administrative disputes and the lack of appropriate discretionary powers of public authorities is an obstacle to the use of mediation that affects its **availability**. According to part 2 of Article 19 of the Constitution of Ukraine, "state authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine" (Verhovna Rada (Parliament) of Ukraine 1996). Therefore, there is still a concern about the scope of powers and responsibilities of public authorities' participation in mediation procedures, despite the existence of a legal framework for mediation and the fact that the Code of Administrative Proceedings of Ukraine promotes the use of mediation (Verhovna Rada (Parliament) of Ukraine 2005).

Another central problem with the use of mediation to resolve administrative and legal disputes is the question of who can be a mediator in such cases. Unfortunately, the Law of Ukraine "On the Judiciary and the Status of Judges" (Verhovna Rada (Parliament) of Ukraine 2016). does not currently allow judges to act as mediators unless they have undergone special training in accordance with the requirements established by law (Verhovna Rada (Parliament) of Ukraine 2021), although the Code of Administrative Proceedings of Ukraine (Verhovna Rada (Parliament) of Ukraine 2005) does provide for the institution of dispute resolution with the participation of a judge. Due to the peculiarities of public law relations, the presence of a public authority as one of the parties to a dispute, and the territorial location of district and appellate administrative courts, it seems optimal to reform the institution of dispute resolution with the participation of a judge in an administrative process to a jurisdictional form of mediation, where a judge or retired judge of administrative jurisdiction may act as a mediator, which will not cause an additional financial burden on the state budget of Ukraine and will solve the issue of insufficient staff.

The creation of a list of mediators qualified and specialised in administrative dispute resolution will be another important step towards the introduction of mediation in administrative disputes.

In 2016, the Constitution of Ukraine was amended to include a policy provision that "the jurisdiction of the courts shall extend to any legal dispute and any criminal charge. In cases provided for by law, courts shall also hear other cases. The law may establish a mandatory pre-trial dispute resolution procedure" (Verhovna Rada (Parliament) of Ukraine 1996). The Law of Ukraine "On Administrative Procedure" currently has only a provision on conciliation as a right of participants in administrative proceedings (Verhovna Rada (Parliament) of Ukraine 2022).

The recommendation to ensure the introduction of mediation at the earliest possible pretrial stage is important, so it is proposed to supplement Article 28 of

the Law of Ukraine "On Administrative Procedure" at the first stage with the right of the parties to reach conciliation through mediation.

In the future, as another remark *de lege ferenda*, mediation should be made a prerequisite for going to court and making a decision at the court proceedings stage, and the issue of presumed consent of the public authority to participate in mediation should be regulated by law if an individual or legal entity initiates the process. Ensuring proper implementation of the agreement resulting from mediation is an important component, and the example of France may be used, where the Code of Administrative Justice provides that "the court may, in all cases where mediation has been initiated (…), approve and give effect to the agreement resulting from mediation" (French Republic 1999).

An important aspect is the **accessibility** of mediation. The issue of payment is currently a significant obstacle for the parties to an administrative dispute. Therefore, this is another factor in favour of the institutional model of mediation. If both parties apply for time for reconciliation, including through mediation under Article 236 of the Code of Administrative Proceedings of Ukraine (Verhovna Rada (Parliament) of Ukraine 2005), the court shall suspend the proceedings. The existence of a link between the mediation process and the court procedure facilitates the development of mediation.

One of the main obstacles to the development of mediation is the lack of **awareness**, and understanding of the benefits and procedures of mediation, lack of information and insufficient communication between all parties: administrations, courts, legal advisers and citizens.

Unfortunately, there is still a perception that mediation is a process only for resolving disputes between private individuals. A certain lack of trust on the part of the parties to mediation, and reluctance on the part of lawyers who have no knowledge of mediation and are used to the classical method of resolving disputes in court, although they help to draft the agreement resulting from mediation, also does not contribute to the development of a culture of dispute resolution through mediation.

That is why it is important to create incentives for the widespread of mediation culture:

Availability of information not only in courts but also in administrations to encourage the use of mediation, information and communication campaigns for all mediation actors, analysis and annual reports that provide insight into the practice to track emerging difficulties. One of the possible ways is to institutionalise mediation referrals among institutional mediation actors, following the example of France, where in 2017 the Committee for Administrative Justice and Mediation (CAIM) was established to pilot mediation in all administrative jurisdictions. In addition, administrative and appellate administrative courts have appointed "mediation referents" to coordinate mediation activities at the local level and raise awareness of mediation among both the courts and the public. Such a committee

could be created under the High Council of Justice of Ukraine (High Council of Justice of Ukraine, n.d.) and a pilot project could be initiated, based on the practice in the Administrative Court of Strasbourg. In order to raise awareness of the benefits of mediation among the parties and to offer mediation more effectively, a "mediation referent", after studying the case, offers the parties the opportunity to consider mediation as a possible way to resolve their dispute and simultaneously appoints a mediator. His task is to inform the parties about mediation and the reasons why their dispute is suitable for mediation.

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