

## When a State Is a Party to a Dispute – (Court-)Administrative Mediation in Poland and in Ukraine (A Comparative Perspective)

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**Abstract:** Ukraine’s status as a candidate country for the European Union membership reinforces the need for comparative analysis between Ukrainian regulations and the laws of other EU Member States, as well as European regulations. One of the fields of comparative law is the development of mediation as a legal institution, also in cases when the state is involved – for disputes covered by administrative law. This has already been a subject of interest and promotion of both the EU and the Council of Europe, as European standards of democracy provide for the state’s cooperation with citizens/individuals. The aim of this article is – firstly – to compare the current development of mediation in administrative and court-administrative cases in Poland and in Ukraine, the similarities in successes and challenges, and – secondly – to determine to what extent both countries follow the latest CEPEJ guidelines. Although

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the state of research and literature on this subject is advanced in Poland and slightly less satisfactory in Ukraine, a comparative overview of this type of mediation regulations can be considered a *novum*. As for methodology, the paper is dominated by the logical-linguistic method, although some conclusions were drawn on the basis of both statistics and participant observation, i.e. the authors' own mediation practice. So far – although both legal systems are quite compatible with the CEPEJ guidelines examined and provide for inter-branch solutions – in both countries in question, the development of administrative and court-administrative mediation is not a “success story.” *A contrario*: it can be classified as developing in the least resilient manner. To some extent, Poland and Ukraine show similarities and correlations in terms of successes and challenges, as well as social and mental barriers to mediation development.

## 1. Introduction

Ukraine's status as a candidate country for the European Union (EU) membership<sup>1</sup> reinforces the need for comparative analysis between Ukrainian regulations and the laws of other EU Member States, thereby creating an area for new discussion and introducing a new context to academic reflection and research. One of the fields of comparative law is the development of mediation as a legal institution, also in cases when the state is involved – for disputes covered by administrative law. This type of mediation has already been a subject of interest and promotion<sup>2</sup> of the Council of Europe (CoE) which is another pillar of European integration and to which both Poland and Ukraine have belonged since 1990s.<sup>3</sup>

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<sup>1</sup> On 17 June 2022, the European Commission issued its opinion on Ukraine's application for EU membership, and on 23 June, the European Council granted candidate status to Ukraine.

<sup>2</sup> See: Recommendation R (2001) 9 of 5 September 2001 on Alternatives to Litigation Between Administrative Authorities and Private Parties (<https://rm.coe.int/16805e2b59>).

<sup>3</sup> Poland – since 1991, Ukraine – since 1995. The Russian Federation had been a member since 28 February 1996, was suspended on 25 February 2022, announced its withdrawal from the CoE on 15 March 2022 and was expelled from it on the same day with immediate effect. As for Belarus – it was granted the Special Guest status from 1992 to 1997 and then barred from membership from 1997 due to its lack of progress in the field of democracy, human rights and the rule of law.

Although mediation (in various branches of law) is at different stages of development in signatory-states (there are some states with a solid mediation culture, comprehensive legislation or procedural rules, but there are also some where legislative bodies have shown little interest in regulating mediation), the CoE recommendations and resolutions,<sup>4</sup> despite their soft law nature, apply in all the Member States. European standards of democracy provide for the state's cooperation with citizens/individuals. One form of such cooperation and communication is mediation as a dispute resolution tool.

The aim of this article is – firstly – to compare the current development of mediation in administrative and court-administrative cases in Poland and in Ukraine, the similarities in successes and challenges, and – secondly – to determine to what extent both countries follow the latest CEPEJ guidelines.<sup>5</sup> Although the state of research and literature on this subject is advanced in Poland<sup>6</sup> and slightly less satisfactory in Ukraine,<sup>7</sup> a comparative

<sup>4</sup> Restricting only to normative regulations of a *lex generalis* nature, these are recommendations: R (81) 7, referring to (78) 8; R (86) 12 and the resolution no. 1 (2000). As for regulations of a *lex specialis* nature, see recommendations other than R (2001) 9 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 (2002) 10 on Mediation in Civil Matters. See also: “European Code of Conduct for Mediators,” European E-Justice, [http://ec.europa.eu/civil-justice/adr/adr\\_ec\\_en.htm](http://ec.europa.eu/civil-justice/adr/adr_ec_en.htm).

<sup>5</sup> “CEPEJ (2022) 11 of 7 December 2022,” CEPEJ, accessed March 10, 2023, <https://rm.coe.int/cepej-2022-11-promoting-administrative-mediation-en-adopted/1680a95692>.

<sup>6</sup> Ewa Gmurzyńska and Rafał Morek, eds., *Mediacja. Teoria i praktyka* (Warsaw: Wolters Kluwer, 2014); Anna Kalisz and Adam Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu* (Warsaw: Wolters Kluwer, 2014); Krzysztof Pleszka et al., *Mediacja. Teoria, normy, praktyka* (Warsaw: Wolters Kluwer, 2017); Martyna Plucińska-Nowak, *Status i oblicza mediacji w społeczeństwie polskim* (Poznań: Wydawnictwo UAM, 2021); Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądowo administracyjnym* (Warsaw: Wolters Kluwer, 2013); Magdalena Tabernacka, *Negocjacje i mediacje w sferze publicznej* (Warsaw: Wolters Kluwer, 2018); Anna Kalisz, “Mediacja administracyjna i sądowoadministracyjna,” *Państwo i Prawo*, no. 2 (March 2018): 19–39.

<sup>7</sup> Nataliya Mazaraki, “Mediation in Ukraine: problems of theory and practice,” *Foreign Trade, Economics, Finance, Law* 84, no. 1 (January 2016): 92–100, accessed June 16, 2023, <http://journals.knute.edu.ua/foreign-trade/article/view/533>; Tatiana Tsvina, “National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives,” *Problems of Legality*, no. 158 (2022): 110–123, <https://doi.org/10.21564/2414-990X.158.264998>; Karyna Rostovska et al., “Mediation as a Means to Resolve

overview of this type of mediation regulations can be considered a *novum*. As far as methodology is concerned, the presented research is based on the referenced literature, internet resources, legal acts, as well as – subsidiarily – mediation statistics. The paper is dominated by the logical-linguistic method, although some conclusions were drawn on the basis of both statistics and participant observation, i.e. the authors' own mediation practice. The leading method, however, is introducing a comparative perspective to the text (given that the part concerning Polish mediation reality is presented here as much shorter).

## 2. Development of Mediation in Poland and Ukraine – Analysis of Legislation and Practice

### 2.1. (Court-)Administrative Mediation in Poland

The history of Polish administrative and court-administrative mediation is not a “success story”<sup>8</sup>. In the field of administrative mediation – as a *novum*, and (court-)administrative mediation – as an institution existing since 2004, significant changes have been introduced since 1 June 2017 by the Act amending the Code of Administrative Procedure Act and certain other acts.<sup>9</sup> The solutions contained therein are largely formulated *per analogiam* with the provisions of the Code of Civil Procedure, especially those introduced in 2015. The legislator justified such amendments in administrative field with the need to ensure a “partnership relationship between the administration and the parties [to the dispute – A.K.]” The explanatory statement to the Act pointed out that “administrative proceedings are closely linked to many areas of life and concern the daily affairs of all citizens. The speed with which cases are handled and the quality of the decisions have a substantial direct impact on the assessment of the public administration system and the level of citizen’s trust in the state.”<sup>10</sup> One of the means to achieve these goals is the institution of mediation.

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Administrative Disputes: An Appraisal of the Historical and Legal,” *Journal of International Legal Communication* 1, no. 1 (June 2021): 197–204.

<sup>8</sup> See: Anna Kalisz, “Mediacja jako forma dialogu w stosowaniu prawa” (Warsaw: Difin, 2016).

<sup>9</sup> Journal of Laws of 2017 item 935, as amended.

<sup>10</sup> Polish Sejm’s paper no. 1183.

Before the amendments, the institution of administrative mediation did not exist and mediation in administrative courts was approaching a *desuetudo* situation. For example, in 2004, regional (voivodeship) administrative courts initiated mediation proceedings in as many as 679 cases, 170 of which were settled under this procedure. At that time, the largest number of requests for mediation were received in cases related to: construction law; tax liabilities and public finances; expropriation of real estate; fees related to the increase in the value of real estate as a result of adopting a local spatial development plan; and the imposition of a fine for performing road transport without paying a toll on national roads. Unfortunately, this number has been gradually decreasing and in 2016 and 2017 no mediation proceedings were conducted in any case.<sup>11</sup>

Currently, administrative mediation is provided by law in both horizontal and vertical aspects, i.e. it is admissible both between the parties to the proceedings (horizontal aspect) and between the parties and the public administration body before which the proceedings are pending and which is hearing the case (vertical aspect).

As regards mediation within court-administrative proceedings, the amending act significantly changed the shape of the procedure which had existed since 2004 and was based on the model of mediation conducted by a judge or court referendary (who has a role not only in moderating but also in controlling the whole process of reaching an agreement) by introducing the classic mediation model which involves a mediator, i.e. a third party, not involved in the resolution of the case and located outside the court structures. As in the case of administrative mediation, the solutions adopted are largely modelled on the provisions of the Code of Civil Procedure. Administrative and court-administrative mediation is based on universal mediation principles, not fully codified, such as the principle of impartiality, confidentiality and voluntariness, the principle of conflict autonomy, the principle of good faith, the principle of respect, the principle of neutrality of the mediator and the principle of de-formalization of the mediation procedure.

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<sup>11</sup> “Annual Reports,” The Supreme Administrative Court, accessed March 10, 2023, <http://www.nsa.gov.pl/sprawozdania-roczne.php>.

The scope of (court-)administrative mediation may include cases relating to property issues (i.e. neighborhood disputes; land consolidation; disputes concerning the development conditions or building permits and infrastructural line investments) that may “fit into” this type of mediation. Reconciliation of interests can take place in the area of concessions, permits or business licenses; environmental protection; agriculture and forestry, industrial property, taxation or customs obligations. The field for mediation can also be seen in social welfare disputes or other multi-faceted or long-standing conflicts between parties. Particularly, it will fit cases involving parties with many conflicting (but also partly converging) interests, but also cases involving complex factual and personal situations. In this respect, the administrative judiciary could be at least partially relieved of finicky decision-making processes. However, there is a lack of legal framework that “clearly defines the (...) scope of mediation.”

The institution under examination undoubtedly has the potential to help in building an atmosphere of partnership and respect for the legitimate interests of the parties, as well as to speed up the resolution of cases, as conciliatory resolution of disputes may result in a decision not being challenged either administratively or subsequently before an administrative court. Unfortunately, the court statistics<sup>12</sup> show that after 2017 administrative courts passed decisions dismissing or refusing the request for mediation in almost all the cases<sup>13</sup>.

Summing up – the overall development of mediation in Poland is progressing rather slowly and is not as vigorous as its enthusiasts would expect, as shown by the mediation statistics available on the website of the Ministry of Justice.<sup>14</sup> What is more, administrative and court-administrative mediation can be classified as developing in the least resilient manner.

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<sup>12</sup> Paweł Rochowicz, “Kłapa mediacji, ale uproszczenia działają – resort rozwoju ocenia wprowadzone procedury,” *Prawo.pl*, accessed March 10, 2023, <https://www.prawo.pl/samorzad/uproszczenia-procedur-administracyjnych-nie-zawsze-dzialaja,516368.html>.

<sup>13</sup> “Centralna Baza Orzeczeń Sądów Administracyjnych,” The Supreme Administrative Court, accessed March 10, 2023, <https://orzeczenia.nsa.gov.pl>.

<sup>14</sup> “Dane statystyczne dotyczące mediacji,” Ministerstwo Sprawiedliwości, accessed March 10, 2023, <https://www.gov.pl/web/sprawiedliwosc/dane-statystyczne-dotyczace-mediacji>.

## 2.2. (Court-)Administrative Mediation in Ukraine

### 2.2.1. Brief History and Current Legal Regulations

On August 24, 1991, with the proclamation of Ukraine's independence, the justice system underwent thorough changes – in particular, the principle of separation of powers between the legislative, executive and judicial branches was enshrined. The very next year (1992), the Parliament approved the Concept of Judicial and Legal Reform, which introduced the possibility of resolving disputes between citizens and public authorities (the state) into administrative proceedings. In 1996, the Constitution of Ukraine<sup>15</sup> was adopted, Article 3 of which proclaims, *inter alia*, that human rights and freedoms and their guarantees determine the content and direction of the state's activities; the state is accountable to the individual for its activities and affirming and ensuring human rights and freedoms is its main duty.

It is important to note that administrative justice is legislatively and functionally enshrined in states with a clear division between private and public law, in which administrative law is formalized as an independent branch (of public law). The establishment of the system of administrative courts first took place in 2002 in the Law on the Judicial System of Ukraine.<sup>16</sup> On October 1, 2002, a decree establishing the High Administrative Court of Ukraine (*Верховний Суд України*) was signed by the President. It is believed that from this point on, administrative justice officially began to function.

The final legislative consolidation of the administrative justice system took place with the adoption of the Code of Administrative Procedure (hereinafter referred to as the CAP).<sup>17</sup> On the path to establishing Ukraine as a democratic state under the rule of law and its integration with the European community, many innovations were introduced in the sphere of state–individual relations, including in the judiciary. One of them was the introduction of the institution of administrative justice, which gave individuals and legal entities the opportunity to appeal decisions, actions

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<sup>15</sup> “Constitution of Ukraine,” accessed March 10, 2023, <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.

<sup>16</sup> “Law of Ukraine,” accessed March 10, 2023, <https://zakon.rada.gov.ua/laws/show/1402–19>.

<sup>17</sup> “The Code of Administrative Procedure of Ukraine,” accessed March 10, 2023, <https://zakon.rada.gov.ua/laws/show/2747–15>.

or inactions of public authorities to an administrative court, as enshrined in Article 55 of the CAP. Incidentally, it should be noted that at that time it was the only code that contained a provision on the possibility of reconciliation of the parties at any stage of the process.<sup>18</sup>

Within the framework of two pilot projects, financially supported by the European Commission and the Council of Europe (“Procedure for Selection and Appointment of Judges, Their Training, Disciplinary Action, Case Distribution and Alternative Dispute Resolution”, 2006–2007 and “Transparency and Efficiency of the Justice System in Ukraine”, 2008–2011”), the European model of judicial mediation was piloted by Dutch and German experts, with specially trained judges acting as mediators.<sup>19</sup> Judges of two courts of administrative jurisdiction (Vinnytsia and Donetsk) were trained, and in 2010–2011, judges-mediators of Vinnytsia District Administrative Court conducted 31 mediation procedures, 20 of which resulted in positive outcomes and, eventually, agreements.<sup>20</sup> In 2010, the Donetsk Administrative Court of Appeals held a “mediation week” during which 8 mediations were held, all of which resulted in a positive outcome.<sup>21</sup> Unfortunately, after the projects ended and due to insufficient legislative regulation at that time, mediation within administrative courts did not continue and the tradition was not established.

According to the statistics and case law records, in the period 2008–2016, 6,449,087 cases were pending in local administrative courts, and about 0.05% of them ended in reconciliation. Namely: in 2012 – 0.02%, in 2013 – 0.04%, in 2014 – 0.06%, in 2015 – 0.08%, and in the first half of 2016 – 0.25%.<sup>22</sup> Despite the small percentage, it is possible to observe an increase in interest and in use of the conciliation of the parties in the field of public law disputes.

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<sup>18</sup> Article 51(3) of the CAP, as amended on July 6, 2005.

<sup>19</sup> A German model of *Güterichter* – conciliation judges.

<sup>20</sup> “Vinnytsia District Administrative Court,” accessed March 10, 2023, <http://voas.gov.ua/work/med-ats-ya/med-ats-ya-efektivne-vir-shennya-konfl-kt-v>.

<sup>21</sup> “Mediation Week in the Donetsk Administrative Court of Appeals,” Judiciary of Ukraine, accessed March 10, 2023, <https://apladm.dn.court.gov.ua/sud9102/pres-centr/news/3889>.

<sup>22</sup> Oleksander Sydelnikov, “The Institution of conciliation of the parties in administrative proceedings” (abstract of a dissertation for the degree of Candidate of Law), [https://library.nlu.edu.ua/POLN\\_TEXT/AVTOREF\\_2017/Sydielnikov\\_2017.pdf](https://library.nlu.edu.ua/POLN_TEXT/AVTOREF_2017/Sydielnikov_2017.pdf).



In 2016, amendments were made to the Constitution, namely to Article 124 (“the jurisdiction of the courts extends to any legal dispute and any criminal charge. In cases provided by the law, the courts shall also consider other cases. The law may establish a mandatory pre-trial procedure for dispute resolution”). Such a provision opened the future possibility of introducing a mandatory mediation model in certain categories of cases involving a public authority. In 2017, the procedural provisions were reformed and the institution of dispute resolution with the participation of a judge<sup>23</sup> in civil, commercial and administrative proceedings was introduced,<sup>24</sup> which was undoubtedly another progressive step towards developing Alternative Dispute Resolution (ADR) methods in the judiciary. The adoption of the Law on Mediation on November 16, 2021<sup>25</sup> was, ultimately, one of the most important events in the establishment of the mediation as a legal institution.

Currently, Ukrainian legislation provides for both mediation and the institution of dispute resolution with the participation of a judge in the Code of Administrative Procedure of Ukraine. It is supported by international and European regulations<sup>26</sup> and standards, such as: Directive 2008/52/EC of the European Parliament and of the Council of Europe on certain aspects of mediation in civil and commercial matters,<sup>27</sup> the Council of Europe Recommendations on Mediation for Different Categories of Cases developed by the European Commission for the Efficiency of Justice<sup>28</sup> and the UNCITRAL Model Law on International Commercial

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<sup>23</sup> In spite of the pilot project, the judge cannot be a mediator according to Ukrainian law.

<sup>24</sup> Law of Ukraine “On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts,” accessed October 3, 2023, <https://zakon.rada.gov.ua/laws/show/2147-19#Text>.

<sup>25</sup> Law of Ukraine “On mediation,” accessed October 3, 2023, <https://zakon.rada.gov.ua/laws/show/1875-20#Text>.

<sup>26</sup> Guidelines for Lawmaking in the Field of Mediation – *European Handbook for Mediation Lawmaking*, European Commission for the Efficiency of Justice (CEPEJ), accessed March 10, 2023, <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>.

<sup>27</sup> OJ L 136, 24.5.2008, p. 3–8.

<sup>28</sup> “Guidelines for a better implementation of the existing recommendation concerning family mediation and civil mediation,” European Commission for the Efficiency of Justice (CEPEJ), accessed March 10, 2023, <https://rm.coe.int/16807475b6>; “Guidelines for a better

Mediation and International Settlement Agreements Resulting from Mediation (2018, amending the UNCITRAL Model Law on International Commercial Conciliation, 2002),<sup>29</sup> were certainly taken into account in the Law on Mediation. In addition, a comprehensive analysis was prepared under the Pravo-Justice project with the participation of international and national experts.<sup>30</sup>

Despite the fact that the CAP promotes its use, it is still not a common practice to use mediation as set forth in the provisions of Article 122(6), Article 47(5), Article 180(2) and Article 181. One of the main reasons is the lack of appropriate discretionary powers of public authorities. Part 1 of Article 190 of the CAP requires that “the terms of conciliation must not contradict the law or go beyond the competence of the authority,” and according to Part 2 of Article 19 of the Constitution “public authorities and local self-government bodies, and their officials are obliged to act only on the basis of, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine.” At the same time, however, it is worth noting that according to Article 2 of the CAP the task of administrative proceedings is to resolve disputes in the field of public law relations in a fair, impartial and timely manner in order to effectively protect the rights, freedoms and interests of individuals as well as rights and interests of legal entities from violations by public authorities. Sharing the opinion of T. Kyselova within the framework of the Council of Europe project “Support to the Implementation of the Judicial Reform in Ukraine,” it is important to ensure that the task of integrating mediation into the judicial system is in progress.<sup>31</sup>

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implementation of the existing recommendation concerning criminal mediation,” European Commission for the Efficiency of Justice (CEPEJ), accessed March 10, 2023, <https://rm.coe.int/1680747759>.

<sup>29</sup> “UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018,” United Nations, accessed March 10, 2023, [https://uncitral.un.org/en/texts/mediation/modellaw/commercial\\_conciliation](https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation).

<sup>30</sup> Bert Maan et al., “Mediation Gap Analysis Report,” Pravo-Justice, accessed March 10, 2023, <https://www.pravojustice.eu/storage/app/uploads/public/5f7/435/116/5f743511604ec221015187.pdf>.

<sup>31</sup> Tatiana Kyselova, *Integration of Mediation into Ukrainian Court System: Policy Paper (October 17, 2017)*, Council of Europe, Kyiv, 2017.

Another key problem is the question of who can be a mediator in such cases. Ukraine envisions a classic model of facilitative mediation,<sup>32</sup> with a fixed definition of who is considered a mediator and requirements for people who can become mediators (Part 2 of Article 8 and Part 1 of Article 10 of the Law on Mediation). This is outside-the-court mediation. T. Tsuvina describes another model that is also possible – internal court-related mediation or integrated mediation as a type of mediation conducted “inside” the court by its employees or mediating judges.<sup>33</sup> However, there is an institution of settlement with the participation of a judge, the law does not allow judges to be mediators. The advantage of judge-conducted mediation is the authority of the judge over the person and the state body, which disciplines the parties and improves the involvement of the public authority in the mediation procedure. It also seems to increase the credibility of such a procedure.

### 2.2.2. Types of Disputes That Can Be Resolved Through Mediation

Mediation in administrative proceedings can become an essential tool for influencing relations in the resolution of public law disputes by reaching an amicable decision without going through all the mandatory stages of the administrative process, which will increase trust in public authorities, as this is a priority area of state and local government activity – as stated in the ruling of the Constitutional Court of Ukraine of July 9, 2002 (case on pre-trial settlement of disputes).<sup>34</sup>

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<sup>32</sup> Bernard Mayer, “Facilitative mediation,” in *Divorce and Family Mediation: Models, Methods, and Applications*, eds. Jay Folberg, Ann L. Milne, and Peter Salem (London: Routledge, 2004): 29–52.

<sup>33</sup> Tatiana Tsuvina, “Introduction of the Institute of Court Mediation as a Promising Area for Reforming the Civil Procedure Legislation of Ukraine,” in *Ukraine on the way to Europe: reform of civil procedural legislation. 36. scientific works. Materials of the International Scientific and Practical Conference (Kyiv, 7 July 2017)*, eds. I.O. Iزارova and R.Y. Khanyk-Pospolitak (Kyiv: Dakor Publishing House, 2017): 195–200. [https://dspace.nlu.edu.ua/bitstream/123456789/12731/1/Cuvina\\_195–200.pdf](https://dspace.nlu.edu.ua/bitstream/123456789/12731/1/Cuvina_195–200.pdf).

<sup>34</sup> Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the Limited Liability Company “Trading House Campus Cotton Club” regarding the official interpretation of the provision of part two of Article 124 of the Constitution of Ukraine (case on pre-trial settlement of disputes), accessed October 3, 2023, <https://zakon.rada.gov.ua/laws/show/v015p710–02#Text>.

According to Article 3(1) of the Law on Mediation, the law applies to social relations referring to mediation in order to prevent conflicts (disputes) in the future or to resolve any conflicts (disputes), including administrative ones. It should also be noted that an important unifying factor will be the entry into force of the Ukrainian Law “On the Administrative Procedure” (currently undergoing the legislative process).<sup>35</sup>

So far, mediation in administrative disputes has not been successfully implemented. The proposal of a criterion for the possibility of administrative mediation – expressed in the report of the national experts of the above-mentioned Pravo-Justice project – that the relevant authority should have proper decision-making powers and that the category of dispute should be negotiable seems valid.

In order to foresee potential administrative cases in which the mediation procedure could be applied, it is necessary to study cases from both a subject and object perspective, taking into account two conditions: the actors who are inclined to settle the dispute and the matter to be settled within the powers of such actors. Analyzing current legislation and opinions of various scholars on this topic (O. Sydelnikov, M. Blikhar, K. Tokareva, K. Rostovska, N. Hryshyna, O. Melnychuk, A. Pyshna and others), as well as examining these criteria, it is possible to distinguish the following categories of administrative disputes.

Classified by actors: legal professions to which the state functions are delegated; state supervision and control bodies; bodies related to public service; local self-government bodies and tax authorities.

Classified by subject matter: disputes concerning the activities of notaries and private enforcement officers; disputes concerning the adoption of response measures in the form of suspension of operation of educational institutions; disputes concerning obtaining permits from local authorities, appealing against decisions of local authorities, appealing against decisions of local authorities on setting tariffs and transferring municipal property; disputes concerning: the provision of plots of land by local authorities for ownership or lease, appeals against the refusal of a local council to grant a permission to develop a land management project, collection of land

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<sup>35</sup> Law of Ukraine “On Administrative Procedure”, accessed October 13, 2023, <https://zakon.rada.gov.ua/laws/show/2073-20#Text>.

fees (with the territorial bodies of the State Land Cadastre regarding approval of the location of a plot of land); disputes concerning the receipt of public information; disputes arising from payments between private individuals and public authorities; certain investment disputes involving the state; disputes concerning public service and dismissal from public service, including dismissal in connection with a reduction of the number of employees of a state body, recovery of outstanding wages, recovery of moral damages caused by the employer; disputes concerning the collection of taxes and fees.

Summing up – at present, there are prerequisites for the use of mediation to resolve administrative disputes in Ukraine. This is confirmed by pilot projects in administrative judiciary, the existence of the institution of dispute resolution with the participation of a judge, as well as the existing legal regulation of mediation, and there is hope to expand the competence of public authorities and their participation in the mediation procedure.

### **3. CEPEJ Guidelines Against the Background of the Council of Europe Recommendations**

As noted, the introduction of ADR methods (including mediation) involving the state and its administrative bodies is in line with the *acquis* of the CoE, since European standards of democracy provide for the state's cooperation with citizens/individuals.

Aforementioned Recommendation no. R (2001) 9 states that law governing alternative means should ensure: that the parties receive appropriate 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); transparency of the use of alternative means and a certain level of discretion and the possibility of effective enforcement of the solutions reached using alternative means.

Recommendations no. R (81)7 and no. R (86) also refer to, *inter alia*, judicial proceedings in administrative matters. The CoE documents point to the need for introducing conciliation and mediation procedures as a means of relieving the courts of their workload by shortening and streamlining the proceedings and recommend the use of mediation both before and during the trial. Recommendation no. (2001) 9 states that “the widespread use

of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public,” which can be of strategic importance for Ukraine under war conditions and during the post-war period.

However, according to a research by the CEPEJ Working Group on Mediation (CEPEJ-GT-MED), only a few member states used proper administrative mediation tools (O. Sydelnikov, M. Blikhar, K. Tokareva, K. Rostovska, N. Hryshyna, O. Melnychuk, A. Pyshna and others). Taking into account the findings of the research, CEPEJ-GT-QUAL developed a guide on administrative mediation *Promoting mediation to resolve administrative disputes in Council of Europe member states*.<sup>36</sup> The document contains a section on definitions and principles, and attention is drawn to the novelties, namely the term “administrative mediation” as a type 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. 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 (the state), brings citizens and the administration or authorities closer together, given that the parties to an administrative dispute are not on equal terms. Mediation is more accessible to citizens and facilitates communication between a citizen and a public authority to prevent the emergence of new conflicts.

The potential scope of mediation in administrative disputes is very broad and can cover all types of administrative disputes (contractual and liability disputes, but also disputes concerning legality) as well as those arising from town planning decisions or documents, such as when several people dispute a planning permit or document, which would not be resolved by legal proceedings, since these are not legal disputes in the *strict* sense. The same applies to social assistance disputes, which generally concern people in precarious situations who, above all, need clarifications of certain decisions that they are unable to understand. Mediation is also a very effective way of resolving disputes arising from contracts concluded

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<sup>36</sup> CEPEJ (2022)11 of 7 December 2022, accessed June 16, 2023, <https://rm.coe.int/cepej-2022-11-promoting-administrative-mediation-en-adopted/1680a95692>.

by public bodies (contracts and concessions); between citizens and local authorities concerning the operation of local public services (water, electricity, internet access, etc.); between insured persons and social security bodies; between the administration and public servants, when the nature of these conflicts affects the normal functioning of the service; disputes requiring technical expertise (e.g., disputes between sports federations concerning the organization of sports events). Mediation is also proving to be an effective process for resolving difficulties related to the non-enforcement of court decisions by the administration. Undoubtedly, such a broad approach to the use of mediation to resolve administrative disputes is a progressive step in building partnerships between citizens and the state, a step that strengthens democracy.

The section on recommendations on measures that can be taken to promote the use of administrative mediation focuses on recommendations in three important “A-aspects,” namely availability, accessibility, and awareness.

The aim of strengthening the availability of mediation in administrative disputes is to avoid conceptual ambiguities and be able to include all the existing mechanisms that meet the essential elements of successful mediation. It is also to choose the forms of institutional, jurisdictional or purely conventional mediation. The different forms of processes may co-exist to improve efficiency. The document points out the need to develop a legal framework that clearly defines the rules and scope of mediation in administrative matters and that constitutes a common base for all types of administrative mediation and also to introduce mediation at the earliest possible stage, starting from the pre-trial (pre-litigation) phase. An important element is providing for a register of mediators who are qualified and specialized in resolving administrative disputes, given the availability of professionals in this field.

Financial support is an important factor to ensure the accessibility and development of mediation. The document contains provisions contributing to the training of mediation actors: judges, administrations, lawyers and people who are to become mediators, as well as ensuring that legal aid is accessible in all mediation procedures. Attention should be paid to two important aspects: establishing a link between court-administrative proceedings and the mediation, and developing procedural legislation on the suspension and interruption of the appeal and limitation periods.

As for awareness (consciousness) – the development of mediation is possible only if public authorities, courts, lawyers, and state-owned companies and all the actors involved have quality information on mediation. The fact is that public administration is still not quite ready for a dialogue with citizens; lawyers still do not sufficiently understand the essence of the mediation process and show a certain reluctance and distrust towards it, 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.

#### **4. Administrative and Court-Administrative Mediation in Poland and Ukraine – Comparative Conclusions**

There is no doubt that mediation is more in line with the nature of private law, where what matters is the autonomy of the will, the individual interests of the parties to the dispute, and the balance between them, as well as the adversariality or the principle of *volenti non fit iniuria*, derived from Roman times. However, it is an institution which combines the resolution of various types of disputes and therefore works “across” the boundaries between different branches of law and irrespective of the differences between them, but which at the same time emphasizes private elements in certain legal disputes. 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 the democratization and the “flattening” of relations in contemporary society. This is why administrative and court-administrative mediation is recommended by the CoE (and the EU). Polish and Ukrainian legal systems are both supported by international and European regulations within this area.

However, it should be noted that there is still much to be done – both in the case of Poland and Ukraine. In spite of the promotion efforts, mediation, particularly administrative and court-administrative mediation, is not sufficiently used either by citizens, public authorities or judges. Such lack of popularity is also coupled with the lack of legislative regulations facilitating, in particular, the referral of parties to mediation, as well as the lack of an information policy. All the factors create a rather unfavorable climate for spreading the culture of a civilized, amicable way of resolving administrative disputes.



The development of mediation in general and (court-)administrative mediation in particular in Poland and in Ukraine to some extent shows similarities and correlations in successes and challenges. We share the experience of being initially sponsored by Western donors (first the US then the EU) and then having grassroots evolution of mediation emerging from a growing civic society. In both countries, current legislation is favorable to the possibility of settling disputes at any stage of the judicial process, including enforcement proceedings, but mediation practice shows a certain reluctance. In Poland, however, the legislator followed social innovations up to the point when mediation is overregulated in some branches, while in Ukraine mediation was underregulated for a long time; proper regulation was delayed until a year before the war, which is naturally a suppressing factor in many areas of civic life.

In both legal systems, mediation covers a wide range of cases: disputes arising from criminal acts, disputes concerning civil and family, and – last but not least – disputes between state authorities or authorities and citizens. We also share common social and mental barriers to mediation development (such as: lack of knowledge, awareness and habit; social mentality which is not favorable to amicable dispute resolution and a lack of confidence in ADR institutions; a society-wide lack of trust, including trust in each other and in the potential mediator; the conviction of the litigants that their case will ultimately go to court anyway; lawyers' reluctance towards mediation due to misunderstanding of the nature of mediation or fear of losing financial remuneration; low rates of remuneration for mediators that render it a side occupation rather than a professional career) as well as the need to raise public awareness about mediation. In this sense, part of Polish experience can be useful to Ukraine, but this statement does not apply to the title matter, since Polish (court-)administrative mediation seems to suffer from the same barriers and imperfections in legislation.

Nevertheless, it worth pointing out that both legal systems are quite compatible with the CEPEJ guidelines examined and provide for inter-branch solutions (except for the fact that, as Ukrainian mediation is still not integrated into the judicial system, there is no unified register of mediators), even though Ukraine is mentioned in its provisions once and Poland – not at all. There is a legal notion and regulations for “administrative mediation” (although there is a lack of definition, which seems to be

preferably given at European level, just as in the case of commercial mediation) and there is, unquestionably, a wide range of mediation in administrative disputes that are of negotiable nature (but also – as mentioned in Guidelines – concerning the issue of legality). As for the three “A-aspects” – availability, accessibility and awareness, they make it possible to meet requirements such as: the coexistence of different forms of processes (mediation, conciliation, procedure of dispute resolution with the participation of a judge); the possibility of mediation at the earliest possible stage from the pre-trial (pre-litigation) phase; as well as training for mediation actors: judges, administrations, and lawyers. However, it is worth repeating that the public administration in both Poland and Ukraine is still not quite ready for a dialogue with citizens; lawyers still do not sufficiently understand the essence of the mediation process and show a certain reluctance towards it; additionally, there is a certain level of distrust, which, of course, hinders the development of (court-)administrative mediation.

The “law in books” in Poland and in Ukraine provides sufficient potential for administrative and court-administrative mediation, but, nonetheless, “law in action” presents difficulties and obstacles. The research of figures and numbers emerging from the statistics, which give an idea of the practice of administrative mediation and the difficulties encountered in its implementation, does not paint a very optimistic picture. In all probability, the requirement to “develop a legal framework that clearly defines the rules and scope of mediation in administrative matters” shall be implemented more fully.

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