



Legal Status and Acquisition of Mediator Qualifications. A Legal Comparative Analysis of Regulations in Spain and Poland


Włodzimierz Broński

Dr. habil., Associate Professor, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, correspondence address: Al. Raclawickie 14, 20-950 Lublin, Poland, e-mail: wlodzimierz.bronski@kul.pl
 <https://orcid.org/0000-0002-1303-6737>

María Concepción Rayón Ballesteros

Dr., Assistant Professor, Faculty of Law, The Complutense University of Madrid, correspondence address: Av. Séneca, 2, 28040 Madrid, Spain, e-mail: mcrayon@ucm.es
 <https://orcid.org/0000-0002-7362-2885>

Marek Dąbrowski

Dr., Assistant Professor, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, correspondence address: Al. Raclawickie 14, 20-950 Lublin, Poland, e-mail: marek.dabrowski@kul.pl
 <https://orcid.org/0000-0002-7907-0989>

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Abstract: The article aims to analyze the legal status and modes of acquiring qualifications by mediators in Poland and Spain. The study uses the legal dogmatic and the legal comparative methods. The research problem lies in the applicable solutions in Polish and Spanish legislation implementing the objective set out by the content of Article 4 of Directive 2008/52/EC, which obliges EU Member States to ensure adequate quality of mediation and enhance the professional status of the mediator. An analysis of the legislation, judicature, and the literature on the subject has shown that the normative regulations which are in force in Spain and Poland are convergent in terms of the objectives set out in Article 4 of Directive 2008/52/EC since they oblige mediators to be adequately qualified to conduct mediation. Notwithstanding the above, significant differences in the legal systems under analysis becomes apparent as concerns an array of legal instruments they apply to implement the Directive. The Polish and the Spanish methodologies display

disparate procedures for regulating the acquisition of qualifications by mediators. They suffer from a number of shortcomings, resulting from an insufficient level of standardization, including the *intra legem* gaps in the normative regulations in Poland. The outcomes of the analysis enable the conclusion that the regulations concerning the legal status and qualifications of mediators that are in force in Poland and Spain can complement one another while preserving and respecting the distinctiveness of both legal systems. This complementarity can facilitate the development of an adequate model to enhance the professional status of mediators and improve the regulations so as to achieve the objective set in Article 4 of Directive 2008/52/EC.

1. Introduction

One of the basic functions of the rule of law is to guarantee the judicial protection of citizens' rights, which raises the challenge of implementing a high-quality justice system capable of resolving the various conflicts that arise in modern society. This is why in the 1970s, amicable methods of dispute resolution entered the systems of justice, gaining recognition and importance over time as an instrument complementary and supportive to the core system of justice.

The quality and effectiveness of mediation proceedings to a large extent depend on the “quality” of the mediator, including their professionalism. Therefore, pursuant to Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters,¹ “Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties” (Article 4(2)). Equally vital for member states is to secure “effective quality control mechanisms concerning the provision of mediation services” (Article 4(1)).² With this in mind, Spanish Law 5/2012 of July 6, 2012, on

¹ Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008, on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, pp. 3–8 – hereinafter: Directive 2008/52/EC.

² See: Marek Dąbrowski, “Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of May 21, 2008, on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System,” *Krytyka Prawa* 14, no. 3 (2022): 6–19.

mediation in civil and commercial matters, establishes the unitary and operative legislation on mediation that is applicable throughout the national territory, although the great majority of the autonomous communities also have their respective regulations.³ This aforementioned law stipulates that mediation is an intervention of a neutral professional who facilitates dispute resolution by the parties themselves in a fair manner, allowing the parties to protect their relationship and retain control over how the conflict ends (Preamble, I).⁴ The regulations governing the requirements for mediators are expressly contemplated in the aforementioned Law on Mediation in Civil and Commercial Matters and the Regulations for the development of the Mediation Law Royal Decree 980/2013, of December 13, developing further certain aspects of Law 5/2012.

In the Polish context, acts that are particularly important for defining the legal status of the mediator and the professionalization of mediation activities and procedures are the amended Code of Civil Procedure⁵ and Law on the Common Court System.⁶ The amended Code of Civil Procedure was introduced by the Act of September 10, 2015, amending certain acts relating to the promotion of methods of amicable dispute resolution.⁷ The Polish regulations define qualification requirements for mediators only in general terms, and the procedural regulations or mediation standards adopted by mediation centers, along with codes of good mediation practice do not fill this regulatory gap.

The subject matter of this article is issues concerning the status of a mediator in Spain and Poland, and the modes of qualification acquisition by mediators. The article concludes with the presentation of the outcomes of the legal comparative analysis of Polish and Spanish regulatory solutions.

³ Law 5/2012, of July 6, 2012, on mediation in civil and commercial matters, Journal of Laws of 2012, No. 162, as amended – hereinafter: Law 5/2012.

⁴ Law 5/12, Preamble I.

⁵ Polish Code of Civil Procedure of November 17, 1964, consolidated text: Journal of Laws of 2021 item 1805 – hereinafter: kpc.

⁶ Act on Law on the system of common courts of July 27, 2001, consolidated text: Journal of Laws of 2023 item 217 – hereinafter: pusp.

⁷ Journal of Laws of 2015 item 1595.

2. The Legal Status of the Mediator in Spain

The mediator is the pivotal figure in mediation regulations, hence they require training and skills that are legally established, and they assume the corresponding responsibilities as a third party that brings the positions of the conflicted parties closer.⁸

The first requirement referred to Article 11 refers to the need for mediators to “be natural persons,” it expressly denies the possibility of legal persons being able to carry out mediation directly. Legal persons that intend to engage in mediation, whether they are professional companies or any other legal entities provided for by the legal system, must appoint a natural person who meets the requirements set out in the Law, but they cannot provide the service directly. The second requirement to act as a mediator is to be in “full exercise of one’s civil rights,” for which reason it is necessary to mention the specific rules referred to in this respect in the Civil Code, excluding both minors, even if they are emancipated, and those incapacitated by judicial decision, regardless of the degree of incapacity declared. The third condition refers to the non-existence or concurrence of an impediment due to the “legislation to which they may be subject in the exercise of their profession.”⁹ The training requirements for mediators are a university degree and one hundred hours of theoretical and practical training, which will be referred to below.¹⁰

In Spain, there is currently only one category of mediators who can voluntarily register in the Registry of Mediators of the Ministry of Justice. Title III of Law 5/2012 refers to this issue under the heading “Statute of the mediator.”

The mediator’s function is to arrive at a solution to the conflict between the parties by adapting to the specific situation of each case in a short period

⁸ See: María Concepción Rayón Ballesteros, *Out-of-court dispute resolution: the answer for the post-covid-19 era* (Madrid: Dyckinson, 2021), 121.

⁹ See: Carretero Morales, “El estatuto del mediador civil y mercantil,” *Revista de mediación* 7, no. 1 (2014): 15.

¹⁰ See: Navas Paús, “La formación del mediador,” in *Mediación: experiencias desde España y alrededor del mundo*, ed. Kevin J. Brown and María Concepción Rayón Ballesteros (Madrid: Universidad Complutense de Madrid, Facultad de Derecho. Servicio de Publicaciones, 2016), 201–208.

of time.¹¹ The mediator's responsibility is to assist the parties through dialogue in finding a solution to the differences that divide them; a solution that is voluntarily desired by the parties. The mediator must maintain a balanced position, respecting the divergent points of view of the parties, and suppressing any measures that could be detrimental to either of them. The mediator must facilitate communication and rapprochement between the parties. The mediator can change the direction of the discourse by reformulating their approach to the problem. The mediator does not act alone in deciding the conflict but leads the parties toward a resolution that is worked out by the parties. The mediator must remain in a neutral position and is therefore obliged to inform the parties of any circumstances that may affect this neutrality. Lack of neutrality can generate a conflict of interest, such as having family, contractual, or business relationships with either or both parties or intervening directly or indirectly in the negotiations on behalf of either party. The mediator must maintain an active position oriented to resolving controversies between the parties, making proposals that can be accepted or rejected by them. In addition, the mediator must ensure that the parties receive the same interventions and advice.¹²

The quality of the mediation process and of the mediating institution itself depends on the fact that the mediators who carry it out are qualified to do so, and professionalism is recognized as a fundamental principle in all international instruments relating to this matter.¹³

As a matter of fact, the remuneration of mediators is governed by the law of supply and demand, without administrative regulation,¹⁴ and is publically announced by mediation institutions. This remuneration will be stated in the constitutive act of the mediation process with a separate indi-

¹¹ See: Pérez-Serrabona González, "El estatuto del mediador," in *Tratado de mediación en la resolución de conflictos*, ed. José Luis Monereo Pérez, Rosa M. González de Patto, Antonio M. Lozano Martín (dir.), and Guillermo Orozco Pardo (dir.) (Madrid: Tecnos, 2015), 137–152.

¹² See: Bujosa Vadell, "Estatuto jurídico y capacitación del mediador," in *Los desafíos de la justicia en la era post crisis*, ed. Federico Bueno de Mata, Julio Pérez Gaipo, and Ana Neira Pena (dir.) (Madrid: Atelier, 2016), 351–365.

¹³ See: Carretero Morales, "El estatuto del mediador civil y mercantil," 10–23.

¹⁴ Obviously enough, abusive fees may be denounced, if applicable, in accordance with the ordinary legislation in force.

cation of the fees and potential expenses.¹⁵ Regarding the cost of the mediation, Article 15 of the Mediation Law stipulates that, whether the mediation has been concluded in an agreement or not, the cost shall be divided equally between the parties, unless otherwise agreed.

The liability of mediators in the exercise of their functions is established in Article 14 of the Mediation Law, which states that they shall be liable for any damage caused by them. The injured party shall take direct action against the mediator and, if applicable, the corresponding mediation institution, regardless of the reimbursement measures that the latter may have taken against the mediators.¹⁶ The responsibility of the mediation institution derives from the appointment of the mediator or from the breach of the obligation incumbent upon the mediator.

3. The Legal Status of the Mediator in Poland

Pursuant to Article 3(b) of Directive 2008/52/EC:

‘Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

The success of the mediation process depends to a large extent on the mediator: the mediation is “as good as the mediator is.”¹⁷ This, in turn, entails requirements that mediators must meet such as proper professional training and selection.

While in Spain only one category of mediators is legally defined, under Poland’s current legal system, up to four categories of mediators can be distinguished. First, there are so-called *ad hoc* mediators, who are neither officially listed as permanent mediators, nor do they belong to any mediation center. They can only be selected by the interested parties to conduct the proceedings on an *ad hoc* basis. Second, there are mediators listed in

¹⁵ Art. 19 of Law 5/2012.

¹⁶ The liability of the mediation institution shall be derived from the appointment of the mediator or from the failure to comply with the obligation incumbent upon the mediator.

¹⁷ See: Maciej Bobrowicz, *Mediacje gospodarcze* (Warsaw: C.H. Beck, 2004), 33.

mediation centers who have not applied to the president of a district court to be registered on the list of permanent mediators, or who fail to meet the relevant selection criteria. In the literature, this latter category is referred to as non-fixed (non-permanent) mediators. Third, there are permanent mediators, who are officially listed in the wake of a decision by the president of a district court, and whose legal status is most extensively regulated.¹⁸ The fourth group is family mediators, appointed pursuant to Article 436 par. 4 of the Civil Procedure Code.¹⁹

The minimum criteria relating to all mediator categories distinguished above are regulated in Article 1832 par. 1 of the Civil Procedure Code. The Code provides that the mediator shall be a natural person having full legal capacity and enjoying full public rights.²⁰ The second criterion is that they have full legal capacity. The third requirement is to have full public rights. This latter criterion is fulfilled insofar as the punitive measure provided for in Article 39(1) of the Penal Code in the form of deprivation of public rights has not been imposed on the person concerned.²¹

The requirements *de lege lata* discussed above do not constitute an exhaustive list of criteria to be met by permanent mediators. Article 157 of the Code provides for additional qualification criteria such as knowledge and skills in mediation, a minimum of 26 years of age, proficiency in the Polish language, no criminal record for an intentional offense or an intentional fiscal offense, and a positive decision of the president of a district court concerning registration on the list of permanent mediators.²² In the current absence of comprehensive legal regulation of mediation and mediator

¹⁸ See: Marek Dąbrowski, *Mediacja w świetle przepisów kodeksu postępowania cywilnego* (Lublin: Wydawnictwo KUL, 2019), 103–116.

¹⁹ Dąbrowski, *Mediacja*, 87–88. Some publications distinguish only three categories of mediators in Poland: *ad hoc* mediators, mediators listed at a mediation center and permanent mediators. See: Andrzej Korybski, “Profesjonalizacja czynności mediacyjnych (wybrane zagadnienia w perspektywie polskiego porządku prawnego),” *Annales Universitatis Marie Curie-Skłodowska* 66, no. 1 (2019): 127–128.

²⁰ Active judges cannot become mediators, as provided for in the exemption to in Art. 1832 par. 2 of the Civil Procedure Code.

²¹ Polish Penal Code of June 6, 1997, consolidated text: Journal of Laws of 2022 item 1138.

²² The range of requirements largely mirrors the criteria that apply to criminal mediators. See: Par. 4 of the Regulation by the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases, Journal of Laws of 2015 item 716.

status in Poland, the coverage of the status of permanent mediators in a Statutory Law can provide evidence for the growing awareness of judges and stakeholders of a need for enhanced professionalization and transparency of the norms governing both the list of permanent mediators and their professional functioning.²³ At the same time, it should be noted that registration on the list of permanent mediators is no longer a sole key criterion for differentiation between mediator categories. The condition of having necessary “knowledge and skills” has become equally vital.

When analyzing the requirements imposed by the Code on permanent mediators, it is impossible to conclude that the four distinct categories of mediators involve differences in the level of necessary knowledge and skills.²⁴ Hence, the requirements formulated this way are too general and ambiguous. The legislation does not differentiate between the requirements for permanent mediators and unlisted mediators, and the mere fact of being registered is not a guarantee of more advanced mediator competences. This is all the more so since presidents of district courts – who are the only authority competent for registration on the list of permanent mediators – are required to verify the documents submitted with the enrolment application.²⁵ However, they do not have practical tools to verify the relevant knowledge and skills, especially in the case of prospective permanent mediators.

As in Spain, mediators in Poland, acting on behalf of individuals, companies, social organizations, offices, or courts, receive a fee for mediation. The scope and amount of the fee depends on the subject matter of the mediation proceedings. In out-of-court mediations, the fee will be freely agreed between the parties and the mediator, and will generally be set out in the mediation agreement. If the parties use the services of a mediator belonging to a mediation center, they may be expected to accept a fee

²³ See: Lidia Mazur, “Ustawa o zawodzie mediatora – czy jest potrzebna?” in *Mediacje w prawie*, ed. Janina Czapska and Maksymilian Szeląg-Dylewski (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014), 111–123.

²⁴ See: Katarzyna Antolak Szymanski, “Mediation in Polish labour law: comparing its evolution and development to labour mediation in EU and US law,” *Review of Comparative Law* 34, no. 3 (2018): 34–35, <https://doi.org/10.31743/recl.4510>.

²⁵ See: Art. 157b par. 2 pusp and par. 4 of the Regulation by the Minister of Justice of January 20, 2016, on the list of permanent mediators, Journal of Laws of 2016 item 122.

schedule based on the regulations developed by that particular mediation center.²⁶ There are no overt provisions to regulate mediators' fees or the extent of expenses to be reimbursed in out-of-court mediation. The situation is fairly different when mediation results from a court referral. In such cases, costs of mediation are part of the costs of the court proceedings, and hence, are covered by the State Treasury. Consequently, the amount of mediators' remuneration and mediation-related expenses is provided for in the relevant regulation by the Minister of Justice.²⁷ The mediator's receipt of mediation fees and reimbursement of mediation expenses is qualified by the relevant tax authorities. Polish regulations do not impose a *de lege lata* obligation that mediators conclude a civil liability insurance contract for damage caused by tort, or one resulting from non-performance or improper performance of a professional obligation.²⁸

4. Mode of Qualification for Mediators in Spain

Article 11 of the Law on Mediation in Civil and Commercial Matters establishes the requirements and qualifications necessary to practice as a mediator. To become a mediator, one needs to be a natural person in full exercise of civil rights.²⁹ Legal entities engaged in mediation, whether they are professional companies or any other entities provided for by the legal system, must appoint a natural person who meets the legal requirements.

²⁶ Rafał Morek, *Mediacja i arbitraż (art. 1831–18315, 1154–1217 KPC). Komentarz* (Warsaw: C.H. Beck, 2006), 62.

²⁷ See: Pars. 1–5 of the Regulation by the Minister of Justice of June 20, 2016 on the amount of remuneration and reimbursable expenses of a mediator in civil proceedings, Journal of Laws of 2016 item 921.

²⁸ Marzena Myślińska, "Problematyka odpowiedzialności cywilnej mediatora," in *Arbitraż i mediacja. Aktualne problemy teorii i praktyki funkcjonowania sądów polubownych i ośrodków mediacyjnych. Materiały konferencyjne (Nałęczów Zdrój 8–10.5.2009 r.)*, ed. Jan Olaszewski (Rzeszów: TNOiK, 2009), 288.

²⁹ See: García Villaluenga, "Artículo 11: condiciones para ejercer de mediador," *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012*, ed. Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.) (Madrid: Editorial Reus, 2012), 152.

The mediator must have a university degree or higher professional training.³⁰ The degree does not need to relate to social sciences, yet it constitutes a preferable option. The simple requirement for the mediator to have a university degree has been criticized by the doctrine³¹ as it is not sufficient to qualify a mediator. It is proposed that the degree studies that are required in advance should involve basic mediation training. Therefore, as the Law does not refer to any specific qualification, it is clear that the status of mediator is extended to all those who hold any of the university degrees officially recognized in Spain, provided that they can prove it by the corresponding qualification.

The mediator must complete specific training in mediation, provided by a duly accredited educational entity. The course must have a minimum duration of one hundred hours. It should be noted that it is essential to attend a course offered by a mediation training center accredited by the Ministry of Justice. Therefore, when applying for registration in the National Registry of Mediators, the candidate has to verify the entity – if it is not accredited, it will not appear in the list of training entities. In this sense, Article 4 of Royal Decree 980/2013 of December 13, developing certain aspects of Law 5/2012 of July 6 on mediation in civil and commercial matters stipulates that the specific mediation training shall provide mediators with sufficient knowledge and skills for the professional practice of mediation. As a minimum, the knowledge and skills must concern the precise area of specialization in which they provide their services, the legal framework, psychological aspects, mediation ethics,³² processes and techniques of communication, negotiation, and conflict resolution. The specific mediation training shall be developed at both theoretical and practical levels, with the latter corresponding to at least 35% of the minimum duration

³⁰ In some regional autonomic norms that regulate family mediation, preferences for certain qualifications are established. However, Law 5/2012 does not require any specific qualification.

³¹ See: Rivera Morales, “La formación del mediador,” *Iudicium: Revista de Derecho Procesal de la Asociación Iberoamericana de la Universidad de Salamanca*, no. 1 (2017): 73–102.

³² Ethics in mediation is a very relevant issue which cannot be covered in this short article. For an interesting article that analyzes the training and ethics of the mediator, see: Bolaños Cartujo and José Ignacio, “Formación y ética del mediador,” in *Jornadas Internacionales de Mediación Familiar* (Madrid: Unión de Asociaciones Familiares UNAF, 2000), 189–230.

provided for in the Royal Decree for mediator training. The practical training must include practical classes and simulation of cases and, preferably, assisted participation in real mediations. This training is valid to practice as a mediator in the entire national territory.³³ At least every 5 years, mediators must complete one to several activities as part of continuous training in mediation, of an eminently practical character, with a total duration of at least 20 hours.³⁴

In Spain, there is no official or regulated process of verification of mediator qualifications, nor is there any state examination for mediators. Simply, dedicated courses are taken, and mediators receive their titles.

Mediators can be registered voluntarily in the Registry of Mediators of the Ministry of Justice, for which they must prove that they have an official university degree or higher professional training, that they have specific training to practice mediation, and that they are insured or have an equivalent guarantee covering civil liability arising from their actions in the conflicts in which they intervene.

The Spanish Ministry of Justice verifies the qualifications issued by mediation institutions which must also register and prove that the qualifications they issue comply with the regulations. The Registry of the Ministry of Justice has two sections: one for mediators and the other for mediation institutions. The regulation of the Register of Mediators and Mediation Institutions should be seen as a factor for confidence and legal certainty,

³³ The specific training for mediators, including their continuous training, shall be provided by public or private training centres or entities, legally authorized to carry out such activities or duly authorized by the Public Administration with competence in the matter, as established in Article 7 of the Regulations of the Mediation Law. The centres that provide specific training for the practice of mediation shall have a teaching staff that has the necessary specialisation in this area and meets, at the minimum, the requirements of an official university degree or higher vocational training. Likewise, those who impart the training of practical character shall fulfil the conditions foreseen in this royal decree for the registration in the Mediators and Mediation Institutions Registry. In the case of mediators acting on behalf of a mediation institution, the coverage of the damage and prejudices that could derive from the mediator's performance may be assumed directly by the mediation institution.

³⁴ Article 6 of Law 5/2012 imposes a need for continuous training of mediators so that they must take courses periodically to update their competences. The mediators must carry out one or more continuous training activities in mediation, of an eminently practical nature, at least every five years, which shall have a total duration of at least 20 hours.

insofar as registration facilitates the publicity of the mediator and enables the mediator's status as a mediator.³⁵

The mediator must obtain civil liability insurance or an equivalent guarantee that covers the civil liability in relation to their performance as a mediator. This insurance or guarantee may be contracted individually by the mediator or within a collective policy that includes the coverage of the liability corresponding to mediation activity. The insurance shall cover all damage, other than the expected results of the mediation, caused by their acts or omissions; such as those derived from the infringement of the principles of impartiality and confidentiality,³⁶ professional error, or the loss or misplacement of files and documents of the parties; and the sum insured or guaranteed by the facts generating the mediator's liability, per claim and annuity, shall be proportional to the entirety of the matters in which the mediator intervenes. Before the commencement of the procedure, the mediator shall inform the parties of the coverage of the mediator's civil liability, leaving its record in the initial mediation agreement.

It should be noted that mediation institutions must also have in place insurance or an equivalent guarantee covering the liability applicable to them, in accordance with the Mediation Law.

A fundamental aspect of the role of mediator in a mediation process is to try to bring the parties together in order for them to formulate their own agreements to solve the conflict. That requires some training in psychology, sociology, and human relations. This role of facilitator involves a number of aspects of practice and knowledge, for example,³⁷ empathy, perception of indirect aggressive language, raising the awareness of the parties so that understanding can flourish, managing to minimize psychological harm, and other similar aspects.

³⁵ See: Morales, *La formación del mediador*, 79.

³⁶ See: García Villaluenga, "Artículo 7: igualdad de las partes e imparcialidad de los mediadores," *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012*, ed. Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.) (Madrid: Editorial Reus, 2012), 109–118.

³⁷ See: Morales, *La formación del mediador*, 80.

5. Mode of Qualification for Mediators in Poland

Polish normative acts offer an exceptional scarcity of regulations concerning *ad hoc* mediators, who do not have to display any specific qualifications. At the same time, extensive, yet highly imprecise regulations define formal requirements for prospective permanent mediators.³⁸ It can be argued that this solution is dictated by the desire to raise the professional status of permanent mediators, as indicated by the requirement to have the knowledge and skills necessary to mediate successfully. This requirement is intended to be a guarantee of the proper performance of the mediator's duties, contributing to increased public confidence in mediators and the mediation process.³⁹ Nonetheless, the experiences of stakeholders and their practical assessment of the current normative regulations unveil the gross ineffectiveness of the regulation in force. The root of the problem is that the criterion for candidates for permanent mediators – to be qualified in terms of knowledge and skills in mediation – is formulated in too general terms,⁴⁰ and additionally complicated by unlimited and undefined trajectories toward the acquisition and documentation of such qualifications.⁴¹ The ineffectiveness of the regulations also manifests itself through the undefined level of qualifications required of a permanent mediator. The provisions constructed in this way pose difficulties for presidents of district courts as the authorities that verify the formal requirements for candidates applying for the status of permanent mediator. In practice, this leads to discrepancies in the level of professional training among permanent mediators, contributing to the negative phenomenon of the uncertainty of the law.⁴² The lack of provisions setting out minimum competence levels for candidates – like the ones that are in force in Spain – allows for subjective assessment by presidents of district courts, leading to disparities between judicial districts. To

³⁸ See: Dąbrowski, *Mediacja*, 87–108.

³⁹ See: Włodzimierz Broński and Marek Dąbrowski, "Status prawny mediatora w sprawach cywilnych stan obecny i propozycje zmian," *Roczniki Nauk Prawnych* 24, no. 4 (2014): 19.

⁴⁰ See: Article 158a(2) *pusp* and par. 4(6) of the Regulation by the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases, *Journal of Laws of 2015 item 716*.

⁴¹ See: Par. 5(1) of the Regulation by the Minister of Justice of January 20, 2016, on the keeping of a register of permanent mediators, *Journal of Laws 2016 item 122*.

⁴² See: Dagmara Kornobis-Romanowska, *Pewność prawa w Unii Europejskiej. Pomiędzy autonomią jednostki a skutecznością prawa UE* (Warsaw: C.H. Beck, 2018), 1–7.

make matters worse, according to a nationwide study on gaps in mediators' competences, the qualification criteria established for permanent mediators are, according to the respondents, too lax, which consequently negatively affects the quality and level of confidence of potential parties and judges in mediation.⁴³

In the Polish legal system, the objective of acquiring knowledge and skills to become a permanent mediator can be pursued along three pathways, each of which is optional and independent of each other. First, the qualifications can be acquired at a mediation training course. Second, candidates can document their qualifications that result from their professional experience. This can mean presenting a certificate of completion of mediation training. The third way is to take a validation examination, whose positive result is interpreted as confirmation that the candidate has the knowledge and skills required of a permanent mediator.

In relation to the first pathway, it should be noted that, unlike the current regulations in Spain, training for candidates for permanent mediators in Poland is only an option. What is more, such training courses can be provided in an entirely unregulated manner by organizations that do not have to meet any requirements or obtain accreditation safeguarding their ability to provide quality training. In contrast to the Spanish regulations, in Poland there are no binding laws specifying the requirements for training organizations, the qualifications of trainers, guidelines for the training curricula and programs, or the mandatory number of learning hours. Hence, there is no uniform minimal standard of certification or a certificate confirming the qualifications of candidates for permanent mediators. The lack of quality standards and training guidelines provokes a tendency to acquire qualifications in the least demanding, and often the cheapest and simplest possible ways. This can be less about qualifications, and more about obtaining a certificate confirming the acquisition of knowledge and skills, which makes it possible to successfully apply for registration on the list of

⁴³ See: John Paul II Catholic University of Lublin, "Raport z badań w zakresie potrzeb i oczekiwań społecznych dotyczących Krajowego Rejestru Mediatorów oraz luk kompetencyjnych w zakresie szkoleń mediatorów," accessed January 20, 2023, https://krm.gov.pl/files/page_files/113/raport-z-badan-w-zakresie-potrzeb-i-oczekiwan-spoecznych-dotyczacych-krm-oraz-luk-kompetencyjnych.pdf.

permanent mediators. In contrast to the equivalent regulations applicable in Spain, the Polish legal system suffers from an *intra-legem* loophole as regards qualification acquisition and training. The gap is caused by regulatory imprecision because, while allowing for the training, the system fails to care for the adequate regulation of such training. This renders the current regulations in Poland ineffective in terms of the desired objective of ensuring a high level of mediators' qualifications and a guarantee of their due performance.

The second pathway for obtaining, or rather documenting, the qualifications by candidates for permanent mediators in Poland – and not standardized under Spanish law – involves the candidate's submission of documents confirming the qualifications. In the application for registration on the list of permanent mediators, candidates are required to provide information about documents confirming knowledge and skills in mediation, including information on the number of mediations carried out, a list of authored publications on mediation, opinions of mediation centers or individuals on the candidates' knowledge and skills in mediation, documents proving the details of their education. However, candidates can also limit themselves to the presentation of a certificate of completion of a mediation training course – as part of the first trajectory – in order to prove the qualifications acquired by the candidate for a permanent mediator.⁴⁴ In contrast to Spanish norms, which do not provide for a separate body to verify mediators' qualifications – since they impose an alternative precondition of compulsory training by accredited training organizations – in Poland, presidents of district courts are burdened with the responsibility for verifying candidates for permanent mediators. The assessment is based on the documents mentioned above, whose merit and relevance – especially in the case of the number of mediations carried out, the list of publications, or optionally submitted opinions – is unreliable and even precludes a reliable, substantive verification of a candidate's knowledge and skills.⁴⁵

⁴⁴ Par. 5(1) Regulation by the Minister of Justice of January 20, 2016, on the register of permanent mediators, Journal of Laws of 2016 item 122.

⁴⁵ See: Marek Dąbrowski, "Criterion of knowledge and skills as a requirement for permanent mediators – a gloss to the judgment of the Voivodeship Administrative Court in Poznań of January 25, 2018, III SA /PO 634/17," *Studia Prawnicze KUL* 79, no. 3 (2019): 217–220; Agata Przylepa-Lewak and Marzena Myślińska, "Zasady wpisu na listę stałych mediatorów

The third pathway for fulfilling the requirement of having knowledge and skills to mediate, which again avoids standardization under Spanish law, is an option to take a (theoretical and practical) validation examination to verify the qualifications of a candidate. Upon passing the examination, a candidate receives a ten-year certificate attesting to their knowledge and skills in mediation. The examination can be held in four separate mediation specializations: civil,⁴⁶ commercial,⁴⁷ family,⁴⁸ or criminal specialization.⁴⁹ While a mid-level (high school) education background is sufficient to take an examination for civil mediation, commercial, family, and criminal mediation specializations involve high entry requirements for candidates. In the case of commercial validation, the requirements are a prior qualification (specialization) in civil mediation, the requirement to have a university degree, and a working experience of at least 5 civil mediations conducted in the past five years before the commercial validation procedure.⁵⁰ In family cases, however, the prerequisite requirement includes a university degree and experience documented by four mediation protocols, as well as four case studies of family mediations conducted, including at least two with a written mediation settlement and at least two with a minimum of three meetings between the parties in family mediations conducted in the past three years before the validation. As an additional condition for

w Polsce – w kontekście dyskusji nad profesjonalizacją zawodu mediatora,” *Krytyka Prawa* 14, no. 1 (2022): 77–80.

⁴⁶ Announcement of the Minister of Justice of December 4, 2018, on including the commercial qualification “Conducting Judicial and Non-judicial Mediations” in the Integrated System of Qualifications, Official Journal of the Republic of Poland “Monitor Polski” 2018, item 1198.

⁴⁷ Announcement of the Minister of Justice of December 3, 2018, on inclusion of the commercial qualification “Conducting court and out-of-court mediation in commercial cases” into the Integrated Qualification System, Official Journal of the Republic of Poland “Monitor Polski” 2018, item 1201.

⁴⁸ Announcement of the Minister of Justice of June 9, 2020, on inclusion of the market qualification “Conducting court and out-of-court mediation in family cases” into the Integrated Qualification System, Official Journal of the Republic of Poland “Monitor Polski” 2020, item 556.

⁴⁹ Announcement of the Minister of Justice of August 19, 2022, on inclusion of the market qualification “Conducting mediation in criminal and delinquency cases” to the Integrated Qualification System, Official Journal of the Republic of Poland “Monitor Polski” 2022, item 851.

⁵⁰ Annex to the Announcement of the Minister of Justice of December 3, 2018. Official Journal of the Republic of Poland “Monitor Polski” 2018, item 1201.

taking a validation examination, a self-development report must be submitted in the year preceding the examination application.⁵¹ In contrast, applying for validation in criminal and misdemeanor cases is conditional on the presentation of a certificate confirming participation as an observer, mediator, or co-mediator in a minimum of four mediation meetings. The flaw in the regulations under the third pathway is that the prerequisites they outline do not apply under the first pathway. This is why by completing commercially available training courses, a candidate can obtain their full qualification certificate without any term or validity limit and without the condition of fulfilling the prerequisites of the third pathway. Furthermore, it needs to be emphasized that the prerequisites established for the family, commercial, and criminal specializations can satisfy the requirements indicated under the second pathway, providing a self-contained and sufficient basis for becoming a permanent mediator without having to take a validation examination under the third pathway. This, in turn, renders the qualification acquisition system inefficient and provokes candidates to seek the least demanding and cheapest routes to becoming permanent mediators, ultimately missing the objective of the dedicated regulations, which is to strive for professionalism and high qualifications.

6. Conclusions

Safeguarding the quality of mediation, and ensuring that mediation services are provided to the parties effectively, impartially and competently, undeniably requires the establishment of normative regulations that guarantee an adequate level of mediators' qualifications. This objective, set out in Article 4 of Directive 2008/52/EC, constitutes a minimum obligation binding on all EU Member States. However, the nature of a directive, as a legal instrument requiring implementation, allows EU Member States to freely adapt this legislative solution to their legal system, only binding them to achieve the designated outcome. This, in turn, allows for differences in the way the EU Member States regulate the matter at hand, including the legal status of the mediator and the modes of acquiring qualifications.

⁵¹ Annex to the announcement of the Minister of Justice of June 9, 2020, Official Journal of the Republic of Poland "Monitor Polski" 2020, item 556.

As can be seen from the legal and comparative analysis carried out in this study, the normative regulations in force in Spain and Poland are convergent in terms of the objectives set out in the aforementioned Article 4 of Directive 2008/52/EC, establishing equivalent requirements for mediators as far as knowledge and skills for mediation are concerned. Notwithstanding the above, the two legal systems differ in regulating how qualifications are gained, and in the details of mediators' training. In Spain, the regulatory model is based on training provided by entities accredited by the Ministry of Justice, with a norm regulating the training conditions, but without establishing an additional body to verify mediators' qualifications. In Poland, the system is based on multiple pathways leading to the acquisition of qualifications by candidates for permanent mediators.

Undoubtedly, the Polish solutions cannot be deemed flawed a priori. They are based on a model that, on the one hand, allows for the absence of any mediation qualifications, while at the same time allowing for an authentic path of personal or professional development, complemented through training. On the other hand, it allows for the inclusion of education, experience, and qualifications acquired over the years, making it possible to document them at the stage of applying for mediator status or to verify them in a validation (examination) for a specific mediation specialization. However, the impact assessment of the current regulations in Poland proves that it is burdened with flaws that render them dysfunctional in relation to the intended and desired results. From a legal comparative perspective, it would be adequate to transpose into the Polish legal system the Spanish regulations defining the minimum standard of training for mediators, with the training curricula, their scope, the number of learning hours, and the requirements for training organizations. This would fill the *intra legem* gap that exists with regard to training, and make the best use of the first pathway in the Polish system since it would guarantee an adequate level of professional preparation for mediators. At the same time, the Spanish regulations could potentially be improved by the second and third pathways for the acquisition of qualifications that are in place in Poland. That would expand the Spanish regulatory network by creating broader opportunities and make the best use of candidates' educational backgrounds and working experience acquired before becoming mediators.

References

- Antolak Szymanski, Katarzyna. “Mediation in Polish labour law: comparing its evolution and development to labour mediation in EU and US law.” *Review of Comparative Law* 34, no. 3 (2018): 21–40. <https://doi.org/10.31743/recl.4510>.
- Bobrowicz, Maciej. *Mediacje gospodarcze*. Warszawa: C.H. Beck, 2004.
- Broński, Włodzimierz and Marek Dąbrowski. “Status prawny mediatora w sprawach cywilnych stan obecny i propozycje zmian.” *Roczniki Nauk Prawnych* 24, no. 4 (2014): 7–20.
- Cartujo, Bolaños, and José Ignacio. “Formación y ética del mediador.” In *Jornadas Internacionales de Mediación Familiar*, 189–230. Madrid: Unión de Asociaciones Familiares UNAF, 2000.
- Dąbrowski, Marek. “Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of May 21, 2008, on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System.” *Krytyka Prawa* 14, no. 3 (2022): 5–19.
- Dąbrowski, Marek. “Criterion of knowledge and skills as a requirement for permanent mediators – a gloss to the judgment of the Voivodeship Administrative Court in Poznań of January 25, 2018, III SA /PO 634/17.” *Studia Prawnicze KUL* 79, no. 3 (2019): 211–231.
- Dąbrowski, Marek. *Mediacja w świetle przepisów kodeksu postępowania cywilnego*. Lublin: Wydawnictwo KUL, 2019.
- González, Pérez-Serrabona. “El estatuto del mediador.” In *Tratado de mediación en la resolución de conflictos*, edited by José Luis Monereo Pérez, Rosa M. González de Patto, Antonio M. Lozano Martín (dir.), and Guillermo Orozco Pardo (dir.), 137–152. Madrid: Tecnos, 2015.
- John Paul II Catholic University of Lublin. “Raport z badań w zakresie potrzeb i oczekiwań społecznych dotyczących Krajowego Rejestru Mediatorów oraz luk kompetencyjnych w zakresie szkoleń mediatorów.” Accessed January 20, 2023. https://krm.gov.pl/files/page_files/113/raport-z-badan-w-zakresie-potrzeb-i-oczekiwan-spoecznych-dotyczacych-krm-oraz-luk-kompetencyjnych.pdf.
- Kornobis-Romanowska, Dagmara. *Pewność prawa w Unii Europejskiej. Pomiedzy autonomią jednostki a skutecznością prawa UE*. Warszawa: C.H. Beck, 2018.
- Korybski, Andrzej. “Profesjonalizacja czynności mediacyjnych (wybrane zagadnienia w perspektywie polskiego porządku prawnego).” *Annales Universitatis Marie Curie-Skłodowska* 66, no. 1 (2019): 125–139.

- Mazur, Lidia. “Ustawa o zawodzie mediatora – czy jest potrzebna?” In *Mediacje w prawie*, edited by Janina Czapska and Maksymilian Szelaǳ-Dylewski, 111–124. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014.
- Morales, Carretero. “El estatuto del mediador civil y mercantil.” *Revista de mediación* 7, no. 1 (2014): 10–23.
- Morales, Rivera. “La formación del mediador.” *Iudicium: Revista de Derecho Procesal de la Asociación Iberoamericana de la Universidad de Salamanca*, no. 1 (2017): 73–102.
- Morek, Rafał. *Mediacja i arbitraż (art. 1831–18315, 1154–1217 KPC)*. Komentarz. Warszawa: C.H. Beck, 2006.
- Myślińska, Marzena. “Problematyka odpowiedzialności cywilnej mediatora.” In *Arbitraż i mediacja. Aktualne problemy teorii i praktyki funkcjonowania sądów polubownych i ośrodków mediacyjnych. Materiały konferencyjne (Nałęczów Zdrój 8–10.5.2009 r.)*, edited by Jan Olszewski, 277–288. Rzeszów: TNOiK, 2009.
- Paús, Navas. “La formación del mediador.” In *Mediación: experiencias desde España y alrededor del mundo*, edited by Kevin J. Brown, and María Concepción Rayón Ballesteros, 201–208. Madrid: Universidad Complutense de Madrid, Facultad de Derecho. Servicio de Publicaciones, 2016.
- Przyłępa-Lewak Agata, and Marzena Myślińska. “Zasady wpisu na listę stałych mediatorów w Polsce – w kontekście dyskusji nad profesjonalizacją zawodu mediatora.” *Krytyka Prawa* 14, no. 1 (2022): 74–91.
- Rayón Ballesteros, María Concepción. *Out-of-court dispute resolution: the answer for the post-covid-19 era*. Madrid: Dyckinson, 2021.
- Vadell, Bujosa. “Estatuto jurídico y capacitación del mediador.” In *Los desafíos de la justicia en la era post crisis*, edited by Federico Bueno de Mata, Julio Pérez Gaipo, and Ana Neira Pena (dir.), 351–365. Madrid: Atelier, 2016.
- Villaluenga, García. “Artículo 11: condiciones para ejercer de mediador.” *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012*, edited by Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.), 149–162. Madrid: Editorial Reus, 2012.
- Villaluenga, García. “Artículo 7: igualdad de las partes e imparcialidad de los mediadores.” *Mediación en asuntos civiles y mercantiles: comentarios a la Ley 5/2012*, edited by Carmen Fernández Canales, Leticia García Villaluenga (dir.), and Carlos Rogel Vide (dir.), 109–118. Madrid: Editorial Reus, 2012.