

ALTERNATIVE MEANS FOR RESOLVING ADMINISTRATIVE DISPUTES IN UKRAINE IN THE LIGHT OF EUROPEAN INTEGRATION / Yuliia Vashchenko

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Abstract: *This paper aims at the exploring the issues of the legal regulation of alternative means for administrative disputes resolution in Ukraine in frames of European integration. The importance of alternative dispute resolution in the field of administrative legal relations has been emphasised by the Committee of Ministers of the Council of Europe in a number of its recommendations. Alternative means have been introduced in administrative procedure and administrative justice in some European countries, including Ukraine. However, the ADR mechanisms in administrative legal relations still are not widely used primarily because of the lack of the clear legal regulation. In this paper, the core problems related to the use of alternative means for dispute resolution in administrative procedure and administrative justice have been identified and recommendations on enhancement of legal regulation of certain instruments in Ukraine have been provided based on the European approaches and the best practices of the selected states – members of the Council of Europe.*

Key words: *Administrative Dispute; Administrative Justice; Conciliation of Parties; Mediation; Dispute Settlement with the Participation of the Judge*

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1. INTRODUCTION

The importance of the alternative means for resolution of disputes arising in different spheres of social relations has been widely recognised. More often, the use of alternative dispute resolution (hereinafter – ADR) is considered in relation to civil, criminal and commercial matters. The implementation of progressive European standards in Ukrainian legislation has been emphasised by scholars (e.g., Ladychenko and Golovko, 2017). The use of the ADR mechanisms in the field of administrative legal relations has been recommended by the Committee of Ministers of the Council of Europe. Following these recommendations, some countries – members of the Council of Europe, including Ukraine, introduced such mechanisms in the field of administrative procedure and/or administrative justice. However, they are still not widely used and their legal framework needs to be enhanced.

In the conditions of the full-scale aggression of the Russian Federation in Ukraine some judicial institutions do not work; it influences the terms of the consideration of cases the number of which significantly increased.¹ The use of the ADR in the sphere of administrative relations will contribute in tackling this problem.

The hypothesis of the study is the insufficiency of legal regulation of alternative means for administrative dispute resolution in Ukraine and necessity of its enhancement with consideration of the core principles elaborated by the Committee of Ministers and the best practices of the selected states – members of the Council of Europe.

A wide range of general methods of scientific research has been used for the purpose of this research. In particular, the method of comparative legal analysis made it possible to explore the legal framework for the ADR in the selected states – members of the Council of Europe and to define the best practices. The system-functional method, methods of analysis and synthesis, and the method of theoretical generalisation helped to generalise existing approaches to the ADR mechanisms in the administrative legal relations and elaborate the recommendations regarding their improvement.

The first part of the paper focuses on the theoretical issues of the ADR in the field of administrative procedure and justice, recommendations on the use of the ADR in administrative legal relations formulated by the Committee of Ministers, and the legal framework for the ADR mechanisms in the administrative procedure and justice in the selected states – members of the Council of Europe. The second part of this paper provides the analysis of the legal regulation of the certain alternative means for administrative disputes resolution in Ukraine, identifies their core commonalities and differences, advantages and challenges, and presents the recommendations on the enhancement of the legal framework elaborated with consideration of the European principles and best practices from the selected European states.

2. ADR MECHANISMS IN THE ADMINISTRATIVE PROCEDURE AND ADMINISTRATIVE JUDICIAL PROCEEDINGS: EUROPEAN APPROACHES AND THE EXPERIENCE OF THE SELECTED STATES – MEMBERS OF THE COUNCIL OF EUROPE

In last decades, the issues of alternative dispute resolution in administrative procedure and justice have been discussed by scholars from different countries (e.g., Kavalné and Saudargaitė, 2011; Tsursumia, 2021). Radical changes in social relations led to changes in administrative relations and the role of the public administration as well. Whereas previously the ADR instruments were mostly associated with civil, criminal, and commercial proceedings, currently they have been also introduced in the administrative procedure and administrative judicial proceedings *“depending on the flexibility of the relations in this field and taking into account the impact of administrative traditions”* (Kovač, 2016), in particular, in certain European countries – members of the Council of Europe.

The ADR mechanisms in administrative disputes resolution, similar to the ADR in civil, criminal and commercial disputes resolution, aim at saving the time of the dispute resolution, reducing the court workload, and saving the costs for litigants. Due to the ADR mechanisms, disputes are not only formally and legally, but also *de facto* resolved (Kovač, 2016).

¹ Supreme Court. The state and mediation: the judge of the Supreme Court outlined the perspectives of out-of-court dispute resolution and restorative justice. Available at: <https://supreme.court.gov.ua/supreme/pres-centr/news/1456227/> (accessed on 20.09.2023)

The ADR mechanisms in the administrative procedure and administrative judicial proceedings are characterised by specificities. First, they aim at the resolution of disputes of specific nature – public disputes – the disputes related to public interest (interests). Different types of such administrative disputes can be specified based on the instruments of public administration (e.g., administrative acts, regulatory acts, administrative contracts, plans and factual actions). The ADR mechanisms cannot be used in some types of administrative disputes, e.g., where the dispute raises issues of public concern, such as ecologically sustainable development (Preston, 2011). Secondly, one of the parties to the dispute is always the public administration entity (public authority, local self-government authority, or other public administration entity). These peculiarities can lead to the restrictions, both objective and subjective, for the use of the ADR mechanisms. One of the problems is that public administration entities shall act only in frames of their competence defined by law. If the possibilities of use of ADR mechanisms are not clearly defined by law, it would be problematic (if even possible) to use it by certain public administration entities. The ADR cannot achieve the objectives of the procedure if it does not meet the legally provided objectives of a specific relation, which in case of public law matters implies an *a priori* limited range (Kovač, 2016). Therefore, the adequate legal framework for the ADR in the administrative relations that provides the public administrative entities with necessary discretionary powers is crucial. At the same time, it shall be taken into consideration that such discretionary powers cannot be unlimited; possible options always should be defined by the respective legal norm (Vrabko et al., 2018).

The next problem is the readiness of the public administration entities – parties to a dispute – to recognise their mistakes (if any) and for the amicable procedures with private persons. In this case, it is worth to mention the position of the European Commission for Democracy Through Law (Venice Commission): governments and parliaments must accept criticism in a transparent system accountable to the people (Venice Commission, 2019).

The ADR mechanisms in the administrative disputes (i.e., disputes between the public administration entities and the private persons), where the public administration entity is a party to a dispute, shall be distinguished from the ADR mechanisms that are functions of the public administration entities, where the public administration entities help private persons – parties to a dispute – to resolve their disputes within out-of-court procedure. In particular, the national energy regulatory authorities can be empowered with the function to use the ADR in order to resolve disputes between the electricity and gas economic entities and their consumers in accordance with the Electricity² and Gas³ Directives. E.g., the Regulatory Office for Network Industries (URSO) – the energy regulator of the Slovak Republic – performs the ADR function according to Section 3(2)(a) of Act No. 391/2015 Coll. on alternative dispute resolution, as amended. The ADR aims at amicable settling a dispute between the parties to the dispute, which are the seller (e.g., electricity/gas/water/heat supplier) and the consumer (e.g., household consumer). The energy regulator in such procedure acts independently, impartially, and with due diligence, taking into consideration the protection of the rights and legitimate interests of both the

² Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast). OJ L158, 14.06.2019, pp. 125-199.

³ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. OJ L 211, 14.08.2009, pp. 94-136.

consumer and the seller.⁴ The ADR mechanisms in such categories of disputes are regulated, in particular, by Directive 2013/11/EU of 21 May 2013 on ADR for consumer disputes,⁵ Regulation (EU) 524/2013 on online dispute resolution for consumer disputes.⁶ In recent years, the issues of the implementation of the EU requirements on ADR mechanisms for consumer disputes in the EU Member States attract attention of the academic society (e.g., Vačoková, 2020).

The Committee of Ministers of the Council of Europe emphasises the importance of the alternative means for resolving disputes between administrative authorities and private persons in a number of its recommendations. Such recommendations constitute soft law on alternative means in administrative proceedings.

In Recommendation No R (81) 7⁷ the Committee of Ministers of the Council of Europe points out that the court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights in member states. It is recommended that state parties should take measures to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings.

According to Recommendation No R (86) 12⁸ of the Committee of Ministers of the Council of Europe, the Member States are invited to consider encouraging, where appropriate, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.

In Recommendation Rec (2001) 9⁹ the Committee of Ministers of the Council of Europe emphasises that judicial proceedings, in some cases, may not always be the most appropriate to resolve administrative disputes. Means of alternative dispute resolution can be easier, more flexible, speedier, less expensive; they allow more discretion. It stresses the importance of the regulation of alternative means and defines, among other, that such regulation should aim at provision the necessary information regarding the possible alternative means, encouraging the independence and impartiality of conciliators, mediators and arbitrators, fair proceedings based on the respect of rights of the parties and the principle of equality, transparency in the use of alternative means and a certain level of discretion, the execution of the solutions made via alternative means. The Recommendation defines the alternative means that may be used (or their usage can be

⁴ Alternative dispute resolution (ADR). Available at: <https://www.urso.gov.sk/alternative-dispute-resolution-adr/> (accessed on 20.09.2023).

⁵ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC. OJ L 165/63, 18.06.2013, pp. 63-79.

⁶ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). OJ L 165, 18.06.2013, pp. 1-12.

⁷ Recommendation No R (81) 7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice (adopted by the Committee of Ministers on 14 May 1981 at its 68th Session). Available at: <https://rm.coe.int/168050e7e4> (accessed on 20.09.2023).

⁸ Recommendation No R (86) 12 of the Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804f7b86 (accessed on 20.09.2023).

⁹ Recommendation of the Committee of Ministers of the Council of Europe to Member States on alternatives to litigation between administrative authorities and private parties Rec (2001) 9 adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies. Available at: <https://rm.coe.int/16805e2b59> (accessed on 20.09.2023).

made compulsory) prior to judicial proceedings, such as internal reviews, conciliation, mediation, and the search for a negotiated settlement, and the alternative means that may be used during judicial proceedings, such as conciliation, mediation and negotiated settlement, possibly following a recommendation by the judge. It is stressed in the Recommendation that in all cases, the use of alternative means should "allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration". Such judicial review will depend on the alternative methods used; the use of alternative means should lead to the suspension or interruption of the time-limits for judicial proceedings.

The Recommendation mentioned above defines that the conciliation and mediation can be initiated by the parties, by the judge, or be made compulsory by law. Conciliators and mediators can invite an administrative authority to repeal, withdraw or modify an act on grounds of expediency or legality. It should be noticed that this Recommendation does not provide notions and clear distinction between the conciliation and mediation. As to the negotiated settlement, it is stated that, "unless otherwise provided by law, the administrative authorities shall not use a negotiated settlement to disregard their obligations. In accordance with the law, public officials participating in a procedure aimed at reaching a negotiated settlement shall be provided with sufficient powers to be able to compromise."

In order to help member states to implement the abovementioned Recommendation the European Commission for the Efficiency of Justice (CEPEJ)¹⁰ developed the Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties (2007).¹¹ In these Guidelines, the CEPEJ pays attention to the necessity and problems of use of alternative means for public disputes resolution. Lack of awareness among public administration entities regarding the use of alternative means for public disputes resolution, distrust of courts to the development of non-judicial alternatives to litigation in public administering, lack of professionals that can be mediators or conciliators, and lack of specialised research on the matter are defined between the core problems. It is recommended that the member states approve the regulations regarding the alternative means. As to the use of alternative means in courts, it is stated that the member states shall define when and how to use different types of alternative means in administrative dispute resolution, in particular, internal review, conciliation, mediation, negotiated settlement, and arbitration. The Guidelines emphasise the role of judges in the development of alternatives to litigation between administrative authorities and private persons. As to the concrete powers of judges on this matter, it is recommended that judges should have the power to recommend to the parties to use such alternatives as conciliation, mediation and negotiated settlement, and arrange information sessions. Such alternatives should be available, either by the establishment of court annexed schemes or by directing parties to lists of neutrals. In judicial review, judges must take into account parties' agreement, unless it is against the public interest. For these purposes, the judges shall have a full knowledge and clear understanding regarding the

¹⁰ The European Commission for the Efficiency of Justice (CEPEJ) was established on 18 September 2002 with Resolution Res (2002)12 of the Committee of Ministers of the Council of Europe. The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end. Available at: <https://www.coe.int/en/web/cepej/about-cepej> (accessed on 20.09.2023).

¹¹ European Commission for the Efficiency of Justice (CEPEJ). Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties (7 December 2007). Available at: <https://rm.coe.int/1680747683> (accessed on 20.09.2023).

alternatives, their peculiarities, procedures, and benefits. It is recommended to arrange the information sessions, to establish the training programmes regarding the alternatives. Also, the Guidelines stress the importance to foster institutional and individual links between judges and neutrals, in particular, via joint conferences and seminars.

Based on the following approaches, different alternative means of administrative dispute resolution are used in the administrative proceedings in certain countries – members of the Council of Europe.

In particular, the use of mediation is prescribed by the Code of Administrative Justice in France (Code de justice administrative. Chapitre III: La médiation (Articles L213-1 a L213-14)).¹² Mediation can be initiated by the parties to a dispute or by the judge. Mediation is conducted by the mediator who informs the judge about the results of the mediation – whether the parties came to the agreement or not.

Conciliation procedure is defined by the Code of Administrative Court Procedure of Estonia.¹³ As referred to in para. 137, division 5, if all parties and third parties agree to this, the court may conduct conciliation proceedings in which participants in proceedings, with the assistance of the judge, resolve their dispute by negotiations. In this case, the court will issue a corresponding order by which it also orders a stay of proceedings in the administrative matter until the conclusion of conciliation proceedings. It should be noticed that another court panel is appointed to conduct conciliation proceedings. During the negotiation the court, in particular, explains the procedure and objective of conciliation and the rights of the participants of conciliation proceedings, hears the positions of the participants, ascertains, as specifically possible, the interests of the participants and the possibilities for protecting those interests in relation to the subject matter of the dispute, discusses with the participants of proceedings the possibilities for resolving the dispute by a compromise (para. 138, division 5 of the Code). Conciliation procedure is concluded: by approval of the compromise and termination of proceedings in the administrative matter; by resumption of proceedings in the administrative matter without having reached a compromise, if the corresponding application is made by a participants in proceedings; by resumption of proceedings in the administrative matter without having reached a compromise, in the case that the court does not consider a compromise likely to be reached within reasonable time, or considers conciliation proceedings to be impractical for other reasons. If proceedings are resumed, the initial court panel continues conducting proceedings in the matter. In the case of a resumption of proceedings, a participant in proceedings may not rely on any declaration or admission made by another participant during conciliation proceedings (para. 140, division 5 of the Code). The out-of-court mediation is not regulated by the Code of Administrative Procedure of Estonia. The Conciliation Act of Estonia¹⁴ governs only proceedings in civil matters and does not cover the administrative disputes.

In Latvia, there is the Mediation Law approved on 22 May 2014.¹⁵ Some scholars, in particular, Litvins, G. (2019), considered this Law as an umbrella law for different types of disputes, including administrative ones. However, at the same time, they pay attention

¹² Code de justice administrative. Available at: <https://www.legifrance.gouv.fr/codes/id/LEGISCTA000033424088>

¹³ Code of Administrative Court Procedure of the Republic of Estonia (passed 27.01.2011). Available at: <https://www.riigiteataja.ee/en/eli/512122017007/consolide> (accessed on 20.09.2023).

¹⁴ Conciliation Act (passed on 18.11.2009). Available at: <https://www.riigiteataja.ee/en/eli/530102013028/consolide> (accessed on 20.09.2023)

¹⁵ Mediation Law of the Republic of Latvia of 22 May 2014. Available at: <https://likumi.lv/ta/en/en/id/266615-mediation-law> (accessed on 20.09.2023).

that no special provisions regarding the use of mediation in administrative proceedings are included in this Law or in other acts of legislation. In fact, in the definition of the subject of regulation of the Mediation Law there are no limitations regarding the types of disputes regarding which mediation can be used. However, in the Informative Reference to Directive of the European Union which is part of the Mediation Law it is stated that this Law contains legal norms arising from Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Based on these provisions, one may conclude that this Law aims at the regulation of mediation in civil and commercial matters and does not cover administrative disputes. Thus, special regulation regarding the use of mediation in administrative proceedings is needed. However, the Administrative Procedure Act of the Republic of Latvia¹⁶ (which covers both administrative procedure and administrative judicial proceedings) includes special provisions related to the alternatives, namely settlement (primarily, sections 80-1, 107-1 of the Administrative Procedure Act). As referred to in Section 107-1 of the Administrative Procedure Act if a court (judge) believes that a settlement is possible in a case, the court (judge) may explain the possibilities of entering into a settlement (administrative contract) to participants to the proceedings, and also make recommendations for the conditions of a settlement. The court (judge) may explain possibilities of entering into a settlement both in writing and in court hearing. The court (judge) may convene a court hearing only to discuss this issue.

In Lithuania, out-of-court mediation for administrative disputes is possible, but is used very seldom (Tvaronavičienė, Kaminskienė, Rone, and Uudeküll, 2022). Lithuanian Law on Mediation¹⁷ that came into force on 1 January 2021 covers also administrative disputes.

In Poland, mediation can be used before the start of administrative proceedings according to the Law on Administrative Proceedings before Administrative Courts.¹⁸ It is stated that at the request of the complainant or an authority, lodged before the trial has been designated, mediation proceedings may be carried out in order to clarify and consider the factual and legal circumstances of the case and to determine by the parties the manner of its settlement within the limits of the existing law. Mediation proceedings may be carried out even if the parties have not requested that such proceedings be instituted (Art. 115 of the Act). Mediation proceedings shall be conducted by a mediator appointed by the parties or by the court (if the parties have not reached any agreement regarding the mediator) (Art. 116). On the basis of arrangement made during the mediation proceedings, the administrative authority shall set aside or modify the challenged act or shall make or take other action in accordance with the circumstances of the case within the limits of its own jurisdiction and competence. If the parties have made no arrangement as to the manner of settlement of the case, it shall be subject to a hearing by the court (Art. 117).

In the Slovak Republic, alternative means, including mediation, are not used for administrative dispute resolution. The Law on Mediation and amendments to certain laws of the Slovak Republic approved in 2019¹⁹ covers mediation in disputes arisen in

¹⁶ Administrative Procedure Act of the Republic of Latvia. Available at: <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> (accessed on 20.09.2023).

¹⁷ Law on Mediation of the Republic of Lithuania. Available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> (accessed on 20.09.2023).

¹⁸ The Law on Proceedings before administrative courts of 30th August 2002. (Dziennik Ustaw of 2018, item 1302 – consolidated text).

¹⁹ Zákon č. 420/2004 Z.z. od 25.06.2004 O mediácii a o doplnení niektorých zákonov. Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/420/> (accessed on 20.09.2023).

civil, family, commercial, and labour relations, and does not regulate mediation in administrative disputes. The Law on Administrative Judicial Proceedings of the Slovak Republic²⁰ includes the right of the complainant to withdraw his complaint as a whole or in some part until the court delivers a judgement (para. 63 of the Law), and it can be done in cases when a settlement was achieved between the parties. In this case, the administrative court will terminate the proceedings in this part. However, the first-instance court does not examine the reasons for withdrawal of complaints. The issues of alternative dispute resolution in the field of administrative relations are subject to special research in the Slovak Republic. In particular, Molitoris, P. stresses the advantages of use of alternative means for dispute resolution in the administrative relations and the importance of implementation of the recommendations of the Committee of Ministers of the Council of Europe (Molitoris, 2016a; Molitoris, 2016b). He pays attention that *“means of alternative disputes resolution could represent one of the tools contributing to the speeding up of court proceedings by eliminating the excess of administrative court agenda”* (Molitoris, 2016a). As to the use of alternative means in the administrative procedures, the researcher points out that the Administrative Procedure Act²¹ includes the institution of conciliation (§3(4), §48). However, conciliation can be used in very limited types of administrative procedures, mostly related to neighbour disputes or cases of administrative violations (Molitoris, 2016b, p. 76). This institution cannot be used for the disputes between the participants of the procedure and the administrative authority, because conciliation is a bilateral or multilateral agreement between the participants of the procedure (Vrabko et al., 2019). Molitoris, P. stresses that the notions of conciliation and mediation are not used in the Administrative Judicial Procedure Code of the Slovak Republic. In his opinion, the institution of “complainant’s satisfaction” prescribed in this Code (Art. 101) can be considered as similar to conciliation. However, he emphasises that the administrative authority shall be empowered with the right to change its decision in question for the purposes of use the “complainant’s satisfaction” institution by special competence norm. In frames of current legal regulation, it would be “safer” for the administrative authority to wait for the final judgement (Molitoris, 2016a). The researcher concluded that *“the space which has opened up during the drafting of the new comprehensive administrative courts adjudication codification for a wider utilization of alternatives to litigation has been mostly left unused. This fact, connected with the absence of relevant regulations governing the procedures to be adhered to by administrative bodies in administrative proceedings, can potentially result in the situation when the anticipated effect represented by the speeding up of court proceedings secured, inter alia, by alternative means of disputes settlement is not achieved”* (Molitoris, 2016a).

In Romania, there is no in-court conciliation procedure. The Law on Administrative Disputes does not regulate the arbitration proceeding as alternative means for resolving administrative disputes regarding administrative acts in general. However, the arbitration procedure provided by the Civil Procedure Code is applicable to administrative contracts.²²

Considering mentioned above, in some selected countries (e.g., France, Estonia, Poland, Latvia) certain types of alternative means for dispute resolution are implemented

²⁰ Správny súdny poriadok (z 21. mája 2015). Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/162/> (accessed on 20.09.2023).

²¹ Zákon č. 71/1967 Zb. O správnom konaní (správny poriadok) (1967). Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1967/71/> (accessed on 20.09.2023).

²² Administrative Justice in Europe – Romania Report. Available at: https://www.aca-europe.eu/en/eourtour/i/countries/romania/romania_en.pdf (accessed on 20.09.2023).

in administrative proceedings, whereas in some other countries – no (in particular, Slovakia, Romania).

In the report of the Working Group on Mediation of the European Commission for the Efficiency of Justice “The impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation” (European Commission for the Efficiency of Justice, 2018) it is stated that the abovementioned Administrative Mediation Guidelines and Recommendations had little to no impact in the majority of states. However, they had an impact in Hungary, Montenegro, and Ukraine while adopting the legislation on administrative mediation, whereas in Denmark, Finland, Ireland, Norway, Armenia, and Slovakia the mediation in administrative justice is not used. Experts of the abovementioned Working Group stressed the importance on the enhancement of regulations regarding the use of alternative means in administrative procedure.

3. CONCILIATION OF PARTIES, MEDIATION, AND DISPUTE SETTLEMENT WITH THE PARTICIPATION OF THE JUDGE IN THE ADMINISTRATIVE JUDICIAL PROCEEDINGS IN UKRAINE

3.1 Conciliation of Parties, Mediation and Dispute Settlement with the Participation of the Judge in the Administrative Judicial Proceedings in Ukraine: General Overview

3.1.1 The Conciliation Parties

The institution of conciliation of parties has its roots on the Ukrainian land from the period of Kievan Rus. Scholars pay attention that certain provisions related to this institution can be found, in particular, in such sources as “the Tale of Bygone Years” and “Russkaia Pravda” (Arakelian, 2019).

Currently, legislative provisions regarding alternative means for resolving administrative disputes are included in the following legal acts of Ukraine: Law of Ukraine “On Administrative Procedure”,²³ Law of Ukraine “On Mediation”,²⁴ and the Code on Administrative Judicial Proceedings of Ukraine.²⁵

The Law of Ukraine “On Administrative Procedure” is a framework legal act that establishes the core principles and regulates the stages of the general administrative procedure. The process of development of this Law took approximately 22 years. It was approved on 17th of February 2022 and enters into force on 15th of December 2023. This Law defines the rights of the participants of the administrative complaint proceedings to conciliation (point 10, part 1, Art. 28 of the Law). In order to realise this right all participants shall request (joint request is to be submitted) to provide the time for conciliation (point 5, part 1, Art. 64 of the Law). The subject of administrative complaint consideration (in the majority of cases – an administrative authority of higher level) shall inform the participants of the administrative proceedings about the possibility to resolve the dispute via conciliation in frames defined by law (part 3, Art. 84). It should be stressed

²³ Закон України «Про адміністративну процедуру» від 17.02.2022 №2073-IX. Голос України, 15.06.2022 №123 [Law of Ukraine “On Administrative Procedure” of 17.02.2022 No2073-IX. Golos Ukrainy, 15.06.2022 No123]. Available at: <https://zakon.rada.gov.ua/laws/show/2073-20#Text> (accessed on 20.09.2023).

²⁴ Закон України «Про медіацію» від 16.11.2021 №1875-IX. Відомості Верховної Ради, 2022, №7, ст. 51 [Law of Ukraine “On Mediation” of 16.11.2021 No1875-IX. Vidomosti Verkhovnoji Rady, 2022, No7, Art. 51]. Available at: <https://zakon.rada.gov.ua/laws/show/1875-20#Text> (accessed on 20.09.2023).

²⁵ Кодекс адміністративного судочинства України від 6 липня 2005 №2747-IV. Відомості Верховної Ради України, 2005, №35-36, №37, ст. 446 [Code on Administrative Judicial Proceedings of Ukraine of 6 July 2005 No2747-IV. Vidomosti Verkhovnoji Rady, 2005, No35-36, No37, Art. 446]. Available at: <https://zakon.rada.gov.ua/laws/show/2747-15/ed20170803#Text> (accessed on 20.09.2023).

that the participants of the administrative proceedings have the right to conciliation at any stage of the administrative proceedings. In this case the administrative authority shall issue the decision on termination of such administrative proceedings, if only actions of the participants do not violate the law and do not infringe any right, freedom, or legal interests of other persons (part 3, Art. 65 of the Law). However, it should be emphasised that the conciliation is possible for resolution of disputes between participants of the administrative procedure and the administrative authority is not a participant of the administrative procedure. Therefore, as in the Slovak Republic, conciliation cannot be used for administrative disputes (disputes with the administrative authority). Also, there are no special provisions regarding the use of mediation in this Law.

The Code on Administrative Judicial Proceedings of Ukraine (hereinafter – the Code) specifically defines three possible ways of amicable dispute resolution between public administration entities and private persons: conciliation of parties, dispute settlement with participation of the judge, and mediation.

It should be noted that according to the Code, parties can reach conciliation by themselves, without external help, or via procedures of dispute settlement with participation of the judge, or via mediation.

First of all, the right to conciliation of parties is among the key procedural rights of the parties. It is stipulated that parties can achieve conciliation, in particular, via mediation, at any stage of the judicial process; in this case, the proceedings in the administrative case shall be closed (part 5, Art. 47 of the Code).

It should be emphasised that parties and their representatives shall fairly use their procedural rights; abuse of procedural rights is prohibited. In particular, it is not allowed to approve the conciliation conditions that aim at the violation of rights of third parties (Art. 45 of the Code).

Not all parties to administrative disputes have the right to conciliation of parties. Thus, according to the Code, the Representative of the Verkhovna Rada of Ukraine in Human Rights (Ukrainian Ombudsman), public bodies, self-government bodies, natural persons and legal entities) can bring an action before the court in the interests of other persons. However, such participants don't have the procedural right to conciliation of parties (Art. 54, part 1 of the Code).

During the preliminary case hearing, the court shall identify whether the parties have a will to resolve the dispute via conciliation, via out-of-court settlement through mediation, or to apply to the court regarding the conduct of dispute settlement with the participation of the judge (point 2, part 1, Art. 180 of the Code).

Two articles of the Code are directly devoted to the conciliation procedure – Art. 190-191.

As referred to in Art. 190 of the Code the parties may resolve the dispute, in whole or in part, on the basis of mutual compromise. The conciliation of parties can be devoted only to the rights and duties of the parties. Court shall not accept the refusal of a complainant from the complaint, acceptance of the complaint by the respondent, and shall not recognise the conciliation conditions if these actions contradict to the law or violate rights, freedoms or interests of any person (part 6, Art. 47 of the Code). The parties can reach the conciliation on conditions that exceed the frames of the subject of suit, if such conciliation conditions do not infringe rights or legal interests of third persons. The conciliation conditions cannot contradict to the law or fall outside the competence of the public administration entity. Upon the motion of the parties, the court suspends the proceedings for the time requested by the parties for conciliation. The conciliation conditions the parties to the dispute shall provide in the application on conciliation of the parties. The application can be submitted in the format of a single document signed by

all parties, or in the format of the application on conciliation conditions submitted by on party and the written consent with conciliation conditions submitted by other party. Until the court ruling on conciliation of parties is rendered, the court shall explain to the parties the consequences of such decision, check if the representatives of the parties are not limited in the right to conciliation. The conciliation conditions shall be approved by the court ruling. By this ruling, the case proceedings are terminated. The court shall refuse the approval of the conciliation conditions and continue the case hearings if the conciliation conditions contradict to law or infringe the rights or legal interests of other persons or if they cannot be executed; or one of the parties to conciliation is represented by the legal guardian whose actions violate the interests of the person represented.

As to the impossibility of conciliation of parties to the administrative dispute if it infringes rights or legal interests of third persons, the Supreme Court in its judgement in case No. 640/16646/21 of 12 July 2022²⁶ pays attention that the third person that was not involved in the proceedings can challenge the judgement regarding the approval of conciliation procedure if this judgement directly related to rights or duties of such person (new rights or new duties were imposed, changed or revoked). As an example of the court ruling on the approval of conciliation conditions can be provided the ruling of the Supreme Court in case No. 9901/898/18 of 13 June 2019.²⁷

The requirements on the execution of the conciliation conditions are defined by Art. 191 of the Code. It is stated that the parties shall execute the conciliation conditions. The court ruling on conciliation conditions approval is an enforcement document and can be executed according to the enforcement procedure stipulated by law (Law of Ukraine "On Enforcement Procedure" No. 1404-VIII of 2 June 2016).

As to the court fee in case of conciliation of parties, it shall be equally distributed between the parties of the dispute, unless parties agreed on another distribution (Art. 141 of the Code). If conciliation took place before the merits hearing, the court decides on return of 50% of the paid court fee to the complainant. If the conciliation took place when the case was under consideration by appeal court or cassation court the court decides on return of 50% of the court fee paid upon the submission of the certain appeal or cassation complaints (Art. 142 of the Code).

3.1.2 Dispute Settlement with the Participation of the Judge

Dispute settlement with participation of the judge was introduced in the legislation of Ukraine in 2017, via amendments to procedural codes, including the Code on Administrative Judicial Proceedings of Ukraine. In 2021, the Code on Administrative Judicial Proceedings of Ukraine was amended with the provisions related to mediation due to the adoption of the of Law of Ukraine "On Mediation" of 16 of November 2021 No. 1875-IX.

Dispute settlement with the participation of the judge shall be mutually agreed by the parties before the merits hearing begins. It cannot be conducted in certain categories of cases with the peculiarities of hearings (e.g., cases connected with the elections of the President of Ukraine, upon administrative complaints on elimination of obstacles and prohibition of interventions in realisation of the right to freedom of peaceful assembly),

²⁶ Judgement of the Supreme Court in case No640/16646/21 of 12 July 2022. Available at: <https://reyestr.court.gov.ua/Review/103944034> (accessed on 20.09.2023).

²⁷ Ruling of the Supreme Court in case No9901/898/18 of 13 June 2019. Available at: <https://reyestr.court.gov.ua/Review/103944034> (accessed on 20.09.2023).

as well as in the cases when the third party with independent demands on the subject of an action joins the case (Art. 184 of the Code).

Dispute settlement with the participation of the judge is conducted by the judge (the judge who prepared the case for hearing – in case of collegial hearing). The court issues the court ruling about dispute settlement procedure and decides on the suspension of the proceedings. Thus, the procedure of dispute settlement with the participation of the judge is conducted by the same judge who hears the administrative case (not by the special "court mediation" judge, like in some countries, e.g., in Estonia).

It should be emphasised that dispute settlement with the participation of a judge can be used only once in the case. Thus, if this procedure did not lead to the peace-making results, it cannot be used one more time (Art. 185 of the Code).

The Code regulates the procedure of dispute settlement with the participation of the judge in the format of joint and (or) closed meetings. Parties have the right to participate in such meetings via video conference according to this Code. Joint meetings are conducted with the participation of all parties, their representatives and a judge. Closed meetings are conducted with each party separately upon the initiative of a judge. A judge directs dispute settlement with a participation of a judge for the achievement of the conciliation of parties. A judge can pronounce a break in the proceedings, taking into consideration the merits of the case. At the beginning of the first joint meeting, a judge shall clarify to the parties the goal and the procedure of dispute settlement with the participation of a judge, as well as the rights and duties of the parties.

During the joint meetings, a judge detects the grounds and the subject of the complaint, reasons of objections, explains to the parties the fact in proof according to the category of the case, invites the parties to provide proposals regarding the ways of the peaceful dispute settlement, and makes other actions aimed at the peaceful dispute settlement by parties. A judge can offer the possible way of the peaceful dispute settlement to the parties.

During the closed meetings, the judge has a right to pay attention of the party to the case law in similar cases, to offer to the party and (or) its representative the possible ways of peaceful dispute settlement. However, during dispute settlement procedure the judge does not have the right to provide the parties with the legal advises and recommendations, and to examine the evidences. It should be noticed that abovementioned provisions regarding the role of the judge in a such procedure are not clear. The main question is how to use the professional experience in order to help parties to the dispute to find the most appropriate solution, but without providing any legal advice.

The information received by any of the parties, as well as by a judge during dispute settlement is confidential. During dispute settlement with the participation of a judge the minute is not filled in and the fixation via technical means is not allowed. If necessary, the interpreter is engaged for the participation during the meetings. The interpreter is warned about the confidential character of the information received during dispute settlement with the participation of a judge.

According to the abovementioned Recommendation of the Committee of Ministers of the Council of Europe Rec (2001) 9, the regulation of the alternative means resolution shall promote the conclusion of alternative procedures within a reasonable time by setting time-limits or otherwise. As referred to in Art. 187 of the Code the procedure of dispute settlement with the participation of the judge shall be performed during the reasonable term, that cannot exceed 30 days from the day of issuing the court ruling regarding its performance. The term of dispute settlement with the participation of a judge cannot be prolonged. It should be noticed that this time is not enough for this

procedure and is considered by professionals as one of the core obstacles for the use of this procedure. Thus, the Code provisions regarding the time-limits for the procedure of dispute settlement with the participation of the judge are not in correspondence with the Recommendation Rec (2001) 9 in part of reasonability of time.

Concerning the approach to “reasonability” of term for dispute settlement with the participation of the judge the attention should be paid to the case law of the Supreme Court. In particular, the Supreme Court in its judgement in case No160/12705/19 of 01 February 2022 stresses that “reasonable terms” in administrative justice cover the following aspects: 1) reasonable term – the shortest from possible term for consideration and resolution of administrative case, however it cannot be associated with the fast consideration of the case: the duration of reasonable terms shall be the shortest, but enough for the full investigation by the court and assessment of arguments and evidences provided by the participants; 2) the duration of the “reasonable term” is influenced by different factors, both objective (behaviour of participants, complexity of the case, necessity for submission and assessment of additional evidences, the court’s workload, etc.) and subjective character (the behaviour of the judge and the staff of the court’s apparatus).²⁸

According to Art. 188 of the Code, dispute settlement with the participation of a judge is terminated:

- if the party submits an application regarding the termination of dispute settlement with the participation of a judge;
- if the term of consideration is expired;
- upon the initiative of a judge in case of delaying tactics used by any of parties to the dispute;
- if the parties reached conciliation and submitted to the court the application regarding conciliation or the complainant submitted the application regarding the leaving the claim undecided, or in case of refusal of the complainant from the complaint, or recognition of the complaint by the defendant.

The judge shall issue the ruling regarding the termination of dispute settlement with the participation of the judge. Such ruling is not subject to appeal. At the same stage the judge considers on renovation of the case proceedings.

It should be emphasised one important provision of Article 188 of the Code. In case of termination of dispute settlement with the participation of the judge, in particular, in cases of submission an application regarding the termination of dispute settlement with the participation of a judge or if the term of consideration is expired, the further consideration of the case shall be conducted by another judge (not this one, initially considered the case and conducted dispute settlement with the consideration of the judge). This provision in practice can be used by parties for the unfair (but lawful) tactics of changing the judge. There is one exception from this rule: the same judge will hear the case after unsuccessful dispute settlement procedure with the participation of the judge, if this procedure was initiated by the judge, however, before the end of the term stipulated in the ruling on beginning of the case proceedings the party rejected its conduct (part 4, Art. 37 of the Code).

²⁸Judgement of the Supreme Court in case No. 160/12705/19 of 01 February 2022. Available at: <https://reyestr.court.gov.ua/Review/103027454> (accessed on 20.09.2023).

3.1.3 Conciliation of the Parties to the Administrative Dispute via Mediation

As was mentioned above, the parties to the administrative dispute have the right to conciliation, including by means of mediation, at any stages of administrative judicial proceedings.

The mediation procedure is regulated by the abovementioned Law of Ukraine "On Mediation". Mediation is defined as out-of-court voluntary, confidential, structural procedure, during which parties with help of the mediator (mediators) try to prevent or to settle the conflict (dispute) by means of negotiations.

The Law of Ukraine "On Mediation" is not limited only to civil and commercial disputes, but clearly covers other certain types of disputes, in particular, administrative disputes and cases on administrative violations. Thus, mediation in administrative disputes in frames of administrative procedure shall be conducted according to requirements of this Law.

Participants of mediation are the mediator (mediators), parties of mediation, their representatives, defenders, the translator, the expert, and other persons agreed by the parties of mediation.

The mediator is a specially trained neutral, independent, impartial natural person. The Law of Ukraine "On Mediation" stipulates the requirements to the person that can serve as a mediator. It is stated that the mediator can be a natural person that has completed a basic training for mediators in Ukraine or abroad, has no convictions, and has legal capacity. It should be noticed that the Law does not include any provisions regarding the education requirements for the person of the mediator. However, such requirements can be stipulated by subjects that would use the mediation services, or by the professional associations of the mediators – for those that want to be included in their registers. The requirements are established by the abovementioned Law regarding the professional training for the future mediators.

The Law stipulates that the parties of mediation, as well as the mediator have the right to withdraw from the participation in mediation.

The core rights and obligations of the mediators are defined by the Law. In particular, the mediator has the right to define independently the mediation methodology, to obtain the necessary information regarding the conflict (dispute) from the parties. As to the financial aspects, the mediation services can be free of charge or chargeable (Art. 11 of the Law of Ukraine "On Mediation").

Concerning the obligations of the mediator, in particular, he/she shall: prepare for mediation and conduct it according to the law, mediation rules and the code of professional ethics of the mediator; provide the parties to the dispute/conflict with the code of professional ethics that he/she follows; keep secret information; moderate the mediation procedure (Art. 12 of the Law of Ukraine "On Mediation").

What is important: the mediator shall consult the parties to the conflict/dispute about the mediation procedure and fixation of its results, but cannot provide concrete recommendations/consultations regarding the solution or to issue the concrete decision on the matter of the conflict/dispute (Art. 7). Otherwise, it shall be considered as a violation of the legislative requirements on neutrality of the mediator.

The mediation procedure is completed by:

- conclusion by the parties of the agreement upon the mediation results;
- expiring the term for mediation and/or agreement on mediation;
- withdrawal by at least one party or the mediator (mediators) from the participation in mediation;
- recognition of the party to mediation or the mediator as an incompetent person;

- death of the natural person – a party to mediation or liquidation of the legal entity – a party to mediation;
- in other cases, defined by the mediation agreement and rules on mediation conduct (Art. 17 of the Law on Mediation).

According to the Law on Mediation the agreement upon the results of mediation shall include, in particular, the obligations agreed by the parties, methods and terms for their execution, as well as consequences in case of their non-execution or undue execution (Art. 21 of the Law on Mediation). It is important to point out that the parties to the agreement can go beyond the matter of the conflict/dispute defined in the agreement of mediation conduct, and the subject of claim (in case of mediation in court hearings). Of course, the agreement upon the results of mediation cannot include provisions that infringe the rights or legal interests of other persons, or public interest.

The Code on Administrative Judicial Proceedings of Ukraine includes provisions specifically related to mediation. Thus, the conduct of mediation does not influence the term for bringing an action before the administrative court (part 6, Art. 122 of the Code). It is stated that the court can announce the break in the preliminary hearings if the parties decided to use out-of-court dispute resolution via mediation (part 6, Art. 181 of the Code). The court hearings shall be suspended by the court upon the motion from both parties with the request to provide the time for conciliation via mediation. It should be noticed that the person cannot be the representative of the party if he/she was a mediator during the mediation regarding the dispute connected with the case that is being heard by the court (part 3, Art. 58 of the Code). The mediators cannot be involved as witnesses in administrative judicial proceedings related to the information obtained during out-of-court mediation procedure where they rendered the mediation services (point 2, part 1, Art. 66 of the Code).

3.1.4 Commonalities and Differences between Mediation and Dispute Settlement with the Participation of the Judge

Based on the analysis of the legislative provisions regarding mediation and dispute settlement with the participation of the judge, the following commonalities of these procedures can be defined. Both of them:

- are alternative means for administrative disputes resolution;
- lead to conciliation of parties to the administrative dispute;
- help the parties to find their own solution to dispute resolution;
- require consent of all parties to the administrative dispute;
- require suspension of court hearings;
- help to decrease the court workload.

The core differences between these two procedures are presented in the table below:

Mediation	Dispute settlement with the participation of the judge
Regulated by the Laws of Ukraine "On Mediation", "On Administrative Procedure", and the Code on Administrative Judicial Proceedings of Ukraine.	Regulated by the Code on Administrative Judicial Proceedings of Ukraine.

Conducted by an independent intermediary – mediator chosen by the parties.	Conducted by a legal professional – the judge that conducts case hearings. The judge is defined according to the court procedure and cannot be chosen by the parties.
The mediator can withdraw from the participation in mediation any moment.	The judge cannot withdraw (only within the procedure of judge-rejection/self-rejection in cases and according to the procedure prescribed by the Code).
Can be used in different modes and at different stages of dispute resolution – prior to court hearings, during the court hearings, and even after the court ruling rendered.	Can be used after the bringing an action before the court (after payment of the court fee), but before the start of hearings on the merits (thus, only during the court hearings in the first instance).
The mediator can provide the parties with the consultations and recommendations regarding the procedure of mediation and fixation of its results, however, cannot provide the parties with the consultations and recommendations regarding the decision on the matter of the conflict/dispute or to issue the decision on the matter of the dispute/conflict between the participants of mediation.	During the closed meetings, the judge can direct party's attention to the case law in similar disputes, as well as offer to the party and (or) its representative the possible ways of amicable dispute settlement, however, cannot provide the parties with legal advises and recommendations or assess the evidences in the case.
The term of mediation is not restricted by law.	The term of dispute settlement with the participation of the judge cannot exceed 30 days.
Mediation can be used in all disputes.	Cannot be used in cases with third persons with an independent claim, and in some categories of cases defined by the Code (part 2, Art. 184)
Free of charge or chargeable.	Starts when court fees have been already paid.

Taking into consideration the current legal regulation of mediation and dispute resolution with the participation of the judge, the procedure of mediation looks more attractive (at least to start with) for the parties if they really want to find solutions for amicable dispute resolution. They can turn to the mediation at any stage of administrative complaint procedure, which is free of charge, whereas in order to bring an action before the administrative court the court fee shall be paid. Mediation looks more attractive option also during the court hearings, considering the fact that it can be used at each stage of the court hearings, the term for mediation is not limited by law (however, the parties to the administrative dispute shall keep on mind that the mediation procedure does not influence the limitation period). The mediation is regulated by special Law of Ukraine "On Mediation" and its regulation is clearer for all participants (especially in part of rights and obligations of the intermediary – a mediator) than legal regulation of dispute settlement with the participation of the judge.

3.1.5 Conciliation of Parties in the Administrative Judicial Proceedings: Challenges and Possible Solutions

Despite the existence in Ukraine of special legal regulations for alternative means for administrative dispute resolution, namely, regarding conciliation of parties, dispute settlement with the participation of the judge, and mediation, these procedures are not very popular. Professionals pay attention that there is not enough case law in administrative proceedings regarding the use of the institution of dispute settlement with the participation of the judge (Lazebny, 2021).

First, due to novelty of procedures mentioned above, the lack of experienced neutrals (in case of mediators), the lack of experienced judges (in case of dispute settlement with the participation of the judge) could be mentioned among the reasons.

According to the current legislation, the "mediation" judge (the judge in dispute settlement procedure with the participation of the judge) is the same judge that conducts case hearings. The lack of necessary mediation experience, the uncertainty of regulation of rights of the judge in the proceedings (how to help the parties, but not to provide legal advises and not to examine evidence), limited and very short term for the duration of dispute settlement with the participation of the judge (30 days), the usage of this procedure by parties in order to change the judge (in case of unsuccessfulness of such a procedure in the majority of cases the new judge will continue the case hearings) makes this procedure undesirable for judges. One of the possible solutions would be the introduction of the institution of "conciliation"/ "mediation" judges, as for, example in Estonia, and enhancement the provisions of the Code regarding their powers. In particular, the idea to train special "judges-mediators" was expressed by Smokovych M., the Head of the Cassation Administrative Court as Part of the Supreme Court (The Institution of the Dispute Settlement with the Participation of the Judge Requires Enhancement, 2019). In case of abovementioned changes in the procedure and positive case law, and also taking into consideration the level of people's trust that administrative justice in general enjoys in Ukraine, it could become attractive for private persons.

"In-court mediation" in the form of dispute settlement with the participation of judges is not very popular among private persons – complainants, considering the fact that it starts after they paid court fees, hired representatives, prepared necessary documents; they expect to win, not to reach a compromise (Lazebny, 2021).

Second, and very important reason, is the unreadiness of public administration entities for amicable resolutions of administrative disputes. It should be stressed that the public administration entities in Ukraine are not ready to recognise mistakes. In the majority of cases public administration entities use all stages of administrative proceedings (from local administrative courts to Cassation Administrative Court as part of the Supreme Court). Such position of public administration entities makes the administrative complaint procedure unattractive for private persons. In the majority of cases, the public administration entities of higher level (the subjects of consideration of administrative complaints) support the challenged decisions of public administration entities. On the one hand, public administration entities are bound by the competence stipulated by the Constitution and laws of Ukraine. They can act only on the basis, by means, and for the execution of the Constitution and laws of Ukraine (part 2, Art. 19 of the Constitution of Ukraine).²⁹ But, on the other hand, there is a room for discretionary powers defined by law, and the public administration entities can go to the compromise

²⁹ Конституція України від 28.06.1996 [Constitution of Ukraine of 28.06.1996]. Відомості Верховної Ради України (ВВР), 1996, No30, Art. 141.

in frames of discretionary powers. This institution has been finally regulated by the Law of Ukraine "On Administrative Procedure". As to the discretionary powers of public administration entities, another very important aspect shall be taken into consideration: the public administration entity is bound by its regulations approved on the basis of discretionary powers. In particular, the Supreme Court in its judgement of 28 September 2021 in case No. 640/20081/18 (arising from the action filed by the public joint-stock company "Dniprogas" against the National Energy and Utility Regulatory Commission)³⁰ stresses, based on the case law of the European Court of Human Rights (Case of Rysovsky v. Ukraine (Application no.29979/04) that the public authority shall follow its own procedures; the logic of the decisions of the public authority, as well as the possible consequences of such actions shall be precise and clear, and the person shall not be responsible for the mistakes made by the public authority. Thus, powers of the public administration entities to use ADR mechanisms shall be clearly defined by legislation.

4. CONCLUSION

The Committee of Ministers of the Council of Europe in a number of its recommendations emphasises the importance of alternative means for resolving disputes arisen between administrative authorities and private persons as they can be easier, more flexible, speedier, less expensive and allow more discretion.

The use of alternative methods for administrative disputes resolution is characterised by specificities arisen from the peculiarities of administrative disputes where one of the parties is usually the public administration entity bounded by its competence. These peculiarities may cause difficulties in the implementation of such mechanisms in administrative procedure and administrative justice. The efficiency of alternative means in administrative disputes depends on adequate legal regulation. The possibility to use the alternative means for administrative dispute resolution, the types of alternative mechanism and their clear regulation shall be provided by national legislation.

In the last decades, certain types of alternative means have been introduced in administrative procedure and administrative justice in some European countries – members of the Council of Europe, including Ukraine. Out-of-court mediation and dispute settlement with the participation of the judge are among the most popular means for alternative resolution of administrative disputes. European countries use different approaches to implementation of alternative dispute resolution. In certain selected European countries – members of the Council of Europe (e.g., France, Estonia, Poland, Latvia) some types of alternative means for dispute resolution are implemented in administrative proceedings, whereas in some others – no (in particular, Slovakia, Romania). In some countries, the legal regulation of conciliation procedure cannot provide clear answer whether it is applicable to administrative disputes or not (e.g., Latvia). In Lithuania, out-of-court mediation for administrative disputes is possible, but used very seldom. In the Slovak Republic, it is possible to use conciliation in administrative procedure, however, it is not applicable in disputes with administrative authorities.

The Code on Administrative Judicial Proceedings of Ukraine stipulates that conciliation of parties can be achieved, in particular, via the procedure of dispute settlement with the participation of the judge (introduced in 2017) and the mediation (introduced in 2021). The introduction of these instruments shall be considered as a

³⁰ Judgement of Supreme Court in case 28 September 2021 in case No 640/20081/18. Available at: <https://reyestr.court.gov.ua/Review/99977286> (accessed on 20.09.2023).

positive step on the way of implementation of recommendations of the Committee of Ministers of the Council of Europe. The use of the procedure of dispute settlement with the participation of the judge and mediation would decrease the workload of judges, make the dispute resolution less harmful for parties, less expensive (in some cases), and faster. However, the use of conciliation of parties in the administrative proceedings in Ukraine is not so popular than in civil or economic proceedings. Lack of specification of the procedure of dispute settlement with the participation of the judge, time limits for the procedure (which cannot be considered as reasonable in the meaning of Recommendation Rec (2001) 9 of the Committee of Ministers of the Council of Europe), lack of necessary skills among judges, as well as competence limits of the public administration entities – parties to a dispute can be mentioned among the key reasons. The introduction of the institution of “conciliation”/ “mediation” judges, as for example in Estonia, and enhancement of the provisions of the Code regarding their powers can be considered as a possible solution. Therefore, certain legislative amendments, as well as changes of the public administration entities and judges’ attitude to the instruments of conciliation of parties via special trainings, conferences, workshops, etc. are necessary for the effective implementation of the ADR institution in the field of administrative procedure and administrative justice in Ukraine.

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