Curentul Juridic – Juridical Current

2018, Vol. 72, No. 1, pp. 78-87

MEDIATION AS AN EFFICIENT WAY OF SAVING PUBLIC MONEY

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ABSTRACT: *The prudent use of public money is an imperative for all public authorities as they are responsible for the good management of the funds entrusted by citizens. Public resources must be used wisely not only when public authorities engage in contracts or other financial operations, but also when they are engaged in a dispute.*
Mediation as an alternative dispute resolution method in administrative and fiscal conflicts, is preferable to taking the matters to court. Accepting mediation in conflicts involving rights that parties may dispose of, may be a proof of public authority's lawfulness and could also represent a saving of public money.
Mediation used to prevent or defuse an administrative conflict should be a priority to public authorities. The invitation to mediation is likely to meet the features of preliminary complaint in administrative disputes involving rights that parties may dispose of.
The procedure in cases of administrative and fiscal mediation should be similar with the procedure established for mediation in criminal cases, where the judge may suspend the court procedure for a maximum period of three months, when a contract of mediation is presented.

KEY WORDS: *public interest; mediation; preliminary complaint; administrative and fiscal litigation; public authorities.*
JEL CODE: *K 23*

Administrative law deals with relationships both within the field of public administration activity but also conflictual relations of the administration with those administered, so we may distinguish between relations of active administration and administrative litigation (Lazăr 2016, *Public Finance Law*, p. 107).

In terms of active administration, public authorities must exercise great caution when engaging in contractual relations or other agreements that involve public money. In other words they must proove efficiency when using public funds in achieving public procurement and sector procurement as required by Art. 2 para. (1) of Law no. 98/2016 on public procurement and art. 2 par. (1) of Law no. 99/2016 on sectoral acquisitions. The use of resources in terms of efficiency, economy and effectiveness is one of the purposes of the law of public works and service concession as imposed by Art. 2 para. (1) lit. b) of Law no. 100/2016 on concessions for service concessions.

In order to ensure a prudential use of public money, the Court of Accounts is entitled to control the formation, management and use of the financial resources of the state and of

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the public sector according to Law no. 94/ 1992 concerning the organization and functioning of the Court of Accounts.

Each public authority must identify the services of public interest in its area of competence and, in compliance with the principles of transparency and proportionality, must constantly update the purpose of public services and decide how they are to be exploited: by the administration or by entrusting the service to a public enterprise or to a private or mixed enterprise(Bauby 2007, pp. 68-69).

Regarding the provision of public services through private agents, there are opinions that indicate some malfunctions of these contracts. It has been reported that the use of private funding through the public-private partnership contract in towns and small communities may lead to higher costs compared to services provided by the administration(Stancu-Ţipişcă 2007, p. 124).

Among the objectives of the European Union in the field of public procurement, we may find the insurance of effective and practicable competition in order to provide the best quality in the spending of taxpayers' money and to improve the quality of public services offered. The aim is to achieve free and undistorted competition among enterprises in the field of public procurement (Lazăr 2016, *European Union Competition Law*, p. 130 and *infra*. Note no. 321).

In European institutional practice we may find the principle of proportionality, according to which contracting authorities may not impose excessive conditions in relation to the effective requirements of the contract to be concluded. Moreover, the principle of proportionality is applicable in all areas of Community law as an important criterion for determining the lawfulness of the acts of the contracting authorities and of the Member States(Şerban 2007, p. 92 et seq.).

Public authorities are forbidden to engage in bilateral agreements with non-compliance with legal provisions on the use of public funds. Thus, a public authority can not act against the public interest and implicitly dispel public funds, under the shield of concluding a contract. This was the solution, in a case brought to justice to the former Romanian Supreme Court of Justice, in which a county council decided to conclude an association agreement with a sports club and subsequently, the public authority to participate with a certain amount as contribution to the organization of a sports cultural festival where athletes with outstanding results will be awarded. This decision was brought to administrative court by the prefect, and the Bucharest Court of Appeal, as the first instance, admitted the action. Following the appeal promoted by the county council, the Supreme Court of Justice - the Administrative Litigation Division pronounced the Decision no. 1385 of 5 April 2001. The Supreme Court rejected the appeal as unfounded, deciding that the county public authority acted in its capacity as public authority and in this capacity it decided on a part of its financial resources and did not act in its capacity of the a civil legal person, so that the act through which it has disposed of the money funds is one of authority and not one of administration. Moreover, the financial participation of an authority in a sports festival aiming the awarding of some people can not be considered a work or service of local public interest, so as the collaboration or association of the public authority with another person may have been approved. The supreme court considered irrelevant the subsequent conclusion of the association agreement, in relation to the conditions of legality in which the county cauncil decision was adopted (Mrejeru, Albu, Vlad 2002, p. 93-95*).*

Therefore, when engaging in agreements or collaborations involving public funds, the administration is required to comply with restrictive legal provisions and must prudently use these funds in its capacity of public asset manager. It is the duty of the administration to carefully analyze the risks arising from the involvement of the administration in certain contracts, namely in administrative contracts. The administration's aim is to achieve a balance between the resources used and the result obtained, namely the service provided.

Unlike private-law contracts, certain conditions and special forms are required for concluding administrative contracts relating to public authority capacity, the choice of the contractor by means of a special procedure established for that purpose, and a certain common form established for those contracts (Manda 2008, p. 421).

The conclusion of the administrative contract is possible after obtaining advisory body's approval of the opportunity to involve the public authority in such an agreement (Puie 2009, p. 27) and after a public selection procedure for the candidates. After the completion of the public procedure, the executive body of the administration, be it minister, mayor, county councilor chairman or manager of an institution, will conclude the administrative contract with the candidate who have been nominated as winners of the competitive procedure or with the contractor with whom the contract was negotiated , If the public procedure allows such a negotiation.

The administrative contract, which involves financial participation by the contracting authority, can be concluded only if the administrative body that approved the conclusion of the contract has provided in its budget the necessary sums for that contract. In case the administrative body concludes a contract without having provided for and approved in the budget the necessary amounts for the payment of the contract, that body may be liable both civil, for contractual damages, and criminal, insofar as its action can be qualified as deception.

The principles, rules and responsibilities of engaging in budgetary spending, mentioned by Art. 14 and 22 of Law no. 500 of 11 July 2002 on public finances, as amended and supplemented and by art. 14 and 23 of Law no. 273 of 29 June 2006 on Local Public Finance, as amended and supplemented, are also incumbent on the conclusion of administrative contracts or any other agreemets that involves public money.

The budget balance principle, which is only prescribed by the local budgets, is considered to be the golden principle of budgetary management and involves the full coverage of budget expences from the budget revenues, including the surplus of previous years. Current economic realities, which imply an accelerated increase in public spending, a slowdown in public revenue growth, fluctuations in exchange rates and interest rates, make this principle difficult to achieve, resulting in a budget deficit that can be covered either through state loans, or through the temporary use of available funds in the general treasury account of the state (Lazăr *2*016, *Public Finance Law*, pp. 207-208).

The public procedure preceding the conclusion of the administrative contract is aimed at identifying the private party who will provide the public service (Trăilescu 2002, p. 206). It is not necessary to go through the strict public procedure when the service contract is awarded to a public authority enjoying exclusive or special rights for the provision of public services on the basis of laws or administrative acts of a normative nature, insofar as they are compatible with the provisions of the TFEU, according to Art. 30 of the Law no. 98/2016.

Romanian legislation allows local and county councils to decide on the participation with capital or assets on behalf of and in the interest of the local communities they represent in the establishment, functioning and development of bodies providing public services and public utility of local or county interest, under the law, together with public or private parties, according to Art. 17, Art. 45 par. 2 letter f) and Art. 91 par. 6 letter a) of the Local Public Administration Law no. 215/2001, republished, as amended and supplemented.

Public authorities may participate with funds and capital in the establishment, operation and development of public services makes either by concluding public-private partnership contracts under the Law no. 233/2016, either by concluding joint-venture agreements under the provisions of Art. 1949-1954 of the Civil Code. As regards joint-venture agreements, we consider that the public authority participates in such a contract, on the basis of its status as a private legal person, in order to carry out a commercial operation, the contract being therefore subject to the common law.

However we must also keep in mind that applying a different legal regime to the concession or rental of an asset, as the property is in the public or private domain of the state or territorial administrative unit, violates the constitutional principles guaranteeing judicial control through administrative litigation courts of the public authorities' administrative acts, without distinguishing between administrative acts of a normative nature and those of public or private administration. According to the same author, the provisions of the Law on administrative litigation are infringed, as this law establishes an absolute presumption that the public authorities act in a regime of public power, in the satisfaction of a general interest, when they issue administrative acts of a normative nature or conclude acts of public or private administration (Lazăr 2011, pp. 185-186).

Art. 32 of the Law no. 98/2016, gives the contracting authority the possibility to constitute companies or associations without legal personality under the conditions of Law no. 287/2009 on the Civil Code, republished, as amended an supplemented, and to carry out joint projects.

Commitment of public funds does not occur only as a result of the conclusion of contracts by public authorities. An active administration often generates conflicts due to the divergent interests of the public authorities and the citizens.

In case of conflict with the administration, private persons have two ways of appeal against acts that violate their rights or interests: administrative appeal – addressed to the issuing administrative authority or the one hierarchically superior; and jurisdictional appeal, which is exercised before the court or before an administrative-jurisdictional body(Lazăr 2011, pp. 103-104).

Traditionaly, administative conflicts are solved using the procedure required by the Law no. 554/2004 concerning administrative litigation, amended and supplemented. The procedure for challenging the administrative act is regulated by Art. 7-11 of Law No 554/2004. The injured party in a right or legitimate interest by an administrative act, shall file a preliminary complaint to the headquarters of the authority issuing the contested act or to the one hierarchically superior, within 30 days from the date of receiving the document. If the public authority or institution does not revoke the act, then the injured party addresses the administrative court to amend or to rescind all or part of the administrative act, within six months from the date the response to preliminary complaint has been communicated or from the date of unfounded refusal to settle the application;

from the date of deadline expiration for solving the preliminary complaint or expiration of legal deadline for solving the request; from the legal deadline expiration for settling an application, calculated from the day the administrative act issued in settlement of favorable demand or, where appropriate, preliminary complaint has been communicated; respectively from the date of conclusion of the minutes of completion of the conciliation procedure in administrative contracts.

There is nothing that prevents parties from trying to solve the conflict between them by mediation, in the period of time from the filing of preliminary complaint until the dispute is brought to court, to the extent that conflict is the subject of rights that the parties may dispose of, under the provisions of Art. 2 para. (4) of Law No 192/2006 concerning mediation and the profession of mediator, as amended and supplemented. Mediation may be required both by the injured party and the public authority.

The advantages of mediation in administrative litigation matters are (Lazăr 2011, p. 72):

1. Incidence of availability principle according to which any person engaged in mediation can end the procedure without motivation, which is reflected in the absence of any constraints.

2. Relieving the courts of a significant number of disputes.

3. Without being perceived as a judge, the mediator can find a solution to the conflict that would satisfy both sides, and this would be preferably to the fact of justice, which will make one party be unsatisfied.

Important authors are in favor of admissibility of mediation in administrative disputes procedures, both in the preliminary procedure and in the administrative-jurisdictional procedure, insofar as it involves a civilian component, which covers economic rights that parties may dispose of(Deleanu 2013, pp. 628-630; Lazăr 2011, pp. 70-73; Puie 2015, pp. 761-763). Reference is made to Art. 15 of Law no. 33/1994 concerning expropriation for public utility, which regulates the parties' right to consent in front of the committee constituted to resolve statements of defence, regarding both the way of transfer of ownership and the amount of compensation. Mediation is not admissible in cases involving the analysis of the legality of the administrative act that is a matter of public policy (Deleanu 2006, p. 77; Deleanu 2013, p. 869; Puie 2015, pp. 760-761).

If mediatiation is admissible in the civilian component of an administrative dispute, we think that the special rules established for civil disputes, such as suspension of obsolescence rate or prescription rate, should be applied in mediation proceedings started after triggering legal action, in accordance to Art. 62 para. (2) of Law No 192/2006, as amended and supplemented and Art. 2532 point (7) of Civil Code.

Accepting the invitation to mediation or even initiating a mediation procedure by the public authority in administrative conflicts involving rights that parties may dispose of, could significantly reduce the number of requests in court. In cases regarding the granting of compensation for material damage caused to citizens by an administrative act, mediation is to find the balance between the claims of the private party and the correct value that may and must be paid by the public authority when it's fault is proved or recognized. Solving through mediation of such conflicts, would represent a saving of public money as opposed to a process that often involves high costs with experts or attorneys' fees. Besides significant costs, a lawsuit may take a lot of time for defense preparation, which involves engagement with legal advisers, lawyers and other specialists.

Compensations, as a result of a settlement agreement, are subject to review by the Court of Auditors that must check the whole complexity of the agreement, reporting both to the amount offered as compensation, which must be the actual value of the market, and to the costs that would have been incurred by the public authority in case of losing a lawsuit before court.

The audit of the Romanian Court of Accounts is to be performed in order to accurately verify the economy, efficiency and effectiveness of public funds spending by the public authority, pursuant to Art. 29 paragraph (1) letter e) of the Law no. 94/1992 concerning the activity and structure of the Romanian Court of Accounts, republished in 2014, amended and supplemented.

In accordance with Art. 167 of Law no. 207/2015 regarding the Fiscal Procedure Code, amended and supplemented, payment amounts from the budget are those sums that the state or territorial administrative units must pay to a person, including those resulting from legal contractual relationships if they are established by enforceable titles. To obtain enforceable title character, mediation agreement on the amounts in dispute, may be presented to a notary public for authentication or may be subject to approval of the court in accordance with Art. 59 para. (2) of Law no. 192/2006 concerning mediation and the mediator profession, amended and supplemented.

Initiating and using mediation by public authorities and institutions may be an example for privat persons in their conflicts with others. This way, public authorities would realy encourage and promote mediation as an alternative to judicial system. Public bodies available for negotiation and trying to find a solution from equal points of view, prove to be part of a moderne administration who focuses on the private party's needs and interests. Even though it takes time and involvement of public authority, this kind of procedure may be usefull in preventing future lawsuits. The privat party who managed to settle an agreement with the public authority by mediation, will probably use the same procedure in case of a future conflict and will encourage others to use mediation in their conflicts with public authorities.

This alternative dispute resolution may offer mostly suprising solutions, therefore saving public finance. Using the mediation procedure, the public authority could agree that the sums of money unlawfully paid, could compensate for other duties that belong to the tax-payer or could be given back to the tax-payer by installment(Lazăr 2009, p. 65), not taking in consideration interest.

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, encourages member states to use mediation as an alternative dispute resolution method. In the attempt to promote mediation, before starting a lawsuit in the Romanian courts, in certain matters, the parties were required to provide evidence of participation in a briefing on the advantages of mediation. The obligation of the briefing was declared unconstitutional by the Constitutional Court of Romania by Decision No 266 of 7 May 2014 concerning the exception of unconstitutionality of art. 200 of the Code of Civil Procedure, as well as those of art. 2 paragraph (1) and (1^2) and art. 60 of Law no. 192/2006 concerning mediation and the mediator profession.

The Council of Europe issued „Recommendation (2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties *(Adopted by the Committee of Ministers on 5 September 2001 at the*

762nd meeting of the Ministers' Deputies)". The recommendation deals with alternative means for resolving disputes between administrative authorities and private parties, such as: internal reviews, conciliation, mediation, negotiated settlement and arbitration. Although the recommendation deals with resolving disputes between administrative authorities and private parties, some alternative means may also serve to prevent disputes before they arise; this is particularly the case in respect of conciliation, mediation and negotiated settlement. On one hand, alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, in particular those concerning individual administrative acts, contracts, civil liability, and generally speaking, claims relating to a sum of money and on the other hand, the appropriateness of alternative means will vary according to the dispute in question.The Committee of Ministers also statued that the regulation of alternative means should provide either for their institutionalisation or their use on a case-by-case basis, according to the decision of the parties involved (Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2b59).

Art. III point 2 of the Appendix to Recommendation (2001)9 encourage mediators and conciliators to invite public authorities and institutions to repeal, withdraw or modify an act on grounds of expediency or legality. As long as the invitation to mediation is signed both by the mediator and the injured person and it contains the request for the public authority to modify or cancel the administrative act, it may be considered preliminary complaint, under the condition to be formulated within the deadline of art. 7 of Law no. 554/2004, as amended and supplemented. Deadline set by art. 7 of Law no. 554/2004 is 30 days from the notification of individual administrative act. Deadline in case of administrative contracts is 6 months from the conclusion, modification or denial of the request to amend the contract, breaches of contract, from the date of contractual term expiry or occurrence of any cause that attracts the extinguish of contractual obligations or, where applicable, the date when an interpretable contractual clause is found. If normative administrative documents, preliminary complaint can be lodged at any time. There is however a debate about the 6 months deadline in case of administrative contracts since the New Civil procedure code is in force. There are authors who argue that art. 7 paragraph (6) of Law no. 554/2004 is outdated (Puie 2015, p. 46).

When receiving the invitation, the public authority may accept or refuse the mediation. The refuse may be expressed in writing or it may be tacit, when the invited party does not respond within the established deadline. At the time of receiving the negative response of the public authority or after the expiration of the acceptance term of mediation, the mediator will conclude a minutes that will note that mediation was not accepted.

In accordance to Art. 7 of Law no. 554/2004 concerning administrative litigation, as amended and supplemented, in order to meet the conditions of the preliminary complaint, the mediator should wait a 30 days period of time for the response of the public authority before concluding the minutes showing that public authority expressly refused the invitation or it did not reply in the period in which mediation could have been accepted. So, the 15 days deadline for accepting mediation by the invited party established by art. 43 of Law no. 192/2006 concerning mediation and the profession of mediator, as amended and supplemented, is not compatible with the preliminary complaint conditions imposed by Law no. 554/2004, as amended and supplemented.

In case of tacit or express refusal by the public authority, the term for bringing the administrative action to court by the dissatisfied private party may begin from the time of communication of the minutes concluded by the mediator showing that public authority refused the invitation or did not reply in the period in which mediation could have been accepted, or it may begin at the time of the public authority's refusal or, where appropriate, the first day after the expiry of the term in which mediation could have been accepted by the public authority.

If the invitation to mediation is considered preliminary complaint, then the term for bringing the administrative action to court, should begin at the time of communication of the minutes concluded by the mediator, stating the refusal of the public authority or passage the deadline for acceptance of mediation. This idea is sustained by the fact that a possible response of the public authority is communicated to the mediator and not to the private party directly. In this situation the mediator may influence, willingly or not, the date from which the private party can bring the action to court, because there is not a legal deadline for the mediator to conclude the minutes finding that mediation was not accepted.

In case of acceptance of mediation by public authority, followed by the conclusion of the mediation contract, the parties undertake to endeavor to reach an agreement. If mediation fails then the private party should be free to address to the administrative court within 6 months from the moment of communication of the minutes stating that the procedure of mediation is completed. The term of 6 months is imposed by Art. 11 of Law no. 554/2004 concerning administrative litigation, amended and supplemented. We can observe that the mediator's opportunity to influence the term in which the administrative action may be brought to court, reappears.

One may argue that the mediator is not the representative of a party of the conflict, but is a neutral person, who remains outside the parties' conflict so the invitation to mediation could not meet the conditions of preliminary complaint. If the invitation to mediation in not accepted as meeting the conditions of preliminary complaint, the private person, who is unhappy with the content of the administrative act, shall file the preliminary complaint to the public authority or to the one hierarchical superior(Alexandru, Cărăuşan, Bucur 2005, p. 511; Lazăr 2011, p. 105.), if there is any, within 30 days from the date of issuing the administative act.

In accordance to Art. 2 para. (1) letter j) of Law No 554/2004, as amended and supplemented, the preliminary complaint may be addressed both to the issuing public authority or to the superior hierarchy public authority, if there is any, while the invitation to mediation may be submitted only to the issuing authority. Thus, the mediation agreement can be achieved only between the issuer and recipient of the administrative act. A mediation agreement could be possible of conclusion between the superior hierarchy public authority and the private party only when the subordinate authority has no legal personality and no budget of its own, so the higher authority must assume the agreement.

Higher authority should conduct a control of legality and opportunity when it receives the preliminary complaint. If the complaint is found reasoned, then the consequence is revocation of the administrative act of the subordinate institution or the determination of amending the act or carrying out of a certain benefit by the subordinate institution (Petrescu 2009, p. 396).

When the injured person chooses to adress only the invitation to mediation and not to file the preliminary complaint, his administrative action may be dismissed by court as inadmissible. Dismissal as inadmissible of administrative action in court would be possible only if the defendant in his statement of defence invokes the infringement of preliminary procedure (Puie 2015, pp. 36-38).

If the mediation takes place before filling the preliminary complaint and a mediation agreement is concluded, then the injured person no longer has any interest to introduce preliminary complaint and should be deprived of this benefit.

Prior to court referral, the term for bringing the administrative dispute to court should be suspended during the course of mediation procedure. If the warring parties have not concluded an agreement, the injured party must have the possibility of bringing the action to the administrative court within the period prescribed by law, which shall begin on the date of conclusion of the minutes terminating the mediation procedure.

If the mediation is conducted after the administrative action was brought to court, judgment may be suspended when the parties present the contract of mediation. The suspension should last until the mediation procedure closes by any of the methods provided by law, but not more than a certain limit set by law, which in the case of civil and criminal cases is 3 months from the date on which it was willing. This would be an honest solution, considering that the mediation is applicable only in civilian component of administrative dispute and on the rights of the parties may dispose of.

In conclusion, when engaging in contractual relations or in disputes involving the use of public resources, public authorities must act in terms of economic and social efficiency. The efficient use of public funds is closely related to the transparency of contracting authorities.

In case of administrative disputes, mediation is an alternative dispute resolution(ADR) for parties trying to reach an agreement. The possibility of filling the preliminary complaint through the invitation to mediation, may be the first step for the alternative dispute resolution in administrative disputes involving rights that parties may dispose of.

Public authorities should be encouraged to use mediation procedure to prevent or defuse an administrative conflict, so legislation must be adapted for this purpose. An efficient way of encouraging public authorities to use mediation in disputes relating to rights which the parties may dispose of, is that of bearing the costs of the mediation procedure from special funds set up for this purpose.

Law no. 192/2006 concerning mediation and the mediator profession, may be supplemented with provisions regulating the procedure in cases of administrative mediation, modeled on the procedure established for mediation in criminal cases by Art. 67-70 of Law No 192/2006, as amended and supplemented. In this regard, the term for bringing the dispute to court should be suspended during the course of mediation procedure, and after the action was brought to administrative court, judgment may be suspended when the parties present the contract of mediation.

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