Public Administration and Mediation. Conflict Management of Public Legal Relationships

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Abstract: The difference between mediation and court proceedings is mostly reflected in the difference between the procedural rules, goals and consequences. In Hungary, it has been possible to switch between civil litigation and mediation proceedings since 2008. The court may, at any stage of the proceedings, attempt the parties to settle all or part of the dispute amicably. A major breakthrough, especially in the development, transparency and efficiency of public administration in Hungary in terms of administrative practice and regulation of administrative activities, is that in the case of administrative litigation from 1 January 2018 it is also possible to use the mediation procedure. The significance of this is, among other things, that the official decision and the procedure aimed at making it can take into account the views of the client or other interested parties in a more emphatic and direct way, so it can have a significant impact on the client's acceptance and voluntary implementation. The aim of the present study is to examine how the possibilities of mediation in a functioning organizational system have prevailed in the recent period. The examined area shows an answer to the question whether the aim of the legislator is achieved by providing the possibility of mediation in everyday administrative practice.

1 Conflicts in Public Administration

Conflict appears in private sphere and in public sphere, too. Conflict is everywhere. It can be found in human interactions as well as business interactions. Companies involved in formal conflict, search for lawyers and leaders that resolve conflict in an efficient way. This means not only to address the issue of conflict and come to a solution but also to do so with the best use of resources possible and that assures a final solution rapidly. In the last quarter century, alternative dispute resolutions (ADR) has become an increasingly efficient and popular strategy to conflict

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management. Among the most well-known ADR methods are mediation, conciliation, negotiation and arbitration. [2]

Litigation present a series of inherent disadvantages for companies - the parties lose control, the lawyers and the judicial system have power over the timing and procedure of the conflict resolution, and in result, disputes can take years to come to any resolution. The parties lose the ability to communicate with each other in order to resolve the problem. This causes most business relationships to be ruined and erodes trust and cooperation. Also, the costs of litigation increase significantly due to delays and (mostly) the lawyer's fees. The companies that become embroiled in litigation can lose its competitive advantage.

On the other hand, ADRs have become progressively common due to the advantages to litigation such as benefits in costs, simplicity and maintenance of the power of the entire state of affairs. In case of usage of these methods, a resolution is only reached if both sides accept to engage in this voluntarily. This own-willed approach to a conflict management implies a rationalized approach to the conflict at hand. This same rationalized approach also looks to quick conclusions that allow to construct a scheme to frame the relationship to prevent future disputes.

While there are some notable nuances between the different ADRs, they share the common feature: the dispute is mostly decided by the parties involved and less power is given to the third party involved (i.e. mediator, referees). Whereas in the case of litigation, the jury is granted absolute powers for the resolution of the conflict and to enforce this resolution. In mediation, the parties determine the result of the dispute and are in power of the conflict management the whole time while in arbitration, the result is determined in accordance with a rule, the law applicable. In both cases of ADR, when deciding on a result, the parties can take account for a wider range of rules, and in particular, their respective commercial interests. [3] Therefore, mediation and arbitration are procedures based on interests and rights. The fact of taking commercial interests into account also means that the parties can decide the result by reference to their future relationship rather than solely by reference to his past conduct.

The term conflict [4][5][6][7] has no single clear meaning. Much of the confusion around the definition has been created by scholars in different disciplines who are interested in studying conflict. Reviews of the conflict literature show a conceptual sympathy for, but little consensual endorsement of, any generally accepted definition of conflict. There is tremendous variance in conflict definitions, which is mainly defined according to two approaches. First, a more specific approach which includes a range of definitions for more particular interests or areas. Second, a broader approach which include a variety of more wide-ranging definitions that attempt to be more all-inclusive in the subject matter. We use the definition of Rahim (2011) [8] which is more of a broader approach. According to this author, "conflict can be considered as a breakdown in the standard mechanisms of decision making,

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so that an individual or group experiences difficulty in selecting an alternative". Conflict is even published by authors on the side of peace: "Peace is nothing more than a change in the form of conflict or in the antagonists or in the objects of the conflict, or finally in the chances of selection." [9]

2 Public Administrative Procedure Act of 2017. Nr. I. (Kp.)–possibilitiy of agreement and mediation

2.1 Agreement

In case of a court trial, the conflict management revolves around different litigation costs. In the case of litigation, which continues as the most popular formal conflict management procedure there are several costs to bear in mind. First, one can clearly compare the type of costs a plaintiff might have during a civil or a public administrative procedure. Not only the court fees, but time, the question of reasonable time mean also the cost of litigation.
Why it may be effective to reach an agreement in the public administrative procedure? If the subject matter of the dispute so permits and is not precluded by law, the court shall try to reach an agreement between the parties if there is a reasonable opportunity to do so within a reasonable time. 2) The court shall a) inform the parties of the benefits of the agreement. and (b) inform the parties of the nature of the mediation procedure, the possibilities and conditions for its use, (c) it may present the proposed agreement to the parties in writing during the preparation of the hearing or in the minutes of the hearing, or (d) summon the parties to an attempt.

2.2. Agreement and mediation

Settlement and mediation can be classified as alternative dispute resolution. The legal institutions of settlement and mediation are based on the aim of reaching an agreement between the opposing parties that reflects the interests of the parties as much as possible. The amicable settlement of a conflict between the parties is not only in the interests of the parties, but is also in the fundamental interest of the public authorities, as it speeds up the proceedings before them and, in all likelihood, closes them permanently. In contrast to traditional judicial decisions, which necessarily have a winning party and a losing party, the essence of alternative dispute resolution is that, at the cost of compromises, all parties involved can be considered to be largely winning. [Sáriné Simkó Ágnes (szerk.): Mediáció - Közvetítői eljárások. Budapest, 2012, HVG-ORAC, 18. p.]

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A necessary condition for this is that, given the nature of the dispute, it is possible to reach an agreement and that the parties also have a willingness to settle their conflict in this way. The classic areas of alternative dispute resolution (family mediation, health redress, consumer conciliation) are typically linked to private enforcement, as the parties' decision-making autonomy in private law is significantly wider than in public law, and in particular administrative law. (Sáriné Simkó Ágnes: Mediáció 2012, 355. p.) In administrative law, ADR is closely linked to the issue of discretion, as there is essentially an agreement between the parties in areas where the law allows for some degree of discretion. Logically, in situations where the administrative body can only make one lawful decision, the possibility of a different agreement cannot arise during the litigation. If, on the other hand, the administrative body has acted in the exercise of its discretion, the following legal institutions may be applied within that framework.

In the application of settlement and mediation in administrative lawsuits, a fundamental question arises as to whether these tools can only be used in lawsuits where opposing parties outside the administrative body or authority are opposed to each other (eg. contact cases, expropriation cases) or possibility. There are for their application in official activity, in classic bipolar cases, i.e. also in the opposition of an authority and a client (e.g. imposition of a tax fine).

In our view [9], there is no obstacle to the conclusion of a settlement or mediation in cases where an authority is confronted with a client, since the basis for the application of these legal institutions does not depend on the number of subjects of the underlying legal relationship but on whether room for maneuver defined by law within which the agreement can be established.

Thus, for example, the legal institution of the settlement can be used in construction matters when establishing special permit conditions or even in social assistance matters. Similarly, it can be beneficial to seek settlement in complex regulatory lawsuits such as communications cases or competition cases. The wider application of the agreement in this type of case may also induce a change in the perception of the judiciary, as the focus of judicial activism is on reaching an agreement on reviewing the decision, leaving more room for market participants and the authority to agree on their own interests, eg GVH Notice 3/2015 on the settlement attempt). The court can thus indeed act as a guardian of legality in these complex cases and does not take over the role of the regulatory authorities through the review of the decision.

Another peculiarity of litigation settlement is that in the application of the law of the administrative authority - even in the changed legal environment - it gives the authority the opportunity to amend or revoke its decision protected by the rights acquired and exercised in good faith during the proceedings. Kp’s explanatory memorandum also emphasizes that "the role of the settlement may play an important role in the context of the widening of the judicial sphere and the limitations of ex officio review possibilities". In this way, the conclusion of a legal settlement gives

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the administrative body more leeway to shape its decision afterwards. Although Kp's Section 83 provides for the possibility for an administrative body to remedy an infringement in an administrative proceeding during the proceedings, in addition to the suspension of the proceedings, this is only within the limits of ex officio review of decisions (eg. Section 120 of the Act). possible. In contrast, during a court settlement, an earlier decision can be amended in the absence of a breach of the law, or beyond the one-year time limit, or even repeatedly.

Before examining the rules of settlement and mediation, it is necessary to briefly present the difference between the two legal institutions. The relationship between a settlement and mediation can essentially be described as a goal-tool relationship. The purpose of alternative dispute resolution in each case is to reach an agreement between the parties. One possible means of doing this is to use the mediation procedure, in which the parties call on an external mediator to reach an agreement. However, an agreement as an objective may be reached without mediation, either by an agreement between the parties independent of the proceedings or by the assistance of the trial judge.

2.3. Conditions for establishing an agreement

Within the framework of the establishment of the agreement, the Kp. essentially lays down three conditions: a) it is not precluded by law, b) the nature of the dispute allows an agreement to be reached, c) an agreement can be reached within a reasonable time.

Kp. According to the system of conditions, the possibility of concluding an agreement becomes the main rule in the administrative lawsuit, ie in the case of the other two conditions, theoretically any Kp. an agreement may be reached in proceedings falling within the scope of However, the possibility of reaching an agreement may be ruled out by the legislator in sectoral rules. The Ákr.-Kp. Mod. For the time being, there are two such sectors: settlement is excluded in lawsuits related to the official procedure of food chain supervision [Act XLVI of 2008 on the food chain and official supervision. Section 39 (2) of the Act], as well as in lawsuits related to environmental administrative authority proceedings (Kvt. 96/D. §). The latter exclusion rule is particularly unfortunate, as issues of discretion in environmental matters would have been appropriate for the application of the legal institution of the settlement.

With regard to the nature of the dispute, we have already stated in the introduction that, in principle, an agreement may be reached in cases where the administrative body acts in a discretionary manner. The administrative body acting in its discretion may choose from several legal decision-making possibilities provided by law. [Molnár Miklós: Jogkövetői mérlegelés az államigazgatási jogban. Jogtudományi Közlöny, 1989/44. sz., 376-378. o., 377. o.; illetve Fazekas Marianna (szerk.): Közigazgatási Jog - Általános Rész III. ELTE Eötvös, Budapest, 2013, 103-108. o.] The Curia 2/2015. (XI. 23.) KMK's opinion delimited the scope of the decisions made in the following discretion: "Administrative substantive law is extremely

characterized by the discretion in the indication of decision possibilities. The classic cases of this are the statutory provisions of some previous social benefits, as these provisions only created the possibility of a given benefit (named: "can be given") under certain conditions. Another large group of discretion inherent in decision-making options is the list of different types of decision-making options from which the authority can choose. The third important area of regulation is when only the framework of the decision is designated by law. This is mainly the case in fines, usually by setting an upper limit or both.

If the law prescribes a binding decision for the authority in the presence of certain conditions, and the authority takes evidence for the examination of these conditions, the result of which is assessed, the decision cannot be classified as a discretionary decision in view of the latter. [Vö. Fazekas Marianna (szerk.): Közigazgatási Jog - Általános Rész III. ELTE Eötvös, Budapest, 2013, 103-108. o.]

It can be read from the above that the discretion is basically in the choice of the administrative decision, it provides alternatives in the decision-making process, thus the discretionary activity of the administrative body in the evidentiary procedure cannot be included in this circle, nor the cases when the decision of the body is essentially. Legal framework does not exist outside the definition of decision-making power (discretion).

As a last condition, the Kp. he mentions that, given the circumstances of the case, there is a chance of reaching an agreement within a reasonable time. This provision reflects the idea that one of the advantages of the settlement is that it speeds up the procedure. The assessment of reasonable time is at the discretion of the trial judge and can only be decided on a case-by-case basis. Presumably, in this situation, it can be considered a reasonable time that does not exceed the expected duration of the termination of the lawsuit without a settlement.

2.4. The judge's options for making a settlement

If the conditions for reaching an agreement are met, the trial judge is obliged to inform. The information is two-way, on the one hand the parties must be informed about the advantages and conditions of the settlement, and on the other hand the judicial information should cover the description of the mediation procedure. In addition to the general benefits mentioned in the introduction, the benefits include the costs of litigation and fees, as well as the exercise of the right of appeal. The court must therefore inform the parties that they may agree to bear the costs of the proceedings, failing which the costs will be determined in accordance with Section 67 (3). Itv. Pursuant to Section 58 (1) and (3), they are required to pay a moderate fee in the event of a successful settlement. In any case, the information must take into account the fact that the approved settlement is a judgment decision, but the parties to the settlement may not appeal against it.

In addition to general information, there are essentially three possible ways for a judge to help reach an agreement. On the one hand, the court may recommend the

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parties to use mediation, in which case the procedure is governed by Section 69: if the parties agree to use mediation, the court suspends the proceedings for the duration of the mediation. On the other hand, Kp. it also provides an opportunity for an agreement to be reached between the parties in court proceedings. One way to do this is for the judge himself to outline a possible settlement for the conflict between the parties and present it to the parties.

In an administrative lawsuit, the court if the Kp. unless otherwise provided, the administrative dispute shall be adjudicated within the framework of the application, the applications submitted by the parties and the legal declarations [Kp. § 2 (4)], ie the principle of being bound by the application applies. Within the framework of the rules of the settlement, this may be interpreted as meaning that the court considers ex officio whether the legal conditions for the settlement exist and, if so, informs the parties ex officio about the methods of settlement and may decide to summon the settlement. without the cooperation and request of the parties.

On the basis of the parties 'request for a settlement, the court is obliged to examine the existence of the terms of the settlement, however, it may reject the parties' request if the legal conditions are not met (eg. in its opinion the proceedings cannot be completed within a reasonable time). The court decides on the rejection by an order, which, however, is issued by the Kp. does not regulate separately, so the Kp. Pursuant to Section 112 (1), there is no place for a separate appeal against it, it can be challenged in an appeal against the judgment.

With a view to concluding the dispute within a reasonable time, it can be stated that an attempt to reach an agreement will clearly increase the duration of the action only if the parties attempt to reach an agreement through mediation. In this case, Section 69 (2) also provides that the court shall stay the proceedings. In cases where the court summons the parties to a conciliation attempt or presents the proposed settlement to the parties, the length of the proceedings may increase depending on the nature of the case, but there is no need to stay the proceedings, these measures may be included in the proceedings. [10]

3 Data Collection

3.1. Method

The primary research is a survey, a questionnaire. It is not a representative survey, so the result is able to show us an example based on the samples, on 35 responses.

3.2. Result

To go deeper into the topic of analysis, clients, natural persons were contacted on the subject. I consulted them on the topic of analysis, the research tool used was a questionnaire. 35 persons were contacted and responded the questions. Basic

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questions were: the age of the respondents, the working years in public administration, the number of resolved cases in the working period.
The question of the study focused in asking about the decision in case of public administrative procedure –in case of the possibility of the decision about how to continue the procedure: in litigation or to make a possible agreement, specifically:
1. In case of a conflict, which way of conflict resolution is preferred in your decision? In the procedure of the public administrative court, I will:?

- The figure shows that 90% of respondents prefer choosing mediation in case of a conflict.

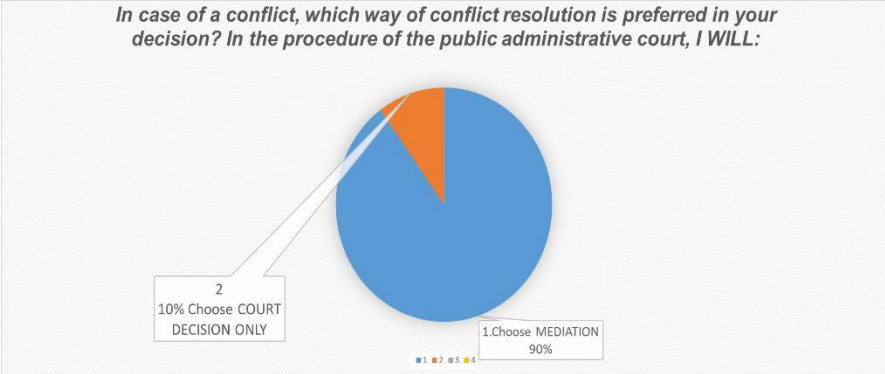

Figure 1. In case of a conflict in public administrative court procedure
Source: own research

- The figure shows that 10 % of respondents would stay in litigation and would choose court decision in case of public administrative conflict.

Conclusions

The results of this study suggest that according to the current data of proceeding fees, alternative dispute resolution in terms of cost, are a more economical alternative in conflict management as they allow a more expedite resolution. In addition to court proceedings, alternative dispute resolution (i.e. mediation, arbitration) is another way to achieve a lasting more peaceful solution to conflicts. As it allows the parties to maintain the negotiation power necessary to conduct the conflict management, it helps them keep communications open. This also seems to be hinted in the respondents' answers to the above question in this study. There is an almost 90% divide in those who prefer to compromise and will even accept a certain loss of power in order to obtain a better resolution. The study highlight the significance of power relationships in public admisitrative conflict management and the selection of ADR, agreement and mediation.

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