

Mediation and Settlement in Administrative Matters in Slovenia

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UDK 347.919.1:35(497.4)
Pregledni znanstveni rad (review scientific paper)
Priljeno: 20. 1. 2010.
Prihvaeno: 22. 9. 2010.

Unlike with court procedures, the kernel of the administrative procedure is not to resolve a dispute among parties to a procedure but to recognize a private party's right while protecting the public interest. Therefore it is questionable – even with regard to constitutional law – whether mediation and settlement between the public and private interests are possible in administrative matters. However, elements of settlement are being introduced into the administration with the development of partnerships. A distinction must be made here between the administrative process involving adoption of general administrative acts, and determination of particular administrative cases under the General Administrative Procedure Act. The author finds that incorporation of the institutes of mediation and settlement into this Act following the example of the civil procedure would result in more hazards than benefits. Therefore the current system, with partial supplements, suffices. A greater poten-

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tial for a contractual determination of public law relations is identified in sector-specific administrative law.

Key words: administrative procedure, administrative matter/case, administrative dispute, alternative dispute resolution, mediation, settlement, public interest/benefit, parties with opposing interests, termination, administrative agreement, agreement under public law

1. Introduction

Within modernized functioning of the state and the cooperative »good governance« – and thereby a redefined role of the state – one of the widespread approaches in the past decade has been the use of methods of alternative or amicable dispute resolution (ADR). ADR methods are supposed to start being systemically used within different relations between entities of power representing the different branches of power at the state and municipal levels (i.e. the government, courts, public administration bodies), and particular legal or natural persons.¹ This is expected to result in a more efficient and less repressive rule. Given the social environment and regional culture, it is no surprise that ADR methods have been developed and continue to be more widespread mainly in the Anglo-Saxon world, and in Japan,² China etc.

For similar reasons, ADR is more developed in some legal fields than in others (e.g. civil/commercial, labour, family etc. disputes; and environmental matters, construction, urban planning, social welfare and tax-

¹ This paper is not concerned with relations in which a public entity is a party to an agreement under private law, e.g. when the state is engaged on the commodity market as a buyer, seller etc. (compare on those issues in Virant, 2009; and Pirnat, 2000: 96–97). Furthermore, in relation to private addressees, authoritative functioning may not be entirely distinguished from non-authoritative functioning – neither organizationally nor functionally, as all state administration functions represent both the exercise of state power and non-authoritative work of administrative specialists. The distinction is therefore based on a predominance, which is not always easy to identify (Adamovich & Funk, 1987: 143–155). Administrative matters/cases and authoritative functioning are thus conceived of as predominantly authoritative in this paper.

² Japan, e.g., with a population of 128 million only has 3,000 judges, while Germany has 21,000 judges for its population of 82 million (Pitschas et al., 2008: 145). In Slovenia, this ratio is even more unfavourable with respect to the goal of tolerance and amicable life in a community.

tion within the administrative law). Legal fields covering authoritative (public law) relations are far less inclined to ADR, since its introduction is rather a gradual one due to primarily defined and, principally, nonnegotiable protection of public interest in these relations. Public interest is hereinafter categorised as a legal phenomenon, since it is in theory understood as a general societal benefit, based on common values in society, set in sectoral administrative law.³ It is about the way of ensuring social needs, which a majority of people recognize as being guaranteed most rationally by the authorities (state or administrative body).

The most established form of ADR is mediation. It is to be stressed at the very beginning, that in this paper a distinction is maintained between the institutes of:

- mediation – being a procedural approach; and
- settlement between parties to a procedure – as a merit-based, substantive decision or agreement/contract.

In 2001, the Council of Europe adopted the recommendation Rec (2001)9 (hereinafter: the CE's Recommendation),⁴ encouraging member states to start using ADR in administrative matters, even to the point of a mandatory mediation procedure as a procedural condition. A forceful regulation of relations leads into the need for repression in administrative matters, e.g. through enforcement, inspection measures, criminal prosecution, which in the long run is more expensive in addition to being less democratic. Notwithstanding this, it may be concluded from the Council of Europe's documents and Slovenia's regulations and strategies that within different private law disciplines ADR is promoted in terms of substance, i.e. with the goal of a solution acceptable to all involved in a dispute. On the contrary, in public law, ADR seems to be grounded only in the tackling of case overload, and the need for a faster decision-making to eliminate backlogs.⁵ The core of a relation under public law, as a general

³ More in Vavpetič, 1974, and Jerovšek, 2003. For instance, public interest in the field of construction when builder applying for building permit, follows all legally set safety and environmental standards of construction and not diminishing the life conditions of the closest neighbours. In social insurance procedures there is a definition of public interest by the obligation of an authority to take care of retired, disabled, ill etc. people, especially with no means of their own to get a minimal care.

⁴ Recommendation Rec (2001) 9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties, adopted on 5 September 2001 at the 762th meeting of the Ministers' Deputies.

⁵ See in detail the EC Recommendation; points 4 & 5.

rule, is at least a potential conflict – and the consequent weighting – in a procedure between the public and private interests. Any recognition of a particular private person's right or legal entitlement might entail a hazard for or even actual damage to the public benefit. In general, according to Šinkovec,⁶ administrative law is characterised by the fact that even after administrative acts become final, they can be altered or replaced if so required by the public interest, the reason being that administrative proceedings, unlike court proceedings, are aimed at reaching a certain end rather than asserting the law as the objective in its own right. If an administrative act does not result in the realisation of public interest, it has lost *its raison d'être*. Therefore it is questionable how much mediation and settlement is indeed possible within public (and especially administrative) law. Limitations are also clear from the CE's Recommendation (points 10–12), as this document mainly refers to the administrative dispute, and less to other proceedings related with administrative matters. Furthermore, the CE itself stresses that in using ADR in relations between an administrative authority and a private party, it is legality (the principle of law-governed state) that must preferentially be considered, i.e. disputes may only be resolved within the applicable legislation. Mediation, or ADR, is thus only a supplement to the administrative and judicial systems, and not the basic or exclusive form of rights protection.⁷ Therefore, one can conclude that mediation and settlement in administrative procedures are merely a minor supplement compared to civil law regulation. Whereas in civil law ADR is a basic concept – despite some limitations like the protection of minors – in administrative law mediation, and especially settlement, would be a gradual and not just a qualitative change, if introduced thoroughly and completely.

The core of this paper is to analyse the needs, potentials and conceptual barriers related to introduction of mediation and settlement in admini-

⁶ His Vested Rights (1994: 3–15), where the author is mainly concerned with the institutes of finality and remedies, or the (non)acceptability of actions affecting final legal acts. He cites the specific features of relations under administrative law as compared to judicial procedures after older German theory (Burckhard, 1936 etc.), while pointing to different views since the 1960s (cf. Pitschas et al., 2008: 90).

⁷ If by mutual agreement in a particular case mediation was determined by the parties as the exclusive form of their rights' protection – resulting in one (weaker) party being denied judicial protection, or protection against a public authority (e.g. labour inspection body) – such agreement, even in a conflict of private interests (e.g. between employer and employee), would be unlawful (Šetinc Tekavc, 2002: 69; the case from the USA, E. E. O. C. vs. Astra USA Inc.). Therefore, according to Zalar (2007: 1292), the limitation by legality is the fundamental principle of conceptual integration of ADR.

strative procedure. Administrative procedure is understood as an instrument of realising particular rights, legal entitlements or obligations that a private party has under the public, especially administrative law, by way of applying the General Administrative Procedure Act (GAPA).⁸

2. The notions of administrative process, administrative matter, public interest, mediation and settlement

2.1. Administrative process, administrative matters, administrative procedures, and administrative dispute

Broadly speaking, »administrative matters« may refer to the implementation of (all) the functions, competences and responsibilities, and tasks of public administration bodies, where primarily the authoritative as well as the servicing nature of administration is realised. Within this, the issue of general and individual administrative acts also belongs among authoritative administrative operations. On the other hand, under the GAPA (Art. 2), an administrative matter/case is clearly defined as the determination of, or decision-making on, a right, legal entitlement or obligation that a particular natural or legal person has under administrative law; i.e., application of an abstract substantive rule to a specific actual situation. The decision is reached within the administrative procedure – by issuing an individual administrative act, which, after becoming final within the administrative procedure, may be contested by different parties to the procedure before the administrative court under the Administrative Dispute Act (ADA).⁹ Furthermore, after a final judicial decision there are possibilities to attack an administrative decision via constitutional complaint and through action before the European Court of Human Rights (ECHR) if the decision is deemed to have violated the Constitution of the RS or the European Charter of Human Rights and Fundamental Freedoms.¹⁰

⁸ Ur. l. RS (Official Gazette of the Republic of Slovenia), nos. 80/99, 70/00, 52/02, 73/04, 119/05, 105/06-ZUS-1, 126/07, 65/08, 8/10.

⁹ Ur. l. RS, no. 105/06; in force since 1 January 2007.

¹⁰ Slovenia ratified this charter in 1994.

Therefore, an administrative matter – where a dispute between authorities and private parties may arise along the lines of the CE's Recommendation – may primarily have three different meanings, i.e. that of:

1. the substance of the tasks of administrative bodies in general, particularly in authoritative decision-making in the preparation of general legal acts and the issue of general administrative acts as well as the issue of individual administrative decisions – i.e., participation in the administrative process;¹¹
2. the object of an administrative procedure (Article 2 of the GAPA), which generally ends with an administrative decision;
3. realisation of a party's right, legal entitlement or obligation under administrative law through an individual administrative act, where the potential conflict of private interests with the public interest is examined – first within an administrative procedure, and later potentially also within an administrative dispute, a constitutional complaint proceeding and before the ECHR.

In this paper, administrative matters are understood in accordance with the third possibility, being mainly considered in relation with the GAPA.

However, it is to be stressed that, although administrative procedure is primarily aimed at protecting the public benefit, the public interest does not necessarily need to be potentially threatened to define a certain matter as administrative. The constituent element of a relation under administrative law is that within it, an authoritative body – with its overbearing will and in compliance with applicable regulations – recognizes a certain right or legal entitlement of a subordinate party, or imposes an obligation on it.¹² For the purpose of protecting the public benefit and parties' rights (Art. 7 of the GAPA), however, there is – pursuant to Art. 2 of the GAPA and the administrative dispute case law – not only a formal but also a substantive definition of a matter as an administrative matter, where an authority must act in accordance with the GAPA although the sector-specific law itself stipulates neither an administrative procedure nor a subsidiary

¹¹ Along these lines, Pitschas (2008: 7, 95) stresses the possibility of mediation (i.e. harmonisation of interests) as well as compromise solutions (i.e. settlement) in administrative process, mostly in environmental issues. In the adoption of such general decisions or policies, mainly by way of regulations, mediation is known as the preliminary (regulatory) impact assessment ((R)IA). For details on RIA see Kovač et al., 2009.

¹² In detail see Androjna & Kerševan, 2006: 50–55.

application of the GAPA. It is an administrative matter if the following requirements are cumulatively met:

- The party's claim, or the object of the procedure, is being decided upon (and not, for example, agreed upon).
- The substance of the decision is the establishment, or recognition or denial of a right or legal entitlement, or establishment or (none) imposition of an obligation.
- An individual case (involving a known or, at least, identifiable addressee) is determined.
- What is concerned is a right, legal entitlement or obligation as specified by substantive administrative law.
- Determination involves the balancing between the protection of the public benefit and interests of the private party/parties to the procedure.

Generally, the GAPA, or an administrative procedure, is only a formal framework enabling a civil servant to balance in a particular case how much private interest may be realised without endangering the public benefit. It is a point of intersection aimed at ensuring that the public and private interests are balanced or proportional.¹³ If a matter is defined as administrative in accordance with the nature of a right, obligation or legal entitlement, the administrative procedure must ensure that the public interest is not excessively protected but also that a private interest does not have precedence over the public interest. Thus, in the substantive definition of administrative matter, protection of public interest is an essential element, unlike with the formal definition, where a sectoral law may stipulate applicability of the GAPA although what is concerned is only a conflict of two opposing personal interests, which is otherwise a characteristic of the private, particularly civil law.

In contrast to this, we have recently seen in Slovenia in the adoption of general acts – more specifically, in the amendments made to the GAPA – the view that the GAPA is in fact only a cluster of administrative barriers to realising the rights of private parties, under the Lisbon Strategy, primarily those of commercial operators. Thus the dilemma that may indeed be present and relevant in certain fields – i.e. whether in some cases the

¹³ Cf. with the stress on protecting the public benefit according to Šturm et al., 2002: commentary to Art. 69 of the Constitution of the RS.

decision if a right is to be granted or an obligation imposed is indeed an administrative matter or not – is moved to the procedural level.¹⁴

2.2. The role of public interest in administrative procedures

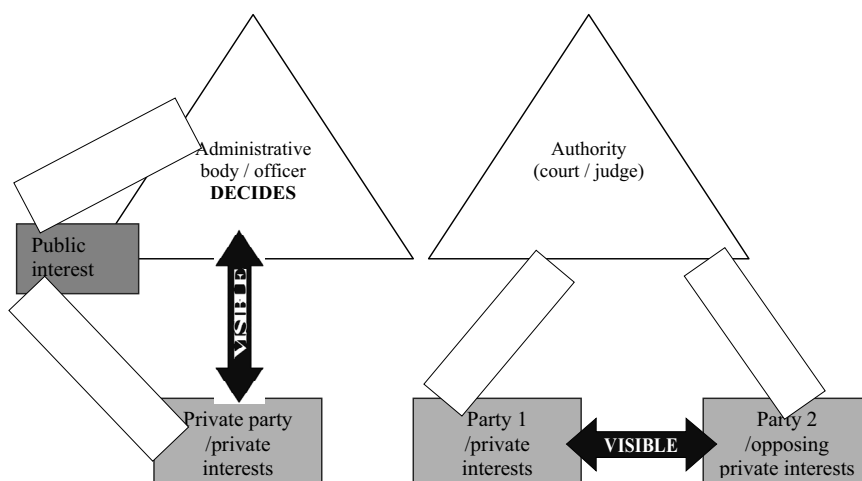
According to the GAPA, the fundamental principles of administrative procedure must be observed in all public law proceedings, and generally even sectoral law may not overrule or completely exclude them (it may indeed, for example, exclude the right to appeal, or limit discretion in weighting the evidence, but only exceptionally and with regard to specific characteristics of a particular administrative field requiring or justifying such exceptional conduct). Public interest/benefit protection is one such core principle, which, operationally, is frequently reflected in specific GAPA rules, as it is vital to the nature of a relation under administrative law (Jerovšek et al., 2004: commentary to Art. 7 of the GAPA, p. 73). Notwithstanding that throughout a procedure, civil servants must protect the interests of parties to it, even by warning them of substantive rights if they learn or judge that a client is entitled to realise a certain right in the given actual situation (Jerovšek et al., 2004: 75), if in conflict, it must be the public interest that prevails. The difference between the notions of public benefit and public interest, according to most authors, mainly exists only in theory, although some consider that benefit is more tangible, »enforceable« than interest. The GAPA itself employs the two notions non-strictly, mainly in defining the role of the administrative body as the protector of the public interest/benefit in the context of the *ex offio maxim* and the inquisitory principle.

Thus, the administrative body must protect both the public benefit and citizens' rights, making decisions in a conflict of those, which not uncommonly entails a somewhat schizophrenic situation, especially because in real environments, a specific person acts in official capacity on behalf of the body, and the private party/client on the other side, while the public interest is generally not protected by a third natural person (except if e.g. a state attorney or an association in public interest participates in the case). Therefore, certain relations not uncommonly fail to materialise, as especially decision-making in a collision between the private and

¹⁴ An example is deciding in the dispute between telecommunications' operators and their subscribers; along these lines, Jerovšek (2000: 173) discusses the assessment of building land development fee.

public interests primarily depends on the authority – if and how much it gets aware of and presents the substance and power of the public benefit concerned. Unlike in a court procedure, another term known in administrative procedure is the initiation of a procedure on the authority's own motion under the *ex offio* maxim. This »official duty« is based on Art. 126 of the GAPA or sectoral provisions,¹⁵ i.e. without the application of at least one private party, and contrary to its interest. Unlike this, in the civil procedure the deciding body (only) decides in a dispute of two equal parties with opposing private interests, where each interest is personalised with an individual, separate entity.

Figure: Relation between the participants and interests involved: administrative procedure vs. civil procedure



Like, *mutatis mutandi*, in the civil procedure, in administrative dispute also – where the parties, even though action is brought against a public entity/ issuer of an administrative act, are equal – the adversarial principle applies (Breznik & Kerševan, 2008: commentary to Arts. 21, 22, 43, ff. of the ADA), although the defendant supposedly represents the public benefit. By nature of the matter, therefore, it is significantly less difficult to involve mediation, and especially settlement, in an administrative dispute than under the GAPA (Vetter, 2004: 7). The ADA explicitly provides that parties to an administrative dispute may settle any time before the case

¹⁵ For example, concerning inspection. In Jerovšek & Kovač, 2008: 177.

is adjudged (Art. 57 in relation with Art. 45) – furthermore, according to the GAPA itself, at any time since the beginning of an administrative dispute until its conclusion, it is possible to use the extraordinary remedy of alteration (with a prospective effect) or annulment (with a retroactive effect) of the disputed decision (Art. 273). This recourse is a special variety of settlement in administrative dispute, as the defendant must satisfy all the plaintiff's claims, without encroaching upon any third party's rights. Nevertheless, another administrative dispute action may be brought against the decision under Art. 273 of the GAPA.¹⁶ A similar institute, i.e. substitute decision under Arts. 242 and 243 of the GAPA, is known in the appellate administrative procedure. The issuer of a contested decision may comply with the complaint if it is well grounded.

However, in all cases the key principle is legality. An administrative body may only change or annul a decision if the latter is illegal, and cannot harmonise the public and private interests. Therefore it would be inappropriate if the bulk of procedures were handed over to a mediator outside court,¹⁷ as this would result in a distortion of power; hence, each body in a legal system must have its own competences and responsibilities.

Concerning administrative procedure, the key question is why the law assumes the priority of the public benefit/interest over the private one. More generally – what is the ground for the unquestioned precedence of an administrative body in relation to the client? Is this just an execution of indirect democracy, where the source of public bodies' power is the people? This cannot be so – in addition to executing their formal competences and responsibilities under the Constitution and laws, administrative bodies must function legitimately, i.e. see to the common welfare, to the general social good. At the same time, they are subject to existing legislation. Jerovšek (2003: 247) actually proceeds from the contention that public interest is legally guaranteed public benefits specified by the law. Further, Pavčnik (2007: 117) emphasizes that public interest must be defined as precisely as possible in a law itself. It is particularly important to fill out the notions of public and legal interest/entitlement in discretionary decision-making. Similarly, Schuppert (2000: 800) contends that public interest is concretized by specifying what is protected in particular cases, mainly by sectoral regulations; even more, precisely in this sense public

¹⁶ For example, also if deemed necessary by the Government of RS judging that the public interest has suffered (by ADA).

¹⁷ Even if, like in France since 1973, a special Mediator was set up as an independent state body, similar to Ombudsman (Tratar, 2001: 218).

administration is an interest-determined decision-making system. Public interest and legitimacy of functioning may thus not be interpreted by an authority arbitrarily or even in contrast to the law.¹⁸ Hence, in principle not even administrative bodies have public interest at their disposal, since it is the legislature, not public administration, which determines what it is.

Superiority of public interest has lately become relative in so far as a certain private interests enjoy the protection of fundamental rights. Thus, in administrative as well as in civil law private interests are balanced through the proportionality test.¹⁹ Even by the GAPA, the public interest is not given as the only one to protect. To the extent of not infringing the public interest an administrative authority has to ensure the realisation of private interests as much as possible (Art. 7). Additionally, predominance of public interest over private ones is questionable, since it is not always clear which participant in the procedure is the holder of which interest. In Slovenia, for instance, there is a raising phenomenon of defining private parties (such as associations on protection of nature or animals) in sectoral laws as the representatives of public interest. Broader, especially French and EU administrative laws tend to use the individuals or groups in pursuing public interests in administrative procedures, be it without a classic private interest (e.g. environmental groups in EU environmental law) or alongside an individual interest (e. g. competitors in state aid law). In such constellations there is a question to which extent a distinction between public interest and party/private interest/s is (still) crucial and legitimate. The actual development of specific administrative procedures regulation in comparison to civil law may be more gradual than perceived.

If, however, social praxis shows that deregulation or a redefinition of rules is required – either for better protection of the public interest or easier realisation of private persons' rights – the particular law is to be amended in compliance with the prescribed legislative procedure, as the latter guarantees not only formal legality, but also (indirectly) that public tasks are performed democratically. From this viewpoint, the bodies conducting

¹⁸ For details Jerovšek et al., 2004: commentary to par. 2 of Art. 6 of the GAPA. On potential abuse of power also Craig, 2006: 462. On forceful means as a form of asserting the public interest Pavčnik, 2007: 587.

¹⁹ The need for such balancing (German *Abwägung*) has greatly influenced German administrative law and opened margins of appreciation where ADR may find more fertile ground. More in Jerovšek, 2000 and 2004.

administrative procedures and thus having a direct contact with citizens have a systemic duty to report to the competent ministries on any dis-functionalities that they may detect in implementing existing legislation. The obligation to observe legality is tied with the prescriptive dimension of law, while the aspiration for a socially maximally acceptable positive law relates to the value dimension of the law and of how authoritative institutions function.

Despite some impediments, we may conclude that the superiority of an administrative body over a client generally reflects the superiority of the public interest over private interests as specified by substantive regulations within particular fields. Public interest is not a sociological category, but a legal phenomenon, when processes of specification and institutionalisation take place in law through (the changing) regulation.

2.3. Mediation and other ADR forms, and settlement

Mediation is a form of alternative or amicable dispute resolution. The very definition of ADR, with its presumption of an (ongoing) dispute, implies that it is of limited use in administrative procedure, where mainly only one private party is involved, while on the other side the authority must take care to protect the public interest – although the collision between the party's interest and the public benefit may only be potential, or may not exist at all (in a formally defined administrative case). According to Section 8 of the EC's Recommendation, the main advantages of ADR include simpler and more flexible proceedings, dispute resolution according to the equitable principle and not just strict legal rules, friendly settlements, greater discretion etc., as well as, among other things, a higher acceptability of decisions by the clients.²⁰ The Recommendation cites several forms of ADR in administrative matters (or disputes), i.e.: internal control, conciliation and mediation, negotiated settlement (if not forbidden by a national law), and arbitration. In addition to this, according to the EC's analysis, the following ADR classification is cited in member states:

1. preventive procedures aimed at avoiding litigation, i.e. consultations with the public (in the adoption of general acts) and negotiations;

²⁰ According to Sekirnik, 2008: 287. Further on the issue of legitimacy of authoritative decisions versus individuals also in Koprić, 2009: 29-43.

2. out-of-court procedures, like internal administrative control, conciliation (in Slovenia with its Law on the State Attorney's Office), mediation, settlement, and human rights ombudsman; and
3. alternative court procedures, i.e. tribunals in Anglo-Saxon systems, and arbitrations.²¹

In Slovenia, mediation is systemically regulated by the Mediation in Civil and Commercial Matters Act (MCCMA²²). According to this law (Art. 3), mediation is a process in which parties; helped by a neutral third person (mediator), voluntarily try to amicably resolve a dispute relating to a certain contractual or other legal relation. Mediation belongs among the procedures aimed at expediting rather than adjudicating, its goal being that the mediator, as a third and neutral party, procedurally leads the parties to themselves finding a solution that is at least minimally acceptable to everybody involved. Unlike a judge or an arbiter, a mediator does not decide in a proceeding in terms of substance, but only conducts the process of seeking an agreement; through his activity, he helps the parties to reach an agreement that will resolve the dispute and determine mutual rights and obligations anew. By nature of the matter, mediation as a process is substantially less formalised than adjudging.

In mediation and in ADR in general, certain principles apply that make it possible for the goals to be reached; among them, those to be stressed are voluntariness, mediator's impartiality, confidentiality, equality of parties, procedural non-formality, efficiency, and, finally, legality (MCCMA; Zalar, 2007: 1291). Some of those principles, e.g. equality of the parties, to begin with, obviously entail a potential conflict with the fundamental principles of administrative law, or the GAPA. If mediation is defined as a non-authoritative, non-adjudging process, it is vital that the mediator cannot adopt a decision permitting enforcement; furthermore, generally even the parties themselves cannot do so. An exception in administrative law – though a very limited one – may be found in Art. 137 of the GAPA.

²¹ On out-of-courts procedures see Pitschas et al., 2008: 172. Similarly on alternative court procedures in Šetinc Tekavc, 2002: 18. In addition to those cited, model ADR methods as including mini trial (German *Miniprocess*), early neutral estimation, mediation combined with arbitration, private judge, expert's decision (in a way, such case in Slovenia is when compulsory health insurance rights are decided upon by physicians; Jerovšek & Kovač, 2008: 239), settlement meetings etc.

²² Ur. l. RS, no. 56/08.

But this is the case only if a settlement between the clients with opposing interests is concluded before an administrative body.²³

Settlement – unlike mediation – entails a substantive confrontation and balancing of different parties or interests in a proceeding. It is possible under the GAPA as an agreement (although the instrument permitting enforcement is the settlement record), but exclusively between private parties with opposing interests, and not between the public and private interests (Breznik et al., 2008: 398). In addition to the two extremes – i.e. the generally unilateral determination of public law relations by an administrative act in the protection of public interest, and agreements between entities with private interests – an intermediate notion is emerging in administrative matters in »modern European systems«. It is about the institute/s of agreement under public law, public law agreement, or administrative agreement, which first developed in France and later also Italy and, fragmentarily, the UK.²⁴

An administrative agreement is not within an authority's discretion but rather within its scope, or cases of determination through an agreement instead of a unilateral act are laid down in law.²⁵ On the other hand, it is to be stressed that in certain special administrative fields – primarily in (non-commercial) public services, where no clear demarcation line can be drawn between authoritative and non-authoritative functioning – a matter may, according to constitutional case law,²⁶ only be defined as administrative if an action contrary to the addressee's consent is required. A public service is thus performed outside administrative decision-making as long as a consensual solution can be reached, which instead of clear delimitations brings along even more hybrid but practically unavoidable situations. There are such administrative relations whose it is only in the public interest that they are determined in certain points without the state having any specific interest within this. Therefore the issue of redefining such cases from administrative to contractual comes to be relevant here.

²³ Similarly there are some exceptional cases specified by sectoral legislation, e.g. in agreements pertaining to family relations, partly also in cases when settlement is concluded in the form of a notarial protocol; par. 2 of Art. 14 of the MCCMA.

²⁴ See Pirnat, 2000: 95–10, Kerševan, 2007: 244 and Koprić, 2009: 45 and the following.

²⁵ See the German and Austrian laws on the administrative procedure and Adamovich & Funk, 1987: 293.

²⁶ E.g. in the US (Vetter, 2004: 136).

3. Elements of mediation and settlement in the *GAPA de lege lata*

Even the most enthusiastic proponents of mediation (and settlement) find that this institute is limited or controversial in administrative matters where:

- an entity incapable to be a party participates in the proceeding (e.g. a minor under the GAPA);
- clients cannot freely dispose of the rights or obligations concerned; thus clients do not have public interest at their disposal (and neither does any administrative body!), since it has already been (precisely, in general) specified by the legislator;²⁷
- constitutional rights or issues of public law are involved;
- a forceful execution, and thus an instrument permitting enforcement is needed;
- dishonesty may be expected in the client (e.g. concealment of facts for tax assessment to avoid its payment);
- there is no possibility that the case might fall under the statute of limitation (which does not exist under the GAPA, while it does apply in certain tax matters; in addition, certain administrative rights/obligations lose relevance in time, e.g. citizenship attained under more favourable conditions);
- there is an actual or legal imbalance of power in the parties to a dispute (even if formally this is a bilateral conclusion of agreements – the so-called »take it or leave it« relations); etc.

In summary, in all the above limiting points we will likely recognise elements of a typical administrative relation, decided upon within the administrative procedure. However, because mediation and settlement are known within the existing Slovenian legislation in criminal law, and partly in misdemeanour law,²⁸ and in some administrative matters related to en-

²⁷ Some authors argue that an exception to this in administrative matters is interpreting indefinite legal notions as well as cases when a sectoral law gives an administrative body the power of discretion, where the administrative body »in fact performs the legislative function« under the appropriate authorisation clause (Jerovšek, 2000: 169). However, it must be added that in such case the administrative body is only bound to act in accordance with the purpose, and within the scope, of the authorisation received (Art. 6 of the GAPA).

²⁸ The Act amending the Criminal Procedure Act, 1998: Art. 16. The Act does not distinguish between the procedural mediation and the substantive settlement, as one can

vironment and family relations. Therefore we cannot generalise that mediation and settlement are directly unconstitutional for all matters under public law, although in most administrative cases they are more or less inappropriate.

Limitations in substituting a unilateral with a consensual determination of relations – even at the general level, i.e. adoption or amendment of substantive administrative legislation (laws) – are based on the principles of the Constitution and the GAPA, i.e. legality, public interest protection, public administration's subjection to the law, or the purpose and scope of a given discretion, and equality before the law. The constitutional case law in Austria, for example, points out that a consensual determination of relations in typical administrative matters leads to a different treatment of equal or comparable situations, which is inadmissible from the constitutional perspective (Jerovšek, 2000: 172). Pitschas (2008: 99–102) similarly contends that equality in public law relations is illusory, although in the asymmetry between those involved, the superior public entity is supposed to aspire toward it.

The GAPA does not incorporate the institute of mediation. It does, however, regulate settlement (Art. 137), but exclusively between clients with opposing private interests;²⁹ not in relations between the public and private interests. Moreover, even settlement between private persons must not impair the public interest (or public morality or third parties' legal entitlements) and settlement may only be concluded by the parties before an administrative body to have legal effect. The instrument permitting enforcement is the record of settlement. The initiation of settlement under the GAPA is therefore an atypical, or surprising possible implementation of administrative procedure, as this is a classical civil procedure institute aimed at resolving a dispute between parties by partial compromising and acknowledgment of the counterclaims.

only go with the other; and what is concerned is less serious offences, where in case of a settlement the gap between the public and private interests is not so wide (e.g. in criminal offences that may be sanctioned by a fine or imprisonment of up to three years); in general, the state prosecutor estimates on a case-by-case basis whether the public and the private parties' interests allow for a report to be referred to the mediation procedure. Misdemeanour Act, 2005, introduces a halved fine if paid within a certain time limit and upon wavering of the right to appeal.

²⁹ A party to such a proceeding may be a person claiming a right or a person being imposed with an obligation, or an accessory participant under Arts. 43 & 142 of the GAPA. According to Breznik et al., 2008: 398, if the case involves an entitled party and an obliged party, they are the so-called contrary parties, while in an opposition between an active party and accessory participants, these are colliding parties.

Thus, administrative bodies determine parties' rights, legal entitlements and obligations through concrete administrative acts rather than through agreements or operational acts. A settlement may be concluded – as clearly explicated by the Supreme Court of the RS in an order of 2004³⁰ – either by clients in a legal relation with one another or sides that are each a party *vis-à-vis* the authority determining the administrative case, but not between a private party and the authority. An administrative body issues administrative decisions determining authoritatively a client's right or obligation. Clients cannot settle with a certain authority (say the Office of the RS for Intellectual Property), as the latter has issued a decision to protect the public interest – nor may they settle with it under a sectoral law in a civil procedure (as a form of access to justice under the Competition Protection Act), because not even in court can they freely, and in contrast to the public interest, dispose of the administrative decision. If there is no right to disposal in substantive law, it may not be recognised in a procedure either. A settlement between the public and private interests is impossible based not only on the principles of separation of powers (with the legislator, not public administration, specifying the public interest) and of legality, but also those of substantive truth and of discretion in evaluating evidence (Arts. 8 & 10 of the GAPA). It is since the authority itself estimates not only legal aspects of a case but also questions of fact rather than whether the parties are able to reach an agreement concerning this (Jerovšek et al., 2004: 410). Discretionary power entails neither mediation nor settlement, as in discretionary decision-making. An administrative body is bound to proceed within the scope of the given discretion and in accordance with its purpose.

However, provided that conditions for settlement as laid down in legislation are satisfied, the civil servant conducting the administrative procedure is nevertheless obliged to encourage the parties – pursuant to the principles of the protection of clients' rights and public benefit, and of procedural economy and respect of legality – to negotiate a settlement, but within the administrative procedure rather than upon a suspension of it (as opposed to the CPA). Along the lines of those principles, a partial settlement is possible – only concerning one part of the object of a procedure. In such case, civil servants, although in an authoritative position *vis-à-vis* the clients with opposing interests, acts as a mediator. They do not dictate solutions (although allowed to state their estimation) nor de-

³⁰ Decision of the Supreme Court of the RS, no. III Ips 33/2004, of 6 April (VS40687).

cide on a settlement's validity, but only on a potential infringement of other guaranteed entitlements, or its effect on the further procedure. If the settlement is concluded legally, the procedure is discontinued in this part with an order (under special law, settlement is exceptionally incorporated in the decision, like in denationalisation). If a settlement infringed on a public benefit, public morality or a third party entitlements, it would have to be – under par. 2 Art. 137 of the GAPA – rejected through an order; pursuant to the principle of investigation, the procedure would continue. A settlement is deemed final when the record of it is read and signed, and it becomes effective immediately unless settled otherwise. As a general rule, than, (a record of) settlement may not be contested with remedies available under the GAPA and the ADA, being a bilateral agreement rather than a concrete administrative act. Appeals may only be filed against the order(s) or decision issued in a procedure involving an (attempted) settlement if the latter has not been carried through or has not been concluded in compliance with the law – or else the settlement is to be contested in a litigation proceeding as agreements made under private law.³¹

In praxis, settlements pursuant to the GAPA are not frequently applied institutes³², because in most proceedings there is only one private party involved, while a condition laid down in the GAPA is that – at least two – clients with opposing interests participate, and reach an agreement. Even less is known about mediation, which is not even regulated by the GAPA. On the other hand, it is used in individual high-profile cases, such as, for example, the first administrative case of 2008, involving nine parties to a mediation process over the environmental protection consent for the Tenetiše landfill site (Ristin, 2008). In general, it is characteristic for mediation in the public sector that – in addition to being subject to the public interest – there are usually several conflicts to be resolved, and thus several parties to a procedure, from individuals and organisations to civil initiatives. Such disputes must be dealt with in a full perspective; administrative procedure may only be one of the loci where conflicting interests intersect and collide.

Broadly speaking, a settlement between clients (as an actual agreement reached past the authority either prior or in consequence) may also be

³¹ A similar rule applies to the civil procedure – settlement cannot be challenged through any (extraordinary) remedy under the CPA, but only through litigation as action for annulment of a settlement with a suspensive effect.

³² Only in denationalisation procedures, judging from case law; Breznik et al., 2008: commentary to Art. 137 of the GAPA.

identified in some other institutes laid down in the GAPA. Such case is, for example, the discontinued execution under Art. 293, when an execution procedure was initiated on the proposal of the entitled party but the latter has withdrawn it because having settled with the obliged party – provided that the execution is only in the party's, and not also the public interest. Further, another such institute is waiver of the right to appeal under the GAPA (since January 2008 – Art. 224a), as such waiver may be settled upon by the party and accessory participants to a procedure, and it results in immediate finality and enforceability of the administrative act. In addition to these, we find in the GAPA a kind of settlement between the public and private interests – although only in a subsidiary and procedurally determined form – in situations of an authority's implied decision, i.e. when the law provides for a fiction of positive decision after the time limit set for issuing a decision has expired. The GAPA provides that only in case of collective decision – procedures where several authorities are to reach a joint decision; similarly under some sectoral laws, e.g. under the Energy Act in case of consents to project conditions.³³

Thus, the GAPA and the CPA regulate settlement rather differently, although the two laws have some similar procedural provisions (e.g. for the purposes of procedural economy, effort exerted on the part of the authority conducting a procedure to make the parties settle). According to the theory of mixed legal nature of judicial settlement (although a preliminary settlement is also possible), this institute incorporates both substantive and procedural elements and effects, as it ends a dispute, has the effect of a final judgement (i.e. *res iudicata*), and permits enforcement. A greater similarity concerning settlement may be identified between the GAPA and the non-litigious judicial procedure, where the *ex offio* principle does not apply to such extent.

Unlike the Slovenian GAPA, some laws on (general) administrative procedure applying abroad, e.g. those in Germany and Finland, provide for the institute of administrative agreement. Furthermore, the administrative agreement, or settlement, is recommended by international organisations, such as Sigma and the OECD – primarily in taxation, concessions, and urban planning – on grounds of a cooperative, partner-like administration. The appropriate German law (*Verwaltungsverfahrensgesetz*, VwVfG) stipulates in Arts. 54–62 that a legal relation under public law may be constituted, amended or annulled by agreement (Pitchas et al., 2008: 98

³³ Jerovšek et al., 2004; commentaries to Arts. 18, 209 & 222 of the GAPA.

& 151) provided that this is not contrary to the law. This, however, explicitly refers to a situation when *»the authority may, instead of issuing an administrative act, conclude an agreement under public law with the person to whom it would otherwise direct the administrative act«*. This is possible *»by mutual yielding (compromise)«* in order to *»eliminate an uncertainty existing even after due consideration of the facts of the case or of the legal situation ... if the authority considers the conclusion of such a compromise agreement advisable in order to eliminate the uncertainty«*. Hence, the ground for settlement is an unclear actual situation or substantive law application. The Finnish Law on General Administrative Procedure of 2003 focuses on encouraging good administration and access to justice, and on the other hand – where the institute of administrative agreement, although only generally outlined rather than regulated in detail – on raising the quality and output of administrative services. The only obvious limitation is that the principle of legality must be adhered to.

4. Mediation and settlement under the GAPA *de lege ferenda*

Currently, the requirement for settlement in an administrative procedure is the substantively determined freedom of the clients to dispose freely of the claim that is the object of the procedure. Within the entire scope of administrative procedure, this is only possible in the cases:

- when a formally defined (in a sectoral law) administrative matter is the procedural framework for the resolution of a substantive law dispute – in which the authority only decides which party is obliged to give, or do or omit something in relation with the another party – or
- within the discretion to arrange the relation given to it by the legislator itself – when the authority only enters into an agreement with the client concerning the manner, but not the substance, of recognising a right or imposing an obligation. This, however, is not a *»true«* settlement – the latter would only be realised if negotiations and decision-making by discretion could be introduced with regard to the relation between the public and private interests as the substance of an administrative matter, as in the German GAPA.

As one of its various activities, the Slovenian Mediators' Association (<http://www.slo-med.si/401.html>) presented the draft White Book on Mediation in June 2008, aimed at defining the framework that would provide all three branches of power with a basis for adoption of a national strategy of amicable dispute resolution, the missing legislation, and financing issues. Mediation is seen as leading to fewer backlogs in conducting the procedures, and to more tolerant and correct interpersonal relations. We may conclude from it that mediation with settlement is possible and necessary – within the boundaries of the substantively specified public interest – in some, but not in all or most administrative matters, i.e. under the GAPA.

Within special administrative fields, mediation and settlement in principle may be defined by the legislator through sectoral law(s) at three possible levels:

1. through a (re)definition of certain relations between public administration bodies and entities with private interests as belonging to the specialist rather than authoritative aspect of public administration, when a consensual solution can be concluded with the addressee(s) without compromising the public benefit or third party rights (e.g. in education, health care, social welfare, public utilities);
2. through a direct instruction to an administrative body, or a subsidiary discretion clause, that it may, within the scope specified by the law, harmonise the public interest with private interests in administrative matters when such a solution is efficient in the common social context and the administrative system as a whole (win-win solutions);
3. through definitions of the possibility of a (partial) cancellation of a debt, or the manner in which an obligation is to be fulfilled or a right realised, after the administrative matter itself has already been finally determined through a – possibly judicially reviewed and upheld – unilateral administrative act (settlement within the execution).

Less problematic than settlement seems to be an incorporation of (procedural only) mediation into the GAPA, provided that it is defined as a form supplementing the administrative and judicial procedures in administrative matters; within the concept of administrative procedural law, only within the relation among the clients. Currently the GAPA does not even provide for such mediation, although this would clearly make sense in a

number of cases. These are mainly the matters where disputes between contrary (parental disputes, social security insurance rights and obligations, disputes between public network operators and users) or colliding (construction and environment related matters) parties are possible and in fact common in reality. A minor change in the GAPA is needed, adding to reasons for staying a proceeding under Art. 153 the initiation and conduct of mediation, which would entail an interruption in the running of time limits in administrative procedure.

However, we need to bear in mind several conceptual limitations if and when amending the GAPA. Firstly, it has to be maximally distinguished between the procedural mediation and the substantive settlement, although mediation may, if possible under the relevant sectoral provisions, result in a settlement – especially within predominately servicing public services, where unilateral determination is only appropriate if a consensual solution with the user cannot be reached. Secondly, according to the principle of subsidiary applicability of the GAPA, it is nevertheless more appropriate to regulate specific features of a certain special administrative field by sectoral legislation, and by the GAPA only if there are several or most such fields³⁴ and if at the same time the legislator judges that it makes sense for a general law to include a referring (promoting) provision as a basis for those preparing sectoral procedural arrangements, as well as a basis on which an administrative body may itself refer to an ADR process. Thirdly, if the institute of mediation was incorporated into the GAPA, it would be sensible to lay down some fundamental limitations for the case of administrative matters, such as determining requirements for the mediator and his or her relation towards the civil servants. Fourthly, although non-formal in principle, the mediation process should be at least minimally regulated, e.g., who indeed may propose mediation (the client or the authority or perhaps even a mediation hearing is mandatory as under the CPA), costs, when the administrative procedure resumes because the public benefit or parties' rights require so, suspension effects, exclusivity or parallelism of different procedures (Vetter, 2004: 7) etc. Fifthly, for the purposes of the protection of public interest and legality, the principle of confidentiality in the mediation process, unlike in the civil procedure, is necessarily subsidiary, and so is the adversarial principle. Finally, if settlement is to be allowed (by a special law) it should have legal nature of an instrument permitting enforcement.

³⁴ The majority of administrative matters are not such, as mediation would be contrary to the nature of those cases.

Regarding settlement potentially provided for by the GAPA with regard to the relation between the public and private interests, however, there seem to be more reservations than opportunities and benefits. Thus the CE's Recommendation, although it does encourage the states to enact mediation in matters where administrative body issues an individual administrative act, it does so with limitations. For example, mediation is limited to claims or acts relating to a sum of money, or the primary administrative decision-making along with a simultaneous admissibility of a suspension of act until the conclusion of mediation (similarly as with the provisional decision) etc. and the possibility of a subsequent judicial review – and thus it is not even mediation in full sense, not to mention settlement. In conclusion, within harmonisation of the public and private interests, it would thus be sensible to include both mediation and settlement in sectoral administrative procedural law and, to a larger degree, in administrative dispute, but not in the GAPA, especially with regard to the procedures initiated on the authorities' own motion.

According to the CE's Recommendation, each country regulates ADR procedures between administrative bodies and private parties/interests on its own. While doing so, it must observe the principles of due process, impartiality, and equal protection of clients/parties' rights, i.e. the safeguards of not only administrative, but also constitutional procedural law. Nevertheless, mediation in administrative cases entails a stronger voice of weaker persons, i.e. a democratisation of the administrative system. According to the experience (primarily) of ombudspersons, a dispute is frequently resolved merely by people having the chance to voice their views. Nevertheless, for persons holding financial, political or other power, these processes enable them to legally employ such instruments to ensure that their particular interests prevail,³⁵ even over the public interest. In addition, based on experience of new public management analysts, when offered opportunities, people want more, expecting to be able to »bargain« with the public domain.

If mediation, and perhaps even settlement, between the public and private interests were incorporated into the GAPA, a safeguard against (lawful) misuse would therefore have to be provided at least as a further extraordinary remedy, which in exceptional cases – by analogy with extraordinary repeal under Art. 278 of the GAPA – would make it possible to assert the

³⁵ On corporativism Kovač et al., 2009, and Pitschas et al., 2008: 23; on partitocracy Virant, 2009.

public benefit, even over legality. This is pointed to as a possibility by the CE's Recommendation; as well as by Pirnat (2000: 95, 108), who stresses that for the purposes of protecting the public benefit, the fundamental rule of contractual law, i.e. *pacta sunt servanda*, cannot be applied to administrative agreements. Exceptionally, and taking into account the principles of reasonable expectations and proportionality, unilateral actions affecting concluded agreements must be allowed, which may be realised in different forms, such as a law-based general administrative act, an individual administrative act, or a real act.³⁶ It thus should be allowed in cases of settlement – by analogy with the already enacted authoritative actions – that an agreement is repealed or altered, both directly by the authority having entered into it and through court action, with the private party, as in the extraordinary repeal under the GAPA, being entitled to financial compensation.

5. Conclusions

Administrative matters primarily entail the determination of public law relations between the authorities and private parties, where protection of public benefit usually has precedence. Because public benefit is specified by the law, yielding in its realisation through a settlement between the public and private interests is in principle illegal, even unconstitutional, both on the part of the private party and of the administrative body, as they do not have the public interest at their disposal, as the legislator does. Contrary to this, settlement is possible, both under the GAPA and in special forms in special administrative procedures, if the matter concerned is an agreement between private parties with opposing interests, or a reduction or cancellation of a public law obligation for the purposes of increased efficiency of the system of power at large, facilitation of the economy, and social welfare. Therefore, an introduction of mediation and settlement in their true essence in administrative procedure would be a gradual one – redefining administrative law closer to private than to public law. Since such an approach would endanger the mission of administrative law, changes realised so far are just of qualitative nature both in Slovenia and abroad. Nevertheless, although the administrative procedure differs in its substance from the civil procedure, it is being supplemented with –

³⁶ On actions affecting final decisions Šinkovec, 1994: 3–15.

similarly to litigation institutes already established in the GAPA, such as finality, adversarial principle, waiver of the right to appeal – possibilities of mediation in the sense of a procedural clarification if not harmonisation of interests. It thus seems that despite different models in the appropriate German Act, the Slovenian system under the GAPA would follow the needs of social environment if applicable rules were partially supplemented. On the other hand, more radical changes in accordance with specific characteristics of particular administrative fields might be expected in future in sectoral administrative law.

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POSREDOVANJE I NAGODBA U UPRAVNIM STVARIMA U SLOVENIJI

Sažetak

Za razliku od sudskih postupaka, bit upravnoga postupka nije rješavanje spora među strankama u postupku, već priznavanje prava stranke u postupku uz istovremenu zaštitu javnog interesa. Stoga je upitno – uzevši u obzir čak i ustavno pravo – je li moguće posredovanje i nagodba između privatnih interesa i javnog interesa u upravnim stvarima. S druge strane, elementi nagodbe uvode se u javnu upravu kroz razvoj partnerstva. Potrebno je razlikovati postupak donošenja provedbenih propisa od upravnog postupka prema Zakonu o općem upravnom postupku. Autorica smatra da bi uključivanje instituta posredovanja i nagodbe u taj zakon, onako kako se to čini u građanskom postupku, donijelo više štete nego koristi, te da je važeći sustav koji ih dopušta u posebnim područjima dovoljan. Smatra da ugovorno rješavanje javnopravnih odnosa ima znatno veću potencijalnu primjenu u posebnim upravnim područjima.

Ključne riječi: upravni postupak, upravna stvar, upravni spor, alternativni načini rješavanja sporova, posredovanje, nagodba, javni interes / javno dobro, stranke s oprečnim interesima, dovršenje, upravni ugovor, ugovor u javnom pravu