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Mediation in proceedings involving entities of the public finance sector (in the light of Art. 54a of the Public Finance Act)

Abstract: The amendment to the Public Finance Act (adding Article 54a) and to the Act on the responsibility for a breach of public finance discipline of 2017, introduced the possibility of concluding a settlement regarding the disputed civil law liabilities by entities of the public finance sector. Execution of a lawful settlement will not constitute a violation of public finance discipline. Until the amendment came into force, the pursuit of claims by the public finance sector entities was possible only in court. Currently it is also possible in mediation proceedings.

Keywords: MEDIATION, CIVIL LAW RECEIVABLES, ENTITIES OF THE PUBLIC FINANCE SECTOR, MEDIATION-BASED SETTLEMENT, RESPONSIBILITY FOR A BREACH OF PUBLIC FINANCE DISCIPLINE

Introduction

The amendment of the Public Finance Act and the Act on the responsibility for a breach of public finance discipline of 7 April 2017,¹ which consisted in adding Art 54a to the former,² stipulating the possibility of settlement of disputed public-law liabilities by an entity of the public finance sector (hereafter: PFS entity) and also in adding Para 4 to Art. 5, as well as changing the wording of Art. Art. 11 and 15 of the ARBPF³, offers new possibilities of settling legal disputes outside the court.

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¹ Art. 9 of the Act of 7 April 2017 on changing certain acts with the aim to simplify claiming receivables, *Journal of Laws* of 2017, item 933, came into force on 1 June 2017.

² The Act of 27 August 2009 on public finances, i.e. *Journal of Laws* of 2017, item 2077, hereafter referred to as "PFA".

³ The Act of 17 December 2004 on the responsibility for a breach of the public finance discipline, i.e. *Journal of Laws* 2017, item 1311, hereafter referred to as "ARBPF".

Until the moment the amendment came into force, the only possibility of settling such liabilities had been through a regular court procedure. Organs which were responsible for management of public finance means, often being aware of a possibly unfavorable settlement on their part, did not have any other opportunity but to ‘struggle’ through a detrimental, time-consuming and cost-intensive court procedures. The new regulation is thus undoubtedly beneficial from the point of view of managing public means.

In practice, an actual application of Art 54a PFA is also determined by the ARBPFĐ, which – before the amendment came into force – had made carrying out mediation procedures virtually impossible. This was most often the reason why subjects of the public finance sector resigned from searching for alternative ways of settling disputes for fear of breaching the public finance discipline. Along with the introduction of Art 54a PFA, the legislator changed the regulations concerning the ARBPFĐ. It was established in them that if the particular conduct described as an act which breaches the public finance discipline results from settlement of a disputed case of civil-law liability, made in compliance with regulations of law, then such a conduct is not a breach of public finance discipline. This results from Art. 5 Para 4, Art. 11 Para 2 and Art. 15 Para 2 ARBPFĐ.

Time will show whether the amendment of Art. 54a PFA and Art. 5 Para 4, Art. 11 Para 2 and Art. 15 Para 2 ARBPFĐ will actually lead to a breakthrough. There exist “inhibiting factors” which, in practice, can impose limitations of making use of this institution by entities of the public finance sector.

In the light of Art. 54a Para 2 PFA, before taking the decision with regard to mediation procedure, an organ of the public finance sector should assess the effects of concluding a settlement, taking into account primarily the circumstances of the given case as well as whether there exist premises in favor of acknowledging their legitimacy, and if there is a chance to meet them. The assessment rendered in writing ought to also include an analysis of the possible settlement of the disputed case in the traditional manner, that is executed via application of a regular court procedure. This means mentioning the expected duration of such a proceeding and costs of court or arbitration proceedings. Bringing a case before the court is connected with the necessity of paying due court fees derived from the value of the object of dispute (legal action) (hereafter: VOD). If, it turns out to be necessary to commission an expert’s opinion or to conduct a separate procedure by another organ, the settlement of which could determine the court’s judgement, if it is indispensable to hear witnesses, examine evidence from documents, etc. – all these factors will lead to a substantial increase in the costs of proceedings.

Analyzing the binding scope of Art. 54a PFA, there appear certain doubts as regards the manner of understanding some of the notions due to their vague wording.

Civil-law liabilities and public-law liabilities. The object of mediation proceedings

Mediation proceedings with the participation of PFS entities, which are dealt with in Art. 54a PFA, refer to disputed civil-law liabilities. The civil-law character of the liabilities is thus the condition of this regulation applicability. This means that it can not be extended over tax liabilities and the so-called untaxed budget receivables of the public-law character (e.g. fees for land measuring and cartographic services, VAT, fees for issuing vehicle registration books). The definition of tax receivables is contained in Art. 3 item 8 of the Tax Code,⁴ while the notion of untaxed budget receivables, together with their open catalog, is defined in Art. 60 PFA.

The PFA does not contain a legal definition of the term of civil-law liabilities. According to the wording found in a dictionary, the term “liabilities” refers to an amount, a sum of money, that is to be paid to somebody.⁵ In order to explain this term, one must consult, among others, Art. 55 and the following of the PFA, which deal with sources of civil-law liabilities. They are primarily regulations of law, administrative acts and civil-law relations. Thus, it means all kinds of means allotted to state budget entities, budget companies, auxiliary plants as well as special purpose funds as their beneficiaries, on the basis of any legal title, in particular acts or executive acts, contracts, torts or administrative actions (chiefly decisions). These liabilities can be remitted in total or in part, or their payment can be deferred or spread out to be cleared by instalments (Art. 55 PFA). In practice, remitting, spreading out in instalments or deferring payments are the responsibility of organs of the subjects indicated in Art. 58 PFA (among others, Minister of Finance, province governor, authorizing officer managing a state special purpose fund).

By “civil-law liability” one should understand a benefit in cash which results from the relation of the civil-law character, in the framework of which an entity undertakes to perform actions with the aim to obtain it (that is pursue the claim). The disputed nature is connected with the fact that the debtor questions the claim as far as the principle, height or its ti-

⁴ The Act of 29 August 1999 – Tax Code, *Journal of Laws* of 2019, item 900 as amended, hereafter referred to as “TC”.

⁵ M. Szymczak (ed.), *Słownik języka polskiego PWN, tom II L – P* [A Dictionary of the Polish Language, vol. II, L-P], Warszawa 1998, p. 253.

tle are concerned. When the PFS entity is a debtor in relation to the subject with which they entered into an agreement or remained in a different civil-law relation with the latter, the question of dispute is not material. The case is different, though, when the debtor is the subject and a PFS entity is the creditor. Then it is the latter who are responsible for documenting the “disputability” of the claim. The very statement itself that there exists a civil-law liability and it has not been cleared cannot be accepted as sufficient. It is indispensable to prove that, for instance, it is impossible for the subject to pay the due liability or that the subject questions its legitimacy on principle. Justification of making the decision to pursue the claim under Art. 54a PFA will require including an analysis in the assessment of effects of compounding the debt. This is of paramount importance in view of the later evaluation of the legality of reaching the settlement, which is carried out by organs in control of the PFS entity in this respect. The lack of proving the “disputability” can be a reason to institute proceedings against the entity, concerning a breach of public finance discipline. In fact, in accordance with Art. 5 Para 4, Art. 11 Para 2 and Art. 15 Para 2 ARBPF, execution of the settlement in the case of disputed civil-law liability, which was reached in compliance with regulations of law, does not qualify as breaching public finance discipline.

What is essential, however, in the case where a settlement was concluded between the PFS entity and the subject as regards remitting the liability or spreading it out to be paid in instalments, Art. 54a does not apply under Art. Art. 55-59 PFA.⁶ Also, in this case there is a lack of the element of dispute between the parties regarding the height or the title of the liability. Spreading out payment of the liability by instalments cannot offer a premise (cause) to launch mediation under Art. 54a PFA; still, it may be its effect.

Civil-law liabilities will be public means not counted into those whose height and collection are based on financial governance and enforcement, and which do not make untaxed budget liabilities mentioned in Art. 60 PFA. In the situation when one cannot prove with certainty that the given liability is or is not of the public-law or civil-law character, the criterion of source (title) of this liability ought to be applied.⁷ Apart from the already quoted Art. 3 point 8 TC and Art. 60 PFA, the regulation of Art. 5

⁶ Similarly Walczak, Uwagi do art. 54a [Comments on Art. 54a], In: Walczak (ed.), *Ustawa o finansach publicznych. Komentarz dla jednostek samorządowych*, Warszawa 2017.

⁷ J. Salachna, M Skrodzka, *Uгода mediacyjna w sprawie spornej należności cywilnoprawnej a ocena skutków prawnych jej zawarcia – perspektywa prywatnoprawna i publicznoprawna (art. 54a ustawy o finansach publicznych)* [The mediation-based settlement of a disputed case of civil-law liability and an assessment of legal effects of its concluding – the private-law and public-law perspective (Art. 54a PFA)], „Przegląd Ustawodawstwa Gospodarczego” 2018, no. 7, p. 11.

Para 2 PFA will be helpful in this respect. In the light of this regulation, which indicates exemplary incomes, the following should be considered to be civil-law liabilities:

- revenues from sales of goods and services provided by PFS entities;
- incomes from the property of PFS entities (in particular revenues from lease agreements, contracts of tenancy and other agreements of a similar character, interest on means deposited in bank accounts, interest on loans granted and securities, dividends from the property rights held);
- legacies, bequests and donations made to PFS entities;
- compensations due to PFS entities;
- financial means obtained by PFS entities from sureties and warranties granted;
- revenues from sales of property, objects and rights, which are not incomes from sales of securities or privatizing procedures.

The notion of untaxed budget liabilities was explained by the legislator in Art. 60 PFA. They are understood as liabilities that are not taxes or fees, which constitute an income of the state budget or the budget of a unit of local self-government and which result from public-law relations. Still, as the Provincial Administrative Court in Gliwice stated in the sentence of 14 February 2018, “they are liabilities, the duty to settle of which constitutes realization of regulations of law and is not an effect of violating these regulations. The range of the notion of public-law liabilities should exclude not only public incomes resulting from civil-law relations, but also those, the source of which are torts.”⁸

A significant question that is revealed against the background of Art. 54a PFA is the possibility of applying civil-law constructions in legal relations with the participation of PFS entities with reference to agreements which are of the mixed character, i.e. of the civil-administrative one. Such agreements include, in particular, contracts of public procurement drawn in compliance with the Law of Public Procurement⁹ or agreements to obtain grants according to the PFA. In the case of agreements on grants, the possibility of reaching a settlement under Art. 54a PFA will require a deepened analysis of admissibility of concluding it not only with reference to the very premises themselves, but also regarding the type of grant. Such settlements should be the subject of the so-called evaluation of effects of reaching a settlement.¹⁰

⁸ Judgement of the Provincial Administrative Court in Gliwice of 14 February 2018, I SA/Gl 1326/17, Lex no. 2460035.

⁹ Act of 29 January 2004 – Law of Public Procurement, *Journal of Laws* of 2004, item 1986 as amended, hereafter referred to as “LPP”.

¹⁰ In the doctrine there are basically doubts as regards the possibilities of reaching a settlement under Art. 54a PFA with reference to agreements on grants (subjective, objective or pur-

A similar case offers when it comes to public procurement contracts that are mentioned in Art. 144 LPP.¹¹

The subjective scope – stakeholders

The possibility of concluding a settlement under Art. 54a PFA refers to a particular circle of stakeholders. Judging from the specifics of this procedure, the circle of subjects who can participate in mediation proceedings groups – on the one hand – broadly understood PFS entities including those listed in Art. Art. 8 and 9 PFA; on the other hand – the subjects which these entities have entered into an agreement with or those which they remained in a different civil-law relation with. The first group includes, among others:

- public authority organs (organs of government administration, organs of local government administration, organs of state control and protection of law, courts and tribunals;
- the Polish Academy of Sciences and organizational units;
- National Health Fund;
- public colleges of higher education;
- independent public healthcare centers;
- state legal persons;
- companies of the State Treasury (e.g. PLL LOT, PZU S.A., PZU Życie S.A.);
- state organizational units (e.g. ZUS);
- legal persons with shares of the State Treasury;
- executive agencies;
- *statio fisci* of the State Treasury;

poseful passed on the basis of agreements concluded in compliance with the requirements defined in Art. Art. 150 and 250 PFA). Inasmuch as in the case where the beneficiary of the grant pursues a claim against the organ offering the grant (e.g. an organ running a non-public educational center against the commune or the county) the regulations of the Code of Civil Procedure relating to a mediation-based settlement can be applicable. However, in view of the public-law character of such a subsidy, the practice of reaching settlements can raise doubts. On the other hand, in the situation where it is the granting organ who pursue the claim against the beneficiary, this is not a claim of the civil-law character, but the case means claiming untaxed budget liability of the public-law nature. The organ should then initiate administrative proceedings and claim the decision obliging the beneficiary to return the grant.

¹¹ More on this subject to be found in: W. Robaczyński, Z. Zieliński, *Dopuszczalność zawarcia umowy przez jednostkę sektora finansów publicznych w świetle znówelizowanych przepisów ustawy o finansach publicznych* [Admissibility of reaching a settlement by a PFS entity in the light of amended regulations of the PFA], „Finanse Komunalne” 2018, no. 1-2, p. 7; A. Ostrowska, *Dopuszczalność zawierania umowy mediacyjnej w sprawach dotyczących w świetle odpowiedzialności za naruszenie dyscypliny finansów publicznych* [Admissibility of reaching a mediation-based settlement in cases of obtaining grants in the light of responsibility for breaching public finance discipline], „Przegląd Ustawodawstwa Gospodarczego” 2018, no. 7, p. 22.

- units of local self-government and their unions;
- organizational units of local self-governments;
- communal legal persons (e.g. communal services plants, communal management plants);
- state special purpose funds;
- institutions of budget economy;
- plants of local government budget;
- institutions of culture – state-owned, run by local governments, etc.

The circle of persons taking part in mediation proceedings with the participation of PFS entities in cases of disputed liabilities includes subjects that remain in a civil-law relation with the entities, in consequence of which they are obliged to pay civil-law liabilities or may demand such liabilities from a unit of local self-government. The basis of this relation is most often the agreement drawn between them.

It seems that the circle of stakeholders can also extend over other units not qualifying as PFS entities which have been given public means to use or to have at their disposal, or an organ which manages the property of these units. This results from the regulations of the ARBPFĐ, which under Art. 13 regulates breaching the discipline connected with management of EU and foreign means. And also, in the light of Art. 11 Para 2 ARBPFĐ in the scope of possible violation of regulations that concern making individual kinds of expenses from public means.

In each case, in order to avoid problems at the stage of mediation proceedings, it is of key importance to appoint persons who are competent to conclude a settlement in PFS entities. They are most frequently the managers of given units, whose establishment comes from the founding act or from an entitlement issued by the organ that controls this unit. For instance, relevant entitlement for a local self-government budgetary unit will come from the board, village or town mayors, president of the territorial government, or from a minister or another central organ with reference to state budget units.

Assessment of effects of reaching a settlement

In the light of Art. 54a PFA, a PFS entity can enter into a settlement if the evaluation, which has been executed, proves that the effects of the settlement will be more beneficial to this unit (or to the State Treasury, or to the budget of the local self-government unit) than the possible result of court or arbitration proceedings. Thus, in the first place, the unit – before it enters into mediation proceedings – must present a legal-financial analysis in writing, which will contain references to all the aspects of this procedure. Preparation of the evaluation is to precede the basic mediation

proceedings aimed at concluding a settlement. The condition of moving on to the phase of mediation is the statement that effects of the settlement reached will be more beneficial.

The legislator does not explain, however, what criteria should govern a PSF entity in assessing the effects, or when this evaluation should be executed. Hence, there appear a number of doubts of the formal-legal-organizational nature, which the unit has to resolve. Firstly, what will be the most appropriate moment to carry out the relevant evaluation: not until upon analyzing evidence material, documentation, opinions of other organs that the PFS entity makes its standpoint dependent on in the given respect, or perhaps such an assessment does not require collecting all the evidence material? It seems that the evaluation should be drawn after initial establishment of the conditions of settlement to be reached, which makes it indispensable for the unit to obtain the largest possible number of data.¹² Secondly, should this assessment be undertaken in each case of proceedings in which a PFS entity will have to settle the disputed civil-law liability, or is this necessary only in the case of filing a concrete application by the subject which endeavors to reach a settlement? Thirdly, in what way should one evaluate “the justifiability of disputed demands”? It appears that in the context of factual and legal circumstances of the given case it is indeed vital to decide whether this requires carrying out a penetrating assessment by a professional lawyer (a solicitor, attorney-at-law, the General Counsel to the Republic of Poland) or by a representative of the entity, who is in charge of matters of this character. Fourthly, who should actually conduct such an evaluation on behalf of the PFS entity: should it be a lawyer (employed by the PFS entity or one cooperating with it), specializing in the area which is the subject of proceedings and holding knowledge in the field of broadly understood substantive and procedural law, or will it be a person who is “familiar with” alternative methods of resolving disputes, especially arbitration, the possible costs of which are the subject of the analysis? Or maybe this should be executed by a team of analysts composed of specialists in different areas, like the chief accountant (Treasurer) of the entity, public procurement specialist, etc.? At last, minding the high value of the disputed object (the issue raised by environments of lawyers active in the sphere of PFS), it seems that the opinion should be drawn up by the General Counsel to the Republic of Poland. Fifthly, what obligatory elements should such an evaluation include so as to be able to decide in advance for the proceedings to be settled by mediation – apart from circumstances of the case, justifiability of disputed demands, possibilities of their satisfying by the PFS entity, expected duration of the court

¹² See: J. Salachna, M. Skrodzka, *op. cit.*, p. 10.

or arbitration proceedings, or the costs – which the legislator mentions directly in Art. 54 Para 2 PFA? Should it cover also financial, organizational and temporal effects of concluding or not concluding a settlement? Sixthly, how to practically justify the conviction that the choice of the road leading to reaching a settlement will be more “beneficial”? What criteria should be applied: solely financial or also organizational, temporal ones, or perchance those taken into consideration by organs of the Supreme Chamber of Control of the Republic of Poland in case they control the activity of PFS entities, i.e. compliance with the law (legality), reliability, economic effectiveness, purposefulness. It appears that more beneficial effects of a settlement refer to the possibility of obtaining income from civil-law liability at a shorter time and without the necessity of bearing additional costs. This means that even if the retrieved liability finally is lower than the possibly adjudged expenses, then the sum of all “for and against” resulting from possible difficulty of execution of the whole of the claim will speak in favor of choosing the out-of-court path.¹³ Seventhly, according to what criteria should the “justifiability of a settlement” be evaluated, for instance in the case of a claim relating to contractual penalties? If the ordering party has redounded to a contractual penalty, is the possibility taken into account of moderating this penalty on the basis of Art. 484 Para 2 of the Civil Code?¹⁴ Furthermore, it would be necessary to take into account the question whether the space which Art. 54a PFA has created can be used without evading or violating the mandatory provisions of law, especially that of public procurement (Art. Art. 140 and 144 PPA). Eighthly and lastly, how should the documentation of the work done by the persons or the team responsible for preparing the assessment of effects of reaching a settlement look like? Is it necessary to extensively document the process of “thinking” or this is not required? It seems that the whole decision-making process connected with application of Art. 54a PFA cannot be run in an uncontrolled way. It should however be suitably documented, e.g. through opinions expressed by lawyers, law teams, chief accountants, public procurement officers and the like, in order to prove its rationality and compliance with public interest, which is of crucial importance in the case of control of a PFS entity by the Supreme Chamber of Control.

Preparation of an assessment of effects of concluding a settlement is a vital element which precedes taking the road of outside-the-court settlement of the dispute. Nevertheless, in order that the evaluation should perform its task well, it must be a result of conducting a methodologically

¹³ Walczak, Uwagi do art. 54a [Comments on Art. 54a], In: Walczak (ed.), *Ustawa o finansach publicznych. Komentarz dla jednostek samorządowych*, Warszawa 2017.

¹⁴ The Act of 23 April 1964 – Civil Code, *Journal of Laws* of 2014, item 121 as amended, hereafter referred to as “CC”.

appropriate analysis, documenting the thought process which has led to formulating a prognosis as to a possible settlement. Such analyses ought to be rendered in writing and have proper substantive content (both legal and technical, for example) so as to be able to make an evaluation of the adequacy of this procedure in an effective manner. In the analytical process, one needs to take into consideration a series of circumstances, in particular – an assessment of risk of unfavorable settlement of the case by the court, mainly in the context of available case law regarding similar cases, the course of hearing of evidence, that is classically conceived risks of proceedings, but also the relation between height of the claim and costs and expenses borne on court proceedings (especially experts' opinions), risk of paying interest, financial stability of the opposing party and even social costs.

Assessing costs and risk of court proceedings is thus of great significance. A PFS entity must take into account the necessity of paying the court fee which makes 5% of the VOD. For instance, in cases dealing with construction works, the IT sector, or ones relating to public procurement, this is most often the maximum fee amounting to PLN 100 thousand.¹⁵ It is indispensable then to assess the expected and probable duration of court or arbitration proceedings, which – in the given category of cases – may take from 2 to 5 years. Consequently, the PFS entity must do calculations of costs of court proceedings, taking account of experts' opinions (an average fee for preparing an opinion by an expert ranges from PLN 7 to 10 thousand in cases relating to construction works which are of vital importance, yet certain opinions are even valued at PLN 200-300 thousand). Additionally, such opinions issued in complicated cases, frequently at the request of the opposing party, are complemented or new opinions are prepared, or still the opinions are questioned, which can prolong the proceedings considerably. A substantial cost of court proceedings is that of legal representations calculated in compliance with the directive of the Minister of Justice, depending on the VOD. Lastly, it is also necessary to take into consideration the interest paid for delays, which in the case of long-lasting proceedings can grow considerably, as well.

The risk connected with initiation of court proceedings against the subject, regarding the disputed civil-law liability, is primarily the lack of certainty as to the court's settlement. The court can allow the claim by the PFA entity as a whole, or can partially dismiss the action. The lack of certainty with regard to duration of court proceedings is tied to the risk that the proceedings will be prolonged because of a variety of circumstances

¹⁵ Which is the consequence of the Act of 28 July 2005 on costs of court proceedings in civil cases, *Journal of Laws* of 2016, item 623 as amended.

(like experts' opinions, counter-opinions, complementary opinions, witnesses, difficulty with processing the evidence). Therefore, there exists a fear of expiration of the claim. Another kind of risk is the uncertainty as to the organizational-financial stability of the opposing party, since potentially it is possible that after a few years of continuing the proceedings, the subject may not be in operation any longer in consequence of having declared bankruptcy or because of reduction of the property it will prove impossible to execute the liability and payment of costs. The risk of unrecoverability of debt is high then. In the case where the PFS entity loses the suit, it must reckon with the need to pay interest. On the other hand, in case the entity wins, there is a risk that the retrieved part of the liability will not compensate the costs of court proceedings anyway. In the assessment of risk connected with initiating proceedings, the PFS entity must also take into account the need to engage its workers in the trial and thus drawing them away from their regular duties at work and taking a series of actions which absorb the entity in an incommensurable way. At last, an important element of the risk, which the entity must take into account, are the social and reputational costs, which are again hard to assess.

Additionally, there arise certain threats from the fact that PFS entities manage public property. Inasmuch as the court's evaluation of the settlement reached will be made from the point of view of maintaining the premises of compliance with the law, admissibility of and not violating the principles resulting from Art. 58 CC, in the case of evaluation of reaching the settlement, which is executed by the Supreme Chamber of Control, abiding by the criteria of reliability, purposefulness and economic effectiveness will be checked additionally. Under Art. 44 Para 3 PFA, PFS entities are responsible for expending means in a purposeful and economical manner. In turn, not taking action towards reaching a settlement – as long as the statutory premises have been fulfilled – may be considered the basis to bring charge against the entity of non-purposeful and economically inefficient actions. An assessment of effects of concluding a settlement, which includes, for instance, related circumstances, makes a significant stage of proceedings under Art. 54a PFA.

Model of procedure

The legislator has, in a general manner, defined the principles concerning the possibilities of reaching a settlement in a disputed civil-law case. The principal condition here is to carry out an assessment to find out whether the effects will be more beneficial to the entity than the expected result of court or arbitration proceedings. It has also been indicated what criteria the entity should apply while conducting the assessment, that is

circumstances of the case, justifiability of disputed demands, chances of satisfying them, or the expected duration as well as costs of the proceedings. It follows from Art. 54a PFA that the assessment of effects of concluding a settlement is to be made in writing. However, the procedure within the entity itself – preceding possible reaching the settlement, with reference to which this evaluation is to be formulated – has not been defined.

Due to the fact that there are no clear legal directives in this respect, it seems desirable to create a sketch of a model procedure or good practices guidelines for application of the regulation of Art. 54a PFA, which will gear towards concluding a settlement by the entity. Such a procedure should consist of the following stages: (1) analysis (an assessment of effects of reaching a settlement); (2) negotiations (mediation proceedings); (3) conclusion of a settlement.

The first stage, analytical in its character, consisting in evaluating the disputed situation and possible variants of its solving, should cover an assessment of effects of reaching a settlement by the PFS entity. At this stage, the entity must establish a team responsible for analysis and negotiations, composed of members of the personnel who hold relevant knowledge of the dispute and the course of the development of the case to date. Representatives of the subject (the opposing party) will participate in works of the team. This team, relatively to the scale of the dispute, should conduct a multi-faceted analysis, taking into consideration the premises following from Art 54a PFA. At the same time, the criteria of legality, economic effectivity, purposefulness and reliability must be taken into account, the compliance with which may be evaluated during control executed by the Supreme Chamber of Control in the future. All establishments ought to be documented in writing, in accordance with Art. 54a Para 2 PFA, which was mentioned earlier. If, in consequence of the conducted analysis, the PFS entity concludes that reaching a settlement will be more beneficial to it than the probable result of court or arbitration proceedings, it will go on to the next stage.

The second stage (of the negotiation character) means mediation proceedings concerning the disputed civil-law liability held between the PFS entity and the subject which the former remains in a civil-law relation with. Prior to embarking on the mediation, the entity should appoint a team or delegate personnel who took part in the earlier works of the analytical team. It is necessary to make preparations for the mediation process, among others, by determining an effective negotiation strategy, the minimal and maximal targets which the entity has assumed, as well as by defining optimal (indirect) goals that would be acceptable and compliant with law in force, at the same time recognizing and understanding the targets and arguments of the other party. This is indispensable to be able to assess

whether reaching an agreement is possible. The next step is conducting mediation and working out conditions of the settlement, which will comply with the assumed goals and the law, followed by developing the final document of the settlement which will again be compliant with the binding regulations of law. The whole stage should be documented in writing, particularly with regard to the vital points that have been established during the mediation. This is indispensable in order that the entity could prove rationality of its actions and their compliance with public interest in case of being controlled later.

The third and the last stage involves concluding a settlement according to relevant procedures which follow from the Code of Civil Procedure (CCP). In the light of these regulations, a settlement can be reached before the court or before a mediator. In the first case, the settlement is drawn between the parties, i.e. the PFS entity and the subject in the course of court proceedings. As regards the other option, this is accomplished in the presence of an independent mediator. It is required that the settlement reached be approved by the court to be fully effective. It is not until then that it acquires the power of a legal settlement and can be subject to execution under Art. 183 [15] CCP.

Mediation proceedings with the participation of units of the public finance sector

Mediation proceedings with the participation of PFS entities, concerning disputed civil-law liabilities is run according to the regulations of the CCP, which are included in Art. Art. 183[1]-183[13].¹⁶ However, because of the specific nature of the proceedings, which results from the different subjective scope in relation to “classical” economic mediation, the principles behind the mediation can suffer certain limitations.

The fundamental principle of mediation – voluntariness – must be perceived through the prism of participants of the proceedings, the so-called stakeholders. On the one hand, there are subjects related to PFS entities by means of civil-law ties, which take part in it, in consequence of which the civil-law liability has arisen. It is in their interest that settlement of the dispute most frequently lies at the least possible cost. These subjects take part in mediation on the voluntary basis and likewise they can withdraw from it at any time. On the other hand, there are also PFS entities (mentioned, among others, in Art 9 PFA) participating in it, whose decision to embark on mediation is determined by purposefulness, effectivity

¹⁶ The Act of 17 November 1964 – the Code of Civil Procedure, *Journal of Laws* of 2014, item 101 as amended, hereafter referred to as “CCP”.

and cost saving. Taken after a broad analysis with reference to possible effects of reaching a settlement have been carried out in proceedings inside the organization, which precedes entering into mediation, it restricts voluntariness connected with possible resignation from mediation and withdrawing from it at any stage of the proceedings. Thus, in view of the possibility of withdrawal from mediation, the principle of voluntariness is not fully implemented.

The principle of impartiality and neutrality refers basically to the mediator and his/her attitude towards the object of dispute. The mediator's qualifications can prove of key importance in such a case. Independent of the requirements with reference to the mediator, which are mentioned in Art. 183 [2] CCP, from the point of view that is proper to the course of mediation with the participation of PFS entities, the possibility of his/her getting acquainted with case files is vital. Under Art. 183 [9] Para 2 CCP, the mediator has the right to get familiar with the files unless the party disagrees on this within a week, beginning with the day of announcing or delivering the decision which sends the parties to mediation. The files, in the case of mediation initiated with the participation of subjects of the public sector, contain an analysis in the form of assessment of effects of reaching a settlement, which was made before the PFS entity took the decision of entering into mediation. These documents can be of vital importance to the mediator, firstly – to avoid accusations that the mediation violated principles of legality when public means were spent; secondly – so as not to expose the parties to the risk of concluding a settlement which will not be approved by the court. Compliant with Art 183 [14] Para 3 CCP, the court refuses to accept the settlement as a whole or a part of it if it is contrary to law or to the principles of social co-existence, intends to bypass law, or still it is not clear or contains contradictions. An appropriate evaluation of the situation as to the right course of mediation, one that is in agreement with law, can be performed if the mediator could get acquainted with the case files. Possessing the knowledge about needs and interests of the parties, the mediator can see to giving an equal share to the parties in mediation as well as protection of their interests.

Confidentiality of mediation is another fundamental principle which rules the process. Under Art. 183 [4] CCP the obligation to keep facts, the knowledge of which came in connection with running the mediation, secret rests not only on the mediator, but also on the parties and the other persons participating in the proceedings. In the case of mediation with the participation of PFS entities, due to its specifics, this principle also is affected by some limitations, primarily because of the multiplicity of subjects taking part in preparation of the assessment of reaching a settlement. As it was mentioned, there are a number of people engaged in this process. Each of

them, in order to be able to express their opinion on whether the effects of a concluded settlement will be more beneficial than the possible result of court or arbitration proceedings, must get acquainted with the documentation relating to the case and take a stand on it within the scope of their competences. Therefore, it is difficult to guarantee full confidentiality of mediation. An additional factor that poses a threat to maintaining secrecy is that each citizen has the constitutionally guaranteed right of access to public information. Under Art. 61 of the Constitution of the Republic of Poland¹⁷ the access to public information covers also assessment of effects of regulations, which is at the disposal of the public sector.¹⁸ It offers a valuable source of information on entities' strategies, calculations related to the possible risk of court proceedings and their costs. It is on the basis of these data that it is possible to establish the negotiation standpoint as well as define the interests of the PFS entity which is taking part in mediation.

Another important principle of mediation, that is the guarantee of equality of the parties, is not realized to the full extent. Despite the fact that the object of proceedings is disputed civil-law liability and not tax debts or the so-called untaxed budget liabilities, mediation is run between subjects of quite different character and legal statuses. The participation of a professional legal representative on the part of the PFS entity, frequently supported by an analytic team, undoubtedly can make the position of this party stronger. Consequently, the mediator's role during proceedings is to take care of ensuring equal positions to both parties.

Mediation with the participation of PFS entities, despite its specifics, possesses a lot of features which reflect its essence. Most obviously, it makes proceedings faster and less costly, offers an opportunity to settle a dispute within the boundaries of law in force and to reach a settlement. At the same time it gives the parties a chance to save face for the future and to still remain in a good relation.

Conclusion

Mediation with the participation of PFS entities constitutes a new legal solution. It has been two years since Art. 54a Public Finance Act and amended regulations of the Act on the responsibility for a breach of public

¹⁷ The Constitution of the Republic of Poland of 2 April 1997, *Journal of Laws* 1997, No. 78, item 483 as amended.

¹⁸ In practice there may arise a doubt that the assessment of effects of reaching a settlement will be qualified by PFS entities as documents of the internal character, not falling under the obligation of rendering them available under Art. 61 of the Constitution of the Republic of Poland and the Act of 8 September 2001 on access to public information, *Journal of Laws* 2001, No. 112, item 1198 as amended.

finance discipline were introduced. The statistics presented by the General Counsel to the Republic of Poland¹⁹ and by the authors of the project to amend, among others, the Public Finance Act,²⁰ show that mediation is the most beneficial way to solve disputes for entities of the public sector. Comparing, in the first place, time and costs of arbitration and court proceedings, it needs observing that the former is four times faster and one-and-a-half times cheaper than the latter. Still, mediation looks even better in comparison with that statistic: it is eight times quicker than arbitration proceedings and as many as 12 times less expensive than regular court proceedings. Then, when it comes to saving expenditure, mediation is three-and-a-half times cheaper than arbitration and five times cheaper than court proceedings. This evidently means that PFS entities, while launching the procedure of analyzing and assessing effects of concluding a settlement hold strong arguments to at least attempt embarking on mediation.

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¹⁹ The statistic was presented by *Prokuratoria Generalna RP* [the General Counsel to the Republic of Poland] during the meeting of The First Arbitral Discussion Salon, dedicated to “Effective settlement of disputes with the participation of the State Treasury and state legal persons”, which was held on 5 February at the seat of the Arbitratory Court at the General Counsel in Warsaw.

²⁰ Sejm paper no. 1185 for the bill concerning amendment of some acts aiming to facilitate recovery of claims, available at www.sejm.gov.pl (10.06.2019).

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MEDIACJA W POSTĘPOWANIU
Z UDZIAŁEM JEDNOSTEK SEKTORA FINANSÓW PUBLICZNYCH
(W ŚWIETLE ART. 54A USTAWY O FINANSACH PUBLICZNYCH)

Streszczenie: Nowelizacja ustawy o finansach publicznych (dodanie art. 54a) oraz ustawy o odpowiedzialności za naruszenie dyscypliny finansów publicznych z 2017 roku, wprowadziła możliwość zawarcia ugody w sprawie spornej należności cywilnoprawnej przez jednostkę sektora finansów publicznych. Wykonanie ugody zawartej zgodnie z prawem nie będzie stanowić naruszenie dyscypliny finansów w publicznych. Do czasu wejścia w życie tej nowelizacji dochodzenie roszczeń przez jednostkę SFP było możliwe jedynie na drodze sądowej. Obecnie możliwe również w postępowaniu mediacyjnym.

Słowa kluczowe: MEDIACJA, NALEŻNOŚCI CYWILNOPRAWNE, JEDNOSTKI SEKTORA FINANSÓW PUBLICZNYCH, UGODA MEDIACYJNA, ODPOWIEDZIALNOŚĆ ZA NARUSZENIE DYSCYPLINY FINANSÓW PUBLICZNYCH