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Public-Private Partnership and the Institution of Mediation

Partnerstwo publiczno-prywatne a instytucja mediacji

SUMMARY

The aim of this article is to present relationships between the institutions of public-private partnership and mediation under Polish law. To this end, both the legal and non-legal nature of public-private partnership needs to be presented in detail. This institution is usually applied in a specific system of social demand for specific infrastructure, equipment or services. The dialogue pursued in this respect at the level of local community as part of relations of this community with local authorities and under formal procedures between the authorities and a private entity or entities interested in cooperation in a public-private partnership may lead to the initiation of mediation or quasi-mediation.

Keywords: public-private partnership; mediation; public entity; private partner; public consultation; negotiations; public procurement

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INTRODUCTION

Contemporary legal institutions and related forms of legal decision-making have increasingly departed from traditional and well-established patterns of classical decision-making processes[1]. The boundary between the processes of law-making and applying the law, very definite until quite recently, is not so clear now. It is increasingly harder to state whether a certain legal relationship occurs in public or private spheres. The time has come for hybrid forms to be used by social actors. The emergence of these forms can be considered a consequence of adaptation by these actors to the changing social environment of the post-modern world. One must fully agree with the contemporary qualification of behaviour of social actors as occurring "in a situation of multi-directional, multi-level and diachronic activities, which prevent them from being examined empirically as a system of activities, axiologically and organizationally unified across the entire organization of public authority"[2]. It seems that the institution of public-private partnership perfectly matches this conclusion.

There are essentially two objectives of this study. The first one is to analyze the legal nature of the hybrid institution of public-private partnership. Theoretically, it can be classified as part of the public law, but essentially it is based on cooperation with private business entities. There is no formal equality of parties in an established legal relationship of partnership, nonetheless, it is certainly not a relationship of subordination, even if the public body exercises superior function. The second objective is to determine whether and to what extent, if any, the institution of mediation can be linked to the institution of partnership and whether we can find legal characteristics of the processes of mediation in public-private partnership.

As soon as at the stage of preliminary considerations, it seems reasonable to note that the decision on the need for a particular project is usually a consequence of a specific social problem. For example, the local community may require that their municipal authorities build a sports facilities complex. Administrative authorities have an obligation to meet the needs of their respective residents, which is often difficult due to scarce financial resources. The situation of controversy may be inflamed by intense pressure from the public. In such a situational arrangement, relevant public consultation may be carried out. It is possible that it will be carried out with the participation of entities acting in the capacity of mediators in a conflict between the local community and the local authorities. This is one of possible sce-

[1] More on the subject, see H. Duszka-Jakimko, *Alternatywne rozwiązywanie sporów. Pomiędzy instrumentalnym a komunikacyjnym paradygmatem prawa*, Opole 2016; *Mediacja. Teoria, normy, praktyka*, red. K. Płeszka, J. Czapska, M. Araszkiewicz, M. Pękala, Warszawa 2017.

[2] A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, p. 64.

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narios and determinants of the decision to apply the legal formula of public-private partnership. This means that the institution of mediation itself may sometimes underlie and precede the decision to employ the institution of partnership.

MEDIATION IN THE PUBLIC SECTOR

Mediation is becoming an increasingly popular method of dispute resolution. In essence, it boils down to a specialized and non-imperative interference by a third party, who – through impartiality and neutrality towards the parties – is supposed to lead them to achieve an agreement and restore good relationships[3]. The increasing popularity of mediation proceedings is noticeable in the case of disputes between natural persons or businesses, i.e. between members of the so-called private sector. This is due to the fact that, unlike formalized and expensive court trial, mediation is a faster, more flexible and less expensive procedure. This is so because in mediation proceedings the parties have a decisive influence on the choice of mediator, place, time and form of the entire procedure, and they also avoid bearing high trial costs. The amicable manner of resolving disputes also allows the contracting parties to maintain their mutual partner relations, which in turn is beneficial for their further business or contractual relationship.

Despite numerous advantages of mediation, it is rarely used in disputes involving entities from the so-called public sector. This results largely from their concerns about the risk of breach of public finance discipline. These result from the applicable law, which, especially until the amendment of the Act of 27 August 2009 on public finances[4] and the Act of 17 December 2004 on liability for the breach of public finance discipline[5] (in particular until the amendment of 2017), restricted considerably the option of amicable settlement in disputes involving public finance sector entities as parties to the dispute.

As an example, the contracting authority (such as a local government unit) who is entitled to contractual penalties against the economic operator who had been awarded the public procurement contract, in the event of attempting to settle the dispute by refraining from charging the contractual penalty is exposed to public finance discipline liability due to the failure to recover receivables payable to the public finance sector unit[6].

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[3] A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2009, pp. 43–44.

[4] Journal of Laws, 2017, Item 2077 as amended, hereinafter PFA.

[5] Journal of Laws, 2017, Item 1311, hereinafter PFDLA.

[6] According to Article 5 Item 1 Point 2 of PFDLA, breach of the public finance discipline is the failure to collect or recover receivables payable to the State Treasury, a local government unit or

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However, this does not mean, *a priori*, that a public sector entity is absolutely not allowed to amicably waive the penalty or refrain from pursuing another claim. However, noting the decision of the General Adjudicating Commission (*Główna Komisja Orzekająca*) of 28 June 2007[7], stating that "public finance sector unit does not exercise full discretion to waive the amounts payable to it. In their financial activity, these entities should be guided by the principles of reasonableness, austerity and acting for the sake of public finances", the criteria for deeming such action lawful are so equivocal and vague that those held liable for the breach of public finance discipline are reluctant to reach for amicable forms of dispute settlement in this respect.

As a result, public entities usually decide rather to initiate a lengthy and costly court trial, even though the possibility of an unfavorable court ruling and incurring the costs of proceedings can often result in greater financial and time losses than it would be for mediation and amicable settlement.

Therefore, it was not possible to change this situation without amending the regulations. As a result, the Act of 1 June 2017 on amending certain acts in order to facilitate the recovery of claims[8] was adopted, which made the following modifications to PFA and PFDLA. In the Act on public finances, Article 54a was added, according to which

> […] the public finance sector unit may conclude an amicable settlement regarding the disputed civil law receivables if the unit deems the potential outcome of the amicable settlement more favorable to the unit or the State Treasury or the budget of a local government unit than the probable outcome of judicial or arbitration proceedings. The assessment of probable effects of the amicable settlement shall be made in writing, taking into account the circumstances of the case, in particular the legitimacy of the claims in question, possibility of satisfying them and the anticipated duration and costs of judicial or arbitration proceedings.

Also, § 4 was added to Article 5, and § 2 was added to Article 11, and the content of Article 15 was modified in the Act on liability for the breach of public finance discipline. Due to these amendments, the following do not constitute a breach of public finance discipline:

- performance of a lawfully concluded amicable settlement on the disputed civil-law receivables,
- making an expense payment from public funds under a lawfully concluded amicable settlement on the disputed civil-law receivables,

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another unit of the public finance sector, or collecting or recovery of such receivables in the amount lower than that resulting from the relevant calculation.

[7] DF/GKO-4900-26/30/07/18.

[8] Journal of Laws, 2017, Item 933.

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- assuming or changing an obligation under a lawfully concluded amicable settlement on the disputed civil-law receivables.

In view of the above regulations, the amendments allow, to a wider extent than before, for the amicable settlement of disputes involving the State Treasury or public finance sector units, without being charged of an alleged breach of public finance discipline. Therefore, it should be expected that these changes will cause a gradual increase in the number of mediation proceedings in disputes involving entities from the public sector in a broad sense. The expectation is even greater due to the fact that public sector entities (mainly local government units) increasingly resort to alternative forms of performance of public tasks, namely public-private partnership (PPP), where mediation can be applied in a wider scope than in the context of traditional public procurement. The growing demand for public tasks performed in the formula of public-private partnership is evidenced by the fact that according to the "Government policy for the development of public-private partnership" adopted on 26 July 2017 by the Polish Council of Ministers, at least 100 new PPP agreements will be concluded in the public sector by the end of 2020, and the value of projects to be accomplished in this formula will amount to at least 5% of the total investment expenditure in the public sector[9].

Although essentially limited to dispute resolution mechanisms, mediation in its various forms may also be used to support PPP projects from the moment the project concept is defined and the project is implemented until the termination of the entire contractual obligation. However, before we specify the forms of use of mediation in PPP projects, the institution of public-private partnership set out in the Polish law and procedures related to the implementation of projects in this organizational form need to be first defined and characterized.

THE ESSENCE OF PUBLIC-PRIVATE PARTNERSHIP

Public-private partnership is a sort of long-term public procurement contract related to the execution of municipal tasks and covering a specific project to be jointly carried out by a public entity and a private partner under a public-private partnership agreement[10]. The legislation setting out the public-private partnership framework under the Polish legal order comprises the Act of 19 December 2008 on public-private partnership[11]. However, this Act does not provide a legal definition

[9] The Annex to the Resolution No. 116/2017 of the Council of Ministers of 26 July 2017 "Government policy regarding the development of public-private partnership" (RM-111-83-17).

[10] *Partnerstwo publiczno-prywatne. 100 pytań, wyjaśnień, interpretacji*, red. R. Cieślak, Warszawa 2014, p. 15.

[11] Journal of Laws, 2015, Item 696 as amended, consolidated text, hereinafter the PPP Act.

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of PPP. The definition of public-private partnership has been introduced into the EC law by the general regulation on EU cohesion policy for 2014–2020[12], which provides for, in its Article 2(24), that "Public-private partnerships' (PPPs) means forms of cooperation between public bodies and the private sector, which aim to improve the delivery of investments in infrastructure projects or other types of operations, delivering public services through risk sharing, pooling of private sector expertise or additional sources of capital". The above legal definition of public-private partnership was introduced as a result of the need to make better use of PPPs in the public sector for absorbing EU funds under the EU financial framework 2014–2020, by using so-called hybrid projects[13]. The European Commission has noted that the participation of the private sector in the process of providing public services may contribute to market efficiency of the entire project since public-private partnerships may be established not only within a given EU project, but may also cover further management of the infrastructure built as a result of the project[14]. On the other hand, the Polish legislature defined the subject of public-private partnership, in Article 2 Point 4 of the PPP Act, as a joint implementation of a project based on the division of responsibilities and risks between public entity and private partner[15]. Despite the fact that a party to a PPP agreement is a public finance sector entity or a public law entity, or a union thereof, PPP agreement is classified as a civil law agreement. Under a PPP agreement, the private partner agrees to carry out the project for a consideration, and to bear, in whole or in part, the expenses for the accomplishment of the project, or that they be borne by a third party, while the public entity agrees to collaborate for the purpose of achievement of the project goal, in particular by making own contribution[16]. Despite the civil-law nature of PPP agreements, the discretion to shape contractual provisions is subject to certain limitations in this case. These limitations are essentially rooted in two laws: the Act of 29 January

[12] Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No. 1083/2006 (Official Journal of the European Union, L 347/320).

[13] See M. Liżewski, R. Cieślak, *Projekty hybrydowe w ramach PPP*, „Czysta Energia" 2016, nr 1, p. 22.

[14] *Ibidem*.

[15] Pursuant to Article 2 Point 4 of the PPP Act, the very term 'project' is understood as: a) construction or refurbishment of a building or structure, b) provision of services, c) performance of a work, in particular equipping an asset with devices increasing its value and use, or d) other consideration (service) – combined with maintenance or management of the asset that is used for implementation of the public-private partnership project or related to it.

[16] See Article 7 Item 1 of the PPP Act.

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2004 – Public Procurement Law[17] and the Act of 21 October 2016 on concession contracts for construction works or services[18], applied in Poland accordingly to PPP projects as regards selection of a private partner and the matters related to the agreement concluded with the private partner (Article 4 of the PPP Act).

In view of the above regulations, a particular contract will be characterized as a public-private partnership within the meaning of the PPP Act if:

1) the contract covers the implementation of the project as defined in Article 2 Point 4 of the PPP Act,
2) parties to the PPP contract include a public entity and a private partner as defined in Article 2 Point 1 and Article 2 Pint 2 of the PPP Act,
3) the collaboration between the parties is based on a commercial contract and complies with an appropriate division of responsibilities and risks,
4) the collaboration on part of the public entity involves making its own contribution, for example in the form of a real property on which the project is to be implemented, or additional payments for services provided by the partner,
5) an element of the project is the maintenance and/or management of at least one asset used for the implementation of the project or a related project,
6) the private partner is to bear at least part of the expenses for the implementation of the project[19].

The above demonstrates that we are dealing with a contract which differs form the 'traditional' public procurement processes carried out under PPA, which affects the entire process of implementation and accomplishment of the project.

A feature that distinguishes PPPs from classic public procurement methods is primarily the fact that the private partner is responsible not only for the production of a specific asset, but also for maintenance and/or management of that asset[20]. It is also important that the partner pre-finances a considerable portion of the necessary expenditures. This means that the remuneration payable for the private party is not charged once after the investment task has been completed, but is paid in tranches during the whole term of the PPP agreement, and its final amount depends on whether an adequate 'accessibility standard' of the produced asset is ensured or on whether users actually use the services provided under the PPP contract, paying fees directly to the undertaking acting as a private partner/concessionaire. This specific method of being paid is determined by longer terms of PPP contracts in comparison to classic public procurement contracts. PPP contracts are often con-

[17] Journal of Laws, 2017, Item 1579 as amended, hereinafter PPA.

[18] Journal of Laws, 2016, Item 1920, hereinafter the Concession Contract Act.

[19] *Partnerstwo publiczno-prywatne*..., p. 19.

[20] *Ustawa o partnerstwie publiczno-prywatnym. Komentarz*, red. M. Bejm, Warszawa 2014, Article 7 (Legalis 2018 [access: 27.02.2018]).

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cluded for a period of several or a dozen or so years, which is a condition for the private party to have costs returned and profits gained[21]. Thus, the private partner, due to the need to provide a specific standard of services under the PPP agreement in the long run, is constantly involved in the implementation of the public task to the extent delineated by responsibilities and risks entrusted to the private partner.

To sum up the above, it should be stated that public-private partnership is distinguished from traditional public procurement procedures carried out under the Public Procurement Law by a much greater involvement of the private partner in the process of public service provision, covering the financing of the project, activity at both the stage of design and construction of public infrastructure and at the stage of maintaining this infrastructure and managing the public service process (comprehensive operation by the private partner), making the private partner's remuneration dependent on the actual availability or actual use of the object of the partnership, and the increased indicator of benefit for the public interest versus the traditional model (value for money)[22].

THE APPLICATION OF MEDIATION IN THE PROCESS OF PUBLIC-PRIVATE PARTNERSHIP

The above features of public-private partnership result in that during the entire project implementation process beginning from definition of the social need through the analysis of feasibility of the project in the PPP model, conduct of market research and the private partner selection procedure, to the accomplishment of the project both at the investment and operational stage, it is possible to define additional manners of using mediation to support PPP projects and specify the differences between the institution of mediation and negotiation forms of communication between the parties used in a PPP process. Therefore, at each stage of implementation of a PPP project, it is possible to identify described below areas where the institution of mediation (or variations thereof) can be applied.

1. Defining the social need – social mediation

A decision on the implementation of a given municipal project should be preceded by identification of a particular social need in a given territorial area. To achieve this end, it is important that the authorities communicate with those members of the public who will also be the final users of the infrastructure, and then obtain

[21] *Partnerstwo publiczno-prywatne…*, p. 29.
[22] *Ibidem*.

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approval for the manner of meeting this need, for example by implementing the project concerned using the PPP model or its implementation in a given area.

Despite the fact that public authorities perform their tasks using their sovereign powers (sphere of *imperium*), i.e. powers enabling them to force their subjects to perform specific activities, it is a common practice, as part of preparation for the project implementation, is to survey public opinion in order to choose the optimum variant of the public-private partnership project. This is due to the fact that carrying out a partner project, especially of a concession nature, i.e. where the private partner/concessionaire is paid directly from users of the infrastructure, requires social approval, since a new entity will appear on the local market as a result of completion of the PPP project, who on behalf of the public authority will provide a specific communal service, often even for several years.

The acceptance by the public may often require mediation. This is especially so when a specific concept of project implementation proposed by the public authority is opposed by the public (e.g. due to the planned location of a sewage treatment plant[23] in the vicinity of residential buildings, or due to the private partner who constitutes competition for local businesses). In such a situation, the authorities, through their authorized representatives, should undertake mediation with the society, which will result in mutual concessions and a compromise solution[24]. Impartial mediators accepted by the parties can be involved in this process, and their participation is especially recommended where many stakeholder groups are concerned. Mediation carried out in this way can be described as so-called social mediation, due to the fact that it concerns disputes with many entities participating and it concerns areas related to life of the local community. This is so because the parties to such a conflict may include both residents and local entrepreneurs or NGOs.

For PPP projects, social mediation may result both in taking a decision by the public authority to undertake a public task in this formula (e.g. where there is

[23] Such a situation occurred in Lubartów, Poland, in connection with the planned construction of the Waste Management Plant – a project co-funded by Switzerland under the Swiss programme of co-operation with new member states of the European Union. The project was to be carried out in the area designated for commercial projects, but adjacent to streets forming part of the residential district of the town. The dispute arose as a result of conflicting interests of various social groups which felt marginalized in terms of actual impact on the decision-making regarding spatial development and living conditions in the town. The local authorities faced a situation where it was necessary to settle that dispute not only for the benefit of individual parties, but also of the entire local community, so that all participants of the conflict could win to some extent. In the case described, the Mayor of Lubartów decided to carry out a survey among residents to consult the public opinion. To this end, he appointed a team of experts to carry out this process. Based on this survey, an expert opinion was developed. See B. Liżewski, M. Łacek, S. Pilipiec, *Mieszkańcy Lubartowa wobec budowy i lokalizacji Zakładu Zagospodarowania Odpadów (ZZO). Ekspertyza z procesu ankietyzacji w dniach 1–15 października 2011*.

[24] More on the subject, see *Forms and Determinants of Development of Civil Dialogue*, ed. M.W. Staśkiewicz, Lublin 2015, p. 207.

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social resistance due to insufficient knowledge about this method and erroneously identifying it as privatization of public tasks), as well as taking a decision on the scope of the planned project (e.g. by incorporating in a road modernization project additional road sections that was not previously included in the project).

The need for amicable settlement of the dispute may also occur during administrative proceedings, for example due to the need to issue a specific administrative decision to allow the commencement of the project or provision of a communal service (e.g. a building permit). This is so because there may occur a dispute between the parties to the proceedings and the public administration body which decides the case. Mediation may also apply to such circumstances. The institution of mediation was placed in the administrative procedure in Chapter 5A of the Administrative Procedure Code on 1 June 2017 in conjunction with the entry into force of the Act of 7 April 2017 on amending the Code of Administrative Procedure and some other acts[25]. However, it is not a completely new institution. Mediation has been used before in the judicial-administrative procedure, designed for resolving disputes over the legality of a contested administrative act, inactivity of the body or excessive length of proceedings[26].

The institution of mediation in administrative proceedings follows the model of the regulation adopted in Section II of the Civil Procedure Code – *Proceedings before the courts of first instance*, Chapter 1 *Mediation and conciliation*, Unit 1 *Mediation* (Articles 183^1–183^{15}). It differs from the institution of mediation set out in the Criminal Procedure Code by the fact that it can be applied only after initiating court proceedings in the case[27].

Pursuant to Article 96a § 3 of the Administrative Procedure Code, the purpose of mediation is to clarify and examine the factual and legal circumstances of the case and make arrangements for its settlement according to applicable law, including by issuing a decision or concluding an amicable settlement. This means that if arrangements are made to settle the case under applicable law as a result of mediation, the public administration body shall settle the case in accordance with these arrangements recorded in the report on the course of mediation. The compliance of the arrangements made to settle the case with the law in force delineates the extent to which the body is bound by these arrangements[28]. Owing to mediation, the body can explain to the parties the current status of the case, find facts and collect

[25] Journal of Laws 2017, Item 935.

[26] P. Gołaszewski, *Nowelizacja Kodeksu postępowania administracyjnego oraz Prawa o postępowaniu przed sądami administracyjnymi z 7.4.2017 r. (cz. I)*, „Monitor Prawniczy" 2017, nr 15, p. 788.

[27] B. Adamiak, J. Borkowski, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 2017 (Legalis 2018 [access:10.02.2018]).

[28] *Ibidem*.

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evidence, which may make the parties to accept the content of the decision to be made and not challenge it, so that the case be finally resolved.

Mediation in administrative proceedings, where public-private partnership projects are concerned, may be of special value, as the suspension of the private partner selection procedure due to formal and administrative reasons (competitive dialogue process) for several months or delayed commencement of the project may have negative financial and social consequences for the public party (e.g. a delay of commencement of a project long awaited by the public). In view of the above, various types of mediation may be applied under the formula of public-private partnership, as soon as in the preparatory phase of the project, depending on the moment of occurrence, subject and legal basis of the dispute.

2. Market consultation

Once the social need and the manner of meeting it are defined (i.e. once the concept of a given project is defined), the next stage of implementation of a public-private partnership project is, in principle, the preparatory analysis and market consultation (market research). The analytical studies are to be carried out pursuant to the PPP project guidelines defined by the public entity and concern legal, economic, financial and technical aspects of the public task planned. Despite the fact that under the Polish legal system the obligation to carry out preparatory analytical studies applies only to hybrid projects, i.e. those combining EU funding with the formula of public-private partnership[29], public entities which plan to perform a specific public task in the PPP formula without EU funding also usually undertake to carry out such analytical studies to demonstrate that the PPP model is a more advantageous form of project implementation than the traditional public procurement model.

The guidelines for the most favourable project implementation model of public-private partnership presented as part of the preparatory analysis shall be verified, as part of so-called market research or tests, by private entities operating in the industry related to the subject of the planned project and financial institutions (such as banks), which may be providers of capital needed to carry out the project.

This stage is primarily aimed at verification of the project concept adopted by the public entity in the analysis and at possible changes in some guidelines to make the PPP project feasible and attractive to the other party, i.e. the private partner. Market tests constitute a less-formalized process and thus can be carried out both in the correspondence form and in the form of direct meetings with representatives

[29] Wytyczne Ministra Rozwoju i Finansów z dnia 17 lutego 2017 r. w zakresie zagadnień związanych z przygotowaniem projektów inwestycyjnych, w tym projektów generujących dochód i projektów hybrydowych na lata 2014–2020 (MR/H 2014-2020/7(2)/02/2017).

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of the private and financial sectors. Nevertheless, the public entity which launches a given project should always ensure that the test process is conducted in a transparent way[30]. For market tests conducted in the form of direct meetings, an independent arbitrator may be employed to objectively assess the positions presented by each party: public and private. Participation of such a person in the meetings may help the public party develop the final concept of the project implementation under the PPP model, which can often be difficult in the event of differing positions presented by private entities on the same issue (e.g. regarding the model of remuneration). However, due to the informal nature of market research and the fact that it does not lead to the development of a common position of the parties, and only this process gives the opportunity to learn about the position of private partners, this procedure should not be equated with mediation. It is difficult to assume that the market consultation – as the name suggests – is based on the need to resolve a specific dispute. Naturally, it cannot be ruled out that discrepancies between positions presented during market testing may lead to a dispute between the public party and the private party at a later stage of implementation or performance of the PPP project, nevertheless a reliable market consultation and acceptance of reasonable remarks from the private and financial sector minimizes, as a principle, the risk of emergence of a dispute and increases the chances of effective implementation and performance of the project.

3. Negotiation nature of the private partner selection procedure

The next, and also the longest and most difficult, stage of the PPP project implementation is the private partner selection procedure. The legal basis for selecting a private partner is set out in Article 4 of the PPP Act, which determines the appropriate selection procedure by the structure of the private partner remuneration mechanism[31]. If the project assumes that the private partner should be selected under PPA, taking into account the current practice of implementing PPP projects in Poland, the optimal procedure for project partner will be competitive dialogue[32].

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[30] *Ibidem*.

[31] Article 4 of the PPP Act stipulates as follows: 1. If the private partner's remuneration has been agreed as referred to in Article 3 Item 2 of the Act of 21 October 2016 on construction work concession agreement (Journal of Laws Item 1920), the provisions of that act shall apply to the private partner selection and public-private partnership to the extent not regulated herein. 2. In cases other than specified in paragraph 1, the choice of the private partner and the public-private partnership agreement shall be governed by the provisions of the Act of 29 January 2004 – Public Procurement Law (Journal of Laws of 2017, Item 1579), to the extent not regulated herein.

[32] On 25 May 2006, Section 3a of Chapter 3 was introduced, regulating the competitive dialogue procedure. The grounds for the draft amendment to the Act stipulate that: "The draft amendment introduces a new procedure for awarding contracts: the procedure of competitive dialogue. It is to enable the award of complex and comprehensive contracts, especially related to infrastructural projects,

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On the other hand, if a private partner/concessionaire is selected based on the concession contract, the public entity may, to some extent arbitrarily, specify the procedure for the selection of the investor to carry out the project[33]. However, the most frequent obligatory element of this procedure is negotiations with economic operators admitted to participate in the proceedings for the conclusion of PPP/concession.

The above indicates that while traditional public procurement, as a rule, is deprived of the element of negotiation/dialogue with the economic operator (e.g. open tender procedure or restricted tender procedure), negotiations in the case of PPP projects form an intrinsic element of the tender procedure. This is due to the fact that it would be considerably difficult, or most often impossible, to specify the detailed legal, financial, organizational and technical conditions of a long-term PPP project without prior negotiations with potential private partners. Only in the course of the dialogue, the detailed parameters of the project, its qualitative features, functional description and rules of funding can be determined. In addition, one of the basic advantages of PPP is the opportunity to use the know-how and experience of private investors. However, in order to be able to use such knowledge, there must be a possibility to consult individual solutions with representatives of the private sector at the stage of the pending procedure. In practice, both public entities and private investors use the assistance of technical, financial, legal, etc. advisers during the negotiations. Although the negotiations are intended for the resolution of controversies related to the conditions for the implementation of the PPP project, it can not be said that the advisers play the role of mediators in this process, as each of them represents one of the negotiating parties.

The very process of negotiation/dialogue does not have all the characteristics of mediation as defined in the Civil Procedure Code or Administrative Procedure Code, nonetheless it contains certain elements typical for this institution. In particular, one should point to the fact that pursuant to Article 60d Item 7 of the PPA, the competitive dialogue procedure is of a confidential nature, which means that none of the parties may disclose technical and commercial information related to the dialogue without the prior consent of the other party. Similarly, in the case of negotiations held under the Act on concession contracts for construction works or services, the contracting authority may require that the economic operators protect the confidential nature of the information being disclosed during the proceedings to conclude the concession contract.

ICT technologies or projects involving complex financing processes. […] The use of this procedure will be possible for contracts of a particularly complex nature, e.g. projects related to public-private partnership […]".

[33] Article 28 of the Act on the concession contract: "The Contracting Authority shall organize the procedure for concluding the concession contract as necessary".

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One of characteristics is also the voluntary nature of participation in the dialogue. The economic operator, by the request to participate in the procedure/to conclude the PPP contract or be granted the concession, must express his willingness to participate in the dialogue or negotiation. Failure to submit such a request will prevent the economic operator from participating in the proceedings under way. Of course, the mere submission of the request referred to above does not guarantee the economic operator's participation in the dialogue or negotiation, as the economic operator must also meet a number of additional conditions specified by the awarding entity in the tender procedure documentation. Nevertheless, it is primarily the economic operator's choice whether to participate in a given procedure or not. Also, although the provisions of both the Public Procurement Act and the Act on concession contract for construction works or services do not provide for the formal option for the economic operator to renounce the participation in the dialogue or negotiation, the economic operator is not required to participate in all rounds of dialogue/negotiations, which does not deprive the economic operator of the possibility to submit an proposal in the proceedings.

In the event of a standoff in negotiations pursued with only one economic operator, there is also a theoretical possibility to engage a mediator independent of the parties in order to resolve the dispute and enable negotiations to continue. In such a situation, this solution may be reasonable, because in the absence of agreement in issues that are critical for the project, the entire proceedings may be annulled after several months of negotiations due to the lack of an offer in the proceedings.

On the other hand, where several economic operators take part in the dialogue, this possibility seems to be limited due to the need for the public entity to ensure fair competition and equal treatment of these participants[34]. Undertaking mediation with only one entity could be considered a breach of this rule in relation to other economic operators involved in the dialogue.

A feature that distinguishes dialogue from mediation is the fact that it does not need result in an agreement reached between the parties to it. According to Article 60e Item 1 of the Act on Public Procurement Law, "The awarding entity conducts the dialogue until it is capable of determining – by comparing the solutions proposed by the economic operators, if necessary – the solution (solutions) that best meet (meets) its needs". This means that competitive dialogue is actually beneficial for a contracting authority which purchases a specific service from a private partner, as it allows determination of optimal conditions for the implementation of the contract from the point of view of that contracting authority's needs and public interest. In practice, terms agreed as a result of the dialogue constitute a certain compromise between the expectations of the public party and the expectations of the economic operators, which is manifested by the submission of tenders in the proceedings

[34] Article 7 of the Act on PPL.

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and then by acceptance by the public party of the best tender. Therefore, it can be stated that dialogue or negotiations are intended to make some concessions by both the public and private parties in relation to the original assumptions, and therefore they have also a mediation nature to some extent.

4. Mediation at the stage of project realization

Once the public entity and the private partner have entered into a public-private partnership contract, the realization of the PPP project starts. The specificity of this type of projects, resulting from the private partner obligation of administering and/or maintenance of the produced asset (e.g. long-term maintenance of roads in the area of municipality), results in that contracts are most often being entered into for a period from a few to a dozen or so years. In view of the above, it is particularly important for both parties to the PPP agreement to maintain good contractual relations throughout the entire term of the agreement. Therefore, where disputes arise in connection with the implementation of such projects, the institution of mediation may be widely used. This is due to the fact that for long-term PPP contracts, the lack of prompt resolution of the dispute may cause the private partner to withhold or cease to provide a service important to the public, which in turn will increase public dissatisfaction and, consequently, significantly deteriorate the relations between the parties in the subsequent years of the project performance.

Therefore, public-private partnership projects can take advantage of the greatest benefits of mediation, which focuses on meeting the interests of either party and allows for developing a relatively quick and compromise solution. Moreover, in the course of the mediation process, the parties consciously develop a form of amicable settlement, which positively affects the resolution of situations of controversy in the future.

CONCLUSIONS

A brief analysis of the subject of public-private partnership does not provide a basis for the formulation of statements about the relationship of this institution with the mediation process. However, when the issue is studied in more detail, such links can be found. All this depends on whether we adopt the narrow or broad definition of public-private partnership when examining this issue. In the narrow perspective on PPP, the notion comes down to a public-private partnership agreement covering joint fulfillment of the project based on the division of responsibilities and risks between the public entity and the private partner. In fact, the narrow approach reduces the definition of PPP to the analysis and implementation of the provisions of the partnership agreement, and thus limits the issue to

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the accomplishment phase of the project in accordance with the provisions of the agreement entered into between the entities. The adoption of such a narrow spectrum, however, does not allow us to fully comprehend the essence of the institution of public-private partnership. To understand it, it is necessary to adopt the broad approach. This includes an extremely important stage preceding the conclusion of a PPP agreement. This is a stage when problems materialize regarding specific social demand for the implementation of a particular infrastructural project, development of the concept of its implementation together with necessary market tests, if any. It is the stage at which the strategic decisions are taken to determine the shape of the PPP agreement to be concluded. Therefore, understanding the peculiarities and the essence of the institution of public-private partnership needs to be analyzed using this broader approach.

Under such a research perspective, we can identify potential links between public-private partnership and the institution of mediation. They can occur at the stages of public consultation, development of the concept of project implementation, market tests, at the stage of taking the administrative decision affecting the project, at the stage of private partner selection and finally at the accomplishment stage. Two remarks must be made at this point. First of all, the institution of PPP is accompanied by processes that take specific forms of mediation. Sometimes the statutory form of mediation can be used, such as mediation as provided for in the Administrative Procedure Code, but usually these processes are not mediation procedures in a strict sense. They have a more informal character and at the same time employ negotiation elements. Secondly, individual mediation formulas have a potential character, that is they can occur in a given situation but not have to. As a result, it should be stated that the implementation of an effective and efficient public-private partnership may require the application of several mediation processes, both those governed by applicable law and any other such processes in a broad sense.

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STRESZCZENIE

Celem artykułu jest przedstawienie związków uregulowanej na gruncie prawa polskiego instytucji partnerstwa publiczno-prywatnego z instytucją mediacji. Aby tego dokonać, należy w pierwszej kolejności przedstawić w sposób precyzyjny zarówno prawny, jak i pozaprawny charakter partnerstwa publiczno-prywatnego. Instytucja ta znajduje zastosowanie z reguły w określonym układzie społecznego zapotrzebowania na określone urządzenia infrastruktury lub usługi. Dialog prowadzony w tym zakresie na szczeblu społeczności lokalnej, w relacjach tej społeczności z władzami lokalnymi, a także w ramach formalnych procedur między władzami a podmiotem lub podmiotami prywatnymi, które wykazują zainteresowanie kooperacją w ramach partnerstwa publiczno-prywatnego, może prowadzić do uruchomienia postępowań mediacyjnych lub quasi-mediacyjnych.

Słowa kluczowe: partnerstwo publiczno-prywatne; mediacja; podmiot publiczny; partner prywatny; konsultacje społeczne; negocjacje; zamówienie publiczne