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# Assessment of the Correct Implementation of Article 4 of Directive 2008/52/EC of 21 May 2008 on Some Aspects of Mediation in Civil and Commercial Matters in the Polish Legal System<sup>2</sup>

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## Abstract

The purpose of the article, which has not been analysed so far, is the assessment of the correct implementation of Article 4 of Directive 2008/52/EC in the Polish legal system. The starting point for the considerations made herein has been the determination of the required minimum harmonisation level and the indication of results which are binding for the state authorities. At a further stage, an analysis has been made of applicable Polish regulations on preliminary and continuing training for mediators and of actions undertaken to develop ethical and deontological codes and to make them commonly observed by mediators in the context of the results indicated in Article 4 of Directive 2008/52/EC. The results of the analysis have indicated faults in the process of implementation in the form of a too narrow transposition of Article 4 of Directive 2008/52/EC and a failure to ensure the effectiveness of its resolutions, and also pointing the direction to ensure the *effet utile* of Article 4 of the Directive of the European Parliament and of the Council of 21 May 2008, constituting the starting point for determining the directions at the stage of legislative work related to ensuring the appropriate quality of mediation.

**Keywords:** quality of mediation, professionalisation of mediators, qualifications of mediators.

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# Ocena prawidłowego wdrożenia do polskiego systemu prawnego art. 4 Dyrektywy Parlamentu Europejskiego i Rady 2008/52/WE z dnia 21 maja 2008 r. w sprawie niektórych aspektów mediacji w sprawach cywilnych i handlowych<sup>3</sup>

## Streszczenie

Celem artykułu, który nie był dotychczas analizowany, jest ocena prawidłowego wdrożenia do polskiego systemu prawnego art. 4 dyrektywy Parlamentu Europejskiego i Rady 2008/52/WE z dnia 21 maja 2008 r. w sprawie niektórych aspektów mediacji w sprawach cywilnych i handlowych. Punktem wyjścia dla poczynionych rozważań było określenie minimalnego wymaganego poziomu harmonizacji oraz wskazanie wyników wiążących dla władz państwowych. Na późniejszym etapie dokonano analizy obowiązujących w Polsce przepisów dotyczących wstępnego i ustawicznego kształcenia mediatorów, a także działań podjętych w celu rozwinięcia kodeksów etycznych i deontologicznych oraz w celu sprawienia, że mediatorzy będą ich powszechnie przestrzegać, w kontekście rezultatów wskazanych w art. 4 dyrektywy 2008/52/WE. Wyniki analizy ujawniły usterki w procesie implementacji w postaci zbyt wąsko pojętej transpozycji art. 4 dyrektywy 2008/52/WE i braku zapewnienia skuteczności postanowień tejże, przy wskazaniu kierunku zapewnienia *effet utile* art. 4 dyrektywy Parlamentu Europejskiego i Rady z dnia 21 maja 2008 r., co stanowi punkt wyjścia dla określenia kierunków działania na etapie prac legislacyjnych związanych z zapewnieniem odpowiedniej jakości mediacji.

**Słowa kluczowe:** jakość mediacji, profesjonalizacja zawodu mediatora, kwalifikacje mediatorów.

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## Introduction

20 May 2021 marked the tenth anniversary of the final date imposed on the member states to implement the resolutions of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.<sup>4</sup> Due to the significant differences in the way the directive has been implemented by the EU member states and the problems that have been unchangeably associated for years with the functioning of mediation in civil matters in Poland, the analysis of the correct implementation of Article 4 of Directive 2008/52/EC in the Polish legal system has remained up-to-date. Apart from the linguistic interpretation, the assessment of the correct implementation has also been determined by the purpose- and function-related arguments so as to ensure the *effet utile* of the provisions of the directive in accordance to the jurisprudence of the Court of Justice<sup>5</sup> based on the legal and factual grounds.

Considering the minimum harmonisation model,<sup>6</sup> the starting point shall be to determine the material scope and the desired result of Article 4 of Directive 2008/52/EC and then to juxtapose the results so obtained with the legal regulations that are applicable in Poland. Once completed, the analysis shall make it possible to assess whether the implementation has been correct and to answer the question whether there have been any failures in the process of the transposition of Article 4 of Directive 2008/52/EC to the Polish legal system and where those failures exist.

### Minimum Harmonisation Level Under Article 4 of Directive 2008/52/EC

Article 4 of Directive 2008/52/EC is characterised by high practical significance which rises above the implementation of the institution of mediation in civil matters in national legal systems. The *ratio legis* of the aforementioned article is expressed in the need to establish mechanisms ensuring the correct and effective functioning

<sup>4</sup> OJ L 136, 24.5.2008, pp. 3–8 [henceforth cited as: Directive 2008/52/EC].

<sup>5</sup> A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego*, Warszawa 2007, p. 200; J. Helios, W. Jedlecka, *Wykładnia prawa Unii Europejskiej ze stanowiska teorii prawa*, Wrocław 2018, pp. 12–14.

<sup>6</sup> B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków 2004, pp. 82–103.

of the regulations on mediation in civil matters. In this sense, Article 4 of Directive 2008/52/EC actually plays the role of a 'metaregulation', indicating the need to adopt mechanisms for the control of the effectiveness of applicable regulations in order to achieve the result of ensuring a proper quality of mediation provided by professional mediators. The result follows directly from Article 4 and clause 16 of the preamble to Directive 2008/52/EC and it has taken a specific form of two obligations. The first one imposes an obligation on the member states to provide support in the development of voluntary codes of conduct and on the mediators and organisations providing mediation services to comply with them (Article 4 section 1 of Directive 2008/52/EC). The other one consists in an obligation to support the preliminary training of mediators and to continue it (Article 4 section 2 of Directive 2008/52/EC). Both aforementioned obligations can be deemed detailed objectives which also determine the minimum harmonisation level. At the opposite pole, there are results expressed as general obligations which require that 'other effective mechanisms for quality control of mediation services' (Article 4 section 1) are established and that the parties are guaranteed an 'effective, impartial and competent' mediation (Article 4 section 2). Filling the gap between the minimum harmonisation level and the full implementation of the indicated results has been left to the member states that can accept further reaching solutions than limiting themselves to the required minimum. Although the systematics of Article 4 of Directive 2008/52/EC has been designed 'from down' – determining the minimum harmonisation level – 'to top' – in the form of the desired result, it should be assumed that ensuring 'effective mechanisms for quality control of mediation services' and ensuring 'effective, impartial and competent' mediation is an optimised result which the member states should achieve according to the rule of effectiveness. Furthermore, the content of Article 4 uses expressions with a varying degree of imperativeness with regard to the obligations imposed on the member states, from the obligation 'to ensure' through 'to support' to 'to guarantee'. Similarly, it is the case in relation to the desired results which are not of unconditional, sufficiently clear and precise nature.<sup>7</sup> In fact, it cannot be precisely specified what the notion of 'mechanisms for quality control of mediation services' should be understood to mean and what criteria should be used to measure their 'effectiveness'. Nevertheless, the member states' obligation to 'support' actions aiming at ensuring the minimum harmonisation level means an obligation to undertake all actions which the state authorities consider to be appropriate in order to achieve results determined by the resolutions of the directive.

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<sup>7</sup> G. De Palo, *A Ten-Year-Long EU Mediation Paradox: When an EU Directive Needs to Be More... Directive*, European Parliament 2018, p. 1.

The minimum level of convergence of the member states' national regulations, determined in Article 4 of Directive 2008/52/EC, leads to divergences that are particularly visible in the states which have decided to employ solutions going beyond the minimum harmonisation degree while pursuing an optimised result of Article 4. In consequence, there are significant divergences related to the quality control mechanisms for the mediation services in the member states.<sup>8</sup> This phenomenon is recognised in the resolution by the European Parliament of 12 September 2017 which highlighted the problems resulting from, among other things, the diversity of mechanisms for the quality control of mediation services in particular member states, indicating the need to examine the rationality of the development of the EU quality standards for the mediation services, especially by establishing minimum standards to ensure the coherence of regulations.<sup>9</sup> Moreover, it has been indicated in the survey performed for the European Commission and concerning the assessment of the implementation of Directive 2008/52/EC in the member states that many judges in Poland are reluctant to refer matters to a mediation proceeding due to an insufficient quality of mediation.<sup>10</sup> This phenomenon and the related obligation to ensure an appropriate quality of mediation has been recognised in Poland in the explanatory statement to the draft Act of 2015, amending the regulations on mediation, which expressed 'the state's obligation to guarantee to the parties the highest quality of services provided by professional mediators'.<sup>11</sup>

Undoubtedly, the approved design of Article 4 of Directive 2008/52/EC results from the diversity of the member states' national legal systems and the necessity to adjust to them the adequate mechanisms for the quality control of mediation services with the stipulation that they are to be 'effective'. The minimum harmonisation model does not mean, however, that the principle of *effet utile* becomes exhausted

<sup>8</sup> European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM/2016/0542 final; European Parliament, *The Implementation of the Mediation Directive – Workshop*, 29 November 2016, PE 571.395, p. 51.

<sup>9</sup> European Parliament, Resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ C 337, 20 September 2018, pp. 2–5.

<sup>10</sup> European Commission, Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive'. Final report. Update report of 16 March 2016, <https://op.europa.eu/en/publication-detail/-/publication/bba3871d-223b-11e6-86d0-01aa75ed71a1/language-en> (access: 10.03.2021); European Parliament, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, PE 493.042, p. 54.

<sup>11</sup> Governmental draft of the Act amending the Civil Procedure Code Act and some other acts in relation to the support of amicable conflict resolution methods of 22 May 2015, bill No. 3432.

in the achievement of the minimum standard<sup>12</sup> determined by Article 4 of Directive 2008/52/EC exhausted in the obligation 'to support' or even one-time 'support'. The formal conclusion of the implementation process does not release the state authorities from the obligation to undertake further actions intended to make its resolutions effective in practice. This is especially the case when it is revealed in the process of applying the law that the implemented regulations are inadequate to the results determined by the resolutions of the directive and are not reflected in practice. Therefore, the significant factor in the assessment of the correct implementation of Article 4 of Directive 2008/52/EC is not only the provision of support in the field of trainings for mediators and the development of voluntary codes of conduct, but also the degree to which the current legal regulations ensure that the results following from Article 4 of Directive 2008/52/EC are effective.

## Obligations of State Authorities in the Field of Developing and Applying Ethical and Deontological Codes in Accordance to Article 4 Section 1 of Directive 2008/52/EC

The first obligation and, at the same time, the minimum one imposed on the member states is to provide support to the development of voluntary codes of conduct and them being complied with by mediators and organisations providing mediation services (Article 4 section 1 of Directive 2008/52/EC). In Poland, the implementation of the aforementioned obligation is manifested by the Standards of Mediation and Conduct for Mediators,<sup>13</sup> the Ethical Code of Polish Mediators<sup>14</sup> and the Standards for the Training of Mediators<sup>15</sup> approved by the Social Council for Alternative Methods of Solving Conflicts and Disputes. The Standards of Mediation only contain a general recommendation for a mediator to maintain a high level of professional ethics. On the other hand, it is emphasised in the Standards for the Training of Mediators that 'the success of mediation as an effective method of resolving conflicts largely depends on the professional approach of mediators and the high level of their professional ethics'. The documents referred to herein are of universal

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<sup>12</sup> A. Zawidzka-Łojek, *Zasady prawa materialnego Unii Europejskiej*, [in:] A. Zawidzka-Łojek, R. Grzeszczak (eds.), *Prawo materialne Unii Europejskiej*, Warszawa 2015, p. 5.

<sup>13</sup> Standards of Mediation and Conduct for Mediators, <https://www.mediacja.gov.pl/Standardy-dotycz-ce-mediacji-.html> (access: 10.03.2021) [henceforth cited as: Standards of Mediation].

<sup>14</sup> Ethical Code of Polish Mediators, [www.mediacja.gov.pl/Zasady-Etyki-Mediatora.html](http://www.mediacja.gov.pl/Zasady-Etyki-Mediatora.html) (access: 10.03.2021).

<sup>15</sup> Standards for the Training of Mediators, <https://www.gov.pl/attachment/5df6b777-fc94-4bf7-8d16-9f675f96e359> (access: 10.03.2021).

nature and can serve as a point of reference for mediation centres which develop their own rules of conduct for mediators who have been registered in the registers maintained by them. The content of Article 4 section 1 of Directive 2008/52/EC is not, however, limited only to the obligation to provide support to the development of codes of conduct but it also covers the obligation to provide support in 'complying with them'. The obligation to provide support may be interpreted as an obligation of state authorities to undertake actions intended to develop ethical and deontological codes and to publicise them among mediators. The provisions of the Civil Procedure Code<sup>16</sup> and Article 157a of the Law on the System of Common Courts Act,<sup>17</sup> however, do not require the mediators in civil matters to respect any ethical and deontological codes. Moreover, they do not institute a requirement that a permanent mediator in civil matters, contrary to a permanent mediator in criminal matters,<sup>18</sup> should warrant the adequate performance of obligations or be a person worthy of confidence. The attachments to the request for registration in the register of permanent mediators also do not include the obligation to submit a statement on respecting ethical and deontological standards.<sup>19</sup> For the sake of comparison: Article 1726 section 6 of the Belgian Civil Code requires that a candidate for a mediator submits a written statement on the observance and use of the ethical code established by the Federal Commission for Mediation.<sup>20</sup> It is similar in the Netherlands where there are developed mechanisms for the quality control of mediation services provided by mediators, including the requirement to know and observe the professional ethics and practice standards, which is one of the fields covered by the theoretical exam for mediators.<sup>21</sup> This requirement is included in the mediator competence profile and it is one of the prerequisite criteria for being registered in the register of mediators. Similar solutions are employed in the Lithuanian Act on Mediation where Article 4 section 3 stipulates that the mediator's obligation is to observe the European Code of Conduct for Mediators, which is

<sup>16</sup> Act of 17 November 1964 – Code of Civil Procedure, Journal of Laws of 2020 item 1575 as amended (Dz.U. z 2020 r., poz. 1575).

<sup>17</sup> Act of 27 July 2001 – Law on the System of Common Courts, Journal of Laws of 2020 item 2072 as amended (Dz.U. z 2020 r., poz. 2072) [henceforth cited as: PrUSP].

<sup>18</sup> See: § 4 clause 7 of the Regulation of the Minister of Justice of 7 May 2015 on the mediation procedure in criminal matters, Journal of Laws of 2015 item 716 (Dz.U. z 2015 r., poz. 716).

<sup>19</sup> Regulation by the Minister of Justice of 20 January 2016 on the keeping of a register of permanent mediators, Journal of Laws of 2016 item 122 (Dz.U. z 2016 r., poz. 122).

<sup>20</sup> Belgian Civil Procedure Code of 10 October 1967 (Code Judiciaire Publication: 31.10.1967 numéro: 1967101052, page: 11360).

<sup>21</sup> Mediators Federation Netherlands (MFN), [www.mfnregister.nl](http://www.mfnregister.nl) (access: 10.03.2021).

also subject to verification at the exam for a certified mediator.<sup>22</sup> On the other hand, the Latvian Act on Mediation provides for a sanction in case a certified mediator has substantially infringed the standards of the professional ethics of mediators resulting in the loss of the certified mediator status.<sup>23</sup>

Undoubtedly the obligation to establish effective mechanisms for the quality control of mediation services requires that especially the permanent mediators comply with the ethical and deontological standards associated with the function held. In fact, Article 4 section 1 of Directive 2008/52/EC does not rule out the establishment of an obligation, especially for permanent mediators, to comply with e.g. the Standards of Mediation and the Ethical Code of Polish Mediators determining the minimum behaviour patterns based on which mediation centres can, within their autonomy and on a voluntary basis, develop their own further-reaching rules of conduct. This seemingly insignificant action might be of much importance for the building of confidence in mediation, serving as a tool determining the model of the professional diligence<sup>24</sup> of mediators and contributing to the social promotion of values followed by mediators. Furthermore, it could constitute a disciplinary liability criterion for mediators and a point of reference for presidents of district courts when they assess whether a permanent mediator fulfils his or her obligations in due manner. So, while the requirement resulting from Article 4 section 1 of Directive 2008/52/EC taking the form of support provided to the development of codes of conduct for mediators has been fulfilled in Poland, the requirement to provide support to their use has practically been ignored and implicitly ceded to mediation centres which, however, do not always develop rules of conduct for their associate mediators when there is no obligation to do it.<sup>25</sup> One should also notice that in the case of permanent mediators who do not belong to mediation centres, there are no 'support' mechanisms whatsoever provided to their use of the ethical and deontological codes. Mediators and permanent mediators who do not belong to mediation centres do not have any obligations in this respect. Therefore, the current solutions cannot be deemed to promote the building of confidence in mediation

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<sup>22</sup> Lithuanian Act on Mediation of 29 October 2017 (Lietuvos Respublikos civilinių ginčų taikinamojo tarpininkavimo įstatymo Nr. X-1702, 2017 m. birželio 29 d. Nr. XIII-534 Vilnius).

<sup>23</sup> Article 22 section 5 of the Latvian Act on Mediation of 6 April 2014 (Mediācijas likums 04.06.2014, nr. 108.1.).

<sup>24</sup> K. Zacharzewski, *Znaczenie kodeksów deontologicznych w dziedzinie prawa prywatnego*, „Przegląd Prawa Handlowego” 2011, 6, p. 39.

<sup>25</sup> See the survey carried out by Centrum Pozasądowego Rozwiązywania Sporów [English: Centre for the Non-Judicial Settlement of Disputes] at WPiA UW concerning the *Implementation of Directive of the European Parliament and Council 2008/52/EC in Civil and Commercial Matters – in Law and Practice*, [www.mediacje.wpia.uw.edu.pl](http://www.mediacje.wpia.uw.edu.pl) (access: 10.03.2021).



and mediators, contributing to their professionalisation by shaping behavioural patterns in the area of mediation services. One cannot be a professional without complying with the standards of the profession and the ethical standards.<sup>26</sup>

## **Obligations of State Authorities to Support Training for Mediators According to Article 4 Section 2 of Directive 2008/52/EC**

The second of the obligations resulting from Article 4 section 2 of Directive 2008/52/EC that is consistent with the minimum harmonisation level is the obligation of the state authorities to support the preliminary training of mediators and the follow-on training so as to guarantee to the parties that the mediation is effective, impartial and competent. This mainly refers to permanent mediators because since 2015 Poland has been in the process leading to a complex regulation of the status of permanent mediators that would leave the 'non-permanent' mediators out of this regulation. The notion of preliminary training can be understood to convey the meaning of training addressed to persons who have applied for a permanent mediator status. The follow-on training is imposed by the obligation to continue education after being registered in the register of permanent mediators. On the other hand, the support in the field of training should be understood as an obligation of state authorities to undertake all actions that will make the provisions of the directive effective and ensure that the result determined by it will be achieved. Thus, it will be the implementation of solutions aiming at educating mediators and contributing to the effective and competent mediation.

While assessing the correct implementation of Article 4 section 2 of Directive 2008/52/EC in the Polish legal system, one should notice that it does not assume the introduction of mandatory training for mediators. Nevertheless, it establishes the desired result in the form of a requirement for the mediator to carry out the proceeding in a professional – 'effective and competent' – way while recognising training only as a tool to be used to achieve an objective. Therefore, other solutions are acceptable which will enable the qualifications of candidates for mediators to be thoroughly verified provided that they are 'effective'. Poland is one of the few countries in the European Union which have not introduced the obligation of preliminary or follow-on training, even despite numerous recommendations and

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<sup>26</sup> W. Gasparski, *Wykłady z etyki biznesu*, Warszawa 2007, p. 46.

consistent postulates of the doctrine to introduce such an obligation.<sup>27</sup> While evaluating the current system of requirements and verification of candidates for permanent mediators, which is actually the context in which the obligation to support preliminary training should be considered, the dualism of solutions can be found to exist. On one hand, it is demonstrated only in the possibility for the candidates for permanent mediators to attend the training. On the other hand, however, it is demonstrated in the establishment of a substitute training with regard to persons whose educational background, experience and actual professional occupation may indicate that they have been qualified to conduct mediations and which can be documented based on a number of documents listed in § 5 of the Regulation of the Minister of Justice of 20 January 2016 on the keeping of a register of permanent mediators.<sup>28</sup> The documents, which may constitute a confirmation of one's qualifications, eliminating the need to do training, include a list of publications on mediation or presentation of natural persons' reviews of the qualifications. Such prerequisites make it difficult or even impossible for the presidents of district courts to thoroughly assess candidates for permanent mediators.<sup>29</sup> Within the framework of the existing dualism, verification of knowledge and skills as a criterion which can form a guarantee of an 'effective and competent' mediation is not verified in the form of an exam which is mandatory in many member states of the European Union<sup>30</sup> and the uniform certificate, but considering the lack of precise criteria, it is subject to an often-subjective evaluation by the presidents of district courts. The only legally authorised authority conducting the verification of qualifications of candidates for permanent mediators in Poland are, in fact, presidents of district courts and presidents of courts of appeal who hear appeals against decisions made by the former (Article 157 c § 3 PrUSP). Thus, the system of preliminary training for permanent mediators in Poland boils down to, first, the lack of obligation to attend training.

<sup>27</sup> M. Dąbrowski, *Mediacja w świetle przepisów kodeksu postępowania cywilnego*, Lublin 2019, pp. 80–103; A. Korybski, *Profesjonalizacja czynności mediacyjnych (wybrane zagadnienia w perspektywie polskiego porządku prawnego)*, "Annales UMCS" 2019, 1, pp. 125–139.

<sup>28</sup> Journal of Laws of 2016 item 12 (Dz.U. z 2016 r., poz. 12).

<sup>29</sup> M. Dąbrowski, *Kryterium wiedzy i umiejętności jako wymóg dla stałych mediatorów – glosa do wyroku Wojewódzkiego Sądu Administracyjnego w Poznaniu z 25 stycznia 2018 r., III SA/Po 634/17*, "Studia Prawnicze" 2019, 3, pp. 211–231; A. Kalisz, *Mediator as a Profession Incorporated into the System of Common Courts – Civil Mediation Practice in the Light of Recent Changes*, "Studia Iuridica Lublinensia" 2018, 3, p. 134; A. Zienkiewicz, *Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part II – Survey Questionnaires)*, "Studia Iuridica Lublinensia" 2022, 1, pp. 219–220.

<sup>30</sup> See: Article 11 of the Lithuanian Act on Mediation of 29 October 2017 (Lietuvos Respublikos civilinių ginčų taikinamojo tarpininkavimo įstatymo Nr. X-1702, 2017 m. birželio 29 d. Nr. XIII-534 Vilnius), A. Korybski, *Legal Status of Mediator in Mediation Proceedings in Civil Cases*, "Studia Iuridica Lublinensia" 2018, 3, p. 146.

Second, the lack of regulations defining the programme and the hourly basis of training for candidates for permanent mediators who decide to acquire qualifications by attending the training within the frameworks of the dualism described above.<sup>31</sup> Third, the lack of a system of the verification and specification of requirements for entities organising training and persons running the training. Fourth, the lack of a uniform system of the certification of mediators, making it easier for the presidents of district courts to assess the qualifications of a candidate for the permanent mediator based on formal prerequisites rather than substantial ones. Fifth, as it has already been emphasised, the lack of effective mechanisms of the control of qualifications held by the candidates for permanent mediators as part of the verification process conducted by the presidents of district courts.

It is worth mentioning the establishment of a market-based qualification in the form of 'judicial and non-judicial mediations in civil matters' and including it in the Integrated System of Qualifications.<sup>32</sup> The qualification referred to above defines the training programme, requirements for the certification units, terms and methods of taking exams – being validated as well as a system of certificates issued for a period of 10 years for persons who have done training and would like to be registered in the register of permanent mediators. This is obviously an important step towards the proper implementation of Article 4 section 2 of Directive 2008/52/EC. Nevertheless, it is only one of many possibilities of acquiring qualifications, within the frameworks of the existing dualism, which is presently used extremely rarely and on an absolutely voluntary basis. Its 'drawback' – in the current legal state – is that mediators who have passed the exam are given a certificate issued for a period of 10 years, being subject to reverification after this period is over. This may actually encourage mediators to use a backdoor option by do another training available on the market and getting a certificate with indefinite validity or by replacing the training by submitting other documents which may confirm the qualifications. The qualification referred to above has informally ousted the standards for the training of mediators of 2007 which define the thematic scope of the training over a minimum duration of only 40 clock hours and requirements for persons and training institutions while establishing that conducting a mediation requires 'specific skills' and so 'it is recommended to take part in specialised trainings' without precisely specifying the requirements which they would be to fulfil. This provision, along

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<sup>31</sup> These solutions are in place in Austria, Belgium, Czechia, Lithuania, Germany, Slovenia and other countries.

<sup>32</sup> Announcement of the Minister of Justice of 4 December 2018 on including the market qualification 'Conducting Judicial and Non-judicial Mediations' in the Integrated System of Qualifications, „Monitor Polski” No. 2018 item 1198.

with the recommended number of hours, makes it doubtful whether it is possible to acquire the knowledge and skills required to be able 'to effectively and competently conduct a mediation'. For the sake of comparison, a minimum number of training units in Austria has been determined to be 365, while in the case of lawyers, notary officers, judges, academic staff, psychologists, etc., there is also an obligation to complete the training during 220 training units.<sup>33</sup> In Germany, the training covers 120 hours and it is necessary to be supervised after a conducted mediation.<sup>34</sup>

The conclusions summarised above make it possible to claim that the dualism existing in Poland, especially with regard to preliminary training for mediators, has many legal loopholes and it practically does not comply with the objectives set by Article 4 section 2 of Directive 2008/52/EC. Regulations that are applicable to the procedure of acquiring qualifications through training or its substitute do not guarantee an 'effective and competent' conduct of mediation proceedings. Furthermore, the system used to verify persons applying for being registered in the register of permanent mediators by the presidents of district courts cannot be deemed an effective mechanism for the quality control of mediators' qualifications which would limit the risk of the services being provided by persons being unqualified to perform this function.

As far as the second requirement resulting from Article 4 section 2 of Directive 2008/52/EC for the state authorities to support continuing education after being registered on the register of permanent mediators is concerned, one can briefly conclude that no regulations exist in Poland that would be applicable in this regard. Registration in the register of permanent mediators is indefinite in time and basically lifelong. It does not cause an obligation to continue education even if the permanent mediator has never conducted a mediation after being registered. There are no regulations which would, similarly to solutions applicable in most member states of the European Union, establish a temporary, usually a five-year-long registration in the register of mediators, associated with the obligation to undertake continuing education in the form of supplementary training courses or the necessity to participate in supervision. The only 'other' 'mechanism for quality control of services provided by mediators', as explicitly expressed by Article 4 section 2 of Directive 2008/52/EC, may be Article 157c § 1 clause 5 of PrUSP, under which the president of a district court takes a decision to remove a permanent mediator from the register when he

<sup>33</sup> Austrian regulation on the training of registered mediators on mediation in the field of civil law of 22 January 2004 (Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator. Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediat-AV. BGBl. II Nr. 47/2004).

<sup>34</sup> German regulation on the education and training of certified mediators of 21 August 2016 (Verordnung über die Aus- und Fortbildung von zertifizierten Mediatoren, Zertifizierte-Mediatoren-Ausbildungsverordnung vom 21. August 2016, BGBl. I S. 1994).

or she has been found to fulfil obligations in undue manner. The presidents of district courts have then been entrusted not only with a function of a verifying authority but also a disciplinary authority. The aforementioned second role is only, however, of theoretical nature, considering the lack of regulations governing the disciplinary procedure and the lack of obligation to comply with the ethical and deontological codes which might provide a basis for the assessment. Furthermore, due to the lack of appropriate regulations, a would-be removal of the mediator from the register in one court does not cause the mediator to be removed from a register kept by another district court, thus making also this quality control mechanism only an apparent one. In the face of the lack of relevant regulations, the market of mediation services and the courts referring cases for mediation have, in fact, become a mechanism of the verification of the services provided by mediators. This means that Article 4 has not been properly implemented and the results within the scope of which the directive is binding for the member states have not been achieved.

## Conclusions

Ensuring the proper quality of mediations by providing support through the establishment of ethical and deontological codes and support of the preliminary and continuing training of mediators aims at the reinforcement of confidence in the mediation procedure. However, the prerequisite for the increase of the effectiveness of mediation proceedings and the building of confidence in the mediation is the requirement to ensure that the implemented solutions contribute to the mediators providing the services in an 'effective and competent' way. The support provided by state authorities must not be exhausted in a purely postulative provision calling the 'mediator to keep deepening and enhancing his or her skills and to take care of his or her high level of professional ethics' if this is not reflected in the legal system and it is not observed in practice. The legislative activity must not be limited to the absolutely necessary and also exclusively the minimum harmonisation level, being out of touch with practical effectiveness and materialising the results indicated in Article 4 of Directive 2008/52/EC to a negligible degree. The lack of solutions designed to make the mediator comply with the ethical and deontological codes and the lack of obligation to undertake preliminary and continuing trainings along with an ineffective system of verification of candidates for permanent mediators and principally the lack of other mechanisms for quality control of mediation services constitutes a set of faults in the process of implementation. This proves that the Polish legislator has transposed Article 4 of Directive 2008/52/EC in a too narrow range in relation to the result indicated therein while

not ensuring its effectiveness. One should remember that the directive is binding for each member state to which it is addressed in relation to the result expected to be achieved.<sup>35</sup> In order to make the resolutions resulting from Article 4 of Directive 2008/52/EC effective, it is necessary to introduce mechanisms for the quality control of mediation services at the 'primary' stage, related e.g. to the training of mediators and the binding definition of the programme and the minimum number of hours, the verification and establishment of prerequisite criteria for entities authorised to conduct training and requirements for coaches, the standardisation of the system for the certification of mediators and providing more precise criteria of verification for the registration in the register of mediators. In the case of 'secondary' mechanisms for quality control, it is necessary to establish a requirement to observe ethical and deontological codes and an obligation to regularly take part in continuing training and to submit to supervision. It is also worth considering the introduction of an assessment of mediators based on questionnaires filled by the participants of the mediation proceeding through an IT system or by judges assessing the mediation in formal terms.

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<sup>35</sup> Article 288 of the Treaty on the Functioning of the European Union of 25 March 1957, Journal of Laws of 2004 No. 90 item 864/2 as amended.

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