

## PROCEDURE FOR OUT OF COURT SETTLEMENT OF CONSUMER DISPUTES BEFORE THE PASSENGER OMBUDSMAN

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### ABSTRACT

The adoption of Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution methods for the settlement of consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.05.2013 on the online system of consumer disputes resolution and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, was intended to enable consumers to resolve disputes with entrepreneurs using alternative dispute resolution methods. In order to ensure that consumers can exercise the rights granted to them by EU law, by way of implementation of the Regulations there has been an amendment of the Act of 3 July 2003 – Aviation law (i.e. Journal of Laws of 2019, item 1580), on the basis of which the institution of the Passenger Ombudsman at the Civil Aviation Office was established, which is an entity entitled to conduct proceedings for the out-of-court settlement of consumer disputes between a passenger and an air carrier, tour operator, or seller of air tickets, entered into the register of entitled entities. The purpose of this study is to present the legal regulation concerning proceedings before the Ombudsman, indicating the political position of the Passenger Ombudsman and his team using analytical and comparative research methods.

**Keywords:** Ombudsman, ADR, mediation, consumer, passenger

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## 1. INTRODUCTION

The resolution of Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution of consumer disputes and amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC<sup>1</sup> and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.05.2013 on online dispute resolution for consumer disputes, and making amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC<sup>2</sup> was aimed at enabling consumers to resolve disputes with entrepreneurs using alternative dispute resolution methods. These disputes would be resolved by independent and impartial bodies and the procedure would become effective and prompt<sup>3</sup>. According to Article 1 of the ADR Directive, “The objective of this Directive is, by achieving a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers may, on a voluntary basis, complain about the actions of entrepreneurs to entities offering independent, impartial, transparent, effective, prompt, and fair alternative dispute resolution (...)”<sup>4</sup>. The first Polish act implementing the ADR Directive was the Act of 23 September 2016 on the out-of-court settlement of consumer disputes (Journal of Laws of 2016, item 1823)<sup>5</sup>. The OSCD Act introduces a legal definition of the procedure for out-of-court resolution of consumer disputes. According to Article 3 of the said Act, the purpose of this procedure is to resolve a consumer dis-

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<sup>1</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution of consumer disputes and amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC (O.J. E.U. L165, 18 June, 2013), (hereinafter: ADR Directive).

<sup>2</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21.05.2013 on online dispute resolution for consumer disputes, and making amendments to Regulation (EC) No 2006/2004 and Directive 2009/22/EC (O.J.E.U. L165, 18 June, 2013), (hereafter: ODR Regulation).

<sup>3</sup> Justification of the draft act on out-of-court settlement of consumer disputes, parliamentary print 630, accessed December 1, 2019 <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=630>.

<sup>4</sup> Art. 1 of the ADR Directive.

<sup>5</sup> Act on the out-of-court settlement of consumer disputes of 23 September 2016, Journal of Laws 2016, item 1823, hereinafter: OSCD act.

pute, which may take the form of mediation, conciliation, or arbitration<sup>6</sup>. Mediation would serve to bring the parties' positions closer together to have the dispute resolved by the parties themselves. The essence of conciliation would be to provide the parties with a proposal for the resolution of the dispute by the entity conducting the proceedings. Arbitration, on the other hand, would end with a solution imposed by the arbitrator who previously conducted ADR proceedings.

As mentioned earlier, the OSCD Act was the first act implementing the ADR Directive. "The adoption of the ADR Directive is linked to the European Union's desire to establish in all Member States a uniform system of out-of-court dispute resolution which will cover all disputes arising in the internal market between a consumer and an entrepreneur arising from contracts for the sale of goods or the provision of services, including contracts concluded via the Internet and cross-border contracts (...)"<sup>7</sup>. In the course of further legislative work, the Act of 14.12.2018 amending the Aviation Law and certain other acts (Journal of Laws of 2019, item 235) was amended. Pursuant to the aforementioned act, the following was introduced to the Act of 3 July 2003 – Aviation Law (i.e. Journal of Laws of 2019, item 1580)<sup>8</sup> Section Xa entitled: Protection of passenger rights.

In Chapter 1 of the above-mentioned Section, Article 205a regulates the proceedings in cases of out-of-court resolution of passenger disputes to be held before the Passenger Ombudsman. One may ask whether these changes in legal regulations have had the expected effect. The aim of this study is to present the legal regulation concerning proceedings before the Passenger Ombudsman, indicating the structural position of the Passenger Ombudsman and his/her team. The article also presents selected issues from legal regulations of other EU Member States.

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<sup>6</sup> Art. 3 of the OSCD act.

<sup>7</sup> Justification of the draft act of 14.12.2018. on amending the Act – Aviation Law and certain other acts (Journal of Laws of 2019, item 235), parliamentary print 2988, (hereinafter: justification 2988). December 1, 2019 <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2988>.

<sup>8</sup> Hereinafter: AL.

## 2. PASSENGER OMBUDSMAN AND HIS/HER TEAM

Since 1 April 2019, there has been a Passenger Ombudsman (hereinafter referred to as the PO) under the President of the Civil Aviation Office<sup>9</sup>, acting as an entity entitled to conduct proceedings on the out-of-court settlement of consumer disputes between passengers and the air carrier, tour operator, or seller of air tickets, entered in the register of authorized entities kept by the President of the Office of Competition and Consumer Protection under No 11<sup>10</sup>. The President of the CAO appoints the Ombudsman from among the employees of the Civil Aviation Office for a five-year term. Detailed requirements for the PO can be found in art. 205a (3) of the Aviation Law. The Ombudsman may be a person who jointly meets the following requirements: is a member of the civil service corps<sup>11</sup>, has higher education, knowledge in the field of passenger rights in public transport, and has at least one year's professional experience related to the protection of passenger or consumer rights<sup>12</sup>. If one of the four conditions listed enumerated in art. 205a (6) of the Aviation Law is met, the President of the CAO shall withdraw the appointment of the Ombudsman before the end of the term of office. The provision of the above-mentioned article does not give rise to any doubts as to the nature of the activity performed by the President of the CAO, as it is his/her duty, which means that the activity is obligatory. The premises which oblige the President of the CAO to undertake such actions are: a gross violation of law in the performance of the function of the PO, an illness which makes it permanently impossible to perform the tasks, a statement that the Ombudsman has not

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<sup>9</sup> The legal position of the President of the Civil Aviation Office (hereinafter: President of the CAO) is governed by Articles 20-24 of the AL.

<sup>10</sup> Section 1 (10) of the Regulations of Out-of-Court Resolution of Consumer Disputes by the Passenger Ombudsman affiliated to the President of the Civil Aviation Office dated 8.04.2019. (hereinafter: Regulations).

<sup>11</sup> Issues concerning the competence and performance of duties by members of the civil service corps have been regulated in the Act of 21 November 2008 on civil service (i.e. Journal of Laws of 2018, item 1559).

<sup>12</sup> Art. 205a (3) of the AL.

fulfilled the obligations which allow him/her to perform this function, or the resignation of the PO<sup>13</sup>.

The Ombudsman carries out his/her tasks with the help of a team. A member of the team can be an employee of the Civil Aviation Office, meeting the same criteria as the PO, who has been authorized in writing by the PO to conduct proceedings for the out-of-court resolution of passenger disputes<sup>14</sup>. The Regulations in section 8(1) clarify the requirements for team members by indicating that such a person should have the necessary knowledge and skills in the field of out-of-court or judicial resolution of consumer disputes, as well as general knowledge of the law.

The authorization shall cover a period not shorter than 3 years<sup>15</sup>. The Ombudsman withdraws authorization before the expiry of the period for which it was granted in four situations: in the case of a gross violation of the law in the performance of the office, or an illness which makes it permanently impossible to perform the tasks, a finding of non-fulfilment of the conditions for performing the office or resignation by a team member. In addition, section 8 (4) of the Regulations adds another condition, the fulfilment of which obliges the Ombudsman to deprive a team member of his/her function before the end of the term of office, namely a valid conviction for an intentional crime or fiscal offence. At this point it should be emphasized that the catalogue of conditions concerning the dismissal of a team member is wider than the catalogue of conditions allowing for the dismissal of the PO before the end of the term of office. Conviction of the Ombudsman by a final judgment for committing an intentional crime or fiscal offence does not allow the President of the CAO to remove the PO from office earlier.

From the announcement published on 22.11.2019 on the Ombudsman's website it follows that "In view of the very large number of applications submitted to the Ombudsman (counted in thousands) and the staffing constraints on the Ombudsman's team, we give notice that applications are considered in the order of receipt. At present, applications submitted in

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<sup>13</sup> Art. 205a (6) of the AL.

<sup>14</sup> Art. 205a (5) of the AL.

<sup>15</sup> Section 8 (3) of the Regulations.

May are being processed”<sup>16</sup>. The previous notice – published on 29.07.2019 on the PO’s website – also read that “In view of the difficult HR and financial situation of the office, the Ombudsman does not have a team at the moment. We are making every effort to appoint such a team”<sup>17</sup>. In the last four months, it has at least been possible to set up a team and start processing the applications. Even before the establishment of the Passenger Ombudsman’s institution, Poland was one of the EU countries with the highest number of complaints submitted to Civil Aviation Office. According to the ECC-Net Airline Passline Rights 2015<sup>18</sup> survey, our country was in third place after Austria and Italy in the number of complaints submitted.

The analysis of the solutions of other EU Member States shows that there is no single ADR system. The French Mediator for Tourism and Travel is the closest model to the Polish Passenger Ombudsman<sup>19</sup>. In addition, these issues are dealt with, for example: the Agency for Passengers and Travelers (Austria – *Agentur für Passagier – und Fahrgastrechte*<sup>20</sup>), Consumer Mediation Service (Belgium – *Service de Médiation pour le Consommateur*<sup>21</sup>), Interdisciplinary Centre for Law, Alternative and Innovative Methods<sup>22</sup> (Cyprus) or The Aviation Conciliation Body at The Federal Justice Office (Germany – *Schlichtungsstelle Luftverkehr beim Bundesamt für Justiz*<sup>23</sup>).

### 3. PROCEEDINGS BEFORE THE PASSENGER OMBUDSMAN

The aim of out-of-court proceedings conducted by the PO is to resolve consumer disputes, and more specifically civil disputes concerning

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<sup>16</sup> December 1, 2019 <https://pasazerlotniczy.ulc.gov.pl/>.

<sup>17</sup> Ibid.

<sup>18</sup> March 27, 2020 <https://konsument.gov.pl/aktualnosci/pasazerowie-egzekwujaj-swoje-prawa-prawa-pasazerow>.

<sup>19</sup> More information: March 27, 2020 <https://www.mtv.travel/en/mission-and-notification/>.

<sup>20</sup> More information: March 27, 2020 <https://www.apf.gv.at/de/>.

<sup>21</sup> More information: March 27, 2020 <https://mediationconsommateur.be/fr>.

<sup>22</sup> More information: March 27, 2020 <https://www.icclaimcentre.org/>.

<sup>23</sup> More information: March 27, 2020. [https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Luftverkehr/Schlichtungsstelle\\_node.html](https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Luftverkehr/Schlichtungsstelle_node.html).

property claims resulting from two regulations: Regulation No. 261/2004 of the European Parliament and of the Council of 11.02.2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, or long delay of flights, repealing Regulation No. 295/91/EEC<sup>24</sup> and Regulation No. 2111/2005 of the European Parliament and of the Council of 14.12.2005 on the establishment of a community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC<sup>25</sup>. In the event of a claim under Regulation 261/2004, the parties to the dispute shall be the passenger and the air carrier. As regards Regulation 2111/2005, the parties to the dispute shall be the passenger and the air carrier, or tour operator, or ticket vendor. Section 1 of the Regulations introduces definitions of passenger and air carrier. According to section 1 (6) of the Regulations, the passenger is “a person to whom Regulation 261/2004/EC and Regulation 2111/2005/EC apply, whether travelling for private, business, or professional purposes”, while paragraph 7 of the same section indicates who is to be understood by the term air carrier: “entity authorized to operate air services on the basis of an operating licence – in the case of a Polish air carrier, or on the basis of an act of the competent authority of a foreign country – in the case of a foreign air carrier. The Regulations also use the definition of a Community carrier, which is “an air carrier with a valid operating licence issued by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers”<sup>26</sup>. The property claims under Regulation 261/2004 concern flights located in the

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<sup>24</sup> Regulation of the European Parliament and of the Council No. 261/2004 on the establishing common rules on compensation and assistance to passengers in the event of the denied boarding, cancellation, or long delay of flights, repealing Regulation No. 295/91/EEC (O.J. E.U. L46, 17 February, 2004, 10, (hereafter: Regulation 261/2004).

<sup>25</sup> Regulation of the European Parliament and of the Council No. 2111/2005 on the establishment of a community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC of 14 December, 2005 (O.J. E.U. L344, 27 December, .2005), 15, (hereafter: Regulation2111/2005).

<sup>26</sup> Section 1 (8) of the Regulations.

territory of the Republic of Poland and flights from third countries<sup>27</sup> to those airports operated by Community air carriers<sup>28</sup>.

As is apparent from Article 205a (18), the subjective scope of proceedings before the Ombudsman covers not only disputes concerning consumers<sup>29</sup>, but also disputes between entrepreneurs. “It follows that Regulation No 261/2004/EC and Regulation No 2111/2005/EC indicate the rights of the “passenger”, who may also be a natural person conducting a business activity or a natural person taking a flight in connection with the exercise of an activity for other entities<sup>30</sup>. Thus, a dispute may be conducted between entrepreneurs to the extent that the passenger takes a flight in connection with his or her business or professional activity.

The proceedings conducted by the Ombudsman are mediatory in nature, which means that they are intended to enable the parties to the proceedings to be brought closer together in order to resolve a dispute. The PO becomes a mediator who helps the parties to reach a mutually satisfactory resolution of the conflict. The PO will not impose his/her point of view; on the contrary, s/he will make sure that the resolution of the dispute is a jointly reached compromise<sup>31</sup>. The Ombudsman as a mediator “has no powers of authority and his role is limited to assisting the parties, supporting them in formulating their settlement proposals in order to reach an agreement<sup>32</sup>. In all mediation proceedings, whatever they may be, the mediator plays a key role. It appears that the Ombudsman’s primary role in this procedure will be to explain and to make the parties aware of the law, informing them of their rights and obligations<sup>33</sup>.

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<sup>27</sup> Third countries are those that are not members of the European Union, as well as those other than Switzerland, Norway, and Iceland. December 2, 2019 [https://eurlex.europa.eu/legalcontent/PL/TXT/PDF/?uri=CELEX:52016XC0615\(01\)&from=EL](https://eurlex.europa.eu/legalcontent/PL/TXT/PDF/?uri=CELEX:52016XC0615(01)&from=EL).

<sup>28</sup> Art. 205a (1) of the AL.

<sup>29</sup> The legal definition of consumer is laid down in Article 221 of the Act on the Civil Code of 23 April 1964 (Journal of Laws 2019, item 1145).

<sup>30</sup> Justification 2988, 62.

<sup>31</sup> Anna Tombek-Knigawka and Wojciech Kotowski, “Dlaczego kieruję sprawę do postępowania mediacyjnego?,” *Prokuratura i Prawo*, no. 3 (2011), Legalis.

<sup>32</sup> Hanna Duszka-Jakimko, *Alternatywne rozwiązywanie sporów. Pomiędzy instrumentalnym a komunikacyjnym paradygmatem prawa* (Opole: Uniwersytet Opolski, 2016), 100.

<sup>33</sup> Joanna Wegner-Kowalska, “Mediacja (art. 13, art. 96a-96g),” in *Raport Zespołu Ekspertskiego z prac w latach 2012-2016. Reforma prawa o postępowaniu administracyjnym*, ed.



Section 3 (4) of the Regulations lists and describes the rules relating to the proceedings before the Ombudsman. They include: voluntariness, confidentiality, acceptability, impartiality, and neutrality. The first three refer strictly to the rules of conduct before the PO, the last two in turn are directly connected with the person of the Ombudsman.

The proceedings before the Ombudsman are conducted at the request of a passenger, but can be submitted only after the complaint procedure has been exhausted with the carrier, tour operator, or ticket vendor. The complaint procedure shall be deemed to be exhausted if the air carrier, tour operator, or ticket vendor has considered the complaint or the time limit for considering it has expired. According to Article 7a (1) of the Act of 30 May 2014 on Consumer Rights (i.e. Journal of Laws of 2019, item 134), as a rule, an entrepreneur is obliged to respond to a consumer's complaint within 30 days of its receipt.

However, the time limit for the submission of a complaint by a passenger is limited in time, as it cannot be submitted later than before the end of the year in which the flight being the subject of the application was performed or was to be performed. This is one of the shorter limitation periods among regulations of other EU countries. Malta is the only country that has not introduced a limitation period. Respectively, the longest and the shortest limitations periods have been introduced by: Latvia, Lithuania and Luxemburg – 10 years, Cyprus and Ireland – 6 years, Bulgaria, Greece, Spain and Hungary – 5 years, Austria, Croatia, Czech Republic, Denmark, Estonia, Finland, Germany, Norway, Portugal, Romania and Sweden – 3 years, Italy 26 months, France, Iceland, the Netherlands, Slovakia and Slovenia – 2 years. As in Poland, an annual limitation period was set in Belgium. Sweden introduced the shortest one of only 2 months<sup>34</sup>.

The issue of the limitation period was considered by the Court of Justice of the European Union (hereinafter: CJEU). In the judgment of November 22, 2012 C-139/11 in the case of Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV, the CJEU stated that “it is not disputed that Regulation No 261/2004 contains no provision on the

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Zbigniew Kmiecik (Warsaw: Naczelny Sąd Administracyjny, 2017), December 2, 2019, [www.nsa.gov.pl/download.php?id=446&mod=m/11/pliki\\_edit.php](http://www.nsa.gov.pl/download.php?id=446&mod=m/11/pliki_edit.php).

<sup>34</sup> March 27, 2020 <https://www.airhelp.com/pl/prawa-pasazera/>.

time-limits for bringing actions before the national courts for compensation under Articles 5 and 7 of that regulation. It is settled case-law that, in the absence of provisions of EU law on the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that those rules observe the principles of equivalence and effectiveness. It follows that the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation No 261/2004 are determined by the national law of each Member State, provided that those rules observe the principles of equivalence and effectiveness.”<sup>35</sup>. The Supreme Court in Poland spoke in the same way in its resolution of March 17, 2017 III CZP 111/16 according to which “Claim for compensation provided for in Article 7 of Regulation (EU) No 261/2004 of the European Parliament and of the Council of February 11, 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding or of cancellation or long delay of flights, repealing Regulation (EEC) No 295/91, shall be barred by one year under Article 778 Civil Code”<sup>36</sup>.

The application to initiate proceedings is a pleading and must therefore meet the legal requirements. The AL, referring to its elements, refers in part to the Act of 23 September 2016 on the out-of-court settlement of consumer disputes (Journal of Laws of 2016, item 1826), where in Article 33 (2) there is information on the minimum requirements to be met by a complaint. These include: identification of the parties to the dispute, precise identification of the claim, indication of the type of proceedings (in the situation described, this will be proceedings aimed at enabling the parties to the proceedings to approximate their positions with a view to resolving the dispute, i.e. mediation) and signature. Article 205a (10) and section 4 (3) of the Regulations contain a list of information which the passenger should attach to the application. The information may be divided into several groups. First, information relating to the parties

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<sup>35</sup> March 27, 2020 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=130243&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1244103>.

<sup>36</sup> March 27, 2020 <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%20111-16.pdf>.

to the proceedings: name and surname or business name of the parties to the dispute, place of residence or seat and mailing address, date of birth of the passenger, current telephone number of the parties and e-mail address, second, information relating to the circumstances of the flight: information whether the flight was directly related to the business or professional activity of the passenger, description of the circumstances justifying the request with supporting documents, e.g. a copy of the documentation concerning the complaints procedure, a copy of the booking confirmed for the flight in question, third, information related to the procedure: a statement that the case for the same claim between the same parties is not pending or has not already been considered by another competent entity or court, information as to whether the Ombudsman was not previously requested to consider the same case, information as to whether the applicant consents to the transmission of correspondence by e-mail, a statement that he has read and accepted the Regulations and complies with their provisions during the procedure.

When analyzing the various elements of the application, one of them may be particularly interesting. What draws the attention is the passenger's date of birth. Given that the Ombudsman's proceedings are conducted in electronic form, which will be discussed in more detail, this is the only way to determine whether a person has full legal capacity by virtue of his or her legal age<sup>37</sup>. It is also important to note that the passenger attaches copies of documents and not their originals, which is to be one of the aspects of the formalization of proceedings<sup>38</sup>.

If a complaint does not contain the required elements, the Ombudsman may invite the passenger to complete it, setting a reasonable time limit for that purpose<sup>39</sup>. The Regulations indicate that the deadline for completing the missing elements cannot be longer than 14 days from the date of receiving the letter<sup>40</sup>. What is important, a complaint may be filed in Polish or in English<sup>41</sup>.

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<sup>37</sup> Justification 2988, 64.

<sup>38</sup> December 27, 2019 <https://pasazerlotniczy.ulc.gov.pl/postepowanie-polubowne-przed-rzecznikiem>.

<sup>39</sup> Art. 205a (12) of the AL.

<sup>40</sup> Section 5 (2) Regulations.

<sup>41</sup> Art. 205a (11) of the AL.

A passenger wishing to initiate proceedings before the Ombudsman may submit a complaint in two ways: either on paper or in electronic form. In the first case, the complaint is sent to the address of the Civil Aviation Office, while in the second case the passenger can choose one of three options: submit the application via the electronic platform of public administration services (ePUAP), with a trusted profile, or use the contact form prepared by the CAO dedicated to submitting applications for initiation of proceedings, which is available on the website in the Ombudsman's subject tab and in the CAO Public Information Bulletin. The form is then submitted without a signature. The proceedings are conducted only in writing, which is a rule among EU Member States. An exception is Cyprus, where the proceedings are conducted in writing and orally, because in some cases the physical presence of the parties or their representatives is required<sup>42</sup>.

The date of commencement of proceedings is the date of service on the Ombudsman of a complaint that meets the minimum formal requirements: identification of the parties, indication of the type of proceedings, precise specification of the request, and signature (subject to the absence of the requirement to sign when submitting a complaint using the contact form).

As a rule, proceedings before the Ombudsman are conducted in electronic form. Information is exchanged by electronic means of communication, in particular electronic mail. Where a party does not agree to conduct proceedings in electronic form, information exchange between that party and the Ombudsman is in paper form<sup>43</sup>. The proceedings shall be conducted in Polish with an unofficial translation of the letters in the case into English for a party to the proceedings who does not speak Polish<sup>44</sup>. Most countries have accepted the possibility of conducting proceedings not only in their mother tongue, but also in another language indicated

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<sup>42</sup> Report from the Commission to the European Parliament, the Council on the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution methods for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, March 27, 2020 <https://eur-lex.europa.eu/legalcontent/PL/TXT/HTML/?uri=CELEX:52019DC0425&from=EN#footnoteref35>.

<sup>43</sup> Section 4 (8-9) of the Regulations.

<sup>44</sup> Section 9 (3) of the Regulations.

in the regulations. The second language is usually English. Countries that have decided to conduct proceedings in their native language are: Bulgaria, the Czech Republic Denmark and Estonia<sup>45</sup>.

When a passenger makes a request that meets all the formal requirements, the Ombudsman provides the parties with an acknowledgement of receipt without delay. Such confirmation shall indicate the passenger's claim and the rights of the parties. The rights of the parties in proceedings before the Ombudsman include the right of withdrawal from the proceedings at any time, the possibility of active participation in the course of the whole proceedings: the presentation of positions, documents, and evidence, the possibility of gaining access to positions, documents, and evidence presented by the other party and opinions issued by experts, and the possibility of commenting on them, the right to be assisted at any stage of the proceedings by third parties, including persons providing professional legal assistance<sup>46</sup>.

The Ombudsman conducts the proceedings free of charge, which means that s/he does not charge any fees from the parties. This is not a special regulation compared to other Member States, however, some of them decided to introduce payment for proceedings. In Austria, the procedure is free for the consumer and not for the entrepreneur. The amount of fees in the mediation procedure is set in a regulation of the Austrian Federal Ministry of Transport, Innovation and Technology and is currently 78 EUR<sup>47</sup>. In Cyprus, consumer and entrepreneur pay variable fees<sup>48</sup>. In France, where solutions are closest to Polish solutions, the procedure is free for the consumer, and the fee for entrepreneur depends on membership in professional organizations. For members, the fee is 100 EUR, and for remaining 400 EUR<sup>49</sup>.

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<sup>45</sup> March 27, 2020 <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2&lng=PL>.

<sup>46</sup> Section 5 (4) of the Regulations.

<sup>47</sup> March 27, 2020 <https://www.apf.gv.at/de/flug.html>.

<sup>48</sup> March 27, 2020 [http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/index\\_en/index\\_en?OpenDocument](http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/index_en/index_en?OpenDocument).

<sup>49</sup> March 27, 2020 20020 <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2&lng=PL>.

As a rule, the case should be resolved within 90 days from the date of delivery of a complete application to the Ombudsman. In other countries, the average processing time is: 35 days in Austria, 75 days in Cyprus, 90 days in Belgium and France and 5 months in Denmark. In the case of a particularly complicated dispute, the PO may extend the time limit and, if he/she does so, shall notify the parties, indicating the new expected date of completion of the proceedings. The ninety-day deadline may also be extended upon the parties' consent<sup>50</sup>. By comparison, in Belgium, the legislation provides that the period may be extended only once, up to a maximum of 180 days; in Portugal, the period may be extended twice<sup>51</sup>.

The Ombudsman shall forward the request to the other party and set a 14-day deadline for responding to the request. Participation of the parties in the proceedings is voluntary, so if the other party does not respond to the request within the deadline, or declares that it does not agree to participate in the proceedings, then the PO terminates the proceedings and immediately informs the parties thereof. The Ombudsman also terminates the proceedings if a passenger withdraws the application during the proceedings or if the proceedings have become impossible for other reasons<sup>52</sup>. Participation in the proceedings does not exclude the possibility of pursuing claims in court proceedings.

The provisions of the AL and the Regulations indicate situations in which the Ombudsman leaves the complaint unresolved. These include: the passenger's failure to complete the application for necessary information or documents within the prescribed time limit<sup>53</sup>, the subject of the application concerns flights outside the Ombudsman's jurisdiction<sup>54</sup>, in

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<sup>50</sup> Section 6 of the Regulations.

<sup>51</sup> Report from the Commission to the European Parliament, the Council on the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution methods for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. December 27, 2019 <https://eur-lex.europa.eu/legalcontent/PL/TXT/HTML/?uri=CELEX:52019DC0425&from=EN#footnoteref35>.

<sup>52</sup> Section 5 (6) of the Regulations.

<sup>53</sup> Art. 205a (12) of the AL.

<sup>54</sup> Art. 205a (13) of the AL.

particular flights other than those operated from airports located on the territory of the Republic of Poland and flights from third countries to those airports, operated by Community air carriers. In such a situation, the PO is obliged to immediately inform the passenger about the body or entity competent to handle the complaint. The last possibility of leaving the complaint unprocessed is if the passenger failed to comply with the deadline for submitting the application, i.e. one year has elapsed since the date on which the flight which is the subject of the application was operated or was to be operated<sup>55</sup>.

The Ombudsman informs the passenger that the application has been left unprocessed and, in the case of a paper complaint, also returns the application to the applicant<sup>56</sup>.

The AL also provides for premises, the occurrence of which results in the obligatory refusal of the Ombudsman to consider a dispute. These include: the complaint procedure not being exhausted by the passenger, re-submission of a complaint by a passenger in the same case, a situation where a case for the same claim between the same parties is pending or has already been considered by an entity entitled to out-of-court settlement of consumer disputes, another competent entity or court, or where the complaint serves to cause a nuisance to the other party<sup>57</sup>. The last premise concerns, for example, the situation where Regulation 261/2004 does not provide for the possibility of seeking financial claims for failure to fulfil obligations by the air carrier, and the passenger would make another complaint to the Ombudsman in this regard. “This concerns, for example, failure to comply with the obligation to provide meals on delayed flights or information about the rights of passengers (...). In this case, no property claims can be made but the passenger may persistently seek them”<sup>58</sup>. Prerequisites for refusal to resolve the dispute in other EU countries are mostly the same. As a rule, the countries modify their number, for example in Bulgaria there are only three reasons for refusing to proceed. A premise unknown to Polish solutions is that the conduct of proceedings depends on the value of the subject of dis-

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<sup>55</sup> Art. 205a (15) of the AL.

<sup>56</sup> Section 7 (5) of the Regulations.

<sup>57</sup> Section 7 (1) of the Regulations.

<sup>58</sup> Justification 2988, p. 65.

pute. Germany and Ireland are countries where the procedure cannot take place when the value of the subject of dispute is lower than the required financial threshold or exceeds the permissible ceiling<sup>59</sup>.

The Regulations in section 7 (2) provide an optional premise for refusing to consider a civil law dispute between a passenger and the other party, if the consideration of the dispute would cause a serious disruption of the Ombudsman.

If the Ombudsman finds one of the prerequisites preventing the dispute from being conducted, the PO, within 21 days from the date of delivery of a complete application, shall refuse to initiate proceedings in writing, confirming the submission of the application and informing about the reason for the refusal. The Ombudsman shall return all copies of documents provided to him/her in paper form. Such a letter is also a protocol ending the proceedings.

However, once the parties reach an agreement, they conclude a settlement before the Ombudsman. Such a settlement is non-binding in nature, which means that it cannot be enforced in the same way as a court judgment. Belgium, Denmark and France have adopted similar solutions. The agreement developed in Germany or Austria is binding. An interesting regulation was introduced in Cyprus, where the proceedings may end with more solutions. Such result may be binding or non-binding for one or both parties in accordance with the agreement concluded with one or two parties<sup>60</sup>.

The proceedings end with the drafting by the PO of a pleading, which is the minutes of the proceedings. The minutes should contain the minimum elements indicated in section 5 (8) of the Regulations: the date of drafting, the designated parties, a concise statement of the claim and the value of the subject matter of the dispute, the outcome of the proceedings and the Ombudsman's signature. The minutes shall be promptly delivered to the parties to the proceedings<sup>61</sup>.

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<sup>59</sup> March 27, 2020 <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2&lng=PL>.

<sup>60</sup> Ibid.

<sup>61</sup> Section 5 (7) of the Regulations.



#### 4. CONCLUSIONS

Alternative ways of dispute resolution are becoming a response to the crisis of the wider judiciary. Mediation is one of the oldest conflict resolution methods<sup>62</sup>. In the literature there are many definitions of mediation, and in each of them, their authors emphasize various issues. *The Great Encyclopedia of Law* states that “mediation – (Latin: *mediatio* – intermediation) – is a procedure for mediating a dispute in order to bring the conflicting parties to an understanding. (...) The mediator’s task is to reconcile the positions of the parties involved in a dispute, to ease the gap between them; s/he gives them advice, which may be accepted or rejected”<sup>63</sup>.

The institution of the Passenger Ombudsman may become an important institution for passengers as well as for air carriers. In the legal status prior to the amendment of the AL neither the President of the CAO nor the Commission for the Protection of Passengers’ Rights brought the positions of the parties closer together, and the role of the President of the CAO was to examine whether the air carrier had infringed the provisions of Regulation 261/2004, and when the President found such an infringement, s/he imposed a fine for it.

When making a theoretical comparison of mediation with proceedings before a common court, mediation is cheaper and quicker. One does not have to wait for its outcome as long as for the judgment of a common court. However, at the moment it is difficult to say whether the institution of the Ombudsman will improve the situation of passengers. As mentioned above, it follows from the communication available on the PO’s website, that the applications of May 2019 are only being considered, which means that the Passenger Ombudsman’s activities are not effective yet. The global trend has become the amicable settlement of all possible disputes. As indicated in the study, EU Members States are introducing various solutions to provide consumers with the most convenient way to pursue their claims.

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<sup>62</sup> Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądowniczym* (Warsaw: Wolters Kluwer, 2013), 32.

<sup>63</sup> Eugeniusz Smoktunowicz, *Wielka encyklopedia prawa* (Białystok-Warsaw: Wydawnictwo Prawo i Praktyka Gospodarcza, 2000), 440.

The French Mediator for Tourism and Travel is the closest body to the Polish Passenger Ombudsman.

The very idea and attempt to introduce ADR proceedings in property disputes between a passenger and an air carrier, ticket vendor, or tour operator should be assessed positively, but the practice of mediation in other proceedings, e.g. before common courts, administrative courts, or in administrative proceedings raises serious doubts as to its effectiveness. However, it is difficult to resist the conciliation processes, which cover ever wider areas of law. Every step to facilitate consumer redress should be affirmed.

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