

# ORGANISATIONAL FRAMEWORK OF MEDIATORS' SELF-GOVERNANCE

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## Abstract

*The article examines, at the theoretical level, the self-governance of mediators, assessing the question of the sufficiency of its legal regulation. The aim of this article is to assess the legal and practical issues related to the self-governance of mediators, and the legal and/or organizational, administrative problems that may arise from this. The assessment was carried out by analysing three key aspects: providing an overview of the situation of mediators' self-governance in Lithuania, analysing the factors that may have a negative impact on the institution of mediators' self-governance, and identifying the legal basis for the functioning of mediators' self-governance representatives in joint entities, their sufficiency and factors for their development. The article reveals the concept of mediators' self-governance, examines the structure of self-governance, the relationship between the different organisations and their members, and the role they play in shaping mediation policy. For this reason, the article uses in parallel theoretical, legal and practical evaluative criteria, such as the structure of self-governance, the distribution of competences of the bodies of self-governance, as well as the practical activities of the mediators' self-governance bodies/representatives (defined and/or implied) and their influence on the mediators. Furthermore, the article looks at the profession of mediation and the duality of its members' membership in the mediators' self-governance in relation to their other classical legal professions and the resulting membership of other self-governance bodies, which creates potential legal and practical problems. It draws conclusions on the sufficiency and effectiveness of the legal regulation and current practical functioning of the organisational system of mediators' self-governance in Lithuania and on the status of the organisational framework of mediators' self-governance.*

**Keywords:** mediation, self-governance, self-governance of mediators, mediation organisational framework

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## Introduction

Mediation is an alternative dispute resolution method used in civil, administrative and criminal disputes. In all cases, mediators are involved, regardless of the different nature of the legal process.

One of the first articles on mediation (Milašius, 2007) in Lithuania looked at mediation as an alternative dispute resolution method (the evolution of mediation, its goals and concept). Mediation in Lithuania has been the subject of a number of studies and written works by authors such as A. Banys (2014), N. Kaminskienė (2010, 2011, 2013), R. Taraškevičius (2002), J. Lakis (2008), T. Milašius (2007), I. Saudargaitė (2015), V. Vėbraitė (2009), R. Simaitis (2007). Studies on mediation in criminal justice have been carried out and this issue has been more

extensively analysed by R. Uscila (2002), R. Ažubalytė (2006), G. Rutkevič (2015), I. Michailovič and M. Liesis (2018), but the issues of mediators' self-governance have not been analysed in more depth. The review of research has shown that, while the institution of mediation is studied from different perspectives, there has been no research on mediators' self-governance in Lithuania. This leads to a lack of a holistic view and assessment of what constitutes mediators' organisational self-governance *per se*.

Strengthening mediators' self-governance is linked, among other things, to the readiness of self-governance organisations (or some of them) to take over some of the functions performed by public authorities, e.g. examinations, supervision, professional development, etc. An assessment of the current functioning of mediators' self-governance can help to identify where there is a need to strengthen the functioning and regulation of self-governance organisations in order to make self-governance stronger, more organised, or even able to take over some of the state's functions. The act of transfer of functions is considered as an appropriate and completely normal practice both at the legislative level (*Law on Public Administration of the Republic of Lithuania, 2020*) and in doctrine (Paškevičienė, 2014). The doctrine (Kuncevičius and Kosmačaitė, 2014) also identifies as a normal practice the transfer of part of the functions of public administration to legal persons as well as to natural persons, because "thinking systematically and comparing with the practice of Western European countries, we should acknowledge that we should replace the term 'institution' with the term 'entity', which is broader and can also include individuals".

Currently, there are a number of organisations representing and uniting mediators, varying in terms of organisational experience, internal governance, number of mediators who are their members, financial and technical capacity, etc., which leads to a lack of unified practice, ensuring same competences of mediators, systemic functioning, and representation of mediators' interests. It is therefore crucial to assess how such difficulties affect the institution of mediators' self-governance and how the relationship and the legal and factual framework should be shaped in order for mediators' self-governance to function more efficiently.

**The subject of the article** is the legal and practical issues related to the self-governance of mediators, its organization, and administration.

The **aim of this article** is to analyse the legal framework and the possible problematic aspects related to the mediator's self-governance institution.

### **Objectives:**

- 1) to provide an overview of the situation of mediators' self-governance in the case of Lithuania;
- 2) to analyze the factors that may have a negative impact on the institution of mediators' self-governance;
- 3) to identify the legal basis for the functioning of mediators' self-governance representatives in joint entities, their sufficiency and factors for their development.

## **Methods**

The methods used in the article were data analysis, comparative, linguistic, systematic, logical and generalisation to comprehensively assess the characteristics of mediators' organisational self-management, the current state of play in Lithuania, and the need for a change in the mediators' self-governance institute. The data analysis approach in this topic allows us to reveal the content of the definition of mediators' self-governance, the principles of the practical functioning of mediators' self-governance, and the definiteness of the legal regulation. In

addition to the data analysis method, a comparative method was also used, as it analyses the different models of self-governance, the practice of its functioning, the conformity of the practical activities of the existing mediators' self-governance bodies with their defined objectives, as well as the legal regulation in the context of this topic, the opinions of different authors, etc. The linguistic method of research was used to uncover the meaning and content of concepts and to determine the general meaning of legal norms and doctrinal texts. Systematic and logical methods are used to reveal and summarise the content of legal regulation and doctrinal positions, to draw conclusions or provide insights to better understand the topic under study and to obtain answers to problematic questions. The summarisation method was used to summarise scientific insights and draw conclusions.

### **Mediators' self-governance and its significance**

Definitions of self-governance of mediators and/or the institutional framework for self-governance of mediators are not directly available in academic literature, legislation or other sources. These concepts are illustrated by reference to the general definitions of self-governance, as well as examples of definitions of self-governance in other legal professions.

The Law on Local Self-government of the Republic of Lithuania (*Law on Local Self-government of the Republic of Lithuania*, 2008) provides a definition of local self-government: "Local self-government means the self-regulation and self-action, in accordance with the competence determined by the Constitution and laws, of the permanent residents' community of a law-defined administrative unit of the state territory, where the community enjoys the right to self-government guaranteed by the Constitution."<sup>29</sup> Although this definition focuses on territorial self-governance, it has important features that can be applied to describe the self-governance of professional organisations. First, according to this definition, self-government is the self-regulation and self-action of a specific community (defined according to different criteria) within a defined remit. Self-government cannot function without a corresponding community (formed according to different definitions and criteria<sup>30</sup>), which has its own self-regulation and self-action, as provided for by law or other document regulating the activities of self-government and binding on the members of the self-government.

In addition to the above-mentioned term 'local self-government', the Constitution, while not necessarily *expressis verbis* defining the term 'self-governance', also identifies (in Articles 40, 43, 109 of the Constitution) other types of self-governance, such as higher education, religious, and the judiciary, which are not subject to a territorial criterion, operate in a specialized area of competence, and yet have the distinctive characteristics of self-governance.

In the doctrine (Astrauskas, 2002), professional self-governance is defined as an independent activity of a group of people and their associations (Chambers of Agriculture, Chambers of Industry and Crafts, unions of entrepreneurs, trade unions, etc.). Other authors (Kasparavičienė, Seniutienė, 2016), revealing the etymological meaning of the term 'self-governance', point out that professional self-governance is nothing more than 'self-control', i.e. controlling one's own activity.

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29 This definition is used in the article only to show a certain parallel with organisational self-governance. The definition of local self-government, as noted in the article, is not identical to organisational self-governance and is not without exception applicable in the context of the article, but it does provide some theoretical background to the content and elements of the concept of mediators' self-governance.

30 Members of each community consider themselves to be members of that community according to appropriate criteria. In the Law on Local Self-government, the criterion is the territorial unit to which the population belongs. In the context of self-governance of mediators, the universal list of mediators can and should be the criterion for such designation.

The doctrine (Šileikis, 2005) also distinguishes between different forms of self-governance: (1) territorial self-governance, which applies to all inhabitants of a given territorial unit of the state, regardless of their profession, religion or nationality; and (2) personal self-governance, which is granted to individuals on the basis of their qualification – a particular profession, business, nationality or religion.

Participation in self-governance can be compulsory or autonomous. Representatives of state-regulated professions (e.g. lawyers, bailiffs) are obliged to participate in self-governance. For other professions, there is no such obligation and participation is voluntary. There are authors (Šileikis, 2020) who suggest that membership of professional self-governance associations should not be called compulsory, but rather universal and arising for a specific person from his or her free decision to choose a profession, which is based by law on universal membership of a specific professional association.

Using the voluntary model, professionals have the opportunity to join a self-governance organisation on a voluntary basis. The model of self-governance, based on voluntary participation, allows members of the profession to exercise autonomy and choice in whether or not to participate in self-governance. This non-universal model of participation, based on voluntarism, seems to imply a potential indicator of greater efficiency at self-governance level. Doctrine (Bandura, 1977) also indicates that individuals with a greater need for self-actualisation are more likely to set goals, persevere in the face of challenges and actively shape their environment. Participation in self-governance is not only a formally obligatory act, but also encourages active involvement in professional self-governance activities contributing to the governance and decision-making processes of the mediation community. Self-governance allows individuals to have autonomy, to participate in decision-making processes and to contribute to the achievement of the organisation's common goals (Laloux, 2014).

The decision to join self-governance may be driven by a desire for professional development, the opportunity to build professional networks, access to certain resources within the self-governance organisation or other reasons. However, a potential drawback of a self-governance model based on voluntarism is the potential for fragmentation and the risk of non-compliance with universal professional standards. Non-members may not be subject to the same professional regulatory framework as self-governance members, which may raise problematic issues of inconsistent practice, accountability, and liability for mediators.

In the compulsory model, membership of a self-governance body is a formal requirement to be able to practise the profession in question. All members of the profession must subscribe to and abide by the rules and regulations laid down by the self-governance organisation. The mandatory model is thought to provide a more centralised and coherent approach to professional self-governance. It sets standards of professional practice and enhances accountability. The model of compulsory involvement in self-governance can also lead to a stronger sense of professional community. The doctrine (Virbalas, Gefenas, 2012) points to the advantages of the strict self-governance model as better regulation of the labour market, a unified system of professional requirements, as well as better opportunities for standardisation and quality assurance, better control of professional liability and, presumably, better enforcement of clients' rights in this respect.

Nevertheless, one of the potential drawbacks of a compulsory model is the potential risk of over-bureaucratising the processes and over-regulating the activities of self-governance members. This can limit a person's autonomy and flexibility in their professional life. Among the possible shortcomings, the doctrine (Virbalas, Gefenas, 2012) identifies a lack of motivation of self-governance members, a lack of creativity, possible constraints on the freedom of

professional decision-making, and undue influence of state institutions on the professional activities of individuals.

According to the Law on Mediation, mediation services may be provided only by a mediator entered on the List of Mediators of the Republic of Lithuania (Article 4(1) of the Law on Mediation). Thus, the community of mediators is, at first sight, identified by this criterion, i.e. being on the list of mediators. Self-regulation and self-action of mediators' activities are not directly defined in the law, but their organisation, as in the case of, for example, the Lithuanian Bar Association<sup>31</sup> or other self-governance organisations, is linked to the formation of relevant institutions, associations, which are composed of the respective governing bodies and which interact with each other on the basis of the coordinative and/or determinative principle. However, just because a person is on the list of mediators does not automatically mean that he or she is also on the organisational self-governance of mediators<sup>32</sup>.

The doctrine (Bandura, 1986) outlines the theory of reciprocal determinism, which states that individuals are influenced by both their environment and their own behaviour. This bidirectional relationship between personal factors, behaviour and the environment shows that individuals have the discretion to shape their environment. This theory is also reflected in self-governance, where members of the profession shape self-governance not only through external influences, but also through their own behaviour, the development of professional standards, the shaping and development of professional practice, the pursuit of public interests, etc. This is also the principle behind the self-governance of mediators.

It can be argued that in view of the objectives of the Lithuanian Chamber of Mediators (LCM), i.e. (i) to develop a unified mediation practice and policy and (ii) to serve other public interests, the distinction between mediators who are members of the LCM and mediators who are not members of the LCM seemingly does not contribute to a unified mediation practice and policy. Even if mediators decide to join a self-governance body, they can exercise this right without necessarily joining the LCM<sup>33</sup>. However, the decisions taken by the members of self-governance, when acting on a larger scale (through the Coordination Council or other commissions), also affect mediators who are not part of the self-governance.

From a comparative point of view, the Scandinavian countries have a very clear institutional and functional division. For example, the National Mediation Service in Norway has two administrative levels: one central administration and 12 regional offices spread over 22 different locations in the country. This creates a clear and coherent institutional framework based on functional and territorial distribution. Territorial distribution is a very important factor that undoubtedly contributes to the development of the mediation process nationwide. Of course, some authors (Bernt, 2015) offer not only positive commentary on the current self-governance and institutional situation, stating that "despite the incentives to increase the use of private

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31 The self-governance of the Lithuanian Bar Association consists of the bodies of the General Meeting of Advocates, the Council of Advocates, the Court of Honour of Advocates, and the Audit Commission. The Bar Council may establish committees and temporary commissions to implement decisions of the General Meeting of Advocates and of the Bar Council as necessary.

32 During the preparation of this article, the Law Amending Articles 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 17, 20, 21, 22, 23, 26, 28, and 29 of the Law on Mediation of the Republic of Lithuania No. X-1702, as well as Supplementing the Law with Article 3-1, was adopted on June 13, 2024. This law, which will come into force on January 1, 2025, stipulates that "every mediator included in the List of Mediators of the Republic of Lithuania, except for mediators who are judges, shall be a member of the Lithuanian Chamber of Mediators," meaning that, starting in 2025, all mediators (with an exception for judges) will be mandatorily integrated into the mediator self-governance framework.

33 During the preparation of this article, the Law Amending Articles 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 17, 20, 21, 22, 23, 26, 28, and 29 of the Law on Mediation of the Republic of Lithuania No. X-1702, as well as Supplementing the Law with Article 3-1, was adopted on June 13, 2024. This law, which will come into force on January 1, 2025, assigns the LCM the function of implementing mediator self-governance in Lithuania.

mediation, most mediation services are provided by publicly-funded mediation institutions, and there is still a very small market for private mediators”. The author highlights as a problem the fact that several of the most commonly used mediation providers are closely linked to the court system or use mediation as a compulsory procedural step before the dispute goes to court. However, such an assessment does not seem to be indicative of the self-governance of mediators and the qualitative standard of the process itself. Mediators could hardly be expected to operate in a completely private capacity, without appropriate state institutional oversight, without legislative regulation, without being involved in joint action at institutional level with state institutions through joint commissions, working groups, etc. Such joint action is essential to improve the legal status and development of mediation. It is also important to note that the above-mentioned territorial distribution means that some of the mediators in Norway work on a voluntary basis and are part of the community in which they provide mediation services. This is likely to contribute to building trust in the mediation process and strengthening the self-governance of the mediation community. It seems that the key criterion is a clear functional division of the organisations, non-duplication of activities and territorial distribution, which ensures accessibility of mediation services, quality assurance of the services provided, supervision and control of mediators’ activities. All these processes, starting with the regulation of mediators, the rights and limits of self-governance, the control of mediators’ activities, in the case of Lithuania, the public funding through guaranteed legal aid, the involvement in the legislative process, the participation in joint entities with public institutions, cannot operate exclusively at the private level of mediation, especially when considering the potential influence of self-governance at national level.

One of the tasks of the LCM is to mobilise and unite mediators for common practice. This task is of particular importance and should be a cornerstone in the context of interaction and collaboration between the different mediating organisations.

Although it is important that as many people as possible on the list of mediators also become part of the self-governance, the qualitative criterion and the resulting challenges must be given the highest priority. There is no need to focus on universal participation in self-governance *per se*. Other objectives, such as ensuring quality of service, ethical standards, shaping practice, etc., are also important, and are fulfilled and pursued (beyond the scope of a particular self-governance organisation) through representation of interests, decision-making and monitoring, joint working groups, commissions etc. However, there are legal and practical problems, as mediators working in criminal justice are excluded from this qualitative development of ethics and unified practice and from acting together in working groups and commissions, and are not bound by the decisions taken in the commissions and working groups.

Despite the problematic aspects, the above-mentioned challenges are related to an appropriate, efficient distribution of activities and, *inter alia*, to the adequate representation of the interests of mediators, especially when such representation is seen through the overall development of mediation policy and practice at a higher level, i.e. through the institutions that develop and are responsible for mediation policy, in this case the Ministry of Justice.

### **Difficulties faced by self-governance of mediators**

Unlike state-controlled professions or professions with quotas (e.g. notaries, bailiffs), the vast majority of mediators also engage in other legal activities. The Ministry of Justice is responsible for mediation, and has provided the profession with flexible operating principles and the possibility of combining different professions. This is also evident in practice, as there are few mediators who are not involved in other activities on the side, and these are rather exceptional cases. Mediators work in very different fields and are employed by notaries, judges, lawyers, probation officers, etc. Belonging to different self-governances, organisations, etc. is not

prohibited, and the Constitutional Court has also said so<sup>34</sup> (*Resolution of the Constitutional Court of the Republic of Lithuania, 2008*). This diversity of mediators' activities means that mediators have a broader range of practical experience, skills and knowledge compared to the single-speciality oriented professional legal communities. On the one hand, the diversity of competences and specialisations can be useful for different mediation processes, e.g. mediation in probation, business disputes, labour disputes, disputes with public authorities, etc. On the other hand, such diversity can make it difficult for self-governance to achieve its goals and objectives.

The phenomenon whereby members of a particular community (or a majority of members of a community) are also members of other professional communities, in particular classical legal communities, is unique<sup>35</sup>. This exclusivity raises controversial issues, in particular as regards the reconciliation of obligations between different communities, e.g. whether lawyers, who are not allowed to advertise, can advertise their activities as mediators, or whether a notary public can provide mediation services for disputes arising from a relationship for which he or she has already acted as a notary. This is discussed in the publication "Notariatas" for notaries: "Given the legal framework, it can be quite difficult for notaries to combine the performance of notarial acts and the provision of mediation services, and to find the time to carry out all these functions properly." (*Notarai ir mediacija – galimybė, iššūkis, menas?*, 2021, p. 9). Notaries, judges and bailiffs have certain requirements that must be met in their job, while a mediator has different requirements. These are just a few practical examples that show the potential conflicts between belonging to different professions and acting in their self-governance bodies.

It should also be appreciated that the mediator's duties may be seen by the classical legal professions as subordinate or more formal, which in some cases may even interfere with the performance of his or her direct functions<sup>36</sup>. This hypothetical distinction between direct and subordinate functions may at the same time imply an attitudinal bias on the part of some of the individuals on the list of mediators, which is also directed towards acting not only in mediation sessions (qualitatively) but also in the context of mediators' self-governance in general.

As regards the different professions that make up the mediation community, it is important to mention the criminal justice professions, which can combine their activities with the mediation profession and be mediators. However, unlike mediation in civil and administrative disputes, the Law on Mediation does not cover mediation in criminal matters, which creates both legal and practical problems.

In Lithuania, the activities of mediators are largely regulated by the Law on Mediation. According to the Law, mediators can only act if they have passed the qualification exam for mediators (subject to the exceptions provided for in the Law on Mediation), meet the other requirements for mediators in the Law on Mediation, and are included in the list of mediators. The Constitutional Court (*Resolution of the Constitutional Court of the Republic of Lithuania*,

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34 The fact that the legislator is empowered under the Constitution to establish by law a legal framework which ex lege requires that persons engaged in a particular state-controlled profession belong to a particular association ensuring self-governance of that profession does not mean that persons engaged in a state-controlled profession are not free to join other types of associations or, if such associations are established by other persons engaged in the profession in question, to opt out of them.

35 The uniqueness lies in the fact that we will not see a notary who can also be a lawyer, a lawyer who can also be a bailiff, etc. If a person belongs to one of the traditional legal professions, he or she cannot belong to another. Meanwhile, a mediator can be a member of any other profession.

36 Notary's comment on the combination of the functions of a notary and a mediator in a publication for notaries (*Notarai ir mediacija – galimybė, iššūkis, menas?*, 2021): "And if both parties want mediation and really want to resolve their problem, it takes a long time. The most common challenge is to balance the performance of direct duties with mediation sessions".

2008) clearly and unambiguously makes it clear how important it is for the representatives of the respective professions to have their own self-governance, self-regulation, to strive for the improvement of the qualifications of the representatives of the profession, self-monitoring, etc. The Court is concerned that a different model of operation, which allows non-membership of the community, while leaving the right to act exclusively at one's own discretion, creates not a benefit for the profession concerned, but rather a potential threat and detriment, both to the profession *per se* and to the ultimate beneficiary, i.e. the natural or legal person who makes use of the services of the members of the profession concerned. The case law of the Constitutional Court<sup>37</sup> can be used to assess, among other things, the importance of belonging to the community of mediators. Although the Constitutional Court stresses the importance of self-governance of representatives of different professions, the profession of mediator was not included in the classification of professions prepared and approved by the Ministry of Economy of the Republic of Lithuania<sup>38</sup> until 2024. Since professional self-governance, regardless of the model, i.e. mandatory or voluntary, starts with the primary cell - the mediator, the author of the article conducted an empirical study in 2024, during which, by interviewing mediators registered in Lithuania, among other things, aimed to find out how mediators perceive the fact that the profession of mediator has been officially included into the Classification of Professions in Lithuania as of 2024, with the absolute majority of the respondents assessing the fact as a positive one (70%; N=49) or positively (20%; N=14), while there were no negative perceptions at all.

The institution of mediation as a profession is not homogeneous in practice in different countries. In Belgium<sup>39</sup>, for example, the regulation of mediator as a profession, the strictness of the regulation of the profession, the eligibility criteria, etc., are completely different from, for example, the requirements for the profession of mediator in Sweden<sup>40</sup>. In Czechia<sup>41</sup> the regulation of mediator as a profession varies. The Act (Act No. 202/2012) provides for basic mediator standards, whereby only those who pass specific mediation exams and are registered on the list of mediators maintained by the Ministry of Justice can act as mediators under the Act. However, "private mediators" who are not registered with the Ministry of Justice, can continue to perform their activities outside the scope of the Act<sup>42</sup>. There are also no strict requirements for mediators in Ireland. However, mediators must provide details of their mediator qualifications, training, experience and continuing professional education as

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37 It is generally accepted – not only in Lithuania – that state-controlled professions, such as bailiffs, etc. (and not only in the legal profession) presuppose self-regulation of the profession concerned and an appropriate system of self-governance, which covers the profession as a whole (all its practitioners) and ensures, inter alia, the representation of the profession (its practitioners) in its dealings with the state and local authorities and at the international level, the organisation of continuing professional development, the establishment of uniform professional ethical standards and the monitoring of compliance with those standards, and the other monitoring of the activities of practitioners of the profession as required by law. In the absence of a system of self-regulation and self-governance, transferring the relevant state-mandated functions to private entities would not only lack justification in terms of expediency but could also be constitutionally unjustified. It would also be unjustifiable in terms of expediency, and perhaps constitutionally untenable, for some persons engaged in a particular state-controlled profession to be 'beside' the system of professional self-governance in question, and not only to fail to contribute to its functioning, but also to escape scrutiny of the professional activities in question, inter alia, to check that they are held to the same standards of professional conduct.

38 Lithuanian Classification of Occupations. Accessed via:

[http://www.profesijuklasifikatorius.lt/?q=lt%2Fprofesijos\\_list&code=&title=mediatorius&aprasymas](http://www.profesijuklasifikatorius.lt/?q=lt%2Fprofesijos_list&code=&title=mediatorius&aprasymas).

39 Mediation in EU countries. Accessed via: [https://e-](https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?BELGIUM&member=1)

[justice.europa.eu/64/EN/mediation\\_in\\_eu\\_countries?BELGIUM&member=1](https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?BELGIUM&member=1); Legal Frame of Mediation in Belgium: EuroNetMediation - Legal Frame of Mediation in Belgium ([mediation-net.eu](http://mediation-net.eu)).

40 Mediation in EU countries. Accessed via: [https://e-](https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?SWEDEN&member=1)

[justice.europa.eu/64/EN/mediation\\_in\\_eu\\_countries?SWEDEN&member=1](https://e-justice.europa.eu/64/EN/mediation_in_eu_countries?SWEDEN&member=1)

41 Mediation in EU countries. Accessed via: European e-Justice Portal - Mediation in EU countries ([europa.eu](http://europa.eu)).

42 The introduction of a new Mediation Act in the Czech Republic. Accessed via: The introduction of a new Mediation Act in the Czech Republic | Herbert Smith Freehills | Global law firm.

mediators to their clients<sup>43</sup>. For this reason, the model on which self-government can be established and its activities organised may also vary, as the matter of the legal regulation and evaluation of the profession of mediator as the primary cell in the self-government of mediators, and the qualification, ethical, liability, etc. requirements applicable to the members of the profession, have a significant impact on this.

The State creates a fairly broad autonomy for mediators, while retaining control over a small but important part, namely the statutory compliance with the qualification requirements of the Law on Mediation, so that all persons starting to provide mediation services meet the statutory criteria. It is worth mentioning that there are authors (Tvaronavičienė and Kaminskienė, 2020) who question the exemptions currently provided for by law for persons wishing to become mediators<sup>44</sup>, as the introduction of such exemptions may distort the existing qualification bar and does not necessarily create a sufficient basis for the above criteria.

Mediators are independent in their work, and “in the absence of the mediator’s neutrality, impartiality or independence, the process is oriented towards the greater satisfaction of the interests of one of the parties, thereby causing harm to the other party and reducing his or her satisfaction with the mediation process” (Kaminskienė et al., 2019).

The seemingly most problematic and difficult circumstance, i.e. the fact that not all mediators are members of a self-governance body, does not in itself seem to have negative consequences for the organisational self-governance of mediators. This assessment is based on the arguments set out above regarding the potential greater effectiveness of mediators operating in a non-universal model of self-governance and their willingness to act in the interests of the mediation community. The more problematic issue is probably related to the functioning of mediators in different mediators’ associations, organisations, etc., where there is no clear pattern of interaction, no clear division of functions for avoidance of duplication of efforts, pursuit of identical goals through different methods, etc.

The LCM is joined by natural persons rather than by legal persons, but at the same time a mediator can be a member of different organisations. It is also possible that, as a member of a small organisation, the mediator is not part of the LCM, the core organisational self-governance of the mediation community. The fact that individual mediators from different organisations join the LCM, rather than the organisations themselves, raises problems within the organisational system itself and in the context of the functioning of such an organisational system and the interactions between organisations.

Given that the same mediators may belong to several different mediators’ organisations and associations, which differ in terms of e.g. length of activity, experience, scope of activities, contribution to the development of mediation, as well as administrative characteristics such as funding, it is considered that such organisations should have a clear structure among themselves, with well-defined governance, internal processes and governing bodies as is the case in Norway as mentioned above.

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43 Mediation: Law Society of Ireland.

44 The requirements set out in Article 6(1)(2) and (3) of the Law on Mediation do not apply to judges who have three years’ experience as a judge and who have attended an introductory training course on mediation of at least 16 academic hours, and to holders of a doctorate degree in social sciences who have attended training courses in mediation for a total of at least 100 academic hours during the last three years prior to the date of the application for inclusion in the list of mediators of the Republic of Lithuania. The requirements laid down in paragraph 1(2) and (3) also do not apply to persons who have been authorised by the competent authority of a Member State of the European Union or a State of the European Economic Area to provide mediation services in accordance with the legislation of that State. The requirement laid down in paragraph 1(3) does not apply to lawyers, bailiffs and notaries who have three years’ experience as a lawyer, bailiff or notary respectively.

As the largest organisation of mediators, it is considered that the LCM should include smaller organisations under the umbrella principle and bring them together for common activity. The aforementioned circumstance is also reflected in the Statutes of the LCM (*Statutes of the Lithuanian Chamber of Mediators*, 2022), which state that one of the tasks of the LCM is to implement the self-governance of mediators in the Republic of Lithuania.

The Statutes of the LCM state that the LCM is a non-profit organisation established for the purpose of uniting and coordinating the activities of the members of the LCM, to represent and protect the interests of the members of the LCM, to develop a unified practice of mediation and a policy for its development or to serve other public interests.

It is clear from the foregoing that the LCM was established for four main purposes:

- to unite and coordinate the activities of LCM members;
- to represent and defend the interests of LCM members;
- to develop a unified practice and policy on mediation;
- to serve other public interests.

The documents governing the activities of the LCM, as well as publicly available information, do not make it entirely clear how mobilisation is currently being carried out and what the content of this task is. Nevertheless, it is believed that this task should include the creation of synergies between the different mediators' organisations and the formation of a clear systemic and organisational structure. Greater attention should also be paid to the inclusion of mediators working in criminal justice and the above-mentioned desirable performance criteria should certainly not be limited to LCM members<sup>45</sup>.

Despite the fact that the mediation community is made up of such diverse members, they all have to operate with high ethical standards<sup>46</sup>. Pursuant to Article 28(1) of the Law on Mediation, persons may lodge complaints/reports regarding the performance of mediators who have violated the requirements of the Law on Mediation, the European Code of Conduct for Mediators, or any other legal acts regulating the provision of mediation services with the Mediation Performance Evaluation Commission, the composition of which is approved by the Minister of Justice, and which acts, *inter alia*, in accordance with the Rules of the Mediation Performance Evaluation Commission, adopted by order of the Minister of Justice of the Republic of Lithuania (*On the implementation of the Law on Mediation*, 2018). The Commission for the Evaluation of Mediators' Activities consists of five (5) members appointed by the Minister of Justice from among the representatives proposed by the Ministry of Justice, the State Guaranteed Legal Aid Service, the Council of Judges, the Lithuanian Bar Association and the organisations that unite mediators. As can be seen, although representatives of the mediators' organisations contribute to the work of the Commission, only one person is appointed from among the representatives of the mediators' organisations.

Looking at the wording of the law, it is evident that disciplinary liability, or rather the initiation of an investigation into a possible violation, is initiated upon receipt of complaints/reports from

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45 Although they have the possibility to make suggestions, the self-governance bodies, as well as the Coordination Council, as an organisation operating on a public basis, cannot, without clear legislative regulation, simply include mediators in the criminal justice system in a unified self-governance of mediators with uniform mediation practices, qualification assessment, ethical standards, etc. This task must be carried out on the prerogative of the legislator, but it is also clear that the Coordination Council and the self-governance representatives discussed later in the article may have a role to play. They are the ones who are best placed to see which areas of mediators' self-governance need to be corrected and what gaps are left in the legislative framework and how they can be remedied, and to make suggestions to the legislator. The fact that some mediators operate as if they are working beside the legislation, unsupervised and without assessment, is a major problem.

46 Mediators must comply with the European Code of Conduct for Mediators.

the persons involved in the activity, which are submitted to the Mediation Performance Evaluation Commission. This means that such processes are only initiated on the basis of complaints and may not be initiated for self-regulatory and self-monitoring purposes, through evaluation of mediators, monitoring or other proactive action<sup>47</sup>.

As the Law on Mediation does not apply to criminal justice, mediators acting and applying mediation in criminal justice are not subject to the above-mentioned ethical oversight requirements, and their activities are not subject to appeal to the Mediation Performance Evaluation Commission.

Regardless of the structure of the self-governance, in an empirical study conducted by the author in 2024, the highest proportion of respondents (48.6%; N = 34), when asked about the importance of self-governance for a strong mediation institutional system, rated it as important, while 35.7% (N = 25) rated the importance of self-governance for an institutional system as very important. Thus, the vast majority of respondents (84.3%; N = 59) rated self-governance as important or very important. This suggests that self-governance by mediators is essential for an effective institutional system.

One of the key tasks of the mediators' self-governance should be the improvement of the quality of mediation services and the related issue of ensuring, testing and upgrading the qualifications of mediators, as well as the ethics of mediators. These challenges are particularly significant, especially in view of the importance of enforcing and monitoring these requirements for mediators in the criminal justice system, where there is a legal 'vacuum'. Mediators should have a clear vision of the qualification, personal and ethical standards expected of them in their professional activities, both in the provision of mediation services *per se* and in the representation of the mediation profession and its prestige, and the resulting public confidence in the profession, and be aware of the consequences of non-compliance with professional standards and their inevitability.

These objectives can be achieved through (including but not limited to) the implementation of a process of practical training of mediators, theoretical (ongoing) training (with particular attention to the fact that there are authors (Devinatz, 2018) who exclude the competences of a mediator that they believe can be acquired through mediation training: strong communication skills, flexibility, neutrality, ethics), as well as peer self-monitoring, responding to incoming complaints from both mediation service recipients and other mediators about potentially inappropriate (professionally and/or ethically) behaviour and/or performance of mediators, which must be responded to by ensuring control, professionalism, and a high standard of the services provided, and by extending such requirements and control to mediators working in the criminal justice system. This is the only way to fully ensure the quality of mediators' performance, which would increase public confidence in the mediation profession. At the same time, such confidence would presumably increase the use of mediation as an alternative dispute resolution method in civil, administrative and criminal justice.

### **Acting as self-governance representatives in joint entities**

The Law on Mediation provides that the implementation of the functions entrusted to the Ministry of Justice in the field of mediation is facilitated by the Mediation Coordination Council (hereinafter referred to as the "Coordination Council"), a collegial advisory body operating on a public basis, the composition of which is approved by the Minister of Justice for a term of three years. The length of the term of office relates to continuity and focus, as shorter terms of

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47 Mediators who are judges are not subject to the provisions of the Law on Mediation on disciplinary liability and are liable to disciplinary action in accordance with the Law on Courts of the Republic of Lithuania.

office are likely to have an impact on the quality of the functions performed. Although the decisions/opinion of the institution are not binding (the very definition of the Coordination Council implies this), its role in the development of mediation policy in Lithuania is very important.

As the Coordination Council operates on a public basis, it also includes representatives of institutions and associations of mediators. The law itself does not specify which institutions and associations these are. This leaves a non-exhaustive list of public bodies, which are in principle subject to only one essential criterion: that these bodies and/or associations bring mediators together. Since there are more than one institution or association of mediators (in larger or smaller groups), this wording of the law is considered to be legally sound and fair in terms of its practical applicability and content. Despite the fact that there is a non-exhaustive list of entities whose members may become members of the Coordination Council, the regulations and composition of the Coordination Council are approved by the Minister of Justice in accordance with the law.

According to the Law on Mediation, the Coordination Council: (i) makes proposals for the improvement of the legal regulation and practical application of mediation; (ii) makes proposals for the development of mediation; (iii) makes proposals on the need for and the efficient use of state budget funds for mediation; (iv) makes proposals on the payment for mediation financed from state budget funds.

Two of the Coordination Council's objectives are more conceptual and based on a qualitative criterion, i.e. improving the legal framework and the practical application of mediation, while the other two are more administrative, i.e. dealing with the budgeting and financing of mediators. The latter are no less important and relevant, as without funding, any potential activity, in particular with regard to the possibility of a publicly funded mediation service, would be impossible.

According to the Regulations of the Coordination Council (*On the Implementation of the Law on Mediation of the Republic of Lithuania*, 2018), the Council is established in order to ensure the implementation of the functions assigned to the Ministry of Justice in the field of mediation. This functional assignment and contribution demonstrates the influence that members of the mediation community, acting through self-governance, have on the legal regulation and policy-making of the mediation institution.

In performing its functions, the Coordination Council has the right to (i) submit proposals to the Ministry of Justice on the adoption and amendment of legal acts related to mediation, and (ii) invite to the meetings of the Coordination Council representatives of the state and municipality, research and study institutions and bodies, other interested persons or their representatives.

The Statutes of the Coordination Council also provide that the main task of the Coordination Council is to participate in the formulation and implementation of the state policy in the field of mediation. In carrying out this task, the Coordination Council shall (i) perform the functions referred to in Article 3(7) of the Law on Mediation, (ii) cooperate with state and municipal, scientific and study institutions and bodies, other interested institutions and persons, and carry out any other functions provided for by laws and other legal acts.

Thus, the functions and activities of the Coordinating Council do indeed have a significant impact on the development of mediation policy and practice. These functions are also directly linked to the aims and objectives of mediators' organisations, which are largely aimed at improving the quality of mediation services and the institution of mediation itself.

Although the mediators' organisations themselves may be lacking in coordination, sophistication, functional division, etc., they are already working towards their goals and objectives.

As stated in the Statutes of the Coordination Council, the Coordination Council meets when necessary, but at least once a year. Although this number may seem too low, another criterion for the Coordinating Council's performance should be taken into account: the convening of meetings when necessary. The criterion of necessity implies uncertainty and reacting and acting according to need and necessity. This criterion, while not informative or creating some uncertainty in the legitimate expectations of the Coordination Council's activities, allows the Coordination Council to assess the need for meetings on its own, rather than artificially, as if forcing and creating a fictitious need that is likely to resemble a simulation of work rather than the real and effective performance of functions. The fact that the construct operates on a social basis, i.e. the members of the Coordination Council are not paid, is also a reason for not being constrained by the increased number of mandatory meetings.

How the objectives are implemented, whether they are implemented in full and other aspects to be evaluated are beyond the scope of the study and will therefore not be discussed further in this article, but the fact of functioning and the effectiveness of functioning (especially when measured in terms of the mediators' contribution) is undoubtedly important in the development and shaping of mediation policy and practice.

It should also be noted that the effectiveness of the mediators' self-governance representatives should also be assessed through their participation in the activities of other commissions. Although the Coordination Council is one of the most important, as it is focused on the formulation and development of mediation policy and practice, there are also other commissions that are working to improve the institution of mediation, such as the Commission for the Qualification Examination of Mediators, the Ethics Commission, and the Mediation Performance Evaluation Commission, among others. These commissions and their activities are linked to the fundamental aims and objectives of the self-governance institutions described in the study, which is exactly what their names imply. The commissions, in which representatives of the mediators' self-governance actively participate (especially when assessing the activities of the LCM members), operate in the context of the tasks set by the self-governance organisations, taking into account in particular the quality of mediation services, the professional ethics of mediators, the standards of their activities and the improvement of their qualifications. The self-governance of mediators pursues its tasks and objectives not only in closed groups (organisations and associations), but also through representative bodies, whose decisions and activities affect all mediators on the list of mediators, except those working in the criminal justice system. The latter and the criminal mediation process itself are not affected by the decisions taken by the Coordination Council and other commissions.

## Conclusions

1. The mediation profession is characterised by a certain duality, as mediators often combine their professional activities with other traditional legal duties. This makes it difficult to join the self-governance of mediators. As the mediation profession is not controlled by the state, mediators are not obliged to belong to a mediators' self-governance body, and by combining the mediation profession with other state-controlled positions, mediators see mediators' self-governance and its issues as a secondary and less important area.
2. The mediation profession is subject to little control, which is why the supervision and control of mediators by the mediators' self-governance is so important. It can be argued that the current system of performance and ethics evaluation, which is supervised by the

Ministry of Justice through the relevant commissions, and which includes only a small number of mediators' self-governance representatives, is not effective.

3. The self-governance of mediators pursues its tasks and objectives not only in closed groups (organisations/associations) but also through representative bodies. Their decisions and activities affect all mediators, not just those who belong to the mediators' self-governance. Nevertheless, mediators' self-governance representatives in such representative bodies represent only a small proportion of the members, which makes it more difficult for mediators' self-governance to deal with issues of concern to mediators, and the influence of mediators in this type of representative body is weakened, with decisions taken not necessarily being the most responsive to the needs of mediators.

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