

## ARTICLE

# Ethical guidelines for mediators – the Austrian status quo

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Mediation in Austria is an entirely voluntary process. There are no statutory provisions that make it a mandatory requirement before a case can move to the commercial courts. In particular, the Austrian mediation legislation does not provide parties with any incentives – neither positive nor negative – to attempt mediation.

The Austrian Mediation Act (*Zivilrechts-Mediations-Gesetz – ZivMediatG*)<sup>1</sup> regulates the profession of so called ‘listed’ mediators in civil and commercial matters in Austria. It was one of the first codifications of mediation laws in Europe and also served as a model for other European jurisdictions.<sup>2</sup> The rules pertaining to mediation in cross-border cases within the EU are codified in the Austrian EU Mediation Act (*EU-Mediations-Gesetz – EU-MediatG*).<sup>3</sup> Austria was also the first of the European civil law jurisdictions to enact legislation regulating the obligatory qualifications and training of mediators in the By-Law on Training for Mediation in Civil Matters (*Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediatAV*). Mediation related provisions can also be found in the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) and the Austrian Code of Criminal Procedure (*Strafprozessordnung – StPO*), most notably as regards the right of mediators to refuse to give evidence.

- 1 BGBl. I Nr. 29/2003; Mediation as a method of dispute resolution was first introduced in Austria as early as 1994/1995 when pilot projects were set up at courts in Vienna and Salzburg. Married couples seeking divorce were invited, on an entirely voluntary basis, to settle both legal and economic aspects of the divorce with the support of a neutral third party. The objective was to conclude a consensual agreement regarding the divorcees’ future role as parents and the wellbeing of their children. Given the success of the pilot projects, mediation proceedings were formally introduced in the context of family law shortly thereafter. The Austrian Mediation Act was passed in 2003, opening up the possibility of resolving disputes by way of mediation in all civil law matters.
- 2 The UNCITRAL Model Law on International Commercial Conciliation was not enacted by Austria since the Austrian mediation approach seeks to be predominantly interest-based with the mediator’s role being limited to the facilitation of negotiations between the parties. The Model Law, by contrast, promotes a more evaluative style of mediation.
- 3 BGBl. I Nr. 21/2011 [CELEX-No. 32008L0052]; The EU-MediatG served the implementation of the EU Mediation Directive 2008/52/EC in Austria. Against the background of the advanced legal framework already implemented in Austria before 2008, no adaptations were introduced to the ZivMediatG at that point. A substantive revision of the ZivMediatG is in preparation, with the formation of an expert group within the Austrian Ministry of Justice currently underway.

## Qualification Requirements

Mediators trained in accordance with the requirements set out in the Austrian Mediation Act can apply to be listed on the roster of mediators administered by the Austrian Ministry of Justice.<sup>4</sup> It is not compulsory to be listed on the roster. However, non-listed mediators do not enjoy the benefits expressly granted under the Austrian Mediation Act (e.g. automatic interruption of prescription periods, protection of confidentiality beyond the scope of the mediation).

In order to be listed on the roster of mediators administered by the Austrian Ministry of Justice, candidates must fulfil the following criteria:<sup>5</sup>

- written application;
- minimum age: 28 years;
- qualification as mediator;
- extract from police records/disclosure;
- professional liability insurance (min. coverage: EUR 400,000);
- information as to where the mediator will offer his/her services.

Candidates will be considered qualified if they:

- have completed relevant training;
- display knowledge and skills in mediation; and
- have completed basic legal and psycho-social training.<sup>6</sup>

Training is considered ‘relevant’ if completed with registered training institutions, including universities. The Austrian Ministry of Justice keeps a list of those training institutions. The content of the training is laid down in Section 29 of the Austrian Mediation Act and in the respective By-Law.<sup>7</sup> Any listing on the roster is limited to a period of five years. Listed mediators may apply for the extension of

4 See <https://mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/docs/home>.

5 Section 9 ZivMediatG.

6 Section 10 ZivMediatG.

7 The theoretical part of the training consists in:

- a introduction in the development of mediation, including basic rules and guiding principles;
- b procedural rules, methods, phases of mediation with special regard to negotiation and solution-oriented approaches;
- c principles of communication, including communication, question and negotiation techniques, conversation and moderation skills in conflict situations;
- d conflict analysis;
- e fields of application of mediation;
- f personality theory and psycho-social forms of intervention;
- g ethical questions regarding mediation, in particular in respect of the position of the mediator;
- h legal, in particular private law questions regarding mediation and legal questions relating to conflicts that are particularly prone to resolution by way of mediation.

The practical part of the training consists in:

- a self-awareness practice and seminars for the training of mediation techniques through role playing exercises, simulations and reflections;
- b peer group work;
- c a case study and accompanying participation in a supervision practice in the field of mediation.

their listing for a period of a maximum of ten additional years per new application.

The role of the Austrian Ministry of Justice is purely administrative. In particular, it does not serve as a gatekeeper when it comes to the observance of certain ethical standards by mediators listed on its roster. Section 14 paragraph 1 of the Austrian Mediation Act vests the acting Minister of Justice with the authority to order – if necessary upon the issuance of a report by the Mediation Commission instituted at the Ministry of Justice – that a certain mediator is struck off the roster, if it is brought to the Minister's attention that (i) any of the criteria for a listing on the roster as set out above has fallen away, or that (ii) the mediator in question has failed to continue professional training, or that (iii) the mediator in question, despite admonition, has repeatedly violated his or her duties. As can be seen from the wording of the provision, it is not designed for monitoring the ethical conduct of 'listed' mediators. Non-compliance with basic ethical standards may, however, very well be considered as falling under item (iii) above and may thus lead to a removal of the mediator from the Ministry of Justice's list.

### Safeguarding Best Practices and Ethical Standards

Overall, the situation in Austria is such that there is no codification of rules of ethics that would enjoy universal applicability or legally binding force for mediators.<sup>8</sup> When it comes to the issue of safeguarding best practices and ethical standards in the conduct of mediations on the basis of the Austrian Mediation Act, the website of the Austrian Ministry of Justice provides a link to *Servicestelle Mediation*.<sup>9</sup> *Servicestelle Mediation* is a platform offering mediation-related services that is run by *Österreichisches Netzwerk Mediation* (ÖNM – the Austrian Mediation Network).<sup>10</sup> ÖNM is a non-profit organization that organizes and funds *Servicestelle Mediation*. Via *Servicestelle Mediation*, users of mediation services find access to general information about mediation and the Austrian Mediation Act, about financial assistance through public funding, and about the ethical guidelines for mediators developed by ÖNM and its affiliated associations. In particular, *Servicestelle Mediation* offers parties assistance in the selection of

8 For the sake of completeness, it should be mentioned that in Austria mediators who are also practicing as lawyers are obliged to observe the Guidelines for Members of the Austrian Bar acting in the Framework of Mediation (the 'RL-Mediation' – Richtlinien für die Tätigkeit von Rechtsanwälten im Rahmen von Mediation) issued by the Austrian Bar Association. The RL-Mediation deal with relevant matters such as the mediator's independence, impartiality and neutrality. Other aspects covered are confidentiality and the duty to observe professional secrecy. The RL-Mediation also contain a prohibition for members of the Austrian bar to act as both counsel and mediator in one and the same dispute. On the other hand, they expressly allow lawyer mediators to engage in the drafting of the settlement documentation under the condition that all parties (and, as the case may be, their legal representatives) have given their consent. Other independent professions may impose similar rules on their active members.

9 See [www.servicestellemediation.at](http://www.servicestellemediation.at).

10 See [www.netzwerk-mediation.at](http://www.netzwerk-mediation.at).

mediators and handles complaints about mediators. All services are free of charge.

ÖNM was founded in 2003 as a center of competence in all matters of mediation in Austria and as the mouthpiece of the Austrian mediation scene. Its prescribed goal is to 'promote constructive approaches towards conflict resolution in the context of intercultural co-existence' and to make accessible and facilitate the use of mediation in all thinkable segments of society.

The following associations are affiliated with ÖNM:

- *Anwaltliche Vereinigung für Mediation und kooperatives Verhandeln (AVM)* (Lawyers' Association for Mediation and Co-operative Negotiation);<sup>11</sup>
- *Berufsverband Österreichischer Psychologinnen und Psychologen* (Professional Association of Austrian Psychologists);<sup>12</sup>
- *WKÖ Experts Group Wirtschaftsmediation, Fachverband UBIT (Unternehmensberatung, Buchhaltung und Informationstechnologie)* (Experts Group Commercial Mediation at the Austrian Federal Economic Chamber, Professional Association UBIT (business consultancy, accounting and information technologies));<sup>13</sup>
- *forum wirtschaftsmediation* (Forum Commercial Mediation);<sup>14</sup>
- *Gesellschaft für Mediation im Notariat (GMN)* (The Society of Mediation in the field of Notarial Services);<sup>15</sup>
- *Gesellschaft für Wirtschaftsmediation (GWM)* (Association for Commercial Mediation);<sup>16</sup>
- *Mediation ohne Barrieren (M-O-B)* (Mediation without Barriers);<sup>17</sup>
- *mediationsverband österreich (mvö)* (Mediation Association Austria);<sup>18</sup>
- *Österreichischer Arbeitskreis für Gruppentherapie und Gruppendynamik (ÖÄGG)* (Austrian Working Group for Group Therapy and Group Dynamics);<sup>19</sup>
- *Österreichischer Bundesverband für Psychotherapie (ÖBVP)* (Austrian Federal Association for Psychotherapy);<sup>20</sup>
- *Österreichischer Verein für Co-Mediation (VCM)* (Austrian Association for Co-Mediation);<sup>21</sup>
- *Verein NEUSTART* (Association NEUSTART);<sup>22</sup>
- *Verein zur Förderung von Mediation (VFM)* (Association for the Advancement of Mediation);<sup>23</sup>

11 See [www.avm.or.at](http://www.avm.or.at).

12 See [www.boep.or.at](http://www.boep.or.at).

13 See [www.wirtschaftsmediation.cc](http://www.wirtschaftsmediation.cc).

14 See [www.wirtschaftsmediation.at](http://www.wirtschaftsmediation.at).

15 See [www.notar.at](http://www.notar.at).

16 See [gwm.or.at](http://www.gwm.or.at).

17 See [www.mediation-ohne-barrieren.at](http://www.mediation-ohne-barrieren.at).

18 See [www.mvoe.org](http://www.mvoe.org).

19 See [www.oegg.at](http://www.oegg.at).

20 See [www.psychotherapie.at](http://www.psychotherapie.at).

21 See [www.co-mediation.or.at](http://www.co-mediation.or.at).

22 See [www.neustart.at](http://www.neustart.at) (social rehabilitation of convicted criminal offenders).

23 See [www.mediation-vfm.at](http://www.mediation-vfm.at).

- *Verband für Mediation gerichtssanhängiger Verfahren* (Association for Mediation in Pending Court Proceedings);<sup>24</sup>
- *Bundeskammer der Architekten und Ingenieurkonsulenten* (Federal Association of Architects and Engineering Consultants);<sup>25</sup>
- *Mediation Austria – Plattform zur Suche nach erfahrenen, aktiven und eingetragenen Mediatoren* (Mediation Austria – Search platform for experienced, active and listed mediators);<sup>26</sup>
- *Österreichisches Trainingszentrum für Neuro-linguistisches Programmieren und Neuro-Linguistische Psychotherapie (ÖTZ-NLP)* (Austrian training center for neuro-linguistic programming and neuro-linguistic psychotherapy).<sup>27</sup>

In November 2005, ÖNM published ethical guidelines for mediators (the ‘Guidelines’ – *Ethikrichtlinien für MediatorInnen*).<sup>28</sup> The Guidelines are based on the considerations of the working group ‘Quality in Mediation’ initiated by ÖNM. They were revised in 2017 with an express reference to the European Code of Conduct for Mediators developed by a group of stakeholders with the assistance of the European Commission.

The Guidelines define ethical standards for mediations conducted in accordance with the Austrian Mediation Act by mediators listed on the roster administered by the Austrian Ministry of Justice. They were drafted for the purpose of providing Austrian mediators with a generally acceptable deontological framework for their professional activities that they may adopt on a voluntary basis.

At the time of their inception, the Guidelines were intended to serve as a contribution to a strong and capable Austrian Mediation scene and as a tool to provide insights into what should be considered as professional mediation services. The Guidelines were also intended to draw a clear distinguishing line between the work of mediators and other professionals active in related fields of crises and conflict management. The Guidelines do not supersede the deontological rules and standards of other professional groups active in the field of mediation: in case of doubt, the stricter standards shall apply.

In terms of substance, the Guidelines are built around four broad headers: (a) Inner Attitude and Conception (*Haltung und Menschenbild*), (b) Competence and Acceptance of the Mediation Mandate (*Kompetenz und Übernahme eines Mediationsauftrages*), (c) Fair Proceedings (*Faires Verfahren*), and (d) Mediation Agreement, Method and Procedure, Conclusion of the Proceeding (*Arbeitsvereinbarung, Methode und Ablauf, Abschluss*).

#### a) *Inner Attitude and Conception*

Under the first header, much in the sense of setting the frame for an environment conducive to consensual dispute resolution, the Guidelines postulate that

24 See [www.vmg.or.at](http://www.vmg.or.at).

25 See [www.arching.at](http://www.arching.at).

26 See [www.mediation-austria.at](http://www.mediation-austria.at).

27 See [www.mediator.co.at](http://www.mediator.co.at).

28 See [www.netzwerk-mediation.at/fileadmin/pdf/Ethikrichtlinien.pdf](http://www.netzwerk-mediation.at/fileadmin/pdf/Ethikrichtlinien.pdf).

all participants in a mediation shall afford each other the right of having their dignity respected (*Recht auf Wahrung der Würde*).

Mediators shall ensure:

- that each party accepts the dignity of the respective other party and that the mediators themselves avoid any and all actions or statements that could result in a violation of such dignity;
- that they respect and advance the autonomy and individual responsibility of the parties.

Mediators shall meet all parties with the same degree of deference, appreciation and respect.

#### *b) Competence and Acceptance of the Mediation Mandate*

Under the second header, the Guidelines address the issue of professionalism, set out certain basic framework conditions for the provision of mediation services, and deal with the issue of promotion of mediation services. Further issues addressed are participation in the mediation process and remuneration of the mediator.

- *Professionalism*

On the issue of professionalism, the Guidelines contain a programmatic clarification that mediators have gained their qualification through specialist training based on defined standards and that they keep engaging in continuous advanced training.

- *Framework Conditions*

In terms of the framework conditions for mediation, the Guidelines stipulate that mediators shall, before accepting a particular mediation mandate, make sure that they dispose of the necessary qualifications required. Upon the parties' request, they shall provide information on their background and experience.

Mediators accept responsibility for the organization of the mediation proceeding. Together with the parties, they determine such details as the actual stakeholders to participate in the mediation, the time, venue and procedure for the mediation session(s), as well as the remuneration of the mediator.

- *Promotion of Mediation Services*

On the issue of promotion of mediation services, the Guidelines stipulate that mediators shall inform about the services they are offering in an objective manner.

- *Participation*

The issue of participation is addressed such that mediators subscribing to the Guidelines are required to take care that, as far as possible, all individuals affected by the dispute and its potential resolution are included in the process in an adequate manner.

- *Remuneration*

As regards the issue mediator remuneration, the Guidelines require mediators to give, at all times, clear and understandable information on the fee arrangements that shall apply. The mediation shall commence only once the principles governing the remuneration of the mediator and the respective fees have been accepted by all stakeholders.

- c) *Fair Proceedings*

Under the third header, the Guidelines address the issues of independence, impartiality, transparency and confidentiality.

- *Independence*

Before commencing or continuing a mediation, mediators shall disclose all circumstances that:

- could compromise their independence, or
- could lead to conflicts of interest, or
- could suggest the existence of either of the above circumstances.

For example, such circumstances may consist in:

- a personal or professional, even past, relationship or connection with one of the parties in conflict,
- a financial or any other direct or indirect interest in a certain material outcome of the mediation,
- any other intervention for one of the parties in conflict.

In such cases, mediators shall act only if they are certain that the mediation can be conducted in an independent and objective manner and such that their impartiality is guaranteed. All parties must have given their express agreement in light of the mediators' disclosures.

The obligation to disclose continues throughout the mediation proceedings at any time and to the extent that it does not run counter statutory obligations of confidentiality.

- *Impartiality (Allparteilichkeit<sup>29</sup>)*

Through their actions and behaviours, mediators shall afford the same degree of commitment and devotion to all parties in conflict. They shall support all parties in an even-handed manner.

- *Transparency*

Mediators shall make transparent every aspect of the mediation in an understandable manner. In particular, the parties shall be informed about the method applied, its contents, goals, limits and, if applicable, other forms of alternative dispute resolution besides mediation.

29 The Austrian mediation scene has developed the German term 'Allparteilichkeit' (as opposed to 'Unparteilichkeit', the conventional translation of the English term 'impartiality') to express that the mediator shall be at the service of all parties in dispute.

- *Confidentiality*

Mediators and their staff shall protect the confidentiality of all information obtained in the mediation or in connection therewith. They are responsible to explain to the parties the implications of the obligation to confidentiality. As a matter of principle, this issue shall be addressed in the mediation agreement. In addition, if certain information is of public interest, mediators are obliged to clarify, together with the parties, how such information shall be dealt with.

If the mandate is given by a third party, the mediator shall agree with the parties as to which information shall be passed on to such third party.

- d) *Mediation Agreement, Method and Procedure, Conclusion of the Proceeding*

Under the fourth header, the Guidelines address the mediation agreement, the method applied in the mediation and the applicable procedure, the issue of party autonomy and aspects regarding the conclusion of the proceeding.

- *Mediation Agreement*

Mediators shall make sure that the parties have understood the cornerstones of the mediation procedure and the respective roles of all involved.

They shall also ensure that the parties, at the very outset of the mediation, take note of the conditions contained in the mediation agreement – in particular the mediator's confidentiality obligation – and expressly agreed thereto.

Upon the wish of the parties and/or the mediator(s) the mediation agreement shall be concluded in writing.

- *Method and procedure*

Mediators shall conduct the mediation in an adequate manner. They shall take into account the circumstances of each individual case, including any potential power imbalances, shall respond to the wishes of the parties, shall heed the necessity of resolving the dispute without undue delay and shall, as the case may be, also take into account legal, fiscal, psychological, economic and other specialist aspects.

Further, mediators shall take all necessary measures in order to allow the parties to reach a settlement. They shall agree with the parties on the methodological approach best suited for the mediation, taking into account the parties' individual requirements and goals. If indicated, mediators shall point out to the parties existing possibilities for obtaining specific advice.

- *Party autonomy*

The parties bear direct responsibility when it comes to ensuring that their concerns and options are considered. This responsibility shall be respected and promoted by the mediator.

## Conclusion of the Proceeding

### a. Settlement

Mediators shall ensure that any settlement reached is recorded in writing. They shall also make sure that all stakeholders understand the particular solution agreed upon and, if indicated, shall direct the parties to seek professional advice in order to reach the best possible outcome, to ensure the legal enforceability and best quality.

### b. Termination

The parties may, at all times, notify the mediator of the termination of the proceeding without stating any reasons.

Mediators may terminate the proceeding if they reach the conclusion that:

- the principles of mediation are being undermined;
- the parties lack authority to act and commit to a binding settlement; and/or
- the intended settlement would be illegal or *contra bonos mores*; and/or
- other serious reasons persist.

If the mediation proceeding is terminated, the mediator shall – ideally in the course of a final session with the parties – seek to secure any results reached so far.

*Servicestelle Mediation* is not the only organization in Austria offering mediation-related services and, in particular, the handling of complaints about mediators. The Austrian Federal Association for Mediation (ÖBM – *Österreichischer Bundesverband für Mediation*) also runs a complaint office for disenchanted users of mediation. ÖBM, which was founded in 1995, is the largest professional mediation association in Europe. It is firmly committed to both ÖNM's ethical guidelines for mediators as well as the European Code of Conduct for Mediators.

### • Complaint Procedures

In 2018, *Servicestelle Mediation* registered two complaints against mediators.<sup>30</sup> Both were forwarded for handling by the competent units within the professional association of which the mediator in question is a member.<sup>31</sup> In so far as no such unit exists within the relevant association, complaints are handled directly by *Servicestelle Mediation*. As a first step, the complaining party is invited to tell its story in a fact-finding interview that is usually conducted via telephone. All relevant information is collected by experienced mediators who will also explore the complaining party's needs and assist in developing options of how to remedy the situation that lead to the complaint in the first place. Upon completion of this first step, the complaining party will be requested to decide on how it wishes to proceed. If the complaint was raised against a mediator during the course of an ongoing mediation, points of grievance may ideally be addressed directly during the next mediation session. If this is not an option, *Servicestelle Mediation* will ask

30 Information provided by *Servicestelle Mediation*.

31 No further publishable information available.

for disclose of the name of the mediator in question and check whether he or she is a member of ÖNM. If so, the complaining party will be requested to file a written brief setting out the details of its complaint. The mediator in question will in turn be invited to submit a written response. *Servicestelle Mediation* also offers the possibility of dealing with the complaint within the framework of a so-called 'extended mediation' (*erweiterte Mediation*), which is conducted as a co-mediation. The parties to the extended mediation are the complaining party and the mediator concerned by the complaint. The co-mediators, who will both be 'listed' mediators, are nominated by *Servicestelle Mediation*. As a basic requirement, all parties must agree to the extended mediation. Participation is entirely voluntary. The costs involved for a first two-hour session are covered by *Servicestelle Mediation*. Under the described procedures, no sanctions are foreseen against the mediator concerned by the complaint.

During the same year, the number of complaints registered with ÖBM was also limited to two.<sup>32</sup> In both cases, the complaints concerned misgivings of the complaining party as regards the correctness of the mediator's conduct in relation to the basic principles of confidentiality and partiality (*in concreto* certain statements of the mediator were perceived as threats against the complaining party). In both cases the ÖBM first inquired about the mediator's name in order to confirm membership with ÖBM. ÖBM is only competent to handle complaints against mediators who are members of the association. One of the two cases was dropped because the latter requirement was not fulfilled. In the other case, the complaining party did not request that the case be looked into further. The ÖBM operates on the basis of a general agreement with ÖNM that all cases implicating a mediator who is a member of an association under the roof of ÖNM will be referred to ÖNM/*Servicestelle Mediation*. According to the information provided by the Legal Advisory Board of ÖBM, by reference to the year 2018, the number of complains was similarly low in preceding years.

Cases brought before ÖNM/*Servicestelle Mediation* or ÖBM are not published.

## Conclusions and Outlook

In light of the evident scarcity of recorded complaint cases, it is rather difficult to draw meaningful conclusions when it comes to mediation quality control in Austria, especially as regards the interplay of the voluntary commitment of mediators to codes of conduct or ethical guidelines, and the quasi-disciplinary investigation of 'mediation malpractices' via complaint bodies instituted at Austrian mediation associations.

Overall, one may be inclined to make the following general observation: the mediation landscape in Austria is quite inhomogeneous, with no universally applicable framework in place to safeguard best practice standards.

32 Information provided by the Legal Advisory Board of ÖBM.

There are essentially four ways in which mediations can be conducted:

- with a mediator who is listed on the roster of mediators administered by the Austrian Ministry of Justice (enjoying the privileges granted under the Austrian Mediation Act);
- with a mediator who is not listed on the roster of mediators administered by the Austrian Ministry of Justice (potentially enjoying privileges granted under their respective deontological rules, e.g. lawyer mediators);
- with a mediator in accordance with the provisions of the Austrian EU Mediation Act; and
- with a professional who may not even be formally qualified as a mediator but who enjoys the trust of the parties.

In none of the above-described constellations will the professional acting as mediator automatically be bound by a specific code of conduct or ethical guidelines. It thus remains the very personal – but necessarily also professional – duty of each and every provider of mediation services to make a conscious decision as regards the kind of professional standard he or she chooses to submit to and the degree by which he or she adheres to such standard. It is along these lines that the professional practice of mediation will increasingly be judged as a tool of alternative dispute resolution, not only within an exclusively Austrian, but also in a broader, cross-border context.