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Chapter 19

Mediation in Administrative Proceedings: A Comparative Perspective

K.J. de Graaf, A.T. Marseille, and H.D. Tolsma

19.1 Introduction

Mediation is a subject of keen interest in the European Union member states. It is no surprise that the method is also gaining ground in the efforts to resolve administrative law disputes in an amicable way. Mediation brings the promise of an interest-based, fast, cheap, and informal resolution for different kinds of disputes. The rise of mediation and its potential benefits over traditional administrative court proceedings is met with enthusiasm in some countries and with skepticism in others. It is therefore a suitable subject for a comparative analysis and an outlook towards the future.

This chapter is concerned with all forms of alternative dispute resolution (ADR) in administrative proceedings but focuses in specific on mediation in administrative law disputes between citizens and administrative authorities. It will provide a comparative analysis for which the chapters on the national legal systems in this volume have served as a basis. We will start with a brief introduction to administrative law disputes and ADR in general (Sect. 19.2) and present the influences of the European Union on the use of mediation (Sect. 19.3). After that, we will provide a general legal perspective on ADR in administrative law, which will focus on theoretical, substantive, and procedural constraints (Sect. 19.4). All chapters on national legal systems refer to the important implications of the rule of law on the development of ADR in administrative proceedings. We will then provide a comparative perspective and an analysis on the basis of some relevant questions into the way mediation in administrative law disputes fits within the structure of the national legal systems of administrative adjudication (Sect. 19.5). This chapter will end with some concluding remarks on the role of mediation in administrative proceedings (Sect. 19.6).

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19.2 Administrative Law Disputes and Alternative Dispute Resolution

What disputes should be considered administrative law disputes, and what are alternative forms of dispute resolution in administrative proceedings? Without hoping to present an answer to those important questions on the divide between administrative and private law that will suffice for all European national legal systems and with some hazard of oversimplifying this crucial demarcation, we will consider any dispute on the (non)application of a competence by an administrative authority that changes the legal position of a person or good in a way that no ordinary (legal) person is able to do, as subjected to administrative law and, therefore, an administrative law dispute. National legal systems in Europe are familiar with either a specialized administrative court system or special procedural rules on administrative law disputes between citizens and administrative authorities. One common element of administrative dispute resolution in countries that apply the rule of law is that citizens are entitled to appeal against an administrative decision by an administrative authority and that they are able to request the annulment of such a decision by a court when it is contrary to written or unwritten public law (appeal procedure or judicial review). This form of appeal is sometimes preceded by a (mandatory) administrative procedure in which the contested decision is reviewed either by the administrative authority that made the decision (internal review) or by another administrative authority on both questions of legality and the use of discretion (objection procedure or administrative review). For the purpose of this chapter, we will consider appeal procedures and objection procedures as normal forms of administrative dispute resolution.

This chapter focuses on alternative forms of dispute resolution in administrative proceedings. That subject is closely related to negotiated decision making by administrative authorities.¹ It is quite clear that there is an important relation between negotiated decision making and forms of ADR like negotiation, conciliation, and mediation. The quality of administrative decision making could benefit from the use of mediation techniques by administrative authorities.

ADR in administrative proceedings can refer to different forms of dispute resolution. *Arbitration* is a technique where the disputants refer their dispute to one or more persons (arbitrators or arbiters) by whose decision they agree to be bound; the decision is legally binding for both sides and enforceable. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts. There aren't many examples of arbitration in administrative law disputes for reasons that are obvious when analyzing the constraints for ADR in administrative law (see Sect. 19.2).

¹ See, on that issue, De Waard (2000).

When national chapters refer to arbitration, it is to point out that arbitration in administrative law is either rare² or can only be used in disputes that resemble private law disputes in the sense that disputants are able and allowed to arrange for the legal relationship between them without breaching the law.³ Arbitration could be applied in disputes regarding public–private contracts, concessions, and procurement but is not well suited to disputes considered classic administrative disputes. Therefore, this chapter will not focus on arbitration as a specific form of ADR.

*Mediation*⁴ is a form of negotiation facilitated by a neutral third party (mediator) and/or experts.⁵ It is based on the continuing voluntary consent of all disputants. Unlike an arbitrator, the mediator has no authority to impose a decision or other measures upon the parties. The goal of mediation is generally to seek a future-oriented solution to the dispute (conciliation), thus allowing the parties to move forward and continue their cooperation. Such a forward-oriented perspective is perceived to enable value-added cooperative approaches. The mediator uses various techniques to open or improve dialogue between disputants, aiming to help the parties reach an agreement. The neutral third party, the mediator, must be independent and impartial. Confidentiality and secrecy are to be observed during and after the process of mediation by all parties concerned. The three basic elements of mediation (voluntariness, impartiality, and confidentiality) can also be found in the 1980 UNCITRAL Model Rules on Conciliation and are essential to a number of legislative acts on mediation in European countries.⁶ The techniques of the mediator have been refined on the basis of predominantly American research on the benefits of “principled bargaining.”⁷ Mediation has changed into a professional activity in which mediators have to be certified and have to demonstrate they have expert knowledge on the mediation techniques. In most cases, they must be linked to professional bodies that monitor and guarantee quality. Mediation can theoretically be used before or during administrative proceedings like objection or appeal procedures (administration-based and court-annexed mediation), and the positive outcome is likely to have an effect on the outcome of these procedures and on the contested decisions. In European countries such as the Netherlands, England, France, Germany and other countries, mediation and mediation techniques are

² See Belgium (Sect. 6.4), which allows persons governed by public law to be party to arbitration (and mediation) in cases explicitly established by statute or royal decree. Also, see Germany (Sects. 1.1 and 1.4).

³ Cf. Romania (Sect. 14.5), which will allow mediation only regarding rights that the parties can dispose of. Also see Serbia (Sect. 15.4).

⁴ See, for recent comparative information on mediation in general, Hopt and Steffek (2013).

⁵ Also see the “authorized inspector” in the Czech Republic (Sect. 13.4.2.2) and the “liaison officer” in Hungary (Sects. 10.2.2 and 10.4). Both are seen as alternatives to the normal administrative law remedies.

⁶ See UNCITRAL Conciliation Rules, A/RES/35/52, 10 December 1980 (articles 2, 7, 14 and 20), arguably the world’s first set of mediation rules.

⁷ Golann (2009) and Goldberg et al. (1985).

used in an increasing extent to avoid or to settle disputes about governmental decisions in all sorts of administrative law disputes.

Since the mid-1990s mediation is on the rise as alternative form for settling disputes between citizens and administrative authorities. The appeal of mediation is that it is flexible and provides disputants with a quicker, cheaper, and emotionally less stressful manner to handle their dispute than the complex and highly formal legal proceedings. Mediation also increases the control the parties have over the resolution of their dispute. One of the goals of stimulating mediation in administrative law disputes is to enhance the efficiency and effectiveness of normal administrative proceedings by decreasing the number of court judgments necessary to resolve administrative disputes. Also, it is believed that using mediation or mediation techniques in administrative law disputes will lead to higher acceptance of decisions and better relations (and trust) between government and its citizens. Mediation also scores high on aspects of procedural justice; parties have the opportunity to be heard and are able to take control of the process and the outcome of dispute resolution.⁸ In recent years, several European countries have implemented a policy to grow awareness among civil servants, lawyers, and judges about the potential positive influence of mediation and the use of mediation techniques (effective communication and conflict resolution skills) during administrative proceedings. National legislatures have introduced legislation concerned with mediation in general, and in some cases those regulations refer to mediation in administrative proceedings as well.

19.3 Influences of the European Union on the Use of Mediation

In light of the comparative perspective of this chapter, a rather interesting question is whether the use of mediation was triggered by the legislative acts of the European Union in any way.

There is no European Administrative Procedural Act. However, a mandate to codify general rules on administrative (procedural) law for the European institutions can be found in Article 298 TFEU. It requires the European Parliament and the Council to adopt, in accordance with the ordinary legislative procedure, the necessary provisions in order to achieve “an open, efficient and independent European administration.” It aims to ensure that the Union legislature develops, through legally binding rules, the fundamental right to good administration enshrined in Article 41 CFREU based on the codes of good administrative behavior developed by the European Ombudsman, the Parliament, and the Commission. Although there certainly is a relation between good administrative behavior and the use of mediation (techniques), there is usually no direct referral to it in legal documents. On the

⁸ See Marseille and De Graaf (2012), pp. 136–137.

basis of the mandate enshrined in Article 298 TFEU, the European Parliament's "Working Group on EU Administrative Law (WGAL)" published a working document "State of play and future prospects for EU Administrative Law" on 19 October 2011. One of the recommendations to the European Parliament concerns the internal review of administrative decisions of European institutions (objection procedures). Such procedures are treated in many different ways throughout different EU agencies, bodies, and offices. The working group recommends (nr. 13) that any future general instrument of internal review of decisions "should attempt to draw conclusions from past experience and incorporate some generally applicable provisions which foster alternative dispute resolution without prejudice to judicial remedies." However, there is no codification of European administrative law at Union level at the moment, and it appears that this future process of codification will not play an important role where the development of ADR in administrative proceedings is concerned.⁹ The principle of national procedural autonomy also plays an important role in reaching the conclusion that the primary goal of European law isn't the harmonization of administrative procedural law in all Member States. According to the principle of procedural autonomy, the national courts perform their duties as "Union courts" within the context of the national system of judicial protection and procedural law.¹⁰ The European Union is not primarily concerned with the development of mediation or ADR in administrative proceedings in the legal systems of the Member States.

Some national chapters refer to recommendation Rec(2001)9 adopted by the Committee of Ministers of the Council of Europe on 5 September 2001 on alternatives to litigation between administrative authorities and private parties. The impact of that recommendation is considered not very significant to the development of ADR in general administrative law in the European countries.¹¹ The recommendation itself acknowledges some of the inherent problems of ADR in administrative law disputes.¹² Relevant for the development of ADR in European countries seems to be the Mediation Directive that was to be implemented by May 2011 and is now applied in the Member States. The Directive concerns mediation in

⁹ Most regulations on EU agencies do not contain provisions on alternative means of dispute resolution (see the chapter on European Union Law, Sect. 16.5.1.2). The document of the Working Group on EU Administrative Law does acknowledge the crucial role of the European Ombudsman and the Code of Good Administrative Behavior in applying mediation and mediation techniques (see recommendation nr. 23) and furthermore refers to Article 7(4) of Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, 2004/752/EC, Euratom, OJ L 333, 9.11.2004, p. 7: "At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement."

¹⁰ See Jans et al. (2007), p. 40.

¹¹ The national chapter on Slovenia refers to the recommendation in a footnote (Sect. 12.5), and the chapter on Spain states that it had null or very little impact on Spain's basic administrative law (Sect. 8.3.2).

¹² Cf. Kovač (2010), p. 745.

cross-border civil and commercial disputes.¹³ This EU directive defines mediation as a confidential and structured proceeding in which the parties, voluntarily and on their own responsibility, seek an amicable settlement of their dispute with the assistance of a mediator. The Directive sets out comprehensive provisions on confidentiality, court-mandated mediation, and the effect of the statutes of limitations. Also, it demands of Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request; the choice of mechanism is left to the Member States. Strictly speaking, the directive isn't relevant for administrative law.¹⁴ Furthermore, the relevance the directive has is confined to cross-border disputes. Despite those inherent limitations, several of the national chapters deservedly refer to it as relevant for the development of mediation in administrative disputes. In Germany, for example, the legislature implemented the Mediation Directive in such a way that the implications are relevant for both civil and commercial disputes and administrative disputes even if they cannot be considered cross-border disputes.¹⁵ In most European countries, however, the Mediation Directive was transposed into the national legal system by introducing legislation for the use of mediation in all civil and commercial disputes. Few European countries have introduced legislation that is specifically tailored to mediation in administrative proceedings between administrative authorities and citizens.

19.4 Common Constraints for ADR in Administrative Proceedings

The use of mediation—or mediation techniques—can be incorporated into the process of administrative decision making by interpreting existing legal standards and deduce a legal duty for administrative authorities to strive toward consensus. Where appropriate and legal, the existence of this duty can also have significant impact after a decision has been taken and during administrative proceedings. Some have indeed argued that such a legal duty to strive for consensus could be derived from the principle of due care.¹⁶ However, a traditional reaction to the use of mediation in order to resolve administrative law disputes is that it is complicated for a number of reasons. The reaction is triggered by a number of elements in both the relation between administrative authorities and citizens and the structure and

¹³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24-5-2008, pp. 3–8.

¹⁴ See on the implementation of the Directive and mediation in general in the EU: de Palo and Trevor (2012).

¹⁵ See the national chapter on Germany (Sect. 1.4.2).

¹⁶ Cf. Tolsma (2007), p. 74. Also see Härtel (2005), pp. 753–762; and Pitschas (2004), pp. 396–403. De Waard (2000), p. 229 speaks of an “implied legal duty to negotiate.”

characteristics of administrative law that at first sight seem to be at odds with the idea of mediation and conciliation. In this section, we try to give an overview of possible constraints for mediation in administrative proceedings; some of these issues have been raised in the national chapters as well. It should be kept in mind that this overview of potential constraints on mediation in administrative law disputes is not meant to imply that those disputes are not well suited to mediation as a method of dispute resolution.

19.4.1 The Relationship Between Citizens and Administrative Authorities

In countries where the rule of law is firmly established in the legal system, any administrative authority will have to interact with its citizens while taking into account its special position. In general, such a legal system will allow the amendment of the legal position of a citizen by a unilateral decision of an administrative authority, although several European countries implemented legislation that would equally allow an administrative authority to serve the general interest by using the form of a contract with citizens to come to a similar change of the legal position of the citizen.¹⁷ Therefore, the relationship between citizens and administrative authorities is, in a traditional view, *de iure* asymmetrical, authoritarian, and hierarchical. This view of the relationship seems contradictory to the idea of facilitated negotiation to end a dispute in administrative proceedings. In most western countries, however, legal scholars observe a tendency towards cooperative arrangements between administrative authorities and private actors. There are a number of reasons for this tendency. One is that the legal systems are overloaded with complex regulations, and the executive is unable to look after the execution of the public interest without the help of its citizens. Furthermore, the idea that citizens are nothing more than the object of the actions of the administration is obsolete. Administrative authorities strive towards good governance and a service-oriented approach to decision making by allowing meaningful participation in the decision-making procedure. Unlike the private law relations between private actors, the core of the legal relation between administrative authorities and citizens is unequal. In fact, most legal systems acknowledge that the relation between them is *de facto* asymmetrical; in many situations, the administrative authority can be characterized as the Repeat Player and the citizen as the One Shotter.¹⁸ The latter usually has less experience, less financial means, and less legal expertise. Many principles underlying administrative proceedings in the countries that are discussed in this book regard this inequality as a reason to attempt to level it out by allowing the

¹⁷ See, for instance, the explicit references thereto in the chapters on Germany (Sect. 1.4.1) and the Czech Republic (Sect. 13.4.2.1).

¹⁸ Galanter (1974), pp. 95–160.

administrative courts a more active role than its private law compeer and by not allowing the parties to dispose of their rights or their obligations by the concurrence of the wills.

19.4.2 Constraints Based on the Rule of Law, the Use of Discretionary Powers, and the Public Interest

Administrative law is concerned with the exercise of powers of a public law nature. Such powers entrusted to various agents within the public administration are essential for the discharge of the public tasks or duties assigned to these offices. Related to the issue discussed in the previous paragraph is the constraint for ADR in administrative proceedings that lies in the fact that decisions and actions of administrative authorities must be to the benefit of the public interest based on the competences awarded to it by the legislator and in conformity with the law. The implications of the acceptance of the rule of law in the legal systems of the European Union are important. Negotiating the settlement of an administrative law dispute after the decision was taken by the administrative authority can only be lawful if the authority is legally competent to amend its previous decision.¹⁹

Any exercise of power by an administrative authority is subject to boundaries. The administrative authority does not have full discretion in exercising its powers. Every decision relating to the exercise of powers under public law is bound by the statutory rules governing the matter in question. Even when those rules imply that the administrative authority has no discretion, the use of mediation or mediation techniques might be useful. In that case, the authority must however limit itself to explaining the situation or suggesting alternatives for the conflict that has arisen. Reviewing the decision will not solve the dispute. In other cases, the statutory rules may also mean that the authority has a margin of discretion. Discretionary power means that in response to an objection or appeal the administrative authority can investigate whether using its discretionary power in a different way can lead to a decision that is more in keeping with the interests of the interested parties. However, this discretion is always subject to certain restrictions. Even when the statutory provisions offer administrative authorities discretion in the way that they are able to decide on a particular issue like the application for a permit, the rule of law demands that these discretionary powers are applied in a purpose-specific manner. In any case, they should reflect the specific goal(s) that the legislator had in mind when attributing the competence to the administrative authority, and the result of the application of the competence should be to the benefit of the public interest. The fact that the legislator attributes competences to administrative authorities with a specific purpose (a specific general interest) in mind is a restriction of some importance when negotiating in administrative proceedings. Any agreement that

¹⁹ Cf. De Graaf and Marseille (2007), pp. 81–98.

entails an obligation for a citizen or administrative authority that has no basis in any statute or is seen as irrelevant to the use of the discretionary power that has led to the conflict in the first place has to be considered at odds with the rule of law. It is not unthinkable that any of the parties to such an agreement will claim that concluding the settlement to the dispute constitutes abuse of power by the administrative authority (*détournement de pouvoir*) and that it therefore could not be bound by it.

The consequence of this is that the possibilities for government authorities to modify the contested administrative decision in order to reach or carry out an agreement are sometimes limited.

19.4.3 The Relevance of the Interests of Third Parties

Another constraint for ADR in administrative proceedings that administrative law scholars frequently put forward is the fact that many conflicts either involve or will, in some way, influence the legal position of third parties that are not involved in the proceedings. A dispute between the applicant of a building permit and the administrative authority that refused the application cannot be solved entirely by reaching an agreement that implies that the competent authority will retroactively accept the application; any neighbor that was happy to hear the application was initially denied will probably start administrative proceedings when information on the change of position of the administration reaches him. To be certain that the use of ADR could indeed lead to a binding resolution of the conflict, any interested third party should be included in the (facilitated) negotiations. It is often these sort of issues that bring up important questions of effectiveness, efficiency, and legitimacy of the involvement of the administrative authority or the administrative court in facilitating the settlement of a dispute in another manner than by judgment; it is primarily the task of the administrative authority to take a decision that is both in conformity with the law and reasonable. The answer lies of course in the general interest of amicable dispute settlement in a civilized society, in the fact that a judgment is seen as *ultimum remedium* and in the costs of adjudication in general. Still, a relevant question remains. What time, costs, and efforts should administrative courts or authorities invest in possible dispute resolution by way of mediation or negotiation? This is a question that any legal system will have to answer, and the answer will probably differ considerably in light of the cultural and historical backgrounds of the legal system of a specific country.

19.4.4 Equal Treatment and the Fear of Precedent

Another substantive issue that is relevant when it comes to ADR in administrative proceedings is the principle of equality as a principle of good governance. This basic principle for any behavior of any administrative authority implies that all

equal cases shall be treated equally and unequal cases shall be treated differently in a way that reflects the differences between the cases on the basis of legally allowed and objective reasons. We will not discuss this principle in depth here, but it is obviously of influence when mediating or negotiating in administrative proceedings. When an administrative authority is negotiating the way it shall exercise its discretionary power, there is more at stake than the single use of the competence in that particular instance. Any administrative authority is obliged to act and decide systematically and consistently and treat equal cases equally. This will limit the possibilities of an administrative authority negotiating on the use of a discretionary power, as the use of the power in this one instance will have to be repeated when the same conditions are met in another case. Successful application of any method of ADR is only in order when an administrative authority is willing to change the way it uses this particular competence in any similar case that the future might bring and therefore is willing to change its policy for legitimate and objective reasons. In any other situation, the result of ADR will be considered (unwanted) precedent for future use of the competence. The principle of equality could therefore be considered a complicating factor when considering mediation in administrative proceedings.²⁰

19.4.5 Transparency

One of the key elements of mediation as an important form of ADR in administrative proceedings is that the facilitated negotiations are confidential of nature. Mediation is seen as a confidential process, and parties will usually have to agree to this confidentiality when the process of mediation starts with the help of a (professional) mediator. Negotiations for the settlement of a conflict are deemed to be more open, free, and informal when the parties involved don't have to worry that what they say, write, or bring to the table during the process will be used against them in a later stage of the conflict. The EU Mediation Directive that is concerned with cross-border civil and commercial disputes states in Article 7(1) that member states shall ensure that, unless the parties agree otherwise, neither mediators nor others involved in the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except where this is necessary for overriding considerations of public policy of the Member State concerned or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

It follows from the above that confidentiality is an important aspect of the mediation process. In this respect, the nature of mediation and one of the basic

²⁰ See Bondy and Mulcahy (2009), p. 34, as referred to in the chapter on the UK (Sect. 9.2.2).

principles of administrative law seem in conflict with each other.²¹ Access to information of the administration is to be seen as one of the most important characteristics that will allow for public participation and contribute to the accountability and legitimacy of the functioning of the administration. Governmental documents are an important source of information for citizens and will encourage integrity, efficiency, and effectiveness in public administration. This is reflected in the legislation in many of the EU member states and in several important international agreements and treaties.²² Seeking government transparency is a citizen's right and resolving administrative law disputes in a confidential manner might infringe on that right. The chapter on administrative proceedings in the UK explicitly states on this aspect of mediation that it is important to recognize that good administration may be best served by a visible dispute resolution mechanism that is accountable to the rule of law.²³

19.4.6 Prescribed Period for Administrative Proceedings

A last potential constraint that is of a more formal nature but could be of some importance when a process of mediation starts in a conflict between an administrative authority and interested parties is the fact that administrative proceedings like internal administrative review (objection procedure) or an appeal procedure will, in most cases, have to be initiated within a prescribed short period, and the procedure itself has set time frames for getting to the end of the procedure within a certain prescribed period of time.

In any case in which the administrative authority has taken a decision that has lead to a conflict and ADR is a serious option for resolving it, one should understand that attempting to resolve the conflict using an alternative process will probably not suspend the statutory appeal period that applies for initiating the "normal" administrative procedures. All parties must keep in mind that there is the possibility that the appeal period, the period for treating the internal review, or the judicial review procedure by the administrative court will expire. However, in many of the discussed legal systems, the law will allow for suspension of time prescriptions and other measures that allow administrative proceedings to accommodate (or not oppose) the possibility that either long negotiation or mediation between the parties could result in the amicable dispute resolution. The EU Mediation Directive, although not applicable to administrative proceedings, stipulates in Article 8 that member states shall ensure that parties who choose mediation in an attempt to settle

²¹ Cf. the chapter on the UK (Sect. 9.2.2).

²² See the Council of Europe Convention on Access to Official Documents (Convention no. 205) and Articles 4 and 5 of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

²³ Chapter on the UK (Sect. 9.2.2).

a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process. Such a provision is all the more relevant when mediation is used in administrative law disputes.

19.5 A Comparative Outlook

In this section, we will allow for a comparative analysis on the basis of the information contained in the chapters on the national legal systems. The analysis is designed to answer certain questions in a comparative manner. Is an administrative authority allowed to resort to mediation in administrative law disputes, and can a mediation agreement replace an administrative decision? What is the role of mediation before or in administrative proceedings, and what is the relation between the two? What is the substantive or procedural effect of successful mediation in administrative proceedings? We will try to answer some of these questions on the basis of the chapters on the national legal systems.

Quite a lot of countries have embraced the potential of mediation (by a third party) and mediation techniques (by civil servants in their behavior to citizens) in light of a service-oriented approach and the finding that this method could be to the benefit of the quality of decision making, the settlement of administrative law disputes, and the relationship between government and its citizens. The chapter on the Dutch legal system stipulates that mediation techniques are deemed to be part of the internal review procedure or administrative appeal. The Dutch ministry of Interior and Kingdom Relations is indeed actively supporting and stimulating administrative authorities that are willing to use the so-called Informal Pro-active Approach Model for handling applications for internal review. The model basically consists of a public servant ensuring quick and direct personal contact with the citizen concerned (telephone call or informal meeting) and using communication skills such as listening, summarizing, and questioning from an open, unbiased approach and certain conflict management techniques that can lead to deescalation and conflict resolution. The results—measured by the percentage of initiated internal review procedures that were canceled after informal approach was applied—are very positive.²⁴ Where the Dutch policy seems to reinvest in (informal) objection procedures, in Austria and Germany the objection procedure is becoming rare. The section on alternative dispute settlement in the chapter on Austria discusses the possibility to revise a final administrative decision by way of petition (art. 68 *Allgemeines Verwaltungsverfahrensgesetz*). Although the formal objection procedure was almost completely removed from the Austrian administrative system of adjudication, the chapter also refers to the potential importance of the possibility of the administrative authority to voluntarily amend, change, or

²⁴ See www.prettigcontactmetdeoverheid.nl (“pleasant contact with the government”).

retract the contested decision in light of objections against it [art. 14 (1) *Verwaltungsgerichtsverfahrensgesetz*]. Without explicit provisions on the matter, the same development seems *a fortiori* present in German public administration. The extensive abolishment of the objection procedure by the German *Länder* has led to a variety of informal actions by administrative authorities to avoid unnecessary procedures before the administrative courts. Administrative authorities actually invite affected parties to make use of the right of petition to open informal communications on the contested decision. Even the decision itself may be accompanied by openings for informal communication to avoid affected parties going to court; in many cases, the administration is able to clarify inconsistencies and resolve the potential dispute. The administration has proven very resourceful in setting up complaint management systems that will allow for an informal approach and possible solution to the conflict before an appeal is lodged with the administrative court.²⁵ In the UK, the policy on “Transforming Public Services” certainly seems to have the same goal in mind. It strives to develop a range of policies and services that will, as far as possible, help people to avoid legal disputes in the first place and provide tailored solutions where they cannot.²⁶

There seem to be no countries in which there is an explicit provision that prohibits administrative authorities to resort to mediation or mediation techniques for either the improvement of the quality of decision making or the settlement of administrative law disputes. A number of authors do however point out that public law is substantively at odds with the concept of negotiated settlement. As an example, we could refer to the legislation on settlement in Belgium. The provision on the possibility of settlement during court proceedings states that “any dispute that is susceptible to be controlled via a settlement, may be the subject of a mediation” (art. 1724 *Gerechielijk Wetboek*). The article continues: “The legal persons governed by public law can be a party to mediation in cases established by law or by Royal Decree.” This is an explicit reference to the fact that all national legal systems will allow settlements only on those subjects where the law allows the parties to dispose of the rights and duties involved; parties will generally not have at their disposal those rights and duties that are part of administrative law.²⁷ If we also consider that the core guiding principle of all decisions of administrative authorities shall be to the benefit of a specific general interest, the conclusion should be that there is not much room for a legal compromise in administrative proceedings. Practically, all chapters on the national legal system emphasize this particular point. Nevertheless, it follows from the aforementioned developments in The Netherlands, Austria, Germany, and several other countries that mediation,

²⁵ See the chapter on Germany (Sect. 1.2.5.3).

²⁶ Cf. the chapter on the UK (Sect. 9.1) and “Transforming Public Services: Complaints, Redress and Tribunals,” accessible at www.dca.gov.uk. The most significant references in judgments to ADR in public law are *R (C) v Nottingham City Council* [2010] EWCA Civ 790 and *Cowl v Plymouth City Council* [2001] EWCA Civ 1935.

²⁷ Also see the chapter on Romania (Sect. 14.5), specifically art. 46 of the Law on mediation (no. 192/2006). Also see the chapter on Serbia (Sect. 15.4).

mediation techniques, and informal communication could mean a significant effect in the number of court proceedings that are avoided.

Several European countries have introduced legislation or soft law specifically tailored to mediation. In the UK, Article 3.1 of the Pre-Action Protocol for Judicial Review states that the disputants should consider whether some form of ADR would be more suitable than litigation and, if so, endeavor to agree which form to adopt. Both parties may be required by the court to provide evidence that alternative means of resolving their dispute were considered for litigation should be a last resort and claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed, the court must have regard to such conduct when determining costs. Although these incentives for parties to resort to ADR are potentially strong, the preaction protocol also refers to the obligation that judicial review must be filed promptly and, in any event, not later than 3 months after the grounds to make the claim first arose and furthermore states that no one shall be forced to use ADR (art. 3.4).²⁸

In July 2012, the German legislator implemented the EU Mediation Directive and adopted the so-called Act to Promote Mediation and Other Methods of Out-of-court Dispute Resolution.²⁹ While the EU Directive is applicable to cross-border commercial disputes only, the implementation does not distinguish between cross-border and domestic disputes and is also concerned with mediation in public law matters. Paragraph 173 *Verwaltungsgerichtsordnung* (hereafter VwGO) was amended in such a way that the administrative courts are allowed to propose the parties to resort to mediation and suspend proceedings for as long as the mediations last (paragraph 278a VwGO) but may also direct the disputants to a so-called *Güterichter*, who is not competent to decide in the legal dispute by judgment but can resort to mediation and all other possible methods of dispute resolution [paragraph 278(5) VwGO]. The question on whether or not to include a separate concept of in-trial mediation along with out-of-court mediation was a major controversial issue. Whereas the draft bill originally proposed by the German government provided for such a concept, it was adopted in a modified manner. Instead of being an independent concept in the legislative act, it is now mentioned as one of the potential methods for judicial conciliatory proceedings.

The new civil procedural code that was introduced in Romania in 2012 demands the courts to organize a pretrial session to inform the parties about the possibilities of mediation and recommend its use; court proceedings are only allowed to continue if parties have refused mediation. A specific legislative act on mediation with a similar goal was already adopted in Romania in 2006.³⁰ According to this law, mediation may commence either at the initiative of parties or at the recommendation of the judge when the parties consent to that recommendation; court

²⁸ The Pre-Action Protocol for Judicial Review is accessible at <http://www.justice.gov.uk/courts>.

²⁹ See *BGBI.* 2012 I, 1577 (Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung).

³⁰ Also see the chapter on Serbia (Sect. 15.4), specifically the Mediation Act (no. 18/2005).

proceedings will be suspended as long as a settlement is negotiated with the help of a mediator. Mediation can only be allowed in disputes where the object of the mediation is not against the provisions of the law or against the public order. Although there are some clear incentives for the court to stimulate mediation as a form of ADR, there still seem to be some important questions on the general issue of allowing administrative authorities to negotiate the application of public law competences that should always be applied to the benefit of the general interest.

A successful mediation process will start and end with a contract between the disputants. The agreement that is intended to end the dispute can be qualified as a public law contract in any legal system, but not every system of administrative law will allow the administrative authority to amend the legal position of a person or good by way of a contract. This brings us to the question of the effects of the agreement in administrative proceedings. Some legal systems that are discussed in the national chapters have explicit provisions on such contracts, and the authors refer to those provisions.³¹ Although we could imagine that it is relevant for the development of mediation in administrative law that the agreement shall have a direct binding effect on the legal position of the private party involved in the mediation, this doesn't seem the case in practice. The chapter on German administrative law stipulates that a formal contract is only more likely to be concluded when the resolution of the dispute has a third-party effect. In other cases, the willingness of the administrative authority to compromise or settle the dispute will most likely lead to the informal agreement that the administrative authority will either withdraw or change the contested decision. This possibility of the administrative authority to take a new decision that it knows the private party will agree with seems to be the predominant legal effect of a successful mediation in administrative proceedings. During the internal review procedure, such an informal agreement could lead to a decision on the application for internal review that will be accepted by all parties,³² or—when the agreements mean that the contested decision should remain as it is—the application for internal review could be withdrawn. If mediation is successful during court proceedings, the appeal could of course also be withdrawn.³³ However, if the agreement entails the obligation of the administrative authority to take another decision, it could be wise to wait for the new decision. In most of the legal systems, the procedural provisions will allow for the pending appeal to be extended to encompass the new decision as well; in that case, the appeal against the new decision—that all parties now accept as the outcome of the mediation—will be deemed inadmissible because the interest needed to bring the case to court is lacking since the applicant has accepted that

³¹ See, e.g., the chapters on German and Spanish laws.

³² See the chapter on Hungary (Sect. 10.4).

³³ To our knowledge, the German *Verwaltungsgerichtsordnung* allows to formally end the appeal by concluding a so-called *Prozessvergleich* (paragraph 106 VwGO, a contract to end an appeal in court) that will have a *Doppelnatur*. It regulates both the intended substantive legal issues and the intended procedural effect, namely the end of the appeal. We are not aware of any other legal system that has provisions on this specific kind of contract.

specific decision in the mediation procedure. If the agreement covers all aspects of the dispute, including costs, and the administrative authority has indeed satisfied all obligations that were agreed upon, the appeal could be withdrawn safely by the applicant.³⁴

19.6 Concluding Remarks

Mediation is on the rise as an important form of ADR in administrative law. Although all forms of administrative proceedings could potentially benefit from the positive influence of mediation on the relationship between disputants (administrative authorities and private actors), there seems to be an emphasis on the exploration of the possibilities of mediation in those disputes that are not yet brought before administrative courts. Most legal systems that are discussed in this book actually have growing policies to implement mediation, mediation techniques, and communication skills within all processes that demand civil servants of governmental agencies to interact with private parties. When public law decisions are at the basis of the conflict, the structure and core aspects of administrative law will have an important role in deciding whether mediation could have a role in resolving the dispute.

There are a number of reasons for doubting the potential positive effects of mediation in administrative proceedings; the unequal relationship between administrative authorities and private parties in legal issues and, in fact, the predominance of the rule of law, the principle that governmental powers shall be applied consistently in a purpose-specific manner and to the benefit of the general interest, the access to information that allows for transparency, for public participation and will contribute to the accountability and legitimacy of the functioning of the administration. Nonetheless, it seems important to recognize that mediation could also be relevant in administrative court proceedings and that it is of eminent importance to remove obstacles that would impede on that potential. This means that the procedural rules should facilitate, accommodate, and allow for amicable settlement of administrative law disputes by using mediation (techniques). Some relevant issues have come up in this chapter. First, it could be of some importance to inform parties of mediation. Second, the procedural provisions could—if necessary—be amended in such a way that administrative proceedings will be suspended for the time an amicable solution is under serious negotiation. Third, when an agreement is concluded, it should be clear to parties what legal effect such an agreement has on the pending administrative proceedings. These are all procedural issues that need clarification in several legal systems. Furthermore, it could be beneficial to the mediation process when a legal system would make clear whether,

³⁴ See, on this issue, the chapter on the Netherlands (Sect. 4.4) and Romania (Sect. 14.5).

and to what extent, confidentiality of the (facilitated) negotiations could legally be guaranteed.

Any expert in administrative law will agree that negotiating the rights and duties between administrative authority and private actors is a challenging task when there is a discretionary competence of the administrative authority. Even if there is room to negotiate, there are numerous substantive criteria to be met. There is a risk that either administrative authorities will allow more than what a private actor is entitled to according to law or that the private actor agrees to receive less than the law would give. It is in that respect that we feel that any legal system that allows mediation and negotiation in administrative law disputes to lead to compromise will have to recognize that such a system would also benefit from a stable, robust, and easily accessible system of judicial review.

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