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Mediation in Belgian Administrative Practice, with Special Focus on Municipal Administrative Sanctions and Urban Planning

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ABSTRACT

Given Belgian legal doctrine, the rise of mediation in other legal disciplines, and the influence of the EU, the call for mediation in administrative practice is increasing in Belgium. The proposed framework for ADR in the legal doctrine at the beginning of this century was the start of the increasing use of mediation in Belgian administrative law. This contribution is a study of these new forms of mediation as they occur in Belgium in the year 2014. On the basis of two examples (mediation in municipal administrative sanctions and urban planning), administrative mediation and the associated problems are outlined.

Key words: mediation, Alternative Dispute Resolution, municipal administrative sanctions, urban planning

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1 Introduction

The rise of mediation. Mediation is one of the oldest forms of dispute resolution (consider, e.g., the Old Testament, or the Laws of Solon). Last decades, mediation is a tremendous success in several branches of Belgian law. The first legal framework for mediation was introduced with regard to

criminal matters.[1] Furthermore mediation appears in social affairs,[2] in family matters.[3] In 2005[4], a general law on mediation finally came into effect in private law, again as a result of a European stimulus.[5]

Europe continues down this path. Not only in the context of its access-to-justice policy, but also because of the other mentioned benefits of ADR.[6] Emphasis is put on the confidentiality of mediation[7], the suspension of the limitation period[8], the importance of a legal framework[9] and the A call for mediation in Belgian administrative practice and the obstacle presented by the compulsory public law framework

The call for mediation in administrative matters. On the above-presented background, it became clear that mediation in administrative law should not lag behind the trend. Calls for mediation in administrative matters rose after increasingly common annulment judgments with far-reaching social consequences. The example par excellence was the annulment on 28 April 2011[10] of the planning-permission/building permit granted in 2007 for a tram line, following a complaint from a local resident when the works were already two-thirds complete.

Other examples include the decision of the city of Antwerp regarding the compulsory retirement of a staff member, who was not contacted about the decision for five years and all the while remained at home waiting for new work orders.[11] Another example is the annulment of the dismissal of a police inspector who had been criminally convicted for attempted extortion and fraud, due to the violation of language legislation.[12]

Both among politicians and in the media a storm of criticism blew up around the strictly legalistic approach of the Council of State, which seemed to have no regard for the social consequences of its judgements. But on such case law,

1 Act of February 10, 1994 regulating the procedure for mediation in criminal cases, *Belgian Official Gazette* April 27, 1994.
2 Act of July 5, 1998 on the collective debt settlement and the possibility of sales from the hand of the seized goods, *Belgian Official Gazette* July 31, 1998.
3 Act of February 19, 2001 on the procedure mediation in family matters, *Belgian Official Gazette* April 3, 2001.
4 Act of 21th February 2005, *Belgian Official Gazette* March 22, 2005.
5 Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, to consult on http://eur-lex.europa.eu/LexUriServ/site/nl/com/2002/com2002_0196nl01.pdf
6 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 3–8.
Hereabout also: Vanderhaeghen, 2008, 6-7: Verbist, 2011, 6-39.
7 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 5.
8 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 5.
9 Directive 2008/52/EC of the European Parliament and the Council of 21th May on certain aspects of mediation in civil and commercial matters, 3.
10 Council of State 28th April 2011, n°. 212.825.
11 Council of State 9th June 2011, n°. 213.776.
12 Council of State 15th March 2012, n°. 218.494.

the Council could not be judged by its critics. After all, the limited suspension and annulment competences of the Council of State were not designed to be effective for factual dispute resolution. Above all, it became clear that administrative mediation prior to a judicial procedure could play an important role.

Mediation in administrative matters: a useful tool. Mediation, as a form of alternative dispute resolution in administrative disputes, has many advantages. The conciliation procedure is usually quicker and cheaper than court proceedings, and often leads to durable solutions, since in theory everyone agrees with the solution. The outcomes of mediation also meet the real interests of the person concerned, as some interests cannot be addressed in a judicial procedure. Mediation can also improve or restore the relationship between the parties concerned, who are more often satisfied if the case is amicably resolved.

In order to demonstrate the relevance of mediation in administrative matters, the case of the tram line can once again be cited as an example. Since the neighbour was not arguing a matter of principle, mediation could have presented a solution to the dispute. The ruling of the administrative court was based on a legal problem, in particular the illegal exemption from preparing an Environmental Impact Study. However, the local resident merely feared that the infrastructural works would disrupt his street; he had no problems at all with the tram line as such, and even suggested in the media that it was not his intention to shut down the works, either in the short or the long term. The question must therefore be raised whether the local resident and the government could have solved the problem by means of a conciliation procedure, without addressing the legal issue. It is clear that a legal procedure could have been avoided if prior administrative mediation had occurred.

Mediation in Belgian doctrine. Although mediation in administrative law has no general legal basis in Belgian law, De Geyter created a basis for mediation, as a form of Alternitive Dispute Resolution, in Belgian law.[13] The doctoral thesis by De Geyter (2006, p. 366), under the supervision of Professor Veny, titled "Mediation in administrative law: alternative methods to resolve administrative disputes". In the first part of his thesis, the author describes the different definitions of Alternative Dispute Resolution (ADR), the elements identified as constituent and those that are regarded as not constituent, and why ADR is useful in Belgian Public Law. The second part of the dissertation deals with the compatibility of ADR and administrative law (i.e., compatibility of ADR and administrative procedural law and the legal problems and limitations of ADR in administrative law). De Geyter examined these issues in order to create a theoretical framework for ADR in Belgian administrative law. Since the thesis deals with these aspects extensively, they are only briefly introduced in this paper for the foreign reader to prove

13 See for example: Veny et al., 2009; Warnez et al., 2014.

that mediation as a form of alternative dispute resolution is not evident and to show why mediation has not been extensively implemented in Belgian administrative law.

The thesis also makes a first step towards mediation in administrative law. Because of this doctrine, the rise of mediation in other legal disciplines and the European influence, the call for mediation in administrative law is increasing in Belgium.

Mediation in administrative matters: restrictions. Not all disputes are suitable for mediation in administrative matters. First, suitability obviously depends on whether both parties are willing to talk and reach a solution which is desirable for all parties. Secondly, discretionary competences should not be involved in order to ensure the decision is fixed by law and cannot change. Finally, the applicant must not be intending to set a precedent.

In addition, there are still numerous other legal restrictions. In De Geyter's doctoral thesis mentioned above these restrictions are described in detail.[14] The author argues inter alia that Belgian government cannot freely decide its competences; this restriction stems from the Constitution, on the one hand, and the civil code on the other. Government may therefore not relinquish its powers and should exercise these in the public interest. As a solution, it is suggested that in the agreement on the resolution of the dispute a reservation should be included, i.e., a certain commitment on the part of the government that may not be deviated from without good reason, and which is part of the general interest. Furthermore, the government must always act within the framework of mandatory public law, and will therefore have to take into account the hierarchy of legal norms, the general principles of good governance, and the principle of open government, among other things. Another important limitation is the scope of mediation in relation to third parties/stakeholders. Mediation can only apply between two parties, although the effects can still stretch to third parties (De Geyter, 2005, pp. 772–773).

Given the extensive contribution of De Geyter and others, it is not the intention of this paper to discuss the legal problems and limitations of ADR in administrative law and the compatibility of ADR and administrative procedural law; we therefore refer to the relevant legal doctrine.[15]

Instead, the paper concentrates rather on characteristics of mediation and its problems in practice. Therefore, it is important to define the concept of "mediation" first of all.

14 De Geyter, 2006, pp. 119–175; also De Geyter, 2005b.

15 See Allemeersch et al., 2005, pp. 9–57; Andersen et al., 2002, p. 285; Caprasse, 2006, pp. 21–26; De Leval et al., 2005, p. 178; De Geyter, 2006, p. 366; De Geyter, 2005a; De Geyter, 2005b; Goovaerts & Thielmans, 2000, p. 361; Hubeau, 2001; Lancksweerdt, 2003; Lancksweerdt, 2010; Lancksweerdt, 2006; Lindemans, 2003, p. 255; Vanderhaeghen, 2009; Van Ransbeeck, 2008, p. 277.

2 Mediation Defined In Belgian Doctrine

In France and the Francophone part of Belgium, "mediation" is used to describe the job of the ombudsman; the French *"défendeur des droits*" is the French national ombudsman, while in Belgium the federal, and of course the regional ombudsmen are called *"médiateurs*". It seems that mediation is limited to the services delivered by ombudsmen. One rare Anglophone article follows the francophone approach and considers both the French and the Belgian ombudsmen to act as mediators. The article states that mediation in France cannot be considered as being widely and successfully applied in administrative courts; however, the system of institutional mediators, as well as well as the institutional *défendeurs des droits* (and previous *médiateurs de la République*) and their practice, support the finding that the practice of mediation in disputes arising between public authorities and citizens is well established in France. The authors conclude that this system tends to be one of the best examples of the implementation of mediation in the administrative sphere (Kavalne, 2011, pp. 251–265). An *ordonnance* of 16 November 2011 defines mediation and establishes a common regime for all mediations in order to contribute to the development of ADR in France.[16]

In the Netherlands and in Flanders, on the contrary, mediation is considered to be a kind of alternative dispute resolution, and excludes the ombudsman's work. When we look at the situation in other countries, we find that in the United Kingdom, mediation in the "Dutch" sense is still rarely used in public law litigation. Evidence shows that although some public law cases are also suitable for mediation, there is a lack of confidence among practitioners and officials in identifying them. Even if they do identify suitable cases for mediation, practitioners are then faced with the challenge of persuading the other side to agree. The usage of mediation as an alternative dispute resolution method in solving disputes between citizens and public authorities is continually applied in the United Kingdom. Moreover, analysis of documents recently adopted by the public authorities confirms a prospective application of mediation in disputes between public authorities and private parties.

In Germany (Trenczek et al., 2012, pp. 61–70) and Austria mediation is mainly applied in civil (commercial and family) and criminal procedures but is unknown in public law. Although the Spanish mediation regulation defines *"mediación"* very largely as *"aquel medio de solución de controversias, cualquiera que sea su denominación, en que dos o más partes intentan voluntariamente alcanzar por sí mismas un acuerdo con la intervención de un mediador"*, it is only applied in civil and mercantile matters.[17] Only in the spring of 2013, proposals were launched and a pilot project established to apply mediation between citizens and public administration. As for the Portuguese situation, mediation occurs

16 Ordonnance de 17 Novembre 2011 fixant un cadre général à la médiation, JORF n° 0266.

17 Art. 2, Real Decreto-ley 5/2012, de 5 de marzo, de mediación en asuntos civiles y mercantiles. Boletín Official del Estado, 6 March 2012

in civil and mercantile matters, too. Some would consider the ombudsman – the *"Provedor de Justiça"* – as a mediator. The Portuguese ombudsman himself considers the power to foster initiatives of concertation and mediation as a characteristic quality of the ombudsman function.[18]

For the scope of this paper, what should be understood by "mediation"? A quick overview of West-European public law shows that this term has a lot of different meanings. Some would consider ombudsmen's tasks to be a means of Alternative Dispute Resolution; others would argue that ADR is anything but an ombudsman's work.

In our opinion mediation should be described as "an alternative way to resolve conflicts between two or more persons, based on consensus and with assistance, which is organized by a neutral, impartial and independent third party that does not use any method of coercion, but possesses a right to examine and to make recommendations and tries to reconcile the parties in order to facilitate, structure or coordinate the voluntary search for a solution, and that tries to achieve a lasting solution which the parties have agreed upon voluntarily, because it takes into account the mutual interests and viewpoints" (De Geyter, 2005b, pp. 763–764).

3 The Characteristics of Mediation ond Their Appearance in the Imposition of Municipal Administrative Sanctions (MAS)

It is important to note that the described form of mediation in this contribution does not take place in court and therefore is a form of alternative dispute resolution. The characteristics of mediation given below are common elements derived from the various forms of mediation in the various branches of public law (such as the regulations concerning municipal administrative sanctions, the right of education, environmental protection, urban development, social protection, housing, institutional consultation structures between the federal and regional authorities, etc.) (Lancksweerdt, 2003, pp. 103–105; Santens, 2005; Lancksweerdt, 2005). Nevertheless, they do not appear to the same extent for each of these forms of mediation.

The following are the essential features of mediation:

- A voluntary process ("mediation agreement");
- The presence of an independent, impartial and neutral third party ("mediator");
- The search for a satisfactory solution;
- A clear communication process;
- Taking into account the underlying interests;

18 X, Portuguese Ombudsman – Report to the Parliament – 2010, Lisbon, The Ombudsman's Office 2011, 26.

- Equivalence between the parties;
- No strict legal approach to the conflict;
- The confidentiality of mediation.

To explain the features in an understandable way and to show that a difference may exist between the desired theory and used administrative practice, these characteristics are explained on the basis of the mediation form of the law on municipal administrative sanctions. We opted for MAS mediation since it is an excellent example of how citizens come closer to the government through mediation in Belgium. The empirical study of mediation in the procedure concerning MAS shows that the use of mediation is increasing significantly. In the district "Geraardsbergen", for example, the use of MAS mediation increased from 122 cases in 2010 to 210 cases in 2012. In other districts, we see a similar increase.[19] In 2011 129 cases of MAS mediation were closed in the district "Leuven". Only in 11 cases no agreement was reached. [20] The increasingly horizontal nature of the relationship between citizen and administration is therefore one of the main reasons for the rise of administrative mediation. Another important reason is the attention of the legislator for the main features of mediation in the MAS procedure. The characteristics are necessary to successfully complete mediation.

3.1 An introduction to the regulation of municipal administrative sanctions (MAS)

As described in the recent legislation on municipal administrative sanctions,[21] every municipal council has the power to counteract local nuisance using municipal administrative sanctions (MAS). Examples include street litter, vandalism or dog fouling on public roads. The law provides various municipal administrative sanctions but MAS mediation is only possible with the imposition of an administrative fine.

The legislation was introduced with the aim of counteracting the impunity of small nuisances. In the mainstream justice system these often went unpunished. In essence, municipal administrative sanctions have a mainly repressive character, and mediation has to be seen as a balance to this (De Schepper, 2013, pp. 118–119).

As previously stated, mediation is only possible during the procedure to impose fines. In the law, it is also referred to as "local mediation". Mediation should not be confused with the right to oral defence.[22] In the case of a minor

19 In the district "Ghent" there were 188 cases in 2011 and 401 in 2012. The cases in the district "Dendermonde" increased from 94 (in 2011) to 148 (2012).

20 Bemiddelingsdienst Arrondissement Leuven (2011). Jaarverslag, 8–9 (to consult on www.alba.be).

21 Act of 24th June 2013 concerning municipal administrative sanctions, *Belgian Official Gazette* 1 July 2013 (hereafter abbreviated as "MAS Act").

22 Cf. art. 25, §4 MAS Act.

offender of 14 years and older, the local government is required to present a mediation proposal.[23] The legislation does not allow municipal administrative sanctions for offenders younger than 14 years of age, and therefore there can be no question of mediation in these cases. Although mediation is not an obligation for adult offenders, it is widely used in practice. To illustrate: in the district »Leuven« there were 46 minors and 81 adults offenders involved in MAS mediation.[24]

The success of the MAS mediation means that the municipal administrative fine cannot be imposed. The imposition of a penalty after successful completion of mediation would undermine the mediation process, the powers of the mediator and especially the decision of the parties.

Several definitions of mediation can be found, but the MAS Act defines mediation as "a measure, caused by the intervention of a mediator, that allows for the offender to repair the damage or to indemnify or to calm the conflict".[25]

3.2 A voluntary process (*"mediation agreement"*)

A voluntary approach is an essential requirement of mediation and its importance cannot be stressed enough. The voluntary approach applies to all the participants in the mediation. The offender may not be led to participate in the conciliation with the threat of a (higher) penalty in the event of non-participation, as this would be improper. The victim must also choose whether he/she wishes to participate in the conciliation procedure, and decide whether a conciliation procedure can serve his or her interests.

Voluntary does not mean absolute permissiveness for the parties. Once they have agreed to proceed to mediation, the parties must act in good faith. This means actively and constructively contributing to finding a solution (an obligation to perform to the best of one's ability).

MAS mediation for minors aged 14 and over is always provided (*supra*). In the case of adults, this is only provided if the local government has explicitly defined the possibility of mediation in its local regulations.[26] Given its voluntary nature as a constituent element, mediation may never be imposed but may only be offered. The consent of the offender is always required to start the mediation.[27] An informal – not necessarily written – agreement, given for example by attending the mediation talks, is sufficient.

23 Art. 18, §1 MAS Act.
24 Bemiddelingsdienst Arrondissement Leuven (2011). Jaarverslag. (to consult on www.alba.be).
25 Art. 4, §2, 2°, MAS Act.
26 Art. 12, §1, 1°, MAS Act.
27 Art. 12, §1, 2°, and 18, §2, and § 5, MAS Act.

Another aspect of the voluntary nature of the process is that the damage is freely negotiated and decided upon by both parties.[28] A solution can never be imposed by the mediator.

3.3 The presence of an independent, impartial and neutral third party (*"mediator"*)

Although a neutral third party is not a decisive element of ADR, the mediator as an independent, impartial and neutral third party is essential for mediation. The mediator may not benefit someone and he may not take a position on the content of the solution. For this reason the mediator is not allowed to intervene as a lawyer, as a judge or as an arbitrator.

The mediator will try to get the dialogue going again. He focuses on the process and on the interpersonal communication between the parties. By listening to the parties and conducting a constructive dialogue with them, the mediator will try to make the parties come to an agreement.

The mediator treats the parties as equivalent persons and does not distinguish between offender and victim. The mediation aims to search for a solution rather than a culprit. As a result, the mediator ensures his/her neutrality vis-à-vis the parties and independence with regard to facts and results. He/she is also, as far as possible, independent of the institution that employs him.

The designated MAS mediator can be a municipal staff member or an employee of an external mediation service. In the first case, it may seem difficult to ensure neutrality. To maintain neutrality, the mediator cannot be the municipal staff member usually tasked with imposing administrative fines.[29] In this way, the mediator is unrelated to any decision imposing sanctions. The Belgian government aims to establish additional neutrality conditions in the near future.[30]

3.4 The search for a satisfactory solution

As one purpose of ADR is yielding a solution to a dispute, the objective of mediation is either to repair the damage or to calm the conflict. Compensation can therefore be considered as an expression of material damage and/or moral damage. Usually, material damage can be expressed in monetary terms. In such cases, there will usually be a specific identifiable victim. Typical examples of this type of damage are destruction or vandalism. Often, however, the damage is not limited to a purely material affair, but contains also a moral component. The recovery of the damage will not be confined to a formal repayment, but will also cover the emotional significance. In such cases, offering apologies can lead to a form of recovery.

28 Art. 12, §2, MAS Act.
29 Art. 12, §1, 2° and 18, §2 en § 5, MAS Act.
30 Art. 8, MAS Act.

In some cases, it is more difficult to determine the actual damage, for example with noise pollution. With these kinds of events, it is often difficult to pinpoint specific victims because the case often involves a large group of affected people. In such cases, more creativity will be needed in order to repair the damage. This is also the case where no individual victims can be found, for example where the offender has urinated in a public area, or broken other behavioural rules in a public park. In such cases, there is often also no material damage.

Mediation makes it easier for the offender to be reconciled with the consequences associated with the offence. The explanatory memorandum to this law therefore underlines that mediation is an educational and not a repressive measure. By focusing on dialogue, the mediator works with a process of awareness between both parties. As the mediation aims to stimulate the offender to think about his or her behaviour and its harmful effects on fellow citizens, offenders start a dialogue with the victim and gain a better understanding of their erroneous behaviour (Opgerfelt, 2012).

3.5 A clear communication process and the choice with knowledge

It is important to find the best solution and to make informed choices. The parties are invited to share all their information. If the participants are not informed about their rights and obligations, the mediator shall inform them of the existence of a legislative framework and may refer to legal counsel.

The parties concerned must then try to formulate as clearly as possible their views on the conflict and actively listen to the views of the other parties. Mutual understanding can arise due to this openness. Many conflicts arise from miscommunication.

Despite the gap in the MAS Act on direct or indirect communication between the offender and the aggrieved party, in reality the parties sit down in physical proximity to each other to resolve the conflict ("face to face"). Because of this direct contact, emotions, body language, etc., also play an important part in the process. In this way, the awareness of the offender and any processing on the part of the victim are being encouraged. The mediator, however, cannot impose direct contact.

3.6 Taking into account the underlying interests, needs and desires

The conflict is not strictly legal. In addition to material damage, emotions are also discussed. Many conflicts are soluble once people feel respected.

One of the main needs of the aggrieved party is the repair of or compensation for the damage suffered. Given the explicit mention of indemnity in the MAS Act as a target for successful mediation,[31] this should be taken into account.

It is also in the interest of the municipality to avoid cases of inconvenience. Through mediation, the offender is intended to acquire insight and move towards a full sense of guilt. As such, mediation has a preventive character through which the offender will no longer commit new acts.

3.7 Equivalence between the parties

The principle of equal treatment is a fundamental principle in Belgian law (*supra*). When material or moral damage has been caused to another citizen, equivalence between the parties can easily be ensured. In the case of a minor offender, equivalence is strengthened by involving parents in the mediations[32] and making a lawyer available.[33] A lawyer is also a possibility for adults, but is not offered by the municipality.

In many cases, however, the municipality is the direct or indirect victim. Consequently, the aggrieved party is the same as the potential imposer of sanctions. The municipality therefore maintains a superior position. The law, however, does not consider this imbalance; therefore, the inequality remains in reality.

3.8 No strict legal approach to the conflict

One of the constituent elements of ADR is flexibility. Parties are free to choose if they will apply mediation, which procedure they will follow, which person or institution will be appointed as a third party, if any, and, with the exception of arbitration, which person or institution will remain master of the outcome. The mediator should not be regarded as a truth seeker. MAS mediation is therefore not concerned with whether an administrative fine should be imposed or how heavy this fine should be.

On the other hand, MAS mediation is bound by a number of legal rules (cf. MAS Act). According the MAS Act, the mediator still has great control over the progress of the mediation procedure. In addition, the parties are not free to choose a mediator; the mediator is chosen by a municipal staff member.

3.9 The confidentiality of mediation

All methods of ADR are confidential in each aspect, and mediation is no exception. To achieve a successful mediation, the content of the discussions should be confidential. Everything said during mediation or exchanged (documents, emails, etc.) is strictly confidential. From the beginning

31 Art. 4, §2, 2° MAS Act.
32 Art. 17, MAS Act.
33 Art. 16, MAS Act.

of the mediation process, the parties must agree that everything said in the mediation will remain internal and will not be communicated to third parties without mutual agreement. Any potential third party (for example an expert) is bound by the same confidentiality. The confidential nature of the mediation must be respected during the whole mediation procedure. The mediator is bound by the duty of professional confidentiality and must follow the same rule. This increases the possible effectiveness of mediation because parties can be more open about their interests, goals and potential concessions, without having to fear abuse.

Nevertheless, the MAS Act provides no explicit safeguards for preserving the confidentiality of talks between the parties. The duty of confidentiality does not rest with the mediator, either. A constitutional principle of "administrative transparency" prevails in Belgian public law, which gives everyone the right to consult any administrative document and receive a copy thereof.[34] For administrative sanctions in general, and thus also for mediation, an exception has been made so that these documents need not be made public.[35]

4 Mediation and granting a permit concerning urban development in Flanders[36]

4.1 Introduction

A permit from the local authority is necessary for a lot of activities in urban development, such as chopping down large trees or building or renovating a house. When a local authority decides whether or not to grant planning permission, it is bound by a number of legal rules. On the other hand, the local authority has autonomous discretion that leaves room for policy decisions. The local authority has therefore first and foremost to take into account the general interest, but also takes the individual interests of citizens into consideration. For example, building an industrial building may cause a nuisance to local residents. Mediation between the planning permission applicant, residents and any other relevant body of government can be helpful. As stated earlier, there is almost no regulation of mediation concerning the granting of planning permission.

It should be noted that in the procedure of planning permission citizens have the possibility for participation: the so-called "public inquiry".[37] At this stage of the proceedings anyone can submit objections to the application of the permission (Van Hoorick, 2011, pp. 236–237). The licensing authority is required to take into account these concerns (Van Sant et al., 2012, p. 960).

34 Art. 32, Belgian Constitution.

35 Art. 13, 4° Flemish Decree of 26th March 2004 concerning openness of administration, *Belgian Official Gazette* 1 July 2004.

36 Policies and regulations on urban planning is a competence of the regions. Therefore, the regulations discussed here applicable in the Flemish Region.

37 Art. 4.7.15 Flemish Codex of Urban Planning.

Despite the possibility of the public inquiry, mediation can be useful since such an inquiry is not aimed at adjusting and negotiating the planning permission, but rather at whether or not to refuse the permission.

4.2 Mediation preceding the procedure for planning permissions

The procedure for planning permission starts form the moment the applicant submits an official request to the local government. Given the limitations of this procedure (*infra*) preceding mediation will be the most efficient. As written in Belgian legal doctrine, the only form of mediation in urban development is the so-called "project meeting", which can only be used under strict terms (Lancksweerdt, 2010). In addition, informal mediation is still possible. Informal mediation is in practice the most used form, since the constraints of the project meeting do not apply.

In practice it is not easy to take the decision to use any form of (semi-)mediation before the procedure for planning permissions is started. Usually problems and conflicts between the planning permission applicant, the government body and/or other stakeholders arise during the procedure, since this is the time that concretizes the proposed plans. Therefore it is appropriate for the permission applicant to be vigilant and to detect possible tensions in advance.

4.2.1 The project meeting

Persons responsible for the development and implementation of major constructions or building projects may request of the advisory and the licensing authorities a "project meeting".[38] This request cannot be refused.[39] In this meeting possible conflicts and tensions are eliminated in advance.

In our opinion this cannot be called mediation. Firstly, it is not a voluntary process (*supra*), as the concerned authorities may not refuse the request. In the second place, an independent, impartial and neutral third party (mediator) is not present. Thirdly, there is no question of equality between the parties since the concerned authorities also act as the advisory and licensing authorities after the mediation. Finally, we should note that the project meeting does not take into account other interests considering the non-presence of local residents, neighbourhood associations and other interested parties.

4.2.2 The informal mediation

Obviously, the planning permission applicant, the authorities and/or the other stakeholders are allowed to consult the plans in advance. The fact that such a procedure is non-binding is not relevant. In practice, for large projects such informal meetings are organized because thus a large number of complaints can be avoided. Yet it is difficult to speak in this case of mediation, as usually

38 Art. 5.3.2., §1 Flemish Codex of Urban Planning.
39 Art. 5.3.2., §2 Flemish Codex of Urban Planning.

no neutral mediator is involved. In practice the licensing authority takes this role.

The mediation agreement resulting from this must also be nuanced. In the first place, third parties not involved in the mediation can still file a complaint or lodge an appeal during or after the procedure for the planning permission. It is important to involve the relevant actors to ensure legal certainty.

Secondly, the question arises whether the public authority can give up its public power through a private agreement. In principle the powers attributed to the administration should be exercised. The administration does not have the power to dispose of these competences and has the obligation to apply them in the general interest. The constitution and the Law indicate what powers are attributed and how these should be exercised, and make clear that no agreement can be made concerning the way an administrative organ exercises its powers.[40] An administrative organ cannot by means of an agreement engage itself to take a certain administrative action in the future. It is obliged to take the action that best serves the general interest, and if it has bound itself the organ may no longer be able to make an evaluation at the time the decision is made. The private agreement that results from the mediation should contain the reservation that the authority can bypass the agreement for reasons of general interest. For this reason, in practice there is rarely a successful informal mediation preceding the procedure for planning permission.

4.3 The mediation during the procedure for planning permissions

The Flemish legislator has not provided any option of mediation for when the procedure for planning permission is ongoing. Neither is informal mediation evident. It is very difficult to conduct a profound mediation, as the time in which the government must by law come to a decision on the planning permission is too short.[41] Moreover, there is an important legal principle that states that a planning permission application may not be fundamentally modified after the public inquiry.[42]

For that reason, in practice we rarely see a successful mediation during the procedure for planning permission. Given the absolute prohibition of changing the planning permission application after the public inquiry, the essential characteristic of mediation – the search for a satisfactory solution – is completely nullified. However, it is theoretically possible that the planning permission procedure is stopped as a result of the mediation talks for

40 Art. 6 and 1128 Civil Code and art. 33 Belgian Constitution.

41 The terms vary between 75 and 150 days. Cf. art. 4.7.18, §1 Flemish Codex of Urban Planning.

42 Council of State 28 November 2007, n°. 177.326, *Bernaert*; Council of State 10 August 2007, n°. 173.955, *Carron en Callewaert*; Council of State 19 November 2007, n°. 172.417, *nv Prima*; Council of State 14 February 2007, n°. 167.789, *Collaert*; Council of State 4 August 2008, nr. 183.773, *nv D.M.P.*

the applicant to put in an altered planning permission application.

Finally, we should also emphasize that in this form of (semi-)mediation there is no question of equivalence between the parties, and a neutral mediator is rarely called in.

5 Conclusion

Application of mediation is increasing in Belgian administrative law because of the move towards a more bilateral relationship between administration and citizens, characterized by reciprocity and dialogue. The historical overview shows that administrative mediation in Belgium has grown under the influence of the rise of mediation in other legal disciplines and pressure from the European Union. The created legal framework for ADR in the legal doctrine has also played a crucial role.

When applied in administrative law, mediation offers possibilities in examining a dispute beyond the boundaries of a specific administrative action, and in its full complexity. Resolving disputes through mutual agreement and dialogue will result in a more stable relationship between government and citizens in the future, which will have positive spill-over effects in society as a whole.

As of 2014, we can find administrative mediation in the regulations concerning municipal administrative sanctions, the right of education, environmental protection, urban development, social protection, housing and institutional consultation structures between the federal and regional authorities. It should be noted that the mediation forms discussed always occur before a judicial procedure is started. The administrative court that may refer to mediation during the legal process is a very recent concept in Belgian law; finalized cases of application, are, therefore, not yet known.

Administrative mediation occurs in many forms. Nevertheless, common characteristics can be observed. The study of mediation in municipal administrative sanctions (MAS) demonstrates that its features do not always occur to the same extent. When it is determined that a characteristic is present only to a lesser degree, often it must be concluded that this is the Achilles heel of the particular mediation form. For example, the lack of equality between the parties in MAS mediation is a problem that makes the mediation form less valuable.

The specific nature of a compulsory public law framework has an impact on the concrete application of mediation in administrative law. The discussion of mediation in urban planning makes clear that the importance and usefulness of mediation as a form of alternative dispute resolution depends on the ad hoc arrangement contained in the law. Moreover, it appears that informal mediation in practice has little chance of success, given the restrictions imposed by some public law principles.

For these reasons, we argue in favour of a global mediation regulation that is applicable to public law as well as to other branches of law. A central mediation body with accredited mediators is necessary to avoid recurrent ad hoc legislation. An independent, impartial and neutral mediator, approved by the Central Mediation Commission, may lead consultations while the basics of mediation can be guaranteed. Such legal certainty will lead to a significant increase in cases that can be resolved through mediation.

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POVZETEK

1.02 Pregledni znanstveni članek

Mediacija v belgijski upravni praksi s poudarkom na občinskih upravnih sankcijah in urbanističnem načrtovanju

Ključne besede: mediacija, alternativno reševanje sporov, občinske upravne sankcije, urbanistično načrtovanje

Glede na belgijsko pravno doktrino, porast mediacije na drugih pravnih področjih in vpliv EU se zahteve po mediaciji v upravni praksi v Belgiji povečujejo. Predlagani okvir za alternativno reševanje sporov v pravni doktrini z začetka tega stoletja je pomenil začetek vse pogostejše rabe mediacije v belgijskem upravnem pravu. Prispevek je študija novih oblik mediacije, kot se pojavljajo v Belgiji v letu 2014. Na podlagi dveh primerov (mediacija pri občinskih upravnih sankcijah in pri urbanističnem načrtovanju) so analizirane upravna mediacija in z njo povezane težave.

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