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Legal Framework relating to Alternative Dispute Resolution in Belgian Public Law

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ABSTRACT

The application of alternative dispute resolution is increasing in Belgian administrative law hand in hand with the move towards a more bilateral relationship between administration and citizens, characterized by reciprocity and dialogue. The specific character of public law is the cause of specific legal problems and limitations. This paper examines these restrictions and their opportunities as a contribution to the creation of a theoretical framework for alternative dispute resolution in administrative law and serves in an international context as an overview of this theme.

Key words: *alternative dispute resolution, legal problems and restrictions, procedural administrative law*

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1 Introduction

A wide variation of applications of alternative dispute resolution (ADR) can be found in an increasing number of domains in Belgian public law. Nevertheless to this day, a general and uniform conception of ADR in Belgian administrative law has not been conceived. Within the large field of alternative dispute resolution, the particular aspect of mediation in public law has been underexposed in Belgian legal doctrine.[1]

The current evolution and practice of ADR raises several legal questions: how does ADR relate to administrative procedural law and is the main objective of administrative action to serve the general interest, affected by the bilateral nature or the reciprocity, characteristic for ADR?

Furthermore, the administration is bound by a compulsory public law framework designed as a safeguard for citizens based on the unilateral and imperative nature of the powers invested in the administration. How do

1 At present the most exhaustive research in this field is still the doctoral dissertation of Lien De Geyter (De Geyter, 2006). For this reason, this paper adopts in part the structure of the thesis.

the general principles of sound administration and the principle of legality, among others, impact the possibility to apply ADR in administrative conflicts?

This paper examines these issues in order to help create a theoretical framework for alternative dispute resolution in Belgian administrative law. In doing so it presents an overview of the scope of the subject for the international audience.

2 Alternative Dispute Resolution in Belgian Administrative Law

2.1 Definition of ADR

2.1.1 In general

Alternative dispute resolution has been defined as follows:

- ”ADR consists of a mixture of techniques to resolve disputes that are situated outside the courts and who allow parties to resolve their disputes, while maintaining communication or dialogue.” (D’Huart, 2002, p. 5)
- “ADR are the methods to resolve legal disputes that can only be used when parties agree and that result in a solution that is not imposed by one of the parties. They are consensual and egalitarian.” (Richter, 1997, p. 4)
- “ADR are the extra-judicial procedures to resolve conflicts which are conducted by a neutral third party, with the exception of actual arbitrage.” (Europese Commissie, 2002, p. 6.)

The more definitions one examines, the more variations can be found. Even the applied terminology displays a wide variation (Beeldens, 2010, p. 260). These definitions have many aspects repeated by different authors; nevertheless there are divergences. The foremost important task is to bring these together in order to distinguish the essential constituent parts of ADR.

2.1.2 Non - decisive elements

One or many? It should be clear that ADR cannot be limited to just one specific method or procedure. The majority of the definitions given to ADR are in agreement that this should be viewed as a collective name for a variety of methods (De Geyter, 2005, p. 754).

These can find their origin in laws or regulations as well as the developed legal practice or doctrine.

Therefore, mediation, arbitrage, consultation, negotiation and hybrid forms such as *mini-trage* can be considered as current methods of ADR.

Resolution? Immediately the most relevant question arises. A variety of methods, to do what? What is the ultimate objective of ADR? In English the acronym stands for Alternative Dispute Resolution. In Dutch, the translation of the term "resolution" generates a legal question to which the answer determines largely the scope of the object under study.

In the Belgian doctrine the word "resolution" has been translated as "beslechting" which is closer to "settlement" or "completion", when translated back into English. This could be interpreted as if ADR in Dutch legal doctrine is limited to only the methods that will definitely bring the dispute to a settlement or completion. This is the case when both parties agree to bind themselves to the result of a method or procedure, before it has started.

Such a point of view would exclude all methods which have the potential but not the guarantee to resolve the dispute. Practically this would exclude all forms of consultation, mediation,[2] negotiation and the procedure before the ombudsman.

It is clear that in such an interpretation the scope of ADR would not only be too limited, it would even neglect the most important constituent part of ADR: to give a solution to the dispute, as efficiently as possible (Straetmans, 2000–2001, p. 381).

Although the term "resolution" has been translated as "beslechting" ("settlement"), this is not to be interpreted as if ADR is limited to only the "settlement of disputes" but actually as all methods that can bring about a "solution" of the dispute.

Binding or non-binding conflict resolution? In the doctrine all possible positions have been taken (Demeyere, 1996–1997, p. 524; De Wit Wijnen, 2000, p. 42). There are authors that make the distinction between binding and non-binding procedures and argue that only the binding, or inversely, only the non-binding procedures can be considered as ADR.

Author of this paper considers this distinction not relevant for the definition of ADR. The ultimate finality is to resolve disputes. Including binding as well as non-binding methods the scope of ADR creates for administration and citizen alike a greater and more versatile toolbox, which in turn contributes to the application of the best fitted method for each different dispute given its origin, nature and circumstances.

Intervention of a neutral third party? This aspect causes even more disagreement in the doctrine. To some scholars the presence of a third party is essential to be under the scope of ADR. Others do not consider it to be a constituent part of the definition.

2 With exception of mediation where both parties agree on forehand to consider themselves as bound by the outcome of the mediation.

The administration can, in principle, not transfer the powers attributed to administrate. The power to decide (how a dispute will be resolved) can, in principle, not be transferred; nor by giving the power to decide to a third, neither by agreeing to be bound by the outcome of a certain procedure.

Excluding every method where some power to decide is given to a third party or where the administration is to some extend bound by the outcome, would be a too narrow scope of study. As will be seen further it is precisely by the exploration of the limit of this principle and thus the determination of what is an actual "transfer of power" that a field of effective, balanced and legal methods for conflict resolution can be created.

For that reason, the fact of including a neutral third party into the scene should be no decisive element to fall under the scope of ADR (Beeldens, 2010, p. 260).

2.1.3 Constituent elements

Procedure not before a judge. The doctrine is unanimous in the characteristic that ADR offers a possibility to resolute a dispute by means of a procedure that does not take place before a judge, which is to be interpreted in the sense of art. 6 E. T. R. M.[3] Note that the formulation is not "without a judge" or "without the intervention of a judge". ADR can be applied when a judge transfers a case to a third party or a judge – mediator.

Contractual and voluntary base. Only an agreement can initiate ADR. This can happen when the dispute arises or already at the time the parties engaged in the original contract (Osman, 2010, pp. 69–71).

Confidentiality. Unless when parties agree otherwise, all methods of ADR are confidential in each aspect: the course, the exchanged information and the outcome. Any potential third party is bound by the same confidentiality. This heightens the possible effectiveness of ADR because parties can be more open about their interests, goals and potential concessions, without having to fear abuse (Europese Commissie, 2002, p. 8; Lodder, 2004, p. 836; Straetmans, 2000–2001, p. 381).

Flexible. Parties are free to choose if they will apply ADR, which procedure they will follow, which person or institution will be appointed as a third party, if any and, with exception of arbitration, remain master of the outcome.

2.1.4 Essence of ADR

The analysis of the different definitions allows to obtain the essential aspect of ADR. To this end, its final objective needs to be taken into account. Choosing for ADR means that the parties wish to cooperate, not only in order to put

3 This means not only civil and administrative judge but every organ attributed with judicial powers.

an end to the conflict, but as well to establish a modus vivendi to avoid new conflicts and thus securing their relationship for the future, or at least trying to do so (Smets-Gary & Becker, 2012, p. 30).

The definition that poses the least constrictions will offer the most possibilities for citizens and administration to find a method appropriate for the specific circumstances of the parties and the conflict. So, ADR can be described as: "resolving conflicts by other methods than a judicial procedure".

2.2 ADR in administrative law

2.2.1 Reasons for ADR in administrative law

The rise of ADR in administrative law (Beeldens, 2010, p. 260) has been initiated and backed by an increasing horizontal nature of the relationship between citizen and administration. Instead of a strict vertical relationship there are more and more contractual and bilateral relations (Hubeau, 2000–2001, p. 414; Beeldens, 2010, p. 261). This needs a creation of shifted mindset in which reciprocity gains value. In this view negotiating with the administration about administrative actions instead of simply undergoing them becomes conceivable, acceptable and with time normal.

Application of ADR in the run-up of an administrative action has multiple advantages. Consultation and negotiation strengthen the effectiveness of the decision because it contributes to a decision that is more in tune with the concrete circumstances, which in turn helps the acceptance and compliance (De Geyter, 2005, p. 802). As a result less conflicts are to be expected afterwards.

Success of ADR is due as well to a diminishing faith and legitimacy of the judiciary as conflict resolving institution. ADR can also be seen as an attempt to avoid and diminish the overcharge of and the congestion in the courts. Furthermore, judicial procedures are time-consuming, expensive and the trust in the expertise of the judges has eroded (Hubeau, 2000–2001, pp. 414–415; Beeldens, 2010, p. 262).

Specifically relative to ADR in administrative law, the nature of administrative procedural law stimulates the use of ADR. In principle the administrative judge will examine and evaluate the administrative actions separately and not in their interconnectivity (De Geyter, 2005, p. 774). The regularity of the action will be the criterion whilst it is not possible to consider the possible alternatives or the examination of the action in the context of a global project.

In general the choice for ADR instead of judicial or administrative appeal constitutes a choice against head-on confrontation and for dialogue, cooperation and a sound mutual relationship in the future. While the development of ADR is a result of the increasing horizontal nature of the relationship between citizen and administration, ADR has in itself the effect

of facilitating and improving this reciprocal relationship because dialogue, communication and mutual understanding are stimulated.

2.2.2 Evolution

The concrete ADR methods that can be found in Belgian administrative law have not been the product of a general or unified theory, rather they are a patchwork of specific and limited procedures developed each time to face a specific problem (Hubeau, 2000–2001, p. 442).

ADR can be found in the regulations concerning local administrative sanctions, fiscal disputes, the right of education, environmental protection, urban development, social protection, housing, institutional consultation structures between the federal and regional authorities.

The development has carried on without a firm doctrinal base to answer fundamental questions concerning the compatibility between ADR and the specific principles governing the administrative law.

In contrast, concerning the methods of ADR in consumer related fields of commercial disputes, Belgium has led the way in developing "*Belmed*" which stands for "Belgian Mediation" (Voet, 2011, p. 1439). This is an online platform for the promotion and accessibility of Alternative Dispute Resolution and Online Dispute Resolution. It is not only aimed at helping individual consumer and entrepreneurs remedy their disputes by steering them to an appropriate method of ADR. In doing so the platform generates statistical information useful to identify domains in which requests for ADR are frequent, while no specific procedure is in place. Furthermore, numerous similar requests can indicate the existence of a collective problem.

In an intertwined process the strengthening of the theoretical base of ADR in administrative disputes can support the creation of a "sister-platform" for administrative disputes, while such a platform and the information that it generates will help to further develop the doctrine. It can contribute to the identification and development of best practices, the quantification of actual usage of ADR in public law and the deepening of the understanding of how this impacts the traditional conception of the relation between state and citizen.

2.2.3 Compatibility of ADR and administrative procedural law

ADR in administrative law

The application of ADR in private law is widely accepted in Western European countries; it is based upon the following principles: the autonomy of the parties in civil procedures, the agreement between parties to apply ADR, the fact that only the concerned parties are bound by the outcome, ADR doesn't diminish the legal protection of the citizens and there is a certain amount

of control by the civil judge over the course and outcome of the ADR (Pront-Van Bommel, 1997, p. 22).

The main objective of administrative procedural law is to offer legal protection to the justice seeking citizen. Both parties have and keep their autonomy. The citizen decides freely whether or not to initiate a judicial procedure, to stop or continue the procedure, what the object is of the procedure and if he chooses to appeal against the rendered decision (Pront-Van Bommel, 1993).

The administrative body keeps the competence to choose its action after an administrative judicial procedure. Even the annulment of the original decision doesn't impose a determined course of action to the administration. The administrative judge has no task in controlling or imposing his judgments.

In many cases the objective can be obtained without the intervention of a judge. Rarely the objective is obtained solely by a judgment and a new administrative action is needed. This means that the administrative judge has a secondary position, which is the reverse of the autonomy of the parties.

The secondary position of the judicial administrative procedure is emphasized by the fact that administrative jurisprudence can only take place after an administrative action has been taken and conditional to the completion of the organized administrative appeal procedure, if any provided (Veny et al., 2009, p. 521; Mast et al. 2012, pp. 1136–1137).

In essence there is only a role to play by the administrative judge when the realization of the legal claim by the citizen is depending on an action by an administrative organ that refuses the necessary cooperation (Pront-Van Bommel, 1997, p. 32).

The secondary nature of the administrative jurisprudence leads to the permissibility of ADR relating to administrative conflicts. Parties that are free to decide upon their judicial position must be considered to be free to choose other courses of action than those offered by the administrative jurisprudence.

Impact of the specific nature of administrative procedural law

Administrative procedural law is characterized by the unilateral nature of the legal protection, the specific protection of third party interests and the importance of legal certainty.

The unilateral nature of the legal protection is demonstrated by the fact that only citizens with a personal and direct interest can appeal against an administrative action (Van Mensel, 1997, p. 122). The administrative body as a defendant cannot introduce a counterclaim. This doesn't prevent the application of ADR. Agreement between both parties justifies the choice for a reciprocal relationship. Any administration or administrative body must have the general interest as its objective and no rule inhibits the citizen to allow

the administration the possibility to introduce counterclaims during the course of ADR.

In administrative procedural law the position of third party interests is more protected than in civil procedural law. The material component of the third party's specific protection exists in the obligation of the administrative judge to apply the regulations for the protection of the public order. Each rule that protects interests of third parties that are not engaged in the procedure, is to be considered to protect the public order. On the procedural side the protection consists of a large access to the administrative judge for citizens.

This doesn't lead to the incompatibility of ADR because third parties are not bound by the outcome of the ADR and their right to appeal the original decision is not affected.

As to securing legal certainty, administrative procedural law makes important concessions to the legal protection of the citizens. Short terms of appeal are applicable and administrative decisions are, until proven otherwise, considered to be legal (Flamme, 1995). The use of ADR doesn't affect these elements. Even when in the context of the initiation of ADR administration and citizen agree that the normal procedural terms for appeal will be suspended, the contractual base prevents third parties to be bound by this agreement.

2.2.4 Conclusion

There are multiple reasons and circumstances that have led to the development and use of ADR in administrative conflicts. The specific nature of administrative procedural law does not lead to the exclusion of ADR in administrative conflicts.

Still it is important to point out that ADR is not appropriate or possible for all administrative conflicts, e.g. when the parties wish to create a precedent, given the confidential nature of ADR, or when the administration exerts a bound competence and there is effectively only one possible decision it can legally take, ADR has no added value.

2.3 Legal problems and limitations

2.3.1 Power of disposal

In principle, administrative bodies have not the power to dispose their competences and have the obligation to apply them with the general interest as finality. The constitution and the laws indicate what is attributed, how it should be exercised and that no agreement can be made concerning the way an administrative body will exercise its powers.[4]

4 Art. 6 and 1128 Civil Code and art. 33, Belgian Constitution.

As stated earlier, the scope of ADR in administrative law would be very narrow if we are to stop here.

An administrative body cannot by means of an agreement engage itself to definitely take a certain administrative action in the future. It is obliged to take the action that best serves the general interest. If the administrative body has already bound itself before in the private agreement to take a particular action in the future, it could no longer make a genuine evaluation at the time the decision is to be made, since it would no longer have a choice.

This problem can be easily overcome by the incorporation of a reservation in the agreement concerning the decision that will be finally taken.

2.3.2 Value of the agreement

If the administration systematically incorporates reservations in the agreements that are the result of ADR, how should their value be determined?

The administrative body has at least engaged itself. The application of the principles of protection of legitimate expectations and duty of care means that the administrative body can no longer, without good reason, deviate from this engagement. There is a contract with legal value. So, if the administration, without good reason, neglects this agreement, the other party will be entitled to compensation based on contractual liability.[5]

The same principle of duty of care has a backside. It imposes on the administration the obligation to take into account all relevant facts (De Geyter, 2004, p. 472), which means also all new relevant elements that have emerged after the closing of the contract. These new aspects can have an impact on the evaluation on how the general interest is best served and ultimately bring the organ to take other action than the one it has conditionally committed itself to in the agreement.

Besides the strict legal value of the agreement, the use of ADR has a larger positive effect. Not only the enforceability of the agreement is relevant. Negotiation, consultation and mediation as methods of ADR stimulate dialogue between the parties and lead not only to more clarity but even so to better mutual understanding (De Geyter, 2005, p. 802).

2.3.3 The relevant interests

In ADR procedures the administration and one or multiple parties are involved. Nevertheless the administration needs to decide in order to safeguard the general interest, which means not only the interests of the parties directly involved in the conflict but also those of the indirectly affected.

5 Council of State, 3 April 1984, nr. 24.210–24.226, Boogaert.

Since ADR is mostly informal there is a greater possibility to include parties that do not meet the strict legal conditions to be considered as having an interest in the context of a judicial procedure. The more relevant actors are involved, the more the outcome will ensure legal certainty (Lancksweerdt, 2003, p. 156).

Under the current legislation, there are no obligations for participation, consultation or transparency when closing agreements. Third parties, not involved in the ADR, can be affected in their interests by the agreement.

This means that such third party can initiate an administrative judicial procedure to annul the administrative action taken in execution of the agreement. An annulment can lead to financial liability for the administrative body.[6]

In the absence of legislative remediation, it is advised to both parties in ADR to be well aware of this pitfall and to make an effort to include as many interested parties as possible, in order to heighten the legal certainty of the agreement.

2.3.4 Compulsory public law framework

Legality

The rule of law, as applicable in Belgian legal order, imposes several restrictions as to what a specific administrative body can do. The relation between the different rules and regulations is dominated by the doctrine "hierarchy of legal norms", which is a fundamental principle of the legal order.[7]

Within the context of ADR, this means that an administrative body, when closing a contract, is held to respect and execute all present written and unwritten rules. Given the fact that many outcomes of ADR are never made public, it is in praxis possible to deviate from these rules if it is never brought before a judge. The limits to this deviation are the rules protecting the public order; these cannot be neglected.

In order to avoid problems in this respect, it is advised to clarify the relationship between the agreement and the existing legal framework, in the agreement itself, e.g. by mentioning the different administrative actions that need to be taken and which legal conditions surround these decisions. Doing so strengthens the realization that the engagements in the agreement are conditional (De Geyter, 2005, pp. 783–784).

Every administrative body is held by the rules it has made itself: "*patere legem quam ipse fecisti*". Not only the regulations made by higher authorities limit the field of action by the administrative body. In an agreement the

6 Council of State, 3 April 1984, nr. 24.210–24.226, Boogaert.

7 Council of State, 10 September 1998, nr. 75.710, de Vereniging zonder winstoogmerk Gemeenschappelijk Verbond van de Verenigingen voor natuurbescherming.

administrative body cannot deviate from the regulations it has promulgated itself.

The attributed nature of the powers of the administration implies that administrative bodies, when closing agreements in the context of ADR, are obliged to follow the separation of powers as it is incorporated in the constitution and the special laws containing the reformation of the institutions.

The constitutional stipulation that all powers must be exercised in the manner determined by the constitution, is interpreted as containing a prohibition for the administration to delegate their powers (Van Mensel, 1997, p. 44). Delegation is defined as "transfer of the power to decide" (Veny et al., 2009, p. 241). This would mean that arbitrage and every method of ADR where the decision is left to a third party, is impossible.

Here a remedy can be found in transferring the power within a preset legal framework which stipulates that the outcome of the ADR will be considered as a preparatory action leading to an actual administrative action, in which the outcome of the ADR is reprised.

When doing so, the administrative body formally stays responsible (De Geyter, 2005, p. 786) and remains master of the power to decide because it can decide whether to present the conflict to a third party. It also decides at the end if it makes the decision of the third party its own by incorporating it in an administrative action. In doing so the formal legal base of the decision is not the verdict by the third party but this administrative action. Thus, formally the decision is taken by the administrative body and not the third party.

Principle of changeability

The administrative organization and functionality can always be changed to meet the variation in needs to serve the general interest. Changes in policy are needed when the demands, imposed by the general interest, change in time (Mast, 2012, p. 107; De Staerke, 2002, p. 77).

If necessary, administrative body can unilaterally change the terms of the agreement made in the context of ADR. In this case, as a contracting party, it can be held accountable to remediate by means of a financial compensation to the civil party.[8]

Nevertheless, the effects of this principle can be softened (De Geyter, 2005, p. 787). The administrative body can explicitly incorporate in the agreement that new elements will only be taken into account if they have a significant impact on the conflict. Furthermore, the longer the delay is between the agreement and the administrative action(s) that execute it, the higher the risk that new and significant facts arise. If the administrative body takes it

8 Council of State, 3 April 1984, nr. 24.210-24.226, Boogaert.

up on itself to take the agreed action within a fixed term, the effects of this principle can be reduced.

General principles of sound administration

Administrative actions need to meet the demands set by the general principles of sound administration. They have a determining influence on the relation between citizen and government and are applicable when the administration acts within a public or private law framework.

Principle of duty of care

In the context of ADR this principle implies that a party contracting with an administrative body needs to have a clear idea about the legal status. The information provided by the administration should be correct. This principle works in two directions. It obliges the administrative body to take all relevant facts into account and on the one hand there is the contract but on the other hand there are new elements that might have arisen in the delay between the time of closing the agreement and the time an administrative action is taken to execute it. The administration can temper the effects of this principle the same way as the impact of the principle of changeability.

The principle of reasonableness

Each administrative action must be able to withstand the test of reasonableness that can be executed by the administrative judge.

The margin of appreciation by the administration can show great variation given the concrete measure in question. In testing the reasonableness the judge must beware not to enter the domain of policy-making. This is why the judge exercises restraint and the principle will only be considered as breached if the judge decides that no reasonably thinking person would make the same decision in the given circumstances (Boes, 2006, p. 175).

Applied in ADR procedures, the principle means that the administrative action cannot render effects to one or more interested parties that are disproportionate to the objective of the action. To avoid such judgment the administration needs to take into account the interests of all concerned parties to the conflict but even so the interests of not directly involved thirds that could be effected by the result of the solution to the conflict.

This is another reason why it is recommended for the administration initiating a procedure of ADR to make an effort to include as many interested thirds in the process as possible.

Principle of equal treatment

It is a fundamental principle that similar cases should be treated similarly.[9] This can lead to restrain the administration from the application of ADR because it might stimulate citizens in other conflicts to demand the same treatment and solution.

Equality possesses an even greater risk for the administration given the potential precedent effect: when concessions are made in the course of ADR relative to one citizen, what is there to stop all others subject to the same administrative action to demand to be treated equal and thus all receive the same concession.

However, parties can for a great deal remediate this risk themselves: as a major condition for applying the principle of equal treatment is that the cases are the same, this will not be so if the parties during the ADR make an effort to make their conflict sufficiently unique by the way they describe it (Lancksweerdt, 2003, p. 159).

The confidentiality that in principle is part of ADR can also reduce the fear for and impact from the precedent effect.

Administrative transparency

Confidentiality is a key in the applicability and effectiveness of ADR. However the principle of administrative transparency is a constitutional right in Belgium and has been elaborated in the legislation as a right of the citizens to actively request specific administrative documents.[10]

There is no exception for documents relative to the proceedings during ADR. To this day, no satisfactory general and formal *modus vivendi* has been established between these two principles. For the specific ADR method of the ombudsman, the internal rules of operation stipulate that only the elements accepted by both parties will be put in writing and immediately signed.[11] In this case they are binding.

All documents that precede a certain administrative action can be requested and obtained by every citizen, within the conditions set in the relevant legislation. Since the action executing the agreement will take the form of an administrative action, the agreement itself will fall under the scope of the documents that can be obtained by the public.

Furthermore, to the extent that the content of the administrative action is determined by the agreement, the duty to formally state reasons in individual

9 As incorporated in art. 10 and 11, Belgian Constitution.

10 Art. 32, Belgian Constitution; Act of 11 April 1994 concerning the openness of administration, Official Gazette (OG) 30 June 1994; Decree of 26 March 2004 concerning openness of administration, OG 1 July 2004.

11 The internal rules of operation of the committee of the Federal Ombudsman of 19 November 1999, OG 27 January 1999.

decisions[12] will oblige the administration to incorporate these elements of the agreement in the decision.

2.3.5 Bound or discretionary power

The measure to which an administration has bound or discretionary power in the execution of its powers, has a determining impact on the possibility to use ADR.

Per definition bound powers mean that the administration has no choice whether or not to take a certain action. It can only take note of the fact that the conditions set in the legislation have or have not been met and act accordingly (Boes, 1993, p. 92).

Since the administration has no choice an ADR is in principle impossible because there is nothing to negotiate about.

Executing discretionary powers means that the administration has to make a choice as to what it considers to be the most appropriate action.[13] If there is a choice, there is room to maneuver so ADR can be applied to help making this choice.

However, redefining the conflict can turn the content from a bound power to a discretionary power. A conflict concerning an expropriation for example leaves no margin of appreciation; when the conditions are met, the expropriation needs to take place. ADR cannot lead to a different result and is therefore useless. Nevertheless, the parties could redefine the conflict as not concerning the decision to expropriation but having as subject the size of financial compensation and other modalities like delays and method of payment (De Geyter, 2005, p. 799). As flexibility is a key characteristic of ADR, this extends equally to a large freedom in determining what the parties consider to be the actual conflict.

2.3.6 Competent administrative body.

ADR will lead to nothing if the right persons do not partake in the procedure. The outcome of negotiations or mediation by a person inadequate to bind the competent administrative body, will be of no value.

The competent administration needs to be present. This points to the different administrative entities on the many governmental levels that Belgium enjoys: federal, regional, provincial and local. Within the appropriate level of government a competent administrative body needs to be established. If the conflict or the potential solution invokes multiple administrative actions, then the competent department for each of these should be present.

12 Act of 29 July 1991 concerning the formal statement of reasons of administrative acts, OG 12 September 1991.

13 Council of State, 8 July 1982, nr. 22.446, *Zoete II.*

The competent administration needs then to be represented by the appropriate body; a person with the capacity to bind the concerned administration.

2.3.7 Interplay between ADR and the delay for appeal.

There is a general applicable delay for requesting an annulment of an administrative action before the Council of State[14] and a multitude of specific delays in the context of the variety of administrative appeals. Some of the administrative appeals need to be introduced and completed as a condition to have access to the annulment procedure before the Council of State (Veny et al., 2009, p. 521; Mast et al. 2012, pp. 1136–1137).

To strengthen legal certainty, the delays for appealing administrative actions are short.

Potentially ADR can be initiated and completed before the delay is finished, but this is not likely. If it does not lead to a satisfying result for the citizen, his right to appeal evaporates. Even when an agreement – leading to a new administrative action – is reached, the surpassing of the delays for appeal can be problematic. The original decision cannot always simply be withdrawn. If the administrative action is not stained with an irregularity and it grants rights to third persons, the administration has not the right to withdraw it (Mast et al., 2012, p. 893; Vandamme, 1996; Vandamme & De Kegel, 1997).

For these reasons it is better to launch an appeal although ADR is being undertaken. It creates more time for ADR, notably until the closure of the debates. The parties keep their rights; if ADR fails, they can still fall back to appeal procedures. In the situation where the original administrative action is not stained with an irregularity, it grants rights to third persons and the outcome of the ADR is among others that it needs to be withdrawn and the appeal procedure will be necessary to materialize this part of the agreement.

3 Conclusion

Application of ADR is increasing in administrative law because of the move towards a more bilateral relationship between administration and citizens, characterized by reciprocity and dialogue. A definition of ADR with the least restrictions offers the best conception for designing the most appropriate tool for all specific disputes.

The reasons and advantages for ADR in private law equally extend to its use in administrative law, where they can sometimes be applied with even greater significance.

14 Art. 4 of the Ordonnance of the Regent of 23th Augustus 1948 concerning the internal procedure of the Administrative Section of the Council of State, *OG* 23–24 Augustus 1948 & Art. 14 of the coordinated Acts concerning the Council of State of 12 January 1973, *OG* 21 March 1973.

When applied in administrative law ADR offers possibilities in examining a dispute beyond the boundaries of a specific administrative action and in its full complexity. Resolving disputes by pacifying them based on 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.

The actual rules and principles incorporated in Belgian administrative procedural law do not prevent alternative methods of dispute resolution. Nevertheless, the specific nature of a compulsory public law framework has an impact on the concrete application of ADR in administrative law.

At every step of the way, the administration needs to be aware that, notwithstanding the fact that it is engaged in a contractual relation, its principle objective is to safeguard and serve the general interest. This has its effects on reservations in the agreements resulting from ADR, the need to involve relevant third parties in the process, the conditions in which a neutral third can be appointed with a degree of power to decide.

Given the flexible nature of ADR, these aspects should not be seen as merely restrictions; instead, they are the contextual elements that, once taken into account by the administration, still offer a wide scope for the government in which to resolve disputes in a variety of alternatives, by allowed methods whenever this is deemed appropriate and without endangering the legal certainty of the parties involved or others. In an intertwined process the development of an information and research platform similar to "*Belmed*" would generate data capable of substantially strengthening the general theoretical framework and facilitating the daily usage of ADR in public law.

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POVZETEK

1.02 Pregledni znanstveni članek

Pravni okvir glede alternativnega reševanja sporov v belgijskem javnem pravu

Ključne besede: alternativno reševanje sporov, pravni problemi in omejitve, upravno procesno pravo

V belgijskem upravnem pravu se uporaba alternativnega reševanja sporov povečuje in se hkrati uveljavlja tudi bolj dvostranski odnos med upravo in državljani, za katerega sta značilna vzajemnost in dialog. Specifična narava javnega prava pa povzroča specifične pravne probleme in omejitve. Članek raziskuje te omejitve in njihove priložnosti kot prispevek k ustvarjanju teoretičnega okvira za alternativno reševanje sporov v upravnem pravu. Članek omogoča pregled te aktualne teme v mednarodnem kontekstu.

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