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ALTERNATIVE DISPUTE RESOLUTION IN TURKISH ADMINISTRATIVE JUSTICE AND LEARNING FROM OTHER LEGAL JURISDICTIONS

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Project on Improving the Effectiveness of the Administrative Judiciary and Strengthening the Institutional Capacity of the Council of State

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INTRODUCTION AND WORKING DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

I INTRODUCTION

This Report is structured into four parts. The first develops a working definition of different forms of ADR for the purposes of the Report; Part Two sets out current Turkish law with respect to various ADR mechanisms; Part Three presents learning from other legal jurisdictions presented and collated during the project with some suggested learning for Turkish Administrative Justice; and Part Four sets outs some conclusions and recommendations based on the review of Turkish national law and international comparisons.

A Alternative Dispute Resolution

This Report takes as its starting point the Council of Europe Recommendation Rec (2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties. This Recommendation refers to the following alternatives to litigation: internal reviews, conciliation, mediation, negotiated settlement and arbitration.

Internal reviews: the phrase internal review is often used interchangeably with the phrase administrative appeal, or internal administrative appeal, and these phrases can be taken to have the same meaning in the present context. This refers to a situation where

an individual asks an administrative authority to reconsider the decision in their case, and these appeals may concern the expediency or the legality of the administrative decision or action. In some cases, administrative appeals may be a compulsory prerequisite to legal proceedings, or indeed to other forms of ADR. Administrative appeals are determined by public administrative bodies. In many legal jurisdictions, administrative appeals are nowadays no longer referred to as mechanisms of ADR, but rather as part of the ordinary process of dispute resolution in administrative law.

Conciliation: is where a third party is involved in a discussion to seek to resolve a dispute, and the conciliation professional will seek to give advice and make interventions to support parties to settle their disputes.

Mediation: also involves an independent third party supporting the parties to reach a resolution to their dispute. Mediators generally aim to empower participants to make their own decisions, facilitating a constructive conversation between the participants with a view to reaching a conclusion. Mediation can be seen as different to conciliation in that mediators may make suggestions to facilitate settlement, but they are not usually formally there to give advice and persuade the parties to reach a solution based on their own evaluation (as can be the case with conciliation). However, in the literature from various legal jurisdictions conciliation and mediation are sometimes used interchangeably, with mediation being the more common term in relation to administrative disputes. The results of mediation are not usually legally binding.

Mediation is further examined in the European Commission for the Efficiency of Justice (CEPEJ) document Promoting mediation to resolve administrative disputes in Council of Europe member states (7 December 2022). In this document mediation is referred to as "a structured and confidential process in which an impartial third person assists the parties by facilitating the communication between them for the purpose of resolving the issues in dispute" and that: "Mediation may concern an administrative dispute, or a dispute of an administrative nature between administrative authorities and private persons or public officials, the settlement of which is, in principle but not necessarily, the responsibility of the judge competent to settle administrative disputes" (CEPEJ 2022). The document further notes

that administrative mediation may take three forms: institutional, conventional, and jurisdictional or para-jurisdictional. These terms are encountered in the various literature and activities of the present project on Administrative Justice in Turkey, and are defined further below:

- **Institutional mediation** is a process conducted by an institutional mediator, usually from the administration or with the status of an ombudsman. It allows for the resolution of a very wide range of disputes, which are not limited to administrative disputes in the strict sense of the term (those whose resolution is the responsibility of a court). It can be used to settle disputes arising from "maladministration".
- **Conventional mediation** happens when, in order to find a solution to their dispute, the parties agree to request a third-party mediator to help them find a solution to their dispute.
- Jurisdictional or para-jurisdictional mediation takes place within the framework of a lawsuit to resolve an administrative dispute. In such cases, the court has already been seized but the parties decide, either by themselves or at the invitation of the judge, to attempt mediation. Court proceedings are then interrupted to make room for the mediation process.

Negotiated settlement: parties can agree to resolve their dispute out of court by agreeing a settlement and entering into a legally binding contract expressing the terms of that settlement. In the literature from various legal jurisdictions this process is also known as "transaction" or "peaceful settlement".

Arbitration: is a non-court alternative method of resolving disputes, where an expert and professional arbitrator is appointed, usually by the parties, to make a legally binding decision from which there may be very limited grounds of challenge.

B Administrative Appeals

As the Council of Europe Rec (2001)9 and international practice determine, internal administrative appeals can be considered as ADR mechanisms, although they are now more commonly seen not as "alternative" but rather as an ordinary part of the pre-litigation process.

In the current project, work has been conducted to prepare a Guide to Good Administrative Practices for Administrative Appeals to be utilised within the Turkish Administrative Justice System (December 2022). A consultant report (authored by Mary Cooke) notes that:

"The Guide is designed to encourage consistent practices and to improve the overall functioning of administrative authorities in relation to appeal of decisions. The Guide provides information to individuals about their right to administrative appeal and encourages greater use of the option of administrative appeal to resolve disputes between individuals and administrative authorities."

This report also states that in summary, there is a good overall structure in Turkish laws for administrative appeals of administrative decisions, including in the Constitution, the general right to administrative appeal in Law No. 2577 (Law on Administrative Judicial Procedure), other sectoral laws and secondary legislation. However, it is said that the area is complicated with regard to consequences of the failure of the administrative authority to respond to an application for an administrative decision. The consultant's report also finds that the issues are "somewhat fragmented". However, the overall conclusion reached is that the Guide to Good Administrative Practices for Administrative Appeals can be put into place in Turkey without the requirement for any further action such as legislative change, and it would appear that the Guide is useful in drawing together the relevant strands to provide cogent and coherent guidance to administrative authorities and to individuals in the area of administrative appeals. This should then improve access to administrative appeals, whether seen as a method of ADR or as part of the ordinary pre-litigation process, and reduce the pressure on the administrative judiciary.

C Ombudsmen

Applications to ombudsmen are not specifically included as a mechanism of ADR within Council of Europe Rec (2001)9 on alternatives to litigation between administrative authorities and private parties. However, ombudsmen play an important role in the settlement of administrative disputes within Council of Europe member states, as well as having wider functions with respect to strategic improvement of administration, and safeguarding the right

to good administration, which also has positive impacts reducing the workload of the administrative judiciary. As noted in the CEPEJ document, Promoting mediation to resolve administrative disputes in Council of Europe member states, ombudsmen can have a role to play in institutional mediation, allowing for the resolution of a very wide range of disputes, which are not limited to administrative disputes in the strict sense of the term as administrative law disputes between citizens and public administration (CEPEJ 2022). A separate report has been prepared for this project, A Comparative Review on Ombuds: Recommendations of Action for the Turkish Ombudsman and Guidelines for the Ombudsman and Public Authorities. This report aims to collect evidence from a range of ombudsmen about how they operate and where there are examples of best practice. The report notes:

"Ombuds have become a feature of most countries' institutional frameworks around the world. They differ, however, in their mandate, their role, their relationship to other institutions and the justice system…Ombuds are widely regarded as a flexible and adjustable means to solve disputes." (Creutzfeldt, O'Brien and Nowicki 2021).

The present ADR Report makes reference to ombuds institutions where relevant as discussed, for example, with respect to the Turkish Ombudsman Institution, and in the learning from other countries about their approaches to ADR, especially institutional mediation. For example, in some Council of Europe countries, such as France, ombudsmen-type institutions have a key role to play in institutional mediation of administrative disputes.

PART TWO

ADR METHODS UNDER TURKISH ADMINISTRATIVE LAW

In Turkey, ADR is accepted as part of the civil procedure. ADR was initially used for disputes that generally correspond to civil and criminal proceedings, and was considered as a private law concept. Due to the heavy workload and relatively long trial duration of courts, the use of ADR mechanisms has become widespread. Evaluation of ADR within the scope of public law in terms of administrative disputes is relatively new.

Although some legislation within the scope of Administrative Law regulates dispute resolution processes such as conciliation and mediation (non-judicial methods) or arbitration (a judicial method), these have not yet been actively used.

Within the scope of Turkish Administrative Law and Administrative Judicial Procedure Law, it is necessary to evaluate ADR methods, within the scope of the current legislation, in two separate categories: judicial ADR and non-judicial ADR methods. In this context, under Turkish Law, in terms of judicial ADR there is arbitration and in terms of non-judicial methods there is conciliation, peace/settlement, amicable settlement and mediation through ombudsman.

I JUDICIAL ADR METHOD: ARBITRATION

In Administrative Law, arbitration is generally considered for contracts. Amendments made to the Turkish Constitution in 1999 put

an end to the discussions regarding the availability of arbitration in administrative disputes. Even before the 1999 amendments, recourse to arbitration was possible by means of international conventions to which Turkey is a party and by bilateral agreements concluded by Turkey. Although such possibility existed, The Constitutional Court annulled legislation prescribing administrative contracts as private law contracts. The Council of State - acting within its advisory duties – previously used to remove arbitration clauses from contracts. As a result, arbitration was not used in practice, despite the international conventions and bilateral agreements.

In 1999 some articles (article 47, article 125 and article 155) of the Constitution of 1982 were amended, and these amendments introduced arbitration as a judicial ADR to the Turkish Legal System for administrative disputes. Under the new constitutional scheme, recourse to arbitration was and still is possible for contracts - private or administrative - concluded between the administration and private legal persons for the provision of public services. First of all, Article 47 of the 1982 Constitution dealing with "nationalization" was amended. In the new version, the said Article states that "investments and services carried out by the State, State Economic Enterprises and other public corporate bodies which could be performed by or delegated to real or corporate bodies through private law contracts shall be determined by law." With this amendment, the legislator could decide which type of contracts would be carried out for investments and services through private law contracts. Therefore, a contract - administrative in nature - could be regarded as a private law contract by law and regulated by private law, which in turn might lead to the resolution of such disputes by arbitration. In addition, Article 125/1 was amended by adding the phrase "national or international arbitration may be suggested to settle the disputes which arise from conditions and contracts under which concessions are granted concerning public services. Only those disputes involving foreign elements can be solved by international arbitration." With this wording, arbitration - national and international - became possible for disputes arising out of contracts where public service is provided.

In that scheme, the International Arbitration Act, Principles on Recourse to Arbitration for Disputes Arising out of Public Service-Related Concession Conditions and Contracts Act, Private

International Law Act and Turkish Civil Procedure Act govern the regime of the law of arbitration for such contracts.

The constitutional amendments have led to two separate approaches in terms of the operation of arbitration in the performance of public services. First, public service contracts that can be drawn up as a private law contract which includes arbitration clauses pursuant to article 47 of the Constitution, the second is administrative contracts which contain arbitration clauses in accordance with article 125 of the Constitution.

Apart from these, a number of current legislative provisions regulate the settlement of certain disputes through arbitration. Some of them include:

- Law No. 3533 on Settlement of Disputes by Arbitration between Departments and Municipalities Managed with General and Special Budgets and Departments and Institutions Wholly Capitalized by the State or Municipalities or Private Administrations (dated 29.06.1938),
- Law No. 3867 on State Operation of Coal Mines in Ereğli Coal Basin (dated 30.05.1940),
- Law No. 3154 on Organization and Duties of Ministry of Energy and Natural Resources dated (19.02.1985),
- Law No. 3289 on the Organization and Duties of the General Directorate of Youth and Sports (dated 21.05.1986),
- Law No. 4586 on the Transit Passage of Petroleum with Pipelines (dated 23.06.2000) and,
- Law No. 5312 on Principles of Intervention in Emergencies and Compensation of Damages in the Pollution of the Marine Environment by Oil and Other Harmful Substances (dated 03.03.2005).

II NON-JUDICIAL ADR METHODS IN ADMINISTRATIVE DISPUTES

Rules regarding alternative methods, which include conciliation between the parties, instead of rendering a final judgment

through judicial procedures, exist in both criminal law, tax law and administrative law regulations and practices.

In examining the legislation, there can be found different types of non-judicial ADR methods. The first group includes those in which the administration is in a position of a "3rd party to conciliate" instead of being party to the dispute. The second group consists specific disputes to be dealt with in an administrative procedure before being taken to courts. The third group has scope to apply to all administrations in terms of administrative acts and actions and which is enshrined both in the Administrative Judicial Procedure Law and in the Decree Law No 659. The fourth group includes institutional dispute resolution mechanisms such as Ombudsman, and Human Rights and Equality Institution of Turkey.

A ADR in Disputes Where the Administration Takes a "3rd Party/Conciliatory" Role

As for ADR methods where the administration is not a party but plays a role of 3rd party in a dispute, these can be found in various legislation such as:

- Law No. 442 Village Law (dated 18.03.1924),
- Law No. 6326 Petroleum Law (dated 07.03.1954),
- Law No. 3091 on the Prevention of Encroachment on Possession of Immovable Property (dated 04.12.1984),
- Access and Interconnection Regulation, which was enacted in accordance with the provisions of the Law No. 406 Telegram and Telephone Law (dated 04.02.1924),
- Law No. 658 Radio Law (Law No 2813 Law on the Establishment of the Information Technologies and Communication Institution (dated 05.04.1983), and Regulation on the Procedures and Principles for Making the Roaming Agreement and Regulation on the Procedures and Principles Regarding the Use of Intellectual and Artistic Works in Radio and Television Broadcasting.

B ADR Methods for Certain Disputes in Various Legislation

There are many examples of pre-litigation ADR methods under Turkish Administrative Law regulated within administrative procedure, whether such procedures are compulsory or optional. Some examples of these are as follows:

1 **Regulation on Compensation of Damages Arising out of Terror and Fight Against Terrorism** which entered into force within the scope of the Law No. 5233 on Compensation of Damages Caused by the Terror and Fight Against Terrorism. Accordingly, the Damage Determination Commission established under the Ministry of Interior investigates and estimates the damages that have been allegedly incurred and lays out a draft settlement agreement for such damages. In so doing, compensation for the loss is reimbursed before bringing the dispute before the court. If the draft peace agreement is not accepted by the individual concerned, a report regarding the dispute is drawn up and judicial proceedings can be followed.

2 **It is possible for local administrations to resort to settlement/ peace as a pre-litigation ADR method in disputes of a certain amount, excluding the tax dues.**

- Law No. 5302 Special Provincial Administration Law Article 26 - The duties and powers of the Council are as follows: ...f) To decide on amicable settlement of disputes up to five billion Turkish Liras, excluding taxes, duties and charges.
- Law No. 5393 Municipal Law Article 18 - The duties and powers of the municipal council are as follows: ...h) To decide on amicable settlement, acceptance and waiver of municipal disputes that are the subject of lawsuits, excluding taxes, duties and fees, and amounting to more than five thousand YTL.

Article 34 - The duties and powers of the municipal committee are as follows:...f) To decide on the settlement of municipal disputes, which are the subject of litigation, by agreement, excluding taxes, duties and fees.

3 **Regulation on the Procedures and Principles Regarding the Collection of Public Damages based on the Public Financial Management and Control Law No. 5018**

Methods of collection of receivables arising from public loss Article 12 - (1) Receivables arising from public losses are collected from the responsible and/or related parties together with the interest to be calculated according to the relevant legislation as of the date of the damage. (2) Identified public damages; a) To be paid with consent and peace.

Therefore, it is stated that identified public damages could also be allocated by way of consent and peace.

4 **Complaints and objections stipulated within the scope of tender disputes under the scope of the Public Procurement Law provides for the resolution of the dispute as mandatory administrative applications that must be exhausted before resorting to a judicial remedy.** Accordingly, under the Articles 54 et sec of the the Law No. 4734 Public Procurement Law, bidders and candidates for a tender who claim that they have suffered or are likely to suffer a loss of right or damage due to unlawful acts or actions during the tender process may file complaints and objections, provided that they comply with the rules of procedure and procedure specified in Law No 4734. Complaints and appeals are mandatory administrative remedies to be exhausted before filing a lawsuit. Complaint applications are made with signed petitions addressed to the administration, and objections to the Authority.

5 **Within the scope of Article 43/3 of the Law No 4054 on the Protection of Competition Law, it is possible to decide to terminate the investigation by making a commitment to eliminate competition problems by the actors in the sector, about whom an investigation has been launched** After the investigation has started; the Competition Authority may decide to end the investigation through conciliation procedure. Under Article 43: ...

(3) Relevant undertakings or associations of undertakings may offer commitments in order to eliminate the competition problems under Article 4 or 6 which may arise during an ongoing preliminary inquiry

or investigation process. If the Board decides that the proposed commitments can resolve the competition problems, it may render these commitments binding for the relevant undertakings or associations of undertakings, and decide not to initiate an investigation or to terminate an ongoing investigation. Commitments shall not be accepted for naked and hard-core infringements such as price fixing between competitors, region and customer allocation, or supply restriction. The rules and procedures concerning the application of this paragraph shall be established with a communiqué issued by the Board.

...

(5) After initiating an investigation, the Board may, on the request of the parties concerned or on its own initiative, start the settlement procedure/conciliation, taking into account the procedural benefits that may arise from a rapid resolution of the investigation process and the differences in opinion concerning the existence and scope of the infringement. Before the notification of the investigation report, the Board may come to a settlement with the undertakings and associations of undertakings under investigation which acknowledge the existence and scope of the infringement.

(6) In this framework, the Board shall grant a definite period of time to the parties under investigation to present a settlement text wherein they accept the existence and scope of the infringement. Notifications made after the expiry of the granted period will not be taken into account. The investigation is concluded with a final decision which includes an establishment of the infringement and the administrative fine imposed.

(7) As a result of the settlement procedure, a discount of up to twenty-five per cent may be applied to the administrative fine. Application of a discount in administrative fines under this article does not prevent the application of a discount under article 17.6 of the Law on Misdemeanor no 5326.

(8) In case the process is concluded with a settlement, the parties to the settlement may not take the administrative fine and the provisions of the settlement text to court.

(9) Other rules and procedures concerning settlements shall be set out with a Regulation issued by the Board.

6 **Within the scope of Article 8 of the Law No 2942 Expropriation Law, the administration that expropriates shall first try the "purchase" method with the owner of the property.** In this context, an agreement is reached through the "conciliation commission", which is established within the administration and establishes a relationship with the owner at the stage of the purchase method in the expropriation procedure. A record of this agreement is drawn up. In case the expropriation could not be achieved by the purchasing method, the expropriation procedure is followed by applying to the civil court of first instance.

7 **Under the Law No 4458 Customs Law, a conciliation procedure is laid out to allow for appeals as regards to customs taxes and penalties.** Article 242 (1) Obligees could submit a petition to a higher authority or, if there is no higher authority, to the authority that issued the act, within fifteen days from the date of notification, against customs duties, penalties and administrative decisions notified to them. (2) Objections submitted to the administration shall be decided within thirty days and notified to the relevant person... (4) Against the decisions of rejection of the objection, an application could be made to administrative courts in the place where the action was taken.

Article 244 – For those who will receive the content of an additional accrual and penalty decision issued by the customs administrations, an application for conciliation could be made by the obligor or the addressee of the penalty.

8 **Under the Tax Procedure Law, there is an opportunity called "invitation to clarification", which is operated by ensuring the participation of those concerned in the administrative procedure.** According to Article 370 of the Tax Procedure Law, taxpayers may be invited to explain the preliminary determinations made by the competent authorities that there are signs indicating tax loss before the tax examination is started or referred to the valuation commission, provided that no notification is made until the determination date. This could be, though is not a "regulatory negotiation", asserted to be

an ADR mechanism for individual administrative acts in which concerned individuals have been given right to participate in the administrative procedure. By doing so future disputes might be prevented.

C TADR Methods Having General Application Covering All Administration

1 (Optional) Administrative application within the scope of article 11 of Law No. 2577 Administrative Judicial Procedure Law (İYUK)

Administrative applications are the ones in which the unlawfulness of the administrative act could be requested to be resolved by the administration itself, without the need to resort to administrative courts. Optional application is regulated under the Article 11 of the İYUK with the title of "Application to higher authorities". The application provides the opportunity to resolve the dispute by non-judicial means, by applying to the hierarchically superior authority, or if there is no higher authority, to the authority that has issued the act, without resorting to a judicial remedy, and including the request for the abolition, withdrawal, change, or issuance of a new administrative act. Such an application suspends the term of the litigation period. If the administration does not respond to the administrative application within thirty days, the request is deemed to be rejected. In case the request is rejected or deemed rejected, the term of the litigation period starts to rerun again.

Application to Superior Authorities
Article 11
1. Before bringing an action, the person concerned may request the abolishment, withdrawal, alteration of the administrative act or the implementation of a new act from the superior authority, if there is no superior authority, from the authority that implements the act. This application shall stop the time limit that has started to run.

2. If no response is given within thirty days, the request shall be deemed to be dismissed.

3. When the application is dismissed or deemed to be dismissed, the time limit shall re-run and the period passed until the application date shall also be taken into account.

2 The institution of "peace" / "settlement" under the Decree Law No. 659

Under article 12 of the Decree Law No. 659 individuals may claim compensation for their losses arising out of an administrative act issued by the administrations stated under article 1 of the said Decree under a "peace/amicable settlement" procedure within the term of litigation. In addition, if an individual applies to the administrative authority for compensation out of an administrative action as required by article 13 of Law No 2577 (İYUK) the application is deemed to be an application for "peace/amicable settlement" under the article 12 of the Decree Law No 659.

Such an application suspends the term of litigation period. An application for conciliation shall be finalised within 60 days. If such an application cannot be concluded within 60 days and an agreement cannot be reached, then the suspended term of litigation starts to rerun.

If the application is not finalized within 60 days, the request will be deemed rejected and an implied rejection will result in the rerun of the suspended term of litigation. The dispute cannot be brought before the administrative courts before the application is concluded.

Applications made in accordance with the Decree shall be sent to the legal dispute assessment commission of the administration to which the application is made. A joint legal dispute evaluation commission may be formed in cases where the violation of rights is caused by more than one administration. While carrying out the necessary examination, the Commission carries out various research and investigation, including expert examination, and may listen to people who have information about the event.

In accordance with Article 12/6 of the Decree Law No 659, the legal dispute evaluation Commission prepares a report as a result of the examination and submits it to the competent authorities specified in Article 11 of the Decree No 659. If competent authorities accept the settlement report/document, the applicant is given at least 15 days

to sign the prepared report. In the invitation letter, it is stated that s/he must be present on the specified date or send her/his authorised representative, otherwise s/he will be deemed not to have accepted the report and s/he has the right to seek compensation for her/his damage by bringing the dispute to the court.

If the administration and the individual agree on the compensation amount and payment method, a report is drawn up and signed by the parties. This record is legally binding and have a force of a verdict. In cases where the report is not accepted or deemed not accepted, a dispute report is prepared and a copy is given to the individual concerned.

According to Article 12/9 of the Decree Law No. 659, it is then not possible to apply to the courts regarding the agreed issue or amount.

D Institutional ADR

1 Ombudsman

The Ombudsman Institution was established under the Law No. 6328 in 2012 and started to receive applications as of 2013. The aim of Ombudsman institution is to establish an independent and effective complaint mechanism for public services and pursuant to Article 5 of Law No. 6328 the Institution shall be responsible for examining, investigating, and submitting recommendations to the administration with regard to all sorts of acts and actions as well as attitudes and behaviors of the administration upon complaint about the functioning of the administration within the framework of an understanding of human rights-based justice, and in the aspect of legality and conformity with principles of fairness.

The scope of the duties of Ombudsman covers public administrations under the central government, social security institutions, local administrations, affiliated administrations of local administrations, local administrative unions, organisations with the circulating capital, funds established under laws, public organisations, public economic enterprises, associated public organisations, and their affiliates and subsidiaries, professional organizations with public institution status, and private legal entities providing public services.

The independence and impartiality of the Ombudsman Institution is accorded under article 12 of the Law No. 6328. Under the article 17 of Law No. 6328, natural and legal persons may apply to the Ombudsman and such applications shall be kept confidential upon the request of applicants. Pursuant to the same article, if the applications fail to contain an appropriately specified subject matter, if they are related to the disputes that are being heard before or decided by the judicial organs, if they do not meet the application criteria, and if the reasons, subject matter and parties are the same and the issue has been resolved beforehand, then the application shall not be examined by the Ombudsman.

Under Article 18 of the Law No. 6328, the Ombudsman Institution may request necessary information and documents within the scope of the investigation initiated upon the complaint, and this request shall be submitted to the Ombudsman within thirty days from the date of notification. The relevant authority shall launch an investigation about those who refuse to submit documents or information requested within this period without any justifiable reason. In addition, the Ombudsman Institution may assign experts on the subject of examination in accordance with Article 19 of the Law No. 6328.

When an application is made to the Ombudsman, the term of litigation is suspended. According to the Article 21 of the Law No. 6328 if the application is declined by the Ombudsman Institution, the suspended term of litigation shall resume upon the date of notification of the Ombudsman's decision to the individual concerned. In case the application is accepted by the Ombudsman, if the relevant authority does not launch any action or transaction within 30 days upon the Ombudsman's recommendation, then the suspended term of litigation shall rerun. If the Ombudsman fails to finalize its examination and investigation within six months following the date of application, then the suspended term of litigation shall resume.

The Ombudsman shall prepare a report including its activities and recommendations at the end of every calendar year and submit it to the Joint Commission, which consists of the members of the Petition Commission of the Grand National Assembly of Turkey and the Human Rights Investigation Commission

The Ombudsman Institution provides for a cost-free and easy application procedure, fast decision-making process, and wide audit

area for individuals with alternative methods to seek their rights and audit the transactions of the administration, and more importantly, to resolve disputes or find an administrative solution without bringing disputes before the administrative courts.

Additionally, recently the concept of an "amicable settlement" mechanism was introduced in the Regulation on the Procedures and Principles Regarding the Implementation of the Law on the Ombudsman Institution which states in Article 27 that: "(1) While the examination and research continues, the Institution may invite the parties to amicable (friendly) settlement. The necessary measures regarding confidentiality are taken by the Institution. (2) In cases where the request subject to the complaint is fulfilled by the relevant administration, the Institution decides on an amicable settlement and terminates its examination and investigation". Although it is stated that the parties could be invited to amicable settlement, what is meant by the amicable settlement is not clearly stated or regulated, and is carried out with in-house practices.

2 The Human Rights and Equality Institution of Turkey (TİHEK)

TİHEK, is based on human dignity, protection and promotion of human rights, ensuring the right of people to be treated equally, preventing discrimination in the enjoyment of legally recognised rights and freedoms, and was established by the Law No. 6701. TİHEK's task is to effectively combat torture and ill-treatment and TİHEK fulfils its duty as a national prevention mechanism in this regard. Within the scope of the prohibition of discrimination, an application could be made to the institution under the National Prevention Mechanism (NPM).

Among others, under Article 11 of the Law No. 6701, one of the most important duties of the TİHEK is to take a decision about application on violations of non-discrimination and ex officio inquiries into violations of human rights or non-discrimination, to conclude the conciliation process, when necessary, about these applications and inquiries, to issue decisions of administrative sanctions foreseen in Law No. 6701 against violations of discrimination.

Under the Article 17 of the Law No. 6701 every natural and legal person who claims to have suffered from violations of non-discrimination

could apply to the TİHEK Institution. Applications to the TİHEK may be filed via governorates and sub-provincial governorates. Applications are free of charge and suspend the term of litigation if made within the term of litigation.

Before applying to the TİHEK Institution, those concerned shall demand from the relevant party to correct its act which is allegedly in violation of Law No. 6701. If such claims are negatively responded to, or not responded to within thirty days, then the individual concerned may apply to TİHEK. However, where it is likely that damages have arisen which are irremediable or difficult to remedy, the TİHEK Institution may accept applications without the time limit condition.

Under Article 18 of the Law No. 6701 the TİHEK shall conclude applications and its ex officio inquiries within at latest three months following the date of application and ex officio inquiry decision. Such period may be extended only once for an additional three months.

While examining the application parties may be invited to conciliation, either upon the request of the parties or ex-officio under the article 18 of the Law No 6701. The conciliation may involve the cessation of the alleged practice of violation of human rights or discrimination, or solutions that will bear such consequence for the victim, or be in the form of payment of a certain compensation to the victim. Conciliation shall be concluded within at latest one month. Findings, statements or explanations obtained during negotiations of conciliation cannot be used as evidence in any investigation and prosecution or in any court case. Reports on applications and inquiries that could not be settled through conciliation shall be submitted to the Human Rights and Equality Board within twenty days, upon which the Human Rights and Equality Board shall decide whether a violation of human rights or non-discrimination has been committed or not. Where required, an expert with an advanced level of technical and/or financial expertise might be appointed for the inquiry or the examination.

The power that makes the TİHEK distinct from the Ombudsman Institution is the power to fine. Under Article 25 of the Law No. 6701 in case of violations of the non-discrimination principle, an administrative fine shall be imposed on the relevant public institutions and agencies, professional organisations with public institution status, natural persons and legal persons established under private law that are held responsible for the violation.

3 The Ministry of Justice Action Plan on Human Rights

The Turkish Ministry of Justice Action Plan on Human Rights includes a goal of "Improving the Effectiveness and Expanding the Use of Alternative Dispute Resolution". Specifically:

"An administrative settlement procedure will be introduced in order to settle disputes between natural persons or legal entities and the State in the fastest and most cost-effective manner, thereby introducing yet another method of alternative dispute resolution to justice service." (Ministry of Justice Republic of Turkey 2021).

The Plan also provides that the legal status of mediation will be codified, and standards will be laid down with regard to the establishment and supervision of mediation centres. As discussed below in relation to the learning from other legal jurisdictions, there is value in ensuring the appropriate qualification, training and continuing professional development of mediators in administrative law, including through developing a specific legal framework around mediation and the ethical principles to be followed by mediators. The Plan also notes that: "The institutional structure within the Ministry of Justice will be strengthened in regard to alternative dispute resolution methods".

PART THREE

INTERNATIONAL COMPARISONS AND LEARNING FOR THE TURKISH ADMINISTRATIVE JUSTICE SYSTEM

The Project has involved a wide range of different activities aimed at learning from the ADR practices of other legal jurisdictions. This has included webinars, study visits, written reports and presentations, including during the International Symposium on Administrative Judiciary, aimed at meeting the project objectives of exploring and informing members of the judiciary about different ADR methods applied in administrative justice in European countries that may be specific to the cases or mechanisms in Turkey. This Section of the current Report summarises learning from international comparisons activities alongside some additional literature-based research and presents this by country.

I ADMINISTRATIVE JUSTICE IN FRANCE

With the Turkish administrative justice system being most closely linked to the French system, this legal jurisdiction has provided an important basis for comparison and shared learning, with various activities having taken place.

A Webinar on Alternative Dispute Resolution Mechanisms in French and Turkish Administrative Disputes

This Webinar took place on 16 December 2020 and brought together experts from France and Turkey to discuss current developments and practices on ADR in both jurisdictions. The aim of the Webinar was to explore ADR mechanisms in the French administrative justice system, whilst also providing a platform for Turkish stakeholders to share their views on the applicability of ADR methods in the Turkish administrative justice system, and to consider new approaches. The Webinar focused on the existing ADR framework in both jurisdictions, and the ADR methods applied pre-trial (pre-litigation) as well as those applied during trial within the administrative justice system.

In addition to discussing the background to the development of ADR in the French system, the Webinar also considered case studies in relation to particular specialist areas of mediation such as in the public health sector. These examples were used as a means to show how mediation can be brought closer to public services users, and also how mediation can involve representatives of public services users through a mixed commission of persons.

During the Webinar a range of questions were presented to the French experts. These related to mediation in zoning cases; legal representation; legal aid; the mandatory nature of mediation; the potential liability of mediators for unlawful actions; the number of local delegates of the Défenseur des droits (the Ombudsman); the relationships between the Défenseur des droits (the Ombudsman) and other mediators; the situation, including the legal situation, if recommendations of the Défenseur des droits (the Ombudsman) are not complied with; the required experience of mediators; and discussions around the take up of ADR and extent of its use particularly pre-litigation institutional mediation (which is extremely common) and conventional or judicial mediation during litigation (which is less common). The answers to these questions are generally incorporated within the following text discussing the French system. This section of this Report has also drawn on the Report of Karine Gilberg, Reforms in the French Administrative Justice System and Alternative Dispute Resolution (ADR) Methods.

B An Overview of the Development of ADR in France

The French administrative justice system includes three layers of courts: administrative courts (tribunaux administratifs) with first instance jurisdiction; administrative courts of appeal (cours administratives d'appel) that have mostly appellate and some first instance jurisdiction; and the Conseil d'État.

There are a range of different ADR mechanisms in the French administrative justice system, including mediation, conciliation, transaction and arbitration. There are two different meanings to ADR in France: this can mean an alternative to state justice or an alternative to court proceedings. For example, it is considered ADR when settlement on a final solution is reached within the normal court process, with the resultant effect of lightening the judicial workload; it is also called ADR when legal disputes are referred to other means of resolution outside the courts. ADR processes are variable and can be conventional or institutional; jurisdictional within the courts or as an alternative to court jurisdictions; requiring the intervention of a third party or only between the initial parties themselves; ADR can be common to civil procedures across the courts generally but can also be specific to the resolution of particular administrative disputes; ADR can be contentious or non-contentious; it can be optional or in some cases mandatory.

In France, as in many jurisdictions, there are prior administrative reviews/appeals to the administration that are part of institutional processes, these are specific to the settlement of disputes within the administration, and do not require any third-party intervention. These processes are aimed at settlement of the administrative dispute and may be optional or mandatory depending on the context.

There are also opportunities for mediation which involve an independent third party whose role is to facilitate the negotiation and assist the settlement of disputes. These procedures exist to settle all kinds of administrative disputes, and again using these processes may be optional or mandatory depending on the context.

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There is also a mechanism called “transaction”, a concept which comes from the French Civil Code, where the parties voluntarily agree to end their dispute through some form of peaceful settlement.

Arbitration is also used and is a conventional mode of dispute resolution which consists in having the dispute resolved by a panel of arbitrators freely chosen by the parties, where the arbitrator renders a decision that is to be legally binding on the parties. In the French system, arbitration is mainly used for the settlement of commercial disputes, and disputes with an international element. There is a general ban, in principle, on public authorities from proceeding to arbitration, therefore recourse to this procedure must be specifically authorised by a relevant law

Some of the ADR processes in France are very old. As early as 1804, the French Civil Code established the power of municipalities and public establishments to compromise. A judgment of the Conseil d’ État (Council of State) in 1893 also recognised the state’s right to compromise.

In tax matters, a rule in relation to mandatory prior claims has been imposed by law in 1927 relating to direct taxes, which was extended to all taxes in 1963.

A key mechanism is the Institution du Médiateur de la République. This form of institutional mediation was established in 1973 and makes it possible to resolve conflicts that may arise between citizens and the administration. The role of the Médiateur de la République goes beyond the role of ombudsmen in common law systems, which is primarily to determine matters of maladministration rather than to determine issues of legal rights and duties, the Médiateur de la République (now known as the Defenseur des droits) has broader powers to protect the rights of individuals against public administration

There is also a law allowing the Conseil d’ État to adopt decrees to determine under which conditions contractual disputes involving public persons and relating to their extra-contractual liability, may be subject to preliminary administrative appeal procedures or conciliation prior to litigation or arbitration.

A study adopted by l’Assemblée Générale du Conseil d’État in February 1993 considered the further development of ADR in the administrative justice system. Various reasons were given supporting

the need for reform including: prevention of litigation and its impacts on administrative efficiency; the noted increase in claims to the Conseil d'État, to the administrative courts, and to the administrative courts of appeal; there was a concern that sometimes the strict application of the rule of law to certain disputes might lead to inequitable results at an individual human level, or to disproportionate financial consequences; there was a noted need to end disputes more quickly; there was also an aim of bringing the administration and its users closer together to facilitate more dialogue between the administration and private individuals.

Measures brought in after 1993 included developing the use of "transaction" (peaceful compromise) and clarifying the procedures of administrative appeals. Notice was taken in France of the Council of Europe recommendation on alternatives to litigation between administrative authorities and private parties Rec(2001)9 and the Conseil d'État played a role in continuing to develop the mechanism of transaction as a means for the amicable settlement of disputes.

There have been further developments, including reports, studies and speeches of the Conseil d'État. For example, an Arbitration report in 2007; a study on compulsory prior administrative appeals in 2008; a study by the Conseil d'État on the development of mediation frameworks within the European Union in 2010; and a working group reflecting on the future of administrative justice in 2015; as well as speeches from former Presidents and Vice Presidents of the Conseil d'État.

There has also been new legislation. In particular:

- Order 2011-1540 of November 16, 2011: consecration of mediation for resolving cross-border disputes
- Publication of book IV of the code of relations between the public and the administration (CRPA) on the settlement of disputes (Order of October 23, 2015)
- Law no° 2016: 1547 of November 18, 2016 on the modernisation of justice in the 21st century: generalisation of judicial mediation
- Art. 24 of law no° 2018 - 727 of August 10, 2018, for a State in the service of a company of trust: to encourage the use of transactions by State services

The main reason for reforming the administrative judiciary in France, including reforming ADR, has been the increase in the number of incoming cases. Reforms have been needed to meet domestic, European, and international best practice standards for the efficient disposal of cases.

C Current ADR Mechanisms in France

According to the Code of Administrative Justice (CJA), all disputes may be settled through ADR mechanisms, such as mediation. However, there are areas where French law provides for more details such as in relation to public procurement law.

In general, there are three main categories of ADR mechanisms under French law: transaction; mediation, and internal administrative reviews and appeals.

Representation by a lawyer is not required or mandatory in ADR proceedings in France, when a mediation (discussed further below) is proposed during a judicial procedure, a litigant who is already represented by a lawyer would likely be assisted by their lawyer during the mediation process also.

1 Internal Administrative Reviews/Appeals

According to Article L410-1 of the code concerning relations of the public with public administration there are four types of internal review of administrative decisions:

- Administrative requests – aimed at settling a dispute resulting from an administrative decision
- Equitable relief – by which an individual asks a public authority that issued the decision to review it (e.g., to modify or withdraw its decision)
- Hierarchical recourse – by which an individual asks the superior of a public authority to review the administrative decision
- Mandatory Preliminary Administrative Appeal (Recours administratif obligatoire – RAPO or MPO) discussed further below

Administrative appeals are sometimes provided for in statute, but this is not a necessary requirement, and it is well established that such reviews can be performed even without any textual foundation.

An individual may seek any of the above-mentioned requests, in principle within two months of notification of the individual decision. If the public authority does not answer, this is seen as a rejection of the request, and the individual may lodge a case before an administrative court within a two-month period. The time limit may exceed two months when the administration did not acknowledge receipt of the applicant's request or did not properly inform the person concerned about the conditions under which they may lodge a case.

There are further rules and case law of the Conseil d'État governing how public authorities must respond to review/appeal requests, what information they should give to an individual making a request and matters of timing. However, for those appeals that take place under common law, in the absence of any specific statute, there are no strict procedural requirements and Conseil d'État case-law is especially important here in determining how such appeals should be conducted.

A common law administrative appeal has no suspensive effect on the contested decision which remains in force and may be applied, only a specific statutory provision may derogate from this general principle. A significant practical consequence of an administrative appeal is the extension or renewal of the time limitation for challenging the original decision before the courts.

The most debated question concerning administrative appeals is whether they should be mandatory. Administrative appeals under the common law will always be optional and facilitative; on the other hand, those appeals which are mandatory will always be statutory, with the compulsion expressed in the statute. If an appeal is mandatory but has not been made it would be impossible to bring an action before the administrative courts.

As in other countries administrative appeals are seen as efficient because they provide some guarantees to the citizen and avoid the time and cost of judicial proceedings. However, others argue that the process adds to delays, and most importantly that it must not be seen as a substitute for impartial judicial review.

2 Mandatory Preliminary Administrative Appeal

Mandatory preliminary administrative appeal, known as RAPO, is a mandatory preliminary request to public administration and is provided for by law in many contexts. There are 140 possible situations where RAPO is provided for by law, in cases such as tax law (payment and amount of tax), migration law (visa denial) and parking fines.

The Law of 17 May 2011 (simplification and quality of legislation) extended the procedure to cases concerning civil servants. Since 2015, the general principles of this type of proceedings are enshrined in the CRPA (Article L412-1 to L. 412-8). In those cases where a request shall be referred to the public administration, any claim lodged before an Administrative Court without a preliminary appeal decision is inadmissible.

3 Mediation

In the French system it is necessary to separate institutional mediation, in which mediators belong to public administrative departments or other institutions, from mediation performed by individual mediators or mediation companies. Only a very small number of disputes fall outside the scope of mediation, specifically this includes disputes in migration law. The co-existence of different types of mediation (institution, conventional and judicial (or jurisdictional)) in France has been praised by the European Commission for the Efficiency of Justice (CEPEJ) as helping to improve efficiency of administrative justice.

There are a large number of institutional mediators, with significant diversity across the institutional mediation mechanisms, with organisations including an Employment Agency Mediator, National Education Mediator, and National Health Services Mediator etc. A recent study on institutional mediation between individuals and public administration gives a full overview of mediators, and groups these into five categories: the Ombudsperson (Defenseur des droits) discussed further below; mediators in Ministries or State entities (Ministry of Economy and finance; national education etc); mediators in National Health and welfare services; mediators in municipalities; mediators in hospitals and universities. Institutional mediation generally takes place prior to any legal proceedings (Gilberg 2020).

During the institutional mediation process, the mediator decides upon the admissibility of the request. The individual applicant must often ask the administrative agency first to reconsider the matter, and many requests for mediation are found inadmissible because this has not been done. In most cases an individual must have raised their concern with the public authority before seeking mediation. If the matter is admissible, the institutional mediator formulates recommendations or solutions among which the administration and the claimant may choose. These recommendations and solutions are just for guidance, and it is up to the parties to reach what they consider to be the most suitable solution.

The diversity of institutional mediation mechanisms in particular is addressed by an effort to rationalise and to ensure consistency through codes of ethics, as well as through the co-ordinating role of the Defenseur des droits (Ombudsman) discussed further below. According to a Charter of Ethics established by the Conseil d'État, the mediator shall inform the parties of any potential risk of conflict of interests or of circumstances that may impair their independence, and should this be the case the mediator must withdraw.

The CJA provides that mediators are fully trained in mediation generally or administrative mediation more specifically, and mediation is driven by the autonomy of the parties. By law national institutional mediators are usually appointed for a three-year term, institutional mediators are at the apex of the administrative hierarchy (e.g. just below the Minister for ministerial mediators) but receive instructions from no one (including the Minister).

Institutional mediators are liable for their unlawful actions as any other public servant would be.

The French Administrative Justice Code (Code de Justice Administratif) (CJA) also provides for conventional mediation, and for this to take place outside court. In this situation the parties may request to use mediation, and this will interrupt the time limit for litigation. Whilst this type of mediation takes place outside of the Court, the parties may seek help of the President of the Court to set it up.

More commonly, the administrative judge will refer the case for mediation during the course of proceedings. Before 2016 (a previous

version of Art. L. 211-4 CJA), the President of an Administrative Court could, if the parties agreed, organise a conciliation and choose the appropriate mediator. This procedure was, however, rarely used. After 2016 (2016-1547 Law 'J21'), the parties may also take the initiative to use mediation (art. L. 213-5 CJA). Mediation is defined by Article L. 213-1 CJA as a "structured procedure by which one or several parties seek for an agreement in order to solve their case". The parties may initiate the procedure, with or without the cooperation of the court, the judge can also initiate a mediation with the agreement of the parties. The parties may choose a judge as a mediator (Article L. 213-5 and L. 213-8 CJA). The CJA provides for guarantees concerning the mediator and his/her obligations, confidentiality of the procedure, and the implications of the agreement for both parties. The judge acting as mediator shall not be the judge of the case concerned. The CEPEJ has praised the French legislation including its broad definition of mediation as "any structured process, by whatever name it may be called, by which two or more parties attempt to reach an agreement with a view to the amicable settlement of their disputes, with the assistance of a third party, the mediator, chosen by them or appointed, with their agreement, by the court" (CEPEJ 2022).

Mediation outcomes are not automatically legally binding, and the parties may choose to submit their agreement to the approval of a judge ('homologation'), by which the agreement becomes legally binding (Article L. 213-4 CJA). The CEPEJ considers the specific legal framework developed in France to be an example of good practice, with the relevant articles of the CJA providing a model for other mediators (CEPEJ 2022).

Article L. 213-2 of the Code of Administrative Justice provides that "unless the parties agree otherwise, mediation is subject to the principle of confidentiality". It is also specified that the mediator's findings and the statements made during the mediation process may not be disclosed to third parties, nor may they be invoked or produced in the context of a judicial or arbitral proceeding, without the consent of the parties. Secondly, the same article lists the possible exceptions to the principle of confidentiality:

1. If there are overriding reasons of public policy or reasons relating to the protection of the best interests of the child or the physical or psychological integrity of a person;

2 When the revelation of the existence or the disclosure of the content of the mediated agreement is necessary for its implementation.

The "ethical charter for mediators in administrative disputes", drawn up by the Conseil d'État in 2016, insists on not only confidentiality but also on other guiding principles of administrative mediation: information, consent, and freedom of the parties. Article L. 213-2 of the Code of Administrative Justice specifies that the mediator shall carry out their mission with impartiality, competence, and diligence. The "ethical charter for mediators in administrative disputes" gives more details on the "principles guaranteeing the quality of the mediator", including:

1 The mediator presents guarantees of probity and good repute;

2 The mediator is competent;

3 The mediator is independent, loyal, neutral, and impartial;

4 The mediator is diligent;

4 The mediator is disinterested.

The mediator, whether an independent natural person or a legal person (a mediation centre or association), must have the required qualification in relation to the nature of the dispute, either through past or present activity. They must also have training or experience in the practice of mediation. In the 2016 "ethical charter for mediators in administrative disputes" gives further details regarding the required competences of the mediator in administrative disputes, namely:

(a) Have at least five years' professional experience in the field of litigation;

(b) Have a qualification in mediation techniques and provide evidence of mediation training or significant experience in this field, the quality of which is assessed by the court;

(c) Undertake to update and perfect their theoretical and practical knowledge by regularly informing themselves on the legal news in his field of competence, as well as on the current state of the art of negotiation methods and developments in the field of alternative dispute resolution, by participating in events (colloquia, workshops, debates) or training courses on these topics.

In France, mandatory preliminary mediation was introduced, as an experiment, by Article 5 IV of the Law n°2016-1547 of 18 November 2016 for cases concerning the personal situation of civil servants or in cases concerning social or welfare benefits, social housing. This experiment in mandatory mediation ran from April 2018 to December 2021, and a December 2021 Law and March 2022 Decree now implement prior mandatory administrative mediation for a limited number of disputes involving social rights and the rights of public employees.

For individual, as opposed to institutional mediators, the mediation process is not enshrined in a strict legal framework, and the mediator is free to organise the mediation as long as it is in compliance with public order principles, and the process, as well as the agreement, must not breach individuals' rights (art. L. 213-3 CJA).

When mediation is decided during the course of a trial and entrusted to a mediator outside the court, the judge decides whether and how much the mediator is remunerated. Parties may bear the mediator's fees and may agree on sharing the costs. If they fail to agree, the fees will be equally shared unless the judge considers it unfair to one party considering their situation. If legal aid has been granted to one party for the main judicial procedures, the mediator's fees are entirely borne by the state, no legal aid is specifically granted for mediation but the party already benefitting from legal aid is exempt from paying mediation fees.

Take up of mediation when a case has already been commenced in an administrative court has been comparatively low compared to pre-litigation mediation, including institutional mediation. The main reason for this seems to be that this new system of mediation is quite recent and there is a need to raise awareness of it. Another reason may be the importance of institutional mediation: most disputes that may be solved through conventional or judicial mediation have already gone through institutional mediation. If institutional mediation has failed and a court case is lodged, it may be unlikely that the parties will then wish to use conventional or judicial mediation. For example, according to the Ministry of Economy, 99% of tax law cases are solved through preliminary institutional mediation (Gilberg 2020). In 2020, 1,394 mediation procedures were instituted during the litigation phase, in comparison though a year earlier in 2019, 180,000 institutional

mediations were commenced at the pre-litigation stage (Gilberg 2020). In order to raise awareness of the administrative courts to direct cases to mediation, the Conseil d'État has set a target of 1% of registered applications per year. The Conseil d'État has also concluded a national framework agreement with the National Council of Bars in 2017 on the implementation of mediation in administrative disputes. Through this agreement:

"The parties undertake to promote the use of mediation among lawyers, magistrates, public actors and litigants and to implement any action aimed at facilitating access to quality administrative mediation at the initiative of the parties or the court, within the framework of a structured process conducted by a competent third party, and in the presence of the parties who may be accompanied by their counsel." (CEPEJ 2022).

Other agreements have been signed at local level by administrative courts and administrative courts of appeal. For example, a framework agreement on administrative mediation was signed between the Strasbourg administrative court, the Nancy administrative court of appeal, the city of Colmar and Colmar agglomeration in May 2022 and a partnership agreement was concluded between the administrative court of Marseille and the association Marseille Médiation in September 2022. The Conseil d'État has also created a committee called "administrative justice and mediation" (JAM), which is responsible for piloting mediation in all administrative jurisdictions. In addition to this committee working at national level, "mediation referents" have been appointed in administrative courts and administrative courts of appeal to guide mediation at local level and raise awareness of mediation, both among members of the courts and the public. The administrative jurisdiction has organised numerous events with the aim of raising awareness of administrative mediation; including national conferences, local events, events run jointly with bar associations and public administration (including local public administration) and the development of educational information documents (shorter accessible briefings and sheets for the public) with information about mediation also available on the websites of the French administrative courts. The Conseil d'État includes information about mediation activities in its annual reports.

In France, ad hoc commissions are not established for the purposes of negotiation or conciliation on individual cases. However, commissions

are established on a permanent basis in public hospitals. These are in charge of guaranteeing users' rights and quality care and services. They are regulated by article L.1112-3 of the Public Health Code, and assist patients with formalities, including in filing complaints. Eventually they may hear from both parties, the patient and hospital representatives. Each commission comprises hospital personnel, mediators and users' representatives.

4 Médiateur de la République - Defenseur des droits – Ombudsman

The Médiateur de la République was established in 1973, and has been re-named the Defenseur des droits since 2011. This development has been important, and institutional mediation is said to have developed at a fast pace since the 1970s.

The Defenseur des droits is the French Ombudsperson. It is an independent constitutional authority which guarantees individual rights and freedoms (Article 71- 1, French Constitution).

- Protecting the rights of public service users
- Protecting children's rights
- Ensuring ethics of security personnel (police, gendarmes, private security services, etc.)
- Guaranteeing anti-discrimination and the promotion of equality
- Issuing guidance and protecting whistleblowers.

The Défenseur des droits:

- Deals with the claims it receives from individuals in the above mentioned areas
- Encourages protection of equal access to individual rights by providing information, training and by developing partnerships with public institutions, and by proposing amendments to the law

The Défenseur des droits has the power to:

- Investigate individual cases, collect evidence
- Favour negotiated settlement between individuals and public authorities
- Issue recommendations (both individual and general) in order to solve a case or modify practices of public bodies
- Make observations in court, through amicus curiae opinions
- Introduce a request for disciplinary action
- Put forward amendment to existing law provisions especially by issuing an opinion on bills within its area of competence

The Défenseur des droits is appointed for a six-year term which is irrevocable and cannot be renewed (Article 71-1 of the French Constitution, Article 26 of Loi organique n° 2011-333 of 29 March 2011.

The Défenseur des droits has approx. 500 local representatives, appointed by the Défenseur des droits and accountable to them. The delegates are responsible for registering and handling individual complaints and answering requests for information.

There is no hierarchy between the Défenseur des droits and other institutional mediators. However, for effectiveness in handling complaints, and to avoid overlaps and discrepancies, the law may provide co-ordination mechanisms. For example, there are some cases where if a claim has been lodged before a particular institutional mediator and the person concerned also files a complaint before the Défenseur des droits, the law provides for the termination of the first procedure.

The Conseil d'Etat has ruled that public authorities are free to choose the measures (legal, budgetary, technical, organisational) as they deem appropriate to implement the recommendations issued by the Défenseur des droits in individual cases, as long as they comply with their obligations or take the necessary actions to do so (see Conseil d'État, 13 November 2020, req. 433243, SFOIP).

Access to the Défenseur des droits has been improved in recent years and the institution's relationship with the judiciary has been reinforced.

5 Transaction – Peaceful Settlement

Transaction has a long history and is different to mediation, here there is no third party to support the parties in reaching an agreement, and the parties are required to make balanced mutual concessions. Transaction is a "contract" by which the parties end a dispute or prevent an upcoming one (Article 2044 of the French Civil Code and articles L423-1 to D423-7 Relations of the Public with Administration Code). Parties may refer such a contract to a contract judge to challenge its provisions.

The Conseil d'État delivered an important ruling on transaction (CE, 5 June 2019, Centre hospitalier de Sedan, case no 412732) in a case where a civil servant had waived their right to lodge a case against the administration. The Conseil d'État held that to be lawful a transaction protocol shall respect three conditions: the object of the transaction shall not be illegal; the parties shall made concessions that are mutual as well as balanced; the protocol shall respect "public order". A transaction can be used to end a current dispute or prevent an upcoming one, but a written agreement is required.

Undue sums cannot be sought as a result of transaction, or mediation, (as ruled by the Conseil d'État (CE, Sect., 19 mars 1971, Sieur Mergui, req. no 79962), and public finance principles and procedures also prevent public authorities from paying undue sums.

6 Arbitration

Historically, arbitration has been closed to public authorities, the principle being that parties cannot avoid litigation before administrative courts as access to administrative justice is guaranteed for individuals. Article 2060-1 of the Civil Code and administrative case law have generally been taken to forbid arbitration in administrative law unless a specific statute provides otherwise. However, exceptions have been introduced and some public authorities are allowed by law to use arbitration, these include the National Railways Company and some industrial and commercial public entities.

D Learning from the French System and Recommendations

ADR remains relatively under-discussed in France as it is a comparatively new development in the history and context of French administrative law. The principle of legality is at the heart of French administrative law, and how this concept is generally conceived in France helps explain some reluctance to widen the scope and types of ADR. The idea of flexible and indeed informal ADR is quite hard to implement, or even to admit, within the French system that is based on a hierarchy of legal norms. This traditional adherence to a formal conception of legality is something that appears also to be shared by the Turkish system and helps explain why the introduction of ADR into French administrative justice is especially instructive for the Turkish system. However, the extensive caseload back logs in the French system also mirror Turkish experiences, and ADR has been growing in France, representing the concrete practical need for alternatives, as against the theoretical block or pyramid conception of legality as a hierarchy with the Conseil d'État at its apex.

Following on from the Webinar on Alternative Dispute Resolution Mechanisms in French and Turkish Administrative Disputes it was concluded that institutional mediation in France is considered by public administration as an effective instrument to solve most disputes between public services users/citizens and public administration. In the overwhelming majority of cases the solution proposed by the institutional mediator is accepted by both parties, and that citizens tend to favour institutional mediation as it is free. Institutional mediation is said to have helped to tackle the caseload before the administrative judiciary especially in tax law cases.

It was noted also that judicial and conventional mediation remains limited, in part due to the success of institutional mediation, but also due to a lack of awareness and limited interest in conventional and judicial mediation from both the administration and litigants. Awareness of the need to request a review from the public authority before seeking institutional mediation needs to be raised to tackle the high number of inadmissible cases in institutional mediation. France has, in effect, chosen a system of specialised mediation as close as possible to both the subject area of the dispute within the administration, and to the persons affected, with a strong local presence.

Various recommendations were made following the Webinar on areas of possible applicability of ADR approaches in the Turkish Administrative Justice System. In summary these recommendations were:

- Consider establishing a clear and uniform legal framework on conventional and judicial mediation procedures together with the establishment of a full Administrative Procedure Law
- Consider a pilot project on judicial and conventional mediation in a particular areas
- To foster conventional and judicial mediation, consider establishing and publishing a list of mediators specialised in administrative justice, sorted by field of specialisation
- To support high quality mediation consider setting criteria for mediators to be included within the list and further develop training criteria
- Consider establishment of a Charter of Ethics on common shared principles and values between mediators and other administrative justice professionals
- Consider conclusion of conventions between national or local bar associations, the Council of State and administrative courts, and associations of mediators deemed appropriate by Turkish authorities, aiming to raise awareness of mediation
- Consider conducting a study, together with the Turkish Ombudsman, of areas where citizens and public administration would benefit from institutional mediation

II GERMANY

A Administrative Justice in Germany

The German administrative judiciary consists of 51 Administrative Courts at first instance, 15 Higher Administrative Courts at second instance, and the Federal Administrative Court (final instance). The procedure of judicial review by the administrative courts

is regulated by the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung – VwGO).

First instance Administrative Courts are responsible for their court district and proceedings start by filing an action, legal representation is not always compulsory in first instance proceedings.

In German court practice, judges take an active role in case management, with German law providing that the court investigates the facts ex officio regardless of the motion of a party. This is an inquisitorial system, in contrast to more adversarial proceedings in other legal jurisdictions. The judge works actively on the case from when the suit is received by the court. The judge will request files of the administrative proceedings from the public authority as a first measure of fact-finding, and this is regarded as an important element of German court procedure.

The Higher Administrative Courts adjudicate appeals on points of fact and law against decisions and judgments of the first instance courts. They may also be courts of first instance for certain matters. The Federal Administrative Court is the highest appellate court, but also increasingly acts as a court of first instance for some cases, including for example, planning of particularly important transport routes or the prohibition of certain associations.

The (Federal) Administrative Procedure Act (Verwaltungsverfahrens-gesetz – VwVfG) provides the basic law for public administration, and Federal and State law in public administration are largely the same as a result of section 137 (1) no. 2 of the VwVfG.

B ADR in German Administrative Justice

1 Administrative Appeals

German administrative law provides for administrative appeal procedures (known more commonly as objection procedures). These would generally not be referred to as “alternative” dispute resolution methods as their use is often understood as a simple, usually mandatory prerequisite to an application to the courts. The VwGO, and other legislation relating specifically to fiscal courts and social courts, provides for objection procedures (administrative

appeals) closely connected to the concept of "administrative act" (Verwaltungsakt) meaning single-case decisions, an important core concept of German administrative law.

In many cases exhausting the administrative appeals procedure is a necessary prerequisite for taking legal action, with some exceptions. The legislation provides a detailed framework of time limits within which administrative appeals should be sought, how they should be approached, and their legal and administrative consequences.

An administrative appeal can reconsider facts and circumstances, and can also consider new facts that might not have been known to the initial decision-maker. Rejection of an administrative appeal must be accompanied by a statement of reasons and information about a further appeal. During the administrative appeals process the administrative act (Verwaltungsakt) may not be put into practice so the process has a suspensory effect. However, there are some exceptions to this both in Federal Law and in the law of the Länder[1], these exceptions tend to relate to matters of public safety, investments and taxes, or other public charges and costs. The exceptions to the suspensive effect are also not themselves absolute. There are further legal rules around the impacts on third parties of the administrative appeals process.

Although the general administrative law, and special administrative laws respectively, contain some different procedures, it is possible to determine a general model which takes the form of a two-stage procedure. In the first stage the authority that issued or rejected the initial administrative act in question must decide whether to remedy it or not, if they decide to remedy it then the procedure is finished. If they decide not to then the competence to make a decision on the appeal tends to shift to a higher authority, namely the authority with supervisory competences over the issuing authority. In this sense the procedure may also be understood as an instrument of administrative supervision. Under the general administrative law, if

[1] The Länder is the name given to the 16 federal subdivisions (states) of the Federal Republic of Germany. The judicial system in Germany is established and governed by part IX of the Basic Law for the Federal Republic of Germany. Article 92 of the Basic Law establishes the courts, and states that "the judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder.

the higher authority rules on an objection, then all competences of the issuing authority as concerns the citizen in this case are shifted to the higher authority.

The legality of the administrative act can be reviewed on any administrative appeal, whereas the suitability of the administrative act can only be reviewed where the law grants a certain degree of discretion to the administrative authority. The administrative appeals procedure effectively leads to a reopening of the matter and so the ruling on appeal can also be based on new facts, new legal considerations, and new considerations as to the suitability of the administrative act.

It should also be noted that the administrative authorities are not competent to decide on the conformity of delegated legislation or by-laws with higher ranking norms. However, the exhaustion of the administrative appeal procedure is still a prerequisite for legal action, meaning that the applicant should file an objection within the set time limit to prevent the administrative act from becoming definitive, even if it is clear that the administrative authorities involved cannot allow the appeal because they cannot decide on the validity of the legislation or norm in question.

The administrative appeals process is considered then not as an alternative form of dispute resolution but as a preliminary stage of specific and time limited court actions. It is a formal remedy against administrative acts and is generally considered the serve three main objectives:

- To give the issuing authority the opportunity to internally review the legality (and the suitability) of the administrative act (or its rejection)
- To give the citizen concerned an efficient (and cheaper) non-judicial remedy
- To relieve the administrative court of claims that may be satisfied by the authority itself

There are some exemptions from the administrative appeals procedure in Federal Law and in the law of some of the Länder. In particular, within the general scope of the VwGO the Länder are usually authorised to stipulate that the exhaustion of an administrative

appeals procedure should not be a necessary prerequisite for court action. The power to abolish the administrative appeals procedure was given to the Länder by amending the VwGO in 1997 as part of a reform meant to promote Germany as a business location by speeding up and simplifying administrative procedures. Now quite a diverse picture has emerged across the Länder so that whilst most Länder continue to adhere to the administrative appeals procedure, other Länder have abolished this procedure for specific areas, and two abolished the procedure quite extensively. Arguments in favour of abolition include that judicial protection could be quicker and more simple without a mandatory administrative appeal; that in practice administrative appeals largely repeat the same arguments made in relation to the initial administrative act; that the success rate of administrative appeals is too low to reduce court caseloads; and that administrative agencies can misuse the administrative appeals procedure to cure formal defects in the administrative act but without re-examining the substance which has bene the real reason for the administrative appeal.

2 The Right to Petition

There is a right to petition founded in Article 17 GG Grundgesetz (Basic Law, the German Constitution) and similar provisions are made in the constitutions of the Länder providing that every person has the right individually or jointly with others to address written requests or complaint to competent authorities and to the legislature. This means that every person has the right to object to a concrete decision or an administrative practice of an administrative authority by filing a motion for reconsideration (Gegenvorstellung) with the administrative authority responsible. Article. 17 GG provides the possibility for everybody to complain to supervisory authorities (Aufsichtsbeschwerde) about decisions taken by administrative authorities over which the supervisory authority has supervisory powers. Article 45c GG and similar provisions in the Länder constitutions provide for the existence of parliamentary petition committees. The law here provides for investigating powers but not for decision making powers. Therefore, the powers of the petitions committees are limited to either dismissing the petition or forwarding the petition to the government with a recommendation to reconsider the request of the petitioner to take a concrete decision

to accommodate the request. However, these recommendations are not binding on the government and if they are not followed, they have only political not legal consequences. Petitions are generally then not considered as an alternative to but rather as subsidiary of judicial protection; if the petitioner did not exhaust the formal remedies foreseen for the relevant request, the petitions committee will in general see no reason to uphold it.

3 Mediation

In principle, all administrative authorities are allowed to resort to mediation provided they have discretion as to which decision to take on a contested matter. In general, an administrative authority can conclude a contract to make the outcome of the mediation legally binding. It would also be possible to resort to mediation within active administrative appeal proceedings, however, in practice this rarely happens, whilst administrative authorities involved in administrative appeals could develop proceedings with more mediative elements, this seems unlikely in practice.

a Mediation with a Conciliator Judge

The Administrative Court usually consists of Chambers comprising three or more judges, with one as the presiding judge, Judges elect members of a presidium which takes decisions about the business plan of the court (Geschaftsverteilungsplan). Decisions must also be taken by the presidium concerning which judges are conciliation judges (conciliators or Güterichter) discussed further below.

The Chambers of the German Administrative Courts, which are usually specialised by subject matter, have two options for each new case: traditional court proceedings or mediation.

According to section 87 of the Code of Administrative Court Procedure VwGO, the presiding judge or the reporting judge shall issue all orders prior to the oral hearing that are necessary to deal with the dispute where possible in one oral hearing, and may subpoena those concerned to discuss the facts, to reach an amicable settlement of the dispute.

Under section 173 of the VwGO and 278 subsection 5 of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) the court:

> "may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decisions (Güterichter – conciliator). The conciliation judge may avail himself of all methods of conflict resolution, including mediation."

Section 278a of the ZPO, also applicable in this context, provides that:

> "(1) The court may suggest that the parties pursue mediation or other alternative conflict resolution procedures. (2) Should the parties to the conflict decide to pursue mediation or other alternative conflict resolution procedures, the court shall order the proceedings stayed."

Section 159 (2) of the ZPO further provides:

> "Records of conciliation hearings or further attempts made at resolving the dispute before a conciliation judge (Güterichter) pursuant to sec. 278 (5) Code of Civil Procedure (ZPO) will be prepared solely based on petition of the parties in congruent declarations."

The development of the *Güterichterverfahren* was seen as a paradigm shift in German administrative justice, as the first time in the history of the German judiciary where out-of-court methods of dispute resolution were included in the rules of procedures in order to offer litigants the opportunity to find a quick and sustainable solution to their dispute in a confidential communicative procedure aimed at reaching an understanding headed by a judge who is not authorised to make judicial determinations in the case. Despite the noted importance of this development, conciliation proceedings are only used to a limited extent in practice by the German courts, in part because they are still a comparatively new development.

Whether the German Administrative Courts encourage ADR or not depends on the circumstances. The court may try in the first instance to find an in-court settlement to which the parties agree. If this is not possible, the court will then consider whether mediation should be attempted, or court proceedings continued.

With agreement of all parties, it is in principle possible to apply for ADR methods at any time during proceedings from lodging the case to finalisation of the dispute. There are no fixed criteria for determining which cases should be referred to the conciliation judge. The responsible panel of judges will normally decide at its discretion whether a case should be referred to a conciliation judge, but this decision only makes sense if the parties agree, even though their agreement to conciliation is not expressly required by law, this would seem necessary in order to reach a consensual solution to their dispute. Under section 278a (2) of the German Code of Civil Procedure (ZPO) if the parties decide to pursue mediation or another method of conflict resolution then the court shall order proceedings to be stayed.

According to German law, only a judge can be assigned as a conciliator judge during court proceedings in a particular case. The conciliator judge must not be a member of the court chamber that would determine the case. A conciliator judge may also be currently working in a court chamber, but may not be a member of the court chamber with overall responsibility for the proceedings.

Other non-judicial mediators/conciliators could be appointed to seek to resolve a dispute either before legal proceedings are initiated or after they have concluded (if still relevant).

If the parties decide to pursue mediation according to section 278a of the German Code of Civil Procedure (ZPO) some characteristics of the Administrative Court's jurisdiction still have to be observed. In particular, the public administrative authority remains bound by applicable administrative law and cannot agree with any compromise solutions that would breach this law.

Conciliator judges have to undergo specialist training, must be neutral within the proceedings and must not give legal advice to either party. Conciliator judges are also likely to be specialised in the specific topic of the dispute, though at any one time this will be dependent on demand and the total number of conciliator judges.

Assigning a conciliator judge may take place any time during court proceedings, and the consent of the parties to the particular conciliator judge is not necessary. Parties are, however, not obliged to participate in the mediation proceedings and can terminate them at any time without negative consequences.

The prevailing opinion is that the conciliator judge may not apply the German Mediation Act, as they are not working on a contractual basis (as other mediators do, for example, in civil justice) but are in fact an organ of the administration of justice. Albeit that the conciliator judge cannot decide the legal dispute, they continue to be a judge. There is no formal complaint mechanism against conciliator judges specifically, but a party might complain to the president of the relevant court, however, such complaints are very rare. If the conciliator is in breach of official duty, it is the state that is in principle liable, the conciliator is only liable in the case of a particularly gross breach of duty (which is again extremely rare).

In principle, the conciliator judge should suggest mediation. Such mediation hearings tend to be longer than normal court proceedings and last between two to four hours, and include working out the background to the conflict and the interests of the parties and possible involvement of other persons. Sometimes more than one hearing is needed. The hearing (or session) should take place as soon as possible, and the conciliator judge is required to inform the parties about the characteristics of the proceedings including confidentiality. The conciliator and parties are required to keep all facts and occurrences confidential, and they must sign a written stipulation to this effect.

The participation of a lawyer/legal representative in mediation hearings is not required by German law, but is nevertheless quite common, which can undercut some of the incentive to save costs. Legal aid is not available in Germany for mediation (section 1 VwGO No. 26).

Alternatively to court proceedings, within mediation there are no comparable restrictions as to the facts that might be considered relevant and which can contribute to an agreed solution. Here the conciliator should make concrete suggestions for a settlement (which is different to mediation approaches that primarily facilitate/empower the parties to reach a settlement). In the German context, if the mediation is successful, that means a legal solution is found to the conflict on which the parties agree, and the solution is then stipulated in a binding written agreement. The parties, including public authorities, are bound by this agreement and upon the order of the conciliator judge, the files are given back to the deciding court

chamber judge. If a solution cannot be found, the conciliator orders that files are also given back to the judge without stating why the parties did not reach a consensual solution. The legal proceedings can then continue, though the parties are also notified that they may still reach an agreed court settlement or withdraw the action.

b Evaluation of the Conciliator Judge

As with ADR generally, the aims of ADR in the German Administrative Justice System are that ADR should be less formal and less expensive than full legal proceedings. There are a range of factors to be balanced, when the conciliator judge and parties pursue mediation in the German system this will not be transparent as the parties must keep all facts confidential, whereas court proceedings are in principle public proceedings. Both confidentiality and the independence of the conciliator judge are particularly important.

Conciliation of this type within court can be based on the idea that mediation adds value compared to traditional court procedures. There are some potential advantages to mediation with the court, as members of the judiciary, the conciliator judges enjoy a particularly high level of public trust, and there appear to be high rates of satisfaction amongst those who have used this method. The fact that judicial decisions and mediation can take place “under one roof” may in principle increase the willingness of parties to attempt mediation, as it is not perceived as an additional hurdle on the way to a dispute (such as administrative appeal) but rather as one possible mechanism for dispute resolution. Parties who might not have considered mediation prior to court action might do so once the case has been issued in court as this may sharpen their mind to the potential serious consequences of a legal judgment.

The disadvantage to the conciliator judge approach is that this is not appropriate where there is a need for establishing a legal precedent or a need for enforcement otherwise than through consent. Although legal representation in mediation is not normally required, parties might often involve a lawyer, at further cost, which also makes mediation then less attractive. If mediation is not in fact quicker and less costly than court proceedings this undermines the rationale for using it. Likewise, if mediations are time-consuming this is also less attractive from the perspective of the administrative authorities, and such authorities may also often be more interested in receiving

an official judicial determination, especially if the issue at stake is not limited to the specific individual case. Mediation is said to be most useful in German administrative justice for large scale more commercial type cases where there is genuine potential to reduce costs and time through a more consensual solution.

Court practice and the degree of judicial interest in the conciliation process can be quite variable across German administrative courts, and the role of the court president is important in creating prerequisites for compliance with court rules around conciliation and encouraging a culture of judicial engagement.

There are considerable differences across German court practice as to how often the conciliator judge mediation is used. In most courts there are only a very few cases (or even none at all) transferred to a conciliator judge. There also seem to be substantial differences concerning the results of mediation.

4 Transactions and Agreed Court Settlement

Through transactions (compromise contracts) the individual and the administrative authority may agree to settle their dispute and enter into a legally binding compromise contract to reflect this. This can happen before, but also during an administrative appeals process. Such compromise contracts seem to be most common in relation to public procurement disputes, especially where third parties are also affected.

As well as the conciliator judge procedure, there is also the possibility for reaching an agreed settlement; a judicial settlement during court proceedings, under section 106 of the VwGO, a judicial settlement may be concluded by the parties accepting a proposal of the court, of the presiding judge or of the reporting judge, issued in the form of an order.

5 Ombudsman

Many administrative authorities, including municipalities (of the Federation and the Länder) have voluntarily established complaints departments, the heads of which are often referred to as Burgerbeauftragter (which is German for ombudsman) and who

serve as contact points for complaints against the administrative authority. However, these "ombudsmen" are a consequence of organisational decisions within the authority and have no legal basis, the civil servants fulfilling the tasks are not independent.

It seems that the creation of an independent ombuds institution empowered to receive complaints across many areas of administration is relatively unfamiliar in Germany. Neither the Federation nor most of the Länder have established such an institution. This seems likely to be due to the comprehensive legal protections guaranteed by administrative courts and the work of the parliamentary petitions committees. Full ombudsmen institutions exist only in four Länder. However, more familiar is the creation of independent commissaries (Beauftragte) which are created to safeguard specific rights or public interests as against the administration and which may be empowered to investigate complaints in context, such as the Commissioner for the Armed Forces, and commissioners for data protection, freedom of information and the rights of women.

C Learning from the German System and Recommendations

During a Project study visit to Germany, Munich and Leipzig 30 May to 2 June 2022, expert consultant Gerda Zimmerer, herself a conciliation judge, noted that in Germany ADR is not considered to be a method to reduce the workload of a court. A commonly held view in Germany is that the rules on administrative procedure and administrative court procedures provide adequate means both to ensure effective legal protection and to definitively settle conflicts. There is a strong constitutional perspective that administrative authorities must not decide - as a "non court" of last resort - on administrative matters concerning individual rights, and that administrative appeal procedures may never be opened as a substitute for recourse to the courts.

III SPAIN

The Spanish model of administrative justice had historically followed the French system, however, various periods of political instability brought about changes. The 1978 Spanish Constitution set out a new model of public administration and a new concept of the relationship between citizens and public administration. Article

24(1) of the Spanish Constitution provides that: “Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests…” Article 103(1) further states that: “The public Administration serves the general interest with objectivity and acts in accordance with the principles of efficiency, hierarchy, decentralisation, de-concentration and coordination, being fully subject to justice and the law”. Article 106 states: “The Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action, as well as to ensure that the latter is subordinated to the ends which justify it.”

A paper on mediation in the Spanish administrative justice system was provided to the Project by Judge Susana Abad Suarez, Judge of Administrative Court No. 5, Madrid, Spain. This explains that there is no express and clear legal coverage of intra-judicial mediation in administrative law, but that such can be accommodated in Article 77 of Law 29/1998 regulating the Contentious Administrative Jurisdiction (LJCA) and also in Article 19 of Law 1/2000 relating to Civil Procedure (LEC) of supplementary application in the contentious administrative order. Article 77 of Law 29/1998 provides that in proceedings at first or single instance, the judge or court, of its own motion or at the request if a part, after the application and defence have been made, may submit to the consideration of the parties the recognition of facts or documents and the possibility of reaching an agreement putting an end to the dispute, when the trial is promoted on matters susceptible to compromise, and, in particular, considering the quantity estimate. Article 77 also provides that an attempt at conciliation shall not suspend the course of the proceedings unless all the parties involved so request; and also authorises an attempt at mediation at any time prior to the date on which final judgment is determined. If the parties reach agreement, the judge or court will issue an order declaring the legal proceedings terminated, provided that what was agreed was not manifestly contrary to the legal system or harmful to the public or third-party interests. In effect, conciliation can be authorised, and settlement reached, at any time during the process, whether in the first instance courts or in appeals proceedings. However, Article 77 does not expressly refer to mediation but rather “agreement” which is more generally seen as including “transaction” (a “negotiated” or “peaceful” settlement between the parties) that could also be assisted and facilitated by the judge through conciliation. Whereas

mediation has otherwise been expressly excluded in administrative disputes (through a national basic law on mediation), Article 77 opens the door to forms of mediation if the judge or the court so refers. What has since happened is that a growing number of Autonomous Communities, such as The Canaries – Las Palmas de Gran Canaria (the first Spanish Court to refer a case for administrative mediation in 2013), Murcia, Catalonia, Madrid or Valencia, have introduced regional Protocols on the basis of Article 77. This has led to varying practices across Spain, a level of inequality which is potentially troubling for Article 24 of the Spanish Constitution which provides a right to effective judicial protection. There have been proposals to develop further unifying regulations across Spain.

The CEPEJ(2022)11 document on Promoting mediation to resolve administrative disputes in Council of Europe member states, includes a number of examples of good practice from Spain, in particular from some of the Spanish Autonomous Communities. In relation to the definition of mediation, it observes that the Madrid Protocol on Administrative Mediation refers in its Article IV to the transversal definition of mediation used by the 2008 European Directive. According to this definition, mediation is "a structured process, however named or referred to, in which two or more parties to a dispute attempt by themselves, voluntarily, to reach an agreement on the resolution of the dispute with the help of a mediator. This process may be initiated by the parties, suggested or ordered by a court or prescribed by the law of a member State". In the context of developing a specific legal framework mediation in administrative matters, the CEPEJ notes that: "In Spain, while there is no national text regulating administrative mediation, some autonomous communities have adopted what is called an administrative mediation protocol. This is the case, for example, in the Canary Islands, Murcia, Catalonia, Madrid and Valencia. These protocols define the specific rules applicable to administrative mediation". The CEPEJ further states that Spain is a good example in defining the scope of administrative mediation, because:

> "Some Autonomous Communities determine the scope of application of administrative mediation by means of an open list. For example, Article VI of the Madrid Protocol on Administrative Mediation specifies the scope of application of administrative mediation in three points: the so-called formal rules of administrative mediation, its material scope of application and a

> list of cases that aims to solve the questions that may arise in the implementation of the mechanism in advance. The protocol thus draws up a list of matters that can be the subject of administrative mediation: disputes involving compensation, town planning, the environment and the organisation of the territory, nuisances as well as unhealthy and harmful activities, administrative failure and inertia, the execution of measures relating to disciplinary and administrative sanctions, the civil service, the collection of taxes and public charges in the event of bankruptcy of the debtor, etc. The resolution of issues concerns those hypothetical situations in which the administration has discretionary power, allowing it to adapt to mediation, or difficulties in the execution of judgments and questions relating to the impacts of judgments." (CEPEJ 2022).

On the professionalisation of mediators, in Spain the mediator must have a university degree or higher professional training as well as specific training in mediation; a Decree of 27 December 2013 also provides for the need for knowledge of law, psychology, ethics, and mediation techniques. It also specifies the amount of training required: the initial training lasts at least 100 hours, of which the practical portion must constitute at least 35%. It also provides for continuous training every five years, which must last at least 20 hours and include a purely practical component. These rules apply to all types of mediation including administrative mediation.

The CEPEJ also refers to an agreement reached between the General Council of the Judiciary and the Madrid Bar Association to apply mediation to conflicts with public administration (CEPEJ 2022).

For the current Project, Judge Suarez's paper provided some valuable commentary on the situations in which mediation can be considered most, and least, appropriate. She notes that reluctance around mediation stems from traditional, indeed constitutional, understandings of legality and the rule of law; where law is seen to regulate administrative activity, it can be hard to see room for choices in the resolution of disputes, suggesting mediation and compromise is less appropriate. However, Judge Suarez notes that there can be differences between discretionary and regulated powers, and that in administration there can be a margin of freedom or discretion for the administrative agency such that there may be two or more solutions that are both in accordance with the law, and the administration may choose, subject to general principles

of law including the prohibition of arbitrariness. Here there is greater space for intra-judicial mediation. Judge Suarez notes that where powers are more regulatory in nature, there is less room for mediation, as the legal system predetermines the elements of the exercise of power, so that in any given factual situation there may be only one just solution. However, she further goes on to note that even here the regulated powers have among their defining elements indeterminate legal concepts which are susceptible to a certain margin of appreciation among the administrator when interpreting and applying them without prejudice to the fact that their definitive determination depends in the courts and tribunals in the contentious judicial process. Hence this margin of appreciation and interpretation can leave some space of intra-judicial mediation. Still, mediation is of most value where there is a singular administrative activity made up of administrative acts, express or presumed, or administrative inactivity, and where the matter affects the rights or legitimate interests of specific citizens.

Commenting on the use of mediation in Spanish administrative law, Judge Suarez notes that a fundamental problem for intra-judicial mediation has been the lack of interest from public administrators in the resolution of their contentious administrative disputes through intra-judicial mediation. The presumption of legality and enforceability of administrative acts does not favour active and positive involvement of administration with citizens to consensually resolve disputes. Judge Suarez notes that improvements could be made to the institutionalisation and regulation of intra-judicial mediation; public administrators could make an institutional commitment to mediation and assist in providing material resources; there could be better training in mediation for judges, lawyers and other staff involved in the administration of justice; adequate valuation of judicial activity that positively encourages referral to mediation; improved selection and training of mediators; and establishment of appropriate structures for the control, co-ordination and monitoring of the procedures derived from mediation. Nevertheless, Judge Suarez concludes that a real obstacle remains not just the lack of appropriate legal regulation of mediation, but the absence of involvement of public authorities with competence in the matter in the implementation and effective development of mediation.

IV UK (England and Wales Jurisdiction)

England and Wales as a legal jurisdiction does not have a formally separate administrative law system or express administrative procedure law. However, most administrative law is laid down in specialist subject-area legislation, for example in social security, health, education, social care, aspects of property, planning, tax, pensions, and immigration and asylum, and this law sets out procedural as well as substantive standards to be applied by administrative decision-makers, as well as outlining the boundaries of their powers. This legislation will usually expressly include a route to redress in the administrative justice system, primarily a specific right of appeal to a tribunal (with a named specialist tribunal designated in the legislation or in later regulations) or a court, increasingly also with an initial right to request an administrative review, reconsideration, or appeal by the administrative body that first made the disputed decision. An administrative appeal to the administrative decision-making body is available in most subject areas and is a mandatory requirement before seeking court action in some areas, such as in relation to welfare benefits, and immigration.

The subject area legislation, such as in planning, tax, welfare benefits and so on, will usually set out how decisions taken under that legislation can be challenged, including administrative appeals, as well as appeals to tribunals or courts, this legislation will also set out limitation periods and some procedural steps, it will also, where relevant, set out the jurisdiction of the appellate tribunal or court. For example, sometimes legislation will expressly state on which legal grounds an appeal can be brought before a particular tribunal or court, and the remedies that can be granted in relation to such an action. Sometimes the legislation will also include so-called “exclusion” or “ouster” clauses such that the tribunal or court may not hear appeals in relation to certain types of administrative decision making and/or hear appeals in relation to certain legal grounds. Some of this subject specialist legislation will set out the position on ADR with respect to particular disputes, this may be to acknowledge that ADR is available and to set out routes that are optionally available to the parties, however, it may also in some cases lay down a mandatory requirement for parties to demonstrate that they have actively attempted ADR (particularly mediation) before they can commence legal action in a tribunal or court. A specific example of this

is under the Children and Families Act 2014 in relation to children with special educational needs. As concerns some administrative decisions relating to the education, health and care of children and young people, a child's parent or a young person may appeal to a tribunal in relation to particular matters (section 51 of the 2014 Act). Section 52 of the 2014 Act covers the "Right to mediation", here in relation to particular decisions the local administrative authority must, before the end of a prescribed period, notify the child's parent or the young person of their right to mediation (section 53 or 54) and the requirement to obtain a certificate under section 55 before making certain appeals. Sections 53 and 54 set out the responsibilities of the local authority to arrange for mediation and to participate in that mediation, but also to ensure the mediation is conducted by an independent person, among other factors. In relation to certain types of appeal, a parent or young person cannot exercise their right to appeal to the relevant tribunal until they have first obtained a "mediation certificate". Section 55 of the 2014 Act sets out that the mediation adviser must issue the certificate if the parent or young person has provided him or her with information about pursuing mediation, and has informed him or her that he or she does not wish to pursue mediation. A mediation adviser must also issue a certificate if the information has been provided and the parent or young person informs the mediation adviser that he or she wishes to pursue mediation and that he or she has participated in such mediation. In effect this makes at least attempting to find a mediated solution compulsory for some types of claim. The CEPEJ notes in its document Promoting mediation to resolve administrative disputes in Council of Europe member states that the development of binding procedures for the settlement of certain disputes favours the promotion of mediation and helps spread a culture of mediation, giving the England and Wales special educational needs context as an example, alongside mandatory mediation in the context of some types of administrative disputes in France, as discussed above (CEPEJ 2022).

Most bodies that determine administrative law disputes in the UK are formally known as tribunals, however, these bodies are courts in all but name and have statutorily guaranteed judicial independence. In the early 2000s a review of tribunals was conducted, and the resulting report was part of a broader line of thinking, including focusing not just on the professionalism and efficiency of judicial dispute resolution through tribunals, but also on improving first instance decision-making within administration, increasing opportunities for

administrative appeals, and improving access to ADR and increasing its use.

Within the tribunals system there are nine sets of Tribunal Procedure Rules governing the procedures to be applied by different subject area specialist chambers, at both first instance and appellate levels. The Tribunal Procedure Rules set out what the particular tribunal or chamber's approach should be to ADR, which can include bringing the availability of particular ADR methods appropriate for the subject area to the attention of the parties and facilitating the use of such procedures by the parties.

ADR has become very much a regular part of the resolution of both civil and administrative disputes across England and Wales as a legal jurisdiction, and the broader UK. There have been various developments since reforms to Civil Procedure Rules (which also apply in some public administrative law disputes) in the late 1990s. These reforms have tended to press the case for ADR being brought more expressly into civil (and administrative) justice procedures through developing pre-action protocols which require the parties to consider other methods of dispute resolution, utilising court action as a last resort, encouraging stays of claims to allow mediation to be attempted after issue of litigation, and promoting ADR within the overriding objectives of the justice system. These reforms have also included changes to costs, such that parties are encouraged to attempt ADR and there are also measures control legal costs incurring before the parties switch to ADR.

From 2001 onwards, central UK Government departments and agencies have entered into dispute resolution commitments, whereby they have agreed to be proactive in the management of disputes; to use prompt, cost effective and efficient processes for completing negotiations and resolving disputes; choosing processes appropriate in style and proportionate costs to the issues that need to be resolved; recognising the value of ADR and its savings in terms of costs and time; and educating their employees and officials with respect to various appropriate dispute resolution techniques to enable the best possible chance of success when using them. However, these commitments have tended to expressly excludes some administrative law disputes and disputes where human rights issues are at stake, for reasons discussed further below.

The use of ADR has continued to grow, and the UK Ministry of Justice sought further views on 2021/22 on how civil, family and administrative disputes could be better resolved outside the court system. The consultation and responses noted that pre-action protocols that must be observed by the parties, and civil and tribunal procedure rules highlight the need to consider ADR and treat litigation as a last resort, there are still more practical barriers preventing the fullest uptake of ADR. Responses to consultation on these matters were divided into seven main categories: drivers of engagement and settlement; quality and outcomes; dispute resolution service providers; financial and economic costs and benefits' technology infrastructures especially in the context of resolving disputes using technology/online dispute resolution; the importance of public sector commitments to equality; and additional evidence (UK Ministry of Justice 2022).

The England and Wales Civil Justice Council produced a paper in June 2021, concluding that compulsory ADR would be both lawful under domestic law, compatible with ECHR Article 6, and practically desirable and workable for certain types of disputes (UK Civil Justice Council 2021). A challenge, at least in the law of England and Wales, is that disputes are not always neatly divisible between civil and administrative elements, and there has been much more reluctance to consider ADR as compulsory for administrative law disputes. At various stages of reform to the justice systems it has been noted that administrative law, and particularly judicial review and appellate level claims, are the means by which judicial control of administrative action is exercised. This policing of legality is an important constitutional function, and key to ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. In a system focused on Parliamentary sovereignty, review by the courts is seen as essential to ensure that unelected executive and administrative bodies are not using their discretionary contrary to the will of the elected Parliament. Administrative law disputes could well lead to the establishment of important legal precedents and clarifying the rights of individuals against the state. The administrative party to the litigation will also often have significantly more resources at its disposal than the individual challenging administrative action, and there can be seen to be an inherent inequality to the parties respective bargaining positions (Doyle 2022). The matter of whether mediation, for example, well serves the aim of public accountability has been discussed, and that the radiating effect of court judgments on the decision-making of administrative authorities is especially important. There have been reforms to encourage parties to claims in the Administrative Court to

seek early settlements, and Tribunal Procedure Rules encourage the use of ADR, but there remains reluctance to implement any further instances of compulsion beyond the operative example in relation to children and young people with special educational needs in disputes with local authorities. The compulsion to seek mediation has resulted in some evident lack of commitment to mediation, and poor planning and preparation by local authority defendants, but this seems to be more a matter of implementation than a flaw in the nature of mediation itself. Other research has suggested that it is a myth to conclude that mediation is inappropriate for administrative law disputes against the state because rights can't be compromised, the studies suggest that there is room for compromise in relation to rights issues, and that mediation can assist in teasing out the underlying issues in the dispute, resulting in outcomes that were more holistic and addresses a broader range of problems, to the satisfaction of both sides, than could have practically been achieved in court action (Bondy et al 2009).

It should finally be noted, that at this time, much of the discussion about ADR in the UK is focused on the use of technology, and this extends from using technology to assist with preparation and sharing of documents, to telephone and online mediations and arbitrations, to the asynchronous resolution of disputes where judges, sometimes assisted by other key professionals, consider information and make decisions over a period of time (with the capacity to ask the parties for further information and so on), to the use of Artificial Intelligence to analyse information and reach conclusions with respect to some parts of particular disputes.

V COUNCIL OF EUROPE

A key Council of Europe source is Recommendation Rec (2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties. Specifically, the Committee: "Recommends that the governments of members states promote the use of alternative means for resolving disputes between administrative authorities and private parties by following, in their legislation and their practice, the principles of good practice contained in the appendix to this recommendation". The Appendix is reproduced below.

Appendix to Recommendation Rec(2001)9

I. General provisions

1. Subject of the recommendation

i. This recommendation deals with alternative means for resolving disputes between administrative authorities and private parties.

ii. This recommendation deals with the following alternative means : internal reviews, conciliation, mediation, negotiated settlement and arbitration.

iii. Although the recommendation deals with resolving disputes between administrative authorities and private parties, some alternative means may also serve to prevent disputes before they arise; this is particularly the case in respect of conciliation, mediation and negotiated settlement.

2. Scope of alternative means

i. Alternative means to litigation should be either generally permitted or in certain types of cases deeed appropriate, in particular those concerning individual administrative acts, contracts, civil liability, and generally speaking, claims relating to sum of money.

ii. The appropriateness of alternative means will vary according to the dispute in question.

3. Regulating alternative means

i. The regulation of alternative means should provide either for their institutionalisation or their use on a case-by-case basis, according to the decision of the parties involved.

ii. The regulation of alternative means should:

a. ensure that parties receive appropriate information about the possible use of alternative means;

b. ensure the independence and impartiality of conciliators, mediators and arbitrators;

c. guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality;

d. guarantee, as far as possible, transparency in the use of alternative means and a certain level of discretion;

e. ensure the execution of the solutions reached using alternative means.

iii. The regulation should promote the conclusion of alternative procedures within a reasonable time by setting time-limits or otherwise.

iv. The regulation may provide that the use of some alternative means to litigation will in certain cases result in the suspension of the execution of an act, either automatically or following a decision by the competent authority.

II. Relationship with courts

i. Some alternative means, such as internal reviews, conciliation, mediation and the search for a negotiated settlement, may be used prior to legal proceedings. The use of these means could be made compulsory as a prerequisite to the commencement of legal proceedings.

ii. Some alternative means, such as conciliation, mediation and negotiated settlement, may be used during legal proceedings, possibly following a recommendation by the judge.

iii. The use of arbitration should, in principle, exclude legal proceedings.

iv. In all cases, the use of alternative means should allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration.

v. Judicial review will depend upon the alternative means chosen. Depending on the case, the types and extent of this review will cover the procedure, in particular the respect for the principles stated under section I.3.ii.a, b, c, and d, and/or the merits.

vi. In principle and subject to the law, the use of alternative means should result in the suspension or interruption of the time-limits for legal proceedings.

III. Special features of each alternative means

1. Internal reviews

i. In principle, internal reviews should be possible in relation to any act. They may concern the expediency and/or legality of an administrative act.

ii. Internal reviews may, in some cases, be compulsory, as a prerequisite to legal proceedings.

iii. Internal reviews should be examined and decided upon by the competent authorities.

2. Conciliation and mediation

i. Conciliation and mediation can be initiated by the parties concerned, by a judge or be made compulsory by law.

ii. Conciliators and mediators should arrange meetings with each party individually or simultaneously in order to reach a solution.

iii. Conciliators and mediators can invite an administrative authority to repeal, withdraw or modify an act on grounds of expediency or legality.

3. Negotiated Settlement

i. Unless otherwise provided by law, administrative authorities shall not use a negotiated settlement to disregard their obligations.

ii. In accordance with the law, public officials participating in a procedure aimed at reaching a negotiated settlement shall be provided with sufficient powers to be able to compromise.

4. Arbitration

i. The parties should be able to choose the law and procedure for the arbitration within the limits prescribed by law. Subject to the law and the wishes of the parties, the arbitrators' decisions can be based upon equitable principles.

ii. Arbitrators should be able to review the legality of an act as a preliminary issue with a view to reaching a decision on the merits even if they are not authorised to rule on the legality of an act with a view to it being quashed.

A second key document is the European Commission for the Efficiency of Justice (CEPEJ) document on Promoting mediation to resolve administrative disputes in Council of Europe member states December 2022 CEPEJ (2022)11. Parts of this document are reproduced below.

Promoting mediation to resolve administrative disputes in Council of Europe member states December 2022 CEPEJ (2022)11

Whatever the form of mediation, the mediator is always an **independent third person** in relation to the parties. They must be **impartial**. They must have both legal and technical **expertise** in the resolution of the conflict in question. They must conduct the procedure within a limited timeframe and respect the **principle of confidentiality**. The process relies on the **goodwill of the parties** and once it has begun, their **freedom** to leave it at any time must be protected. Mediation succeeds when the parties agree on an acceptable solution, thus resolving the dispute or difference.

The mediation process concerns all types of disputes and is not specific to the resolution of administrative disputes. Nonetheless, it appears to be particularly well suited to the resolution of some of them. The actors concerned must be well aware of this, however. The promotion of administrative mediation must allow it to free itself from civil mediation in order to take into account the specificity of the matter it deals with.

Measures that can be taken to promote the use of administrative mediation

Administrative mediation struggles to develop in the majority of Council of Europe member States due to certain obstacles. These could be overcome if member States not only adopted various measures to develop the availability and accessibility of the process, but also the awareness of the different actors involved in mediation.

AVAILABILITY

1° Adopt a broad definition of administrative mediation in order to avoid conceptual ambiguities and be able to include all the existing mechanisms that meet the essential elements for successful mediation. Administrative mediation can be institutional, within the jurisdictional framework or purely conventional. The coexistence of different types of processes is quite possible. It has even been found to be more effective.

The vagueness, ignorance or lack of legal basis is one of the main obstacles to the use of mediation in administrative matters. In some Council of Europe member States there is no legal basis for administrative mediation. When it exists, it is sometimes too general and applies to all mediations without considering the particularities of administrative mediation.

Where the legal basis exists, it may be unintelligible because it is derived from several scattered texts or documents.

Vagueness may also be due to the lack of indication of the scope of application or of the room for manoeuvre left to the administration, which poses difficulties from the point of view of the legal security of the process. Indeed, the administration will not take the risk of committing its administrative or penal responsibility, and the accountants may refuse to execute a public expenditure generated by the amicable solution in order not to take the risk of committing their personal responsibility.

2° Develop a precise legal framework to define the rules and scope of mediation in administrative matters. The legal framework must constitute a common base for all types of administrative mediation: institutional, conventional and jurisdictional. It must be tailored to administrative mediation given the specific nature of administrative disputes.

This legal framework should recall and indicate

- **The principle of confidentiality, a fundamental principle of mediation.**
- **The obligations of mediators in order to increase the confidence in mediation of future parties to mediation**
- **The importance of ensuring the proper implementation of the mediated agreement**

3° Ensure that mediation is introduced at the earliest possible stage, from the pre-litigation phase, well before the jurisdictional conflict crystallises. This requires the definition of a guide to good practice within the administrations in order to set the framework for the procedure and provide the competent services with tools.

4° Develop binding procedures for the settlement of certain administrative disputes.

Recourse to mediation can thus constitute a compulsory prerequisite before the case is referred to the judge.

The implementation of a jurisdictional or para-jurisdictional mediation can be based on an injunction addressed to the parties by the judge to try to settle their dispute amicably, by means of mediation.

The lack of professionalisation of mediators is a structural obstacle to the development of administrative mediation.

5° To professionalise mediators by providing for a list of mediators who are qualified and specialised in the resolution of administrative disputes.

This requires :

- **The definition of the qualifications required to be a mediator**
- **The development of an ombudsman statute**
- **The dissemination of lists of authorised mediators at national and local level.**
- **The development of an ethical charter or code of conduct.**

6° Entrust a single body, such as the Ombudsman in countries where this institution exists, with the task of harmonising and articulating the various mediation practices.

ACCESSIBILITY

Mediation is often presented as a less expensive procedure than administrative litigation. This is the case, for the parties, when the mediator is not paid (mediator-judge, institutional mediation). But when dealing with a professional mediator, the latter must in principle be paid by the parties. However, access to legal aid is not always possible for mediation procedures, or it is only possible if the mediation takes place during a trial.

Moreover, mediation has a cost for the public community. Incentives for the development of mediation are not always accompanied by sufficient financial resources for the training of mediators, the recruitment of magistrates and additional staff to conduct mediation.

7° Deploy the financial means necessary for the development of administrative mediation. Contribute financially to the training of mediation actors: magistrates, administrations, lawyers and people destined to become mediators.

8° Make legal aid accessible to all mediation procedures: jurisdictional mediation, within the administration, but also conventional mediation.

The lack of linkages between the mediation process and the litigation procedure is an obstacle to the development administrative mediation. If the texts or practices do not prepare for the fact that the entry into mediation is likely to interrupt the time limits for judicial appeal and the time limits for guarantees, the parties will have an interest in going directly to court. Likewise, short court deadlines do not give the parties sufficient time to consider the possibility of entering into a mediation process.

9° Organise the linkages between mediation and the administrative trial (suspension and interruption of the appeal and limitation periods) in the procedural rules.

AWARENESS

Some of the main obstacles to the development of mediation are poor knowledge of the process, absence of information, and lack of communication by all the actors involved: administration, lawyers, courts, but also public companies and legal advisers.

Ignorance may persist despite awareness-raising texts encouraging the development of mediation. This lack of awareness is evident among local public actors or lawyers, who believe that mediation is a process that is only open to disputes between private persons.

The spread of a culture of mediation is still hindered by a certain lack of trust of the actors of mediation. The distrust of the citizens, who consider that the settlement of an administrative dispute can

only be done before a judge. There is also mistrust on the part of administrations, whose lack of engagement towards the mediation process is regularly denounced. Indeed, some administrations do not wish to "stoop" to dialogue with citizens or fear being controlled by a third party they distrust.

Finally, there is also a certain reluctance on the part of lawyers who are not trained in the mediation process and are naturally inclined to exercise their activity before a judge, even though they are the ones who draw up the agreement resulting from mediation.

10° To establish incentives for the broad spread of a culture of mediation:

- **Numerical targets not only for judicial and institutional mediation, but also for administrations in order to encourage them to resort to mediation.**
- **Conclusion of reciprocal commitments between the actors of mediation (courts, lawyers and administrations).**

11° Institutionalise mediation referents among institutional mediation actors.

12° Carry out information and communication campaigns for all mediation actors.

13° Publish, in the form of annual reports, figures that give an account of practices in administrative mediation. The publication of these figures should make it possible to monitor the difficulties encountered during the implementation of mediation.

PART FOUR

EVALUATION OF ADR IN TURKISH ADMINISTRATIVE JUSTICE AND RECOMMENDATIONS FOR REFORM

This final Part of the present Report develops some evaluation of ADR in Turkish Administrative Justice and proposes some recommendations for reform based on learning from across the project.

I WORKSHOP ON RECOMMENDED SOLUTIONS FOR TURKISH ADMINISTRATIVE JUDICIARY SYSTEM AND INTERNATIONAL PRACTICES (DECEMBER 2022)

The response to discussions of ADR as part of the project has so far been somewhat mixed. A Workshop on Recommended Solutions for Turkish Administrative Judiciary System and International Practices (December 2022) included recommendations of the Council of State, presented by the Senior Rapporteur Judge of the Case Law, Reporting and Statistics Unit, some of which related to ADR. A relevant recommendation, Recommendation 3, was as follows:

Development of alternative dispute resolution methods: Provided the specific structure of public law relations and the function of the administrative judiciary, which audits compliance with the law, to achieve public interest were taken into account, the following recommendations were made by drawing attention to the need to develop alternative dispute resolution methods:

- To make existing administrative remedies (Administrative Procedure Law articles, 10, 11 and 13) operational
- To amend the Decree-Law No. 659, which regulates the issue of peace in full remedy actions, to ensure that the commissions adopt decisions more comfortably and in line with judicial case law
- To adopt mediation implementation taking the mediation judge practice in Germany as a model in terms of administrative disputes.

During discussion, in response to these recommendations, some judicial participants expressed scepticism that mediation could be useful in more than a few cases, and that mediation is not especially suitable for the structure of administrative disputes. The concerns expressed included that since mediation involves "bargaining" it may not be very appropriate in administrative law, where compliance with the law is expected.

A representative of the Ombudsman Institution stated that the Ombudsman could be assigned a task to make operational the administrative remedy in Article 11 of the İYUK, which was currently seen as ineffective. It was also stated that the Ombudsman Institution could play a serious role in the context of institutional mediation in terms of ADR methods.

II FURTHER EVALUATION OF ADR METHODS FOR ADMINISTRATIVE DISPUTES UNDER TURKISH LAW

The first group of ADR methods operational in Turkey discussed in this Report include those in which the administration is in a position of a "3rd party to conciliate" instead of being party to the dispute. These methods may be considered as not fully within the scope of the present Project as they are not intended to resolve conflicts of an administrative nature, rather they serve to resolve disputes within a sector of administrative functioning, where the administration has law enforcement duties and is empowered to resolve disputes with respect to individuals or actors within the sector.

Secondly, there are various non-judicial ADR methods which involve administrative disputes where administration is a party. In this context, there are various non judicial ADR methods in various legislation

such as regulation regarding terror losses, Municipal Law, Public Procurement Law, Protection of Competition Law, Tax Procedure Law and so on. Some of these non-judicial ADR methods are optional and some are compulsory before bringing the dispute before the court. In practice, it is mostly monetary claims that are subject of these non-judicial ADR methods.

As regards for the administrative acts, under Article 11 of the İYUK there is an administrative application procedure establishing the availability of review of an administrative act by the hierarchical authority or, if such does not exist, the administration that issued the administrative act. Although such an application is not compulsory, and not a remedy that has to be exhausted before bringing the dispute before the courts, this process of administrative appeal provides an opportunity for the administration to correct the administrative act without any judicial process. However, in practice this method has not yet produced fruitful outcomes in Turkish Administrative Justice System, as the administration in general prefers to seek a court decision in order to correct its acts or compensate losses incurred by its actions. Besides this, administrative silence, as a general rule, is accepted as a negative administrative act, and ultimately requires the individual to proceed to the courts to challenge such negative administrative act.

Under Article 13 of the İYUK there is a compulsory administrative procedure mostly in relation to compensation claims where individuals claim that their rights have been violated by an administrative action. Such opportunity is then linked with the “peace” procedure under the Decree Law 659. However, in practice administrations generally tend not to compensate individuals without any court order, for two main reasons: 1. review by the Court of Accounts, 2. budgetary shortages, as a result this administrative procedure has not been an effective non-judicial ADR method under Turkish Administrative Law.

In terms of non-judicial ADR, a “peace” / “settlement” procedure has been introduced with the Decree Law No. 659 on the Execution of Legal Services in Administrations Covered by the General Budget and Administrations with Special Budgets for compensation claims arising from administrative acts and actions. Although it is not compulsory for real persons to apply for a “peace” / “settlement” procedure against administrative acts, it is mandatory for administrative actions in accordance with the Law No. 2577 (İYUK).

Within the scope of Turkish Law, it is necessary to draw attention to an important issue regarding the function of the administrative judiciary within the scope of evaluating ADR methods, which are not included in the administrative judiciary mechanisms. The idea of limiting and controlling the state has developed and found its base with the understanding of the Rule of Law, and as a result, the perception of the state has left its place to an individual-oriented structure in which individuals demand their rights against the state and hold the means of control from a mechanism that poses prohibitions and obligations towards state. In this respect, the state shall be bound by law and be subject to judicial review. Therefore, judicial review of the state is inalienable. It is known that ADR is not suitable for all types of disputes, particularly when one of the parties to the dispute is administration. In this context, for example, when the administration acts to fulfill its legal obligations to protect public order and to ensure public interest/ public welfare, and in cases where the administration does not have discretion, ADR methods may not be suitable. Here it is important to distinguish that international best practices do allow administrative acts to be quashed as a result of administrative appeal processes, which, as discussed above, are often regarded as part of the ordinary process of dispute resolution in administrative law as opposed to means of ADR, and that some administrative appeal processes will include capacity to conduct a legality review of the administrative action. On the other hand, more obviously "alternative" ADR methods would not be considered as appropriate mechanisms to be applied in cases for annulment of an administrative act. ADR may nevertheless be more convenient in compensation cases. Whereas administrative appeals can involve reviewing the legality of an administrative act, methods such as mediation and conciliation would not generally be suitable for cases regarding the legality of an administrative act, and there must always be recourse to the courts for judicial review.

However, today, the heavy caseload of the courts and prolonged trials can result in violation of the right to a fair trial. In addition, the obstacles created in the implementation of judicial decisions by the administrations harms the effectiveness of the administrative judiciary. In this context, pursuant to Article 141 of the Constitution: "It is the duty of the judiciary to conclude the cases with the least expense and as quickly as possible", but this duty could not be fulfilled under heavy caseload, and failure to conclude cases in a reasonable time would lead to the failure of individuals to be compensated, public services not to be carried out properly and an increasing financial

burden of the administration. Moreover, the fact that the disputes are not resolved in a reasonable time could also diminish the trust of individuals who may have little confidence in the judiciary. In this context, resolution of disputes in a reasonable time before bringing disputes to administrative courts while maintaining peaceful relations would facilitate the emergence and utilisation of ADR methods in terms of administrative disputes.

In addition, as for institutional non-judicial ADR methods, the function of the Ombudsman Institution, that fulfills supervisory authority on behalf of the Parliament, foresees an audit within the framework of both the appropriateness and legality of the administration, and the Ombudsman Institution functions as a "mediator" with an optional application and a decision in the form of a recommendation. As a non-judicial ADR method, it constitutes an alternative to the resolution of administrative disputes under Turkish Administrative Law. In evaluating the functioning of the Ombudsman Institution so far, it seems fair to say that the institutional capacity and various cases dealt with shows great promise, which in turn would lead to further future benefits from the experience of the Institution for the utilisation of other non-judicial ADR methods.

Besides, the TİHEK also determines optional applications from individuals for disputes involving violations of human rights or non-discrimination. The significant feature of the TİHEK is that it has a power to issue sanctions.

In summary, in terms of non-judicial ADR methods within the framework of the current legislation, those for administrative disputes seem to be separated as disputes arising from administrative acts and administrative actions, and mostly the suitable cases for non-judicial ADR concentrate on compensation for damages.

III SUMMARY OF LEARNING AND CONCLUSIONS

Various Project activities, learning from the other European jurisdictions examined in this Report, and learning from the CEPEJ work promoting mediation in administrative disputes, suggests a number of areas for development.

The learning strongly supports the adoption of a broad definition of mediation in particular, and that the coexistence of different types

of ADR, including mediation, is quite possible and indeed desirable as the availability of various different options has been seen to improve the effectiveness of ADR and to have reduced pressure on administrative courts.

The learning also supports the need for a clear and precise legal framework relating especially to mediation, but also to other ADR routes, that apply to administrative disputes. This legal framework may well include an overarching administrative procedure/ administrative justice law with formal commitments to ADR, including mediation and its general principles such as confidentiality and independence, but that this should also include specialist elements, through further legislation and/or regulation and judicial practice, tailoring ADR methods, including mediation, to particular subject areas of administration and related disputes.

There is benefit in developing guides to good administration within administrative authorities including explicit content about ADR and the benefits of its early use. Administrative bodies, where relevant (including central government departments), could commit to adopting a Dispute Resolution Commitment or ADR Commitment to always explore the most cost effective and proportionate methods of dispute resolution in their own disputes with citizens and with other administrative bodies.

The learning shows that the matter of compulsory or mandatory mediation is a complex one that engages issues of concern around ensuring the principle of legality (the rule of law) is complied with, that case-law precedents are allowed to develop, that matters of legal rights are respected and that inequal bargaining positions between administration and citizens are not exploited. However, in many jurisdictions there is some degree of compulsion to at least attempt ADR, such as mediation, before a court or tribunal can commence, or at an early stage in court or tribunal proceedings. The degree of compulsion, and its implications, such as for matters of costs and timing, needs to be carefully tailored to the specialist subject areas of administrative disputes in question. The learning also shows that judicial determination of the dispute must always remain available, even in cases where there is some compulsion to use ADR, in order to maintain access to the courts and respect for the rule, which are valuable constitutional principles. Nevertheless, the learning shows that despite some traditional reluctance to use ADR, especially

mediation, in administrative disputes, there is scope to reach more than one fair and lawful outcome within the space of administrative discretion in individual cases and that even legal terms regulating administrative action leave some scope for lawful differences in interpretation that can assist in reaching a mediated compromise to settle a dispute.

The learning also shows that perceived and actual lack of professionalisation of conventional mediators can be an obstacle to development and use of mediation and that there would be benefits to developing lists of qualified and specialist mediators available to offer their services with respect to particular types of disputes. The learning shows that mediators (and other ADR professionals) must have appropriate qualifications, training and expertise, and that they must engage in continuing professional development training and awareness throughout their careers. The learning also suggests there is value to developing ethical codes of conduct for mediators.

The learning shows that some countries, especially France, have developed a large number of institutional mediators and that this can cause some complexity and lack of consistency, and further that where such exists, the Ombudsman institution is seen as a valuable body for assisting with the oversight, rationalisation, and consistency of approaches and practices.

The learning suggests that ADR, beyond administrative appeals, remains a comparatively recent development in administrative law as compared to civil law, and that where new processes (especially intra-judicial mediation) have been developed, there is still variable awareness among members of the judiciary, administrators, lawyers, the general public and others, which impacts on how widely used these methods are. Judicial practice can be quite variable, and there is a need to pursue further means to raise awareness and increase confidence in ADR in administrative disputes. Ways to achieve this include further training, information sheets in administrative offices/ premises and in court buildings, information on the websites of administrative authorities and courts, and through agreements with legal professionals (such as bar associations) and associations representing particular administrative bodies. Publication of regular statistics on the use of mediation, e.g., in annual reports of Administrative Courts and the Council of State, would also raise awareness and encourage greater use. In some jurisdictions this has

included, for example, the setting of targets for the number of claims solved through intra-judicial mediation to be reported on in annual reports, but target-setting may not always be appropriate.

The use of ADR, including mediation, can also be increased with the proper funding of ADR services, and further developing training and specialisation opportunities, as well as providing that for those in receipt of legal aid funding this should be available for various forms of appropriate ADR in addition to court action.

The learning also shows that caution should be exercised in seeing reducing the workload of the courts as a primary movitation for increasing awareness and use of ADR. Whilst increased use of ADR definitely has had this result in many jurisdictions, whether resort to intra-judicial mediation in particular reduces the workload pressure on the relevant court will depend on all the circumstances and mediation hearings can sometimes be longer than court hearings, albeit that they may also resolve a broader range of issues and avert potential further disputes between the parties. Much will depend on the stages at which ADR is attempted, the commitment to fully and genuinely engage in ADR on the part of the administration, and the professionalism of all those involved including mediation specialists.

Considering the significant increase in administrative cases to which the administration is party and the various findings across the activities of this present Project, it seems inevitable that a General Administrative Procedure Law, including ADR methods, should be implemented. It can also be concluded that administrative disputes which only affect the specific parties to that dispute, and which include monetary issues, are those that will be most suitable for ADR. This conclusion can be reached both from considering practices in other legal jurisdictions, and such is also reflected in the basic principles of Turkish Administrative and Administrative Judicial Procedure Law.

Considering the practices of ADR methods in administrative disputes over the years it is fair to suggest that having mandatory non-judicial pre-trial ADR procedures through administrative courts, where appropriate to the subject matter of the dispute, would improve practical take-up, as the optional opportunities seems to have had limited success in practice to date. Bringing such non-judicial ADR methods as a mandatory dispute resolution method, that must at least e attempted prior to seeking resolution before the courts would

ensure that ADR is taken more seriously into account by the parties to the dispute. Such would also reduce the file load of the courts and reduce the tension between parties to the dispute associated with it. In this context, the "nature" of administrative disputes and the "nature" of ADR methods should be taken into account, and it should be noted that not every dispute is suitable for resolution with ADR methods, and different disputes may require different ADR methods.

It will be important, especially in developing new legislation, to continue to consider subjects appropriate for compulsory/mandatory ADR, those where ADR may optional, and those subjects where ADR is not appropriate. It is also necessary to make an assessment of which disputes are suitable for which ADR methods in terms of substance. In this context, there is a difference in the use of ADR methods between in-rem procedures (objective disputes) in which the illegality of an administrative act is the subject of dispute, and in-personam procedures that constitute a violation of a right (subjective disputes), as stated in Recommendation 2001(9); the most suitable disputes shall be paired with the most appropriate non- judicial ADR method.

In terms of alternatives within the administrative authority, legislation including regulatory negotiation (i.e. the Law on General Administrative Procedure), which enables individuals subject to administrative action to take an active role in expressing their position in the formation of the administrative act, would greatly reduce the number of cases in the administrative jurisdiction. An individual who is granted the right to participate in the administrative procedure would at least understand the idea, facts and legal rationale underlying the relevant administrative act and will be satisfied with the relevance, legality and legitimacy of the administrative act. Therefore, a decision taken, or an administrative act taken at the end of a process that includes mutual communication would minimise the consequences that may cause future conflicts. In this way, tensions between the administration and individuals would be kept minimum and a relationship of trust will be established between the parties who are lifelong partners in the formation of the administrative act. Issues involving policy formulation such as zoning, planning, infrastructure projects or public works could often be dealt with within the scope of regulatory negotiation. Although there are expressions related to regulatory negotiation within the scope of a few regulations in the Turkish legal system, such as the Zoning Law and the Municipal Law, the practice is not very

common. In addition, systematic and concrete procedures need to be introduced to ensure openness and participation. For the effective use of regulatory negotiation, the use of the Freedom of Information Law should be facilitated and therefore the law should be interpreted more generally. As a method that is not discussed much in the Turkish legal system, but which is operated in the first place in terms of non-judicial ADR, especially within the scope of preventing disputes, the "regulatory-negotiation" method could also be proposed for a further stage. The specified ADR characterises the inclusion of individuals or interest groups in the decision-making processes, through ensuring transparency and participation in the decision-making processes of the administrations. Thus, the possibility of individuals or groups being involved in the decision-making process and being given the opportunity to contribute to the formation of the decision could reduce the incidence of future disputes. Besides, the tension is minimised between the administration and the individual, which both have mutual ongoing relationship for the. An example for such could be found in the article 13/1 of the Law No. 5393 Municipal Law.

> "Everyone is a citizen of the town in which they reside. Citizens have the right to participate in municipal decisions and services, to be informed about municipal activities and to benefit from the assistance of the municipal administration. It is obligatory to provide aid in conditions that do not harm human dignity."

Through the operation of above-mentioned provision by municipalities involving concerned individuals in the decision-making process by notice and comment, it would be possible to prevent future conflicts.

While evaluating "negotiation" / "conciliation" / "peace" / settlement" and "mediation"; disputes arising from matters over which the parties have power of disposition should be selected. In this context, the results obtained the current Project revealed that monetary claims are the most appropriate topics under this category. In this context administrative fines, zoning law disputes, disputes arising from the Social Security and Public Servants Law (especially discipline, allowance), acts/actions of municipalities, student grade determination cases, confiscation without expropriation, interference to the real estate cases (action negatoria), cases on mines and stone quarries, compensation claims arising from administrative acts/actions may be proposed for non-judicial ADR. In general, disputes within the scope of full remedy cases have come to the fore as the most likely disputes

to be resolved through “negotiation” / “conciliation” / “peace” / “settlement” and “mediation”.

However, as noted above, practice to date has not proven promising, and some reasons for this have been noted above. There are also other bars to effective use of “negotiation” / “conciliation” / “peace” / settlement” and “mediation”. During such procedures the parties to the dispute do not have the opportunity to sit and end their disputes by mutual communication. It is the individual who claims the compensation and the commission within the administration that decides on the issue. It would be more appropriate to include 3rd party settler to bring parties together to solve their disputes, instead of one party to the dispute (whom allegedly violated the rights of the individual) deciding on the matter. It would be more appropriate to terminate the dispute by utilising an impartial third party/committee instead of executing the ADR method by the committee within the administration, especially in disputes that require determination of the liability principles of the administration. As a matter of fact, the Constitutional Court, in its evaluation of the Decree Law No. 663 on the “Organisation and Duties of the Ministry of Health and its Affiliates” underlined the fact that where the compensation issue is carried out with persons and units affiliated to administration and employed within its own body, this procedure lacks impartiality and independence. Since it will be necessary to determine the principle of responsibility for the damage arising especially in disputes regarding compensation of damages, it would be more appropriate to make this determination by an impartial 3rd person/committee instead of the parties.

In this respect, inspiration could be sought from the institutional experience of the Ombudsman and/or TİHEK could. Further, taking into account the unwillingness of administration to compensate without a court decision (with the reservations mentioned above) recourse to such non-judicial ADR would be “compulsory applications” before court proceedings. This would surely require a legal amendment. However, there is no bar for administrative court judges to propose “negotiation” / “conciliation” / “peace” / “settlement” before the court proceedings.

In case the “negotiation” / “conciliation” / “peace” / “settlement” method is rejected by the administration, a provision in the legislation for a liability for public loss arising in terms of being sentenced to

an amount greater than the amount refused to be settled within the framework of the ADR method as a result of the judicial decision, and then bearing the court costs and attorney's fee, could be included in order to make the non-judicial ADR more effectively used.

IV RECOMMENDATIONS

> Recommendation 1

A General Administrative Procedure Law should be enacted within the Turkish Legal System, which should regulate the administrative process and provide guidance in terms of ADR methods. This legislation should, among other things:

- To set out ADR options;
- To empower those involved at various stages of disputes to use ADR methods;
- To require that where individuals seek to use ADR, administrative authorities must engage in a genuine and conscientious way;
- To empower the administrative judiciary at all levels to require the parties to use ADR methods where this is considered to be appropriate by more specialist legislation, regulations and judicial practices.

> Recommendation 2

In addition to overarching General Administrative Procedure Law, there should be further exploration of developing specialist legislation, regulations and judicial practices, including the potential for making it mandatory for the parties to seek to resolve their disputes using ADR before court processes. Legislation should make it clear that administrative authorities should be legally obliged to co-operate in ADR where this is sought by another party to a dispute. Any such specialist legislation, regulation and judicial practice, should always be subject to the overarching principles of legality and access to the courts. Where ADR fails, recourse to the courts must always remain available.

> Recommendation 3

Consideration should be given to further developing mechanisms for consultation with the public where administrative authorities are in the process of taking certain types of administrative action, similar to “notice and comment” procedures in other legal jurisdictions. Further thought should be given to legislating for such notice and comment procedures in appropriate subject areas. “Notice and comment” shall be most probably appropriate for the general administrative acts (having a public effect or effecting public interest) only. In that regard, it is appropriate to use such procedure for rule-making in administration especially for areas which regulates mostly environmental issues.

> Recommendation 4

“negotiation” / “conciliation” / “peace” / “settlement” should be considered for cases within the scope of full remedy actions arising from administrative acts/actions.

> Recommendation 5

The scope of Decree Law No. 659 should be expanded, especially by including local administrations in the scope of Decree by amending Law No. 5018. In addition, amendments need to be considered to the Decree Law No. 659, which may include as follows:

- Determining the issue whether the excess of the amount agreed with the “peace” / “settlement” procedure could be claimed later with a full remedy action.
- “In the resolution of disputes within the scope of the “peace” / “settlement” procedure - since the basis of the dispute is the assessment of the responsibility of the administration - there need to be clear rules on the issue of recourse, especially in the content of the settlement report.

> Recommendation 6

Further regulations should be developed regarding the schedules in Law No. 5018.

> Recommendation 7

Council of Europe Committee of Ministers Rec (2001)9 on Alternatives to Litigation between Administrative Authorities and Private Persons and European Commission for the Efficiency of Justice (CEPEJ) document on Promoting mediation to resolve administrative disputes in Council of Europe member states December 2022 CEPEJ (2022)11 should be taken into account as a guide when creating a system including ADR methods.

> Recommendation 8

Guides to good administration developed for administrative bodies should include sections on ADR and its benefits, and administrative officials should be trained in the general principles of ADR and appropriate methods in order to ensure the most successful outcomes when using these methods.

> Recommendation 9

A “Dispute Resolution Commitment” should be developed through which administrative authorities can commit to certain principles of dispute resolution, including using the most cost-effective and proportionate methods of dispute resolution, in resolving their own disputes with individuals or other administrative bodies.

> Recommendation 10

A list of mediators specialised in administrative justice, sorted by field of specialisation, should be established and published.

> Recommendation 11

It should be ensured that mediators are appropriately qualified, trained and specialised, through developing further legislation or practice codes establishing minimum qualifications and training standards, including a requirement to engage in career-long continuing professional development training. Progressing this recommendation should take into account work to progress the Turkish Ministry of Justice Action Plan on Human Rights activities, including activity 3.5.h. relating to the establishment of mediation centres.

> Recommendation 12

A Charter of Ethics on common shared principles and values between mediators and other administrative justice professionals should be established.

> Recommendation 13

Conventions or agreements between national or local bar associations, the Council of State and individual administrative courts, and associations of mediators deemed appropriate by Turkish authorities, should be developed, aiming to raise awareness of mediation.

> Recommendation 14

A range of print and online materials to raise awareness and improve the use of ADR routes, including mediation, should be developed.

> Recommendation 15

Information, including statistical data, about intra-judicial mediation and other relevant ADR methods, should be provided in the relevant regular reports of the administrative courts and the Council of State.

> Recommendation 16

Consideration should be given to conducting a study, together with the Turkish Ombudsman, of areas where citizens and public administration would benefit from institutional mediation. v

> Recommendation 17

Consideration should be given to the creation of a body or forum to oversee the development of ADR, especially mediation, in administrative disputes, to include key leadership and representation from the Council of State, the Turkish Ombudsman, major administrative authorities, bar associations, mediation and other ADR professionals and organisations representing individual users of administrative justice mechanisms.

> Recommendation 18

This report also further endorses the Turkish Ministry of Justice Human Rights Action Plan activity 3.5.d that the institutional structure within the Ministry of Justice be strengthened in regard to alternative dispute resolution methods.

> Recommendation 19

Where consideration is given to how new technologies, especially digital and online technologies, can be used to improve the efficiency of dispute resolution within the Turkish administrative justice system, specific attention should also be paid to the use of such technology within ADR mechanisms as well as within court structures.

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Alternative Dispute Resolution Reference Report has been prepared in the framework of the Joint Project on Improving the Effectiveness of Administrative Judiciary and Strengthening the Institutional Capacity of the Council of State in Türkiye, implemented between October 2018 and May 31, 2023. The overall objective of the project is to increase public confidence in the administrative judiciary through strengthening the independence, impartiality and effectiveness of the administrative judiciary and raising public awareness. One of the key components of the project is to identify and supporting the measures to relieve the heavy workload of the administrative justice system and courts, and evaluation and consideration of existing pre-trial mechanisms, including appropriate alternative dispute resolution (ADR) mechanisms".

During the project period, stakeholders, national and international experts conducted analysis and held consultations by obtaining information about the legal/traditional alternative dispute resolution mechanisms applied in administrative disputes.

The purpose of the **Alternative Dispute Resolution Reference Report** is to present a general point of view by compiling the information on the ADR practices in the administrative justice system in Türkiye and collecting the data on the use of ADRs in the administrative justice systems of selected member states of the Council of Europe (France, Germany, Spain, England and Wales) within the scope of the project activities and to make various recommendations based on this.

This Reference Report is an important resource for members of the administrative judiciary, lawyers and academics working in this field, as well as for administrative authorities and policy makers.

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