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(CEPEJ)

State of play of the practice of mediation in administrative disputes in the Member States of the Council of Europe

Study prepared at the request of the CEPEJ-GT-QUAL by Mrs Sabine BOUSSARD, Professor at the University of Nanterre (France) and Mr Karim SALEM (administrative magistrate in Egypt)

INTRODUCTION

1. Recommendation Rec(2001)9 of 5 September 2001 on alternative to litigation between administrative authorities and private parties.

Recommendation Rec(2001)9, adopted by the Committee of Ministers of the Council of Europe on 5 September 2001, was intended to develop alternative dispute resolution procedures between administrative authorities and private parties, which can still be described as administrative disputes in the sense of disputes whose settlement falls within the jurisdiction of the courts responsible for judging the administration on the basis of the law applicable to it.

The development of these procedures had several objectives clearly stated in the recommendation:

- To reduce the number of cases brought before the competent courts

- To bring the administration closer to the public

- To find a more appropriate way of resolving administrative disputes

It was also justified by the statement of the advantages of these alternative processes, which are presented as simplified and more flexible procedures, but also quicker, more discreet and allowing for the use of equity.

The recommendation nevertheless sets a framework for the development of these alternative procedures for resolving administrative disputes because they "must not be a mean for the administration and private individuals to circumvent their obligations and the principle of legality". Therefore, a control by the courts must always be possible and these processes must respect the fundamental principles of the right to a fair trial: equality, impartiality and the rights of the parties.

In the appendix to the recommendation, there is a statement of principles of good practice which should guide the member states of the Council of Europe in promoting these alternative procedures.

These principles are divided into two parts: general provisions and provisions specific to each alternative procedure.

The general provisions make it possible to understand that the Council of Europe does not limit the field of application of the alternative methods but that they insist on the guarantees that these procedures must respect: information of the parties, independence and impartiality of the actors, equity, transparency, good execution and possible control by the courts.

Mediation is subject to specific provisions, as are the other alternative procedures. The preparatory work for this recommendation shows that it is difficult to distinguish between conciliation and mediation, which is why both processes are subject to specific common rules: the possibility of having recourse to it in a compulsory or optional manner before the matter is referred to the judge, the possibility of having recourse to it during the legal proceedings, the possibility of having recourse to it on the initiative of the parties or on the proposal of the judge, and a very broad field of application covering both objective and subjective disputes.

2. The role of the Working Group on Mediation (CEPEJ-GT-MED) in implementing this recommendation.

The European Commission for the Efficiency of Justice (CEPEJ) adopted on 7 December 2007 a set of guidelines to improve the implementation of Recommendation Rec(2001)9. The aim of these guidelines, drawn up by the working group on mediation, was clearly to improve the principles of mediation contained in this recommendation. The guidelines were drawn up after analysing a questionnaire sent to the Member States to check whether they were aware of the Recommendation.

The questionnaire revealed that the Recommendation had little impact on the resolution of disputes between administrative authorities and private parties. Hence these guidelines were developed to assist in implementing the Recommendation with regard to mediation in particular.

Member States have been invited to promote these alternative procedures for resolving administrative disputes, particularly in the field of individual administrative acts, contracts and liability. The CEPEJ recommends the adoption of a written legal framework. It advocates the introduction of alternative procedures prior to the referral to the judge (mandatory procedures). It also suggests incentives to encourage the development of mediation within the administration itself but also among lawyers. Finally, the CEPEJ calls for financial support from the States. The guidelines also insist on the training and qualification of mediation agents; they even envisage an accreditation procedure and recommend the adoption of codes of conduct on the model of those which exist for civil and commercial mediation. Finally, they insist on the need to make the procedure accessible to the parties (free of charge). The answers to the questionnaire led the CEPEJ to create on its website a page dedicated to mediation in order to raise awareness among the public, users, courts and lawyers about the development of mediation.

On 16 May 2018, the CEPEJ's working group on mediation produced a report summarising the impact of these guidelines on the practice of mediation in civil, family, criminal and administrative matters. The report was drawn up on the basis of the results of a questionnaire sent to the Member States in 2017 and available online on its website. In addition to the general difficulties encountered in carrying out this study (lack of reliable statistics and data on the mediation process and great disparity in the conception of the procedure by the different Member States), the results of the survey are very disappointing with regard to the practice of mediation to resolve disputes in administrative matters because of the limited information collected for this specific field of disputes.

This is why the CEPEJ wished to carry out a new survey in order to draw up an inventory of the systems of mediation in administrative matters in the member states of the Council of Europe. The aim of this survey is to determine what actions and tools the CEPEJ could implement in order to assist member states in developing and improving the use of mediation in administrative matters.

METHODOLOGY

1. Working method

As a first step, a questionnaire was developed. It consisted of 18 questions addressing different aspects of mediation in administrative matters: the legal sources of mediation procedures, if any, the initiation of the mediation process, the person conducting the mediation, the cost of the mediation, the guarantees of the procedure, the outcome of the procedure, etc.

This questionnaire was sent to all the contact points of the CEPEJ WG-Med, as well as to other interlocutors who were likely to be concerned by mediation in administrative matters (administrative judges, lawyers, mediators and university professors). The 34 responses received corresponded to 24 of the Member States of the Council of Europe. Following the meeting with the WG-Med CEPEJ group on 24 January 2022, it was decided to re-launch the questionnaire with new questions: are there guarantees in the choice of mediators? Are there rules of good practice? What is the knowledge of the recommendation Rec(2001)9 and the guidelines elaborated by the CEPEJ-GT-MED group? What are the examples of successful mediations? Are there any statistics on the practice of mediation?

This second questionnaire allowed us to obtain 14 new answers. The 48 responses received correspond to 33 Council of Europe Member States.

We also organised interviews with major actors in the practice of mediation in administrative matters (judges, mediation referents, university professors, court presidents).

2. Methodological difficulties

As a preliminary matter, the questionnaire specified the terms mediation and administrative disputes or disputes of an administrative nature:

♦ *Mediation* is a flexible process that involves a third party with the aim of reaching an end to a dispute by virtue of a solution that both parties agree to.

♦ *Administrative disputes* or *disputes of an administrative nature* are understood to be disputes between administrative authorities and private persons, the settlement of which is the responsibility of the judge.

It was decided to distinguish mediation from conciliation as the distinction was already included in the draft recommendation prepared by the European Committee on Legal Co-operation (CDCJ) on 3 August 2001 in the context of the preparatory work for Recommendation Rec(2001)9:

♦ *Conciliation*: a non-judicial procedure involving a third party with a view to reaching a solution acceptable to the parties.

♦ *Mediation*: a non-judicial procedure involving a third party who proposes a solution to the dispute, in the form of a non-binding opinion or recommendation.

The answers to the questionnaire confirm what the CDCJ already noted twenty years ago: the terms conciliation and mediation are not understood in the same way in the different Council of Europe Member States and some of them do not distinguish the two concepts so that it was not possible to exclude conciliation in the analysis of the research results.

Care should also be taken with the misuse of the term mediation as this may bring the process into disrepute.

We have adopted a broad definition of mediation based on three criteria:

- There is a dispute between the administration and a private person (the parties)
- Intervention of a third party, i.e. a person independent of the parties, who will help them to resolve their dispute
- The resolution of the dispute results from an agreement between the parties.

The term *administrative mediation* will be used in the sense of *mediation in administrative matters.*

From the answers to the questionnaires and the interviews we conducted, as well as the analysis of the applicable texts and the readings we made, it is possible to give an account of the diversity of the practices of administrative mediation within the member States of the Council of Europe (I), to present the theoretical and practical advantages of administrative mediation (II) and to specify the obstacles to the development of mediation in administrative matters (III). We will conclude this analysis with a series of recommendations with a view to developing this practice, which is a sure way of improving the quality of justice (IV).

III. DIVERSITY OF ADMINISTRATIVE MEDIATION PRACTICES IN THE COUNCIL OF EUROPE MEMBER STATES

The situation varies greatly between the Member States: while in some of them mediation in administrative matters is not known at all, others use different types of processes. In some Member States, mediation is allowed by law, but it is hardly practised at all. In others, on the contrary, it is practised without a clear legal basis, at least at national level. To better present this variety of situations, four categories of Member States can be identified:

1° Administrative mediation does not exist

2° A legal text provides for administrative mediation but the practice is almost non-existent

3° A practice of administrative mediation exists without a legal basis

4° The practice of administrative mediation has an express legal basis

1st category - Mediation in administrative matters does not exist

The legal systems of this category of Member States do not know mediation in administrative matters. There is no legal text or framework for mediation in administrative matters. This category includes a number of Member States: **Andorra, Armenia, the Czech Republic,**

Northern Macedonia, the Republic of Cyprus, Turkey, Montenegro, Sweden[1], Austria, Hungary and San Marino.

In many of the states in this category, although mediation in administrative matters is not permitted, it is quite possible, at least in theory, in civil matters. This is notably the case in the **Czech, Greek, Turkish[2], Hungarian[3], Montenegrin, Andorra and San Marino[4]** legal systems.

Furthermore, while **Northern Macedonia** adopted in 2019 a law to settle administrative disputes, no mention is made of the implementation of mediation to settle such disputes.

Category 2 - A legal text provides for administrative mediation but the practice is almost non-existent

In this case, although a legal text allows for the use of mediation to resolve a dispute of an administrative nature, such a possibility is hardly implemented. This is the case in the legal systems **of Bulgaria, Greece, Poland, Portugal, Azerbaijan, Croatia and Ukraine.**

The legal texts governing mediation in administrative matters, or at least allowing it, do not have the same characteristics and it is possible to classify these practices into two sub-categories.

[1] The "ombudsman" has only a supervisory function in relation to administrative agencies and authorities. There is no real mediation to settle administrative disputes in Sweden.

[2] In Turkey, the Law on Mediation in Civil Disputes came into force in 2012. Under this law, mediation in civil disputes has two distinct branches. The first is voluntary mediation which can be agreed by the parties on a contractual basis. The second is mandatory mediation which is a procedure that must be carried out before going to court.

[3] In Hungary, Act LV of 2002 on mediation concerns civil disputes and expressly excludes mediation in administrative proceedings.

[4] According to the provisions of Law no. 57 of 29 May 2013 adopted by San Marino, mediation is possible in family matters. They provide for the intervention of a qualified professional to whom the parties can turn, both outside the dispute and when summoned by the judge.

Firstly, legal systems in which mediation in administrative matters is only organised by a general text that covers all types of mediation. This is the case in **Poland**[5]**, Croatia**[6] or **Azerbaijan**[7]**.**

In a second category of legal systems, there is a text specifically dedicated to administrative disputes which expressly defines the legal framework of mediation in administrative matters. This is the case in **Bulgaria**[8]**, Portugal** and **Ukraine**[9]. However, the practice of mediation remains rather rare.

Let us take the example of the **Portuguese** code of procedure before the administrative courts. This code provides for two coexisting mediation mechanisms: mediation before arbitration centres and mediation during court proceedings.

With regard to the first mechanism, the State can authorise the creation of arbitration centres whose objective is to find an amicable solution to disputes relating to public employment, public social protection systems and urban planning. In addition to arbitration, arbitration centres may be entrusted with conciliation and mediation. By way of illustration, there is an arbitration centre known as 'Centro de Arbitragem Administrativa' (CAAD) which offers a mediation service that can be requested by any interested party.

As for the second mechanism allowing recourse to mediation in the jurisdictional framework, it is a faculty granted to the judge to attempt an amicable resolution of the dispute which is submitted to him provided that the parties make a joint request or if the judge considers it appropriate. Nevertheless, mediation in administrative matters is practically non-existent in Portugal.

Category 3 - A practice of administrative mediation exists without a legal basis

With regard to this category, while mediation in administrative matters does not have a legal basis allowing recourse to mediation in an express manner, a kind of amicable resolution of administrative disputes exists. This is the case of the "mediation" practiced by the Administrative Court of **Luxembourg.**

In this respect, administrative mediation in Luxembourg is not based on a legislative or regulatory text. That is why the administrative judges within the administrative court of first instance and the administrative court in second and last instance never formally resort to

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[5] According to the Mediation Act, two types of mediation coexist in Poland: jurisdictional mediation (on the proposal of the judge) and extra-jurisdictional mediation (mediation outside of litigation). However, there are no specific details about administrative mediation and no statistics on its practice.

[6] The Croatian Administrative Judicial Procedure Act (Official Gazette, no. 20/10, 143/12, 152/14, 94/16, 29/17, 110/21) does not contain any provisions prescribing mediation as an alternative to administrative proceedings. However, according to Articles 1(1), 1(2) and 19(1) of the Mediation Act (Journal of Laws No. 18/11), it is permitted to conduct mediation in administrative disputes. However, this possibility does not seem to have been implemented in practice yet.

[7] Azerbaijan has a general law on mediation which contains some articles on administrative mediation. This is Law No. 1555-VQ of 29 March 2019 on Mediation as amended in July 2021.

[8] According to the Bulgarian Administrative Procedure Code, with the exception of disputes of a financial nature such as tax disputes, all administrative disputes can, in principle, be mediated.

[9] In Ukraine, the Code of Administrative Justice, as amended in 2017 (Articles 47, 190, 236 and 240), allows conciliation in administrative matters.

mediation. However, "especially the Administrative Court has emphasised that its role as an administrative judge is not only to apply the law, but also and above all, as far as possible, to resolve the dispute, if possible, by conciliating the parties and thus eliminating the point of contention between them, all with a view to social peace. And the President of the Administrative Court of the Grand Duchy of Luxembourg added: "It is with this in mind that the Court usually organises combined measures of appearance of the parties with a visit to the premises, in the presence of the parties' representatives. During these visits to the premises, the Court intends, as far as possible, to find a solution to the dispute that will put an end to the differences between the parties.

The "mediation", in this case, is therefore not conducted by a liberal or institutional mediator but only and solely by a magistrate member of the Court. And the amicable agreement has, in this case, the value of a judgment since it emanates from the judge.

Although there are no official statistics on the number of site visits with the appearance of the parties, nor on the related success rate, the Court states that before March 2020, i.e. before the health crisis, the number of "attempts at an amicable settlement" corresponded to approximately 10% - 15% of the cases registered.

The scope of this procedure covers towns planning (general and specific development plans, building permits), environmental law (construction in green zones, classification in protected areas), litigation concerning sites and monuments, dangerous establishments and roads.

Category 4 - The practice of administrative mediation on an express legal basis

Mediation in administrative matters is practised in **Belgium**, **France**, **Germany**, **Italy, Lithuania**, **Latvia**, **Monaco**, the **Netherlands, Norway**, **Spain, Switzerland** and the **United Kingdom.**

Within this category, the mediation processes are very different depending on the country. Therefore, sub-categories have to be developed. For some countries, the only known mediation in administrative matters is institutional (a), while for other member states mediation is mainly practised in the judicial context (b). There is also a third and final sub-category in which mediation in administrative matters may be conducted by an institutional, conventional or court-appointed third party in the context of a dispute before it (c).

4.1 Institutional mediation

Institutional mediation is practiced **in Switzerland**, in the **Principality of Monaco** and in **Italy.**

In **Italy**[10], mediation in administrative matters is possible before the Difensore civico[11], which is an independent authority whose purpose is to put citizens in contact with the administrative authority. The Difensore civico has no binding power and the procedure does not lead to a contractual solution. Elected by the council of the region, he can be a person from the

[10] Nevertheless, there is a law which provides for a mediation procedure within the jurisdictional framework for tax disputes only, but this possibility is not open to other administrative disputes.
[11] Law no. 127/1997, legge Bassanini bis.

administration, a lawyer or even a retired judge. The Difensore civico can intervene in various fields: education and culture, public employment, personal data protection, health, administrative sanctions, social security, telecommunications, town planning, etc.[12]

In **Switzerland**, almost all cantons[13] now have a cantonal ombudsman, called the "Bureau cantonal de médiation administrative (BCMA)". In addition to a legal recourse, a citizen can appeal to the cantonal administrative mediator in order to try to settle the dispute amicably. The procedure is informal, free and confidential. However, mediation conducted by a BCMA has no impact on the time limits before the judicial authorities. Finally, the missions of the BCMAs are diverse and varied and are not limited strictly to "dispute resolution". [14]

Similarly, the Principality of **Monaco** only knows institutional mediation. In 2013, it set up the "High Commission for the Protection of Rights and Freedoms and Mediation"[15], to deal mainly with individual complaints[16] and promote amicable conflict resolution. Appointed by the Prince for a renewable term of four years, the High Commissioner is independent of the administration in the exercise of his functions. As a mediator, the High Commissioner intervenes in individual complaints that have two aspects: the protection of the rights of citizens and the fight against discrimination. During the period 2017-2019, individual complaints concerned six main areas: housing, economic activities, residence of foreigners, employment, social protection and detention. The success rate of this amicable method was evaluated at around 75%[17].

4.2 "Court" or para-court mediation

This sub-category includes Member States that have established a mediation process within a judicial framework. Mediation is then conceived as a process initiated and sometimes conducted by the judge. This is the case, for example, in **Germany, Spain and Latvia.**

In **Germany**, mediation in administrative matters is provided for by several laws. Mainly, the Mediation Act of 21 July 2012, which transposes the European Directive of 2008[18], which extended the scope of mediation and allowed for an amicable dispute resolution procedure in administrative courts. The particularity of the German mediation regime lies in the status of

[12] See, for example, the website of the Difensore civico de la Toscana.

[13] For example, in Geneva, St. Gallen, Vaud, etc. Administrative mediation is introduced by the constitution of some Swiss cantons: for example, Article 115 of the Constitution of the Republic and Canton of Geneva (Cst-GE) of 14 October 2012 provides that "An independent mediation body is competent to deal extrajudicially with disputes between the administration and the public". https://www.fedlex.admin.ch/eli/cc/2013/1846_fga/fr

[14] For more information, see, for example, the BCMA Geneva website https://www.ge.ch/faire-appel-au-mediateur-cantonal

[15] Sovereign Order No. 4.524 of 30 October 2013 establishing a High Commission for the Protection of Rights, Freedoms and Mediation.

[16] The High Commission also issues opinions to national authorities and regional and international organisations. For more information: see the activity report of the Office of the High Commissioner for the Protection of Rights and Freedoms and Mediation of Monaco available on the website https://hautcommissariat.mc/docs_site/Synthese-RA-2017-2019.pdf

[17] Out of 80 amicable solutions proposed, 75% were accepted and implemented: see the 2017-2019 activity report available on the website https://hautcommissariat.mc/docs_site/Synthese-RA-2017-2019.pdf

18 Directive 2008/52/8 EC of the Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

the mediator who conducts the mediation, since it is the magistrates themselves who conduct the mediation process[19]. Thus, the status of a judge-conciliator or judge-mediator is quite common in Germany today[20].

In **Spain,** there is also a "jurisdictional" mediation procedure in administrative matters at regional level. At state level, Law 5/2012 of June 2012 on mediation in civil and commercial matters and Article 77 of the Administrative Jurisdiction Act 29/1998 allow the administrative judge to propose, either *ex officio* or at the initiative of the parties, the conclusion of an agreement putting an end to the dispute. On this legal basis, mediation procedures within the jurisdictional framework were born in some autonomous communities: in the Canary Islands, in the region of Murcia, in Catalonia, in Madrid and in Valencia[21] .

In each of these regions, administrative mediation is regulated by regional protocols[22]. And in contrast to the German case, administrative mediation in Spain is conducted by mediators who are not judges. The status of a judge-mediator does not exist in Spain.

In **Latvia,** mediation is also jurisdictional but it is different from other German and Spanish practices. There is a general law on mediation but it concerns civil and commercial cases and does not mention administrative disputes. On the other hand, Article 107.1 of the Administrative Procedure Act[23] explicitly recognises the possibility of amicable settlement of administrative disputes by means of an administrative contract which is similar to a transaction[24]. This process is analysed as a mediation since it is up to the judge to propose to the parties to engage in an amicable settlement. The amicable resolution of conflicts concerns mainly employment in the civil service and tax disputes.

4.3 The hybrid system

In this category, the Member States have different possible mediation procedures to settle disputes of an administrative nature. These can be conducted by an institutional or conventional mediator outside of court proceedings or under the auspices of the judge - sometimes by the

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[19] While the German judge has the possibility to invite the parties to enter into mediation with the help of an "extrajudicial" third party, this possibility is rarely used before the administrative courts.

[20] Indeed, mediation by judge-conciliators has gradually evolved in Germany: in 2000 at the Berlin District Court, in 2001 at the Freiburg im Breisgau District Court, in 2002 mediation was implemented on an experimental basis in Lower Saxony. In 2004, judicial mediation was implemented in all Hessian administrative courts and even in the CAA of Kassel. Today all German administrative courts have one or more conciliating judges (judge-mediators). For more information on this aspect, see PETER OSTEN, "La médiation et la conciliation judiciaires dans la juridiction administrative allemande", in BEATRICE BRENNEUR and JACQUES BIANCARELLI (eds.), Conciliation et médiation devant la juridiction administrative, Paris, L'Harmattan, 2015, pp. 80-83.

[21] R. BOUSTA, La notion de médiation administrative, Logiques juridiques, Paris, l'Harmattan, 2021, pp. 53 et seq.

[22] For example, the Valencia Protocol defines mediation in administrative matters as "a process by which two or more parties, following the transfer of the case by the judge, voluntarily attempt to reach a total or partial agreement on their differences with the help of one or more mediators, thus leading to the solution of their conflict. (Protocol of the Valencian Community 4/9/2019).

[23] The Latvian Administrative Procedure Law adopted on 25 October 2001 is available on the website https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law

[24] Indeed, according to Article 80(1) of the Latvian Law on the Structure of State Administration adopted on 6 June 2002, an administrative contract is concluded to terminate a dispute before the court: https://likumi.lv/ta/en/en/id/63545-state-administration-structure-law.

judge himself - in order to settle a case before him. This variety of practices can be found in **Belgium**, **France**, the **United Kingdom**, **Lithuania**, the **Netherlands** and **Norway.**

Within this category, however, practices vary greatly. While Belgium, France, Norway and Lithuania practice administrative mediation for all types of administrative disputes, the scope of mediation is much narrower in the United Kingdom and the Netherlands.

4.3.1. In the **Netherlands**, the legal system has two forms of mediation process in administrative matters: the first one is extra-judicial while the second one is conducted under the aegis of the judge. Firstly, the extra-jurisdictional or institutional mediation procedure concerns disputes relating to tender procedures under the Dutch Public Procurement Act 2012. A private person can request the intervention of the impartial Commission of Public Procurement Experts (CPPE) *Commissie van Aanbestedingsexpert*[25]. The CPPE can take two types of action: it can try to reach an amicable agreement between the parties to the conflict through a mediation procedure or it can give an expert opinion on the basis of which the administrative authority could decide to change its course of action in the tendering procedure.

Secondly, there is an amicable settlement process before the court. Indeed, the judge has the option of encouraging the parties to resolve the dispute themselves by reaching an amicable agreement. In this case, the mediation process is conducted within the court itself with the help of one of its members. However, the judge may refer the parties to an external mediator. The agreement reached in the process is not binding on the parties.

In the **United Kingdom**, two administrative mediation processes coexist: institutional mediation "*public-sector ombuds*" and conventional mediation *"independent mediation*".

The *independent mediation* process is implemented in disputes relating to the educational field (*Special Educational Needs and Disabilities (SEND)*)[26]. It incorporates independent mediation into the statutory framework (Children and Families Act 2014) and into the SEND Regulations. There is also a SEND Code of Practice. SEND mediation procedures are governed by these and by guidance produced by the Department for Education. In addition, SEND mediators are required to comply with the National Good Practice Guidelines and the Code of Conduct for Mediators.

4.3.2 The model for this sub-category is the French legal regime in which administrative disputes can be mediated by an institutional mediator (institutional mediation) or a private mediator (conventional mediation). The process can also be implemented in a jurisdictional framework either because the judge initiates it or because the parties have addressed the judge to organise the procedure. In the other legal systems in this category the 3 types of mediation are the object of a very variable practice but likely to cover all administrative disputes.

[25] For more information, see IVAN VEROUGSTRAETE, "La médiation en droit public et administratif en Belgique", in *Quelles perspectives pour la médiation en droit public ?*, Lille, Lexbase Hebdo édition publique n° 453, 2017.

[26] For more information, see: https://www.collismediationltd.com/send-mediation/

In **France,** until 2016, administrative mediation was confused with the open category of "mediation-conciliation"[27]. Institutional mediation is old and dates back to the creation of the Mediator of the Republic in 1973, on the model of the ombudsman.

Law 2016-1547 of 18 November 2016 on the modernisation of justice in the 21st century institutionalised administrative mediation in a judicial framework. Administrative mediation is now part of the attributions of the administrative judge alongside the strictly contentious and administrative attributions (characteristic of administrative jurisdictions in France). This reform has served as a catalyst to deploy jurisdictional mediation but also conventional mediation and institutional mediation to settle administrative disputes.

Now, under the provisions of the French administrative justice code, the parties can decide to settle their dispute amicably, outside of any trial, by appointing a mediator. They may also request the administrative judge to help them organise the procedure.

In the course of administrative proceedings, the judge may invite the parties to settle their dispute by mediation.[28]

In all cases, the mediator is chosen by the parties and must justify certain skills and guarantees. The mediator's remuneration is also decided by the parties (unless the mediator is a judge, which is possible but quite exceptional; in this case the mediator is obviously not paid by the parties). Mediation, if successful, leads to an agreement that is binding on both parties.

The French Council of State has made a major contribution to the development of administrative mediation thanks to a number of incentive measures: communication campaigns, organisation of conferences[29], setting up of the "Administrative Justice and Mediation"[30] committee. A mediation referent has been appointed within each administrative court. Practical information sheets are available on the courts' websites. Agreements have been signed between the courts and the bar associations. An ethical charter for mediation in administrative disputes was even adopted by the Council of State in 2018. The Council of State has set targets for the courts: to submit 1% of cases registered by the courts to a mediation procedure. 4327 mediations have been carried out over the last 5 years[31] and the objective has finally been reached for the year 2021.

At the same time, the law of 18 November 2016 set up an experiment in compulsory prior mediation (MPO) to settle certain social disputes (social assistance, unemployment benefits) and individual disputes involving public officials[32]. The experimentation was a success[33] and the MPO was generalised for most individual disputes affecting public agents as well as for administrative disputes involving Pôle Emploi (unemployment insurance litigation). In both cases, the mediator reports to a public body and the procedure is free of charge.

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[27] Conseil d'État, Régler autrement les conflits : conciliation, transaction, arbitrage en matière administrative, La documentation française 1993.
[28] Article L. 213-7 du code de justice administrative.
[29] See, for example, the "Assises de la médiation" organised at the Council of State in December 2019 (EC website):
[30] Under the aegis of the Council of State.
[31] https://www.conseil-État.fr/actualites/retour-sur-5-annees-de-mediation-administrative
[32] Decree No. 2018-101 of 16 February 2018
[3333] See the report published on the website of the French Council of State: https://www.conseil-État.fr/actualites/experimentation-de-la-mediation-prealable-obligatoire-bilan-et-perspectives

In the same vein, the law n° 2019-1461 of 27 December 2019 instituted the territorial mediator who can be appointed by the local authorities (regions, departments and communes) and whose status is the same as that of the mediator in the jurisdictional procedure (reference to the provisions of the law of 2016 codified in the code of administrative justice)

In **Belgium**, mediation is governed by a general text inserted in the Belgian judicial code (articles 1724 to 1736). In general, the provisions of this code allow for mediation in all types of cases. However, the Belgian Judicial Code provides that "legal persons under public law may be parties to mediation in the cases provided for by law or by a Royal Decree deliberated in the Council of Ministers". To date, no royal decree has been issued. Jurisdictional mediation thus does not seem to apply to administrative disputes. Nevertheless, the processes of "mediation" involving the administration in Belgian law remain numerous.

First of all, institutional mediation 'Ombudsman and equivalent formulas'[34] is possible at all geographical levels. These are the complaint services at federal, regional and local level. These ombudsmen, whatever their name, have two types of powers: they can issue opinions, "recommendations" to the administration or attempt a conciliation between the administration and the private person concerned.

There is no shortage of examples of *ombudsmen* within the administration - in the broadest sense of the term, whether at federal, regional or local level[35]. There are also institutional ombudsmen within the public services[36].. Still others work within public companies[37].The Belgian legal system also has institutional sectoral mediation: health mediation[38] and tax mediation[39]. Another mediation process can be implemented in administrative matters. This is the mediation for environmental permits applied to the Flemish region[40].

In addition, Belgium also has a kind of compulsory prior mediation for disputes concerning the civil service.[41]

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[34] IVAN VEROUGSTRAETE, "La médiation en droit public et administratif en Belgique", in Quelles perspectives pour la médiation en droit public, Lille, Lexbase Hebdo édition publique n° 453, 2017.

[35] For example, "federal mediators (law of 22 March 1995); regional mediators (Flanders: decree of 7 July 1998; Walloon region: decree of 22 December 1994); communal mediators of the Flemish region (decree of 15 July 2005); youth protection (general delegate of the French Community for the rights of the child instituted by a decree of 20 June 2002; general delegate of the Flemish Community for the rights of the child).

[36] For example, railways (law of 28 February 2002); Brussels public transport (Ordinance of 22 November 1990); port and airport infrastructures; school mediators (decree of 30 June 1998 for the French Community) Ibid.

[37] For example, mediation services established at autonomous public enterprises (Article 43 of the Act of 21 March 1991); post office (Act of 21 December 2006) Ibid.

[38] In particular, with the adoption of the law of 22 August 2002 on patients' rights. A patient has the right to lodge a complaint about a medical treatment. The "Federal Mediation Commission" (Royal Decree of 1 April 2003) attempts to mediate to resolve the conflict between the parties.

[39] This is a tax conciliation service. For more information, see the service's website www.conciliationfiscale.be In 2020, according to the report published by the Tax Conciliation Service (SCF), out of 2,498 conciliations conducted, 1,686 agreements were reached, compared to 608 unsuccessful conciliations and 204 withdrawals. The report is available at: https://finances.belgium.be/sites/default/files/Rapport%20annuel%20SCF%202020_fr_0.pdf

[40] Reference to Article 42 of the Decree of 4 April 2014 on the organisation and procedure of certain Flemish administrative courts

[41] IVAN VEROUGSTRAETE, « La médiation en droit public et administratif en Belgique », *op. cit.*

In **Lithuania**, two types of mediation coexist: one is jurisdictional and the other is rather extra-jurisdictional (institutional)[42]. The first mediation measure in the Lithuanian legal system is the attempt to settle administrative disputes amicably through the conclusion of a contract. Indeed, "contract" is understood to mean the conclusion of a "peace agreement" - either during the proceedings or during the preliminary phase of the proceedings - between the administration[43] and the private person concerned.

It should be stressed that the "peace agreement" has the same legal value as a judgment, since it must be validated by the competent administrative court.

The second possible mediation measure is conducted, not under the aegis of the court, but before the court is seized, by the members of two public bodies: the Lithuanian Administrative Disputes Commission and the Tax Disputes Commission[44].

According to Article 51 of the Lithuanian Law on Administrative Procedure, all administrative disputes can be mediated, with some exceptions: a peace agreement cannot be concluded in cases concerning the legality of normative administrative acts, appeals concerning violations of electoral laws and the Law on Referendum, in cases concerning requests of the municipal council to submit a conclusion if a member of the municipal council or the mayor has broken the oath and/or has not exercised the powers established by the law

Finally, it should be emphasised that mediation in Lithuania, whether judicial or extra-judicial, may be conducted by the judge himself or by a member of the Lithuanian Administrative Disputes Commission or by a mediator registered on the list of mediators.

In **Norway,** it should first be clarified that disputes between administrative authorities and private persons are not treated in a separate or different system from disputes between private persons. They are classified as a type of civil case. The so-called "ordinary courts" deal with all criminal and civil cases, including administrative cases. Therefore, according to the Dispute Act[45], administrative disputes, like any other civil case, can be settled by jurisdictional

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[42] The Law on Mediation regulates extra-judicial mediation and court mediation in general (for all courts); The Law on Procedure for Preliminary Administrative Disputes No. VIII-1031 of 14 January 1999 regulates extra-judicial mediation in administrative disputes. The Law on Administrative Procedure No. VIII-1029 of 14 January 1999 regulates jurisdictional mediation in administrative disputes. The description of the procedure of organisation and execution of extra-judicial mediation in the Lithuanian Administrative Disputes Commission and its territorial divisions is regulated by the Regulation No. 1VE-34 of 30 December 2020 adopted by the President of the Lithuanian Administrative Disputes Commission; also the Rules of Judicial Mediation No. 13P-125-(7. 1.2) of 30 November 2018, approved by the Council of Judges; the Order on the Implementation of the Law on Mediation adopted by the Minister of Justice of the Republic of Lithuania No. 1R-289 of 31 December 2018, which concerns the organisation of mediators' activities.

[43] "Administration" here refers to public administrative entities, which have the power to settle disputes during the administrative procedure or during the preliminary resolution phase of administrative disputes.

[44] According to Article 27 c. 1 of the Law on Administrative Procedure of the Republic of Lithuania No. VIII-1029 of 14 January 1999 as amended in 2018, unless otherwise provided, administrative disputes shall be settled out of court by the Lithuanian Administrative Judicial Commission and its territorial subdivisions, or in certain matters by the Lithuanian Administrative Court. VIII-1029 of 14 January 1999, as amended in 2018, unless otherwise provided, administrative disputes are settled out of court by the Lithuanian Administrative Disputes Commission and its territorial subdivisions, or for certain administrative matters other commissions may be established (Article 27 c. 4).

[45] Available on the Norwegian LOVDATA website https://lovdata.no/dokument/NLE/lov/2005-06-17-90/*#&#x2a

mediation (under the aegis of the judge, if not by the judge himself) and by extra-jurisdictional mediation (outside the court).

As for extra-judicial mediation, it is a procedure before the "conciliation board". Before a claim can be heard by the competent court, it must be submitted to a "conciliation board", unless the amount in dispute exceeds 200,000 kroner and both parties have been represented by a lawyer. The purpose of such a procedure is to help the parties reach a simple, quick and inexpensive settlement of the dispute.

In court-based mediation, the judge acts as a facilitator of the mediation. The claimant brings the case to court. When the judge requests a statement of defence from the defendant, he or she distributes information about mediation to both parties and proposes a mediation process. The judge therefore assesses on a case-by-case basis whether the case is suitable for mediation. The collection of the parties' consent is usually a prerequisite.

Finally, it should be stressed that mediation in Norway can be conducted by a judge, whether he or she is the pre-trial judge, the judge of the merits, another judge of the same court, a judge registered on the pre-established list of mediators; this list can include magistrates of a single court or magistrates of several courts. Mediation may also be conducted by a mediator from a pre-established list. This is a list of external mediators drawn up by the court.

IV - THE IMPORTANCE OF DEVELOPING ADMINISTRATIVE MEDIATION

1. Analysis of the questionnaire

The question of the advantages of administrative mediation was put to our interlocutors in the form of multiple choice answers and the answers all point in the same direction and validate all the items proposed:

- Bringing citizens and the administration closer together
- Reducing the number of appeals brought before the courts and thus relieving the courts
- Speeding up the settlement of administrative disputes
- Reducing the cost of settling administrative disputes
- Making the settlement of administrative disputes more flexible and simpler
- Confidentiality

Most of the comments emphasise the first point and the improvement of the administrative relationship in order to build a relationship of trust between the public and the administration (Azerbaijan) and to re-establish the dialogue between the administration and the citizens, which gives the process a pedagogical virtue (France).

Some emphasise speed, simplicity, cost and confidentiality (Switzerland - Canton of Geneva and Latvia).

Finally, others insist on the outcome of the procedure, which makes it possible to obtain a result whose effects are much broader than the judicial solution (United Kingdom).

2. The advantages of administrative mediation

Mediation appears to be the most suitable amicable dispute resolution method for resolving administrative disputes. Its scope is likely to cover all administrative disputes: subjective disputes as well as objective disputes.

It seems to be particularly useful for resolving disputes arising from planning decisions or documents. For example, a dispute between several associations concerning the content of an urban planning document can be more easily resolved through mediation, which encourages dialogue (example of successful mediation at the Strasbourg administrative court, which involved several actors in the same dispute and made it possible not only to resolve the dispute but also the emerging conflicts). Similarly, the procedure is particularly well suited to litigation concerning town planning decisions, which often involve two private parties before the administration. It makes it possible to establish a dialogue between the two protagonists and to put an end to a whole series of discords, which would not be possible in a traditional lawsuit.

Mediation is still a very effective way of resolving disputes arising from administrative contracts (contracts and concessions). We have received several testimonies of successful mediations concerning disputes relating to the execution of an administrative contract, where the situation was particularly complex. The dispute could be resolved very quickly during the mediation process, whereas if it had been brought before the judge, the investigation would have been very long.

We must not lose sight of the fact that administrative mediation should not be confused with other mediations that can be carried out in civil, commercial or social matters. The parties are not on an equal footing since the citizen is facing the administration. The mediation procedure is undoubtedly better able to respond to the complaints of citizens.

In France, for example, institutional mediation has pedagogical virtues. The Pôle Emploi mediator in charge of mediations relating to jobseekers' disputes published a report in 2021 in which he explains that for the year 2020, 1076 compulsory prior mediations were recorded, 959 of which resulted in an agreement. However, 63% of successful mediations resulted in the decision being upheld after the claimant had accepted it, which illustrates the dialogue function of mediation.

Mediation is also a procedure that allows to go beyond the constraints of the administrative trial. If most of our interlocutors consider that mediation is likely to relieve the courts, we realise that this is far from being obvious. In France, for example, the Council of State has set a target of 1% of mediations before administrative courts, which corresponds to 2000 mediations per year against more than 200,000 cases registered each year, the mass of litigation growing exponentially (210,503 cases registered before French administrative courts in 2020 and 233,254 in 2021, that is to say an increase of more than 10%). In other words, the incentive policy conducted by France since 2017 will not, in the short term, make it possible to curb the mass of litigation, but the interest of the mediation procedure lies elsewhere: the resolution of disputes between the administration and citizens cannot depend solely on the application of the legal rule. As explained by the national delegate for mediation for administrative jurisdictions, Mr Amaury Lenoir, "the whole law and the whole judge" are not appropriate. Mediation allows to reach a solution acceptable to both parties. It is a procedure that contributes to improving the quality of justice.

Another advantage of mediation is that the procedure is not subject to the adversarial principle, so that the parties can talk to the mediator in complete confidentiality without the other party being present, in accordance with the principle of fairness. This advantage is very clear in harassment proceedings in the civil service. This is what emerged from the testimony of the President of the Strasbourg administrative court: a public employee who was a victim of harassment was able to be heard alone by the mediator and to explain his situation as a victim more easily. Before the judge, he would have had to establish the evidence to demonstrate the qualification of harassment, which is never guaranteed in a case of this type.

V. Obstacles to the development of administrative mediation

There are many obstacles to the development of administrative mediation. They can be grouped into 4 types: legal, financial, cultural and structural obstacles.

1. Legal obstacles

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 mediation without taking into account the particularities of administrative mediation. Moreover, when the legal basis exists, it does not always specify the scope of application of administrative mediation. Similarly, many of our interlocutors denounce the lack of precision regarding the margin of manoeuvre of the administrations that are parties to a mediation procedure. Some fear financial or disciplinary sanctions.

The lack of articulation between the mediation process and the administrative trial is presented as another obstacle to the development of administrative mediation. This is the case in Bulgaria, Croatia, Italy, Latvia, Norway, Switzerland and the Principality of Monaco, where the implementation of the procedure does not interrupt the time limits for litigation. In Switzerland, too, the time limits for appeal are very short (30 days for the Canton of Geneva) and do not leave enough time for the claimant-administrator to think about whether it is worthwhile to start a mediation procedure.

2. Financial obstacles

Mediation is often presented as a less expensive procedure than an administrative trial. This is the case, for the parties, when the mediator is not paid (mediator-judge or institutional mediation). But when dealing with a professional mediator, the latter must be paid by the parties. Access to legal aid is not always possible for mediation procedures. This is the case in Azerbaijan, Croatia, Italy, Latvia, Northern Macedonia and Norway.

On the other hand, mediation has a cost for the public authority. The success of a mediation procedure implies that the State provides the necessary means: training of mediators for institutional mediation, recruitment of additional magistrates to conduct jurisdictional mediations. In France, for example, the 2019 law on the territorial mediator only allowed the

institution of 11 territorial mediators because local authorities do not have sufficient financial means.

3. Structural obstacles

Many of our interlocutors denounce the absence of specific rules of procedure applicable to mediation within the administrations concerned. They regret the absence of an ad hoc practical guide that could determine the margin of manoeuvre of the service that represents the administration in the mediation procedure.

The replies to the questionnaire reveal that very few States have established a list of mediators authorised to act in administrative mediation. This shortcoming is presented as an obstacle to the development of mediation.

4. Cultural obstacles

All the respondents to the questionnaire identified a major obstacle to the development of administrative mediation: the lack of a mediation "culture" among the actors of administrative mediation: administrations, lawyers and courts.

The lack of a mediation culture can be explained in particular by ignorance of the process or insufficient information about the existing procedures.

The dissemination of a mediation culture is still hindered by a certain mistrust of mediation actors. This mistrust is due to the fact that the citizens consider that the settlement of an administrative dispute can only be done before the judge. Thus, the advent of the litigious society in the 1970s is obviously an obstacle to the development of administrative mediation, as if the culture of conflict was incompatible with a mediation process. There is also mistrust on the part of administrations whose inertia 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 who are naturally inclined to exercise their activity before a judge, even though they are the ones who have to draw up the agreement resulting from mediation.

Conclusion

The guidelines adopted by the CEPEJ in 2007 to improve the implementation of the recommendation Rec(2001)9 are very important and should have contributed to the development of administrative mediation. Unfortunately, the answers to the questionnaire lead us to believe that our interlocutors are not necessarily aware of them. For those who answered our questions on whether they were aware of the existence of the Recommendation and the Guidelines, we obtained very few answers. The states that did answer in the affirmative were Azerbaijan, Croatia, Lithuania and the Principality of Monaco. These texts have obviously contributed to the establishment of the practice of administrative mediation in these States, for

example in Azerbaijan, even though in this State, as has been pointed out, despite the textual basis, the practice of mediation is almost non-existent!

On the other hand, our Norwegian and British interlocutors replied in the negative. Similarly, French judges who practice mediation on a daily basis told us that they were unaware of the existence of these texts. It would therefore be advisable to think on the way these documents are disseminated. Furthermore, we think that guidelines should be drafted for the development of administrative mediation in order to take into account its specificities and the numerous reforms that have taken place since 2007.