

## The way to mediation in Belgian administrative procedural law

*Lise Vandenhende, Brecht Warnez en Prof.dr. Ludo Veny*

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## A. Quid mediation?

### I. Introduction

1. As a form of alternative dispute resolution, the need for mediation in administrative matters emerged out of administrative practice.<sup>1</sup> The few cases available show that the use of mediation in a public context is not evident. This article examines the applicability of mediation within administrative judicial procedures in the Flemish administrative legal system. The research is based on a thorough analysis of the prevailing regulations, as well as an extensive investigation into the doctrine and the processing of all available judicial decisions. Therefore, the following two sub-questions will be answered:

- At what point and under what modalities was administrative mediation implemented within administrative judicial proceedings? We discuss the deficiencies and lack of effectiveness of the mediation tools that have been used during the few attempts at mediation.
- Can a new legal framework that integrates these fragmentary forms of mediation improve the success rate of mediation within judicial processes? As a form of good practice, we discuss the legislative background to and the practice of mediation in the Netherlands.

2. To define our research, it is important to clarify what is understood by "mediation". A brief survey of Western European public law shows that the term has a lot of different meanings. So we must be precise about what we understand by this term for the purposes of this article. In our opinion, mediation ought to be described as *"an alternative and voluntary way to resolve conflicts between two or more persons, based on consensus and with assistance, which is organized by a neutral, impartial and independent third party that does not use any method of coercion, but that possesses a right to examine and to make recommendations and that tries to reconcile the parties in order to facilitate, structure or coordinate the voluntary search for a solution, and that tries to achieve a lasting solution, which the parties have agreed upon voluntarily, because it takes into account mutual interests and viewpoints"*.<sup>2</sup> This contribution is limited to mediation during proceedings before the Council of State and the Flemish Council for Permit Disputes, as they are by far the two most important administrative courts in Belgium. For a more substantive overview, we first outline the historical background and the call for mediation within administrative practice.

### II. A short historical view

**3.** Mediation is one of the oldest forms of dispute resolution (e.g. consider the Old Testament or the Laws of Solon). The concept has been used to refer to any kind of intervention by a third party with the aim of moving the parties in dispute towards an agreement. Although the term itself was not unknown, mediation as we know it today is not reflected in our old laws or even in Napoleon's Code of Civil Procedure (1806). The lack of a legal framework does not mean that all kinds of mediation have been absent from the Belgian context. Mediation was always available outside the judicial process, while some authors have even sought to provide a basis for the use of mediation during procedures.<sup>3</sup>

The first legal framework for mediation in procedural law was introduced with regard to criminal matters.<sup>4</sup> Thus, the Act of 10th February 1994 inserted the new Article 216b into the Code of Criminal Procedure, which made it possible for the public prosecutor to organize a mediation procedure. Furthermore, a procedure for collective debt settlement was introduced in 1998,<sup>5</sup> in which a debt mediator may be appointed by the court.

Three years after a recommendation from the Council of Europe on family mediation,<sup>6</sup> the Act of 19th February 2001, which concerns mediation in family matters, followed.<sup>7</sup> The law itself, however, could not meet expectations, partly because of the absence of criteria for candidate mediators and partly because of the lack of political will to issue the necessary implementation decisions.

In 2005,<sup>8</sup> a general law on mediation in private procedural law finally came into effect, again as a result of a European stimulus.<sup>9</sup> The 2005 regulations provide a framework for voluntary mediation and create the possibility for judicial mediation by a new addition to the Code of Civil Procedure. Judicial mediation is the true heir to family mediation introduced in 2001. Unlike the latter law, the conditions for the recognition of mediators were set out in the Act itself, with a federal mediation committee established to monitor this.

Meanwhile, taxation mediation was also gaining a foothold. The Act of 25th April 2007 concerning various provisions (IV)<sup>10</sup> set up a fiscal intermediary service that made it possible to reach a mediated solution with the Ministry of Finance, in order that potentially long and expensive judicial procedures might be avoided.

### *III. Mediation in administrative practice*

#### **4. A call for mediation in Belgian administrative practice**

Given the roll-out of mediation in various branches of law, it was inevitable that it would be introduced into administrative law. Calls grew for mediation in administrative matters owing to increasingly common annulment judgements with far-reaching social consequences, an outstanding example being the annulment of 28th April 2011,<sup>11</sup> which followed a complaint from a local resident about the planning permission and building permit granted in 2007 for a tram route. The local resident concerned declared that he was surprised by the annulment. The works were already two-thirds completed and it had not been his intention to undo the investment of € 45 million. He had merely intended to establish a dialogue between the government and the resident's neighbourhood. Nevertheless, the judgement of the Council of State was final.

Other examples include the annulment by the Council of State of a decision by the city of Antwerp regarding the compulsory retirement of a staff member, who was not contacted for five years by the city and all the while remained at home waiting for new work orders,<sup>12</sup> or the annulment, due to the violation of language legislation, of the dismissal of a police inspector who had been criminally convicted for attempted extortion and fraud.<sup>13</sup>

Among politicians and in the media, a storm of criticism arose following the strictly legalistic approach of the Council of State, which seemed to have no regard for the social consequences of its judgements. On case law, the Council could not be judged by its critics. After all, the limited suspension and annulment competence of the Council of State were not inclined to be effective in relation to factual dispute resolution. In turn, it became clear that administrative mediation could play an important role in addressing this problematic situation.

#### **5. A useful instrument**

Mediation has many advantages. The conciliation procedure is usually more efficient and

cost-effective than court proceedings, and often leads to durable solutions provided everyone agrees. The outcome of mediation also responds to the specific needs of the parties concerned, as non-translatable legal interests cannot be addressed by judicial procedure. Mediation also improves or restores the relationship between the disputing parties, especially if the case is amicably resolved.

By way of example, the case of the tramline can once again be cited to demonstrate the relevance of mediation in administrative matters. The ruling of the administrative court was based on a legal problem, namely the illegal exemption from preparing an environmental impact study, while the real problem for the applicant was of quite a different nature. The local resident simply feared that the infrastructural works would create a secret route in his street; he had no problems at all with the tramline as such, even suggesting to the media that it was not his intention to shut down the works in the short- or long term. The question must, therefore, be raised as to whether the local resident and the government would have been able to solve the actual problem by means of a conciliation procedure without responding to the legal issues. Again, it is clear that a legal procedure could have been avoided if administrative mediation had occurred.

## 6. Restrictions on mediation in Belgian administrative law

Not all disputes are suitable for mediation in administrative matters. First, the practicability of mediation in administrative matters depends on whether both parties are willing to talk and seek a solution that is acceptable to all parties. Secondly, bound powers should not be involved; the decision is fixed by law and cannot change. Finally, it may not be the intention of the applicant to set a precedent.

In addition, there are still a number of other legal restrictions. In the doctoral thesis by Lien De Geyter on alternatives to dispute resolution, these restrictions are described in detail.<sup>14</sup> The author argues *inter alia* that the government cannot freely decide on its competences; such a restriction stems from the Constitution, on the one hand, and the civil code, on the other. Governments, therefore, may not relinquish their competences and powers; instead, they should be exercised in line with the public interest. As a solution, it is suggested that, in the agreement about a dispute resolution, a reservation ought to be included; i.e. a certain commitment by the government that cannot be deviated from without good reason and that is in the general interest. Furthermore, the government must always act within the mandatory public law framework and, therefore, take into account, among other things, the hierarchy of legal norms, the general principles of good governance and the principle of open government. Another important limitation is the scope of mediation in relation to third parties. Mediation can only apply between two parties, although the effects can still stretch to third parties as well as other stakeholders.<sup>15</sup>

Given the rather extensive contribution made by De Geyter and others, it is not the intention of this article to discuss the legal problems and limitations of alternative dispute resolutions in administrative law, nor the compatibility of these alternatives and administrative procedural law.<sup>16</sup>

Instead, this article focuses on the characteristics of mediation and its problems in practice. Therefore, it is important to first define the concept.

## B. Two forms of mediation in Belgian and Flemish procedural law

### 1. The Council of State: the Ombudsman as a mediator

## 7. The subsidiarity of the Ombudsman

The position of Federal Ombudsman was established as subordinate in administrative or judicial remedies. The parliamentary documents state that “*it is not for the quasi-parliamentary government (such as the Ombudsman) to intervene during the examination of judicial remedies even for the purpose of reconciliation*”. A submission of a complaint for consideration by the Ombudsman was not able to suspend or halt time limits for lodging an appeal with the Council of State.

While the ombudsprocedure was not highly regarded for a long time, the recent reforms of the State Council in 2014 attach more value to the Ombudsman by linking the procedure

before the Ombudsman and the procedure before the Council of State, which aimed to facilitate the procedure before the Ombudsman. The harmonization of both procedures and the re-evaluation of the Ombudsman will take place alongside each other.

## 8. The suspension of the appeal period

First, the period for appeal of the cancellation action is suspended when a complaint is lodged with the Ombudsman (Article 19, Council of State Law). The rest of the period for appeal shall begin either i) at the time the complainant is informed of the decision whether to investigate or reject his complaint or ii) at the end of a four-month period starting when the complaint is filed, unless the decision by the Ombudsman is made before then. In contrast to the period for appeal to the Council for Permit Disputes, which is not suspended by an ombudsprocedure, the applicant will always be entitled to a period of 60 days to lodge his appeal before the Council of State, whether or not he has decided to submit a complaint to the Ombudsman.

## 9. The parallel ombudsprocedure

A second, consecutive and complementary amendment concerns the reformed Article 13 of the Act of 22nd March 2005 establishing the Federal Ombudsmen. As an exception to the general principle that the procedure before the Ombudsman is suspended by lodging an appeal with a court or an organized administrative appeal, the procedure before the Ombudsman continues to run, even if an appeal to the Council of State is pending. The previously applicable subordination is, therefore, eliminated.

It is regrettable that the reform does not take into account the Belgian trend to establish sub-state administrative courts. For example, the Ombudsman will still be obliged to suspend his investigation into a complaint in the case of an appeal to the Court of Permit Disputes. Furthermore, the proceedings before ordinary tribunals and courts will suspend any mediation by the Ombudsman.

## 10. The Belgian Federal Ombudsman: a form of mediation?

The procedure before the Ombudsman has many of the features of mediation; indeed, according to Belgian legal doctrine, it is sometimes described as a form of mediation.<sup>17</sup> Likewise, parliamentary documents often use the terms “mediation” and “ombudsman” interchangeably.<sup>18</sup> Yet there is a need for nuance here. First, it is generally accepted that voluntariness is an essential feature of mediation.<sup>19</sup> This means that relevant parties are free to use mediation to resolve their dispute with each other, as well as to call a halt to mediation at any time. Voluntariness does not imply a commitment without obligations on the parties. Once it is agreed to start the mediation procedure, the parties must act in good faith, i.e. cooperating actively and constructively to come to a resolution. In contrast, the procedure before the Ombudsman is unilaterally initiated by the citizen who files a complaint.<sup>20</sup> Secondly, the doctrine states that the equality of both parties is an essential feature of mediation.<sup>21</sup> Although the Ombudsman has no power to annul an administrative decision, he may send a negative report with recommendations to the Minister who acts as the higher authority. These recommendations hang like the sword of Damocles over the head of the government concerned. They can exert great moral pressure. Thirdly, in principle, the mediator will not assess the parties' claims.<sup>22</sup> It is the parties who have to come to a resolution. The mediator assists them without imposing an outcome. This is in contrast to the role of the Ombudsman, whose moral pressure is quite onerous even though his recommendations cannot be imposed. Whether or not the Ombudsman is interpreted as a form of mediation is a purely academic discussion. It is regrettable, however, that the recent reforms by the Council of State include the introduction of a non-voluntary (i.e. enforced) complaints procedure with an imbalance between the parties as a method of alternative dispute resolution.

## 11. Conclusion

The Ombudsman is an important form of alternative dispute resolution.<sup>23</sup> The Annual Report of the Federal Ombudsman for 2012 shows that in 98% of cases a positive result was

achieved. This means that the Ombudsman's intervention has resulted in either a (partially) upheld complaint or successful mediation.<sup>24</sup>

Acting as a filter on access to the Council of State, the Ombudsman should be applauded. The previous system led to the situation where many citizens lodged an appeal with the State Council even as they were going through a procedure before the Ombudsman. Otherwise, not lodging an appeal could allow their appeal period to the Council of State to expire because the relevant case was not suspended during the procedure before the Ombudsman.

## *II. The Flemish Council for Permit Disputes as a referral court to mediation*

### **12. Flemish administrative courts equivalent to the Council of State**

Article 161 of the Belgian Constitution stipulates that no administrative court can be created other than by law (in the narrowest sense), which means an act issued by the federal parliament. As such, the Constitution does not explicitly authorize the Flemish Parliament, which is the legislator for the Flemish Community and the Flemish Region, to establish its own administrative courts. Nevertheless, through the legal concept of so-called "implied powers", it is now accepted that the regions have such power. These sub-state administrative courts are, therefore, fully-fledged courts with regard to their specific competences. They are equivalent to the federal Council of State, which is appropriate for matters that are not assigned to sub-state administrative courts. The regional parliaments may autonomously regulate the judicial procedure and have the option to mediate themselves according to the administrative procedural law of the sub-state administrative courts.

Flanders has created four administrative courts over the last decade. One of them is the Council for Permit Disputes, which is a court where appeals can be made against permit decisions concerning the delivery or refusal of planning permission or a subdivision permit, validation decisions and registration decisions.

### **13. Introduced in 2012**

With a view to better solution-focused jurisdiction, the legislator introduced administrative mediation during the procedure for the Council for Permit Disputes in line with the decree of 13th July 2012.<sup>25</sup> Under inserted Article 4.8.5 of the Flemish Codex of Urban Planning, the Council may refer a dispute to a mediator. However, this is never an obligation on the Council for Permit Disputes.

### **14. Voluntariness as a basic principle**

The referral to a mediator during a judicial procedure can happen only at the joint request of the parties concerned or on the initiative of the court with the agreement of these parties. Voluntariness is obviously an essential feature of a mediation procedure. In one case, a request for mediation was rejected because of the absence of consent of all parties.<sup>26</sup> As previously mentioned, voluntariness does not mean absolute permissiveness by the parties in dispute. Once they have agreed to proceed to mediation, the parties must act in good faith (i.e. an obligation to perform to the best of one's ability).

### **15. A problem of impartiality and independence?**

Although Article 4.8.5 of the Flemish Codex of Urban Planning was applicable from 1st September 2012, the Council for Permit Disputes did not refer anything to mediation until 14th January 2014.<sup>27</sup> The start of the mediation procedure suspends any judicial procedure before the Council for Permit Disputes.

Only judges, clerks, members of the support staff or third parties proposed jointly by those in dispute can be appointed by the Council as mediators. Although legislation is not required and there is no applicable jurisdiction available, it must be assumed that a board member cannot act as a mediator and as a judge in the same case, out of respect for the principles of impartiality and independence. Indeed, were this to happen, confidentiality within mediation would be impaired. It is clear that the parties should attach no credence to the confidentiality of a mediator who can decide like a judge in the case of failed mediation. In the cases put forward on 14th January 2014, the Council designated an internal mediator –

in particular, a clerk – who was not involved in the case.

Another possibility is to refer to a third party. In contrast to Dutch law or Belgian civil procedural law, Belgium has no specialized committee for recognizing a mediator in administrative matters. It is the Council for Permit Disputes itself that has to ensure the quality, independence and impartiality of any mediator.

### **16. Towards a faster, conflict-resolving jurisdiction**

Flemish legislators have recognized that administrative mediation is a filter to avoid jurisdictional procedures. It could not have been the intention that a conciliation procedure would be used as a deceleration mechanism. The mediation procedure can, therefore, take up to six months. In the cases of 14th January 2014, the Council for Permit Disputes opted for an even shorter period of four months.

Successful administrative mediation leads to a settlement that gives more satisfaction to the parties in dispute than does a judicial procedure. The Council for Permit Disputes may only refuse to ratify a settlement if what has been agreed is contrary to public order, regulations or urban development prescriptions. Whether mediation will actually result in a more efficient legal system will be revealed within administrative practice in the coming years. The outcome of mediation in the cases of 14th January 2014, however, was not encouraging. In both cases, the parties failed to come to an agreement, and the mediation procedure was terminated.<sup>28</sup> The judicial procedure, therefore, has continued to proceed.

### **C. Peeping at the neighbours: an external mediator in the Netherlands**

**17.** The Netherlands is inclined towards alternative dispute resolution in addition to legal proceedings.<sup>29</sup> Mediation is regulated there by the NMI Mediation Regulations 2008,<sup>30</sup> which set out certain rules regarding the procedure, competence and conduct of a mediator. These regulations were drawn up by the Dutch Mediation Institute (NMI), which is responsible for the quality of mediation in the Netherlands. Since 1st January 2014, the NMI has been called the “Mediatorsfederatie Nederland (MfN)” (i.e. the Mediators Federation of the Netherlands), while its regulations were also renamed. Henceforth, the MfN mediation regulations now contain the rules on mediation. The existing regulations were fully incorporated into the MfN mediation regulations. This means the basic principles of voluntariness, privacy and confidentiality are still valid. Only the Foundation for Mediators Quality (SKM) is completely new and is responsible for the layout of the MfN register.<sup>31</sup> Only when registered in the Register of Mediators, held by the SKM, can a mediator be recognized as such. This is of great importance, since the MfN regulations apply only if the parties mediate using a recognized mediator.<sup>32</sup> Although the SKM, as a new body, is responsible for the recognition of mediators, the same quality standards and rules of conduct apply as before.<sup>33</sup>

From 2000 until 2003, two national experiments were set up in order to determine whether mediation had any right to exist within the judicial infrastructure. The experiments were undertaken within two different projects: *court-connected mediation* (MRM) and *mediation using other legal assistance* (MGRb).<sup>34</sup>

Court-connected mediation takes place through a referral system, even though the case is still *sub judice*.<sup>35</sup> The mediatory proposal can emanate from the court, although the disputing parties themselves can take the initiative. Court-connected mediation can begin at any stage of the proceedings. Importantly, the MfN Mediation Regulations 2008 provide for a suspension of the proceedings for the duration of mediation.<sup>36</sup> During the experiment, five lower courts and one high court gained experience in referral to mediation. The court-connected mediation project proved a great success.<sup>37</sup>

In 2005, the process of implementing a structural mediation referral facility was started in the courts. Accordingly, a judge can bring the potential for mediation to the attention of the parties in dispute, in both civil and administrative cases. The implementation was completed on 1st April 2007, which means that all Dutch courts now have a structural facility for referring any case that qualifies for mediation. Individual courts have to develop a concrete framework for the structural referral facility, although they are guided by the National Bureau for Court-Connected Mediation (LBM).<sup>38</sup>

Nearly 70% of cases that are the subject of mediation through referral by a court result in

total or partial termination of the conflict, which means that mediation in administrative matters has a higher success rate than in civil cases.<sup>39</sup> Although mediation is also gaining ground in other policy areas,<sup>40</sup> it is clear that mediation in dealing with administrative disputes is possible.<sup>41</sup>

## 18. Legal basis?

The use of mediation in administrative disputes has not yet found its way into the Dutch General Law on Administrative Law (hereafter referred to as “the Awb”).<sup>42</sup> This means that, currently, only the general MfN Mediation Regulations 2008 apply. The Dutch law implementing Directive 2008/52/EC Article 3,<sup>43</sup> however, does provide a legal basis for referral jurisdiction in cross-border disputes. Considering the lack of a legal basis for mediation, particularly with regard to the judicial referral system in domestic disputes, including in administrative law, certain aspects of legal doctrine advocate a limited institutionalization of mediation.<sup>44</sup> After all, in administrative disputes, it is still a conditioned reflex to appeal to a judicial procedure.

**19.** In response, a draft bill was made public, which consisted of three interconnected proposals: the Mediator Registry Act, an act on the promotion of mediation in civil law and an act on the promotion of mediation in administrative law.<sup>45</sup> The aim of this last act, which was finally submitted on 10th September 2013, has been to anchor mediation in the Awb. Although the rules of the MfN would still apply, the act has provided for a general obligation in respect of the governing bodies. Effective communication would also be needed to avoid disputes with citizens.<sup>46</sup> This draft act has also introduced a competence for judicial referral for both governing bodies<sup>47</sup> and the courts.<sup>48</sup> They are not obliged to refer the parties to mediation, but are urged to do so to a large extent. It must be emphasized that the parties in dispute are under no obligation to try mediation.<sup>49</sup>

**20.** In order to help judges determine whether a dispute lends itself to mediation, the Administration of Justice Study Centre Agency (SSR), which provides training to judges, provides a reference course in which they gain knowledge about the (im)possibilities of mediation as a way to resolve a conflict.<sup>50</sup> The first draft act obliged the court, in those cases where it has decided not to refer to mediation, to accompany this decision by a detailed explanation.<sup>51</sup> This part of the statement cannot be appealed, so the value of this provision is uncertain.<sup>52</sup> Moreover, the Council of State considered this obligation to give reasons in every case where the court decides not to refer to mediation as too broad, since no differentiation is made. Administrative disputes where court-connected mediation is used mainly relate to tax, social security and public affairs (cases in which the contested decision is an order that is not made public and does not affect third parties). Therefore, it can be assumed that mediation is not functional in every administrative dispute.<sup>53</sup> This is why the obligation to give reasons where cases are not referred to mediation is seen as too broad. The promoter of the draft act also acknowledged this. Upon closer consideration, the obligation to state reasons was limited to cases where an interested party has expressly requested mediation and the court has not honoured this request.<sup>54</sup> Cases that obviously do not lend themselves to mediation can thus be “checked off” right away.

Furthermore, the Mediator Registry Act provides a legal basis for the rules on registration. These rules are in line with those set down in current MfN regulations.<sup>55</sup> The mediator must meet the demands for quality and integrity. In addition, it is important that citizens can have confidence that the mediator is compliant.<sup>56</sup>

The draft of the Mediator Registry Act provides for an interruption of the procedure by the administrative court when the parties use mediation with a registered mediator.<sup>57</sup> In Belgian law, only the limitation period is suspended after the filing of a complaint to the Ombudsman.

When mediation takes place before the start of judicial proceedings, including in the context of an administrative appeal, a possible suspension of the limitation period is by no means superfluous.<sup>58</sup> Not only after, but also before a dispute is brought before the Council of State, there is the possibility of referral to mediation. To this extent, it is possible for an administrative body to postpone its decision when necessary in light of mediation, according to the act on the promotion of mediation in administrative law.<sup>59</sup>

## 21. A settlement agreement

If the parties reach an agreement, the agreement will be made in the form of a settlement agreement.<sup>60</sup> In order not to delay the proceedings, the Council of State has established a maximum period of 12 weeks to reach an agreement.<sup>61</sup> A decision in administrative law is usually seen as a decision within the meaning of Article 1:3 of the Awb. The settlement agreement, however, is a civil contract, which can lead to issues relating to enforceability because the administration is involved in the agreement. Therefore, both civil and public law will affect the relationship between government and citizen.<sup>62</sup>

For civil cases alone, the draft act mentions the possibility for the mediator to offer any settlement agreement to the court for ratification. The judge has a marginal power of scrutiny to check whether or not the content of the agreement is contrary to public policy.<sup>63</sup> Not surprisingly, in regard to the restrictions on government in light of the principle of specialty, the draft act does not mention this possibility with respect to administrative affairs.<sup>64</sup>

For the sake of completeness, it should be noted that this bill was withdrawn, together with two other proposals concerning mediation.<sup>65</sup> The initiator of the proposal has promised to introduce a new, most likely similar, proposal in his capacity as Minister for Justice and Security. The concretization of this bill is currently part of public debate.

#### *D. Towards an administrative judge as referring judge?*

## 22. A judge as mediator

From the above, it appears that the Ombudsman is not the ideal mediator in administrative matters (*supra*). Nor can a judge be considered the most suitable person to act as an intermediary body. Nevertheless, a pilot project in Antwerp with a judge-mediator did have surprisingly positive effects.<sup>66</sup> According to different testimonies from the Presidents of the Courts, the judiciary is averse to judges acting as mediators. However, neither the High Judicial Council<sup>67</sup> nor the “Orde van Vlaamse Balies” (Association of Flemish Advocates)<sup>68</sup> were won over by the idea. The main criticism was that having a magistrate as a mediator is not desirable because of his other work. The intention of entrusting this task to third parties was to relieve the magistrate of this responsibility.<sup>69</sup> Of course, an additional problem of the “judge as mediator” principle is that his duty of confidentiality does not relieve him of his obligation to declare himself as a public official, as defined in Article 29 of the Preliminary Title of the Code of Criminal Procedure.<sup>70</sup>

The required impartiality is another factor that can pose a problem.<sup>71</sup> In this context, the judge, when acting as a mediator, is not allowed to make a decision on the merits of the case if mediation is unsuccessful.<sup>72</sup> Otherwise, this can lead to a legal challenge, which cannot be reconciled with the flexibility inherent in mediation.<sup>73</sup> In addition, it should be noted that, because of the strict separation of powers, a judge is not allowed to substitute for the administration. Yet, the legislature remains silent about the Judicial Code (for now).<sup>74</sup> It is regrettable, then, that the Council of Permit Disputes provides for the possibility of a judge to act as mediator.<sup>75</sup>

## 23. Interference with the judicial procedure

Nevertheless, it is undesirable to rule a judge completely out of mediation. In addition to writing a good judgement, the judge needs to find a solution that every party can agree with. This reconciliation is just as important as the settlement of the dispute.<sup>76</sup> This is why a judge can be of great importance to court-connected mediation in administrative disputes through a referral procedure, by analogy with the Dutch model and the Judiciary Code. Such a possibility had already been introduced into procedure before the Council for Permit Disputes was set up. Continuing along the same lines in the procedure before the Council of State and other administrative courts is desirable. Consequently, at the hearing, or even before the start, of a lawsuit, a judge can refer the case to mediation with the common consent of the parties concerned. Actual mediation is left to a specialized and independent mediator.

**24.** The question arises as to the duty of government to consider a mediatory proposal made by the court. In light of the principle of solicitude, set out in Article 3:2 of the Awb, the Dutch government can be forced to examine the possibility of mediation.<sup>77</sup>



It should be pointed out that mediation is only one possible form of dispute resolution. This means that the obligation to examine the possibility of mediation does not automatically mean that the government must agree with the proposal of mediation.<sup>78</sup>

In Belgium, the government also has a duty of care. This implies that the administration can take a decision only on the basis of an adequate and complete examination of the specific case.<sup>79</sup> Furthermore, the duty of care must be observed during judicial procedures.<sup>80</sup> In line with legal doctrine in the Netherlands, the possibility of introducing a duty to examine the possibility of mediation has also been suggested for Belgium.

This duty to examine whether a referral to mediation is possible will, however, only be effective and consequently applied if court proceedings can be suspended for the duration of mediation, as is already the case with the Council for Permit Disputes.<sup>81</sup> This is not yet the case when a complaint is filed with the Ombudsman (since the reforms by the Council of State, of 19th January 2014, considered the ombudsprocedure to be the most important form of alternative dispute solution). Filing a complaint with the Ombudsman only involves the suspension of the limitation period (*supra* no. 8).<sup>82</sup> It is a good thing that the ombudsprocedure is not suspended during a potential judicial proceeding,<sup>83</sup> with the result being that the ombudsprocedure can be applied more efficiently. It is most regrettable that a pending judicial proceeding is not suspended when disputing parties decide to start mediation (or file a complaint with the Ombudsman). As such, mediation becomes a parallel dispute resolution, rather than an alternative dispute resolution, which was the initial purpose behind introducing mediation. Especially when the judge refers the parties to mediation, it is unacceptable that the judicial procedure is not suspended.

**25.** The MfN mediation regulations of 2008 prescribe the suspension of the judicial procedure at the start of mediation.<sup>84</sup> According to Belgium law, the period of limitation is also suspended when the protocol of mediation is signed.<sup>85</sup> The suspension ends with mediation. Moreover, suspending the limitation period applies whether or not a mediator is recognized.<sup>86</sup> This is in contrast to the legislation in the Netherlands, where suspension applies to mediation only with a recognized mediator. Consequently, it seems feasible and desirable to introduce the suspension to mediation in administrative matters.

The argument put forward in the parliamentary debate – that Belgium has already been condemned by the European Convention on Human Rights (ECHR) on the grounds that the administrative court does not handle court cases within a reasonable time, as Article 6 of the ECHR imposes – is irrelevant.<sup>87</sup> This reasonable period of time must be assessed in light of the specific circumstances.<sup>88</sup> The Dutch Council of State considers that, in this context, mediation should not be included in the determination of reasonable time.<sup>89</sup>

In addition, Article 13 of the ECHR gives everyone the right to an effective remedy before a national authority in order to safeguard, among others, the rights contained in Article 6 of the ECHR. The European Court of Human Rights, which specified this provision, is of the opinion that the requirement of an effective legal remedy before a national body does not imply the requirement of a judicial authority. The totality of the procedures available in a specific state will play a role in assessing whether the requirement of Article 13 has been fulfilled. Accessibility, as well as the speed and guarantee of achieving an effective solution, will be taken into consideration.<sup>90</sup> Therefore, mediation can be an effective means to safeguard the right to a trial within a reasonable time frame. Mediation is accessible, cost-effective and fast, implying that this alternative form of dispute resolution will safeguard the rights contained in Article 6, rather than violate them. A limitation in time for the use of mediation will contribute to this even more. By analogy with the Netherlands and the Judicial Code,<sup>91</sup> a maximum period for mediation in administrative matters can be an additional guarantee of compliance with Article 6 of the ECHR.<sup>92</sup>

### ***E. Towards integral mediation legislation***

**26.** It appears that mediation in administrative disputes can add value to alternative dispute resolution. The inequality of power between government and citizens provides an additional problem. Unequal power relationships are undesirable in the process of mediation. To eliminate these differences, it will be necessary to add more safeguards to the existing means of alternative dispute resolution in Belgian administrative law. Unequal power relations between the government and citizens also cause problems within the scope of complaints to the Ombudsman. A complaint filed with the Ombudsman can lead to a moral judgement,

which the government will want to avoid.

**27.** For the sake of both structurally and emotionally unequal power relations, a neutral mediator in administrative disputes is needed. Of course, the parties are allowed to call in a neutral third party while negotiating. *Ad hoc* mediation, however, where the mediator can be any neutral third party designated by the parties in dispute, does not offer enough guarantees concerning the relationship between the administration and citizens. A recognized mediator, on the other hand, can be guaranteed to be a professional, impartial and independent third party. The requirement to use a recognized mediator can, therefore, be an outstanding means to compensate for the unequal power relations in administrative matters, without losing sight of the purpose of mediation.<sup>93</sup> In our opinion, legislation concerning the designation and recognition of a mediator in administrative matters is now necessary.

**28.** The Belgian Civil Judicial Code, as in the Netherlands, uses a system in which only recognized mediators are allowed in principle to mediate when designated through the referral system. The Council of Permit Disputes suggests the use of a recognized mediator, but this is optional.<sup>94</sup> A mediation committee determines the conditions that need to be fulfilled before a mediator can be recognized.<sup>95</sup>

Whereas the Belgian Civil Judicial Code only provides for the foundation of a mediation committee for civil matters, a mediation committee was founded in the Netherlands as a coordinating function. This committee takes on mediators specialized in all different branches of the law.

**29.** A regulation of the kind found in the Netherlands does not yet exist in Belgium. When introducing a general referral system for the court, it is nevertheless advisable to set up a general mediation committee. All disputes eligible for mediation can be referred by the court to the mediation committee. In turn, the committee refers the dispute to a recognized mediator specialized in the specific nature of the case, who subsequently handles the dispute. Approval thereby proceeds through a flexible procedure based on some predefined conditions, as already happens in civil judicial law and in the Netherlands. This had already been initiated in the mediation procedure that existed before the Council for Permit Disputes. As far as recognition of mediators is concerned, they are referred to the existing federal mediation committee.<sup>96</sup>

### 30. Conclusion

All the above makes it entirely clear that a blurring between private and public law with regard to mediation is desirable. A central mediation body, including recognized mediators, would provide a significant increase in the number of cases that could be resolved through alternative dispute resolution.<sup>97</sup> Judges in both civil and administrative matters can refer to this body with a view to mediation. This structure would also ensure that the referral system could be introduced in an uncluttered and straightforward manner. An independent, neutral mediator, who is recognized by the central mediation committee on the basis of satisfying general criteria, can lead the deliberation, while the basic principles of mediation, such as confidentiality and voluntariness, can also be guaranteed.

### Noten

**1** Cf. *infra*, n<sup>o</sup>. 4.

**2** See also Lien De Geyter, *Alternatieve methoden tot beslechting van bestuursgeschillen*, 4 Chroniques de Droit Public/Publiekrechtelijke Kronieken (CDPK) 751, 763-764 (2005). With references to Bernard Hubeau, *De bemiddeling in het Publiekrecht*, 11 Rechtskundig Weekblad (RW) 410, 410-411 (2000-2001) and to Orde van Advocaten te Antwerpen, *Bemiddeling in andere dan familieaangelegenheden*, 3(1999).

**3** Steven Brouwers, *Bemiddeling tijdens de procesgang. Is er een wettelijke basis?*, Algemeen juridisch tijdschrift (AJT) 192, 193-195 (1999-2000).

**4** Act of 10 February 1994 regulating the procedure for mediation in criminal cases, *Belgian Official Gazette* 27 April 1994.

- 5** Act of 5 July 1998 on the collective debt settlement and the possibility of sales from the hand of the seized goods, *Belgian Official Gazette* 31 July 1998.
- 6** EC Recommendation R (98) 1 of 21 January 1998, available at: <https://wcd.coe.int>. The Committee of Ministers of the Council of Europe was not limited to family matters, but also saw it bigger, see e.g. EC Recommendation R (2002) 10 of 18 September 2002, available at: <https://wcd.coe.int>, and EC Recommendation R (99) 19 of 15 September 1999, available at: <https://wcd.coe.int>.
- 7** Act of 19 February 2001 on the procedure for mediation in family matters, *Belgian Official Gazette* 3 April 2001.
- 8** See the Act of 21 February 2005 amending the Judicial Code in connection with the mediation, *Belgian Official Gazette* 22 March 2005.
- 9** COM (2002) 196 final, 19 April 2002.
- 10** Art. 116-130 of the Act of 25 April 2007 concerning various provisions (IV), *Belgian Official Gazette* 8 May 2007.
- 11** Belgian Council of State 28 April 2011, No. 212.825, *Lauwers*.
- 12** Belgian Council of State 9 June 2011, No. 213.776, *Martens*.
- 13** Belgian Council of State 15 March 2012, No. 218.494, *Parent*.
- 14** Lien De Geyter, Bemiddeling in bestuursrecht. Alternatieve methoden tot beslechting van bestuursgeschillen 119-175 (2006); also Lien De Geyter, *Alternatieve methoden tot beslechting van bestuursgeschillen*, 4 CDPK 751 (2005).
- 15** Lien De Geyter, *Alternatieve methoden tot beslechting van bestuursgeschillen*, 4 CDPK 751, 772-773 (2005).
- 16** See Lien De Geyter, Bemiddeling in bestuursrecht. Alternatieve methoden tot beslechting van bestuursgeschillen (2006); Lien De Geyter, *Alternatieve methoden tot beslechting van bestuursgeschillen*, 3 CDPK 463 (2004); Lien De Geyter, *Alternatieve methoden tot beslechting van bestuursgeschillen*, 4 CDPK 751 (2005); Bernard Hubeau, *De bemiddeling in het Publiekrecht*, 11 RW 410, 418-434 (2000-2001); Eric Lanckswert, *Bemiddeling met en door gemeenten*, 2 Tijdschrift voor gemeenterecht (T.Gem.) 95 (2003); Eric Lanckswert, *Naar een faciliterende wetgeving voor bemiddeling met openbare besturen*, 9 Tijdschrift voor bestuurswetenschappen en publiekrecht (TBP) 511 (2010); Eric Lanckswert, *Publiekrechtelijke rechtspersonen en de nieuwe bemiddelingswet van 21 februari 2005*, 32 RW 1274 (2005-2006); Dirk Lindemans, Gedogen en bemiddelen in het bestuursrecht (2003); Brecht Warnez, Maarten Vankeersbilck and Lise Vandenhende, *In het spoor van privaatrecht: wanneer springt het bestuursrecht op de bemiddelingstrein?*, 4-5 TBP 295 (2014).  
For an extensive comparative research: see Dacian C. Dragos & Bogdana Neamtu (Eds.), *Alternative Dispute Resolution in European Administrative Law* (2014).
- 17** E.g. Bernard Hubeau, *De bemiddeling in het Publiekrecht*, 11 RW 410, 418-434 (2000-2001).
- 18** E.g. Draft law on the reform of the power, the control process and the organization of the Council of State, *Parl.St.* Senaat 2013-2014, nr. 5-2277/3.
- 19** Leo Goovaerts & Sabine Thielemans, *Alternatieve Geschiloplossing. Bemiddelaars en onderhandelaars aan tafel* 18 (2000); Bernard Hubeau, *De bemiddeling in het Publiekrecht*, 11 RW 410, 411 (2000-2001), No. 7; Eric Lanckswert, *Bemiddeling met en door gemeenten*, 2 Tijdschrift voor gemeenterecht (T.Gem.) 95, 103 (2003); Eric Lanckswert,

*Bemiddeling in het bestuursrecht*, in *Gedogen en bemiddelen in het bestuursrecht*, 141, 144 (Dirk Lindemans ed., 2003).

**20** Art. 8 Act of 22 March 2005 establishing the Federal Ombudsmen, *Belgian Official Gazette* 7 April 1995; Art. 12 Flemish Decree of 7 July 1998 establishing the Flemish Ombudsman, *Belgian Official Gazette* 25 August 1998.

**21** Lien De Geyter, *Bemiddeling in bestuursrecht. Alternatieve methoden tot beslechting van bestuursgeschillen* 217 (2006); Eric Lanckswert, *Bemiddeling in het bestuursrecht*, in *Gedogen en bemiddelen in het bestuursrecht*, 141, 145 (Dirk Lindemans ed., 2003).

**22** Lien De Geyter, *Bemiddeling in bestuursrecht. Alternatieve methoden tot beslechting van bestuursgeschillen* 217-218 (2006); Eric Lanckswert, *Bemiddeling in het bestuursrecht*, in *Gedogen en bemiddelen in het bestuursrecht*, 141, 144 (Dirk Lindemans ed., 2003).

**23** Milan Remac, *The Ombudsman: An Alternative to the Judiciary?*, in *Alternative Dispute Resolution in European Administrative Law*, 565-588 (Dacian C. Dragos & Bogdana Neamtu eds., 2014).

**24** See *Annual Report 2012*, 22-23, available at: <http://www.federaleombudsman.be>.

**25** Flemish Decree of 6 July 2012 amending various provisions of the Flemish Code on Urban Planning, which concerns the Council for Permit Disputes, *Belgian Official Gazette* 24 August 2012.

**26** Flemish Council for Permit Disputes 1 October 2013, No. S/2013/0231.

**27** Flemish Council for Permit Disputes 14 January 2014, No. A/2014/0008; Flemish Council for Permit Disputes 14 January 2014, No. A/2014/0009.

**28** Flemish Council for Permit Disputes 24 June 2014, No. A/2014/0446; Flemish Council for Permit Disputes 24 June 2014, No. A/2014/0447.

**29** Hanna Tolsma, *Mediation in de Algemene wet bestuursrecht: de hoogste tijd?*, 2 *Tijdschrift Conflicthantering (TC)* 17, 17 (2009); Philip Langbroek, Milan Remac & Paulien Willemsen, *The Dutch System of Dispute Resolution in Administrative Law*, in *Alternative Dispute Resolution in European Administrative Law*, 113-152 (Dacian C. Dragos & Bogdana Neamtu eds., 2014).

**30** Available at: <http://www.NMI-mediation.nl>.

**31** Art. 1, f en i MfN Mediation Regulations 2008.

**32** Art. 1, e MfN Mediation Regulations 2008.

**33** See <http://www.nmi-mediation.nl>.

**34** With this experiment they acquired experience with the reference through three Legal Aid Agencies.

In 2006 the Legal Aid Bureaus were replaced by Legal Counters to achieve better organization of legal aid. A reference to mediation is still possible, see *Mediation in the legal system*. Letter from the Minister of Justice, *Kamerstukken II 2009-2010*, 29.528, No. 6, 4.

**35** Ellen van Beukering-Rosmuller, *Mediation naast rechtspraak: ontwikkelingen in praktijk en wetgeving*, *Tijdschrift voor Arbitrage (TVA)* 186 (2013).

**36** Art. 9.1 MfN Mediation Regulations 2008.

**37** Annie De Roo & Rob Jagtenberg, *Bemiddeling in Nederland*, in *De Code de procédure*

civile (1806) na 200 jaar; de traditie van het Frans civiel procesrecht in vergelijkend perspectief, 130-136 (Cornelis Hendrik et al. eds., 2008); Mediation in the legal system. Letter from the Minister of Justice, *Kamerstukken II* 2003-2004, 29.528, 7.

**38** Mediation in the legal system. Letter from the Minister of Justice, *Kamerstukken II* 2009-2010, 29.528, No. 6, 5.

**39** Lia Combrink, Albert Klijn, & Machteld Pel, Op maat beslecht. Mediation naast rechtspraak 1999-2009. Research memoranda 65 (2009). (The report can be downloaded at <http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak>); Note that three-quarters of the court-connected mediations concern civil cases, see Mediation in the legal system. Letter from the Minister of Justice, *Kamerstukken II* 2009-2010, 29.528, No. 6, 6.

**40** Hanna Tolsma, *Het specialiteitsbeginsel en bemiddelend bestuur*, 3 Jurisprudentie Bestuursrecht plus (JBplus) 126, 12 (2008).

**41** Moreover, the Dutch Council of State has already for years been referring cases related to the environment and spatial planning to mediation, if they qualify, e.g. M.A. Pach, *Bouwrecht, Mediation in het omgevingsrecht: gegevens en ervaringen*, 42 *Bouwrecht* (BR) 101 (2005).

**42** Available at: <http://www.wetten.overheid.nl>.

**43** Available at: <http://www.wetten.overheid.nl>.

**44** G.J.A. Al, *Bemiddeling. Het terrein van milieu en ruimtelijke ordening*, 9 Justitiële verkenningen 85 (2000); E.J.M. van Beukering-Rosmuller, *Mediation naast rechtspraak: ontwikkelingen in praktijk en wetgeving*, 50 *Tijdschrift voor Arbitrage* (TVA) 8 (2013).

**45** See <http://www.tweedekamer.nl>; The original draft act was amended to the recommendation of the Advisory Division of the Council of State, see Draft Act as amended following the recommendation of the Advisory Division of the Council of State, *Kamerstukken II* 2012-2013, 33.727, No. 5 (hereafter: *Kamerstukken II* 2012-2013, 33.727, No. 5).

**46** Art. 1, A Draft Act from the member Van der Steur to amend the General Law on Administrative Law and the General Tax Act to promote the use of mediation in administrative law (Act promoting mediation in administrative law), *Kamerstukken II* 2012-2013, 33.727, No. 2 (hereafter: *Kamerstukken II* 2012-2013, 33.727, No. 2); Draft Act from the member Van der Steur to amend the General Law on Administrative Law and the General Tax Act to promote the use of mediation in administrative law (Act promoting mediation in administrative law), *Kamerstukken II* 2012-2013, 33.727, No. 3, 12-14 (Explanatory memorandum) (hereafter: *Kamerstukken II* 2012-2013, 33.727, No. 3).

**47** Art. 1, C *Kamerstukken II* 2012-2013, 33.727, No. 5.

**48** Art. 1, F *Kamerstukken II* 2012-2013, 33.727, No. 5.

**49** See, e.g., HR 20 januari 2006, *NJ* 2006, 75, *LJN* AU3724; Nevertheless, it appears that the parties experience a commitment to try mediation since they are afraid the court will not appreciate if he refuses to cooperate. See regarding to labour law i.a. Ktr. Schiedam 9 januari 2007 (n.n.g.); A.J.M. Sponselee, 'Mediation: een strategisch verplichte omweg?', *Arbeidsrecht* 2007, 48.

**50** Mediation in the legal system. Letter from the Minister of Justice, *Kamerstukken II* 2009-2010, 29.528, No. 6, 5.

**51** *Kamerstukken II* 2012-2013, 33.727, No. 3, 13.

**52** *Kamerstukken II 2012-2013, 33.727, No. 3, 15*; Hanna Tolsma, Kars de Graaf, Albert Marseille, *Reactie op het voorstel voor een wet Mediation*, available at: <http://www.internetconsultatie.nl/mediation/reacties>.

**53** Recommendation of the Advisory Division of the Council of State and reaction of the promoter, *Kamerstukken II 2012-2013, 33.727, No. 4* (hereafter *Kamerstukken II 2012-2013, 33.727, No. 4*), 42.

**54** Art. 1, *C Kamerstukken II 2012-2013, 33.727, No. 5* (new article 7:3 a, third paragraph Awb); *Kamerstukken II 2012-2013, 33.727, No. 4, 43-44*.

**55** Draft Act from the member Van der Steur to lay down rules concerning the registration and promotion of the quality of mediators (Mediator Registry Act), *Kamerstukken II 2012-2013, 33.722, No. 5* (hereafter: *Kamerstukken II 2012-2013, 33.722, No. 5*); Draft Act from the member Van der Steur to lay down rules concerning the registration and promotion of the quality of mediators (Mediator Registry Act), *Kamerstukken II 2012-2013, 33.722, No. 6, 13* (Explanatory memorandum).

**56** Draft Act from the member Van der Steur to lay down rules concerning the registration and promotion of the quality of mediators (Mediator Registry Act), *Kamerstukken II 2012-2013, 33.722, report, 9*.

**57** *Kamerstukken II 2012-2013, 33.727, No. 6, 13*.

**58** Hanna Tolsma, *Mediation in de Algemene wet bestuursrecht: de hoogste tijd?*, 2 TC 17, 20 (2009).

**59** *Kamerstukken II 2012-2013, 33.727, No. 2, 2 and No. 6, 20*; For criticism on this article, see i.a. Hanna Tolsma, Kars de Graaf, Albert Marseille, *Reactie op het voorstel voor een wet Mediation*, available at: <http://www.internetconsultatie.nl/mediation/reacties>.

**60** Art. 10 MfN Mediation Regulations 2008.

**61** Afdeling Communicatie van de Raad van State, *Mediation bij de Afdeling bestuursrechtspraak van de Raad van State, (2013)* available at: <http://www.raadvanstate.nl>.

**62** Hanna Tolsma, *Bemiddelend bestuur. Juridische aspecten van bemiddeling bij de bestuurlijke besluitvorming*, 71 (2008).

**63** *Kamerstukken II 2012-2013, 33.727, No. 6, 15*.

**64** See Hanna Tolsma, *Bemiddelend bestuur. Juridische aspecten van bemiddeling bij de bestuurlijke besluitvorming*, 89 (2008).

**65** *Kamerstukken II 2014-2015, 33 722, n° 23, 33 723, n° 14 and 33 727, n° 12*; confirmed by a reply from Minister Van der Steur to a parliamentary question (see *Aanhangsel Handelingen II 2015-2016, 288*).

**66** *Parl.St. Kamer 2003-2004, No. 51-0327/7, p. 64*: The pilot project in Antwerp ran from January 2003 until 1 January 2005. A similar initiative took place in Liège.

**67** Recommendation from the High Judicial Council of the draft legislation that would amend the Judicial Code concerning mediation, *Parl St. Kamer 2003-04, No. 51-0327/2, 8*, recommendation d.d. 9 octobre 2002 from the High Judicial Council concerning the draft legislation that would amend the Judicial Code in the matter of the judicial procedure. Open for consultation at [http://5023.b.fedimbo.belgium.be/sites/5023.b.fedimbo.belgium.be/files/press\\_publications/a0013n.pdf](http://5023.b.fedimbo.belgium.be/sites/5023.b.fedimbo.belgium.be/files/press_publications/a0013n.pdf). See also the point of view of the High Judicial Council at 4 februari 2003 (*Parl.St. Kamer*

2003-2004, No. 51-0327/7, 67).

**68** *Parl.St.* Kamer 2003-2004, No. 51-0327/7, 78. Recommendation from the “Orde van Vlaamse Balies”: in the absence of any legal proceedings, the judges cannot be entrusted with mediation. Whereas mediators find a solution according to the interests of the parties, the court has to rely on the rights of the parties. Moreover, the backlog makes such an arrangement undesirable.

**69** *Parl.St.* Kamer 2003-2004, No. 51-0327/7, 66.

**70** *Parl.St.* Kamer 2003-2004, No. 51-0327/7, 68.

**71** See also Lien De Geyter, *Bemiddeling in bestuursrecht. Alternatieve methoden tot beslechting van bestuursgeschillen 180-182* (2006).

**72** *Parl.St.* Kamer 2003-2004, No. 327/001, 9; *Parl.St.* Kamer 2003-2004, No. 327/007, 53.

**73** *Parl.St.* Kamer 2003-2004, No. 51-0327/1, 11.

**74** Nothing came about with regard to the proposal for a resolution (M. De Schamphelaere *et al.*) concerning an improvement of the judicial organization, *Parl.St.* Kamer 2008-2009, No. 52-1974/001, which argues the necessity of an explicit legal basis for a judge as mediator.

**75** Art. 4.8.5, §2, second paragraph VCRO.

**76** *Parl.St.* Kamer 2003-2004, No. 327/007, 51-52.

**77** However, this obligation is limited to the relevant facts and the interests to be weighed and will play especially if the government’s decision has got a discretionary power, see Hanna Tolsma, *Bemiddelend bestuur. Juridische aspecten van bemiddeling bij de bestuurlijke besluitvorming*, 38 (2008).

**78** Hanna Tolsma, *Mediation in de Algemene wet bestuursrecht: de hoogste tijd?*, 2 TC 17, 19 (2009).

**79** See André Mast, Jean Dujardin, Marnix Van Damme & Johan Vande Lanotte, *Overzicht van het Belgisch administratief recht 55-60* (2009).

**80** Reiner Tijs, *Algemeen bestuursrecht in hoofdlijnen 264* (2012).

**81** Art. 4.8.5, §4 VCRO.

**82** Art. 19, third paragraph Act of the Council of State, as amended by art. 7, 3<sup>o</sup> Act of 19 January 2014 on the reform of the power, the control process and the organization of the State Council, *Belgian Official Gazette* 3 February 2014.

**83** Draft law on the reform of the power, the control process and the organization of the State Council, *Parl.St.* Senaat 2013-2014, No. 5-2277/3, 3.

**84** Art. 9.1 MfN Mediation Regulations 2008.

**85** Art. 1731, §3 Judicial Code.

**86** See also Barbara Gayse, Benoît Allemeersch & Peter Schollen, *De wet van 21 februari 2005 in verband met bemiddeling*, in *De nieuwe wet op bemiddeling*, 9, 40 (Benoît Allemeersch ed., 2005).

**87** Draft law on the reform of the power, the control process and the organization of the State Council, *Parl.St.* Senaat 2013-2014, No. 5-2277/3, 18.

**88** *Frydlender t. Frankrijk*, 30979/96, §86, EHRM 2000-VII; *Pizzati t. Italië*, 62361/00, §134, 29 maart 2006.

**89** Dutch Council of State 2 December 2011, *JB* 2012/257; Dutch Council of State 16 January 2013, *JOM* 2013/311.

**90** *Doran t. Ierland*, 50389/99, §§55-60, ECHM 2003-X.

**91** Art. 1734, §2 Belgian Judicial Code.

**92** The mediation procedure before the Council of Permit Disputes already has a maximum duration of six months (art. 42, first paragraph, 4<sup>o</sup> Council for Permit Disputes procedural rules).

**93** See Lien De Geyter, *Bemiddeling in bestuursrecht. Alternatieve methoden tot beslechting van bestuursgeschillen* 128-132 (2006).

**94** *Parl. St.* Vl. Parl. 2011-2012, No. 1509/1, 10.

**95** Judicial Code: art. 1727, §6 Judicial Code; The Netherlands: Through education and inclusion in a register by virtue of art. 1, e MfN Mediation Regulations 2008 and [http://www.nmi-mediation.nl/nmi\\_registermediator\\_worden.php](http://www.nmi-mediation.nl/nmi_registermediator_worden.php).

**96** *Parl. St.* Vl. Parl. 2011-2012, No. 1509/1, 10.

**97** For an evaluation of the use of mediation in the Netherlands, see Maurice Guiaux, Frederike Zwenk, Maureen Tumewu, *Mediation Monitor* 2005-2008, 168 (2009).