B. THE ADMINISTRATIVE COURTS AND TRIBUNALS

§ 1. Organization and jurisdiction

The federal legislator has created administrative courts and tribunals, from time to time, as the need for them was felt. It has never worked out a structure or a set of legal rules common to them all, so that it is quite impossible to present them in any orderly scheme or overview.

Some of these judicial bodies have been created to give solutions to disputes arising within or with certain administrative services. In that case the judges very often are civil servants, sometimes presided over by a professional magistrate.

Others have been created within the framework of a certain legislation, such as the legislation on family allowances or on retirement of a named class of employees. Possible conflicts over the application of this legislation are then entrusted to commissions of experts or civil servants, mostly under the chairmanship of a professional magistrate.

The legislator has very often, but not always, provided the possibility of appeal against the decisions of such administrative courts and tribunals, but appeal is sometimes limited to points of law only. He may have entrusted this appeal to another administrative judicial body, created specifically for this purpose, or to an ordinary court, or to the Council of State. In all cases where the legislation does not contain any explicit

provisions concerning appeal or cassation, the Council of State, Division Administration, is competent.

§ 2. The Council of State

The highest and most important administrative court is the Council of State. It has been established by the Act of 23 December 1946 and has two divisions: the Division Legislation, an advisory body, and the Divisions Administration, with mainly a jurisdictional function.

1. *The Division Legislation*

Before a legislative rule may be submitted to a parliamentary body or before a regulation may be enacted, prior advice may be required from consultative bodies. One of the most important advisory bodies in that respect is the Division Legislation or Legislation Department of the Council of State.

A draft Government bill containing general binding rules has to be submitted by the competent Minister to the Division Legislation of the Council of State for a mandatory legal advice. The Governments of the Communities and the Regions have to comply with the same procedural requirement for their decrees or ordinances. Draft regulations of the federal Government and of the Governments of the Communities and the Regions must also be submitted to the Division Legislation for prior advice.

In some cases, the initiative to submit a legislative norm for advice to the Division Legislation may stem from a parliamentary initiative. In still other cases, the advice of the Division may be purely within the discretion of the chairman of the assembly concerned.

It was the intention of the legislator to improve the technical and legal quality of the legislation. Therefore the advice of the Division Legislation does not concern the appropriateness of a regulation and will give no policy recommendations. It will, for example, aim at adjusting the French and the Dutch version of the same text. It will strive for a uniform terminology as well as for a logical structure and internal coherence of the legislative and regulatory texts. Sometimes, one regulation will affect existing regulations in other fields and may necessitate the changing of other texts. The Council of State will point this out and suggest an appropriate adaptation of the text.

The Division Legislation also plays an important role in preserving the rule of law. It will examine whether there is an adequate constitutional or statutory basis for the norm submitted to it, whether the norm has been proposed by the competent authority and whether the correct proce-

dures have been complied with. The Division Legislation will also examine whether the submitted norm does not conflict with a higher norm.

Although, legally speaking, the advice of the Division Legislation is mandatory, it is not binding. The sanction for disobeying the rule in connection with a draft bill of a legislator, is purely political. Courts and tribunals refuse to review the formal legality of legislators' norms. If the mandatory advice has not been sought for a draft regulation, however, the regulation can be submitted to the control of the Division Administration and this will find it to be null and void. However, draft regulation is exempted from the obligation to submit it for advice, if the draft regulation has to be accepted urgently, and explicitly gives the reasons for the invoked urgency.

2. *The Division Administration*

The Division Administration has been set up in the first place to remedy the defects in the legal protection of the individual against abuses on the part of the administration. Before the creation of the Council of State, individuals had no means of directly challenging the legality of a decision of the administration, judicial[14] or non-judicial.[15] For this reason, the Division Administration of the Council of State has been given the power to annul decisions of the administration, judicial and non-judicial.

The Council of State has in principle no jurisdiction to order public authorities to provide financial redress for the loss or damage incurred by the citizen. Only the ordinary courts have jurisdiction to deal with tort actions against public authorities. It has however a general power to grant temporary relief, including the possibility to suspend a regulatory decision which is the object of a request for annulment.

2.1 *The power to annul non-judicial administrative decisions*

2.1.1 *Decisions subject to annulment*

The Council of State's power to annul is confined to unilateral, binding administrative regulations and orders. Since agreements cannot be considered to be unilateral administrative acts, they do not fall within the scope of the Council of State's jurisdiction. However the Council of State is

14. Except in those cases in which the legislator had granted the right to appeal in an ordinary court or tribunal.
15. Defense against illegal decisions of the administration was often limited to the possibility to invoke the exception of illegality and the application of article 159 of the Constitution.

empowered to examine the legality of the unilateral decisions, preceding the conclusion of a contract. The fact that the unilateral decision can lead to the conclusion of a contract and that disputes concerning this contract belong to the jurisdiction of the ordinary courts, has no influence on the power of the Council of State to set aside the preparatory decision.[16]

Only completed and enforceable administrative acts can be subject to annulment by the Council of State. Authorizations to take certain decisions, advices and proposals are only preparatory decisions and do not immediately harm the persons concerned. Therefore they cannot be challenged separately.

The challenged decision must stem from a Belgian administrative authority, i.e. a public or even a private institution acting in the general interest and empowered to impose unilateral obligations in application of the law.

The lack of a decision in cases where the law imposes upon the administration the obligation to take a decision, can under certain strict condiditons be challenged as a negative decision.

2.1.2 *Illegality of the decision*

Judicial review of administrative action is aimed at sanctioning decisions which are *ultra vires*. The simple proposition that a public authority may not exceed its power, covers many forms of illegality. The Council of State reviews all forms of illegality: the external illegality (i.e., lack of power on the part of the authority that adopted the measure, or the infringement of essential procedural requirements) and the internal illegality (the answer to the question whether the material requirements for the act are met and whether the authorities have exercised their powers in a lawful way).

In most cases, legal provisions only define the scope of the powers of public authorities by means of general formulae, leaving a measure of discretion to the competent authority. The Council of State is not competent to review the policy choices made in the exercise of this discretion. It must however check whether the decision does not transgress the limits of the discretionary power. In order to do so, the Council of State has developed a set of 'general principles of law', the so called 'general principles of a sound and a proper administration'. These principles include the right of due process, the principle of impartiality, the principle according to which decisions taken on irrelevant considerations or adopted for improper purposes are illegal, the principle of fair play, the principle

16. Doctrine of the "*acte détachable*" ("detachable act" or "divisible act").

of due care, the principle of non-discrimination, the principle of reasonableness and the principle of proportionality. Without ever having the right to substitute its discretion for that of the administrative body or person to whom discretion has been entrusted, the Council of State may sanction the exercise of discretion on grounds of unreasonableness, provided that the administrative authority has come to a conclusion so unreasonable that no reasonable authority acting under the same circumstances could ever have come to it.

All public authorities have the legal obligation to mention in every unilateral decision that affects an individual or another administration, the reasons for this decision, i.e. the grounds in law and in fact on which the decision is based. The law considers this requirement to be essential for the legality of the decision. Therefore a decision which is not or insufficiently reasoned, will be declared null and void.

2.1.3 *Conditions*

While in Belgium the control of administrative action is primarily exercised by the courts, there exist also various forms of administrative appeal. If the right of administrative appeal is formally organized by a statute, a decree or an ordinance, it must be used before lodging the case with the Council of State.

Annulment procedures must be initiated by a written petition filed within sixty days following the publication of the regulation or decision, or following the notification if it is an individual act. If there is no obligation to publish or to notify the administrative decision, the sixty day period will start on the day following the day the party concerned has become acquainted with it. It is up to the defendant authority to prove that the petitioner was acquainted with the disputed decision more than sixty days before his appeal.

Sheer knowledge of the disputed decision is not a sufficient ground to start the sixty day period. The petitioner should have a sufficient knowledge of the contents of the decision and of its implications to form an opinion about the chances of a procedure with the Council of State.

After expiration of the sixty day period, the Council of State is no longer competent to annul an administrative act, but it can still – and eventually, must – make use of the power to set an illegal decision aside.[17]

17. Const. art. 159.

2.1.4 *Standing*

The petitioner must prove a sufficient interest, i.e. a direct, personal and lawful interest in the relief sought. The requirement to establish a sufficient interest must be met at all stages of the proceedings, i.e. from the filing of the petition until the judgment has been rendered.

If the interest in the matter is not direct or personal, only associations with legal personality have standing-to-sue and only for issues falling within the purpose for which they have been set up.

2.1.5 *Consequences of Annulment*

The annulled decision is held never to have been enacted. It is however up to the competent administrative authority to decide whether and how the void that has thus been created, will be filled. In taking a new decision, the administrative authority is obliged to comply with the terms of the judgment of the Council of State: it should not repeat the illegality which has just been sanctioned. This will not prevent the administration from taking materially the same decision again, if it was set aside because of formal shortcomings. The illegality can be repaired by taking an identical but formally correct decision.

In order to secure the enforcement of judgments, the petitioner may ask the Council of State to impose a daily fine for non-performance. This implies that in cases where the law obliges the administration to take a new decision and the administration refuses to comply with the judgment in doing so, it will have to pay a daily fine until the judgment has been complied with. This remedy may only be invoked after a judgment has been rendered, condemning the administration, and after the latter has failed to comply with this judgement, having been duly summoned to do so. The daily fine is not granted to the petitioner. It is paid into a special fund for the modernisation of the organisation of administrative courts.

2.2 *The power to suspend non-judicial administrative decisions*

Before the Council of State was given the power to suspend the challenged administrative acts, the ordinary courts were entitled to issue a positive or a negative preliminary injunction against serious illegalities on the part of the administration. Now, the Council of State has a general power to suspend the regulation or decision under review. From the moment on when a request for annulment has been filed, the Council is the only court having the power to suspend the challenged action and to order other interim measures.

2.2.1 *Conditions*

The suspension of a decision under review will only be ordered provided there is a serious cause of action and the immediate or continued execution of the challenged decision is likely to entail a serious and irreparable harm.

The arguments for annulment are considered to be serious if they seem valid *prima facie*. The fact that the validity of the arguments cannot be excluded, is not sufficient to conclude to the seriousness of the invoked arguments.

The condition concerning the harmful effects of the challenged decision relates both to the seriousness of the harm and to the fact that the annulment will not be sufficient to provide redress. Decisions which cause only a financial prejudice are generally not considered to entail irreparable harm. Such a prejudice, even if it is considerable, can be compensated and consequently does not count as irreparable.

The Council of State is not obliged to order the suspension of the disputed act when the conditions for suspension are met. It may take into account the probable consequences of the interim measures for all parties and persons likely to be concerned and may decide not to grant the requested remedy if the negative consequences would exceed the benefits.

2.2.2 *Procedural aspects*

The request for annulment does not automatically result in a decision concerning suspension or other interim measures. These have to be asked for at the same moment, but in a separate request. The judgment with respect to the request for suspension has to be rendered within a period of 45 days. It is possible however, that even the delay of 45 days may cause substantial and irreparable harm. Therefore, in very urgent cases, the petitioner can request the immediate suspension of the challenged decision as well as other interim measures. In this case, the judgment can be rendered forthwith. The judgment imposing immediate suspension or other urgent provisional measures has then to be reconsidered and eventually confirmed, within a period of 45 days.

If a decision is suspended, the Council of State must render its judgement on the request for annulment, within a period of six months at the latest.

3. *Review of decisions of administrative courts and tribunals*

3.1 *The Council of State as administrative Supreme Court*

The Division Administration of the Council of State is the highest administrative court in Belgium. It acts as a Court of Cassation with respect to the lower administrative courts. It reviews the external and internal legality of the decisions of the lower administrative tribuals.

When the judgement of the lower administrative tribunal or court is annulled, the case is remanded to a like or to the same[18] administrative tribunal or court for a new decision. The lower court or tribunal must follow the decision of the Council of State on the point of law which was the cause for the annulment.

3.2 *The Council of State as court of full jurisdiction*

In a very limited number of cases, explicitly mentioned in the law, the Division Administration has full jurisdiction, either originally, or on appeal.

4. *The award of extra-ordinary damages*

Ordinary law courts may order the administrative authorities and/or civil servants to provide financial redress for the loss or damage they have caused, under the same conditions as apply in cases of tort between private persons.

The Division Administration of the Council of State is competent to order an equitable financial redress for exceptional damages caused by an administrative authority. The challenged act may not be of a tortious nature, nor may it be based on a nuisance or consist in an illegality. For damages following from such causes, the ordinary law courts are competent. The damages have to be 'exceptional' in just this way: they do not follow from a defective application of the law, or from an illegal act, but from a *de facto* unequal apportionment of the negative consequences of a formally correct application of the law.

Because those very restrictive conditions are rarely met, very few such claims have been succesful.

18. If there is only one such administrative judicial body.