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THE BELGIAN CONSTITUTIONAL COURT AND THE ADMINISTRATIVE LOOP: A DIFFICULT UNDERSTANDING

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INDEX

1. INTRODUCTION
II. THE FLEMISH ADMINISTRATIVE LOOP
1. THE FLEMISH LEGISLATION
1.1. The Council for Permit Disputes
1.2. The Flemish Administrative Courts
2. THE JUDGMENTS NO. 74/2014 OF 8 MAY 2014 AND NO. 152/2015 OF 29 OCTOBER 2014 OF THE CONSTITUTIONAL COURT
2.1. Infringement of the principles of judicial independence and impartiality and of separation of powers
2.2. Infringement of the rights of defence, the right to adversarial proceedings and the right of access to court
2.3. Infringement of the formal obligation to state reasons

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2.4. Infringement of the right of access to court by the provisions on the procedural costs

2.5. Conclusion

III. THE FEDERAL ADMINISTRATIVE LOOP

1. THE FEDERAL LEGISLATION

2. THE JUDGMENT NO. 103/2015 OF 16 JULY 2015 OF THE CONSTITUTIONAL COURT

IV. THE FLEMISH ADMINISTRATIVE LOOP REVISITED

V. CONCLUSION

1. INTRODUCTION

1. In the Netherlands, the task of the administrative courts has shifted during the past decades from merely upholding the objective law towards providing a final dispute resolution.[2] This evolution was induced by the criticism that the administrative courts, whose primary aim was to review the legality of authority decisions, only established how the authority should not have decided, without indicating how it should have decided or should decide in the future. Hence, upon the annulment of an authority decision by the administrative court, neither the authority nor the private parties knew how the dispute had to be settled and remediation had to be offered. This often resulted in endless proceedings, with new decisions being taken by the authority and being attacked again by the private party concerned, who was still not satisfied.[3]

In order to remedy this lack of judicial protection, the central point of focus of the Dutch administrative judicial procedural law has shifted towards the protection of the subjective rights of the litigants and the final resolution of disputes. This evolution finds its reflection in additional powers granted to the administrative courts, such as the possibility to ignore a defect ('*een gebrek passeren*'), to maintain certain legal effects of an annulled

[2] For a more elaborated analysis of this evolution and of the implications on the competences of the administrative courts in the Netherlands, see amongst others J.C.A. DE POORTER and K.J. DE GRAAF, *Doel en functie van de bestuursrechtspraak: een blik op de toekomst*, The Hague, Council of State, 2011, 260 p.; L.M. KOENRAAD and J.L. VERBEEK, "Finaliseren doe je zo! De rol van de bestuursrechter bij het vaststellen van feiten na de constatering dat het bestreden besluit een gebrek kent", *NJB* 2006, no. 30, p. 69-80; A.R. NEERHOF, "Van effectieve bestuursrechters en geschillen die voorbijgaan...? De bevoegdheden van de bestuursrechter om geschillen definitief op te lossen", *JBplus* 1999, no. 2, p. 71- 87.

[3] The new primary function of administrative courts is reflected in the Act of 4 June 1992 holding the general rules of administrative law ('*Algemene wet bestuursrecht*').

decision ('*gedektverklaring*'), to decide instead of the authority by substituting the annulled decision by the judgment ('*zelf in de zaak voorzien*') and to order the authority to take a new decision. In 2010, the administrative loop was added to the Dutch administrative courts' toolbox as an additional instrument to achieve a final dispute resolution.[4]

2. Inspired by this evolution in the Netherlands and confronted with similar criticism on the cumbersome and inefficient administrative procedures, the Belgian legislators also intended to achieve a shift in the task of the administrative courts by attributing additional tools to the administrative courts with the aim to increase suitability, efficiency and expediency of administrative judicial procedures. One of these new tools is the administrative loop, which has in the meanwhile been well received and implemented in the Netherlands.

In Belgium, however, this new instrument – which was given a considerably more limited scope – has given rise to fundamental objections from the perspective of the rule of law and fundamental (procedural) rights. These objections amounted in proceedings before the Belgian Constitutional Court, that agreed with some of the arguments of the applicants and annulled the Flemish and federal statutes introducing the administrative loop up to three times.

3. This contribution clarifies the annulled Flemish and federal administrative loop and analyses the rulings of the Constitutional Court. Furthermore, it assesses whether the latest version of the administrative loop, which was introduced by the Flemish legislator

[4] Act of 14 December 2009 completing the General act on administrative law with a regulation for the remediation of defects in a decision during the proceedings before the administrative court. This act entered into force on 1 January 2010. See amongst others B.J. VAN ETTEKOVEN and A.P. KLAP, "De bestuurlijke lus als rechterlijke (k)lus", *AA* 2010, p. 235-244; L.M. KOENRAAD, "De toekomst van de bestuurlijke lus", *AA* 2010, p. 235-240; J.E.M. POLAK, "Effectieve geschillenbeslechting: bestuurlijke lus en andere instrumenten", *NTB* 2011/1-2, p. 2-9; R. ORTLEP, "Bestuurlijke lus: terugkomen op een in een tussenuitspraak neergelegde bindende eindbeslissing", *JBplus* 2012, p. 219-234.

taking into account these rulings, succeeds in meeting the fundamental objections of the Constitutional Court.

II. THE FLEMISH ADMINISTRATIVE LOOP

1. THE FLEMISH LEGISLATION

1.1. The Council for Permit Disputes

4. In Belgium, the administrative loop was firstly introduced by the Flemish legislator as a new tool for the Council for Permit Disputes ('*Raad voor Vergunningsbetwistingen*').

5. The Council for Permit Disputes, being an administrative court on urban planning, adjudicates by means of judgments on actions for annulment of permit decisions, validation decisions and registration decisions. As a rule, the Council for Permit Disputes annuls a contested decision when it is unlawful, meaning when it is contrary to regulations, urban provisions or principles of good government. It may also order the suspension of its enforcement.[5] From the outset, the Council has had an additional tool at his disposal that aims to achieve a final dispute resolution: a right of injunction, allowing it to oblige the authority to take a new decision within a certain time period, whereby it can give well-

[5] Previously Articles 4.8.3(1)(1) and 4.8.13 of the Flemish Town and Country Code; currently Articles 35 and 40 of the decree on the organisation and the procedure of certain Flemish administrative courts.

defined instructions with regard to that new decision (both on the procedure as on the substance).[6]

6. By decree of 6 July 2012[7], the Flemish legislator added two new instruments to the Council for Permit Disputes' toolbox:: the mediation[8] and the so-called "administrative loop"[9].

This initial administrative loop is defined as "offering the authority granting the permits at every stage of the procedure by interlocutory judgment the possibility to remedy, or arrange to have remedied, a defect in the contested decision within the time period that the Council determines".[10] The introduction of this new tool is justified in order "to prevent

[6] Previously Article 4.8.3(1)(2) of the Flemish Town and Country Code; currently Article 37 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[7] Decree of 6 July 2012 amending various provisions of the Flemish Town and Country Code, with regard to the Council for Permit Disputes (published in the Belgian Official Journal on 24 August 2012). The decree entered into force on 1 September 2012 (see Article 60 of the administrative act of 13 July 2012 of the Flemish government on the procedure before the Council for Permit Disputes).

[8] Previously Article 4.8.5 of the Flemish Town and Country Code; currently Article 42 of the decree on the organisation and the procedure of certain Flemish administrative courts. The mediation falls outside the scope of this contribution.

[9] See amongst others the following contributions about this first version of the administrative loop in the Flemish Town and Country Planning Code: H. BORTELS, "De bestuurlijke lus: aanzet naar een meer oplossingsgerichte bestuursrechter?", *TBP* 2013/5, p. 305-316; S. BOULLART, "De bestuurlijke lus en de bemiddeling als instrumenten tot oplossing van bestuursgeschillen", in X, *Actualia rechtsbescherming tegen de overheid*, Antwerp, Intersentia, 2014, p. 47-80.

[10] Article 4.8.4(1) of the Flemish Town and Country Planning Code.

unnecessary new procedures, to gain time and to increase and expedite legal certainty"[11], thus offering an efficient and final dispute resolution.

The administrative loop, as introduced by the decree of 6 July 2012 in Article 4.8.4 of the Flemish Town and Country Planning Code, can only be applied if certain conditions have been fulfilled:

(i) interested parties, namely who could bring an action before the Council for Permit Disputes against the contested decision, must not be disproportionately prejudiced by the application of the administrative loop;

(ii) the irregularity in the contested decision must be remediable; it follows from the parliamentary proceedings that the loop shall essentially apply to remedy formal defects, such as the failure to state reasons, to ask for an obligatory opinion, to answer to raised objections or to take given advice into consideration[12];

(iii) the result of remedying the irregularity must be that "the decision can be maintained"; hence, the decision must remain unchanged in substance;

(iv) the Council for Permit Disputes must investigate all grounds before proposing to use the administrative loop; there is no use in applying the administrative loop if the decision must be annulled on other grounds.

The Council for Permit Disputes may propose the application of the administrative loop by interlocutory decision "at any stage of the procedure", and thus even before the parties have been able to debate the issue. Only after the authority concerned has used the opportunity to remedy the irregularity, can parties make their comments known.

[11] *Parl. Doc.*, Flemish Parliament, 2011-2011, no. 1509/1, p. 9.

[12] *Parl. Doc.*, Flemish Parl0iament, 2011-2011, no. 1509/1, p. 4 and no. 1509/3, p. 3.

If the reported irregularity is fully remedied by the application of the administrative loop, the remedy will apply with retroactive effect and the Council for Permit Disputes will dismiss the appeal. Following the general rule, this entails that the applicant - being the losing party - would be condemned to pay the procedural costs[13]. The legislator, however, inserted an exception to this rule: in case the administrative loop has been used successfully, "the Council *can* charge the costs to the authority granting the permits".

7. This Flemish version of the administrative loop, which finds its origin in the Dutch administrative procedural law, differs in many respects from the Dutch loop.[14]

A substantial difference is that the contested decision has to be maintained when applying the Flemish administrative loop. Hence, unlike under the Dutch legislation, remedying the irregularity can never lead to a new decision with a potentially altered substance. In case the authority, following the implementation of the interlocutory decision (for example by taking ignored objections or lacking advice into consideration), finds that the contested decision cannot be upheld but must be altered in substance, the irregularity cannot be remedied during the proceedings and the contested decision will be annulled.

Another important difference with the Dutch loop relates to the final judgment of the administrative court after the administrative loop has been used successfully. Whilst the Dutch administrative court can find the appeal well-founded and annul the contested (and remedied) decision with maintenance of the effects thereof, the Flemish Council can only

[13] It relates to the cause list fee ('*rolrecht*') and, eventually, the witness expenses ('*getuigengeld*').

[14] For a comparison between the Dutch administrative loop and the initial Flemish loop, see H. BORTELS, *l.c.*, p. 305-316 and CH.W. BACKES, E.M.J. HARDY, A.M.L. JANSEN, S. POLLEUNIS, R. TIMMERMANS, M.A. POORTINGA and E. VERSLUIS, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking*. The Hague, Ministry of Security and Justice, 2014, p. 117-127.

dismiss the appeal. Hence, regardless of the fact that the applicant justly argued that the contested decision was irregular, the appeal will be declared unfounded.

Due to these peculiarities, the Flemish administrative loop has a very limited scope, as it can only be used to remedy irregularities which had no impact on the substance of the decision.[15] Moreover, a much more criticisable consequence is that the Flemish loop only seems to serve the interests of the administrative authorities, who are given the opportunity by the administrative court to rectify defects, with the sole aim to anticipate a potential annulment of the contested decision instead of improving that decision.

1.2. The Flemish Administrative Courts

8. By decree of 4 April 2014[16], the Flemish legislator harmonised the organisation and the procedure of the existing Flemish administrative courts. This involved the aforementioned Council for Permit Disputes, as well as the Environmental Enforcement

[15] Between its entry into force on 1 September 2012 and its annulment by judgment no. 74/2014 of 8 May 2014, the administrative loop was used only twice by the Council for Permit Disputes, be it unsuccessfully due to the retroactive annulment of the administrative loop. In both cases, the irregularity concerned a defect in the formal reasoning of the contested decision. In seven other judgments which were pronounced before the annulment judgment no. 74/2014, the Council rejected the request for application of the administrative loop. In five of these judgments, the Council considered that the established irregularity was not remediable. See B. VANHEUSDEN, "De moeizame start van de bestuurlijke lus: wie durft er nog te lussen?", in J. ACKAERT and others., *Liber Amicorum Anne Mie Draye*, Antwerp, Intersentia, 2015, p. 183-184.

[16] Decree of 4 April 2014 on the organisation and the procedure of certain Flemish administrative courts (published in the *Belgian Official Journal* on 1 October 2014).

Council ('*Milieuhandhavingscollege*')[17] and the Council for Election Disputes ('*Raad voor Verkiezingsbetwistingen*'). Since its entry into force[18], the decree jointly regulates the competences and procedures of these administrative courts.

9. The decree on the Flemish administrative courts provides these courts with several tools, besides the competence to annul decisions, in order to allow them to reach a final settlement of the dispute between the authority and the private party.[19] These tools are again inspired by the Dutch administrative procedural law.

Hence, the right of injunction and the application of the administrative loop have been reintroduced before the Council for Permit Disputes and have been extended to the Environmental Enforcement Council.[20] New is that both courts can connect a lump sum to the injunction.[21] In addition, both courts have the authority to temporarily or definitively maintain certain effects of the annulled decision when exceptional reasons justify an impairment of the legal principle.[22] Furthermore, the Council for Permit Disputes has the authority to use mediation, to suspend the enforcement of a decision and to order interim injunction relief.[23] Finally, the Environmental Enforcement Council can, when annulling a

[17] The Environmental Enforcement Council is an administrative court that adjudicates by means of judgments on appeals against the decisions of the regional authority on the imposition of an alternative or exclusive administrative fine, and on the deprivation of the benefits.

[18] The decree entered into force, partly on 1 November 2014, partly on 1 January 2015 (see Articles 36 and 37 of the administrative act of 16 May 2014 of the Flemish government).

[19] *Parl. Doc.*, Chamber, 2013-2014, no. 2383/1, p. 11-12.

[20] Articles 34 and 37 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[21] Article 40 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[22] Article 36 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[23] Articles 40 to 43 of the decree on the organisation and the procedure of certain Flemish administrative courts.

contested decision, decide instead of the authorities on the amount of the imposed administrative fine and on the deprivation of the benefits.[24]

10. The Articles 33(2) and 34 of the decree on the Flemish administrative courts, concerning the administrative loop, were almost completely copied from the previous legislation in the Flemish Town and Country Planning Code.[25] Hence, reference can be made to what is mentioned above.

2. THE JUDGMENTS NO. 74/2014 OF 8 MAY 2014 AND NO. 152/2015 OF 29 OCTOBER 2014 OF THE CONSTITUTIONAL COURT

11. Following the appeal of several individuals and non-profit associations, the Constitutional Court was brought to decide on the constitutionality of the Flemish administrative loop. The applicants argued that the contested provisions violated several constitutional rights and principles, such as the principle of the rule of law and fundamental procedural rights.

[24] Article 44 of the decree on the organisation and the procedure of certain Flemish administrative courts.

[25] At the time of the adoption of the decree on the Flemish administrative courts, the case on the administrative loop, as laid down in the Flemish Town and Country Planning Code, was indeed still pending before the Constitutional Court.

In its judgments no. 74/2014 of 8 May 2014 and no. 152/2015 of 29 October 2014 (the first judgment relating to the initial administrative loop in the Flemish Town and Country Planning Code, the second judgment relating to the almost identical loop in the decree on the Flemish administrative courts), the Constitutional Court agrees with four fundamental objections raised against the administrative loop, as regulated in the Flemish legislation, and hence annuls the contested provisions.[26]/[27]

2.1. Infringement of the principles of judicial independence and impartiality and of separation of powers

[26] See amongst others the following comments on these judgments: F. Belleflamme and J. Bourtembourg, "Requiem pour la boucle?", *J.T.* 2014, p. 480-483; S. BOULLART, "De bestuurlijke lus bij de Raad voor Vergunningsbetwistingen vernietigd. Wat met de bestuurlijk lus bij de Raad van State?", *RABG* 2014, p. 1383-1388; F. EGGERMONT, "De bestuurlijke lus ... een dode mus", *RW* 2014-15, no. 20, p. 784-789; P. LEFRANC, "De bestuurlijke lus van de Raad voor Vergunningsbetwistingen opgedoekt", *T.M.R.* 2014/5, p. 440-447; S. LUST and S. BOULLART, "De bestuurlijke lus bij de Raad voor Vergunningsbetwistingen vernietigd. Wat met de bestuurlijke lus bij de Raad van State?", *RABG* 2014, no. 20, p. 1383-1388; D. RENDERS, "La boucle administrative ne serait-elle pas bouclée?", *J.T.* 2014, p. 1201-1205; A.S. VANDAELE, "Grondwettelijk Hof 8 mei 2014, nr. 74/2014: de vernietiging van de bestuurlijke lus bij de RVVB als voorbode voor de vernietiging van de bestuurlijke lus bij de RVS?", *CDPK* 2014, no. 3, p. 428-439; T. VANDROMME, "Bestuurlijke lus Raad voor Vergunningsbetwistingen sneuvelt bij Grondwettelijk Hof", *Juristenkrant* 2014, no. 290, p. 1 and 4

[27] For an analysis of the Dutch administrative loop in the light of the fundamental objections of the Belgian Constitutional Court, see CH.W. BACKES and A.M.L. JANSEN, note under judgment no. 74/2014 of the Belgian Constitutional Court, *AB Rechtspraak Bestuursrecht* 2014, no. 44, p. 2571-2577; CH.W. BACKES, E.M.J. HARDY, A.M.L. JANSEN, S. POLLEUNIS, R. TIMMERMANS, M.A. POORTINGA and E. VERSLUIS, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking*. The Hague, Ministry of Security and Justice, 2014, p. 122-127.

12. The Court judges that the contested provisions infringe the principles of judicial independence and impartiality, as well as the principle of separation of powers[28], which it deems fundamental to the rule of law.[29]

The principles of judicial independence and impartiality are violated as the administrative court, by suggesting the use of the administrative loop, already reveals its position on the outcome of the lawsuit. Such an interlocutory decision implies that the court is of the opinion that the contested decision is irregular, that this irregularity is remediable and that the contested decision can be upheld if remedied. However, the interlocutory decision is not binding regarding these issues, as it is only a preliminary judgment by the administrative court. This is, according to the Constitutional Court, unacceptable in the light of the principle of impartiality.

The violation of the principle of separation of powers can be deduced more subtly from the reasoning of the Constitutional Court. The Court emphasizes that the administrative court cannot substitute its assessment for the discretionary power of assessment of the administrative authority. Establishing the substance of a discretionary decision, more particularly when remedying an irregularity, is a matter for the administrative authorities rather than for the courts. The Court seems to be of the opinion that the administrative court, when suggesting the use of the administrative loop which should nevertheless lead to the same decision, interferes with the substance of the discretionary decision. Whilst it is a matter for the authority to decide whether the remediation of the irregularity has an impact on the substance of the contested decision, the authority is clearly encouraged by the administrative court to maintain the contested decision; only under this condition the administrative loop can be used successfully. Such

[28] The infringement of the separation of powers is not explicitly stated by the Court, but can clearly be deducted from its reasoning in the judgments concerned.

[29] Judgment no. 74/2014, B.7.1-B.7.4 and judgment no. 152/2015, B.12.1-B.12.4.

an interference by the administrative court with the discretionary power of the administrative authorities is deemed incompatible with the fundamental principle of separation of powers.

2.2. Infringement of the rights of defence, the right to adversarial proceedings and the right of access to court

13. The Constitutional Court judges moreover that the contested provisions infringe the rights of defence, the right to adversarial proceedings and the right of access to court in two ways.[30]

The first problem lies in the fact that the contested provisions do not guarantee an adversarial debate on the opportunity to use the administrative loop. By virtue of these provisions, the parties can only give their opinion after the administrative loop has been applied. The Court is of the opinion that the administrative court, by giving the opportunity to apply the administrative loop, adduces a fact that serves to influence the settlement of a dispute. Pursuant to the case law of the European Court of Human Rights, the right to adversarial proceedings means that the parties should be able to debate on this new fact. However, this is not guaranteed by the contested provisions.[31]

[30] Judgment no. 74/2014, B.8.1-B.8.5 and judgment no. 152/2015, B.13.1-B.13.5.

[31] The Court is of the opinion that the mere judgment of the administrative court that interested parties cannot be prejudiced in a disproportionate way by the application of the administrative loop, does not suffice. It is indeed a matter for the parties, and not for the administrative court, to assess whether a new fact requires observations or not.

The Constitutional Court finds a second infringement of the aforementioned principles in the fact that the contested provisions do not offer interested parties the possibility to appeal against a decision that was taken by applying the administrative loop. The Court holds that the right of access to court is not guaranteed with respect to such decisions, which is not commensurate with the objective pursued by the Flemish legislator to streamline and speed up the settlement of administrative disputes.

2.3. Infringement of the formal obligation to state reasons

14. The Constitutional Court also finds an infringement by the contested provisions of the formal obligation to state reasons.[32]

The Act of 29 July 1991 on the formal reasoning of administrative acts generalizes the obligation to formally state the reasons for all administrative acts of individual scope. The formal reasoning of these acts is considered a subjective right. An individual is thus given additional guarantees against arbitrary administrative acts of individual scope. The Court reads in the aforementioned Act of 29 July 1991 the right of the addressee of the act, as well as any other party, to take immediate cognizance of the reasons justifying the decision by mention of these reasons in the act proper. This right strengthens the judicial control of administrative acts of individual scope and the observance of the principle of equality of arms.

The Constitutional Court judges that the contested provisions impair this right by allowing the authority to rectify an individual administrative act, which is not formally reasoned, by supplying the reasons after the application of the administrative loop. The

[32] Judgment no. 74/2014, B.9.1-B.9.5 and judgment no. 152/2015, B.14.1-B.14.7.

Court is of the opinion that the formal obligation to state reasons, which is meant to enable the individual to assess whether there are grounds for lodging the available appeals, would be pointless if the individuals only learn the reasons on which the decision is based after having lodged an appeal.[33]

15. In its judgment no. 74/2014, the Constitutional Court also finds an infringement of Article 6(9) of the Aarhus Convention on access to information, public participation in decision-making and access to court in environmental matters.[34] This provision requires explicitly that the text of the administrative decision, insofar it falls within the scope of the Treaty, is made accessible to the public "along with the reasons and the considerations on which the decision is based".

2.4. Infringement of the right of access to court by the provisions on the procedural costs

16. Finally, the Constitutional Court judges that the provisions with regard to the settlement of the procedural costs when the administrative loop has been applied, infringe in a discriminatory manner the right of access to court.[35]

[33] The Constitutional Court also judges that the contested provisions, by reducing the protection that is offered to the litigants by the formal obligation to state reasons, violate the federal competence with regard to the formal motivation.

[34] Judgment no. 74/2014, B.9.5.

[35] Judgment no. 74/2014, B.12.1-B.12.4 and judgment no. 152/2015, B.18.1-B.18.4.

In case the administrative court finds a contested decision irregular and no application is made of the administrative loop, the court will annul the irregular decision. Following the general rule on the settlement of the procedural costs, the authority that took the annulled decision – being the losing party – will be condemned to pay the procedural costs.

However, when the administrative loop has been applied and the irregularity remedied, the administrative court will dismiss the appeal. Consequently, the applicant is considered the losing party. The contested provisions provide the option – not obligation – for the administrative court to deviate from the general rule on the settlement of the procedural costs and condemn the 'winning' public authority to pay the procedural costs. According to the Constitutional Court, the fact that the contested provisions do not exclude the possibility that the applicant is condemned to pay the procedural costs, impairs the right of equal access to court without any reasonable justification.

2.5. Conclusion

17. Given the established infringements of the principle of the rule of law and of fundamental procedural rights, the Constitutional Court decides to annul the administrative loop as laid down in the contested Flemish provisions.

It is important to note that these unconstitutionalities are all linked to the peculiarities of this Flemish administrative loop, which are distinct from the Dutch loop. The annulled Flemish loop can only be applied when the contested and remedied decision is maintained. In case of a successful remediation, the administrative court must dismiss the appeal, without the interested parties being offered a possibility of appeal against the remedied decision.

18. Notwithstanding these fundamental objections, the Constitutional Court explicitly emphasizes that "the legislator's efforts to arrive at an effective and definitive dispute settlement should be applauded".[36] This can be seen as an incitement to the Flemish legislator to reintroduce the administrative loop, be it with respect of the aforementioned fundamental constitutional rights and principles.

III. THE FEDERAL ADMINISTRATIVE LOOP

1. THE FEDERAL LEGISLATION

19. Before the Flemish version of the administrative loop was declared unconstitutional by the Constitutional Court, the federal legislator introduced its own version of the administrative loop with the Administrative Litigation Section of the Council of State.[37]/[38]

[36] Judgment no. 74/2014, B.14.

[37] See amongst others the following contributions about the federal administrative loop: A. CAMBIER, A. PATERNOSTRE and T. CAMBIER, "Les accessoires de l'arrêt d'annulation et la boucle administrative", in F. VISEUR and J. PHILIPPART, *La justice administrative*, Brussels, Larcier, 2015, p. 233-335 ; P. LEFRANC, "Ceci n'est pas une boucle administrative", in M. VAN DAMME, *De hervorming van de Raad van State*, Bruges, die Keure, 2014, p. 51-94; L. LOSSEAU, "L'introduction de la boucle administrative au sein des lois coordonnées sur le Conseil d'Etat", *Ann. dr. Louvain* 2013, p. 523-580.

[38] For a comparison between the federal administrative loop and the Dutch administrative loop, see CH.W. BACKES, E.M.J. HARDY, A.M.L. JANSEN, S. POLLEUNIS, R. TIMMERMANS, M.A. POORTINGA and E. VERSLUIS, *Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking*. The Hague, Ministry of Security and Justice, 2014, p. 127-133.

20. The Administrative Litigation Section of the Council of State is an administrative court that adjudicates by means of judgments on annulment actions for infringement of substantive forms or forms prescribed under pain of nullity, excess or misuse of power, instituted against acts and regulations.[39]

As a rule, the Administrative Litigation Section annuls a contested administrative act if it is unlawful. It may also order the suspension of its enforcement, as well as interim injunction relief (‘*voorlopige maatregelen*’).[40]

21. The Act of 20 January 2014 reforming the jurisdiction, procedural rules and organization of the Council of State[41] provides the Administrative Litigation Section with additional instruments or streamlines the existing instruments in order to make the settlement of administrative disputes more effective. Given the far-reaching and sometimes undesirable consequences of an annulment decision, the legislator wanted to refine the competences of the Administrative Litigation Section of the Council of State, so that it can differentiate as to the appropriate measure according to the established illegality.[42] Hence, the requirement of an interest in the ground, as this emerges from the established case law of the Administrative Litigation Section, has been embedded in the law. This requirement entails that an irregularity will not give rise to annulment if it did not have an impact on the scope of the decision taken, did not deprive the parties concerned of a guarantee or did not have the effect of influencing the authority of the originator of the act.[43] Furthermore, the

[39] See Article 14(1)(1) of the coordinated acts on the Council of State. The existence of the Council of State is laid down in Article 160 of the Constitution.

[40] See articles 14 and 17 of the coordinated acts on the Council of State.

[41] Published in the *Belgian Official Journal* on 3 February 2014

[42] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 2-3.

[43] Article 14(1)(2) of the coordinated acts on the Council of State, as inserted by Article 2(3) of the Act of 20 January 2014.

right of the Administrative Litigation Section to maintain the effects of annulled regulations has been extended to those of annulled individual acts.[44]

Another new instrument is the administrative loop, which was introduced in Article 38 of the coordinated acts on the Council of State and defined as "ordering the respondent by interlocutory judgment to remedy, or arrange to have remedied, a defect in the contested act or contested regulation".[45] The introduction of this new instrument was justified very briefly during the parliamentary proceedings. The legislator referred to the administrative loop in the Dutch and Flemish legislation, and stated that "*[t]he Council of State is now authorized to propose the respondent, in the context of a lawsuit of which it is seized, to make use of the possibility to remedy a reported irregularity during the course of the proceedings in order to avoid annulment"*.[46]

22. Clearly the federal legislator, when introducing this new instrument, was more inspired by the Flemish version of the administrative loop than by the Dutch version.[47]/[48]

[44] Article 14*ter* of the coordinated acts on the Council of State, as amended by Article 2(3) of the Act of 20 January 2014.

[45] Between its entry into force on 1 March 2014 and its annulment by judgment no. 103/2015 of 16 July 2015, the Administrative Litigation Section of the Council of State had to rule twice on the substance of a request for application of the administrative loop. In both cases, the Council of State judged that the established irregularity was not remediable. See B. VANHEUSDEN, *l.c.*, p. 203.

[46] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 2-3.

[47] This was explicitly stated by the legislator during the parliamentary proceedings: see *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 28.

[48] The unconstitutionality of the federal administrative loop, taking into account the findings of the Constitutional Court in its judgments nos. 74/2014 and 152/2015, was already put forward in the following contributions: F. Belleflamme and J. Bourtembourg, *l.c.*, p. 480-483; S. BOULLART, *l.c.*, p. 1383-1388; F. EGGERMONT, *l.c.*, p. 440-447; P. LEFRANC, "Heeft de bestuurlijke lus nog een toekomst in de Raad van State?", in B. GOOSSENS, Y. LOIX and F. SEBREGHTS, *Tussen algemeen en belang en toegewijde zorg. Liber amicorum Hugo Sebreghts*,

Following the example of the initial Flemish loop, the federal loop can only be applied if the irregularity is remediable. Article 38 of the coordinated acts explicitly provides that this is not the case if the authority involved in the procedure does not have the power to remedy the defect. Additionally, the irregularity must be remediable within a reasonable time period (three months as a rule).

Furthermore, the result of remedying the irregularity must also be that the contested administrative act remains unchanged in substance. The parliamentary proceedings clarify that satisfying these two conditions entails that the federal administrative loop can only be applied to remedy irregularities that occurred at the end of the administrative procedure, being defects of little significance. Hence, the administrative loop cannot be applied to remedy a lacking or irregular impact study or hearing, since the observance of these formalities may alter the contested decision in substance,[49] nor can the application of the loop give rise to new arguments. Yet the legislator considers the failure to state reasons remediable, as long as the reasons were mentioned in the administrative file. Another example of a remediable defect is the problem of missing or illegible signatures.[50]

Another condition for the application of the federal administrative loop is that it should lead to the final settlement of the pending lawsuit. Hence, just as imposed on the Flemish administrative authorities, the Administrative Litigation Section of the Council of State must investigate whether any other grounds are well-founded before proposing to use the administrative loop.

Antwerp, Intersentia, 2014, p. 205-213; S. LUST and S. BOULLART, *l.c.*, p. 1383-1388; D. RENDERS, *l.c.*, p. 1205-1211; A.S. VANDAELE, *l.c.*, p. 428-439.

[49] It was also noted that an impact study cannot be performed in the required short period of time.

[50] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 29.

Finally, following the example of the Flemish loop, the successful application of the federal administrative loop will have retroactive effect, and the Administrative Litigation Section will have to dismiss the appeal.

23. While the main features of the Flemish and the federal administrative loop are the same, the federal legislator did depart in certain aspects from the (later on) annulled Flemish loop.

The Administrative Litigation Section *orders* the respondent authority – and does not merely give it the possibility – to apply the administrative loop. This mandatory force of the application of the administrative loop seems however meaningless, given that Article 38 of the coordinated acts explicitly provides that the administrative loop cannot be applied if the respondent authority refuses.[51]

Furthermore, the federal administrative loop cannot, like the Flemish loop, be used "at every stage of the procedure". By contrast, it is explicitly provided that the loop can only be used after the parties have had the opportunity to make their comments known.

Unlike the annulled Flemish legislation, Article 38 of the coordinated acts on the Council of State does not include the condition that the interested parties must not be disproportionately harmed by the application of the administrative loop. The federal legislator considered it unjustified to take the interests of third parties into consideration when deciding to apply the administrative loop, as these same third parties did not appeal against the contested decision, which must remain unchanged in substance upon application of the administrative loop.[52]

[51] The condition of consent was introduced by the legislator in order to guarantee that the application of the administrative loop is meaningful and can be successfully applied (*Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 28).

[52] *Parl. Doc.*, Senate, 2012-2013, no. 5-2277/1, p. 29.

Finally, unlike the Flemish administrative loop, the federal loop can result in a new act or regulation, in which case the appeal will be extended to include that act or regulation. However, according to the conditions mentioned above, this new decision must have the same substance as the contested decision. Furthermore, the fact that the remedy would involve passing a new act or regulation does not have an impact on the final judgment of the Council of State, which will dismiss the appeal if the defect has been fully remedied, without the possibility for interested third parties to lodge an appeal against this new act or regulation.

2. THE JUDGMENT NO. 103/2015 OF 16 JULY 2015 OF THE CONSTITUTIONAL COURT

24. Given the similarity of the federal and the Flemish administrative loop's main features, it did not come as a surprise that the Constitutional Court – deciding on an appeal introduced by several individuals, non-profit associations and bar associations against this federal legislation – also declared the federal version of the administrative loop unconstitutional on nearly identical grounds.[53]

25. Indeed, as under the annulled Flemish legislation, the result of the application of the federal administrative loop must be that the contested act remains unchanged in

[53] See amongst others the following comments on this judgment: C. DE WOLF, "De bestuurlijke lus is dood, lang leve de bestuurlijke lus", *TOO* 2015, no. 4, p. 467-475; J. GOOSSENS, "Grondwettelijk Hof vernietigt bestuurlijke lus bij Raad van State. Overige bepalingen grondwettig", *Juristenkrant* 16 september 2015, no. 313, p. 9; M. Uyttendaele, "Sauver la boucle administrative fédérale", *A.P.* 2014, p. 398-406 ; B. VANHEUSDEN, *l.c.*, p. 202-204; J. VANHOENACKER, "Over de bestuurlijke lus en het Verdrag van Aarhus", *M.E.R.* 2015, p. 323-326.

substance. Consequently, the same fundamental problem arises. The Council of State, when ordering the use of the administrative loop, reveals its position on the outcome of the lawsuit and interferes with the discretionary decision by the administrative authority. Hence, for the same reasons and in the same words as in the judgment nos. 74/2014 and 152/2015, the Constitutional Court judges that the contested federal provision infringes the principles of judicial independence and impartiality and of separation of powers.[54]

26. With regard to the rights of defence, the right to adversarial proceedings and the right of access to court, the contested federal provision remedied one of the problematic aspects under the annulled Flemish legislation, by explicitly providing that the administrative loop can only be applied after the parties have had the opportunity to make their comments known. Hence, the contested provision safeguards the right to adversarial proceedings, which the Constitutional Court confirmed.[55]

However, as under the Flemish legislation, the contested federal provision does not offer interested parties the opportunity to appeal against a decision that was taken with application of the administrative loop. The federal provision does not even contain the condition that the interested parties must not be disproportionately prejudiced by the application of the administrative loop. For this reason, the Constitutional Court judges that also the federal provision impairs the right of access to court.[56]

27. Finally, as under the annulled Flemish provisions, the failure to state reasons is considered a remediable defect. Whilst the parliamentary proceedings of the federal provision clarify that the use of the administrative loop cannot lead to new arguments, it did allow that the failure to state reasons is remedied, as long as these reasons were mentioned

[54] Judgment no. 103/2015, B.11.1-B.11.4.

[55] Judgment no. 103/2015, B.12.3.

[56] Judgment no. 103/2015, B.12.4-B.12.5.

in the administrative file. Hence, the contested federal provision allows that the authority only notifies the reasons on which the decision is based after an appeal has been lodged. This impairs the right of the addressee of the act and of all interested parties to take immediate cognizance of the reasons justifying the decision. For this reason, the Constitutional Court judges that the contested federal provision, in the same way as the annulled Flemish provisions, infringes the formal obligation to state reasons, as enshrined in the Act of 29 July 1991 and in Article 6(9) of the Aarhus Convention.[57]/[58]

28. Although the Constitutional Court once more applauds the legislator's efforts to arrive at an effective and definitive dispute settlement, it annuls the contested federal provision given the aforementioned infringements of the rule of law and the fundamental procedural rules.[59]

IV. THE FLEMISH ADMINISTRATIVE LOOP REVISITED

29. By decree of 3 July 2015[60], the Flemish legislator accepted the invitation of the Constitutional Court to makeover the administrative loop, as laid down in the Articles 33(2)

[57] Judgment no. 103/2015, B.13.1-B.13.4.

[58] In the judgment no. 103/2015, the Constitutional Court did not rule on the settlement of the procedural costs in case application is made of the administrative loop.

[59] Judgment no. 103/2015, B.15.

[60] Decree of 3 July 2015 amending Article 4.8.19 of the Flemish Town and Country Planning Code and the decree of 4 April 2014 on the organisation and the procedure of certain Flemish administrative courts (published in the Belgian Official Journal on 16 July 2015). The Articles 5 and 6 of that decree, which reintroduce the

and 34 of the decree on the Flemish administrative courts and later on annulled by judgment no. 152/2015.[61] The new version of the administrative loop differs on several - essential - aspects from the original one, in which way the legislator aimed to meet the objections of the Constitutional Court in the aforementioned judgments.[62]

30. In order to remedy the infringement of the principles of judicial independence and impartiality and of separation of powers, the new provision stipulates that the administrative court can only suggest the use of the administrative loop if it "establishes that it must annul the contested decision by reason of illegality".

In this way, the legislator ensures that the administrative court does not – as in the annulled provisions – merely reveal its position on the outcome of the lawsuit when initiating the administrative loop, without taking a final and binding decision. On the contrary, the initiation of the administrative loop now presupposes that the administrative court in the interlocutory judgment decides in a final way – after the parties were able to debate on it – on all legal issues which arise with regard to the contested decision. More specifically, the administrative court must decide that the contested decision is irregular, that this irregularity – which is deemed to be reparable – will lead to the annulment of the contested decision, and, if necessary, that all other means against the contested decision are unfounded. In this way, the new version of the administrative loop does not entail a preliminary judgment by the administrative court with regard to the contested decision, but

administrative loop, entered into force on 1 January 2016 (see Article 17(1) of the administrative act of 2 October 2015 of the Flemish Government).

[61] See about this new version of the administrative loop: G. VERHELST, "Raad voor Vergunningsbetwistingen en Milieuhandhavingscollege krijgen bestuurlijke lus 2.0", *RW* 2015-16, no. 24, p. 923-939; X., "Bestuurlijke lus bij Milieuhandhavingscollege en Raad voor Vergunningsbetwistingen", *NjW* 2015, no. 327, p. 582-583;

[62] The parliamentary proceedings clarify extensively in which way the new provisions meet the objections of the Constitutional Court (see *Parl. Doc.*, Flemish Parliament, 2014-2015, no. 354/1, p. 3-22).

only binding decisions. Consequently, the principle of impartiality seems to be complied with.

More importantly, it is no longer required that the result of remedying the irregularity must be that the decision is maintained. By contrast, the new provision lays down that the application of the administrative loop must result in a new decision, the so-called "remedying decision". This remedying decision must not have the same substance as the contested decision. It is left to the discretionary power of assessment of the administrative authority to decide whether the remedying of the irregularity has an impact on the substance of the contested decision. In this way, the separation of powers between the judicial and the executive powers seems to be fully observed.

31. By virtue of this new provision, the appeal will be extended to include the remedying decision, so that the court can assess whether the established irregularity has been fully remedied, and whether it is free from newly alleged irregularities. If this is not the case, the court must annul both the contested decision and the remedying decision, unless it decides to apply the administrative loop once more. If, on the other hand, the court considers that the established irregularity has been fully remedied and that the remedying decision is not affected by newly alleged irregularities, the court will dismiss the appeal against the remedying decision. Also in that case, the court must – by virtue of the new Article 34 of the decree on the Flemish administrative courts – annul the contested (initial) decision, though it can decide to maintain certain effects thereof.

Hence, the application of the administrative loop will always lead to the annulment of the contested (initial) decision, which has indeed been found irregular in the interlocutory decision. In this way, the administrative loop no longer only seems to serve the interests of the authority, which must be applauded from the perspective of the principle of separation of powers.

32. In order to remedy the established infringements of the rights of defence, the right to adversarial proceedings and the right of access to court, the Flemish legislator obeyed to the requirement of the constitutional court to organize an adversarial debate on

the application of the administrative loop. Hence, the new Article 34(2) and (3) of the decree on the Flemish administrative courts explicitly provides that the administrative loop can only be applied after all parties have had the opportunity to make known there point of view about the use of that instrument, both written and orally. In case the parties have not already discussed this issue in their written submissions, the administrative court will by interlocutory judgment give them the opportunity to do so within a delay of 30 days. In addition, the administrative court will always organize a hearing about the application of the administrative loop, unless the parties waive this right. It is only after this hearing that the administrative court will decide by interlocutory judgment on the application of the administrative loop.[63]/[64]

Furthermore, the Flemish legislator remedied the established infringement of the right of access to court, by offering the interested parties the opportunity to appeal against the remedying decision. This decision must be published in accordance with the applicable rules upon notification of the final judgment of the administrative court that establishes the full remediation of the irregularity and dismisses the appeal against the remedying decision.[65]

[63] In this interlocutory judgment, the administrative court will also establish the timeframe within which the remedying decision must be taken. This deadline can be prolonged only once, and maximum for the duration of the initial time limit.

[64] After the administrative loop has been applied by the authority, the parties will also be given the opportunity to make known their opinion on the remedying decision, both written and orally (article 34(5) of the decree on the Flemish administrative courts).

[65] The obligation of publication and the possibility of appeal against the remedying decision, as laid down in the new Article 34(8) and (9) of the decree on Flemish administrative courts, only apply in the proceedings before the Council for Permit Disputes and not in the proceedings before the Environmental Enforcement Council. This is justified by the fact that the latter concerns two-party disputes between an authority that imposed an administrative fine and the addressee of that decision, which were already informed by the remedying decision and given the opportunity to debate on the legality thereof.

33. With regard to the established infringement of the formal obligation to state reasons, it must be noted that the parliamentary proceedings clarify that the failure to state reasons is again considered to be an irregularity that can be remedied by application of the administrative loop. However, given the specific features of the new loop, the remediation of this irregularity does no longer seem to raise objections from a constitutional point of view.

Indeed, the remediation does not take place within the initial (unreasoned) decision, so that the reasons are not merely added to the decision later on. By contrast, a new decision must be taken, which must remedy the established infringement of the formal obligation to state reasons and thus contain the required reasons. This remedying decision will be notified to the parties to the proceedings, which will have the opportunity to debate on the legality of this decision. Furthermore, in case the administrative court establishes the full remediation of the irregularity and upholds the remedying decision, the latter will be published in conformity with the applicable rules and the interested parties will have the opportunity to appeal against this decision before the administrative court.[66] In this way, the right of all interested parties to take immediate cognizance of the reasons of the decision by mentioning these reasons in the act proper seems to be observed.

34. Finally, the new Article 33(2) of the decree on the Flemish administrative courts provides that when the administrative loop has been applied, the administrative court *must* order the respondent authority to pay the procedural costs. By excluding the applicant being charged with the procedural costs, the Flemish legislator meets the objections found by the Constitutional Court with regard to the right of equal access to court.

[66] As explained in the previous footnote, this is only the case in proceedings before the Council for Permit Dispute.

V. CONCLUSION

35. As in the Netherlands, the introduction of the administrative loop in the Belgian administrative procedural law forms part of an overall evolution in the task of the administrative court from merely upholding of the objective law towards providing an efficient and final dispute resolution. Whilst this evolution is well received and seems to be successful in the Netherlands, there is much less academic and political support in Belgium for a more active role of the administrative court.

36. This lack of support might explain why the administrative loop was given a very limited scope in the initial Flemish legislation. Indeed, the administrative loop could only be applied if the decision, upon remediation of the irregularity, could be maintained. Hence, when the administrative court decided to suggest the use of the administrative loop, without this issue being the subject of an adversarial debate, it was predetermined that the result of the administrative loop should be that the decision remained unchanged in substance. In case of a successful remediation, the court would dismiss the appeal, without the interested parties being offered a possibility of appeal against the remedied decision.

It is exactly this limited scope of the Flemish administrative loop that resulted in fundamental objections from the perspective of the rule of law and fundamental procedural rights.

37. The federal legislator seemed to go further, by accepting that the application of the administrative loop could result in a new act or decision. However, he also provided that the contested decision must remain unchanged in substance and that, upon a successful application of the administrative loop, the appeal must be dismissed. Hence, the federal loop finally had the same limited scope as the initial Flemish loop. Furthermore, whilst the federal legislation did provide for on adversarial debate before the administrative court could order the application of the administrative loop, it did not guarantee the right of access to court with regard to the decision that was taken upon application of the administrative loop.

38. Given these fundamental constitutional obstacles, the Constitutional Court decided up to three times to annul the similar Flemish and federal legislation. Nonetheless, it explicitly encouraged the legislator in its efforts to arrive at an effective final dispute settlement.

It seems that the Flemish legislator, by decree of 3 July 2015, succeeded in its efforts to meet the objections of the Constitutional Court by thoroughly amending the system of the administrative loop. The main difference with the initial legislation is that the application of the administrative loop will now always entail a new decision which, depending on the assessment from the authority when remedying the irregularity, can have another substance than the original decision. This remedying decision will be published and appealable by third parties after the court found that the irregularity has been fully remedied. In addition, the application of the administrative loop will always result in the annulment of the contested decision.

39. As could be expected, an appeal has been introduced before the Constitutional Court against the newest version of the administrative loop.

With regard to the chances of success of this appeal, it is relevant to note that the Legislative Section of the Council of State in its advisory opinion assessed that the objections of the Constitutional Court have been remedied.[67] The Legislative Section even explicitly applauds the fact that a new decision can be adopted and be the subject of debate pending the proceedings.[68] It considers this to be a strengthening of the rights of all

[67] Advisory opinion no. 57.080/3 of 12 March 2015 of the Legislative Section of the Council of State, *Parl. Doc.*, Flemish Parliament, 2014-2015, no. 354/1, p. 63-78.

[68] The Legislative Section emphasizes however that the following conditions must be fulfilled: the new decision is properly published, the parties in the proceedings can debate on it and third interested parties can appeal against it. It considers these conditions to be fulfilled in the new legislation.

interested parties and to be in line with the legislator's aim to increase the efficiency and expediency of administrative judicial procedures.[69]

While the Legislative Section seems to support this new version of the administrative loop, it does not appear that this tool will soon be reintroduced before the Administrative Litigation Section of the same Council of State. In an answer to a Parliamentary question on the intentions of the federal Minister of Home Affairs to reintroduce the administrative loop before the Administrative Litigation Section of the Council of State, the Minister briefly answered that there is a willingness to repair the loop, but that "the matter is extremely complicated".[70] Given the fact that the Flemish legislator already seems to have succeeded in its efforts to develop a constitutional new loop, this answer of the Minister can only be interpreted as a lack of interest in a reintroduction of the federal loop. Or maybe the federal legislator prefers to await the application of this new instrument by the Flemish administrative courts, which is possible since 1 January 2016.

[69] *Parl. Doc.*, Flemish Parliament, 2014-2015, no. 354/1, p. 73.

[70] *Hand. (Parliamentary activities)*, Chamber, 2015-2016, 28 October 2015, no. 54 COM 261, p. 28.