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RED TAPE, LAWYERS AND THE BURDEN OF PROOF: LEGAL SPEED - BUMPS ON THE ROAD TO EFFECTIVE ADJUDICATION?

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Abstract

This paper focuses on the effectiveness of appeal procedures and examines the way in which red tape, lawyers and the question of the burden of proof can affect the possible resolution or adjudication of conflicts with the administration. At first glance it seems obvious that red tape mainly hinders effective conflict resolution and that lawyers are usually meant to help the aggrieved citizens to steer clear through bureaucracy and around legal complexities. Interviews conducted with principals of appeal procedures however shed a different light on this matter. In one particular case the chairman of an appeals commission even went as far as to argue that procedural mishaps occur more often when lawyers become involved than when it is just the citizen versus the administration. This rather curious statement – which doesn't exactly bode well for the legal profession in general – led us to the following research analysis.

Collecting statistical information on appeal procedures in several fields of administrative law, analyzing particular case-studies and interviewing key members of appeals commissions gave us a broad overview of the "perceived" effectiveness of a variety of appeal procedures. Key elements of this study included the complexity of the procedure with regard to admissibility and merits, the duration of the procedure, the role of lawyers on the side of either the citizen or the administration and the burden of proof. As for instance will be shown in the paper, the effectiveness of lawyers in administrative appeal procedures can be directly linked to the question of where the burden of proof lies: with the citizen or with the administration. Other results lead to the conclusion that more flexibility with regard to procedural deadlines can certainly improve rather diminish the effectiveness of the appeal procedure. Finally these results will – as much as possible – be briefly compared with similar research in the neighbouring countries.

With this paper we wish to build upon and expand our own research into administrative adjudication and reconnect with research into administrative appeal procedures of other members of the EGPA Study Group „Public Administration and Law" as presented on previous occasions. This paper is not limited to a strict legal-theoretical approach but includes many socio-legal aspects and aspects of process economy. It is therefore our hope that this paper can contribute to the joint research efforts in the Study Group with regard to effective adjudication and general administrative law. Naturally, we are committed – as previous years – to attend the EGPA meeting in Bucharest and look forward to a fruitful discussion of the aforementioned research topics.

1. Introduction

Within the larger framework of citizens' protection against public authorities, effective administrative adjudication is, and continues to be, an important item both in legal literature and in legal practice. Talking about "effective adjudication", this term automatically raises some questions: what is meant by "administrative adjudication" and what is meant by "effective"? Can this effectiveness be objectively measured and, if so, how is it to be measured? What criteria can be set in order to measure effectiveness etc.

Today, in Belgium and especially in Flanders, there is a very strong negativ perception of the effectiveness of traditional administrative adjudicatio Politicians seem more than eager to reinforce this negative bias, for instan like the president of the Flemish government did by stating bluntly, during television interview, that the highest administrative court – the Council of Sta – makes future Flemish investment projects impossible, by suspending annihilating administrative decisions concerning urban planning for "stup reasons".[1] Unfortunately, in recent years the Council of State hasn't exac helped to counter this popular, if not merely populistic view of its role society. For instance, how can it be explained to a layman that the grant planning permission for the extension of a major tramline was annihilated 2011 while construction had started in 2009 and was already two thir completed by 2011? Or how to explain that the immediate dismissal of a civ servant who stayed at home with full pay for five years is considered to be wrongful dismissal, because the civil servant was available for work if on the administrative authority he was assigned to had remembered to call hir So, it was not a surprise at all that the Flemish Minister-President react very satisfied when the federal minister of Interior affairs announce probably as a consequence of these cases, plans to reform the Council State[2].

But dissatisfaction with the functioning of the (federal) Council of State isn't t only reason why recently[3] the Flemish government decided to give green light the creation of one single Flemish administrative law court that, in the near future, is supposed to handle most administrative appeals. It has indeed been tendency during the last decades on both federal and regional levels to crea

[1] X, "Raad van State neemt kritiek niet", *De Standaard*, 4th of December 2009.
[2] Source: Belga News Agency, 23rd of June 2011.
[3] Decided by the Flemish Government on the 29th of April 2011

several new administrative judicial bodies to settle disputes[4]. Most of the time, one of the main reasons given was the expected higher effectiveness of the new bodies than of the traditional judiciary[5].

In the first two sections of this paper, the notions "effectiveness" and "effective adjudication" will be discussed and applied more specifically to the administrative appeals regarding the openness of administration which allows for a comparison between a federal appeals commission and a Flemish one. The following sections focus on certain impediments to "effective adjudication" and raise among others the all-important question: are lawyers useful to have around in administrative disputes? Throughout this paper, we use the results of a study carried out by a student-researcher in the spring of 2011 and reflect on our own assessment of and experience with several appellate bodies.

2. Administrative dispute settlement

2.1. Need for new administrative adjudication bodies?

In the traditional Belgian administrative legal context, an administrative decision that contains deficiencies is, in principle, likely to have consequences; either the decision can be kept out of application by any tribunal or court[6] on the ground of article 159 of the Belgian constitution[7], either the decision will be annihilated by the Council of State[8]. Bearing in mind the rare application of the first possibility and the loss of time and money caused by the second, one can wonder whether these solutions are really useful to the common citizen or not. These were probably some of the reasons why the legislator looked for change. One of the possible avenues for change solutions would be to empower the administrative judge to correct some formal deficiencies during the procedure. This would be

[4] In Flanders, there are actually four administrative judicial bodies: the Council for Permit disputes, the College of environmental maintenance, the Council for Disputes on the field of examination progress disputes and the Council for Elections Disputes.

[5] See: Press release of the Flemish Minister-president on 9th of February 2007 concerning the Decree on environment maintenance: "*Milieuhandhavingsdecreet leidt tot betere milieuhandhaving op het terrein*", 7-8; Parl. Doc., Flemish Parl., Piece 2011 (2008-2009) – Nr. 1, 12 concerning the Council of Permit disputes.

[6] Both judicial and administrative judges have to apply this stipulation.

[7] The "exception of illegality" is a notion that appears in French, Belgian and Dutch and in European Union law. As applied in Belgian administrative law, it can be described as a mean of defence that allows an involved party to call the illegality of an administrative act during the case. So, a decision can be kept of order by a court because of its illegality.

[8] This is the highest administrative court in Belgium.

advantageous for both the citizen (legal certainty) and for the administra (second chance to prevent annihilation and further delay).

Belgian administrative law makes a distinction between several kinds administrative appeals: the *voluntary appeal* (this is the possibility for a citize appeal to the same administration which had issued the original decision), *hierarchical appeal* (appealing to a civil servant who has a higher position in administrative hierarchy) and, thirdly, the *tutelage appeal* (an appeal to the hig level government which supervises the lower-level administrations). On its t the administration held in appeal is only obliged to respond if this ap procedure is explicitly prescribed by any law or decree[9] – the so-called organ appeals. Therefore, if no such procedure is prescribed by law or decree, administrative body is allowed to ignore the appeal by the citizen, althoug ultimately – the question can arise if such an action would be in accordance v the principles of decent governance (that are applicable to all administration any time). Moreover, the unwillingness of an administration to respond to appeal by a citizen can lead, in Flanders, to a complaint by the citizen within framework of the Complaints Decree[10]. In that case, the administration would obliged to handle the complaint which leads to an interesting dilemma: either administration can respond voluntarily to every appeal by the citizens or it wait until it is obliged to answer a complaint about its unresponsive behaviour a citizen doesn't act in good faith, he therefore has the instruments available him to effectively disrupt an administration. A citizen without a legitimate inter in a certain administrative decision might be tempted to start an unfounded app procedure, with the sole intention of forcing an administration to spend ti dealing either with the appeal or with the complaint which might foll afterwards. When rejecting an unfounded complaint, the administration is oblig to motivate its decision formally, as any individual decision taken by any Belg administration must be motivated properly[11].

[9] Under Belgian constitutional law, a decree is a law issued by a regional or commun parliament.

[10] Flemish Decree of 1st of June 2001 (Official Gazette, 17th July 2001); this Decree organizes (free of costs) handling of complaints within a short delay in Flemish public services.

[11] See Article 3, Formal Motivation Act of 29th of July 1991

2.2. The notion "effectiveness"

As mentioned before, effective dispute settlement is often used in Belgium (and in Flanders, too) as an argument to establish new administrative appellate bodies or even new administrative courts[12]. In general, it has to be done in a way that contributes as much as possible to the resolution of the underlying problems of both the involved parties and society[13]. Dispute settlement can be organized, reached in various ways; the original scope anyhow is effective adjudication by whatever means. In general, disputes can be settled by means of courts, administrative bodies, arbitration etc. In some countries[14], administrative tribunals and courts have been established to deal specifically with administrative dispute settlement. So these specialised tribunals and courts are part of the traditional court system. However, in several countries, a shift from traditional courts to other appellate bodies can be noticed during the last decades[15]. This has happened in Belgium, too.

If, in legal literature, some argue that the effectiveness of adjudication can be determined only in the context of the constraints faced by the courts or appellate bodies[16], others argue that effective adjudication can be defined in terms of the basic ability of a court to compel or cajole compliance with its judgements[17]. In this view, the effectiveness of a particular court rests on its power to compel a party to a dispute, in this case an administrative authority, to defend against a plaintiff's complaint and to comply with the resulting judgement. This power is what characteristically distinguishes courts from most other dispute resolvers. Thus formulated, this power is one that is exercised during the pendency of a particular dispute (by means of binding decisions) and immediately after a dispute is resolved through the issuance of a (final) judgement. The effects of this power are felt *ex ante* as well as *ex post*, however, in that parties who are in a similar legal position to actual litigants are likely to comply with the court's judgement "in the shadow" of prospective litigation. But power, however, isn't the only aspect of effectiveness.

[12] See footnote 5.
[13] Agenda van de rechtspraak 2008-2011, The Hague, 2008, 25.
[14] E.g. Germany, Luxembourg and, recently, The Netherlands.
[15] E.g. in France the *juges administratifs d'attribution* can be mentioned; in The Netherlands the "Centrale raad van beroep" and the "College van Beroep voor het bedrijfsleven".
[16] E.g. William D. Popkin, „Effectiveness of the Social Security Review System in Disability Cases", *Administrative Law Review,* 1974, 26, 79.
[17] Laurence R. Helfer & Anne-Marie Slaughter, „Towards a theory of effective supranational adjudication", *The Yale Journal*, November 1, 1997, 1-27.

If we look at the major constraints faced by the administrative courts ar appellate bodies, we can determine: 1) the volume of cases; 2) the difficulty of th legal issue to be resolved and, indeed, 3) the relationship between the legislat and the appeal body (powers, means etc.).

As to the caseload, this item – too many cases at the Council of State and, as consequence, much delay – is often used to argue in favour of the establishment administrative appellate bodies. These are also expected to be very specialised they have to decide on a set of particular issues. And indeed, the effectiveness any jurisdiction depends of its strength or weakness as established in its organ legislation.

Effectiveness has to do with goals and can be seen as a characteristic of a mean an agent; it concerns the extent to which the agent or mean contributes to t achievement of a certain (set of) goal(s). A goal is a desired future situation that to be achieved or maintained[18]. So, as the goals are different, effective dispu settlement and law enforcement, or maintenance are different things and must approached from two different sides; on the one hand, from the legislator's poi of view, law enforcement in general, seeks primarily to impose the most seve sanction on offenders, the most logical route to exact deterrence would be judici cases considering the variety and range of penalties the judicial system ca impose, such as fines, annihilations and reparation. In reality, however, applied administrative disputes, this system fails in Belgium – the Council of State decisions are issued with a delay of two to five years, which causes a lot uncertainty – and it is difficult to achieve deterrence and to secure the appropria fine or other penalty. Effectiveness of courts becomes intertwined with larg jurisprudential questions, such as the nature of law and the sources of complianc So, as the recently established administrative appellate bodies have to deal w very short deadlines, and disputes will usually be settled within a relatively sh delay, they are likely to meet this aspect of effectiveness.

On the other hand, from the citizen's point of view, judicial procedures considered to take too much time and to be very expensive. So, the legislators forced to look for other options in order to enforce the law, especially to benefit of the citizen. In Belgian administrative law, the effectiveness of le protection of citizens is considered to depend on the size of the judicial power, possibilities to check at the disposal of the judge and the extent of the le reparation the judge is able to order[19].

[18] N. Struiksma, J. de Ridder, and H.B. Winter, *De effectiviteit van bestuurlijke en strafrechte milieuhandhaving*, Boom, Den Haag, 2007, 38.
[19] C. Berx, *Rechtsbescherming van de burger tegen de overheid: een analyse van het systeem administratieve rechtspraak in België*, Intersentia , 2000, 46.

The use of administrative appeal procedures, rather than court procedures, is generally supposed to offer benefits to both the citizen and the administration; in the sense that they are to be plain, not bound by technical requirements observed in judicial procedures, and thanks to a desire to avoid expense and delay, administrative adjudication – binding decisions issued by an administrative agency or a specialised administrative court – is conceived of as an alternative to "normal" judicial adjudication[20]. Of course, this does not mean that the – often unwritten – principles of decent government can be denied; on contrary, in order to protect the citizens' rights, these principles are to be applied under all circumstances when an administration is involved. As to "speed the", the majority[21] of the recently created administrative courts and appellate bodies in Flanders (the Appellate Body on Openness of administration; the Council of permit disputes, the Environment maintenance council, …) found their *raison d'être* in the prospective of faster administration of justice, in the form of administrative adjudication[22].

While in a judicial procedure attention is focused almost exclusively on the legality of the decision, an administrative appeal procedure can deal with both the legality and the question of opportunity of the disputed decision. In appeal, an administration can sometimes retract the disputed decision and replace it by another – more equitable – decision. This offers more freedom to solve the dispute to the satisfaction of all parties involved.

So, to conclude, we can take for granted that the *effectiveness* of (whatever) adjudication contains two elements: short delay and the power to settle a dispute. If we add *little or no expenses* to this, we can talk about *efficiency*. These elements are beneficial to both parties. It is obvious that the Belgian administrative appelate bodies are likely to meet these objectives. After all, following this advantageous kind of dispute settlement, another – more slowly and more expensive – kind of appeal at the Council of State is still possible.

We can end this chapter on effectiveness with this quote: "An administrative adjudication process that cannot continually be more efficient, less expensive, and less formal than the court system is not an improvement".[23]

[20] Jerry L. Mashaw, „Organizing Adjudication: Reflections on the Prospects for Artisans in the Age of the Robots", *UCLA Law Review*, Vol. 39, 1991-1992, 1056.
[21] With the exception of the Council of elections disputes; this body took over the procedure of its predecessor which included already narrow deadlines.
[22] E.g. Yearly Report 2009-2010, Council of permit disputes, 5.
[23] District of Columbia, Establishment of Appeals Tribunal by Tax Executive.

3. Case-study: Openness of administration

3.1. Applicable legislation

Like in many other European countries, the principle of openness administration is a constitutional principle; article 32 of the Belgian constituti stipulates that everyone has got the right to consult an administrative docume and to get a copy of it, except for the cases and in the conditions stipulated by t law. However, in a federal country like Belgium this principle is to be appli (including its limitations) both in federal and in regional matters and all legislato are competent to issue laws as far as they respect the scope of their competenc Legislation – federal and regional – distinguishes active and passive openness.

According to the federal Act on openness of administration[24], every natural pers and legal person has the right to access administrative documents. Moreover, t one who puts such a request, can get explanation about those documents. N interest is needed to do so unless the request concerns documents of a person nature[25]. The involved administration is only allowed to refuse the openness legal grounds of exception[26]. According to this Act, an administrative document all information at the disposal of administrative authorities. This means a available information, such as written pieces, statistics, films, pictures etc.[27].

The Flemish Decree on openness of administration[28] stipulates that activ openness of administration means that certain acts and decisions are to be mad public according to certain rules; passive openness, on the other hand, is appli after a formal initiative from a citizen. Apart from certain data that are not to transferred[29], administrative bodies have to give access to the citizen on t mentioned issue or have to send him a copy of the document(s) concerned.

3.2. Appellate bodies

At federal level, a *commission* for access to administrative documents w established. In fact, this is an independent advisory body that (merely) *advises* t requestor as well as the administrative authority within a 30 days delay. No advi

[24] Federal act of 11 April 1994 (Official Gazette, 17 February 1994).
[25] Article 4, Federal Act on Openness of administration.
[26] Article 6, Federal Act on Openness of administration.
[27] Article 1, Federal Act on Openness of administration.
[28] Decree of 26 March 2004 concerning the openness of administration, *Official Gazette* 1st of J 2004.
[29] Concerning e.g. items relating to public security or privacy regulations.

is given when a dispute is pending before an administrative or jurisdictional judge[30].

In 2010 this commission has received 73 requests (appeals). 38 of them have been declared admissible. As the main reason for inadmissibility is a procedural reason[31], the commission suggests to withdraw this difficulty from the legislation, considering that this may hinder the fundamental right to openness[32]. The commission experiences its merely advisory role as a deficiency and wonders whether the constitutional right to openness of administration can be adequately protected or guaranteed with this tool[33]. Another weak point is the absence of a definition of "administrative authority" in the applicable legislation. The law just refers to the legislation on the Council of State[34]. Finally, some administrative authorities do not seem to be very cooperative after the Commission advises them to give people access to some documents and the Commission is unaware of the number of appeals that is introduced at the Council of State after appeal to the Commission. There is no feedback process in place.

On the Regional – we will study the Flemish case – level, too, an appellate body has been established[35]. An appeal can be lodged against every decision that insufficiently meets the request or that is not in accordance with the stipulations of the Decree[36]. Also the lack of any decision or the unwilling execution of a decision can be appealed[37]. The original requester must introduce his appeal in writing, by fax or by e-mail within 30 days. This term does not start if an administrative authority does not mention the necessary items concerning the appeal possibilities[38]. Lodging an appeal is free of expenses. The appeal body is exclusively composed by civil servants appointed by the Flemish government. There are several possibilities at the disposal of the appeal body: at first, it can access or demand all administrative documents on the spot; secondly, it can hear all involved parties and their staff, as well as experts, in order to gather

[30] F. Schram, *Openbaarheid van bestuur*, Brugge, die Keure, 2003, 121-122.
[31] A request to reconsideration must be introduced at the same time as the request for advise.
[32] J. Baert & F. Schram, Annual Report 2010, Commission for the Access to government documents (Jaarverslag van de Commissie voor de Toegang tot Bestuursdocumenten), available at http://www.ibz.rrn.fgov.be/index.php?id=2644&L=1, p. 7.
[33] J. Baert & F. Schram, o.c.
[34] Under Belgian administrative law, the Council of State is competent to deal with appeals against decisions issued by administrative authorities…
[35] See Flemish Government Decision of 19 July 2007.
[36] Under Belgian constitutional law, a Decree is a law issued by a regional (e.g. the Flemish) parliament.
[37] See Article 22, Flemish Decree on Openness of administration.
[38] OVB 2008/90, 26th of June 2008 and OVB 2008/158, 4th of December 2008.

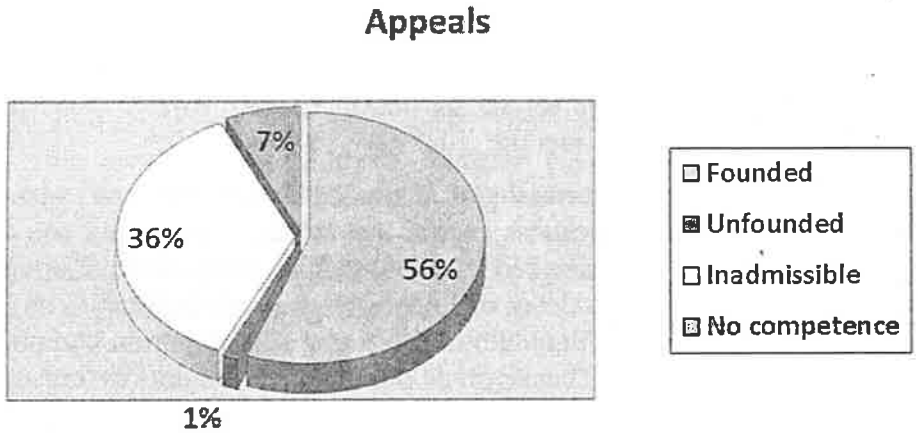
information, although there is no obligation to hear the requester. Thirdly, it c ask for more information and explanation. The appeal cannot have a broader other object than the request to the involved administrative authority[39]. Neith can an appeal be without object if, for instance, the involved administrati authority has in the meantime met the requester's demand[40].

It is up to the appeal body to investigate if any legal exceptions are to be appli in order not to allow the openness of some documents. By doing so, it is r limited to reason of refusal invoked by the involved administrative body[41]. T appeal body decides within a delay of thirty days and must motivate its (publ decision[42]. Such a decision can allow openness, correction or completion administrative documents[43]. The involved administrative authority must execu this decision within 40 days; the appeal body itself can execute this decision, t when it proves not to be done by the administrative authority after this delay. case of refusal, forced execution is possible and a civil servant can be sent execute the decision.

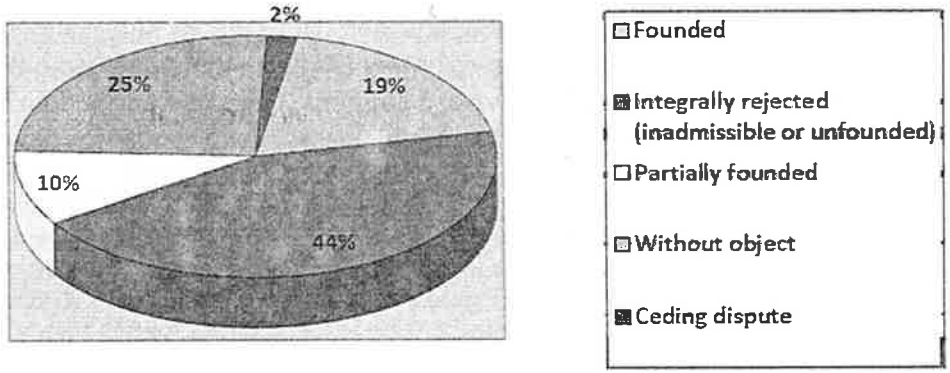
3.3. Effectiveness

It may be clear that as far as delay is concerned, the above described appe procedures are very effective because of their short delay (30 days). Th commission considers this short delay as too short in some cases, especially whe the matter is a rather difficult or complicated one. As to the power of the appella bodies, the weaker point of the federal commission is that this body has only a advisory competence and no decisive one which can endanger the citizens' leg protection of the very constitutional right to openness. The commission itse considers the procedure very accessible and does not believe in a necessity of lawyer[44]. The commission admits that only few (73) requests to advise have be introduced in 2010. This led to 72 advisory opinions. Only one admissible requ was deemed unfounded; in all other admissible cases, the commission advised favour of the applicant.

[39] Reiner Tijs, *Openbaarheid van bestuur. De werking van het Vlaams Openbaarheidsdecreet in bestuurspraktijk*, Brussels, 2011, 227.
[40] OVB 2008/24, 11th of March 2008.
[41] OVB 2008/05, 23rd of January 2008 & OVB 2008/08, 21st of February 2008.
[42] See Article 12, Flemish government decision 19 July 2007.
[43] See Article 24, §2 Flemish Decree on Openness of administration.
[44] Frankie Schram, Secretary of the Commission, *Mededeling Commissie voor de toegang tot het hergebruik van bestuursdocumenten, afdeling openbaarheid van bestuur.*



The Flemish appeal body seems however to be more effective than its federal counterpart. In the period July 2009 to June 2010, 269 files of appeal have been introduced, which means a rise of 67% compared to the previous period. The procedure is fast and free just like the federal one, but the Flemish body has the power to force administrative authorities to execute its decisions. Being assisted by a lawyer does not seem to be necessary[45]. It is remarkable that administrative authorities often do not take any decision concerning the appeal and that they fail to communicate the necessary details on the appeal possibility, even though they are obliged to do so according to Article 35 of the Flemish Decree. Even more remarkable is that many requested documents do not seem to exist. Some requests, however, are to be considered as abuse of the right to openness[46].



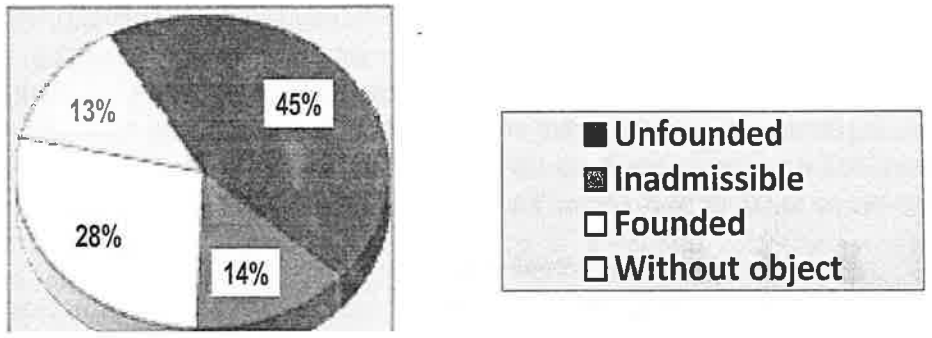
[45] Bruno Asscherickx, Chairman of the Flemish appelate body, Mededeling.
[46] Bruno Asscherickx, Annual Report 2009-2010 Beroepsinstantie openbaarheid van bestuur, 5.

4. Important influences on the effectiveness of adjudication

4.1. Burden of proof

Suspension of unemployment benefits

The administrative appeal against the (temporary) suspension of unemploym benefits by the National Employment Office (NEO) is of a decidedly differ nature than the administrative appeals concerning the openness of governme Whereas every citizen has a principal and constitutional right to revi government information, only the active employment-seeking individual ha right to receive for the duration of his unemployment certain government benef In other words, there is an all-important shift of the burden of proof. To launch effective appeal against the suspension of those benefits, the citizen has to pr that contrary to the opinion of the NEO he is fulfilling his obligations and activ seeking new employment. The National Administrative Commission finds appeal founded when the citizen brings forth more than sufficient proof overturn the opinion of the NEO. As shown in the graph below, in 2010 only 28 of the appeals – which totaled 115 – were resolved in favour of the applicant.[47] I also important to note that in 2010 the NEO issued around 8 799 appealab decisions, which means that only circa 0,367 % of the decisions were successful reversed through the appeal procedure.

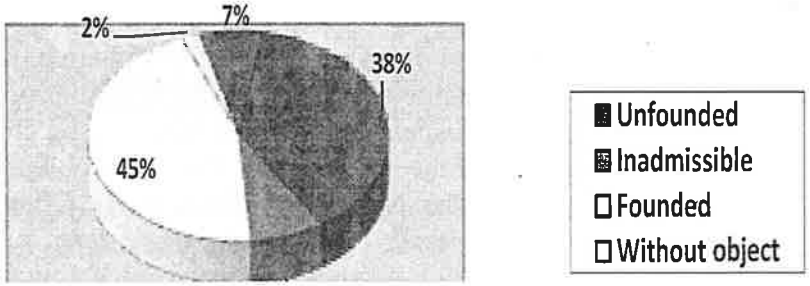


Disputes concerning building permits

In Flanders building permits are granted or refused at the municipal level a these municipal decisions can be disputed at the provincial level administrative appeal with the provincial "deputation").[48] In 2010 about 1 (

[47] C. Buytaert, *Rechtssociologisch en proceseconomisch onderzoek naar enkele bestuurl beroepen in België en het Vlaamse Gewest*, Master-thesis University of Ghent, 2010-2011.
[48] C. Buytaert, *Rechtssociologisch en proceseconomisch onderzoek naar enkele bestuurl beroepen in België en het Vlaamse Gewest*, Master-thesis University of Ghent, 2010-2011.

appeals were received by the deputation of the province of East-Flanders. As can be seen in the graph below, there is more of a balance between the – from the point of view of the applicant – successful and unsuccessful appeals. Unfortunately there is no distinction made by the appellate body between appeals made against the refusal of building permit and appeals made against the granting of a building permit.



Shouldering the burden of proof: a matter of equality and fairness?

Most often citizens find themselves at a disadvantage when disputing decisions of administrative authorities: a lack of sufficient information and/or resources may deter or hamper citizens when lodging an appeal. Many (modern) appeal procedures have taken this into account and try to place the burden of proof as quickly and as much as possible with the administrative authority. Once the citizen has shown that he has a legitimate interest to appeal an administrative decision and once he has cast sufficient and reasonable doubt on the "legality" of the decision, then it is up to the administration to "disprove" these "accusations".

e.g.:

- It's not the citizen who has to prove that the reasons given for non-disclosure of an administrative document are incorrect; the administration has to support its decision with concrete evidence and convince the appellate body that its refusal isn't arbitrary.

- It's not the student who has to prove that he deserves a passing grade; it's the educational institution which has to show, beyond any reasonable doubt, that the failing grade is justified.

The distribution of the burden of proof requires a delicate balancing act between the interests of both parties involved. Placing the burden solely with the administration might result – as seen above with regard to the openness of administration – in an increase of frivolous appeals or worse abuses by disgruntled citizens. However, if

the burden of proof for the individual citizen is too heavy to bear, this might obs abuses of power by the administration. It would therefore be wrong to conclude a low amount of successful appeals means that both the administration and appellate body are functioning efficiently.

Sometimes the burden of proof shifts unexpectedly not because of a fo change in the appeal procedure, but because of "outside" influences circumstances. A good example of this was experienced by the (Flem Commission on Pupil's Rights. Pupils whose registration into the school of choice is refused by the school, may appeal this decision and request Commission on Pupil's Rights to find the refusal unfounded. It's the school w in this procedure has to prove that its decision is based on one of the lim grounds accepted by the legislator. For instance, if the reason for refusal is tha school has reached its maximum capacity, the school has to show that both registration procedure and the procedure to limit school capacity were follo correctly. In recent years, experiments with on-line registration were organize the major cities of Flanders (Antwerp and Ghent) and in Brussels and as a result the amount of appeals increased dramatically: from 60 appeals in 200 over 135 appeals in 2010.[49] There was however another, less visible, yet equ important, change. Because the Commission had to accept the on-line registra system as a given and wasn't allowed to examine the ICT-aspects of registration procedure as such, the burden of proof shifted. It was up to the pup parents now to prove conclusively that (a) the failure to register was caused by malfunctioning on-line system and not because of their own comp malfunctioning, (b) they made no error when completing the on-line registra form and (c) they were indeed on-line within the time-frame needed fo successful registration. Because some schools reached maximum capacity abo minutes and 22 seconds after the opening of the on-line registration system meant that parents had to prove almost up to a second that they would h completed a successful registration within those 9 minutes and 22 seconds hadn't been for some unspecified computer glitch outside of their control. It therefore be argued that by limiting the investigative powers of this appellate b and by demanding a higher burden of proof from the applicants, the ov effectiveness of this kind of administrative adjudication lessened (e.g. decisions were more often postponed to allow the applicants more time to ga concrete evidence).

[49] Commissie inzake leerlingenrechten, *Jaarverslag 2009-2010*, http://ond.vlaanderen.be/gok

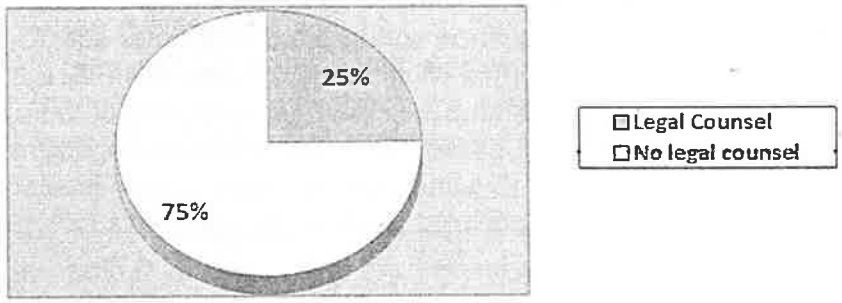
4.2. Lawyers: always around when you (don't) need them?

One of the more remarkable aspects of this research into the effectiveness of administrative adjudication was brought to light during interviews conducted by a student-researcher with principal actors in appeals procedures. It concerns the role of the lawyer in administrative and judicial appeal procedures which – maybe not surprisingly – isn't always regarded as favourable by the appeals commissions or even by the administrative judiciary. In one particular case the chairman of an appeals commission even made the bold statement that procedural mishaps occur more often when lawyers become involved in the dispute, than when it is just the citizen versus the administration. Others remarked that the benefit of legal counsel during the administrative appeal procedures is negligible. Most administrative appellate bodies associate professional legal counsel only with the judicial procedures and claim that it is absolutely unnecessary for a citizen to retain the services of a lawyer during the administrative appeal procedures.

It is difficult to assess the effect a lawyer has on the appeal procedures, because the presence of legal counsel is rarely reflected in the available statistical information and when records are kept of applicants with or without counsel it's rarely linked to the outcome of the procedure.

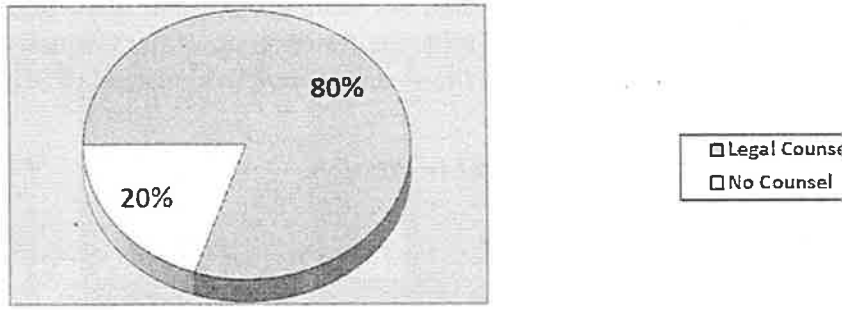
One of the exceptions is the newly erected (Flemish) Council for Permit Disputes, which provides information on how the assistance of legal counsel can have an impact on the admissibility of an appeal – it is also important to note that there is, within the procedure, a last chance given to the applicant to rectify appeals which fail to meet the formal requirements.[50] The appeal can, as such, be "saved" through regularization.

Regularization of appeal was needed in a total of 174 times



[50] Jaarverslag Raad voor vergunningsbetwistingen, 2009-2010, 88p., http://www.rwo.be

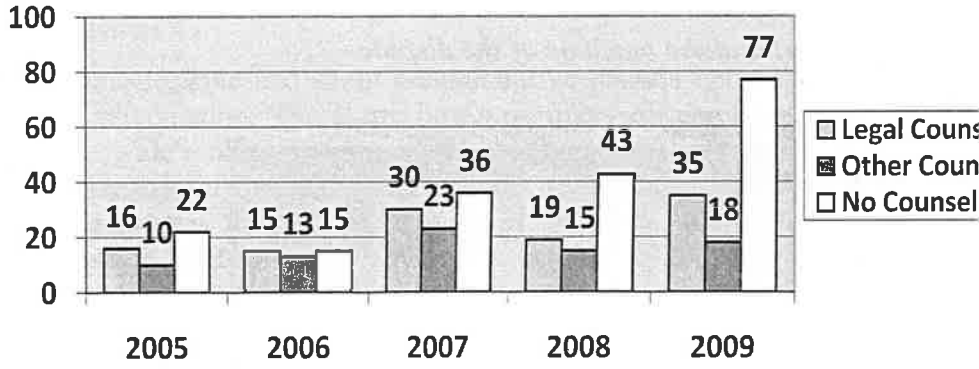
No regularization of appeal necessary (577 appeals)



As can be expected, obtaining professional legal counsel does make a differe when it comes to the potential admissibility of an appeal. The chances of meet formal requirements – especially when it concerns complex procedures – indeed greater when lawyers are involved. It should however be noted that alm 9% of the appeals drafted by lawyers needed to be regularized before be deemed admissible by the Council.

Information concerning the presence of legal counsel is also given by the Flem Council for disputes about decisions on study progress which, as an administrat legal board, decides on the appeals instituted by students against examinat decisions (previously the competence of the Council of State).

Evolution Counsel Student

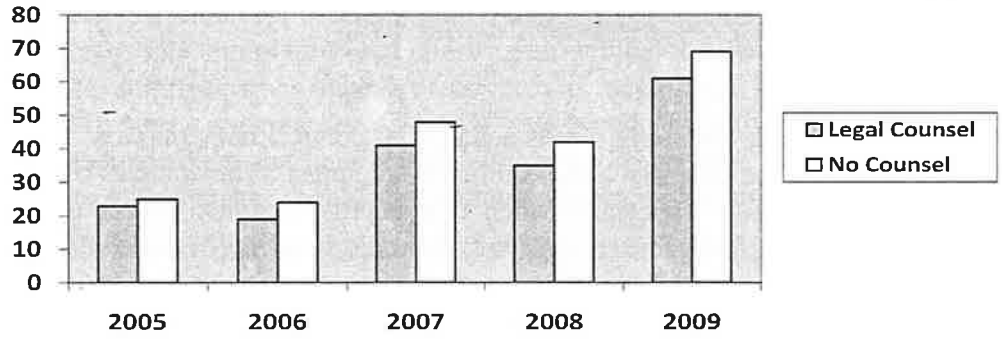


Not only has the total amount of appeals risen between 2005 and 2009 (from 4 130)[51], but the gap between students without professional legal counsel (inclu counsel by a family member) and students with representation by a lawyer

[51] With momentarily a record high of 150 appeals in 2010.

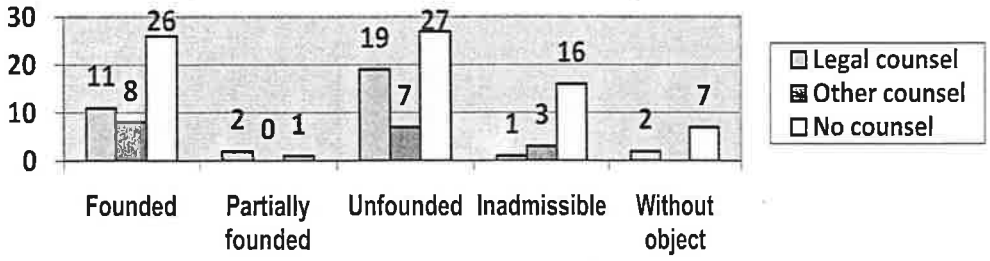
also increased.[52] While one third of the appeals in 2005 were drafted by lawyers, this was only one fourth in 2009. As students become more and more familiar with the appeal procedure and with the functioning of the Council itself, they feel less and less inhibited to plead their case themselves, instead of relying on outside legal counsel.

Evolution Counsel Educational Institution



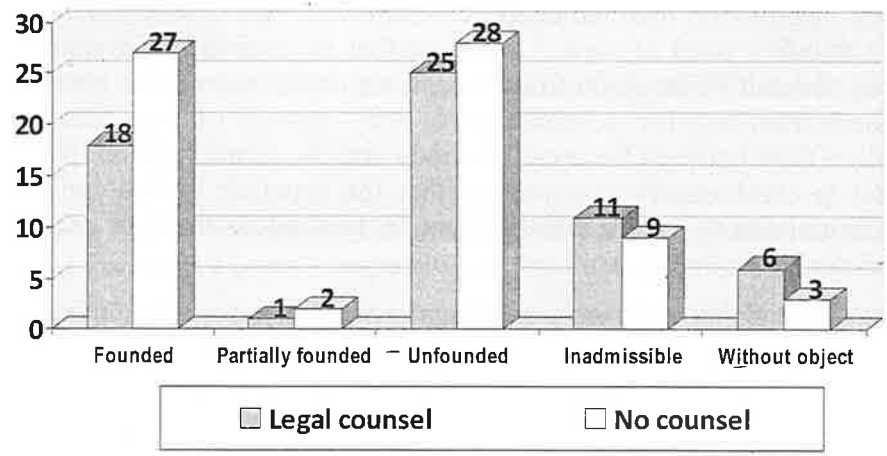
On the defendant side the institutions with and those without professional legal counsel seem to be in balance with little change between 2005 and 2009. However, it should also be noted that when the defendant is an institution of higher education "no counsel" most often means that there is no "external" legal counsel. In slightly more than 50% of the cases institutions rely on their own legal advisors, employed within the institution, to handle the appeals.

Counsel applicant and the outcome of the dispute



[52] Annual reports Flemish Council for disputes about decisions on study progress from 2005 until 2009, http://ond.vlaanderen.be/hogeronderwijs/Raad/

Counsel defendant and the outcome of the dispute



As mentioned before, the presence of legal counsel in a dispute does seem to ha a positive effect on the potential admissibility of an appeal. Only 2.86% of appeals lodged by a lawyer were deemed inadmissible and this compared to 2 inadmissible appeals when there is no professional counsel. Due to the mai inquisitorial nature of the appeal procedure, the benefits of professional le counsel lessens considerably when it comes to a decision on the merits of appeal: 37.14% of legal counsel appeals are founded, compared to 36.84% of "no professional counsel" appeals.

5. Conclusions

A swift and decisive end to an administrative dispute certainly seems to sig effective adjudication. There are, however, many different aspects of an app procedure which often remain in the background, but do sometimes have decisive impact on the perceived effectiveness of the adjudication. Procedu requirements, e.g. the obligation to simultaneously lodge an appeal with appellate body while filing a request for reconsideration with the administrat authority which took the disputed decision, may be seen as filters agai frivolous appeals, but may, at the same time, deter legitimate appeals.

Such a delicate balancing act is even more important when it comes to question of the burden of proof. Legal professionals are quite familiar with concept that it is "one thing to be right but quite another thing to be able to pr you're right". Citizens however, especially in a conflict with an administrat authority, often react differently and this is partially due to the fact that there is s a residual perception of the government's administration as a monolithic blo

Most citizens would certainly be very surprised to hear that sometimes – albeit luckily not very often – appeal commissions or councils have even less access to additional information than the citizens themselves. This is why it's also difficult – from a citizen's point of view – to accept that an administrative appellate body will often demand information from the citizen, which the citizen previously had to demand from another administrative body instead of any form of direct information flow between the appellate body and the administration. It's therefore important to continuously examine whether the appellate bodies can't be given better (administrative) tools which might in turn allow them to reach a more balanced decision.

Finally, the assistance of professional legal counsel seems to be indispensable to cope with the increasing complexities of administrative and judicial appeal procedures. But, naturally, even lawyers can't turn around a complete indefensible case. At best, a lawyer can function as the "master key to unlock an unfamiliar world of appeal procedures" but once inside this world a lawyer is quite rightly merely a guide who may smoothen the path to effective adjudication. It would certainly be cause for concern when the chances for an *in fine* decision in favour of the applicant increase dramatically when that applicant is represented by a lawyer or when vice-versa an appeal commission decides significantly more in favour of the applicant when he is without a lawyer.

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Afterword: EGPA community – actor of excellence in the research in public administration

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Writing these lines, I remember with great pleasure the wonderful moments of t 33rd Annual Conference of the European Group for Public Administration (EGPA).

The courageous initiative of the National School of Political Studies and Pub Administration (NSPSPA) to organize an event of such amplitude has beer remarkable success both on organizational level and from the viewpoint of t contents and valorization of researches.

In fact, even the current volume represents an eloquent reality of the manner h the organizers of the conference – EGPA and NSPSPA – have conceived to ensu a perennial finality of the contributions in the framework of the conference.

A brief synthesis of the conference in Bucharest is necessary in view to justify t above assertions.

The conference had the Chamber of Deputies from Romania as co-organiser.

The organization of the 33rd EGPA Annual Conference by NSPSPA represents t recognition of NSPSPA's role and activity in the framework of the Europe Group for Public Administration, Romania being among the first South-Easte European countries which organized such an event.

The scientific event had the following objectives:

- Promoting and disseminating the scientific research in the field administrative sciences in the European and international specializ academic and institutional environment;
- Recognition and international affirmation of the research potential the Romanian academia in the field of administrative sciences and rela areas: legal, political, social areas;
- Compatibility of the Romanian research directions with those from European universities, recognized for their expertise and high level research in the field of administrative sciences;
- Strengthening the position, organisational and research prestige NSPSPA and other Romanian universities in the framework international specialized organizations;

- Creating relations of academic cooperation as well as research networks aimed to stimulate the participation of the teaching staff and young doctoral students to the European scientific specialized dialogue.

The programme of the international conference was structured into 16 permanent study groups, approaching relevant topics, which have become traditional for the research in administrative sciences.

The French Speaking Seminar "Sustainable Public Sector Reform for Times of Crisis" was held in the same time with the activity of the permanent study groups, comprising specialists and teaching staff from eight European French speaking countries.

At the initiative of the Romanian organizers, a new Permanent Study Group focused on «Public and Nonprofit Marketing» was conceived and included on the agenda of the conference.

At EGPA conference in Bucharest, representatives of Romanian academia were co-chairs of two permanent study groups, of the Seminar for PhD Students and Junior Researchers as well as of the French Speaking Seminar.

315 foreign representatives of the academic and research environment and international bodies from 36 countries and 155 universities attended the international conference. From Romania, 43 representatives of 6 universities and 4 participants from central and local public administration institutions and non-governmental organizations attended the conference.

The promotion and dissemination of the scientific research in the field of administrative sciences represent a strategic objective of most Romanian universities which are organising programmes in this field.

Obviously the above presentation could be broader. But this is not our objective; we would rather like to formulate a few conclusions based on the long activity of the European Group for Public Administration of over 36 years and its continuous enlargement among most European universities.

The access and integration of younger universities, such as NSPSPA or deriving from states which "benefited" of "fragmentized" history of the development of public administration within EGPA activity describe its openness and perenniality.

Personally, as Dean of the Faculty of Public Administration of NSPSPA and Chairwoman of the Organising Committee of EGPA Annual Conference, I found out and benefited of EGPA organisational values, which have determined major changes in the guidance of research and training programmes in public administration.

We are very grateful to "EGPA" spirit and the membership to a broad scientific community such as EGPA, represents, in my opinion, the support for the generous logo of this organisation: "Improving Administrative Sciences Worldwide".

Bucharest
20th August 2012