

ADMINISTRATIVE JUSTICE IN EUROPE BELGIAN LAW

Paul LEWALLE

State Councillor and Professor at the University of Liège

Questionnaire relative to the inventory and typology of administration control in the 25 Member States of the European Union

-Preliminary.

1.

-The Belgian Constitution of *February 7, 1831*, by its articles 92 and 93 (144 and 145 in the consolidated Constitution on February 17, 1994), entrusted to the judiciary power, namely the Courts and tribunals, the competence to rule on disputes in matters of civil and political law. This competence is general. It is exclusive if the dispute is related to civil rights (property, status of persons...), and in principle if the dispute is related to a political right (right to elect or to be elected, "right" to pay taxes...).

The constituent enabled the legislator to also create "contentious" administrative courts (article 146 and 161 of the consolidated Constitution).

The constituent having made no distinction as to the parties in dispute, these rules apply as much to disputes between individuals as to those to which the public authority is a party.

Moreover, the Belgian constituent entrusted the Courts and tribunals with the power to refuse the enforcement of general, provincial and local decrees and rulings if they are not in conformity with the laws.

This supervision pertains to all administrative acts, whether regulatory or individual. It extends to their external and internal legality.

However, the Courts and tribunals have for several decades developed a restrictive interpretation of their competence, based on rigid enforcement of the separation of powers: on the basis of a separation between management and sovereignty having no other foundation than their jurisprudence, the civil courts first declared themselves without power to judge the administration – notably when its civil liability was questioned - when it acted in exercising public power.

This narrow interpretation was finally abandoned.

The rupture established itself with the delivery of a ruling on *November 5, 1920*, city of Bruges vs. the La Flandria Company (Pas., 1920, I, 193), one of the most decisive ever pronounced by the Supreme Court of Appeal in the field of administrative litigation.

This notably underlines that "*so long as a person saying he/she is entitled to a civil right alleges that an interference affected this right and demands reparation for the harm or losses he/she suffered, the judiciary power may and must have jurisdiction on the dispute and is empowered to order, if need be, compensation for this harm or loss, even if the perpetrator of the alleged harm or loss was the State, a county borough, or other institution of public law, as well as in the case where the harm or loss came about through an illicit act by the public administration.*"

The delivery by the Court of Appeal of the rulings of *March 7, 1963* (Pas., 1963, I, 745 and n.) and *April 26, 1963* (Pas., 1963, I, 905) for the civil court to accept the competency, in the context of civic liability policy, regarding all types of faults attributed to the administration, no longer distinguishing whether it was committed by an act of decision or of execution.

It is once again by a ruling of *June 26, 1980* (Pas., 1980, I, 1341 and n.) that the Court of Appeal will recognize that it lies with the Courts and tribunals to sentence the administration to provide in-kind restitution to damages it committed through its own error, when such restitution is possible and does not constitute the abusive exercising of a right.

In a ruling of *March 3, 1972* (R.C.J.B., 1973, p. 431) the Court of Appeal will assert that the control of the legality based on article 107 (which became 159) of the Constitution covers both the internal legality and the external legality of administrative acts.

As much as this evolution was certain, it nevertheless was the case that the Courts and tribunals could not – and still cannot – be directly referred to by an action for cancellation of an illegal administrative act.

It is mainly to bridge this gap that, through the vote of the act of *December 23, 1946*, a Council of State was created in Belgium, after tedious parliamentary discussions (they began with the filing of a bill on May 15, 1930).

Inspired by the appeal for excess of power for which the Council of State of France can have jurisdiction, the Belgian legislator provided for the Council of State he was establishing had the competence to cancel, upon appeal by any interested person, the administrative acts and regulations deemed to be in violation of substantial forms or prescribed under penalty of nullity, excess or abuse of power.

In the absence of any other competent administrative court, the Council of State pronounces in equity by means of rulings, taking into account all the public and private interest circumstances, on claims for indemnities related to reparation for exceptional moral or material damage caused by an administrative authority.

The Council of State is also responsible for giving opinions to the various members of the Federal Belgium Governments on draft bills, decrees, orders and draft regulatory decrees.

Since *June 18, 1993*, the Council of State's existence and competence rested on article 160 of the Constitution.

Finally, the Court of Arbitration, soon to be called Constitutional Court, was created according to article 107ter, § 2, which became 142, of the Constitution, introduced on *July 29, 1980*, and set out by an act of June 28, 1983, today annulled and replaced with the emergency act of *January 6, 1989*.

Its competence currently covers the supervision of the compliance - or compatibility - of the standards having legislative value to the provisions of title II (public liberties) and articles 170, 172 and 191 of the Constitution (tax legality and tax equality, protection of foreigners), as well as to the rules of distribution of jurisdiction among the Federal Belgium legislators.

Although they do not directly relate to the control of the administrative acts' legality, the Court of Arbitration's rulings appear at the head of Belgian public law's jurisprudential sources.

2.

Certainly the administration's control, such as it operates in Belgium, aims to guarantee respect of the law by administrative authorities, both with a view to both ensure their functioning correctly and to offer citizens effective protection.

a) The overseeing of the conformity of the administration's action – and inaction – in matters of legality and the public interest is first ensured by itself, acting in exercise of hierarchical power or supervision.

The supervision control rests upon texts of a legislative nature. Local authorities (provinces and county boroughs), among others, are subject to it.

Thus, article 30, § 5 of the Flemish decree of April 28, 1993, relating to the regulation of the administrative supervision of county boroughs for the Flemish Region, provides that: "*The deliberations violating the rules of a good administration or contrary to the general policy or to the superior authority's interests are considered as contrary to the public interest for this article's enforcement*".

An identical formulation can also be found in article 21, § 5 of the Flemish decree of February 22, 1993 related to the regulation administrative supervision of the Flemish Region.

The article 13, § 2, paragraph 2 and article 16, § 4, paragraph 2 of the decree of April 1, 1999, organizing the supervision over the provinces, county boroughs and intermunicipal county boroughs in the Walloon Region (C.D.L.D., art. L 3122-1 and L 3131-1), stipulated that "*the act violating the rules of a good administration or contrary to the interest of any superior authority*" is contrary to the public and regional interest.

The decree of December 20, 2004 organizing the normal administrative supervision over the Region's German-language county boroughs provides more briefly in article 9 that "*the*

Government may suspend or cancel all or part of any decision from a subordinate authority violating the law or harming the public interest."

b) The administration's jurisdictional control is ensured at various levels.

1 It can be ensured incidentally by the Court of Arbitration, which mainly oversees the various Federal Belgium legislators respect of title II of the Constitution (public liberties), articles 170, 172 and 191 in the same text (legality and equality in relation to taxes, status of foreigners) and the rulings distributing the power between the Federal State, the Regions and the County boroughs.

Its competence enables it to control the legality of administrative acts and regulations (see notably C.A., April 4, 1995, n 31/95, n of role 738, M.B., May 16, 1995).

2 The Courts and tribunals may, both during a civil legal proceeding and a criminal proceeding, refuse to apply the administrative acts and regulations if they judge them to be illegal.

3 The jurisdictional control of the legality of administrative acts and regulations also lies with the administrative courts and particularly with the Council of State.

The latter may not only refuse their application if they are illegal, just like all the administrative courts, but it may also, above all, annul them, on the appeal of any interested person.

It also has jurisdiction regarding the appeal to the supreme court of the decisions pronounced without appeal by the administrative courts.

It is important to mention that in Belgium, it is the Supreme Court of Appeal that has the competence to settle disputes regarding concurrence of jurisdictions between the Courts and tribunals and the Council of State (article 158 of the Constitution).

Belgium has no Jurisdictional Court.

3.

In Belgian law, there is no "*official*" definition of the administrative authority.

It cannot be found in the Constitution, laws or rulings.

However, the law often makes use of the expression "*administrative authority*".

But, rather than imposing a definition for it, it referred to the concept such as it is used, but not defined, in article 14, § 1, consolidated laws of January 12, 1973 on the Council of State that empowers it to annul the acts and regulations of the "*administrative authorities*" if they are imposed in overstepping of power, by relying upon the interpretation it would be given by precedents.

The difficulty is due to the fact that jurisprudence on this matter – not to mention the doctrine – varied a great deal over time.

In a word, one passed, not without difficulty and controversy, from an accurate, though to some too narrow, definition based on a constitutional criterion, to an extensive, yet more ambiguous representation, focused on a combination of constitutional and material criteria.

According to the initial interpretation, held by the Council of State in a ruling of a session of February 13, 2001 n 93.289, consolidated laws, organs which, in accordance with the Constitution and emergency acts of institutional reforms exercising executive power ¹, as well as the organs which, in accordance with a standard of constitutional or legislative rank, are subject to the Federal, Community or Regional Government's hierarchical control ² or supervisory control ³, are administrative authorities in the meaning of article 14, § 1st.

According to the second interpretation, imposed on September 6, 2002 by the Supreme Court of Appeal (J.L.M.B., 2004, p. 11 and n.) in its quality of judge for jurisdictional conflicts, institutions created or accredited by the federal public powers, the Communities, the Regions, the provinces or the county boroughs, constitute administrative authorities in the meaning of article

-
1. Either, in the current situation of our public law, the King, the State Ministers and Secretaries of State, members of the Federal Government, members of the Community and Regional Governments, members of the Commission Working Group of the French-speaking Community and of the Joint Community Commission.
 2. For example, the public universities coming under the jurisdiction of the Community.
 3. Bodies from the provinces, county boroughs, the Brussels agglomeration, from most of the public institutions, from the government controlled corporations, from the intermunicipal associations,

14 of the consolidated laws on the Council of State insofar as their operation is determined and controlled by the public authorities and where they may make compulsory decisions regarding third parties, particularly by unilaterally determining their own obligations towards third parties or by unilaterally establishing the third parties obligations.

This interpretation notably led to the recognition that private education institutions acted as administrative authorities when they issued or refused diplomas to their pupils.

We could observe "*the alignment*" of the positions taken on the matter, both by the legislation department of the Council of State (see notably doc. parl., Ch., sess. 2002-2003, n° 50 0679/002 p. 14) and by the administrative department (CE, June 4, 2003, Zitoumi c/ Institut technique Cardinal Mercier-Notre-Dame du Sacré-Coeur, n° 120.131 Van den Brande vs. l'A.S.B.L. Inrichtende macht van de Vlaamse Katholieke Hoogeschool voor Wetenschap en Kunst, n° 120.143).

4.

As in French law, Belgian administrative law distinguishes between individual acts and regulations (general normative acts).

It also distinguishes between unilateral acts and contracts concluded by the administration.

It intends to settle the abrogation and withdrawal issues of unilateral administrative acts on the basis of the dissociation between the acts which do and do not establish rights.

I - Who monitors the administration's acts and actions?

A - Competent bodies.

5.

The principle of the separation of functions - administrative and jurisdictional - is generally respected in Belgian law.

The control of the legality and conformity with the public interest of the administration's acts and regulations is ensured by hierarchically superior or supervisory authorities relevant to the active administration.

As previously mentioned, the control of the legality of the administration's acts and regulations is also ensured, in Belgian law, by the Courts and tribunals as well as administrative courts with special power (standing caucus of the provincial council in electoral matters, standing commission for appeal of refugees;...) and by the Council of State, the only administrative court with general competence.

In fact Belgian law, unlike French law, does not have administrative courts or administrative courts of appeal. Through functional dissociation, the law does entrust jurisdictional power to bodies of the active administration: such is the case for the provincial council's standing caucus.

6.

We will find, in the answers to questions 7 and 8, the statement of the principles which founds the distribution of litigations to which the administration is party between the Courts and tribunals, organs of judiciary power and the administrative courts of law, headed by the Council of State. The jurisdictional supervision of the legality of administrative acts and ruling is ensured in Belgian law as follows.

As indicated above, it lies with all the courts of law, whether or not they come under the jurisdiction of the judiciary power, to supervise the legality of administrative acts and regulations and to refuse their enforcement if they are illegal.

The basis for this supervision must be sought in article 159 of the consolidated Constitution. Therefore this competence belongs to the judiciary power, the justices of peace and police, the courts of first instance, the commercial and labor tribunals, the Appeal Courts and Labor Courts, and finally the Supreme Court of Appeal, having competency for the whole of Belgium.

Again, this competence is bound to the administrative courts of law with special competences as well as to the Council of State, and actions for cancellation may be referred to the latter for administrative acts imposed with excess of power.

As for the Court of Arbitration, it essentially has jurisdiction, on action for cancellation or prejudicial matters, on compliance of Belgian standards of the legislative order with the Constitution (federal laws, community and regional decrees, as well as, with certain exceptions, orders of the Brussels-Capital Region).

As previously mentioned, this control does not currently cover all of the Constitution but the provisions of its title II, articles 170, 172 and 191, as well as with the standards of distribution of power.

It was stated above that the Court of Arbitration incidentally exercised supervision of the legality of administrative acts and regulations.

B- Status of the competent bodies.

7.

In Belgian law, the competence of the judicial courts rests first upon articles 144 and 145 of the Constitution.

According to article 144, disputes related to civil rights depend exclusively on judicial courts of law.

According to article 145, disputes related to political rights depend in principle on the competence of the same courts of law, but it lies with the legislator to introduce exceptions to this principle.

The application of these provisions has led to the judiciary courts and tribunals having jurisdiction on a large part of the administrative litigation.

Numerous contestations opposing citizens to the administration are related to subjective rights and many were considered rights of a civic nature.

This is how the Courts and tribunals, and not administrative courts of law or the Council of State, judged the disputes related to the administration's civil, contractual, or extracontractual liability or those who had as object expired terms of the civil servants' wages.

Moreover, many legislative provisions attribute the jurisdiction on private disputes to the judicial courts of law. Many examples can be found in the Judicial Code.

8.

According to the terms of article 160 in the Constitution, "For all of Belgium, there is a Council of State whose composition, competence and operation are determined by law. However, the law may attribute the power to settle the proceedings to the King in compliance with the principles it sets.

The Council of State rules by decision as an administrative court of law and gives opinions in cases determined by the law".

Thus the Council of State's dual advisory and jurisdictional competence is based on the Constitution and on the law.

Its organization and missions were determined by a law of December 23, 1946, then by consolidated laws of January, 12 1973, modified many times.

As for the organization and the competence of the various administrative courts of law, they are the object, in application of articles 145, 146 and 161 of the Constitution, of particular legislative provisions whose excessive dispersion was often criticized.

In order to remedy this dispersion, the multiple bills aiming to create one or several administrative courts of law of first degree with general competence have not been pursued to date.

C - Internal organization and composition of the competent bodies.

9.

There are no specialized chambers within the judicial courts of law that would have jurisdiction on an administrative litigation.

The disputes to which administrative authorities are parties are judged by the Courts and tribunals according to the Judicial Code's provisions that constitute, according to article 2, the common law of the proceeding.

10.

As mentioned above, there are currently in Belgian law no administrative courts of law having general competence, similar to the administrative courts of French or German law.

Numerous administrative courts with special power however were created by the legislator over the course of time through the application of articles 145, 146 and 161 of the consolidated Constitution.

He/she most often established a new proceeding to accomplish this.

But in some cases, by application of the functional dissociation, it entrusted jurisdictional power to pre-existing administrative authorities.

This is how the litigation of the validity of communal elections is determined in first resort by the provincial council's standing caucus.

The administrative courts rule sometimes with and without the possibility of appeal, sometimes with the possibility of appeal, then in appeal.

Decisions pronounced without appeal by these courts of law come under the cassation of Council of State's (article 14, § 2, of the consolidated laws of January 12, 1973).

D. The judges.

11.

The head office of the administrative courts of law is often made up of both judicial magistrates and administration civil servants and representatives of the relevant population.

As just one example, the appeals chamber (called the appeal board until a law of December 12, 2002 came into force) of the medical supervision service, such as set out by article 155 of the law on the healthcare insurance and compensation consolidated by royal decree of July 14, 1994, is made up of magistrates of judicial order, in addition to the members appointed by the insurance agencies and members representing the relevant occupations. The law guaranteed its independence and impartiality. The debates are public. Its decisions are justified under penalty of nullity and pronounced in public hearings. The respect of the defendant's rights is fully guaranteed. Only the magistrates have a right to speak and vote in the disciplinary cases.

But it does happen that the duties of a judge are entrusted to bodies composed exclusively of political representatives.

As stated above, the provincial council's standing caucus, whose members are appointed through a second-degree election within the provincial council, is made up of political representatives.

The presence of any person holding a degree in law is not imposed.

Through the article 104bis of the provincial law whose enforcement is subject to the royal decree of September 17, 1987, the legislator only cared to determine the proceeding that the standing caucus should follow when it rules as a court of law.

12.

Here again, a distinction must be made.

a) The magistrates of judicial order who are led to sit within the Courts and tribunals or administrative courts of law are hired according to the very precise rules of the Judicial Code. Among other provisions, article 190, § 1 of this Code stipulates that, in order to be appointed as a judge (or additional judge) at the court of first instance, at the labour court or commercial court, the applicant must be a doctor or a law graduate and have passed the vocational aptitude examination provided in article 259bis-9, § 1, or have completed the judicial training course provided in article 259octies, § 2.

According to article 259ter, § 1 of the same Code, before the King proceeds to appoint as per article 58bis, 1, the Minister of Justice asks, within forty-five days after the publication of the

position's vacancy to the "*Moniteur Belge*", the justified notification in writing, through a pre-designed form established by the Minister of Justice, on a proposal by the Higher Council of Justice, the *chef de corps* of the court or of the public department in the jurisdiction where the appointment is to take place.

According to the § 2 of the same article, the notifications are transmitted in duplicate to the Minister of Justice by the advisory bodies within thirty days from the date of the request.

According to § 4, within a hundred days from the publication mentioned in § 1, the Minister of Justice forwards to the competent nominations commission of the Higher Council of Justice the nomination file of each applicant with the request to proceed with an applicant's introduction. The introduction is performed by a two-thirds majority vote based on the criteria related to the applicant's capacities and aptitude.

According to § 5, from the introduction's receipt, the King has a sixty-day delay to make a decision and to communicate it to the nominations commission and the applicants by certified mail or with proof of receipt (and by simple letter to the court's or public department's *chef de corps* within the court where the appointment is to take place, to the applicant's *chef de corps*). A copy of this justified decision is communicated by simple letter to the nominations commission and the attorney general of the location where the oath is to be sworn. In case of a refusal for cause, the nominations commission has, from the date this decision was received, a fifteen-day delay to proceed with a new introduction in compliance with the terms provided in § 4. The decision of refusal for cause is communicated by certified mail or with proof of receipt to the nominations commission and the applicant introduced. The court's or public department's *chef de corps* within the court where the appointment is to take place, the introduced applicant's *chef de corps* and the other applicants are informed about the refusal decision by simple letter.

b) The appointment of the State Councillors is subject to different provisions.

The Council of State is not part of the judiciary power; thus, the constitutional and legislative provisions setting the court judges' personal requirements⁴ are not directly applicable to its members.

However, it is important to underline that the law intended to attribute an independent status to State Councillors inspired by that which the Constituents gave to the court judges.

To this concern was added in 1997 the will to "*depoliticize*" the appointment procedure for State Councillors, yet according to the terms of the Minister of the Interior, while making sure "*there are always applicants from all horizons*"⁵.

From this perspective, a law of September 8, 1997 brought notable modifications to article 70 of the laws on the Council of State, consolidated on January 12, 1973.

The legislator maintained the appointment method on previously adopted introduction; but gave the Council of State's assembly a seemingly paramount role in this presentation.

According to article 70, § 1 of the consolidated laws of January 12, 1973, amended by law of September 8, 1997, State Councillors are appointed by the King on a three-name-list formally justified, introduced by the Council of State after it has examined the applications' admissibility and has compared the applicants respective titles and merits.

The Council of State's general assembly hears the applicants automatically or upon their request. To this end, it may appoint at least three of its members who will give it a report about these auditions.

The Council of State communicates its introduction, as well as all the applications and the assessments related thereto by the Council of State, both to the Chamber of Representatives or the Senate and to the Minister in charge of the Interior.

The applicant first introduced to a unanimous vote by the Council of State's General Assembly may be appointed as State Councillor, unless the Minister overseeing the Interior refuses this

4. Art. 151 related to the conditions of appointment, 152 related to security of tenure; art. 154 related to the processes legal determination; art. 155 related to the prohibition of the exercise by a judge of duties remunerated by the State; art. 292 and 293 of the Judicial Code relating to plurality and incompatibilities.

5. Doc. parl., Sén., sess. 1996-1997, n° 539/3, p. 1.

introduction, either because the conditions set in § 2 are not respected, or because he/she feels that the number of Council of State members who were appointed from among the Auditor's Office's members is too high in comparison to the number of the other Council of State members.

When the Minister accepts the Council of State's unanimous introduction, he/she informs the Chamber of Representatives or the Senate, who, if they consider that the number of Council of State's appointed members among the Auditor's Office's members is too high in comparison to the number of other Council of State's members, may alternatively refuse this introduction within a delay of no longer than thirty days from the date of this receipt⁶.

In case the Minister or the Chamber of Representatives or the Senate refuses, the Council of State's General Assembly proceeds to a new introduction.

In the absence of unanimous vote during a first introduction or during a new introduction following a refusal, the Chamber of Representatives or the Senate, within a delay of no longer than thirty days from this introduction's receipt⁷, alternatively may either confirm the list introduced by the Council of State, or introduce a second three-name list subject to a formal justification.

The Chamber of Representatives or the Senate may hear the applicants.

When the Chamber of Representatives or the Senate introduces a second three-name list, the State Councillor may only be appointed from among the persons appearing on one or the other of both lists introduced.

The Minister overseeing the Interior publishes the vacancies in the "*Moniteur Belge*" at the Council of State's initiative.

The publication mentions the number of vacant positions, the conditions of appointment, the delay of at least one month for the introduction of the applicants and the authority to which they are to be addressed.

Any introduction is published in the "*Moniteur Belge*"; the appointment may only proceed after at least 15 days have passed since the publication.

According to article 70, § 2 of the laws on the Council of State consolidated on January 12, 1973, amended by law of September 8, 1997, no one can be appointed as State Councillor if he/she has not reached thirty-seven years of age, if he/she is not a doctor of law or holding a law degree, if he/she cannot demonstrate useful legal professional experience of at least 10 years and if he/she does not meet one of the following conditions:

1° having passed the test of the Council of State assistant auditor or of the assistant chief clerk of the commercial court, the test of chief clerk of commercial court at the Court of Arbitration, the test of assistant auditor at the Court of Accounts or the vocational aptitude examination provided in article 259bis of the Judicial Code;

2° carrying out administrative duty of at least class 15 or equivalent, either in Belgian public administration, or in a Belgian public agency;

3° having successfully submitted a law doctorate thesis or being associate professor of law;

4° carrying out duties as a public department magistrate or as an actual judge in Belgium;

5° holding a teaching position in the field of law at a Belgian university

It must be noted that this list, limiting but also fairly open, does not provide any room for experience gained at the Bar. However, the date of registration with the Bar is taken in account to calculate the periodic wage increases of those holding functions at the Council of State⁸.

6. According to the law of March 22, 1999 amending article 70, § 1 of the laws on the Council of State, the thirty-day delays provided in paragraphs 5 and 7 are interrupted:

- when the Federal Legislative Chambers are dissolved as per article 46 of the Constitution;
- when the parliamentary session is adjourned as per article 45 of the Constitution;
- when the parliamentary session is closed as per article 44, paragraph 3 of the Constitution;
- during the parliamentary vacancies set by the Chamber and the Senate.

The new delays start from the next day after the date when the Federal Legislative Chambers permanent offices are set up.

7. See previous note.

8. Art. 3, § 3, par. 1, 1 \ of the law of April 5, 1955 related to the process of Council of State Office Holders, replaced with article 27 of the law of May 25, 1999.

At least half of the State Councillors are appointed from among the Auditor's Office and consolidation office members (Art. 70, § 2, par. 3 of the consolidated laws of January 12, 1973). This provision assumes a sizeable significance considering that the Auditor's Office and consolidation office members are hired upon the examination.

13.

In principle, access to the function presumes, in addition to meeting the age conditions, a doctorate or degree in law as well as a useful experience.

The lay judges and the commercial court judges, members of the labour courts and of the commercial courts respectively, are essentially "*laymen*" appointed by the King, respectively, on a proposal by the Ministers overseeing Labour and Justice and on introduction by the organizations representing employers, workmen, employees and independent workers on the one hand, and on a joint proposal by the Ministers overseeing Justice and Economic Affairs and the middle class and on introduction by the professional or inter-professional organizations representing trade or industry on the other hand.

In addition, jurisdictional power is sometimes entrusted to bodies of the active administration whose members may not hold any law degree.

14.

Promotion within the judicial courts takes place according to experience gained as well as to seniority.

The *chefs de corps* is appointed by the King for a 7-year-mandate, not immediately renewable, within the same court or the same public prosecutor's department (article 259quater of the Judicial Code).

At the Council of State, access to the duty of Chamber's President, President and first President is essentially decided in relation to seniority, according to positions' vacancies.

Whether this is a custom or a habit can be argued, but the rule, if it exists, is in any case irrelevant to the written law.

The situation at the Auditor's Office is different: article 71, § 2 of the laws on the Council of State consolidated on January 12, 1973 provided that the assistant auditors, who are appointed upon the examination, may be appointed as auditors upon appropriate notice from the general auditor when they have accomplished at least two years of duty, and § 3 of the same provision provides that auditors having eleven years of duty are appointed as first auditors.

15.

The passage of judicial courts to the Council of State takes place on a voluntary basis. This occurs rather frequently.

It also may be the case, though in very rare instances, for passage from the Council of State to a judicial court of law.

Several members of the Council of State applied to the Court of Arbitration and became members.

More recently, we have seen Council of State's magistrates charged with responsibilities by the Government.

E - Functions of the competent bodies.

16.

a) In Belgian law, claims may be brought to the active administrator, even if no text provides for this. These are mercy appeals, hierarchical or of non-regulated supervision.

In many cases, such appeals are provided for by the legislative or regulatory provisions against administrative acts established privately or by category.

The special decree of July 6, 2001 regulating the right to file requests with the Flemish Parliament and the decree of the same date related to the terms of the right to file requests to the Flemish Parliament⁹ opened the right to file request to the Flemish Parliament to all. These requests, which cannot be filed personally or by a delegation of individuals, may be forwarded to the Flemish Government with a request for explanations about their content, within the time limit set by the Parliament.

b) Regarding the organization of appeals that may be brought before courts of law, the distribution of competence between the Judicial Courts and tribunals and the administrative courts again requires a distinction.

In carrying out their powers and duties, the judicial courts which, let us remember, essentially rule on disputes related to subjective rights, including those resulting from a contract, whether or not it be concluded by the administration, or on the right to damages, whether or not it was caused by the administration, may not only refuse to apply the administrative acts and regulations when they are illegal, but may also sentence the administration to pay, and to do or not do certain things.

In one example, through a ruling of May 26, 1980, the Supreme Court of Appeal decided that it lies with the Courts and tribunals to sentence the Belgian State to repair in-kind the damages committed by its fault to neighbouring owners of a public property, when this reparation is possible and when it does not constitute a right's abusive exercise (Cass., June 26, 1980, Pas., 1980, I, 1341 and s., conc. J. VELU).

The administrative courts with special competences generally have a competence in full litigation. It is the same, although exceptional, for the Council of State when it exerts the power mentioned in article 16 of the consolidated laws of January 13, 1973.

These hypothesis relate to fields as varied as the provincial and communal elections, the cancellation or review of certain contracts concluded before or during the war 1914-1918, social aid, differences between newly-related county boroughs regarding property division between inhabitants of separated territories, election of the police council's members provided by the law of December 7, 1998 organizing an integrated police service, finally structured at two levels¹⁰. But in the framework of the action for cancellation for excess of power based on article 14, § 1, of the consolidated laws of January 12, 1973, the Council of State's competence is limited to the annulment. It is not its role to reform the disputed act.

The rules determining the distribution of competence between the judicial and administrative courts lead again to the filing before the Courts and tribunals of disputes related to the

9. Moniteur Belge, August 3, 2001.

10. Article 12 of the law of December 7, 1998 provides that the local police in the multi-communal zone are administered by a police council made up of 13 to 25 members according to the number of members of the population. According to article 14 of the same law, in order to be elected as actual or substitute members at the police council, the applicant must, on Election Day, be part of the communal council of one of the county boroughs constituting the pluri-communal zone. The amendment law of April 2, 2001 added article 18ter to the law of December 7, 1998 according to which: "*Whether a claim was filed with it or not, the standing caucus or the college referred to in article 83quinquies, § 2, of the emergency act of January 12, 1989 relating to the Brussels institutions, pronounces as an administrative jurisdiction on the election's validity within thirty days after the file was received and corrects, if necessary, the mistakes made during the establishment of the election's result. If no decision is made in this delay, the election is deemed regular*". Article 18quater, introduced by the same amendment law of April 2, 2001, provides that: "*Within fifteen days after the communication or notification referred to in article 18bis, paragraph 6, an appeal before the Council of State is opened to artificial and natural persons mentioned in article 18bis, paragraph 5. The same appeal is opened to the governor within fifteen days after the decision of the standing caucus or college referred to in article 83quinquies, § 2 of the emergency act of January 12, 1989 related to the Brussels institutions or after the delay's expiration. The appeal to the Council of State is not suspensive towards the standing caucus decision, except if it is directed against a decision of the standing caucus or college referred to in article 83, § 2 of the emergency act of January 12, 1989 related to the Brussels institutions, cancelling the elections or the election of one or several members or substitutes. Within eight days after an appeal is received, the Council of State's clerk of court communicates it to the governor as well as to the relevant multi-communal zone and to the communal council. He/she also communicates them the Council of State's ruling.*" A possibility of similar appeal is opened to the police council's member elected in compliance with article 18 or 19, paragraph 2, of the law of December 7, 1998 contesting he/she has, in compliance with article 21bis, paragraph 1, submitted his/her resignation as police council's member.

interpretation, execution, or dissolution of a contract, even if it was concluded by an administrative authority.

However, the Council of State has competency regarding the action for cancellation the acts that are not related to the contracts, such as the decisions unilaterally made by the administration during the proceedings taking place prior to a public contracting closing.

17.

The courts, whether judicial or administrative, are frequently led to ask prejudicial questions, sometimes to international bodies, other times to a national court.

Article 177 (which became 234) of the Treaty of Rome is often applied.

In addition, the Belgian Council of State may address the Benelux Court of Justice, by prejudicial appeal.

This was the case for the purposes of the interpretation of article 1 of the uniform law on constraint¹¹, source of article 1385 bis of the Belgian Judicial Code.

Most of all, there is frequent application of article 26 of the emergency act, January 6 1989 on the Court of Arbitration, amended by law, March 9, 2003: this provision notably obliges the Council of State to address to it, upon the request of any party, any question related to the interpretation of the provisions of title II (public liberties), and articles 170, 172 (tax system) and 191 (status of foreigners) of the Constitution, as well as provisions distributing competencies among federal, community or regional authorities.

18.

Since its creation by the law of December 23, 1946, the Belgian Council of State exerts both advisory and jurisdictional duties.

This duality appears in its organization.

a) The legislation division has the task of enlightening and assisting the legislator, the Federal Government, the Councils (today the Parliaments) and the Community and Regional Governments, the Commission members of the French-Speaking Community or the united Assembly, the members of the Commission Working Group of the French-Speaking Community and of the united Working Group, depending on the case, in carrying out their normative duty¹².

b) The administration division is essentially vested with the jurisdictional duty.

However, according to articles 8 and 9 of the consolidated laws, this section may be consulted by the federal ministers and the Community or Regional Governments members, the Commission members of the French-Speaking Community and the united Working Group members, each for what concerns them, on the difficulties and contestations that lie with the executive power to solve or determine, as long as they are matters of a non-contentious administrative nature.

Several hundreds of opinions were formulated as such.

19.

The administration division of the Council of State includes the first President or President, Chamber Presidents and State Councillors who were not appointed to be part of the legislation division.

The Council of State's members appointed to the administration division may be called by the first President to sit on the legislation division, either to replace an impeached member, or to constitute additional chambers when needed.

The Council of State's members appointed to be part of the legislation division may be called to sit on the administration division every time they are needed, either to form the bilingual

11. The uniform law's interpretation lies with the Benelux Court of Justice as per article 6, 1 to 3 of the treaty related to the institution and the status of the said Court, signed in Brussels on March 31, 1965 and approved by law, July 18 1969; see F. DUMON, Benelux Court of Justice, Brussels, Bruylant, 1980, p. 57 and n.

12. Art. 2 to 6 of the consolidated laws, such as amended by the law of August 4, 1996.

chamber, or to replace a member of a Dutch-Speaking chamber or a French-Speaking chamber if he/she is impeached, or to constitute additional chambers.

A ruling pronounced on September 28, 1995 by the Court of Strasbourg could imply that the distribution of the Belgian Council of State's members between the legislation and administration divisions is contrary to article 6, § 1 of the E.C.H.R.: indeed the Court judged that, in the framework of an institution such as the Luxembourg Council of State, the fact that certain persons successively exercised advisory duties and jurisdictional duties related to the same decisions was of such a nature as to call into question the institution's structural impartiality¹³.

However, on analysis it appears that, thanks to the care taken in the consolidated laws and in arranging the procedure enforceable before the administration division, the Belgian Council of State's organization is not subject to the same reproach.

In fact, according to article 29, paragraph 2, of the consolidated laws of January 12, 1973, amended by the law of May 25, 1999, the members of the administration division and the Auditor's Office may not have jurisdiction on petitions for cancellation, suspension and provisional measures concerning the decrees and rulings on the text on which they gave their opinion as legislation division's members or about which they intervened in the aforementioned section.

Article 61 of Regent decree on August 23, 1948 determining the procedure before the Council of State's administration division again provides that the members of this section may not have jurisdiction on the pleas for annulment of order and ruling on the text on which they gave their opinion as legislation division members; if they overrode, there would be grounds for challenge, according to article 62,

F - Function and relationship distribution between the competent bodies.

20.

Firstly, it is appropriate to mention the regulatory role that the Supreme Court of Appeal and the Council of State can respectively play, itself ruling in cassation with respect to both the judicial and administrative courts, ruling without appeal.

The jurisprudence unity of the Council of State's administration division is ensured by its general assembly.

The first President may order referral to the general assembly, after the State Councillor responsible for the report to the hearing gives his/her opinion. The first President again orders referral to the general assembly when, after having received the opinion of the auditor responsible for the report, the general auditor considers, for the same reason, that a case should be processed by the general assembly.

Belgian law does not have procedure for requesting a litigation opinion, analogous to that provided in article L 113 - 1 of the French Administrative Code of Justice.

II- How do the courts control the administration's acts and action?

A. Access to the judge.

21.

Here again, a distinction must be made.

a) The submission of a case to judicial courts is independent of the prior exercise of administrative appeals, whether or not they are set out by texts.

The judicial judge has power, in principle, as soon as the contestation that is referred to him/her has a subjective right as actual purpose.

13. -Case 1994/474/555, A.P.M., 1995, p. 189; obs. F. BENOIT-ROHMER under the same order, D., 1996, p. 301; obs. L. BIHAIN under the same order, J.L.M.B., 1996, p. 1098 and n.; obs. D. SPIELMANN under the same order, R.T.D.H., 1996, p. 271 and n.; M. THEWE S, The Luxembourg Council of State after the order "Procola" of the European Court of Human Rights, R.B.D.C., 1996, p. 69 and n.; E. BOUMANS, Het Procola-arrest . . . twee jaar later, T.B.P., 1998, p. 387-390.

b) The appeals admissibility for excess of power depends on the prior exhaustion of appeals to the active administration if they are set out by legislative or regulatory provisions. No other prior measure is imposed upon the person to be tried.

22.

The action before the Courts and tribunals may be filed by those interested, whether natural or artificial persons, public or private, as long as he/she can prove an interest.

The action for cancellation is also open before the Council of State to those interested, whether natural or artificial persons, public or private.

The appeal may be filed either by individuals or by private associations or by commercial partnerships.

Local communities have also referred to the Council of State actions for cancellation of supervisory authority decisions they alleged to be illegal.

It is also accepted that associations or organizations without legal status such as, most often in Belgian law, unions and political parties, may submit to the Council of State an action for cancellation when they act to defend a prerogative they held that was recognized by laws and rulings, that is, to defend a functional interest.

This solution is generally explained by the objective nature of the appeal for excess of power: as to acting in furtherance to rescind an illegal administrative act, it is not necessary to have a legal status. Existing in the eyes of law is sufficient.

23.

The petitioner must prove his/her ability (in principle, age of legal majority if it is a natural person, legal status if an association or organization) and his/her quality to act (particularly when the appeal is filed in the name of others).

The petitioner must also prove an interest.

This condition is widespread.

It is expressly provided by article 17 of the Judicial Code.

It is also explicitly provided by article 19 of the consolidated laws on the Council of State.

The jurisprudence shows that the interest to act in the rescission's litigation must be direct, current, legitimate and sufficiently personalized. It may be both material and moral.

The confirmation of the validity of the petitioner's interest in an action for cancellation has been the subject of a great quantity of case law.

24.

a) The delay to appeal a court decision pronounced by the judicial judge is in principle one month from the court decision's service date or from the date of its notification in compliance to article 792, paragraphs 2 and 3, of the Judicial Code (article 1051 of the Judicial Code) and the delay to file an appeal to the Supreme Court is three months from the date of the service or notification of the decision in compliance with article 792, paragraphs 2 and 3 (article 1073 of the Judicial Code).

b) The control of the legality that the Courts and tribunals may exert on the basis of article 159 of the Constitution is not subject to any delay.

c) It should also be taken into account the prescription periods particular to various litigations when referring a matter to the judicial judge.

It is in this way, for example, according to article 2262bis of the Civil Code:

" § 1. Legal action cannot be taken on a matter after a period of ten years.

By derogation to paragraph 1, any damage reparation lawsuit based on an extra-contractual liability is valid for 5 years from the day following the date when the prejudiced person became cognizant of the damage or its aggravation and of the identity of the liable party.

The lawsuits referred to in paragraph 2 are valid in all cases for 20 years from the day following the date when the fact causing the damage took place.

§ 2. If a decision passed in legal authority allows conditions, the request to have their purpose adjudicated will be receivable for 20 years from the date of the verdict".

Claims upon the State resulting from court decisions are subject to the ten-year limit, and no longer the thirty-year limit.

d) The admissibility of the action for cancellation that may be brought before the Council of State is submitted to a 60-day delay of principle, starting, depending on the case, from the publication, the

notification, or the cognizance of the disputed act.

This delay may be increased according to the distance: the procedural regulation provides that it is increased by thirty days in favour of persons living in a European country that is not conterminous with Belgium and by ninety days in favour of those living outside Europe.

The delay is in force against minors, disqualified persons and other disabled persons. However, the Council of State may relieve them from forfeiture, when it is established that their representation was not ensured, in due course, before the delay expired.

The determination of the "*dies a quo*" from the "*dies ad quem*" of this delay answers these precise legislative and regulatory provisions, which were subject to particularly ample jurisprudence.

Many legislative provisions, part of a trend aiming to ensure the administration's "*transparency*", subordinate the delay's commencement to the informing of the person(s) to be tried: thus, the notification of an administrative decision of individual scope must generally warn him/her about the appeals open to him/her as well as the forms and delays to be respected, otherwise, according to the most common expression, the delay does not start.

25.

In Belgian law, if it involves questions on recognition or non-recognition of a theory analogous to that of the government's acts as found in French law, the answer is, in principle, negative.

However, certain sectors of the administrative action, among the most sensitive, remain reserved: As far as we know, to date no one thought to contest before the Belgian Council of State, notably, a decision such as the appointment of a Federal Government's Minister by the King.

Yet in Belgian law the King is considered an administrative authority ...

It is difficult to foresee what the administrative judge's position would be if he/she had jurisdiction on such an appeal.

Incidentally, he/she accepted to have jurisdiction, in a similar yet separate field, on an action for cancellation a royal decree of a province governor's appointment, whereas the Belgian State, as the other side, was notably opposing an exception drawn from an act of government (CE., June 10, 2002, Vandendoren vs. Belgian State, n 107.561).

26.

In the current state of Belgian law, there is, strictly speaking, no proceeding to screen appeals either before the Courts and tribunals or before the Council of State.

Only summary proceedings are provided to enable the Council of State to declare a request that is clearly substantiated or clearly inadmissible (articles 93 and 94 of Regent decree on August 23, 1948 determining the proceeding before the Council of State's administration division).

Before the Court of Arbitration, a preliminary proceeding is set out in articles 69 to 73 of the emergency act of January 6, 1989.

A limited chamber, composed of the president and two recorders, examines if there is not or not, in view of the request or decision for referral, that the appeal of the prejudicial question is obviously inadmissible or unfounded or that the Court of Arbitration has obviously no power to hear or rule on it. The chamber may decide on the recorders' conclusions in this sense by a unanimous vote, to put an end to the case's examination, without any other pleading, by a ruling where the appeal or the matter is declared inadmissible or where it is established that the Court does not have competence.

27.

a) The referral to the judicial courts is done through subpoena served by writ, except derogation provided by law or statement of voluntary appearance.

Thus, the legislator provided in certain cases that the opposition statement was justified, either because the defendant was easily contactable (for ex. tax authorities), or because the proceedings benefited from a special context (for ex. labour Auditor's Office).

Likewise, the proceeding may be filed through a unilateral request in the cases expressly by law or when the proceeding does not have any opponent, the adversary proceeding being impossible.

b) Referring a matter to the Council of State may be made by simple letter, as long as it is certified.

The regulations for the proceeding are limited to providing that the request include a statement of the facts and means.

28.

a) The law of August 10, 2005 establishing the Phenix information system, published in the "Moniteur Belge" of September 1, 2005, must permit, when it is completed enforced, notification, service, and communication, via e-mail, of the acts required by the judicial proceedings.

b) The Council of State strictly holds to the requirement of sending a proceeding's exhibits by registered letter, in compliance with its general procedural rules (CE. December 6, 2000, Herbiet vs. Barthélemy and others, n 91.398).

However, the royal decree of December 5, 1991, determining the summary proceeding before the Council of State, provides that the communication, subpoena and notifications addressed to the parties or persons interested in the case's resolution may be made by carrier, with proof of receipt. In case of an extreme emergency, they may also be made via fax machine (art. 3, § 1).

The royal decree of July 9, 2000, related to particular proceeding rules of litigation of decisions related to territory access, residence, settlement and departure of foreigners provides that, exclusively in the case of extreme emergency, the plaintiff may address his/her request for suspension or request for provisional measures by fax machine, on the condition that the plaintiff authenticates it with his/her signature at the time of the hearing (art. 19).

29.

a) The court office fee or enrolling fee is 35 Euros in justice of peace (25 Euros in alimony without appeal), 82 Euros before the court of first instance or commercial court (69.50 Euros in summary proceeding), and 186 Euros before the Court of Appeal (139 in summary) and 325 Euros before the Supreme Court of Appeal.

In addition, the right to apply is 52 Euros, except in justice of peace, where it is 27 Euros and the drafting fee is 30 Euros.

b) The petition for cancellation that may be brought before the Council of State is subject to a tax which is currently set at 175 Euros.

30.

a) For the proceedings brought before the judicial courts, article 1026 of the judiciary provides that the unilateral petition must, in principle, be signed by a lawyer.

Likewise, the Judicial Code stipulates the obligation for one to be assisted by a lawyer before the Supreme Court of Appeal in order to file an appeal before it.

b) The petitioner, acting in his/her own name or representing another natural person, artificial person, or a group, may act alone before the Council of State, if he/she considers himself/herself able to do so.

If he/she concludes that he/she needs to be assisted by a lawyer, he/she may call upon a lawyer of his/her choice, even an intern.

According to the terms of paragraph 3 of article 19 of the consolidated laws on the Council of State: "*The parties may be represented or assisted by lawyers registered at the roll of lawyers or on the interns list as well as according to the Judicial Code's provisions, by the nationals of a European Union State Member empowered to carry out the occupation of lawyer*".

31.

As for the appeals to the Council of State, the question of the "*Pro deo*" is settled as follows by articles 77 to 82 of the above-mentioned Regent decree of August 23, 1948.

The president of the chamber referred to rules on the request of *pro deo* without a procedure.

He/she hears the parties, if necessary. His/her decision is not subject to appeal.

If the *pro deo* is refused, the petitioner is invited to docket his/her request. In default of doing so within fifteen days from the notification given by the clerk of court, the request is struck from the docket (art. 81).

During a procedure, the president of the chamber referred to may grant the *pro deo* for acts and duties he/she determines (art. 82).

32.

a) As for the judicial courts, only the unfounded appeal may be penalized with a fine (article 1072bis of the Judicial Code) without loss of the possibility for the defendants or the respondents to solicit the conviction of the plaintiff and the appellant respectively to damages for reckless and persecutory procedure.

b) As to the Council of State, an article 37, reintroduced by a law of February 17, 2002 in chapter IV of title V, of the procedure, of the consolidated laws of January 12, 1973, provides that a fine may be imposed by it for abusive appeal.

The terms, absolutely general, of the new article 37, imply that the administration division may pronounce the fine every time it rules on an appeal, either in carrying out all its power (including, on an action for cancellation, on a summary request, on opposition, on a third-party's opposition, review and penalty request).

This comes down to establish that the fine may be pronounced both by the chamber made up of three advisers and by the sole judge.

According to this provision, "*If in consideration of the auditor's report or additional report, the Council of State determines that a fine imposed on the leader of an appeal which is obviously abusive may be justified, the ruling sets a date in the near future for a hearing*"¹⁴.

The petitioner and the opposing party are notified of this ruling.

The order pronouncing the fine is deemed contradictory.

The fine is from 125 to 2,500 Euros, amounts that may be modified by the King according to the consumer price index evolution. It is pronounced at the cost of the petitioner and is recovered in compliance with article 36, § 4. The funds are paid to the penalties management fund.

B. The legal proceedings.

33.

The consolidated Constitution provides, in its articles 148 and 149, included in title III on powers, chapter VI on judiciary power, that the tribunal hearings are public, that all court decisions are justified and that they are pronounced in public hearing.

There is a controversy as to knowing if these provisions are only valid for the Courts and tribunals or if they apply to all court decisions, even if they are pronounced by an administrative court.

In the case of all lawsuits, the following general principles apply to all proceedings jurisdictional in nature:

- that which obliges the judge to statute when he/she is referred to;
- that which imposes the presence of the judges at all hearings where the dispute was debated and deliberated upon; however the contrary stand taken by the Supreme Court of Appeal must be noted when it

14. In the notice it gave on March 13, 2000 on the bill, the legislation division underlined the ambiguity of its terms: "*Does this mean that the parties will be led up to file new memorandums and the auditor another report? Or will the proceeding be simply oral?*" (Doc. parl., sess. 19 99-200 0, n° 50 0101/004, p. 8). What seems to be well established, in any case, is that no fine may be pronounced in default of a report concluding to the appeal's obvious abusive nature (in this sense, L. LEJEUNE, the law "ratifying the obviously abusive appeal to the Council of State's administration division", J.T., 2003, p. 167).

declares that there is no general principle by which a court decision should be pronounced by the judge who heard the case;

- that which imposes the respect the rights of the defence;
- that which precludes the judge from ruling on non-requested matters;
- the rule of impartiality that opposes the same person from being judge and party;
- the principle of the devolutionary effect of the appeal;
- that which allows the judges to interpret their rulings and court decisions;...

34.

a) The following causes for challenge are provided by article 828 of the Judicial Code:

"Any judge may be challenged for the following causes:

1° if there is a legitimate suspicion;

2° if he/she or his/her spouse has a personal interest in the dispute;

3° if he/she or his/her spouse is related to or related by marriage to the parties or one of the parties by direct line, (...); or in indirect line up to the fourth degree; or if the judge is related at the above-mentioned degree to the spouse of one of the parties;

4° if the judge, his/her spouse, their ancestors and descendants or relatives in the same line, has/have a difference over a question similar to that between the parties;

5° if they have a legal proceeding in their name before a court where one of the parties is a judge; if they are creditors or debtors of one of the parties;

6° if there has been a penal legal proceeding between them and one of the parties or their spouses, relatives or relatives by marriage in direct line;

7° if there is a civil procedure between the judge, his/her spouse, their ancestors and descendants or relatives by marriage in the same line, and one of the parties, and that this legal procedure, if it was brought by the party, had been so prior to the proceeding in which the challenge is proposed; if, this legal proceeding being completed, it was completed within only six months prior to the challenge;

8° if the judge is guardian, deputy guardian or trustee, administrator or legal counsel, presumptive heir or donee, master or partner of one of the parties; if he/she is administrator or commissioner of any institution, company or association, that is party to the case; if one of the parties is his/her presumptive heir or donee;

9° if the judge gave advice pleaded or wrote about the controversy; if he/she previously as a judge or arbitrator had competency regarding it, except if, at the same level of jurisdiction:

- he/she took part in a court decision or a sentence before provisional judgment;

- having adjudicated in default, he/she had jurisdiction on the case on opposition;

- having adjudicated on an appeal, he/she later has jurisdiction on the same case, chambers united;

10° if the judge took part in a court decision in the first degree, and he/she is referred to on appeal on the controversy;

11° if he/she testified as a witness; if, since the beginning of the legal proceeding, he/she has been received by a party at the party's expense or accepted presents from this party;

12° if there is a major enmity between him/her and one of the parties; if there has been, on his/her part, abuse, insults or threats, verbally or in writing, since the proceeding or within six months prior to the proposed challenge."

b) The members of the Council of State's administration division may be challenged for the causes that give rise to a challenge according to articles 828 and 830 of the Judicial Code.

As previously mentioned above, the member of the legislation division who gave an opinion on a draft ruling may not, as a member of the administration division, have jurisdiction on the action for cancellation this ruling.

A particular problem arose during the examination following the request of suspension and the petition for cancellation.

Except for the cases provided in article 17, § 1, paragraph 3, and § 2, paragraph 3, and article 18, paragraph 3, the chambers of the administration division sit as one member in relation to requests of suspension and interim relieves.

These methods generated sensitive questions. In fact, they may result in a same State Councilor being, led to, firstly, have sole jurisdiction on a request to suspend the execution, along with or without a request of interim relief, then, secondly, the petition for cancellation, this time as a member of the three-judge chamber.

They led the Council of State to have jurisdiction on requests to challenge some of its members.

35.

a) Before the judicial courts of instance and appeal, the plaintiff may, in principle, claim new legal grounds

On the other hand, only the grounds of law and order may be claimed for the first time before the Supreme Court of Appeal.

b) Before the Council of State, it lies with the petitioner to formulate his/her grounds in the request itself.

However, the petitioner has the option to raise new grounds in the proceeding's exhibits (memorandum in duplicate and latest memorandum) as well as at the hearing, until the close of hearings, on the express condition that these grounds are of law and order.

There is no listing of the grounds of law and order in the laws or rulings.

Establishment of this is the task of the court.

To cite only one example, the grounds taken of the incompetence of the author of the act (*ratione materiae*, *ratione loci* and *ratione temporis*) are deemed matters of law and order.

36.

a) Articles 812 and 813 of the Judicial Code provide that the intervention may take place before all the judicial courts, but that the intervention aiming to obtain a sentence can only be exercised for the first time on appeal.

The intervention is subject to the same conditions as the main action, that is the plaintiff in intervention must show that he/she has an interest.

b) Any interested person may ask to intervene during the procedure for cancellation taking place before the Council of State, either in support of the petitioner or of the opposing party.

The conditions of this intervention are determined in article 21 bis of the laws on the Council of State consolidated on January 12, 1973.

37.

In disputes which come under the judicial courts, the public department may intervene in application of the rules of the Judicial Code.

For example, all the main rulings of the Supreme Court of Appeal relating to the administration's extra-contractual liability were drawn from the conclusions of the general public prosecutor's department of the Supreme Court of Appeal.

Before the administrative courts, and especially before the Council of State, there is no magistrate similar to that of the public department.

The competence entrusted to the Auditor's Office's members may not be compared with that of the public department.

38.

As already mentioned, the Belgian Council of State includes notably an Auditor's Office.

At the administration division, it has a dual function.

a) It actively takes part in the appeals' preparation.

During the procedure for cancellation for excess of power, it communicates a written report where it analyses the elements of admissibility and substance of the request as well as the relevancy of the opposing party's arguments and, if the need arises, those of the intervener(s).

According to the custom, it concludes the appeal's receipt or dismissal.

b) According to the rule of the case's double examination, it gives its opinion at the hearing, after the parties have exchanged all their arguments. In this opinion, it independently expresses the stand it would take if it were a judge.

It is not provided that the parties reply, but the President often gives them this option, particularly when the recorder auditor takes in his/her opinion a stand that is different to that which he/she took in his/her report.

It is important to underline that the Auditor's Office's member does not take part in the deliberations.

39.

a) Before the judicial courts, the plaintiff may withdraw from his/her action or the proceeding.

In the cases where the close of hearings was not yet pronounced, the demise remains without effect as long as the notification was not made thereto.

In case of notification, the beneficiaries may, should the need arise, be summoned in resumption of proceedings.

b) Before the Council of State, the petitioner may renounce his/her request. The chamber referred to must reach a verdict on the withdrawal.

If, before the close of debates, one of the parties dies, a resumption of proceedings is to take place.

Except in an emergency, the proceeding is suspended during the delay granted to the heirs to take stock and deliberate.

The deceased person's beneficiaries resume the proceedings with a request addressed to the clerk of court, written in compliance with article 1.

The clerk of court forwards a copy of this request to the parties.

After the delays to take stock and deliberate expire, the proceeding is validly resumed against the deceased person's beneficiaries, by a request written in compliance with article 1.

In the case where the beneficiaries of the deceased petitioner did not resume the proceedings on the delay's expiration, the case is struck from the docket.

40.

a) When the judicial proceeding is brought by opposition petition, a copy is attached to the summons addressed by the registry by judicial notification to the parties (art.1034 of the Judicial Code).

According to article 745, paragraph 1, of the Judicial Code, all submissions are addressed to the opposing party or his/her lawyer, at the same time as they are forwarded to the registry.

The Judicial Code also provides that notification of the opinion of the public ministry is sent to the lawyers of the parties by document and to the parties who appeared at the hearing without lawyer by judicial notification (art. 767, § 3).

b) At the Council of State, all the proceedings exhibits must be addressed to the registry, which is responsible for forwarding them to the parties.

41.

a) Before the judicial judge, each of the parties is responsible for proving the facts it alleges (Judicial Code, art. 870).

However, the judge may order to any litigant party to produce the pieces of proof it has (Judicial Code, art. 871).

When there are precise and concordant serious presumptions that a party or a third-party holds a document containing the proof of a relevant fact, the judge may order that this document or a certified copy be submitted to the procedure brief (Judicial Code, art. 877 and 878).

b) Before the Council of State, the proceeding is presided over by an interrogating judge: in the framework of the examination of the action for cancellation, the judge is assigned precise responsibilities as to the case's preparation.

As the Report to the Regent preceding the decree of August 23, 1948 underlined it, determining the proceeding before the Council of State's administration division, "*It is because the very idea*

of administrative litigation is inseparable from the concept of general interest that it is through the judge and not the parties or their counsellors that the proceeding must be led. Otherwise, the parties would be enabled, naturally tempted to place their personal conveniences or interests before the general interest, to delay the dispute's solution; this would enable an administration to use all available means to prolong, despite the law, the effects of the illegal act it committed. This is why in France as well as in the Netherlands, the Council of State itself leads the proceeding (...)¹⁵.

42.

The hearings of the Courts and tribunals, just like those of the Council of State, are public, unless this publicity is dangerous for the public order and moral custom.

At the Council of State, the President firstly recognizes a councillor who reports on the case. Then the president recognizes the petitioner, then the opposing party and, ultimately, the interveners.

The Auditor's Office's member then gives his/her opinion.

The president then decides to close the debates and puts the case under deliberation.

43.

Only the judges having jurisdiction regarding the case take part in the deliberations.

Here one must recall the order pronounced by the European Court of Human Rights on February 20, 1996 in the case of Vermeulen vs. Belgium (58/1994/505/587; R.T.D.H. 1996, p. 615 and n., obs. P. LAMBERT; J.L.M.B. 1996, p. 904 and n., obs. P. HENRY; see also MM. F. DUMON, R. CHARLES and E. KRINGS, De procureur-generaal en de advocaten-generaal in het Hof van Cassatie van België, R.W., 1996-1997, p. 313 and n.; S. VAN DROOGHENBROECK, obs. under Cass. September 13, 1999, R.C.J.B., 2000, p. 745 and n.).

In a civil case, the petitioner complained about not having been able, through his/her consultant, to answer the pleadings of the assistant prosecutor or to speak last at the hearing of the Supreme Court of Appeal; he/she also denounced the participation of the public department's representative in the deliberations that immediately followed.

The Court considered that *"taking in account the stake for the petitioner of the proceeding before the Supreme Court of Appeal and the nature of the conclusions of the assistant prosecutor, the option for the interested person of responding to it before the close of the hearing disregarded his/her right to an adversary proceeding. This implies in principle the right of the parties to a penal or civil proceeding, to take cognizance of any exhibit or observation submitted to the judge even by an independent magistrate, with a view to influence his/her decision and to discuss it"*.

In the extension of the Vermeulen ruling, from now on any party has the option to take cognizance of the public department's opinion and to debate it prior to the court decision.

A law of November 14, 2000 amended to this end the articles 766, 767, 770 and 771 of the Judicial Code by distinguishing according to whether the public department's opinion is written or oral (G.de Leval, Civil proceeding exhibits, Brussels, Larcier 2003, p 208).

It is also important to mention that, with a view to give legislative follow-up to the Vermeulen ruling vs. Belgium, an amendment to the bill modifying the laws on the Council of State, consolidated on January 12, 1973, as well as the Judicial Code, was filed on February 24, 1999 by MM. DETREMMERIE and VANPOUCKE, proposing to complete article 76 as follows: *"If in his/her opinion, the member of the Auditor's Office intends to state his/her point of view or new elements, the parties are informed about it and may submit their observations about it before the opinion of the Auditor's Office's member is given"*(Doc. parl., Ch. repr., sess. 1998-1999, n 1960/3, p. 4). However, this amendment was withdrawn after the deputy minister and the Minister of the Interior declared they feared that, if these initiatives were to be taken in this matter, they might be technically premature (Doc. parl., Ch. repr., sess. 1998-1999, n 1960/4, p. 8); see R. ANDERSEN, the Vermeulen ruling and the role of the Council of State's auditor, in *Mélanges en*

15. Moniteur Belge, August 23-24, 1948, p. 6821.

hommage à P. LAMBERT, Brussels, Bruylant 2000; S. VAN DROOGHENBROECK, *Les paroles s'envolent, les écrits restent*. -About the rule of equal footing abridged before the Council of State, A.P.T., 1997, p. 229 and n.

As the members of the Auditor's Office do not take part to the deliberations of the Council of State's rulings, a similar problem to that which arose in the case leading the Court of Strasbourg to pronounce the order of June 7, 2001 *Kress vs. France* could not be encountered in Belgian law.

B. The court decision.

44.

The Courts and tribunals grounds of judgments and rulings, like that of the Council of State's orders, vary considerably according to the cases processed.

One may notice the Council of State tendency to pronounce more concise rulings than it did 10 or 20 years ago, a period when one frequently encountered several dozen pages outlining grounds for a decision.

45.

The standard references, or formal sources of Belgian administrative law, range from directly applicable conventional international law and European law with administrative rulings and decisions, through the Constitution, with standards having legislative validity (federal laws, community and regional decrees and, to a certain degree, Brussels-Capital Region orders) and the general rules of law that, unlike the former, are unwritten rules recognized as being legally binding.

46.

As for the supervision of the legality exercised by the Council of State over the individual administrative acts and regulations, it is related both to internal legality (competence, elaboration procedure, forms) and external legality (object, motive and goal).

Regarding oversight of the motives in particular, it is related both to the motives of law (legal basis) and the motives of fact (material exactitude, legal qualification and assessment of facts). The question of whether it lies with the judge of excess of power to proceed to balance the interests is controversial.

The oversight of legality exercised by the Courts and tribunals over the decrees and administrative rulings by the judicial judges, on the basis of article 159 of the Constitution, is also related both to internal legality and external legality

47.

a) According to article 1017 of the Judicial Code, any final judgment pronounces, even as a matter of course, the order for the losing party to pay costs, unless particular laws provide otherwise and without prejudice to the parties' agreement that, as the case may be, the court decision announces.

This provision applies to the civil procedures altered before the civil courts subject to the application of article 2 of the Judicial Code (G. de LEVAL, o.c, p. 427).

b) According to the Regent decree of August 23, 1948 determining the procedure before the legislation division of the Council of State, article 68, when the Council of State rules by way of judgment, the petitioner advances the costs; the Council may order the payment of a provision. When the request or the appeal is brought by the State, a province, a county borough or a public institution, the taxes are cleared in balance due by the Council of State's clerk of office and the experts' fees and disbursements, as well as the taxes of the witnesses, are advanced by the registry's and court's administration and entered in expenses in the accounts of the Ministry of the Interior.

The Council of State clears the costs and reaches a decision on the contribution to pay them. In any case, the costs, overall bound both to the request of suspension and to the petition for cancellation, rest on the party losing on the main issue.

48.

The judicial organization is such that the judgments are sometimes pronounced by judges adjudicating alone (Justices of Peace), other times by three-judge or one-judge chambers (civil courts), and sometimes by three-bencher or one-bencher chambers (Courts of Appeal).

The rulings of the Supreme Court of Appeal may only be made with five benchers, including the one who presides (Judicial Code, art. 128).

The rule of collegial administration unwaveringly dominated the chambers organization of Council of State's administration division up until 1993.

This rule remains, but today is accompanied by significant exceptions.

Article 90 of the consolidated laws must be consulted in this regard, such as amended by article 38 of the law of August 4, 1996 and by article 24 of the law of May 25, 1999.

In the matter of opinions, action for cancellation, appeal to the Supreme Court and penalty request brought in compliance with article 36, § 1, of the consolidated laws, the chambers of the administration division sit with three members, including the one who presides.

However they sit as one member:

1° in relation to a action for cancellation or appeal to the Supreme Court brought against administrative decisions made in compliance with the law of December 15, 1980 on access to territory, residence, settlement and departure of foreigners¹⁶;

2° in relation to an action for cancellation or appeal to the Supreme Court where article 17, §§ 4bis and 4ter of article 21, paragraphs 2 and 6 is enforced, or when the auditor's report proposes to declare the appeal as irrelevant, obviously inadmissible, obviously founded or obviously unfounded, to announce the withdrawal from the proceeding or the strike the case;

Moreover, except for the cases provided in article 17, § 1, paragraph 3, and § 2, paragraph 3, and in article 18, paragraph 3, the chambers of the administration division sit as one member in relation to requests of suspension and interim relieves.

49.

The answer is negative, both in relation to the administrative courts and judicial courts.

50.

The court decision is written, in principle pronounced orally and served or notified in writing.

D. The judgment's effects and execution.

51.

A distinction must be made.

a) According to article 23 of the Judicial Code, the final judgment's authority only takes place in relation to that which was subject to the decision. The requested thing must be the same; the request must be founded on the same case; the request must be between the same parties and formed by them or against them in the same quality.

Such is the rule in relation to the court decisions pronounced by the Courts and tribunals.

16. A law of May 6, 1993, amending article 90 of the consolidated laws on the Council of State, already provided this exception, however enabling the petitioner to ask, in the request, and the first president or the State Councillor he/she appointed to order ex officio a case's reference to a 3-member chamber. With an order of July 14, 1994, the Court of Arbitration judged that article 90 of the consolidated laws, such as amended, did not infringe articles 10 and 11 of the Constitution; the specificity, increase and emergency of the litigation resulting from the application of the law of December 15, 1980 and of the laws amending it justify the passing of specific rules, appropriate to catalyze the process of the actions for cancellation; this measure, derogatory to the ordinary rules, does not affect the fundamental guarantees of the jurisdictional control of legality entrusted to the Council of State (No. 61/ 94, No. of role 611, B.6.2. , Moniteur Belge, August 9, 1994).

b) Although no legislative provision stipulated it, the rulings to cancel acts and regulations pronounced by the Council of State have, according to well-established jurisprudence, an irrefragable authority as final judgment.

This jurisprudence rests on formal declarations made during the preparatory works of the law of December 23, 1946 related to the Council of State's creation.

52.

Article 14ter, introduced in the consolidated laws on the Council of State by law of August 4, 1996, empowers it to indicate, by a general provision, those effects of the cancelled regulatory acts provisions to be considered as final or tentatively maintained for the delay it determines. This provision is all the more justified as an appeal to the Council of State may be filed following a ruling to cancel of the Court of Arbitration and as this latter pronounced only one rescission without retrospective force, like article 8, paragraph 2 of the emergency act of January 6, 1989 enables it, it wouldn't be very consistent if the cancelled legislative standard's rescission was totally retrospective.

The power conferred to the Council of State by article 14ter of the consolidated laws is not unlimited, but it must respect the superior standards allotting, in particular, the right to legality, to a fair hearing, to the respect of legal security.

The recent jurisprudence shows a certain reluctance of the judge to use this competence.

53.

The answer requires a series of distinctions.

a) In Belgian law, it is a rule that according to the continuity of the public services delivery, the administrative authorities may invoke an immunity of execution.

Yet a distinction must be made between the sentences targeting them according to whether their purpose is "*a liability to pay*" or "*a liability to act*".

For the execution of the first liability, article 1412bis of the Judicial Code may be applied. A seizure may operate on certain properties owned by the administration and which it previously listed, or, in default of such a list or when the listed properties are not sufficient to pay off the creditor, on the properties that are obviously useless for these legal entities to exercise their missions or for the continuity of public service.

For the execution of the second liability, the immunity remains nearly total, even if the jurisprudence of the Supreme Court of Appeal does not exclude that the individuals may be entitled by the judge to replace the failing administration, at the costs of this administration, when this solution does not affect the continuity of service (Cass., April 24, 1998, J.L.M.B., 1999, p. 672 and n., obs. Ph. COENRAETS and D. DELVAX).

b) The only procedure of direct constraint that may be applied against certain Belgian administrative authorities to ensure, if the need rises, the execution of a decision of justice, is to send a special commissioner; this is a well-known supervision procedure, although limited: it must be formally provided for by law, decree or ruling; it can only be related to an autonomous public service.

Article 9 of the decree of April 1, 1999 organizing the supervision over county boroughs, provinces, inter-communal communities and the zones of semi-communal and multi-communal police of the Walloon Region (C.D.L.D. L 3116-1) provides that the supervision authority may, by decree, appoint a special commissioner when the county borough, province or inter-communal community fails to provide the required information or elements, or to execute the measures prescribed by laws, orders, decrees, rulings or status or by decision of justice passed as legal authority. The special commissioner is empowered to take all the measures necessary in the place of the failing authority, in the limits of the mandate that he/she was given by the decree appointing him/her.

This method, whose usefulness is clear, can also be found in articles 14 to 16 of the decree of December 20, 2004 organizing the normal administrative supervision over the county boroughs of the German-Speaking Region.

However, it cannot be found in article 34 of the Flemish decree of April 28, 1993 related to the regulation, for the Flemish Region, of the administrative supervision over the county boroughs, or in article 3 of the Flemish decree of February 22, 1995 related to the regulation of the administrative supervision over the provinces in Flemish Region, or in article 18 of the Brussels ruling of May 14, 1998 organizing the administrative supervision over the county boroughs of the Brussels Capital Region.

c) Independently of this compulsory execution proceeding, the administration may be sentenced under penalty.

In principle, it lies with the judges, both administrative and judicial, to add a penalty to any sentence at the execution of an obligation to act.

The matter is settled separately by the Judicial Code (article 1385bis and next) and by laws consolidated on January 12, 1973 on the Council of State (article 36).

It must be noted that the Council of State may, on request, pronounce the suspension under penalty of the execution of an administrative act or also to impose interim measures combined with the same method, it is not the same for a ruling of rescission.

The petitioner may not continue the rescission of an administrative act or ruling and ask at the same time that this rescission be combined with a penalty.

This option is open to him/her only in the case when the ruling of rescission is not executed by the administration within three months after its notification.

A separate request must be filed to this end, and after the relevant administration was formally notified.

It is important to highlight that when the Council of State sentences under penalty, the latter's amount is not settled to the plaintiff but to a management fund called the penalties management fund.

54.

The overloading of the courts, both judicial and administrative, and, consequently, their backlog, is subject to a permanent debate in Belgium.

The divestment of the judicial judge may be sought when he/she fails to judge the case he/she took in the deliberations (art. 648, 4\ of the Judicial Code).

Measures, draconian for those to be tried, were taken to accelerate the course of the proceedings. This is how, to cite just one example, according to a law of August 4, 1996 amending the consolidated laws on the Council of State, the petitioner whose request of suspension was not received is presumed to have withdrawn if he/she did not file the request to continue the proceedings within thirty days after the ruling's notification.

Moreover, for several years, bills were submitted, aiming, under various methods, to create administrative courts with general jurisdiction (one per province? One per Region? One per jurisdiction of Court of Appeal? ...), that sometimes rule in first and last resort, sometimes in appeal for a judgment pronounced by the administrative courts with special power, as the Council of State no longer intervenes as an appeal judge.

None of these provisions have succeeded to date.

The Government's attention has been focused, since June 2003, on the Council of State itself, which might be subject to a reform presumed to enable it to absorb the cumulated backlog in foreigners litigation.

E - The rights of review.

55.

It is important to recall the administrative courts of first instance and appeal with general power do not exist in Belgium, but that the Council of State rules in first and last resort on the action for cancellation for any unilateral act of an administrative authority, and that it has jurisdiction on appeal regarding court decisions pronounced without appeal by the administrative courts with special power.

56.

a) Insofar as it depends on judicial courts, the administrative litigation is in principle subject to a double degree of courts (1st instance and appeal).

b) As for to Council of State, it has jurisdiction, sometimes in appeal and other times in cassation, regarding court decisions pronounced by the administrative courts.

The excess of power's litigation rests on the only Council of State, which determines in first and last resort.

Its rulings may be subject to appeal before the Supreme Court of Appeal only if they are pronounced on its own competence in relation to those of the judicial courts (concurrence of jurisdictions).

It is important to note that in Belgium there is no institution similar to the jurisdictional court.

The Supreme Court of Appeal determines the concurrence of jurisdictions (article 158 of the Constitution).

F. Urgent proceedings and summary court decisions.

57. Are there urgent proceedings and summary court decisions?

a) Until 1991, save one single exception in relation to foreigners litigation, only the judicial judge, in this particular case the Court's President (court of first instance, commercial and labour court), could be referred to in summary proceeding against an administrative decision.

According to article 584 of the Judicial Code, the judge of summary proceedings tentatively pronounces in all cases where he/she recognizes an emergency, in all matters, except for those that the law shields from the judiciary power.

In practice, the Court's President pronounces in emergency on all requests questioning a subjective right, even when the administration is an opposing party.

It is out of the question to restrict this intervention only to cases of acts of violence. It covers any flawed prejudice to a subjective right.

The powers of the Court's President adjudicating in summary proceeding were stipulated by the Supreme Court of Appeal in a ruling of March 21, 1985: "*the judge in summary proceedings does not get involved in the attributions of excessive power when, tentatively adjudicating in a case that he/she recognizes as being urgent, he/she declares him/herself, as in this particular case, competent to, within the limits of his/her mission, prescribe the administrative authority the measures and notably the defences required to prevent and stop a prejudice appearing to be wrongly brought by this authority to subjective rights which safeguard depends on the Courts and tribunals*"¹⁷.

b) Since the enforcement of a law of July 19, 1991, which to this end amended articles 17 and 18 of the consolidated laws on the Council of State, this latter may pronounce in summary proceeding.

The rule is that when an administrative act or ruling is likely to be cancelled (thus jurisdictional decisions are excluded, as, unlike in French law, they cannot be subject to a request for reprieve from execution), the Council of State only has power to order the suspension of its execution.

This rule is deceptively clear.

Its application brought up multiple concurrences of jurisdictions.

The Supreme Court of Appeal developed an interpretation upon it where it does not prejudice the competence of the Court's President based on article 584 of the Judicial Code: he/she remains competent when subjective rights are involved.

58.

a) As mentioned above, the summary proceedings judicial judge may tentatively take any necessary measure with a view to protect a subjective right.

17. J.T., 1985, p. 697 and n, conc. of the attorney general VELU, then assistant prosecutor. As application, see notably Civ. Namur (ref), March 25, 2003, J.T., 2003, p. 688 and n.

He/she may intervene as such, notably with a view to protect public liberties.

b) As for the Council of State, it may be referred to on the basis of article 17 of the consolidated laws of January 12, 1973, for a request aiming to suspend the execution of an administrative act or ruling.

When it is referred to for such a request, it alone may, provisionally and under the conditions provided in article 17, § 2, paragraph 1, either if there is a serious means and a risk of grave prejudice difficult to rectify, order all measures required to safeguard the interests of the parties or persons interested in the case's solution, except for the measures related to civil rights.

This is how, by ruling pronounced on December 20, 1991, the Council of State, after having ordered to suspend an order to leave the territory, addressed a foreign petitioner, enjoined the Belgian State to have her entered in the population's register and to give her a EEC residency card¹⁸.

59.

Strictly speaking in Belgian law, there is no bail summary procedure or conservancy summary procedure similar to those arranged by articles L.521-2 and L.521.3 of the French Code of Administrative Justice.

But the filing of a request of suspension, followed by a request of interim relief, may result in similar, if not equivalent, results.

60.

As already indicated in the answer to question No. 16, it is accepted in Belgian law that the administrative authorities themselves may be referred to with appeal, even if legislative or regulatory provisions do not arrange them.

1) In this regard, the appeal for consideration, brought to the perpetrator of the criticized act, the appeal to a higher body, and the supervisory petitions, brought to the relevant supervisory authority, rest upon the relevant administrative centralization and decentralization, respectively. Referred to with such a non-organized appeal, the administrative authority is not obliged to examine it.

This is not a compulsory precondition to bring action for cancellation before the Council of State.

2) There are numerous standards having legal validity and the regulations providing for appeals to administrative authorities, sometimes those especially established to have jurisdiction, other times pre-existing ones.

The administrative authority referred to with such appeal is obliged to examine it.

It then exercises competence for reversal.

It is generally a precondition to the appeal to the Council of State.

61.

For some ten years, mediation has taken its place among the procedures aiming to settle administrative disputes.

Separate mediators were created at the level of the federal, community and regional administrations, their power being circumscribed to the decision-making sphere of each.

According to the statement of the bill's grounds establishing a federal mediator¹⁹, according to the development of the proposition of decree related to the creation of the mediator's institution for the Walloon Region²⁰, according to the grounds statement for the draft decree related to creation of the mediator's service for the French-Speaking Community, as well as according to the developments

18. CE. December 20, 1991, *Triches vs. Belgian State*, n° 38.402, U.G.A.; see also, in the same sense, CE., January 15, 1992, *Ukcardes vs. City of Brussels*, n° 38.499, U.G.A.; J.L.M.B., 1992, p. 272, obs. Ch. PANIER. The injunction may aim to authorize the entry in the Kingdom - see CE., October 27, 1992, *Kongo Vangu vs. Belgian State*, n° 40.846, U.G.A.

19. Doc. parl, Ch. repr., sess. 1993-1994, n° 1436/1, p. 3.

20. Doc. Cons. rég. w., sess. 1993-1994, n° 255/1, p. 2.

of the proposal of decree establishing the Flemish mediation service²¹, the mediator is bound to look for a solution for the administration's inappropriate – and not necessarily illegal – operation, by exercising advisory, and not decision-making, power.

Systematically, the legislator refused to attach to the mediator's submission of a case to the court a suspensive or interruptive effect for the jurisdictional appeals delays.

It also generally provided that the examination of the claim brought before the mediator would be suspended by filing an organized administrative appeal or a jurisdictional appeal.

For reasons that are unclear, these points cannot be found in the decree of June 20, 2002 related to the service of a mediator in the French-Speaking Community.

62.

Until the enforcement of the law of May 19, 1998, the public authorities were forbidden, except for rare exceptions, to appeal to arbitration; such was the rule imposed for several decades by article 1676-2 of the Judicial Code.

This rule was subject to critics: It was considered obsolete, poorly adapted to the public authorities interventionism in the economic domain; the singularity of the exclusion imposed by Belgian law in this regard was excoriated.

The legislator did not remain impervious to these criticisms²².

By law of May 19, 1998 amending the provisions of the Judicial Code related to arbitration²³, the prohibition of public corporations to submit to arbitration, which remains the rule, was considerably softened²⁴.

Article 3 of this law replaced article 1676.2 of the Judicial Code, which is written as follows from now on:

"Whosoever has the capacity or is empowered to compromise may conclude an arbitration agreement.

Without prejudice to the particular laws, legal persons of public law may only conclude an arbitration agreement in cases where the agreement concerns the settlement of a dispute relating to the establishment or execution of a contract. Such an arbitration agreement is subject to the same conditions regarding its conclusion as the agreement whose performance is the subject of the arbitration. In addition, legal persons of public law may conclude arbitration agreements with respect to all matters, which are determined by law or by a royal decree deliberated in the Council of Ministers. This decree may also stipulate the conditions and the rules for the conclusion of the agreement".

IV – Administration of justice and statistical data²⁵.

A. The means available to the justice in the administration control.

63.

The Council of State's budget appears in the expenses of the Ministry of the Interior.

For the fiscal year 2005, this budget is 30,668,000 Euros, while the estimate of the Ministry of the Interior is 464,000,000 Euros.

For 2005, the total estimates are 44,436,400,000 Euros.

64.

21. Vlaams Parlement, zitt. 1997-1998, n' 893-1.

22. Doc. parl, Ch. repr., sess. 1997-1998, n 1374/1, p. 3.

23. Published in the Moniteur Belge on August 7, 1998, this law was enforced 10 days later.

24. See L. DE GEYTER, Arbitrage met publiekrechtelijke rechtspersonen, T.B.P., 2001, p. 304 and n.; L. DEMEYER, De wet van 19 mei 1998 tot wijziging van de bepalingen van het Gerechtelijk Wetboek betreffende de arbitrage, R.W., 1998-1999, p. 865 and n.

25. The answers to the questions of point IV rest on the data and tables kindly communicated by Mr. Klaus VANHOUTTE, Council of State's Administrator.

The Council of State has, as of October 1, 2005, 44 magistrates having the titles of First President, President, Chambers Presidents and State Councillors.

It also includes, according to article 69, 2\ of the consolidated laws, 80 members of the Auditor's Office, having the duty of general auditor, deputy general auditor, first auditors head of division, first auditors, auditors and deputy auditors, in addition to four members, taking into consideration temporary assignments.

It also includes a coordination office made up of 2 first recorders head of division, 2 first recorders, recorders, or assistant recorders.

65.

At the Council of State, 30 members having the titles of President, Chambers Presidents and State Councillors are appointed to the administration division, as well as 55 members of the Auditor's Office.

66.

Several Chambers Presidents and State Councillors and members of the Auditor's Office benefit from the assistance of secretaries with legal training having the title of executive secretaries. The workforce totals 42 units.

67.

The Council of State has a library in which are stored the main collections of legal periodicals and legal literature in French and Dutch languages.

68.

Each member of the Council of State has a computer with access to the network.

The Auditor's Office and the coordination office compiled data banks specifically adapted to the institutional tasks.

The notices and rulings of the Council of State are systematically registered in data banks that are, for the most part, made available to the public.

69.

The Ministry of Justice has an Internet site including notably a section "*Courts and tribunals*" allowing access the judicial jurisprudence, particularly that of the Supreme Court of Appeal.

The Council of State has its own Internet site.

This site allows external users to obtain information about the institution's missions and operation, about the legislation which is applicable to it, the rulings pronounced and the judgments reached.

The Council of State is also responsible for making the laws and rulings in force available to the public.

The data bank "*Reflexdatabank*" was compiled to this effect.

B. Others statistics and calculated information – 2003 and 2004 as base years.

70.

73.

74.

75.

Table 1:

Overview of the number of appeals filed from judicial year 2003/2004 to judicial year 2004/2005 (June 2005), by linguistic register, distributed between the foreigners litigation and the general litigation.

It should be noted that under the term "*appeal*" is mentioned each case subject to one single register's number, which may be applied to several requests, for example in summary proceeding then in rescission.

Judicial Year 2003/2004

	Register in Dutch	Register in French	Bilingual register	Register in German	total
Foreigners	5142	5950	0	0	11.092
General	1666	1480	17	1	3164

Judicial year 2004/2005 (cases entered until June 2005)

	Register in Dutch	Register in French	Bilingual register	Register in German	total
Foreigners	2915	3352	0	0	6267
General	952	883	7	0	1842

Table 2 :

-Overview of the number of "*interlocutory*" rulings from judicial year 2003/2004 to judicial year 2004/2005 (June 2005), by linguistic register, distributed between the foreigners litigation and the general litigation.

General litigation and foreigners litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	Total
2003/2004	954	1.351	17	--	2.322
2004/2005	921	1.150	8	--	2.079

Table 3 :

Overview of the number of final rulings pronounced from judicial year 2003/2004 to and including the judicial year 2004/2005 (August 31, 2005), by linguistic register, and distinction between the foreigners litigation and the general litigation.

General litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	
2003/2004	1.623	912	31	7	2.573
2004/2005	1.941	1.169	36	4	3.150

Foreigners litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	
2003/2004					7.218
2004/2005	4.710	3.948	--	5	8.663

General litigation + foreigners litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	
2003/2004	5.704	4.052	31	9	9.796
2004/2005	6.651	5.117	36	9	11.813

Table 4 :

Overview of the number of rulings pronounced (final and interlocutory rulings) from judicial year 2003/2004 to and including judicial year 2004/2005 (08/31/05), by linguistic register, and with distinction between the foreigners litigation and the general litigation.

General litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	
2003/2004	2.216	1.383	48	7	3.654
2004/2005	2.476	1.649	44	4	4.173

Foreigners litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	
2003/2004	4.441	4.016	--	2	8.459
2004/2005	5.096	4.618	--	5	9.719

General litigation + foreigners litigation

	Register in Dutch	Register in French	Bilingual Register	Register in German	
--	----------------------	-----------------------	-----------------------	-----------------------	--

2003/2004	6.657	5.399	48	9	12.113
2004/2005	7.572	6.267	44	9	13.892

Table 5 :

-Overview of the number of rulings where the suspension of the execution was ordered, from judicial year 2003/2004 to and including judicial year 2004/2005 (08/31/05), by linguistic register, and with distinction between the foreigners litigation and the general litigation.

General litigation

	Register in Dutch	Register in French	
2003/2004	78	116	194
2004/2005	74	78	152

Foreigners litigation

	Register in Dutch	Register in French	
2003/2004	18	211	229
2004/2005	8	121	129

Table 6 :

Overview of the number of rulings of rescission pronounced from judicial year 2003/2004 to and including judicial year 2004/2005 (08/31/05), by linguistic register, and with distinction between the foreigners litigation and the general litigation.

General litigation

	Register in Dutch	Register in French	
2003/2004	242	239	481
2004/2005	592	226	818

Foreigners litigation

	Register in Dutch	Register in French	
2003/2004	43	190	233
2004/2005	24	192	216

The total number of pending cases as of September 1, 2005 was 37,878 (No. of register) including 27,900 pertaining to foreigners litigation.

C. Economics of administrative justice

A partial answer may be given only for that which concerns reparation of exceptional damage by the Council of State.

It judges then in equity, taking into account all circumstances of public and private interest.

Determination of the amount of the indemnity that was decided, notably as a result of the damages caused without fault by compulsory vaccinations, obligated the magistrates to exceptional research.