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Towards good administration: the Belgian experience

REPORT PRESENTED BY

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1. Describing the Belgian experience of good administration has an emotional dimension at a time when Belgium is going through a difficult period and encountering problems in forming a new federal government.

Nevertheless, it has to be said straightaway that, in order to move towards good administration, Belgium has, thanks to the legislature's action on the one hand, and the work of the administrative courts on the other, equipped itself with a number of tools providing evidence that the Belgian administrative services are carrying out their mission, not only in the interests of good administration, but, what is more, with due regard for quality standards.

In discussing good administration in Belgium therefore, it is quite natural to look in turn at the contribution of the legislature (I) and the contribution of the administrative courts (II).

I. The contribution of the legislature

2. As everyone knows, Belgium is a federal state, which means that there are various legislatures in Belgium: not only a federal legislature, but also federated legislatures, of which there are currently eight[1].

In recent years the various legislatures have made serious efforts to ensure, if not good administration, at least better administration.

Originally in Belgium, there was only one constitutional provision concerning the quality of the administrative service. This laid down the principle of the equality of all users before the civil service. This fundamental rule is fortunately still in force today[2].

Since then, the rule of equality has been shored up by other measures that are complementary to it since, when examined closely, they are no more and no less than its corollary.

These new rules have one thing in common: the objective of ensuring "administrative transparency", an "administrative transparency" that has led to the adoption of a dual mechanism.

3. To begin with, Belgium passed a law in 1991 requiring all administrative services in the country to indicate – in what it was agreed to call the *instrumentum* of all unilateral administrative decisions that are individual in scope – the considerations of fact and law on which the decision was based[3].

This law is fundamental. It requires, not that there be underlying justification for individual administrative decisions – this was already the case –, but that this justification should be apparent to the persons to whom such decisions are addressed.

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[1] On the coexistence of various legislatures in Belgium, see in particular, F. DELPEREE and S. DEPRE, *Le système constitutionnel de la Belgique*, Bruxelles, Larcier, 2000, 342 pp.

[2] See Article 10 of the Belgian Constitution.

[3] This is the Law of 29 July 1991 "on formal grounds of administrative decisions", *Moniteur belge* of 30 September 1991; on the formal grounds of administrative decisions, see in particular P. JADOUL and S. VAN DROOGHENBROECK (ed.), *La motivation formelle des actes administratifs*, Bruxelles, La Charte, 2005, 379 pp.

What does this requirement mean in practical terms? It means that the administration should state the legal basis on which it has acted and the legal considerations and facts on which the decision is based. It also means that the reasons given must be appropriate, in other words that there is a causal relationship between them and the decision taken, that they are not inconsistent with that decision and that they are sufficiently explicit and comply with all the rules and all the principles binding on the administration.

It should be emphasised that in the current state of Belgian legislation there is no requirement for formal grounds of unilateral administrative decisions that are regulatory in scope, except in rare cases which are essentially to be found in the law on town-planning and the environment.

4. The 1991 law requiring every administrative service to give formal reasons for every unilateral administrative decision that is individual in scope was not the only piece of legislation enacted. Other legislation has been passed in order to guarantee access to "administrative documents". What legislation is this?

In 1993, influenced by European law, the Belgian Constitution enshrined the right of each citizen to consult "any administrative document and to be given a copy of it"[4].

On the basis of the Constitution, the various legislatures have – each within the context of their own administration – decided to pass a law for the purposes of putting this right into practice[5]. More specifically, the right of access as it is recognised in Belgium by the various Belgian legislatures has a twofold series of guarantees.

5. First, there are guarantees of active openness. To put it plainly, administrative services must be proactive in the field of administrative transparency.

For example, before 1993, an administrative service sent letters to citizens without any reference to anyone or anything. Since 1993, any decisions that citizens receive must contain the identity of the officer dealing with the matter, his or her contact details and the administrative and judicial appeals available if citizens wish to contest the decision in question.

The improvement may seem slight, but in practice it is considerable.

6. In addition to the guarantees of active openness that have just been mentioned, there are guarantees of passive openness[6]. The expression is not pejorative. It refers to obligations on the administration that come into play only at the citizen's request.

In this connection it should be noted that citizens have the right to access any administrative document held by the administration.

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[4] See Article 32 of the Belgian Constitution.

[5] With respect to the federal administration, see the Law of 11 April 1994 "on the openness of administration", *Moniteur belge* of 30 June 1994.

[6] See in this regard P. LEWALLE, *Contentieux administratif*, Bruxelles, Larcier, 2002, pp. 52-146; D. RENDERS (ed.), *L'accès aux documents administratifs*, Bruxelles, Bruylant, 2008, forthcoming.

For example, an administration that intends to issue planning permission for the construction of a building has a duty to allow residents to consult the file submitted to the administration. Residents may obtain copies of everything in the file, be given explanations by the competent civil servant or consult the file on the spot, remaining for hours on the administration premises in order to do so.

The right thus enshrined is in the field of town planning. It is also more fundamentally enshrined in all the fields in which the administration is called upon to act. One more unusual but real example will suffice to show the variety of requests that can legitimately be made: a citizen was lawfully able to request access to the software concerning the computerised voting system used in Belgium at elections in order, in particular, to check that the software was not rigged by the Interior Ministry[7].

There are of course limits to the right of access. If national security or private life is at issue, for example, access to administrative documents may simply be prohibited.

Fundamentally, however, the right of access is exceptionally wide-ranging, which shows that the various legislatures have made great efforts to improve the quality of the administrative services in Belgium.

II. The contribution of the administrative courts

7. The administrative courts have also endeavoured to guarantee good administration of the civil service.

Under the influence of Dutch law, the Belgian administrative courts have made a considerable contribution to raising the requirements in terms of administrative management.

They have gradually come to recognise a general right to "good administration".

This principle is a catch-all because it contains many requirements addressed to the administration.

8. An initial set of requirements all have a fair-play content.

The most important of these include the rights of the defence. Upholding these rights means that people subject to disciplinary proceedings must be able to present their defence, be assisted by the lawyer of their choice, be informed of the charges against them, have access to the administrative file, be summoned to the hearing and be able to request that the witnesses are heard in their presence[8].

9. The duty of fair play also contains the more limited requirement of what is known as prior hearing. This requirement means that, where there is a possibility that the administration

[7] See in this connection Cons. Etat. *bel.*, arrêt *Antoun*, n° 95.277 of 21 May 2001.

[8] With regard to the rights of the defence in the disciplinary law of the Belgian civil service, see in particular . D. RENDERS, M. JOASSART, G. PIJCKE and F. PIRET, "Le régime juridique de la sanction administrative", *in* R. ANDERSEN, D. DEOM and D. RENDERS (eds.), *Les sanctions administratives*, Bruxelles, Bruylant, 2007, pp. 197-209.

will take a decision that will be unfavourable to someone, because of the personal conduct of that person, it will begin by hearing that person. This is the case with respect to the dismissal of a trainee for reasons concerning the way in which he or she has acted[9], and the preventive suspension of a civil servant in the interest of the service[10] or, again, in the context of an authorisation or subsidy accorded to a private individual or another public authority[11].

The prior hearing requirement is less binding than the duty to uphold the rights of the defence. In certain circumstances, the former may be disregarded, never the latter[12].

10. In addition to upholding the rights of the defence and the possible prior hearing requirement, the fair-play principle also requires the administration to be impartial. It is what is known as "objective impartiality" that is required. To put it in another way, even apparent partiality is prohibited[13].

11. Alongside the duty of fair play, the principle of good administration carries a second set of requirements. It requires the administration to take unilateral administrative decisions with full knowledge of the facts, which means that, before it decides, the administrative authority is required to gather all the relevant information[14].

Consequently, in order to be sufficiently informed before taking a decision, the administration may, if necessary, be required to give the person to whom the decision in question will be addressed the opportunity to express his or her point of view. Such is the case where the administrative authority intends to adopt a "serious measure", if a hearing is the only means by which it can be fully informed of the circumstances that it must take into consideration before taking a decision[15].

Moreover, in order to be sufficiently informed, the administration must, if necessary, supplement the information it has by seeking the views of an expert. An administration may not, in particular, legitimately set aside the existence of a medical certificate produced by a civil servant in order to take a measure regarding him or her, unless the administration has been further advised by another medical opinion[16]. Similarly, if with respect to public contracts the evaluation of tenders requires an assessment of technical and financial elements that the administration is not in a position to conduct, it must seek to obtain authoritative information from experts[17].

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[9] See in particular Cons. Etat *bel.*, arrêt *Raychlin*, n° 35.702 of 19 October 1990.
[10] See in particular Cons. Etat *bel.*, arrêt *Navez*, n° 39.104 of 30 March 1992.
[11] See in particular Cons. Etat *bel.*, arrêt *Decrée*, n° 38.893 of 2 March 1992; see also Cons. Etat *bel.*, arrêt *a.s.b.l. Enseignement technique de l'Evêché de Liège*, n° 39.233 of 27 April 1992.
[12] On this point, see in particular D. RENDERS and Th. BOMBOIS, "La motion de méfiance constructive communale: un acte justiciable du Conseil d'Etat", *Journal des Tribunaux*, 2006, p. 321 and the references quoted; see also J. JAUMOTTE, "Les principes généraux de droit administratif dans la jurisprudence administrative", *in* B. BLERO (ed.), *Le Conseil d'Etat, cinquante ans après sa création (1946-1996)*, Bruxelles, Bruylant, 1999, p. 660 and the case-law quoted.
[13] On this point see in particular P. GOFFAUX, *Dictionnaire élémentaire de droit administratif*, Bruxelles, Bruylant, 2006, pp. 132-133, v° "impartialité".
[14] See in particular Cons. Etat *bel.*, arrêt *Hodod*, n° 58.328 of 23 February 1996.
[15] See in particular Cons. Etat. *bel.*, arrêt *Union Saint-Hubert F. I.*, n° 29.759 of 15 April 1988; see also Cons. Etat *bel.*, arrêt *Huart*, n° 38.599 of 28 January 1992.
[16] See in particular Cons. Etat *bel.*, arrêt *Wéry*, n° 38.310 of 11 December 1991.
[17] See in particular Cons. Etat *bel.*, arrêt *s.a. Integan*, n° 19.671 du 31 May 1979.

12. In addition to fair play and the duty to be informed, there is a third set of requirements contained in the principle of good administration which involves the requirements of legal certainty and legitimate expectations.

In substance, legal certainty means that citizens are to a reasonable extent able to predict the way in which the administration will act[18]. It is with this in mind that generally speaking, it is prohibited for unilateral administrative decisions in Belgium to be retroactive[19].

Legitimate expectations involve citizens being able to have confidence in the decision or behaviour of the administration[20]. Accordingly, an authority that has given to believe that it is acting within the limits of its duties incurs civil liability with respect to the person with whom it is dealing[21].

13. In the light of the above considerations, it may be wondered whether the principle of good administration brought out by Belgian case-law is of genuine legal interest. Each of the requirements contained in the principle is individually guaranteed. They are, moreover, accorded varying legal value[22].

14. I will therefore conclude by stating that Belgium now presents a satisfactory picture regarding standards of administrative management, even though it has to be admitted that improvements could be made, in particular regarding the requirement of formal reasons for regulatory administrative decisions and access to a larger number of administrative documents on the internet.

For the moment, however, there are more worrying matters in Belgium than standards of administrative management: a government is needed and, more fundamentally, the survival of Belgium needs to be ensured.

Everything is relative in life, even the administration of a state when the state itself is in question.

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[18] See in particular Cass. *bel.*, 14 juin 1999, *Bulletin des arrêts de la Cour de cassation*, 1999, n° 352, p. 855; see also Cons. Etat *bel.* (ass. gén.), arrêt *Missorten*, n° 93.104 of 6 February 2001.

[19] See in this connection D. RENDERS, *La consolidation législative des actes administratifs unilatéraux*, Bruxelles, Bruylant, Paris, L.G.D.J., 2003, pp. 59-65.

[20] See in particular L.-P. SUETENS, "Algemene rechtsbeginselen en algemene beginselen van behoorlijk bestuur in het Belgisch administratief recht", *Tijdschrift voor bestuur- et publieckrecht"*, 1970, pp. 379-396; see also R. ERGEC, "Le principe de légalité à l'épreuve des principes de bonne administration", note sous Cass. *bel.*, 4 septembre 1995, *Revue critique de jurisprudence belge*, 1998, p. 21

[21] On this question, see in particular Cass. *bel.*, 29 May 1947, *Pasicrisie*, 1947, I, p. 216; see also D. RENDERS and F. PIRET, "La responsabilité pénale et civile des mandataires provinciaux et communaux", *in* L. LE HARDY DE BEAULIEU (ed.), *Droit de la démocratie provinciale et communale: la désignation et la responsabilité des mandataires*, Namur, Presses universitaires des Facultés universitaires catholiques de Mons, pp. 119-120 and the references they quote.

[22] See in this connection P. GOFFAUX, *Dictionnaire élémentaire de droit administratif, op. cit.*, v° "bonne administration", p. 39.