

# **EFFECTIVENESS OF ADMINISTRATIVE APPEALS WITHIN THE FRAMEWORK OF ADMINISTRATIVE JUSTICE IN BELGIUM**

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## **Abstract**

This article outlines the various forms of administrative appeal in Belgium. Furthermore, the administrative appeals regarding the adjudication or refusal of a building permit, the openness of administration, the income tax and the suspension of an unemployment benefits are examined. In each case an inventory of legal norms is made, the case law analysed and the national literature on the topic reviewed.

## 1. Introduction

In all the member states of the European Union an increase of administrative appeal procedures is noticeable. Belgium is no exception to that tendency. Moreover, the fact that there is no codification of Belgian administrative law and consequently no general regulation of the administrative appeal exists makes that the increase of administrative appeal procedures very perceptible.

In the literature different forms of administrative appeal are distinguished which also can be found in various regulations. As a consequence of the lack of coherence the citizen himself must be well informed in order to follow the correct appeal procedure, to file an admissible administrative appeal and to understand the consequences of lodging an administrative appeal. Even more so, because the conditions to lodge an admissible appeal and the consequences of filing such an appeal can differ, subject to the applicable law. The result of the administrative appeal will also be different according to the field of law given that the competences of the body of appeal differ from procedure to procedure.

The present article will firstly discuss the different types of administrative appeal, namely the appeal in reconsideration, the hierarchic appeal and the appeal with the authority exercising administrative supervision; after that the distinction between organized and unorganized appeals will be explained. Next, the administrative appeals concerning the adjudication or refusal of a building permit, the openness of administration, the income tax and the suspension of an unemployment benefit are examined. In each case the conditions for an admissible appeal, the examination of the appeal and the decision in appeal will be discussed.

During the research, the existing legal framework is reflected, the case law is analysed and the national legal doctrine on the topic is reviewed.

## 2. Overview of the topic

Article 28 of the Belgian Constitution guarantees the right of petition. As a consequence, an administrative appeal can always be lodged with a public authority, even if not foreseen by a legal act (Cambier, 1968, p. 441; Wigny, 1962, p. 90). This basic right can only be derogated from by law. When a specific administrative appeal with proper procedural prescriptions and time limits exists, it excludes all other appeal possibilities<sup>1</sup>.

### 2.1. Types of administrative appeal

Administrative appeals can be classified into three groups depending on the relationship between the organ that made the challenged decision and the organ of appeal.

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1 RvS (Council of State) 10 May 1995, no. 53.223, Leenaerts

Firstly, citizens can always lodge an *appeal in reconsideration*<sup>2</sup> with the organ that made the decision. The litigant requests the administrative authority to reconsider its decision and to make another decision, or, when the administrative authority has not yet acted, to make a decision soon. The authority concerned can revoke its earlier decision and decide in another way, or it can do nothing. However, revocation is not possible when a decision creates rights for persons other than the litigant, except when it is illegal. In that case, revocation is only possible during the period of time fixed for appeal to the Council of State, *i.e.* 60 days after the notification of the decision. The possibility to file an appeal in reconsideration can be put on the same footing as a general principle of law as applying for such administrative review is always possible (Mast, 2009, p. 786). A citizen who is lodging an appeal in reconsideration against an administrative decision does not always experience that appeal as very efficient as the appeal body will not be inclined to reconsider its own decision.

Secondly, citizens can lodge a *hierarchic appeal*<sup>3</sup> with the hierarchic superior of the authority concerned. This is only possible when there is a hierarchic superior, which is in the case of deconcentration of competences. The basic principle of this administrative appeal lies in the hierarchical structure of the government, as the hierarchical body can give obligatory instructions to its subordinates. Obviously the possibility of filing a hierarchical administrative appeal can exist without the possibility being provided for in a normative act (Mast, 2009, p. 787). The chance of success of the hierarchical administrative appeal regarding the citizen is in general restricted as the public servant acted on instruction of the higher authority. The higher and hierarchical authority will have more regard for the functioning of the public service than for the interests of the citizen (Mast, 2009, p. 787).

Lastly, an appeal can be lodged with *the authority exercising administrative supervision*<sup>4</sup>. Citizens can turn to the supervisory authority to procure the suspension or annulment of an administrative decision due to a violation of the law regarding that decision (Mast, 2009, p. 787). In this case, there is no hierarchical relationship between the administrative authority that made the decision and the regulatory authority. Appeal to the authority exercising administrative supervision evidently only exists in the case of decentralization, for only then is administrative supervision in place (Lust, 2007, p. 37).

## **2.2. Unorganized administrative appeal**

The aforementioned appeals may or may not be regulated by law. Administrative appeal, in principle, can always be made even if no law provides for it. This form of appeal is called ‘unorganized appeal’<sup>5</sup>. There is no obligation of the person concerned

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2 Willig beroep (Flemish) – recours gracieux (French)

3 Hiërarchisch beroep (Flemish) – recours hiérarchique (French)

4 Beroep bij de toezichthoudende overheid (Flemish) – recours de tutelle (French)

5 Niet georganiseerd beroep (Flemish) – recours non organize (French).

to appeal if no appeal is explicitly provided for. On the other hand, the public authority is not obliged to rule on the administrative appeal. It can prefer not to react at all<sup>6</sup>.

### *2.2.1. Conditions for an admissible appeal*

In general there are no formal conditions that must be met in order to lodge an admissible unorganized administrative appeal. It is not necessary that the interested party who lodges the appeal proves an interest or competence<sup>7</sup>. The manner in which the appeal is lodged is not subjected to specific formal requirements. Although there is no time limit to be respected when an administrative appeal is lodged, it is important to bear in mind the period of 60 days within which appeals to the Council of State must be made ( par. no. 8 and further) (Cromheecke, 1998, p. 227).

### *2.2.2. Suspensive effect*

In general, lodging an unorganized administrative appeal does not have suspensive effect on the initial decision<sup>8</sup>. The cause of that non-suspensive character must be found in the principle of the continuity of the public service and the principle of the 'privilège du préalable'. If each administrative appeal would have suspensive effect, the functioning of the public service would become impossible. Moreover, a decision made by a public authority is considered to be lawful until the contrary is proven. As a result the government's decision must be executed until the body of appeal has made its decision on the case (Wouters and Loncke, 2008, p. 269).

### *2.2.3. Effects on the jurisdictional appeal*

The unorganized administrative appeal has a facultative character, which means that the citizen to whom this appeal is available is not obliged to use this option. As a consequence the application for annulment to the Council of State is possible from the moment the challenged decision is made, simultaneously with the possibility to lodge an unorganized administrative appeal.

An unorganized administrative appeal has no consequences for the term for appeal to the Council of State: it does not suspend nor interrupt it (Baert and Debersaques, 1996, p. 463)<sup>9</sup>. To avoid problems concerning the 60-day period, it is wise to lodge an unorganized administrative appeal and to file an application for annulment with the Council of State at the same time. In general, these simultaneous actions do not have the inadmissibility of the application for annulment as a result<sup>10</sup>. The citizen will only lose his interest when the body of appeal reconsiders the initial decision. If the body of appeal confirms the initial decision, the object of the application for annulment must be extended to the confirmative decision<sup>11</sup>.

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6 RvS 12 January 2005, no. 139.152, Vande Castele; RvS 19 March 2007, no. 169.068, Bilterys

7 RvS 28 April 1994, no. 47.050, Kerryn

8 RvS 29 March 1995, no. 52.577, Verluyten

9 RvS 12 September 1980, no. 20.577, Stuer; RvS 19 November 1982, no. 22.674, Elbagdadi

10 RvS 4 November 1980, no. 20.686, Eeckman en Valcke

11 RvS 29 March 1995, no. 52.577, Verluyten

The Council of State nonetheless has created some exceptions for which the term for appeal will be suspended or interrupted. *An appeal in reconsideration and a hierarchical appeal* do not suspend or interrupt the term for appeal to the Council of State unless new facts have been introduced and the organ of appeal has reinvestigated the case. In the latter case the term for appeal is interrupted and a new term begins upon notification of the new decision. This rule only applies if the administrative appeal has been made within the period for appeal to the Council of State, for if this term has already expired there is no longer any term that can be suspended or interrupted (Lust, 2007, p. 38)<sup>12</sup>. The application of the aforementioned exception lies entirely in the hands of the public administration as it must show the intention to reconsider the case. It is obvious that the interested party cannot rely on that to postpone his application for annulment.

The term for appeal to the Council of State is also interrupted by the lodging of an appeal with the authority exercising administrative supervision if the organ of appeal has notified the applicant of its decision or let him know that it will not exercise its power of supervision<sup>13</sup>.

Although an unorganized appeal can always be lodged in the anticipation of securing a quicker result, one must exercise caution. An unorganized administrative appeal does not prevent the need to file an application because of extreme urgency with the Council of State. Applicants cannot take any risk and must immediately make an application to the Council of State as the body of appeal is not obliged to make a decision on the appeal<sup>14</sup>. In case of extreme urgency, it is not advisable to lodge an unorganized appeal (Cromheecke, 1998, p. 234).

#### 2.2.4. *The competence of the body of appeal*

It is not necessary that the body of appeal consider formal conditions while examining the administrative appeal, unless prescribed differently by a legal act. However, all actions of an administrative authority are subjected to the general principles of good administration (Van Damme, 1995, p. 27)<sup>15</sup>. Art. 6, §1, E.C.H.R. is not applicable to administrative appeals.

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12 RvS 2 July 1970, no. 14218, Beck; RvS 3 September 1974, no. 16611, Mohin; RvS 10 May 1978, no. 18968, Gardinal; RvS 13 May 1980, no. 20323, Heals; RvS 16 March 1984, no. 24145, P.V.D.A. Beth; RvS 28 May 1986, no. 26578, Herin; RvS 21 January 1987, no. 27451, Lamblin; RvS 4 October 1988, no. 30896, Van Havermaet; RvS 28 June 1989, no. 32887, Vandenberghe; RvS 20 February 1990, no. 34106, Vanderkragt; RvS 15 January 1993, no. 41588, Van Varenbergh; RvS 17 June 1998, no. 74338, Van Velthem; RvS 10 December 2001, no. 101.711, Branckhaute e.a.; RvS 15 October 2002, no. 111.495, Feremans; RvS 19 November 2003, no. 125.482, N.V. Derriks

13 RvS 13 February 2001, no. 93.290, Van Middel

14 RvS 23 April 1996, no. 59.149, N.V., Pluimveeslachthuis Lapere; RvS 13 February 1998, no. 71.818, Croonenberghs; RvS 8 September 1998, no. 75.680, Boes.

15 Arbitragehof (The Constitutional Court), 16 November 2000, no. 114/2000, B.17 and B.18

The body that has been asked to give a ruling on the *appeal in reconsideration or hierarchic administrative appeal* has considerable competence. The body of appeal is not obliged to answer the administrative appeal nor respect a certain time period<sup>16</sup>.

The public administrative authority can modify or adjust the initial decision, replace the decision with a new one or, when the relevant conditions are fulfilled, revoke the decision. The organ of appeal not only supervises the legality of the act of administration, but also the opportunity of it (Mast, 2009, p. 790; Cromheecke, 1998, pp. 231-232). It can condemn the authority concerned if its act was inopportune, even if no rule was violated. Thereby, it investigates the entire case as, principally, it is not possible to limit the dispute to certain aspects of the challenged decision. Only if a part of the decision can clearly be separated from the whole, is it sometimes admitted that the administrative appeal is limited to that part of the decision (Lust, 2007, p. 36). Various positions can be taken by the public authority:

- Do nothing and make no decision. There is no appeal for annulment with the Council of State against this attitude.
- Make an affirmative decision based on identical considerations and motivation as the initial decision. No application for annulment with the Counsel of State is possible in this case.
- Make a similar decision though based on different motives than the initial decision.
- Make a decision that is different than the initial decision.

When the body of appeal wishes to revoke a law-creating decision, it must consider the fact that decisions creating rights to persons other than the litigant cannot be revoked except when they are illegal. In that case, revocation is only possible during the time period fixed for appeal to the Council of State, i.e. 60 days after the notification of the decision (Lust, 2007, p. 36, footnote 52). If an appeal in reconsideration or a hierarchical administrative appeal is lodged, the public authority has no competence to withdraw or discontinue a decision and make another decision that deprives certain rights of the citizen (Lewalle, 2008, pp. 313-314).

In case of an appeal to *the authority exercising administrative supervision*, the competences of the organ of appeal depend on its competence of supervision (Lust, 2007, p. 37). The organ of appeal has a more restricted competence as in the case of an appeal in reconsideration or a hierarchic appeal. The reason for this lies in the relationship between administrative supervision and administrative decentralization. The self-government of the decentralized authority guards against an excessively extensive competence of the supervisory authority. Comprehensive regulatory powers risks being an infringement on democratic values as the decentralized authorities are often elected by the people (Mast, 2009, p. 790). As administrative supervision is essentially a form of negative control, it does not provide the possibility for the higher authority to act instead of the decentralized authority, to amend its decisions nor to

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16RvS 19 March 2007, no. 169.068, Bilterys

give orders to it. The central authority can only forbid the decentralized authority from acting in one way or another by suspending and annulling its acts, by not ratifying its decisions or by authorizing it to make certain decisions (Lust, 2007, p. 37). The legality of the initial decision can be examined by the supervisory authority. However, only techniques of the administrative supervision can be used (suspension or annulment as in the general administrative supervision; preparatory advice and investigation, authorization and approval as in the exceptional administrative supervision). Depending on the technique used, the supervisory authority is obliged to rule on the administrative appeal. The supervisory authority must take a more stringent time schedule into account than is the case with an administrative appeal in reconsideration or hierarchical administrative appeal<sup>17</sup>.

### **2.3. Organized administrative appeals**

If the law explicitly provides for an administrative appeal, it concerns an organized administrative appeal. Before a complaint can be made before the Council of State, organized administrative appeals must be exhausted. Regarding an organized administrative appeal, it is determined that a legal act provides in such an appeal; the body that conducts the appeal is not determining as that body can also be consulted in unorganized administrative appeals<sup>18</sup>.

In case of an organized administrative appeal, the body of appeal is obliged to answer the appeal<sup>19</sup> with respect for the rules of procedure foreseen in the specific normative act. The obligation to give a ruling has two advantages for the interested party:

- If the period in which a decision must be made is qualified as an indicated period and that period expires, article 14, §3 of the law on the Council of State offers the possibility to the interested party to urge the public authority to make a decision. If the public authority neglects to make a decision within a period of 4 months after the demand, that silence will be considered as negative to which an application for annulment with the Counsel of State can be filed.
- If the period in which a decision must be made is qualified as an expiry period, appeal to article 14, §3 of the law on the Council of State is not possible as the legislative act itself attaches consequences to exceeding the period.
- Even in the case that the law does not provide a period, the public authority must honour the general principle of good governance of the reasonable time limit (Opdebeek, 2006, p. 397).

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17 RvS 21 May 1968, no. 12970, De Cock; RvS 28 January 1970, no. 13925, Jacobs en cons.; RvS 18 February 1975, no. 16879, Segers; RvS 10 June 1975, no. 17069, Hennis; RvS 15 January 1993, no. 41588, Van Varenbergh; RvS 9 December 2002, no. 113.428, OCMW Wingene.

18 RvS 2 May 1958, nr. 6243, Vanwynsberghe

19 RvS 4 June 2002, no. 107.317, N.V. Belgische Distributiedienst; RvS 19 January 2009, no. 189.536, Weyn

The organized administrative appeal has a devolutionary character as the applicant withdraws the file from the lower public authority, with the objective of giving the body of appeal the chance to decide once again on the case<sup>20</sup>. Because the organized administrative appeal has a devolutionary effect, the body of appeal is obliged to express its own judgement and the decision of the body of appeal will replace the initial decision. The authority that made the initial decision loses its decision-making power<sup>21</sup>. The devolutionary effect also has the consequence that the appeal body can investigate the aspects of legality as well as the aspects of opportunity. The Council of State considers this investigation as one of the essential characteristics of an organized administrative appeal<sup>22</sup>. Barring other stipulations, the body of appeal can change the initial decision and replace it with a decision of its own<sup>23</sup>. As a result of the devolutionary effect, the body of appeal investigates the entire case and, principally, it is not possible to limit the dispute to certain aspects of the challenged decision. Only if a part of the decision can clearly be separated from the whole, is it sometimes admitted that the administrative appeal is limited to that part of the decision (Lust, 2007, p. 36).

### **3. Administrative appeal against the adjudication or the refusal of a building permit**

Spatial planning is a regional competence. As a consequence, in Belgium there are three different regulations, one for each region<sup>24</sup>. Only the Flemish regulation will be discussed below.

In the regular procedure, a building permit is delivered by the Municipal Executive of the local authority where the object of the permit is situated<sup>25</sup>. The Flemish Code of Spatial Planning<sup>26</sup> provides for an organized administrative appeal against the adjudication or the refusal of a building permit<sup>27</sup>.

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20 RvS 4 May 1995, no. 53.131, stad Aalst

21 RvS 23 February 2006, no. 155.470, Van Roussel; RvS 12 March 2004, no. 129.175, Ville de Huy; RvS 9 February 1982, no. 21.992, Seunens

22 RvS 9 February 1982, no. 21992, Suenens; RvS 13 December 2000, no. 91611, Jacobs

23 RvS 14 November 1961, no. 8954, Van Coillie; RvS 12 December 1961, no. 9023, Schuermans; RvS 23 January 1962, no. 9123, Vertongen; RvS 26 October 1972, no. 15530, Klein; RvS 5 June 1973, no. 15904, Tegelhof; RvS 3 December 1981, no. 21633, Meertens en Moermans; RvS 23 June 1992, no. 39774, Sebreghts; RvS 28 January 1994, no. 45862, Quinet; RvS 17 January 2002, no. 102.580, Van De Voorde

24 In the Walloon Region: Code Walloon de l'aménagement du territoire, de l'urbanisme et du patrimoine; in the Brussels – Capital Region: Brussels Wetboek van Ruimtelijke Ordening; In the Flemish Region: Codex Ruimtelijke Ordening

25 Art. 4.7.12. Flemish Code of Spatial Planning

26 Besluit van de Vlaamse regering van 15 mei 2009 houdende coördinatie van de decreetgeving op de ruimtelijke ordening, BS 20 augustus 2009 (in Flemish), (hereafter: Flemish Code of Spatial Planning)

27 Art. 4.7.21. Flemish Code of Spatial Planning



### **3.1. Conditions for an admissible administrative appeal**

The appeal must be lodged with the Provincial Executive in which the municipal is located<sup>28</sup>. The administrative appeal can be filed by different interested parties<sup>29</sup>:

- The applicant of the building permit;
- Every natural or legal person who experiences nuisance or a disadvantage in pursuance of the contested decision;
- Every association that has the capacity to bring an action and that acts on behalf of a group whose joint interests are threatened or damaged, assuming it disposes of a permanent and effective operation in accordance with the statutes;
- The regional public servant of urban development, with some exceptions; and
- The advisory bodies on the condition that they gave their advice on time or that they were not consulted when this was mandatory.

Failure to file the appeal within 30 days results in it being declared as non admissible<sup>30</sup>. The starting point of that period depends on the party that lodges the appeal<sup>31</sup>:

- When the appeal is lodged by the applicant: the day following the day that the copy or the notification has been served;
- When the appeal is lodged by the regional public servant of urban development or by an advisory body: the day following the day that the copy or the notification has been served; and
- When the appeal is lodged by any other interested party: the day following the day of the bill posting.

The appeal must be sent by registered post to the Provincial Executive and at the same time a copy of the appeal must be sent by registered post to the applicant of the permit and the Municipal Executive, insofar as they have not filed the appeal themselves<sup>32</sup>. In addition, the appeal filed by the applicant, a third party or association must contain the proof of payment of the tax.

Lodging the appeal suspends immediately the execution of the permit until notification to the applicant of the decision on the appeal<sup>33</sup>.

### **3.2. The examination of the appeal and the decision**

The Provincial Executive examines the building application in its entirety<sup>34</sup>. Both the legality and the opportunity of the initial decision can be examined by the Provincial

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28 Art. 4.7.21, §1, Flemish Code of Spatial Planning

29 Art. 4.7.21, §2, Flemish Code of Spatial Planning

30 Art. 4.7.21, §3, Flemish Code of Spatial Planning

31 Art. 4.7.21, §3, Flemish Code of Spatial Planning

32 Art. 4.7.21, §4, Flemish Code of Spatial Planning

33 Art. 4.7.21, §8, Flemish Code of Spatial Planning

34 Art. 4.7.21, §1, Flemish Code of Spatial Planning

Executive<sup>35</sup>. As the administrative appeal has a devolutionary effect, the Provincial Executive makes a complete new decision<sup>36</sup>. The decision of the Provincial Executive substitutes the initial decision of the Municipal Executive (Lindemans and Blancke, 1997, p. 139). In general the devolutionary effect does not rule out the principle of *non reformation in peius*. The situation of the applicant of the administrative appeal could become less favourable than it was as a consequence of the initial decision<sup>37</sup>.

The Provincial Executive must answer the appeal within a period of 75 days after the notice of service of the refusal, or 105 days in the case that the right to a hearing is being invoked<sup>38</sup>. If no decision has been made in that time, the appeal is considered to be rejected<sup>39</sup>.

After the ruling in appeal to the Provincial Executive, the interested party can lodge a jurisdictional appeal with a specialized administrative court, the Council for Permit Disputes<sup>40</sup>. The administrative appeal to the Provincial Executive is a condition to lodge an admissible appeal with the Council for Permit Disputes<sup>41</sup>. When the Council decides that the decision of the Provincial Executive is irregular (a legal consideration), the decision is declared void<sup>42</sup>. After the appeal to the Council for Permit Disputes, only appeal in cassation with the Council of State is possible<sup>43</sup>.

#### 4. Openness of administration

Article 32 of the Belgian Constitution states that openness of administration is a basic right for everyone. Barring the exceptions stipulated by federal or regional laws, everyone has the right to consult administrative documents and receive a copy of them. As openness of administration is regulated by all Belgian legislators, openness of administration is provided for in a federal law<sup>44</sup>, in regional laws<sup>45</sup> and in community

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35 Memorie van Toelichting bij de Flemish Code of Spatial Planning, *Parl.St.* VI. Parl. 2011 (2008-2009), no. 1, p. 344 (Motivation to the said act)

36 Memorie van Toelichting bij de Flemish Code of Spatial Planning, *Parl.St.* VI. Parl. 2011 (2008-2009), no. 1; RvS 3 October 2000, no. 90.016, Van den Broecke (Motivation to the said act)

37 RvS 11 October 2001, no. 99684, New Vepeli

38 Art. 4.7.23, §2, lid 1, Flemish Code of Spatial Planning

39 Art. 4.7.23, §2, lid 2, Flemish Code of Spatial Planning

40 Art. 4.8.1, lid 2, 1°, Flemish Code of Spatial Planning

41 Art. 4.8.1, lid 2, 1°, Flemish Code of Spatial Planning

42 Art. 4.8.3, §1, Flemish Code of Spatial Planning

43 Memorie van Toelichting bij de Flemish Code of Spatial Planning, *Parl.St.* VI. Parl. 2011 (2008-2009), no. 1, p. 172 (Motivation to the said act).

44 Wet van 11 april 1994 betreffende de openbaarheid van bestuur, *BS* 30 juni 1994 (in Flemish) (hereafter: Law on the openness of administration).

45 The Walloon Region: Décret du 30 mars 1995 relatif à la publicité de l' Administration, *BS* 28 juni 1995; the Brussels – Capital Region: Brusselse ordonnantie van 30 maart 1995 betreffende de openbaarheid van bestuur, *BS* 23 juni 1995; the Flemish Region: Vlaams decreet van 26 maart 2004 betreffende de openbaarheid van bestuur, *BS* 18 augustus 2004 (hereafter: Decree on the openness of administration).

laws<sup>46</sup>. Only the regulations applicable to Flanders, the federal law and the Flemish Decree, will be discussed in the following. Although the content of all regulations is similar, the procedures concerning the administrative appeal are different.

#### **4.1. The federal law on openness of administration**

Concerning the federal openness of administration, a Committee for the access to administrative documents has been established<sup>47</sup>. The Committee takes notice of disputes concerning the application of the federal law concerning openness of administration and pursues a uniform interpretation of the law through its advice (Veny and De Maertelaere, 1998, p. 2).

When a citizen experiences difficulties in consulting an administrative document, he can submit a request for reconsideration to the administrative authority concerned. At the same time he must request the Committee for access to administrative documents to give advice<sup>48</sup>. The request of reconsideration is an organized administrative appeal, in addition to which simultaneous advice of the Committee is required (Veny and De Maertelaere, 1998, p. 4). The period for lodging an appeal with the Council of State is suspended when a proper request for reconsideration is filed<sup>49</sup>. There are no particular procedural requirements that must be satisfied when filing the request for advice<sup>50</sup>.

The Committee gives its advice to the applicant and to the administrative authority concerned within a time limit of 30 days. If no advice within the aforementioned period is given, the advice is passed over<sup>51</sup>. The Committee itself experiences the time limit of 30 days as too short (Overwegingen van de Commissie, 1994-1995, p. 8; 1996, p. 21, 2009, p. 8).

Within a period of 15 days after the reception of the advice or after the time that the advice should have been delivered, the administrative authority communicates his decision to the applicant and the Committee. As the Committee is an advisory body, its advice is not binding and the administrative authority can deviate from the given advice (Veny and De Maertelaere, 1998, p. 2). When no decision has been made within the period of 15 days, the request should be considered as declined<sup>52</sup>. The decision can be appealed to the Council of State<sup>53</sup>.

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46 The French Community: Décret du 22 décembre 1994 relatif à la publicité de l'Administration, BS 31/12/1994; the Common Community Commission: Ordonnantie van 26 juni 1997 betreffende de openbaarheid van bestuur; BS 20 September 1997; the German Community: Dekret vom 16 Oktober 1995 über die Öffentlichkeit von Verwaltungsdocumenten, BS 29 December 1995; the Flemish Community: the Decree on the openness of administration.

47 Art. 8, §1, Law on the openness of administration

48 Art. 8, §2, lid 1, Law on the openness of administration

49 RvS 6 February 1995, no. 51549, Michaux

50 Advies RvS, Gedr. St., Kamer, 1992-1993, 1112/1, 33

51 Art. 8, §2, lid 2, Law on the openness of administration

52 Art. 8, §2, lid 3, Law on the openness of administration

53 Art. 8, §2, lid 4, Law on the openness of administration

## 4.2. The Flemish decree on openness of administration

Concerning the regional open administration, a specific body of appeal has been established<sup>54</sup>. The body of appeal consists of two departments, namely, the department of open administration and the department of re-use of government information. A citizen who has filed an application for the publication of administrative documents can lodge an administrative appeal with the body of appeal, department of open administration if the publication has not been granted or no decision has been made in time or the decision has not been executed well<sup>55</sup>.

### 4.2.1. Conditions for an admissible appeal

The application for an administrative review must be in writing, either by letter, by fax or by email<sup>56</sup>. The application mentions the decision against which the appeal is lodged. Furthermore the same requirements concerning content must be respected as in the initial application (Schram, 2006, p. 214).

To be admissible, the subject of the application in appeal must be the same as the subject of the initial application<sup>57</sup>. The body of appeal does not have the competence to examine an application that is filed for the first time<sup>58</sup>. An application with regard to an administrative document that was not brought up in the initial application is inadmissible. The application will also be inadmissible if the applicant wishes to exercise his right of access to public information in another way than in his initial application<sup>59</sup>.

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54 Art. 22 Decree on the openness of administration.

55 Art. 22 Decree on the openness of administration; Memorie van Toelichting bij het Decreet van 26 maart 2004 betreffende de openbaarheid van bestuur, *Parl. St.* Vl. Parl. 2002-2003, no. 1732/1, 41

56 Art. 22, lid 1, Decree on the openness of administration.

57 Beroepsinstantie openbaarheid van bestuur 23 februari 2005, OVB/2005/11 (OVb – Body of Appeal for the openness of administration 23 February 2005); Beroepsinstantie openbaarheid van bestuur 23 februari 2005, OVB/2005/12; Beroepsinstantie openbaarheid van bestuur 3 maart 2005, OVB/2005/13 (Body of Appeal for the openness of administration 3 March 2005); Beroepsinstantie openbaarheid van bestuur 30 mei 2005, OVB/2005/37 (Body of Appeal for the openness of administration 30 May 2005); Beroepsinstantie openbaarheid van bestuur 13 oktober 2005, OVB/2005/83 (Body of Appeal for the openness of administration 13 October 2005); Beroepsinstantie openbaarheid van bestuur 18 oktober 2005, OVB/2005/86 (Body of Appeal for the openness of administration 18 October 2005); Beroepsinstantie openbaarheid van bestuur 21 november 2005, OVB/2005/94 (Body of Appeal for the openness of administration 21 November 2005); Beroepsinstantie openbaarheid van bestuur 25 januari 2006, OVB/2006/109 (Body of Appeal for the openness of administration 26 January 2006).

58 Beroepsinstantie openbaarheid van bestuur 25 mei 2005, OVB/2005/33 (Body of Appeal for the openness of administration 25 May 2005).

59 Beroepsinstantie openbaarheid van bestuur 15 maart 2005, OVB/2005/14 (Body of Appeal for the openness of administration 15 March 2005); Beroepsinstantie openbaarheid van bestuur 20 mei 2005, OVB/2005/32 (Body of Appeal for the openness of administration 20 May 2005)

The administrative appeal must be lodged within a period of 30 days. The term begins on the day following the day that the decision is sent or the day after the term in which the decision must have been executed by the authority expired<sup>60</sup>.

#### 4.2.2. *The examination of the appeal and the decision*

The administrative appeal has a devolutionary effect as the body of appeal will investigate the application entirely and make a decision which will substitute the initial decision<sup>61</sup>.

The department of open administration of the body of appeal pronounces its decision on the appeal and gives a notification of it to the applicant within a period of 30 days<sup>62</sup>. The department can prolong that time limit up to 45 days if the circumstances require it<sup>63</sup>.

### **5. Administrative appeal regarding the income tax**

The income tax is a federal competence. Article 366 of the Income Tax Code provides for an objection which can be lodged against the income tax assessment with the director of the tax administration or with the delegated public servant<sup>64</sup>. The exhaustion of the appeal is a condition on which to formulate an admissible appeal to the Court of First Instance<sup>65</sup>.

#### **5.1. Conditions for an admissible administrative appeal**

The objection must be submitted in writing and must be signed<sup>66</sup>. However, failure to meet these conditions will not lead to the inadmissibility of the objection as replacement by a formal regular document is possible (Tiberghien, 2009, p. 662). The director of the tax administration or the delegated public servant will notify the applicant by registered post of the fact that his objection is not admissible on the grounds of article 366 and article 371 of the Income Tax Code<sup>67</sup>. Subsequent to this the applicant can adjust his objection.

In order to be admissible the objection must be motivated<sup>68</sup>. The complaint must be accurately formulated as it is insufficient to formulate a complaint that only indicates the existence of irregularities<sup>69</sup> or alleges the miscalculation of the tax<sup>70</sup>.

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60 Art. 22 Decree on the openness of administration

61 Art. 24, §2, Decree on the openness of administration

62 Art. 24, §1, lid 1, Decree on the openness of administration

63 Art. 24, §1, lid 2, Decree on the openness of administration

64 Art. 366 Wetboek van 10 april 1992 van de inkomstenbelastingen 1992, *BS* 30 juli 1992 (in Flemish) (hereafter: Income Tax Code 1992).

65 Art. 1382 *undecies* Gerechtelijk Wetboek, *BS* 31 oktober 1967 (in Flemish) (hereafter: Civil Procedure Act).

66 Cass. 29 May 1992, *FJF* (Fiscal Jurisprudence) 1992, 273; Cass. 6 October 2000, *FJF* 2000, 762; *Vr. & Antw.* Kamer 1999-2000, 24 January 2000, nr. 15, *Bull. Bell.*, afl. 804, 885.

67 *Com. IB* 1992, no. 375/16

68 Art. 371 Income Tax Code; Rb. Hasselt 10 January 2007, *FJF* 2008, 1100

69 Antwerpen 27 June 1983, *FJF* 1984, no. 84, 108

70 Antwerpen 5 March 2002, *Fiscoloog* 2002, afl. 843, 11.

The tax debtor or his proxy holder must lodge the objection. It must always be possible to identify the signatory of the objection, given that the capacity of the applicant is crucial in lodging an admissible appeal.

The administrative appeal must be filed within a period of 6 months after the third day after the date on which the assessment was sent or after the date of the notification of the assessment<sup>71</sup>. The Constitutional Court does not accept that the objection period starts at a time when the taxpayer possesses no knowledge of the content of the income tax demand<sup>72</sup>. The administration applies the “receipt theory” which means that the objection period starts on the day that the addressee was most likely informed of the assessment; unless the addressee provides proof of the contrary it is supposed that this is the third day after the date of dispatch<sup>73</sup>. The objection period is an expiry period. Except in the case of force majeure no extension can be granted.

The objection must be lodged with the director of the tax administration or the delegated public servant in whose district the assessment is imposed<sup>74</sup>. The appeal lodged with another director of tax administration than the person in whose district the assessment is imposed, is not inadmissible. The director concerned is officially obliged to redirect the objection to the territorial competent director and give the applicant notification of that<sup>75</sup>.

## **5.2. The examination of the objection and the decision in appeal**

The administration investigates the objections. The public servant entrusted with the investigation has, in addition to the same evidence and research power as the taxation official, the power to obtain information from credit institutions at his disposal<sup>76</sup>.

If explicitly requested by the applicant of the objection, a hearing must be organized within a period of 30 days<sup>77 78</sup>. If the right to a hearing is not respected, the decision in appeal will be void, not the initial and discussed assessment<sup>79</sup>. The director of the tax administration or the delegated public servant are not relieved of the obligation to formulate a decision if the applicant fails to give consequence to the invitation to a hearing<sup>80</sup>.

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71 Art. 371 Income Tax Code

72 GwH (Constitutional Court) 19 December 2007, arrest 2007/162

73 Vr. nr. 96 CLAEYS 29 April 2008, *Vr. en Antw.* Kamer 2007-2008, 11, no. 030, 7689-7691 (Parliamentary questions)

74 Art. 366 Income Tax Code

75 Art. 366 Income Tax Code

76 Vr. no. 257 DE CLIPPELE, *Vr. & Antw.* Senaat 1988-1989, 8 August 1989, 2118

77 Art. 374 Income Tax Code

78 Vr. nr. 4 DRAPS 16 October 1987, *Vr. & Antw.* Kamer 1987-1988, 6 November 1987, 68

79 Gent 13 September 2001, *Fiscoloog* 2001, afl 823, 13; Bergen 4 October 2002, *Fiscoloog* 2002, afl. 865, 10.

80 Vr. nr. 77 DE CLIPPELE, *Vr. & Antw.* Senaat 1987-1988, 18 October 1988, 34.

Regardless of the public servant who investigates the complaint, the director of tax administration or the delegated public servant who received the objection is obliged to give a ruling on it<sup>81</sup>. The director must comply with the general principles of good governance, as a consequence he must be independent and impartial<sup>82</sup>. The decision made by the delegated public servant, who is the same person as the inspector entrusted with the investigation of the objection and with the publication of a report to the director, must be declared void<sup>83</sup>.

The applicant will be notified of the reasoned decision through registered post<sup>84</sup>. The decision is not subjected to specific formal requirements, yet it must be possible to examine the legality of it. A decision that does not mention the identity and the degree of the public servant who made the decision and moreover is not signed, is not permitted to be examined even if the decision was made by a competent official<sup>85</sup>.

The decision of the director is irrevocable when no application has been lodged with the Court of First Instance within a period of 3 months after the notification of the decision being appealed<sup>86</sup>. The law gives the possibility to the taxpayer to file a jurisdictional appeal within a period of 6 months if the administration neglects to make a decision<sup>87</sup>. That 6-month term can be considered a reasonable term in which the director must make a decision on the appeal (Tiberghien, 2009, p. 676).

## **6. Administrative appeal regarding the suspension of an unemployment benefit**

Matters of social security are in general a federal competence. In Belgium, an unemployed person can lodge an administrative appeal against the suspension of his unemployment benefit with the national administrative committee<sup>88</sup>.

### **6.1. Conditions for an admissible administrative appeal**

The unemployed person must appeal within a period of a month following the day of reception of the decision that suspends the unemployment benefit<sup>89</sup>. In order to be admissible an appeal with the National Administrative Committee must be in writing, dated and signed. It must be sent by registered post to the secretary of the committee on the seat of the Public Service of Employment Policy<sup>90</sup>.

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81 Art. 375 Income Tax Code.

82 Gent 28 March 2000, *Fiscoloog* 2000, alf. 751, 12

83 Antwerpen 20 February 2001, *FJF* 2001, 351; Gent 30 January 2002, *Fiscoloog* 2002, 11.

84 Art. 375 Income Tax Code.

85 Bergen 3 December 1999, *FJF* 2000, 165; Antwerpen 6 June 2000

86 Art. 375 Income Tax Code *in juncto* art. 1385*undecies* Civil Procedure Act

87 Art. 375 Income Tax Code *in juncto* art. 1385*undecies* Civil Procedure Act

88 Art. 59septies, §1, Koninklijk Besluit van 25 november 1991 houdende de werkloosheidsreglementering, *BS* 31 december 1991, err. *BS* 13 maart 1992 (in Flemish) (hereafter: Royal Decree on the Unemployment).

89 Art. 59septies, §1, Royal Decree on the Unemployment

90 Art. 59septies, §1, Royal Decree on the Unemployment

## **6.2. The examination and the decision in appeal**

The appeal lodged with the national administrative committee has no suspensory effect<sup>91</sup>. In general, the Committee must make a decision within a period of 2 months after the reception of the appeal<sup>92</sup>. The 2-month period must be considered an expiry period due to the fact that if no decision has been made within that time, the administrative appeal will be upheld<sup>93</sup>. Notification of the decision of the Committee will be given by regular post to the unemployed concerned and the director whose decision has been challenged<sup>94</sup>. As the Committee can only confirm the initial decision or declare the initial decision void, the administrative appeal has no devolutionary effect.

The unemployed concerned can lodge a jurisdictional appeal against the decision of the National Administrative Committee with the labour tribunal within a period of 3 months after the notification of the decision that is being challenged.

It should be noted that the unemployed always has the possibility to appeal to the labour tribunal against a negative decision (Van Langendonck and Put, 2006, p. 610) as the administrative appeal is not a condition in which to lodge a jurisdictional appeal with the labour tribunal. In the case of the suspension of an unemployment benefit it is possible to appeal directly to the labour tribunal, without consulting the National Administrative Committee first.

## **7. Conclusion**

Belgium law distinguishes various forms of administrative appeal. Each of those appeals has its own conditions and consequences which can differ to a considerable extent. There is no doubt that the existence of such a hybrid field of administrative appeals denigrates the legal certainty. Notwithstanding the intention of the legislator to provide for administrative appeals as a form of legal protection, the lack of a coherent legal framework denigrates that intention. Through the multiplicity of administrative appeal procedures, the citizen must inform himself well in order to make an appeal. Therefore the question must be asked if a more coherent legal framework is advisable.

Only in a few fields of law there are no provisions for a formal administrative appeal procedure; consequently the majority of administrative appeal procedures must be considered as organized. The law dictates generally an administrative appeal procedure with the intention of creating a filter to the jurisdictional appeals. The effectiveness of such a filter, *i.e.* the extent to which jurisdictional appeals are prevented, determines partially the effectiveness of the administrative appeal. Different factors, such as the devolutionary effect of the administrative appeal, the suspensory effect of the administrative appeal will influence its effectiveness.

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91 Art. 59septies, §1, Royal Decree on the Unemployment

92 See art. 59septies, §3, Royal Decree on the Unemployment for the exceptions

93 Art. 59septies, §3, Royal Decree on the Unemployment

94 Art. 59septies, §5, Royal Decree on the Unemployment



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