Assessment of three acceleration-instruments in the General Administrative Law Act

Utrecht University (UU)
Twynstra Gudde management consultants & managers (TG)

Prof. mr. B.J. Schueler (UU)

Drs. M. Blekemolen (TG)
Mr. dr. A.P.W. Duijkersloot (UU)
Mr. C.B. Modderman (UU)
Mr. dr. R. Ortlep (UU)
Dr. H.H.M. Scholtes (TG)

Summary

Purpose

The purpose of this study, carried out on behalf of the Research and Documentation Centre (WODC) of the Ministry of Justice, is to evaluate the functioning of three instruments which were incorporated in the General Administrative Law Act (Awb) in order to speed up decision-making by administrative authorities. Those acceleration-instruments are: an 'astreinte' in case of not deciding in time, the possibility of direct appeal in case of not deciding in time and the positive fictitious administrative decision (also called the lex silencio positivo). This evaluation aims at three main points. First of all research has been done whether those instruments have been deployed - and, if so, to what extent - and whether those instruments have contributed to the acceleration of the decision-making process. Secondly, the question has been explored whether those three instruments have resulted in an increase or a decline of the pressure resulting from rules and regulations. Thirdly, research has been done as to whether the deployment of those instruments has caused bottlenecks in practice and if so, to identify those problems. All this in view of the possible adjustment of the existing rules.

Methodical justification

The approach of this evaluation is an extensive one. It comprises all decisions for which the acceleration-instruments may be deployed, as well as a diversity of actors involved (like the state, provinces, municipalities, regional water authorities, administrative courts and judges, lawyers, citizens and companies). The aim was to collect a spectrum of experiences as broad as possible, by selecting data in a way that ensures that a number of broad areas of administrative law are covered and by consulting the target group in a broad manner. The data collection consisted of the following aspects. Mainly based on literature, parliamentary documents and case law, the state of the art of the legal position of the three acceleration-instruments, has been mapped out. Furthermore, an electronic survey of administrative authorities has been carried out in April/May 2013. This survey included questions concerning the functioning of the three acceleration-instruments as well as the experiences with these instruments in practice. 465 Officials from as many administrative authorities were approached to take part in the survey. This resulted in a response of 55% (n=253). Subsequently 16 (group)interviews have been held with both administrative authorities and (representatives of) citizens and companies. In total a number of 275 organisations/persons have participated in this research, among those a representative representation of the various types of administrative authorities. Based on the results of these steps that were taken, there has been made a first analysis. This analysis has been submitted to an expert panel for testing. With the use of this input from the expert panel the analysis has been strengthened and this has resulted in the analysis that has been voiced in the present report.

Research findings

The existence of the acceleration-instruments contributes to the awareness within the administration. Attention for the timeliness of decision-making has increased as a result of it. This increase of attention corresponds to the increase of attention as far as the quality of service of the administration in general (apart from the three acceleration-instruments) is concerned.

The preventive effect of the 'astreinte'-instrument has been the result mainly of the fact that those 'astreintes' identify and quantify in a clear way the exceedance of time limits for decision-making. This results in fear for damage of reputation on both a personal and an organisational level, which increases the awareness for timeliness.

The preventive effect of the instrument 'appeal in case of not deciding in time' turns out to be very limited, mainly because citizens and companies only rarely choose to use this instrument and, if they do, the administrative authority will be able to take the decision belatedly. The effectiveness of this instrument in individual cases might be assessed in a more positive manner.

The lex silencio positivo applies to a wide diversity of decision-types. Those types concern licences within the scope of the Services Act (Dienstenwet), licences without that scope (or licences with regard to which it might be doubtful whether they are within that scope), like licences according to the Environmental Licensing (General Provisions) Bill (Wet algemene bepalingen omgevingsrecht). As far as licences under the Services Act are concerned it turns out that only very few positive fictitious decisions have been 'issued'. This is a bit different as far as non-services licences are concerned. Environmental licences have been issued 'automatically' more often, which might be explained by the numerous applications for such a licence. If the lex silencio positivo applies the preventive effect is quite strong. This can be explained by the fact that administrative authorities (and officials) do not want to be responsible for the damaging effects that a fictitious licence might have on the interests of third parties and the general interest as such. The effectiveness of this acceleration-instrument in individual cases turns out to be problematic though. An applicant who has obtained a fictitious licence might legally assume to be in the possession of a licence, but this licence is surrounded with many more uncertainties compared to a genuine licence. Also this applicant lacks the two other instruments, the 'astreinte' and the appeal in case of not deciding in time.

The increased attention for timeliness can be attributed only in part to the acceleration-instruments that were part of this research. Both are connected however. Within government the acceleration, if it occurs, is attributed primarily to other processes, especially the increase of quality of service. The instrument of the 'astreinte' and the appeal are generally just considered to be a big stick.

It is remarkable that both citizens and companies quite rarely choose to deploy one of the acceleration-instruments. The main explanation seems to be the that the familiarity with those instruments is limited. But even if citizens and companies are aware of these instruments, they often decline to use them. Reason for this turns out to be the desire to maintain a constructive relationship with the authorities. As far as the instrument of appeal is concerned sometimes fear for litigation costs plays a role.

Because of their nature the unwanted side-effects of the acceleration-instruments do not justify the abolition of those instruments. However, these effects deserve attention. Several administrative authorities are confronted with a widespread misuse of the 'astreinte'-instrument in cases concerning the so-called improper requests for openness under the Freedom of Information Act (Wet openbaarheid van bestuur). Also quality of decision-making is under pressure because of time limits. And authorities more often make use of the possibilities for suspending time limits for decision-making in an improper way. The lex silencio positivo leads to the damaging of the general interest and interests of third parties

because of licences that are issued automatically. Also legal certainty for citizens and companies is not very well served by the fictitious licence, because of the uncertainties that go along with this instrument.

A further improvement of timeliness of decision-making should primarily be sought for through organisational improvements (monitoring time limits, questions relating to the agenda, monitoring in general). Moreover, an informal approach in cases of an imminent danger of exceeding a time-limit is important. If it is not feasible to take a timely decision in a careful and lawful way, an administrative authority could seek a dialogue with the citizen or company and, in joined agreement, suspend the time-limit for decision-making.