Evaluatie Bestuurlijke Lus Awb en internationale rechtsvergelijking
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English summary

In January 2010 the legislator introduced the so-called administrative loop (‘bestuurlijke lus’, see Article 8:51a of the General Administrative Law Act). This novelty in the Dutch General Administrative Law Act (Algemene wet bestuursrecht (Awb)) could perhaps be considered the most renewing but also the most disputed/discussed tool in the toolbox of the Dutch administrative judge. On request of the Dutch Parliament, members of the Law Faculty of Maastricht University conducted research to investigate the experiences with the administrative loop. The following four main questions have been answered.

- 1) Did the introduction of the administrative loop result in more suitable, efficient and expedient rules of administrative legal procedure?
- 2) Did the introduction of the administrative loop improve or worsen the position of the citizen?
- 3) Which bottlenecks or possibilities for improvement can be found?
- 4) What lessons can be learned from rules of administrative legal procedure in other countries e.g. Germany and Belgium, with the aim to increase suitability, efficiency and expediency of Dutch administrative procedural rules in relation to legal protection of the citizen?

The research was conducted between September 2013 and July 2014. We investigated a large number of courts files – of four district courts, and three courts of appeal. Interviews were held with administrative judges, (representatives of) administrative authorities, and solicitors, and barristers and other representatives of citizens. Next to that, we interviewed several foreign experts.

1. Did the introduction of the administrative loop result in more suitable, efficient and expedient rules of administrative legal procedure?

Frequency of application

The administrative loop has been restrictedly applied, compared to other instruments for final dispute resolution. The administrative loop has been applied in less than 7% of all cases in which the judge found a mistake in the decision. In comparison: in 15% of these cases courts directed that the legal effects of the annulled administrative decision were allowed to stand in full or part and in 19% of the annulments the courts ruled that their judgments replaced the annulled decision. The differences in the frequency of application between the courts are remarkable. It varies from 2% of cases in which the court found a mistake (one of the district courts) to 12% (another district court) and the Central Appellate Administrative Court used the loop in 15% of all these cases. Only to some extent an

explanation of these differences lies in the nature of the disputes. In disputes concerning state tax law matters, courts almost never apply the administrative loop, in immigration law litigation courts apply the loop below average. It is remarkable that in procedures about infrastructural projects the administrative loop has been applied only by exception. And in the few cases in which the courts decided to apply the loop in infrastructural projects, it was not often with success, opposite to the expectations of the legislator. The legislator initially created this instrument especially for infrastructural projects.

Criteria for (non) application?

The main criterion to decide whether the administrative loop is suitable to launch, is the question of whether the remaining dispute and the required restoration is not incalculable. In situations in which the deficiency of the administrative decision is simple to repair and there is a clear perspective of the road of restoration, within a limited time, courts apply the administrative loop. In case of uncertainty what ought to happen after the loop, or in complex situations, courts do not apply the loop. Courts are often weighing the expected acceleration on the one hand and the extra effort and time the application of the administrative loop brings about on the other. For restorations that are easily conducted , judges prefer the so-called 'informal loop' instead of using the formal administrative loop of Article 8:51a of the General Administrative Law Act.

Court Workload Consequences?

The workload for individual judges significantly increases as a result of the application of the administrative loop. This, however, is not a reason for non-application. Neither are the financial consequences, although the finance system of courts is based upon final judgments instead of reserved judgments (used for administrative loops). The felt necessity to keep the workload well-ordered does however play a role. Hence, one could conclude that workload and logistic as well as organizational implications of the administrative loops are also, for a part, decisive for the (non) application of the loop.

Does the administrative loop result in more rapid final dispute settlement?

The average duration of the administrative loop is about 7 months, with differences between 1 and 14 months. Courts need more time for assessment of the repair than the administration for the restoration of the decision. With some cautiousness, the conclusion can be drawn that the disputes in which the loop has been applied successfully, have led to quicker final settlement compared to the disputes in which the loop was not applied.

Nevertheless, sometimes disputes are very quickly decided upon without the loop. And in about 20% of the cases in which the loop was applied, but without success, this led to a significant delay of more than 6 months. Hence, the application of the loop does not always result in acceleration but, on the contrary, to delay. The opposite is true as well: non application of the loop sometimes brings about faster dispute settlement but often takes much longer compared to cases in which the loop was applied.

Was the application of the administrative loop a success?

The application of the administrative loop was relatively successful. In about 80% of the flies in which courts used the loop, the final court judgment resulted in final dispute settlement. If one compares the different courts, this success differs to some extent (some of the district courts: 74% or 76% success, Council of State 90%)

Summary answers question 1

The administrative loop found its place in the toolbox of the administrative judge. It has a more limited scope of application compared to the other finalizing instruments which also prevail over the loop. But once applied, the instrument seems to do its job. It indeed contributed to more suitable, efficient and expedient rules of administrative legal procedure, albeit with a restricted scope and especially in procedures regarding infrastructural projects it hardly contributed to an increased or quicker final dispute settlement. Remarkable were the striking differences between the (district) courts in the frequency of application.

2. Did the introduction of the administrative loop improve or worsen the position of the citizen ?

How often administrative courts decide to abandon the administrative loop because of the presence/existence of interested parties?

The condition that (the interests of) third parties at stake may not be disproportionately infringed is usually considered a component of the fact that application of the loop requires a clear perspective on the error of the decision and a clear overview of the route to restoration. Therefore, disputes in which third parties possibly be disproportionately harmed by the loop, fall outside the scope of application.

The legal position of parties and third-parties

The idea and approach in practice that the administrative loop is applied only after the parties appeared in court strongly prevails. Application of the administrative loop before parties had the opportunity to have their say, like proposed by the legislator, could counter objections in the context of the rule of law (‘Rechtsstaat’).

Courts seem to fully respect the notion of the separation of powers and the position of the administration. They do not interfere in the contents of the administrative decision-making process of repair.

It is obvious that the administrative loop improves the position of addressees of decisions against which appeal is made. They receive in an earlier stage their final decision as regards their legal position. Third parties who contest an administrative decision sometimes not profit the use of the administrative loop. The main disadvantage for them is the fact the loop results in a complete focus casu quo fixation on restoration of the impugned decision at stake, whilst after the traditional annulment the follow-up after the court’s decision is more open. Possible other options and

alternatives could in fact disappear. This is the risk of a fixation as a consequence of the administrative loop. Albeit, larger companies involved in administrative litigation advocate the application of the administrative loop. It contributes to achieve legal certainty sooner.

3. Only few bottlenecks

We have found no indication for the assumption that the introduction and application of the administrative loop resulted in laziness of administrative authorities or sloppy administrative decision making proceedings. Administrative courts only very rarely decide to repeat the application of the loop in the same procedure. In our opinion, in case of an effective administrative loop the appeal against the original decision should be declared well-founded and subsequently the legal effects allowed to stand or the appeal against the restored decision declared unfounded.

Furthermore, the legislator could take into consideration to also let district courts (like appellate courts) order administrative authorities to repair the error in the decision, instead of an invitation to do so. Having said that, we note that the differences between an order and an invitation are smaller as might appear at first sight.

Objections against the background of the Rule of Law (‘Rechtsstaat’) and possible solutions

We detected two main potential objections in the framework of the rule of law. The first objection is related to the right to an oral hearing, e.g. to appear in court and comment on the decision in front of the deciding judge. A purely written settlement of the dispute is in conformity with Article 6 ECHR as far as it regards a so-called ‘manifestly’ case (compare Art. 8:54 GALA). In case the loop results in a novel administrative decision or an (improved, extended) motivation, we recommend this version of the reparation includes that parties involved are given the opportunity to comment (orally) on the decision in front of the deciding judge. It can be taken into consideration to give interested parties the opportunity to request a second court session / appearance in court, unless the appeal against the restored decision is meanwhile manifestly unfounded. Perhaps this measure would lead to a decreased use of the administrative loop but it would take away serious fundamental objections against the loop.

The other fundamental deficit of the administrative loop regards the access to court. Problems could arise in case third parties are deprived from access to court in so far they feel aggrieved for the first time by a substantively similar decision for which decision however the administration stated other reasons. According to the Belgium Constitutional Court if this situation occurs, it could come down to an unlawful restriction of the right of access to court. In this line of reasoning a right to challenge (appeal) must also exist in case an administrative decision has not been changed but is differently motivated.

If one agrees with this, the solution to his problem would in the Netherlands be to prescribe that each attempt of repair by the administration is issued by means of an administrative decision. In this way interested parties which were not yet involved in the proceedings are offered the possibility to appeal against the new decision.

4. Lessons to be learned from abroad?

In the Netherlands, before and during the introduction of the administrative loop, some fundamental rule of law related objections have been made. However, they did not play a manifest and prominent role. In Belgium these fundamental objections resulted in a version of the administrative loop with only very limited scope. In Germany these kinds of fundamental objections led to a complete rejection of the loop. We think fundamental human rights implications of administrative procedural legislation deserve more attention in the Netherlands. Maybe the Netherlands can learn something of the special status of the so-called 'Fachplanungsrecht'in Germany. This very thorough preliminary proceeding with early stage participation opportunities justifies according German doctrine legal provisions which avoid the annulment of the administrative decision. In case such broad and early participation proceedings would be introduced in the Netherlands, it is worth considering consequences for the stage of legal (court) protection. A counter-argument is the fact that in general administrative procedural law already are many instruments have been introduced to persist the (legal consequences of) administrative decision which contain minor faults.

One other element of the comparison with Germany could be of interest too. It regards cases in which an administrative decision concerning a big infrastructural project infringes one or only a few interested parties, but is lawful for the rest. In such cases German courts take their task to solve the dispute broadly and actively search for additional administrative decisions which compensate the breach of the individual rights of the mentioned interested parties. This means parties are not automatically entitled to get the (to some extent unlawful) decision quashed but can have a right of an addition to the contested decision. This solution could be considered in the Netherlands as well.