First Issue: Review of Lawfulness of general acts by the High Administrative Court of Croatia – Admissibility conditions and consequences of an annulment

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Introduction

1. Statutory instruments and individual acts

The distinction between administrative statutory instruments and specific and individual administrative acts is important in Belgian law, since an act's placement in one category or the other determines whether various rules and principles are applied. It is not always easy to categorise an act[1]. For instance, we know that there are hybrid acts[2], or acts that are only individual or statutory within the meaning of one legislative provision or another[3]. Despite this, the system is almost exclusively binary[4]. The third category, 'non-statutory acts'[5] is not autonomous and does not seem to be used often in Belgian law[6].

1. Administrative disputes in Belgium

In Belgium, there are many ways for disputes between the administrative authorities and citizens to be brought and resolved. Participation and stating of grounds are highly developed methods of avoiding disputes. The first is applied to a great many statutory instruments, while the second has only been applied systematically to individual acts since the adoption of a law on 29 July 1991[7]. The grounds for statutory acts are only formally stated if a particular provision requires it. It should also be noted that mediation has been somewhat successful, alongside the traditional methods of appealing before the responsible administrative authority and the courts[8].
This contribution only looks at the main features of the administrative court system. Judicial review only examines the lawfulness of administrative acts and does not bear in mind their appropriateness. Responsibility for judicial review is shared by the ordinary and the administrative courts.

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[1] For example, the criteria applied and the reasoning in CofS, 16 December 2010, Dutron and others, 209.810.
[2] A typical example is a permit to divide land into lots, since it is both an individual permit to divide property and a land development regulation.
[3] For example, the case of draft statutory orders "within the meaning of Article 3 of the laws on the Council of State, as coordinated on 12 January 1973", which must be submitted to the legislation division of the Council of State for a prior opinion if they originate from the federal, community or regional government.
[4] M. Leroy, *Les règlements et leurs juges*, Brussels, Bruylant, 1987, no. 11.
[5] The expression "non-statutory" is sometimes used to define the scope of application of Article 159 of the constitution (Cass., 10 June 1926, Pas., 1927, I, p. 12; Cass., 21 April 1988, Pas. 1988, I, p. 983; RCJB, 1990, p. 402, contribution by P. Quertainmont). Upon further examination, it covers both administrative acts and statutory instruments (F.-X. Barcena, *Le champ d'application normatif du contrôle de légalité*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Charte, 2010, pp. 103 et seq., sp. no. 4).
[6] M. Pâques, *De l'acte unilatéral au contrat dans l'action administrative*, Brussels, Story-Scientia, 1991, nos. 4 et seq.
[7] Law of 29 July 1991 on formal statement of the grounds for administrative acts, which requires the administrative authorities mentioned in Article 14 of the coordinated laws on the Council of State to formally state the grounds for their individual administrative acts (for a general presentation of the law, see Xavier Delgrange and Bruno Lombaert, *La loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs : question d'actualité* in *La motivation formelle des actes administratifs*, edited by P. Jadoul and S. van Drooghenbroeck, Brussels, La Charte, 2005, p. 1 et seq.).
[8] Recently, E. Lancksweerdt, *Naar een faciliterende wetgeving voor bemiddeling met openbare besturen*, TBP, 2010, pp. 511 et seq.

2. Belgian court system

The ordinary courts were created by the constitution when it was originally adopted in 1831. They are the "courts and tribunals" or "judicial courts". The Court of Cassation is the highest of these judicial courts.
The constitution does not create administrative courts itself[9], but it provides for their creation by law[10]. There are a great many administrative courts[11], and the Council of State was created as the highest administrative court in 1946[12]. Its distinguished position among administrative courts stems from the fact that it has cassation powers for decisions by administrative courts. The Council of State also hears direct appeals for the annulment of non-court acts by the administrative authorities. The Council of State was included in the constitution with the revision of 1993 (Article 160).

3. Administrative disputes on subjective rights and objective administrative disputes

Ordinary courts hear disputes relating to subjective rights. There are just two categories of rights under Belgian law, namely, civil rights and political rights. When citizens assert their 'civil rights' against the administrative authorities, the disputes are heard exclusively by the ordinary courts. An example would be the case of the right to compensation for damage caused by government negligence. The ordinary courts also have power to rule when citizens assert 'political rights' against the administrative authorities, but only in principle. In fact, the lawmaker can confer the power to hear disputes relating to political rights upon any administrative courts it may create. For example, this is the case for some electoral rights. As regards disputes relating to civil or political rights, Article 159 of the constitution requires courts to review the lawfulness of applicable individual administrative acts or administrative statutory instruments. I will come back to this point later.

In Belgian law, there is another type of dispute that does not relate to subjective rights, where the sole aim is to challenge the objective legality of administrative acts. In this case, the party concerned brings proceedings against an act and requests its annulment. This is the main type of dispute given to the Council of State, under Article 14 of the coordinated laws on the Council of State. These actions for the annulment of acts of the administrative authorities, also referred to as "appeals on the misuse of powers" are a way of reviewing administrative acts that has just been added to the existing mechanisms for disputing laws, without taking away from any of these mechanisms[13]. Such actions can be taken against individual acts and statutory instruments.

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[9] Except for the Court of Audit, which has associated judicial functions.
[10] In principle, this refers to federal law. The communities and the regions do not have the power to create courts. However, they may create courts by encroaching on the State's power and using the implicit powers conferred upon them. The Constitutional Court has recognised the constitutionality of such procedures (CC, 27 January 2011, 8/2011; TBP, 2011, pp. 195 et seq., contribution by J. Vanpraet, *Deelstatelijke administratieve rechtscolleges: enkele beschouwingen bij het arrest nr 8/2011 van het Grondwettelijkhof*).
[11] According to estimates, there were 250 before the 1967 judicial reform, and there were some 65 administrative courts in Belgium in 1995, I. Sirjacobs and H. Vanden Bosch, *Introduction sur le contentieux administratif* in *Les juridictions administratives en Belgique depuis 1795*, Brussels, State Archives in Belgium, 2006, 84-127, in translation, note 4. In 2008, Mr M. Leroy counted several hundred administrative courts in the country (M. Leroy, *Contentieux administratif*, Brussels, Bruylant, fourth edition, 2008, p. 124).
[12] The Council of State was created by the law of 23 December 1946. This law and the laws that amended it were coordinated on 12 January 1973. Since then, reference has been made to "the laws on the Council of State, as coordinated on 12 January 1973", which have been amended more than 40 times since (hereinafter referred to as "the CLCS").
[13] This is also partially true of the actions heard by the Aliens Litigation Council, which are sometimes actions relating to political rights and sometimes objective actions relating to lawfulness (Article 39(2) of the law of 15 December 1980 on aliens' entry to the territory, residence, establishment and expulsion).

As a complement to actions for annulment, the Council of State has the power to suspend, as an interim measure, the enforcement of individual acts and statutory instruments of the administrative authorities[14] [15].

I. Methods of challenging statutory instruments

A. Full challenge of acts

4. Actions for the annulment of statutory acts

The lawmaker sets out provisions for actions for annulment in Article 14 of the coordinated laws on the Council of State. It is explicitly stipulated that actions for annulment can be brought against both acts and regulations. This mainly applies to acts and regulations adopted by the administrative authorities, but also to acts and regulations issued by certain other authorities that the lawmaker names without recognising them as administrative authorities[16].

5. Broad understanding of lawfulness but not of appropriateness

Article 14 also lists a number of elements for the validity of administrative acts, which the Council of State can check. However, the list is not exhaustive. It covers the external (powers, forms and proceedings) and internal (grounds, purpose and aim) lawfulness of individual administrative acts or administrative statutory acts, including reviews for manifest error and proportionality. Conversely, the court may not review the appropriateness of an act that relates to policy.

6. Broad interpretation of personal interest in an action

While actions before the judicial courts focus on protecting subjective rights, appeals on the misuse of powers (which are brought before the Council of State) aim to restore lawfulness. Appeals of this type could have been mass actions, as logically allowed by their *objective nature*. In reality, however, they may only be filed by people who can claim an interest in seeing the act annulled. This condition was created for practical reasons. Thus for an action for annulment to be receivable, the appellant must prove that there is injury or an interest (Article 19, CLCS). The annulment must benefit the appellant, whether the appellant is a natural person or a legal entity governed by public or private law. The interest must continue to exist until the annulment is performed. The interest must be personal, direct, certain, present and legitimate. These characteristics of the interest, as shown by case law, have been interpreted very subtly in practice over the years. We refer here to specialist works on the subject[17].

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[14] In principle, both requests are made in a single application. However, in the case of extremely urgent actions for interim relief, the request for suspension may be submitted before the application for annulment.

[15] The Council of State hears other types of dispute too: actions aiming to overturn decisions by administrative courts, some specific types of action relating to political rights and actions on fairness relating to compensation for exceptional damages. These are mentioned as a matter of interest.

[16] Article 14(1) The section rules through judgments on actions for annulment for the infringement of procedural requirements that were either essential or were needed for validity and actions for annulment for misuse or abuse of powers brought against acts and regulations:
(1) of the various administrative authorities;
(2) of legislative assemblies or their bodies, including mediators established within these assemblies; of the Court of Audit and the Court of Arbitration; of the Council of State and the administrative courts and of the bodies of judicial power and the High Council of Justice where these relate to public tenders or members of their staff.
Article 159 of the constitution also applies to the acts and regulations mentioned in Article 14(1)(2).

[17] M. Dumont, *Variations sur le thème de l'intérêt*, APT, 1999, pp. 85 to 118; P. Lewalle and L. Donnay, *Contentieux administratif*, Brussels, Larcier, 2008, pp. 778 et seq.; M. Leroy, op. cit., 2008, pp. 510 et seq.; David Renders, *Droit administratif, T. III, Le contrôle de l'administration*, Brussels, Larcier, 2010, no. 342; J. Baert and G. Debersaques, *Raad van State, Ontvankelijkheid*, Bruges, La Charte, 1996; A. Mast, J. Dujardin,

Interest is interpreted broadly, particularly when it comes to appeals against regulations. In such cases, it is enough for appellants to show that their situation has been affected by the contested regulation. For instance, the judgment of 19 October 2001 in the Lannoye case (no. 99961) is noteworthy due to the interpretation of *locus standi* developed. The appellants contested a statutory royal decree setting standards for exposure to electromagnetic waves from mobile telephone antennae, claiming that the standards were not protective enough. The respondent, the Belgian State, argued that the appeal was inadmissible because the appellants had not clearly shown that their own personal situation was directly affected by the contested act, that their accommodation was situated near a mobile telephone antenna or that they were more affected than most by the standards set out in the contested act. The State added that the appellants did not mention any potential damage to their health associated with the enforcement of the contested act and that they themselves acknowledged that their situation was no different to that of any other Belgian citizen. The Council of State observed that the condition of interest set down in the law exists solely to avoid mass actions. It found the appeal to be admissible, expressing itself as follows: "considering that according to the Report to the Crown on the contested act 'people everywhere in the world are worried that exposure to electromagnetic fields (EMF) from sources such as high-voltage lines, radar equipment, mobile telephones and mobile telephone antennae may damage their health' and since this regulation was adopted with a view to protecting public health and the environment from the harmful effects and damage, known and unknown, caused by non-ionising radiation, infrasound and ultrasound (as emitted by mobile telephone antennae), it must be acknowledged that the appellants have sufficient interest in challenging the act's lawfulness"[18].

7. Collective interest

The collective interest claimed by incorporated associations is recognised in case law, under certain conditions[19], so that they can contest statutory instruments of which the content relates to the purpose they have set themselves. For example, it was recognised that the non-profit association *L'ESPOIR à Wavre-Nord* had an interest in contesting a Walloon regional development plan for the town of Wavre and the surrounding area[20]. Similarly, the non-profit associations *Ligue des droits de l'Homme* and *Mouvement contre le racisme, l'antisémitisme et la xénophobie* were acknowledged to have an interest in challenging the Royal Decree of 2 August 2002 establishing the regime and regulations applicable to premises in Belgian territory run by the Aliens Office, where foreign nationals are held, placed at the disposal of the government and kept pursuant to the provisions cited in Article 74/8(1) of the law of 15 December 1980 on aliens' entry to the territory, residence, establishment and expulsion[21].

8. Action for statutory inaction

Inaction in the exercise of the government's regulatory role can also be punished by the annulment of the detailed implicit decision resulting from the government's consistent failure to respond four months after receiving notice from an interested party[22].

M. Van Damme and J. Vande Lanotte, *Overzicht van het Belgisch administratief recht*, Mechelen, Kluwer, 2009, pp. 1017 et seq.

[18] The appeal was refused due to the assessment that no serious harm that would be difficult to make good would be caused by the immediate enforcement of the contested act. The Royal Decree was annulled by the judgment CofS, 15 December 2004, Non-profit association Teslabel Coordination, 138471, Am.-Env., 2005/3, p. 202, which recognised that the non-profit association had an interest.

[19] There is an interesting study on this subject in the Council of State's opinion of 9 March 2010 on the bill to amend the coordinated laws on the Council of State to give associations the right to file an action in the collective interest, in Doc. Parl. Ch., 52-1939.

[20] CofS, 11 September 2000, Delstanche and others, 89585; CofS, 17 December 2009, Non-profit association Grez Doiceau Urbanisme et Environnement, 199.055.

[21] CofS, 10 December 2008, Non-profit associations Ligue des droits de l'Homme and Mouvement contre l'antisémitisme et la xénophobie, 188.705.

[22] Article 14(3) of the coordinated laws on the Council of State: "when an administrative authority is asked to make a decision and does not make a decision in the four-month period from its receipt of a formal decision request from an interested party, the authority's failure to respond is seen as a refusal, against which an appeal

9. Deadline for lodging appeals

Appeals against acts before the Council of State are only admissible if they are filed within the legal timeframe[23]. Regulations are published, and the timeframe for appeal begins on their publication date. Once this deadline has passed, appeals against the regulation are no longer admissible and the principle of legal certainty takes precedence over lawfulness, although not completely, since a regulation's unlawfulness can still be raised through an objection of illegality and there is no time limit for such measures.

10. Publication of appeals

Article 3quater of the Rules of Procedure[24] stipulates as follows: "when the Council of State is asked to rule on an action for the annulment of a regulation, the chief registrar has a notice mentioning the appellant's identity and the contested regulation published in the Belgian Official Gazette in French, Dutch and German".

11. Urgent interlocutory proceedings against statutory instruments

Filing an action for annulment does not suspend the enforcement of the contested act, but the appellant can ask the Council of State to make an interlocutory judgment suspending the enforcement of the contested regulation[25]. Enforcement is not suspended unless the court orders it. There was a system that automatically suspended the enforcement of acts as soon as an appeal was lodged against them, but this was abandoned very quickly because it presented obstacles to the continuity of government action[26]. Appellants request suspension of an act in a single application for the act's suspension and annulment. Nevertheless, if the request for interim measures is very urgent, the request for suspension may be filed before the action for annulment.

To be able to rule on the suspension of the enforcement of an individual act or statutory instrument, the Council of State must find that the appellant has serious grounds for the request and would risk being caused serious harm that would be difficult to make good if the contested act were enforced immediately. This condition results from the lawmaker's desire to ensure that annulment remains useful while guaranteeing that urgent interlocutory proceedings are only used in exceptional circumstances. It should not be confused with *locus standi*, which remains necessary and is always a prior condition for appeal. For instance, in the Lannoye judgment (mentioned above), the court found that the appellants had *locus standi* but could not show that the immediate enforcement of the regulation would potentially cause them serious harm that would be difficult to make good.

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may be lodged. This provision does not affect special provisions that establish a different timeframe or attach other consequences to a lack of response on the part of the administrative authority"; CofS, 6 November 1985, Boitquin, 25.814, APT, 1986, p. 80 et seq., mentioned in M. Leroy, *Une arme nouvelle contre l'inertie du pouvoir, le recours contre la carence réglementaire*.

[23] "Appeals, as referred to in Articles 14(1) and 14(3) of the coordinated laws, may be made in the 60-day period following the publication or proclamation of the contested acts, regulations or decisions. If the acts, regulations or decisions do not need to be published or proclaimed, the timeframe for appeal begins on the day that the appellant first becomes aware of them." (Article 4(3) of the Regent's Decree of 23 August 1948 establishing procedure before the administrative division of the Council of State).

[24] This refers to the Regent's decree of 23 August 1948 establishing procedure before the administrative division of the Council of State.

[25] Article 17, CLCS.

[26] Appeals for interim relief had full suspensive effects for a short period, which ended shortly after the inappropriateness of the system came to light (Royal Decree of 27 October 1989, as amended by the Royal Decree of 6 December 1990 and the Royal Decree of 10 July 1991).

B. Challenging statutory instruments through an objection of illegality

12. Objections of illegality relating to rights

When an objection is made for reasons relating to rights, the court that is asked to rule (be it an ordinary court or an administrative court with power to rule in matters relating to political rights) reviews the regularity of the administrative acts mentioned. The same applies to objective challenges, but I will come back to that.

The constitution gave the courts this power, and they have held it since Belgium became independent. Article 159 stipulates that "courts only apply general, provincial or local decisions and orders if they are in accordance with the law". This article is a way of channelling resistance to government oppression[27] and the wording has remained unchanged since 1831. It was not amended to match the federal structure of the State[28], which has nonetheless not prevented its application to administrative acts by the federate entities (as it was previously applied to acts by administrative authorities that it does not mention). In one notable summary, Mr Jan Theunis demonstrates that all of the words in Article 159 have been interpreted very broadly[29].

If an act is illegal, the courts must refuse to apply it[30].

The standards reviewed by the courts include all administrative acts, be they individual acts or statutory instruments[31] [32], emanating not only from the central powers (the king and the federal

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[27] S. Rials, *Oppressions et résistances*, Paris, PUF, 2008, note 1, p. 14; A. Alen, *Rechter en bestuur in het Belgisch publiekrecht. De grondslagen van de rechterlijke wettigheidscontrole*, two volumes, Antwerp, 1984; A. Alen, *De raadsels van art. 107 van de Belgische grondwet*, RW, 1984, col. 1729 et seq.; A. Mast, J. Dujardin, M. Van Damme and J. Vande Lanotte, *Overzicht van het Belgisch administratief recht*, Mechelen, Kluwer, 2009, pp. 863 et seq. ; J. Theunis, *De 'exceptie van onwettigheid' (art. 159 G.W.) : meer vragen dan antwoorden*, RW, 2007-2008, pp. 5 et seq.; J. Theunis, *De exceptie van onwettigheid : op zoek naar een verloren evenwicht*, TBP, 2011, pp. 260 et seq.; see also contributions in the work entitled *De wettigheidstoets van artikel 159 van de Grondwet*, Bruges, La Charte, 2010 (A. Alen, *Woord vooraf*; K. Leus and B. Martel, *De wettigheidstoets van artikel 159 van de Grondwet. Procedurele benadering - de toepassing van artikel 159 G.W. als exceptie*; J. Ghysels and J. De Staercke, *Artikel 159 Grondwet als directe vordering*; J. Theunis, *De rechter geklemd tussen het beginsel van scheiding der machten en het vereiste van volle rechtsmacht?*; G. Van Haegenborgh, *Artikel 159 van de Grondwet in de rechtspraak van het Hof van Cassatie en het Grondwettelijk Hof. Bedenkingen vanuit Europees perspectief*; T. Erniquin, *Le principe de protection de la confiance légitime, facteur de pondération de l'application du principe de légalité*; W. Weymeersch, *Artikel 159 van de Grondwet in de rechtspraak van de Raad van State*) and the contributions in the work entitled *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Charte, 2010 (F.-X. Barcena, *Le champ d'application normatif du contrôle de légalité*; D. Déom, *Le refus d'application*; B. Lombaert, *Un contrôle d'ordre public à géométrie variable*; R. Van Melsen, *Le champ d'application personnel du contrôle de légalité incident*; M. Nihoul, *L'autorité de la chose jugée de la déclaration d'illégalité incidente*; J. Theunis, *Le contrôle de légalité en droit français et néerlandais*; S. Adam, *Le contrôle incident de légalité à l'épreuve du droit de l'Union européenne entre mutations et transfiguration*; J.-F. Leclercq and D. De Roy, *L'exception d'illégalité et le contrôle incident de légalité des actes administratifs en droit belge par la lorgnette du droit comparé*; Marc Nihoul's conclusions and the bibliography).

[28] F.-X. Barcena, op. cit., no. 10.

[29] "*Elk tekstonderdeel omvat meer dan wat uitdrukkelijk is vermeld*" ("Each part of the text covers more than is explicitly mentioned"), J. Theunis, *De exceptie van onwettigheid : op zoek naar een verloren evenwicht*, TBP, 2011, pp. 260 et seq., sp. no. 11.

[30] D. Déom, *Le refus d'application*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Charte, 2010, pp. 147 et seq.

[31] Prof. Marc Nihoul suggests that more modern wording would refer to individual administrative acts and administrative statutory acts (*Les affres de la législation en matière d' « autorité administrative » et le respect de la Constitution*, JT, 2008, pp. 71 et seq.). The third type of act, namely 'non-statutory acts', rarely occurs in Belgian law.

[32] M. Leroy points out that until 1926, ordinary courts only applied Article 159 of the constitution to regulations (*Contentieux administratif*, Brussels, Bruylant, fourth edition, 2008, p. 75). Nowadays, Article 159 is sure to be applied to individual acts (Cass., 4 December 2006, JT, 2007, p. 169).

ministers, the governments of the communities and regions[33]), the municipalities and the provinces, but also from all other administrative authorities[34]. Conversely, Article 159 does not allow a court decision by an administrative court – which is, by definition, binding – to be challenged, nor does it allow a law to be set aside[35].
The reference standards referred to are laws. This means all sources of administrative law that have a higher value than the act under review, including general legal principles.
The government cannot be one of the parties in the dispute that results the act being set aside. An example of such a dispute would be one in which a tenant contends to his or her landlord that the decision on the basis of which the landlord is requesting a rent increase is illegal. The act in question must bear some relation to the dispute for it to be set aside[36].

13. Scope of lawfulness reviewed

The courts review the internal and external lawfulness of the act, so the review is as broad as the review that the lawmaker entrusted to the Council of State[37].

14. Deadlines for lodging appeals and legal certainty

When a challenge is made relating to a right, an objection of illegality based on Article 159 may be raised at any time[38]. As long as the challenge relating to the right is not statute-barred, the courts may set aside a very old individual administrative act or administrative statutory instrument if they discover that it is illegal through the dispute on which they were asked to rule. This way of trying to ensure that lawfulness is always the most important principle poses a considerable problem in terms of legal certainty, but also constitutes as an important guarantee for citizens harmed by illegal acts.

15. Objection of illegality against a regulation in objective appeals brought before the Council of State

Like all other courts, the Council of State must apply Article 159 of the constitution.
While direct appeals must be made by the relevant deadline, a regulation's illegality may be raised through an objection of illegality at any point in time, as long as the main challenge is filed within the prescribed timeframe. For instance, when the main appeal is made against a single urban planning and environmental permit and is filed in 2007, the appellant may argue that a very old regional development plan (adopted in 1993, or 1981) is illegal and ask the Council of State to find that the permit awarded in application of the illegal regulation is itself illegal and should be suspended or annulled[39]. As long as the illegal regulation is a decisive reason for the adoption of the individual act, the regulation may be annulled if the court upholds the related argument[40].

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[33] As well as the executive bodies of the French and Joint Community Commissions in Brussels-Capital Region. The Flemish Community Commission is a decentralised institution.
[34] This interpretation is reinforced by the new version of Article 14 CLCS. On this subject, see: M. Nihoul, *Les affres de la législation en matière d' « autorité administrative » et le respect de la Constitution*, JT, 2008, pp. 71 et seq.
[35] Reviewing the constitutionality of legislative acts is a responsibility of the Constitutional Court and does not fall within the scope of Article 159 (except in matters relating to compliance with Brussels ordinances, which partly fall under Article 159). Checks on the consistency of legislative acts with international and European law are not based on Article 159 either (for more on this subject, see F.-X. Barcena, op. cit.).
[36] D. Déom, op. cit., p. 172.
[37] Cass., 3 March 1972, Pas., 1972, I, p. 601; CA, 14 July 1992, 57/92, ground B.7.
[38] Brussels Civil Court, 18 September 1987, JT, 1988, p. 480, note by D. Lagasse; Brussels Industrial Tribunal, 16 February 1988, JT, 1988, p. 482; Cass., 21 April 1988, RCJB, 1990, p. 402, note by P. Quertainmont. See also the criticisms voiced by P. Martens, JLMB, 1988, p. 1535, who believes that there is "legalistic conservatism".
[39] CofS, 30 September 2008, Vantomme and others, 186.682.
[40] For instance, CofS, 16 March 2010, Huys and Kupka, 201.930.

16. Deadline for raising an objection of illegality for objective reasons

In proceedings before the Council of State, only statutory instruments can be challenged through an objection of illegality with no deadline. The Council of State only hears challenges to the lawfulness of an individual act within the timeframe for lodging direct appeals against that act, even if the challenge is brought by means of an objection of illegality.

17. Compulsory nature of Article 159

The Court of Cassation requires all courts in the domain for which it is responsible to apply Article 159 of the constitution. In proceedings before ordinary courts, arguments based on the illegality of the administrative act of which the application is requested must be raised of the court's own motion.

Conversely, in proceedings before the Council of State, an argument based on the illegality of a regulation being applied by the government must be mentioned by the appellant in the appeal, as with all other arguments. The only exception to this principle is when the reason for the challenge through an objection of illegality is also a matter of public policy, wrote Mr Bruno Lombaert[41]. In this case, the appellant, the auditor or the Council of State may raise the argument at any point until proceedings are closed. There are few arguments based on matters of public policy in the case law of the Council of State[42]. Notable matters of public policy include the jurisdiction or consultation of the Council of State's legislation division over draft statutory orders from the government. This limitation of the possibility to raise the issue of illegality of the court's own motion is criticised by Mr Lombaert, who does not accept the claim that it would be paradoxical to allow all arguments in objections of illegality when only arguments relating to matters of public policy may be raised of the court's own motion in direct appeals[43].

However, stricter judgments can be found that create a distinction between arguments related to matters of public policy and directed at the contested act itself and arguments relating to illegality and directed at the regulation. For example, in a case where the appellant was challenging a permit that was awarded based on a regulation that had been annulled in the meantime (Royal Decree of 10 August 2005) but had not been questioned in the appeal, the Council of State found that "the Royal Decree of 10 August 2005 setting a standard for antennae emitting electromagnetic waves with a frequency of 10 MHz to 10 GHz was annulled for infringement of rules on powers, which is a matter of public policy. However, it does not follow that the contested act is vitiated by the lack of power of the author of the decree simply because the act refers to the decree. The delegated government official's position as the competent authority to adopt the contested act has not been challenged. The annulled Royal Decree was nothing more than a reason for adopting the contested act and the appellant could usefully have mentioned the illegality of the Royal Decree when filing the appeal, requesting the application of Article 159 of the constitution. The challenge based on the illegality of the contested act (that refers to the annulled Royal Decree) mentioned above was made too late, so this new line of argument is inadmissible"[44].

18. Review of the lawfulness of statutory instruments is not performed by the government

It has traditionally been accepted that Article 159 only gives powers to the courts. The government, for its part, must apply national law and not set aside rules adopted by higher-ranking authorities or by itself (*patere legem quam ipse fecisti*). Thus, were the government to become aware of the illegality of an act that it must apply, it must consciously behave illegally by applying the act, and its unlawful

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[41] B. Lombaert, *Un contrôle d'ordre public à géométrie variable, in L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Charte, 2010, pp. 187 et seq.

[42] A. Wirtgen, *Het ambtshalve aanvoeren van middelen door de Raad van State in het raam van het beroep tot nietigverklaring*, TBP, 2006, pp. 515 et seq.

[43] B. Lombaert, op. cit., nos. 13 et seq.

[44] CofS, 6 April 2011, Schoonbroodt, 212.496.

behaviour will later be penalised by the courts if they are asked to rule on an appeal by an interested party[45].
This historical solution has sometimes been ruled out by the Council of State itself[46]. It has been criticised by people who recommend avoiding illegality at all costs and believe that it would be better to allow the government to set aside, of its own accord, any irregular acts that it must apply,[47] with the rule of law being mentioned in support of this view[48]. On the other hand, Article 33 of the constitution is mentioned in support of the historical solution: it stipulates that powers are exercised in the manner laid down by the constitution, which gives the power to set aside illegal acts to the courts, not to the government[49]. In recent times, the Constitutional Court has been using the traditional interpretation of Article 159 (Const. Court, 30 March 2011, 44/2011).
However, in its judgment, the Constitutional Court left unresolved the question as to whether a general legal principle should lead governments to do what Article 159 reserves for courts alone and therefore does not allow them to do (Const. Court., 30 March 2011, 44/2011, ground B.16) [50].
Both the Court of Cassation [51] and the Council of State[52] have already recognised that such a principle exists. Various prominent authors also argue that Belgium's constitutional structure means that the courts would have the power to set aside illegal administrative acts even if Article 159 did not exist[53]. Since Article 159 does exist, the usefulness of the principle has been questioned[54].
The existence of a principle that would allow the government to set aside the illegal acts it must apply is another matter altogether. The practical problems posed by a broad interpretation of Article 159 are the same as those associated with the government's application of such a principle. Indeed, we could take the view that the principle of legal certainty precludes the government setting aside administrative acts that are in force. The historical solution has the advantage of clarity and order, and takes account of the realities of governing and the difficulties governments would have in carrying out this obligation. After all, it is not easy to determine that acts are illegal without the type of adversary proceedings used in court appeals. The purely theoretical advantage for abstract lawfulness that would be derived from giving the government the power to annul illegal acts may not be as significant as the cost in indirect uncertainties and court appeals, which would still be necessary for clarifying the lawfulness of the acts.

However, we should note that the European Court of Justice recommends a different solution with regard to the primacy of European law, which the government itself must guarantee in relation to the country's national laws, even before a court appeal is lodged[55]. In national law, the view is that an illegal act must be recognised as such by all those who deal with it. It is also accepted that the

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[45] For instance: CofS, 27 April 2010, De Kempeneer, 203.323: "Considering that the author of the contested act is an active government body, that it must apply statutory provisions and does not have the power to set aside any provisions it believes to be illegal and that, by contrast, the Council of State is required to refuse to apply any statutory provision that it finds to be illegal, that it follows that when it reviews the lawfulness of a planning permit or a refusal to grant a permit and if the grounds justify it, it must refuse to apply the illegal development plan".
[46] K. Leus and B. Martel, op. cit., 2010, no. 90.
[47] See the observations by R. Van Melsen, *Le champ d'application personnel du contrôle de légalité incident*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Charte, 2010, pp. 23 et seq.
[48] See CofS, 22 April 1997, Artois, 65.974.
[49] D. Renders, observations on Cass., 21 December 2007, JT, 2008, pp. 554 et seq., sp. no. 5.
[50] "In the case in point, the court therefore does not have to analyse the extent to which the administrative authorities should apply, if necessary, an objection of illegality by virtue of a general legal principle".
[51] Cass., 8 April 2003, Juridat; Cass., 9 January 2002, JLMB, 2002, pp. 1076 et seq., concl. general opinion by Spreutels; also concl. general opinion by Leclercq on Cass., 4 September 1995, Pas. 1995, I, p. 753.
[52] CofS, 10 September 1998, non-profit association Front commun de groupements de défense de la nature, 75710 (Am.-Env., 1999, p. 55, observations by M. Quintin; APT, 1998, p. 201 et seq., with extracts from the report and opinion of M. Kovalovszky); on this subject, see F.-X. Barcena, op. cit., no. 32.
[53] J. Theunis, op. cit., TBP, 2011/5, pp. 260 et seq., sp. no. 2.
[54] P. Lewalle and L. Donnay, *Contentieux administratif*, Brussels, Larcier, 2008, p. 355.
[55] On this subject, T. Bombois, *L'administration « juge » de la légalité communautaire. Réflexions autour des arrêts Fratelli Costanzo et Abna de la Cour de Justice de Luxembourg*, JT, 2009, pp. 169 et seq.

government has a duty not to act on an obviously illegal hierarchical order because of a general principle of legislative value to the effect that the administrative authorities must refuse to apply an obviously illegal administrative act[56]. If the possibility of setting aside an illegal act exists, it must be exploited. I believe that the government could only carry out this obligation when faced with an act that is undeniably illegal, the illegality of which could be easily spotted by any administrator[57]. In my view, it seems excessive to require that all administrators read and are familiar with all case law (even published case law) in principle, to infer that it is illegal. Can it be accepted that if a citizen demonstrates that an act is illegal, the government must examine the relevant point in the reasons provided for the contested act and decide if it should conclude that the act is illegal? In such cases, should it not ask for the opinion of the author of the contested act beforehand? This question could also be asked with regard to individual acts. The question as to whether the government can set aside an act on supervision, for instance, on the grounds of illegality by giving assent is very sensitive. Would this not be contrary to the balance sought in the effective organisation of administrative supervision? Faced with the significant delay in proceedings and appeals that can result from the application of these principles and the associated disadvantages for the citizen requesting authorisation, the General Assembly of the French Council of State ruled that the policymaker could decide whether the opinion provided was lawful or not and set it aside if necessary. And "if it makes use of this possibility wisely, the courts shall approve this infringement on the rule on circumscribed powers"[58]. The existence of such an option in case law calls into question the entire concept of circumscribed powers, which is all the more reason for it to be limited to cases of simple opinions that could, in principle, be set aside by a decision with relevant grounds.
Finally, the creation of a requirement for the government to set aside illegal acts should be viewed in relation to liability, as discussed later in this paper (see below, at the end of section 26).

II. Penalties for illegal statutory acts

A. The scope of the consequences of an act being declared illegal

19. Consequences of a regulation being found illegal following an objection of illegality

If a regulation is found to be illegal following an objection of illegality raised in a related case, the regulation cannot be applied. The decision not to apply the regulation can have several types of consequence. In some cases, it can mean that the court does not apply a penalty requested by the government (e.g. when the court upholds an objection of illegality and acquits a person being charged on the basis of an illegal regulation). A regulation being found illegal can also cause the court to annul the act being challenged (when the argument based on the regulation's illegality is upheld).
The effects of illegality being discovered in this way are relative[59], which means that even if the regulation in question has to be applied in other cases, the declaration of illegality in the ruling or judgment upholding the argument of illegality is only applied to the case being ruled upon: "making an authority's decision non-applicable by virtue of Article 159 of the constitution has the sole consequence of not creating any rights or obligations for the interested parties. The illegal decision continues to exist as long as it is not subsequently annulled through an action for annulment"[60]. In

[56] D. Renders, ibid.; B. Lombaert, *Le pouvoir hiérarchique comme mode de contrôle administratif*, in *Les contrôles administratifs et financiers de l'action administrative*, Revue de Droit de l'ULB, 2008, pp. 137 et seq.
[57] Theunis recommends keeping to an obligation to set aside an act that is clearly illegal and defends a more demanding position with regard to supervisory or appeal authorities (TBP, 2011/5, pp. 260 et seq., sp. no. 13). However, he believes that this requirement should be combined with a deadline for raising objections of illegality.
[58] M. Guyomar et P. Collin, *Chronique administrative générale de jurisprudence administrative française*, AJDA, 2002, pp. 118 et seq., sp. p. 120, comment by the French CofS, 26 October 2001, Mr and Mrs Eisenchteter, ibid., p. 122.
[59] For a recent, in-depth analysis of this traditional position, see M. Nihoul, *L'autorité de la chose jugée de la déclaration d'illégalité incidente*, in *L'article 159 de la Constitution et le contrôle de légalité incident*, ed. Marc Nihoul, Brussels, La Charte, 2010, pp. 211 et seq.
[60] Cass., 29 June 1999, Juridat.

practice, however, the decision not to apply the individual act can be very much comparable to an annulment[61]. Other judgments can require the administrative authority to disregard the statutory standard that was declared illegal by the court[62], and the standard will certainly be disregarded when it comes to redrafting the act that was annulled after the court upheld the argument relating to the regulation's illegality.
The body that issued the regulation is not necessarily present in court for the discussions about the lawfulness of the regulation applied by the contested act[63]. The issue of the author's right to defend the regulation could also contribute to a limited effect being given to the indirect decision that the regulation is illegal.
Furthermore, when an act is declared illegal, the authority that issued it is required to restore lawfulness without delay, such as by repealing the illegal act [64] if it cannot withdraw it.

20. Legislative approval

A regulation may be declared illegal through such proceedings long after its adoption, at a time when it has already been applied a great many times. In such cases, a declaration of illegality undermines legal certainty and could be viewed as excessive application of the principle of lawfulness. Besides, it is often acknowledged that the court with material jurisdiction[65] may have sufficient reasons for approving the regulation in question to prevent a varying number of disputes raising the argument of the regulation's illegality in appeals against decisions that apply that regulation. Approval has retroactive effects and, in the past, has been applied legitimately to disputes that were going on at the time[66].

21. Effects of a regulation's annulment on the acts deriving from it

A rescinding judgment by the Council of State has an *erga omnes* effect[67], so the act's annulment applies to all situations from the time of the judgment.
Annulment is retroactive, and retroactivity is imaginary, requiring people and bodies to behave as though the act had never been adopted. The Council of State deems that "a rescinding judgment, in itself and without any need for a further declaration of illegality, restores the situation to the way it was before the annulled act was adopted"[68].
The effect of annulment on acts deriving from the annulled regulation has been examined in depth[69]. In principle, all that has disappeared is that which has been annulled in the rescinding judgment. Derived acts continue to apply, like all other acts. Penalties can only be applied against them for their illegal basis if appeals are lodged against them.
For example: a judgment annuls a regulation. Another appeal is lodged against a permit that applies that regulation. Upon examining the appeal, the Council of State upholds the argument that the permit

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[61] K. Leus and B. Martel, op. cit., pp. 19 and 35.
[62] CofS, 21 December 2004, Municipality of Kasteelbrakel and others, 138.732; D. Déom, op. cit., no. 27.
[63] M. Nihoul, op. cit., 2010, p. 263.
[64] Report by Auditor Bovin, in CofS, 19 December 1989, Ernens-Dodemont, 33637; CofS, 2 December 1998, Albrecht, 75.355; K. Leus and B. Martel, op. cit., 2010, no. 93.
[65] There are a number of lawmakers in Belgium: the federal government, the community governments and the regional governments.
[66] For instance, as regards regional development plans: Constitutional Court, 28 March 2007, 51/2007; 18 November 2010, 131/2010.
[67] For more on the far more limited scope of the effect of a Council of State judgment throwing out an action for the annulment of a statutory instrument, see Cass., 24 March 1977, Pas., 1977, I, p. 789. D. Lagasse, *L'absence de toute autorité de chose jugée d'un arrêt de rejet du Conseil d'Etat devant les cours et tribunaux ou de la suprématie du principe de la légalité du principe de la légalité administrative sur le principe de la sécurité juridique*, note on Cass., 9 January 1997, RCJB, 2000, p. 257. Proposals have been made to boost the authority of these judgments, see J. Theunis, op. cit., TBP 2011, pp. 260 et seq., sp. no. 24 et seq.
[68] CofS, 12 October 2007, Clobus, 175.725.
[69] P. Lewalle (various contributions), most recently the third edition of *Contentieux administratif*, with the collaboration of L. Donnay, op. cit., 2008, pp. 1105 et seq.; M. Leroy, op. cit., pp. 762 et seq.

applies a regulation that was annulled by an earlier judgment and annuls the permit. The same solution would be used if the Council of State annulled the regulation after the permit was adopted, so if the permit was adopted when the regulation was still in force[70]. As we can see in this case, the retroactive effect of the rescinding judgment confounds the plans of the authority that issued the individual act, since it had fulfilled its task by complying with the rules and regulations that were in force on the day it adopted the permit.

22. Adjusting the effects of an annulment. Preservation of the effects of an act annulled by the Council of State

The lawmaker has acknowledged the sometimes excessively damaging effects of retroactive annulment. Article 14ter of the coordinated laws on the Council of State states as follows: "if the administration division deems it necessary, it shall indicate, through a general provision, which of the effects of the provisions of annulled statutory instruments should be considered permanent or retained provisionally for a period that it shall determine"[71]. It should be noted that when it adopted this text, the lawmaker set aside a legislative proposal with a much broader scope that encompassed all acts, including individual acts. During preparatory work on the law, the minister did not rule out the idea of expanding the system to cover individual acts once its application to statutory instruments had been evaluated[72].

The Council of State may therefore preserve the effects of a statutory instrument that it annuls. When exercising this new power, it takes account of the difficulties presented by the repercussions of the regulation's annulment. It may exercise this power of its own motion, in which case it is recommended that the parties be allowed to debate the matter[73]. When deciding to preserve the effects of a regulation, the Council of State is not bound by the fact of illegality already having been mentioned in the opinion issued by the legislation division on the draft regulation[74].

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[70] CofS, 16 March 2010, Huys and Kupka, 201.930. In this case, the appellant has appealed against the permit before the annulment of the regulation, which was due to be annulled following a different appeal. In his last submission, he endeavoured to show that one of his arguments against the permit already criticised the illegality of the regulation, which became more apparent after its annulment. The Council of State accepted this. In another judgment, where the case concerned the same regulation but the arguments were different, the Council of State could not accept the appeal (CofS, 6 April 2011, Schoonbroodt, 212.496, in which there was also a question as to whether the argument based on the regulation's illegality should be raised of the court's own motion, see no. 20 above).

[71] M.-F. Rigaux, *L'effet rétroactif des arrêts d'annulation rendus par la Cour d'arbitrage et les effets de la norme annulée*, JT, 1986, pp. 589 et seq.; B. Lombaert, *Le maintien des effets des normes censurées par la Cour d'arbitrage. Recours en annulation et questions préjudicielles*, APT, 1998, pp. 174 et seq.; K. Muylle, *Les conséquences du maintien des effets de la norme annulée par la Cour d'arbitrage*, in *La protection juridictionnelle du citoyen face à l'administration*, Brussels, La Charte, 2007, pp. 526 et seq.; G. Rosoux, *Le maintien des 'effets' des dispositions annulées par la Cour d'arbitrage : théorie et pratique*, in *Liber Amicorum Paul Martens*, Brussels, Larcier, 2007, pp. 439 et seq.; R. Andersen, *La modulation dans le temps des effets des arrêts d'annulation du Conseil d'Etat,* in *Liège, Strasbourg, Bruxelles : parcours des droits de l'homme, Liber Amicorum Michel Melchior*, Limal, Anthémis, 2010, pp. 381 et seq.

[72] Report on a bill and two legislative proposals to amend the coordinated laws on the Council of State, Doc. Parl. Ch., 644/4-95/96, of 15 July 1996, p. 4.

[73] Otherwise, Article 6 of the ECHR may be violated (in this connection, see M. Quintin, unpublished report on CofS, 18 January 2011, non-profit associations Inter-Environnement Wallonie and Terre Wallonne, 210.483).

[74] See the limitation of the annulment's effects in CofS, 11 March 2009, non-profit association INTER-ENVIRONNEMENT WALLONIE, 191.272; cf. CofS, 4 June 2010, Town of Andenne, 204.782: "considering that the respondent had been notified of the illegality of the contested act by the opinion of the Council of State's legislation division but nonetheless took the risk of adopting it without taking account of the legislation division's comments, the respondent must accept the consequences. Considering that the order's annulment would affect neither the organisation of firefighting services nor citizen safety but would require corrections to be made to accounts in the case of the municipalities where the decisions have not been made final and that this could result in financial transfers, the paperwork involved, however complex it may be, does not represent such a great danger that it would justify a derogation from the normal effects of a rescinding judgment"; CofS, 21 April 2004, SPRL Funérailles Clerdent and others, 130.492: "considering that the enforcement of this

23. The scope of the preservation of effects is controversial

Does preservation of effects prevent a court from upholding an argument based on the illegality of the regulation of which the effects have been preserved? The Council of State answered this question in the affirmative and found that a decision to preserve effects applied *erga omnes*. It based this idea on the text of Article 14ter, which stipulates that decisions to preserve the effects are made 'through a general provision'[75]. Conversely, others believe that the decision to preserve a regulation's effects are not binding on an ordinary court asked to rule on an appeal and that the latter should, on the basis of Article 159 of the constitution, penalise the irregularity of an act adopted in application of the annulled regulation of which the effects have been preserved. In such a situation, questions could be raised as to the usefulness of Article 14ter[76].

We believe that the *erga omnes* effect is the logical and useful consequence of the application of Article 14ter. If the effects are preserved, it will not be possible for the government or another court (even an ordinary court ruling on matters related to subjective rights) to uphold an argument based on an objection of illegality against the annulled act, regardless of the reason for this illegality. The question is whether this effect does not contravene Article 159 of the constitution or infringe upon certain fundamental rights[77], while straightforward annulment of an act is seen as fully compliant. In my opinion, a felicitous interpretation the constitution could mean that this limitation would apply to all courts asked to rule on the effects of the order, which would be equivalent to asking the lawmaker to define the Council of State's use of Article 14ter once more. After all, retroactive annulment is the rule, and application of Article 14ter is the exception. For this exception to be used, the Council of State must find that the interest protected by the provision violating the annulled regulation and legal order as a whole (including specific interests) are better served by preservation of the effects than by retroactive annulment. If the Council of State finds this to be the case, an *erga omnes* limitation may be more advantageous to legal order as a whole than subsequent upholding of individual challenges. From a constitutional viewpoint, it would be justifiable to devise some limitations to the scope of Article 159 with a view to guaranteeing legal certainty and the coherence of the system. Several arguments could be put forward, such as the developing constitutional status of the principle of legal

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judgment would only result in financial transactions being performed, even assuming that these would inconvenience the respondent, it falls to the respondent to accept the consequences of its illegal behaviour. In any case, there is no risk to a greater public interest that would justify depriving the annulment made by the judgment of the retroactive effect that annulments generally have".

[75] CofS, 18 December 2009, Debie, 199.045: "Considering that with its judgment no. 162.616 of 22 September 2006, the Council of State annulled Article LI.TXVIII.CIII.3(2), which the appellant asked not to be applied by virtue of Article 159 of the constitution and that, in the interests of legal certainty, the Council of State postponed the effects of the annulment on 1 March 2007; that when the Council of State decides to postpone the effects of an annulment on the basis of Article 14ter of the coordinated law on the Council of State, it rules 'through a general provision' that the effects of all or part of the annulled act should be preserved; that by declaring that the Council of State is ruling 'through a general provision' when it decides to implement Article 14ter, the lawmaker gave an *erga omnes* effect to the Council of State decision ordering that an irregular statutory instrument could have effects in law; that a court decision of this nature, taken in the interests of legal certainty, temporarily reinforces the statutory instrument in question and suspends non-application for implementing measures taken while the effects of the instrument are being preserved; that temporary suspension of non-application does not contravene Article 159 of the constitution since that provision only applies to regulations or orders and cannot be applied to those that are given a temporary legal value through a 'general provision' judgment of the Council of State; that the fact that the appellant was not a party to the proceedings that led to the judgment of 22 September 2006 cannot call into question the *erga omnes* and binding nature of the decision; that there is therefore no need to refer a preliminary question to the Constitutional Court; that the acts adopted in implementation of Article LI.TXVIII.CIII.3(2) of the Walloon Civil Service Code between 1 January 2004 and 28 February 2007 cannot be annulled on the basis of the arguments examined in judgment no. 162.616 of 22 September 2006; that the contested act was adopted on 21 June 2004; that the argument is therefore unfounded".

[76] D. Renders, note on CofS, 18 December 2009, Debie, 199.045, JT, 2010, p. 177.

[77] D. Renders, *Le maintien des effets d'un règlement annulé par le Conseil d'Etat et le respect des droits fondamentaux*, JT, 2002, pp. 761 et seq.

certainty, the existence of the Council of State as guaranteed by Article 160 of the constitution and delegation to the lawmaker of organisation of its powers, notably time limits for appeals[78], the comparable jurisdiction given by law to the Constitutional Court on the basis of a non-explicit constitutional text (Article 142), the Court of Cassation's recognition of the principle of legal certainty and the need (sometimes acknowledged by that court) to weigh it up against the principle of lawfulness[79]. On this same subject, we should recall that the matter of application of a *contra legem* principle was discussed when the question was raised as to whether the principle of legitimate expectations or fair play could lead to an act that is otherwise consistent with the law being declared irregular (illegal) in the event that the government had created legitimate expectations against the text of the law, especially in tax matters. Following several judgments that would lead to the conclusion that the principle could lead to the annulment of an otherwise consistent act[80], the Court of Cassation seemed to come back to the pre-eminence of the law[81], which nevertheless does not prevent damages from being awarded for harm caused by violation of the principle of legitimate expectations[82]. In a recent judgment, the Court ruled that "the general principles of good governance include the right to legal certainty", that "this right implies, in particular, that citizens can trust public services and rely on them to comply with rules and pursue well-founded policies, and that there would be no room for citizens to think otherwise" and that "however, citizens can only invoke the right to legal certainty if this would give rise to a policy that goes against legal rules". Nevertheless, the decision is full of nuances and seems to ask the courts (rather less directly than Advocate General Mortier in his conclusions) to actually weigh up the requirements of legality against those of expectations[83].
The Constitutional Court is currently handling a preliminary question that will doubtless allow the debate to progress[84].

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[78] See *mutatis mutandis*, CofS, 19 May 2009, Goslar, 193.418.

[79] In this connection, see the examples provided by J. Theunis, op. cit., TBP, 2011, pp. 260 et seq., sp. no. 26.

[80] See my comment in M. Pâques, *L'application de la loi fiscale, Principes de bonne administration en droit administratif et en droit fiscal*, Actualités du droit, 1993, pp. 399 et seq.

[81] On the same subject, see V. Scoriels, *Le principe de confiance légitime en matière fiscale et la jurisprudence de la Cour de cassation*, JT., 2003, pp. 301 to 310; note by C.B., *Situations contra legem : le principe de confiance resurgit parfois*, in Le Fiscologue, 1216, 3 September 2010, pp. 9-10.

[82] Public Prosecutor Leclercq, concl. on Cass., 26 May 2003 and the judgment, Juridat; Cass., 22 May 2006, CDPK, 2008, pp. 456 et seq., note by S. Koval.

[83] The Court of Appeal judgment refusing to examine an objection of illegality raised by the government against an act in which a citizen had placed trust was set aside. The decision was justified and qualified as follows: "the court that was asked to evaluate a decision mentioned by the litigant for the purposes of legal certainty but viewed as illegal by the government must determine the extent to which that decision gave rise to reasonable expectations. In this instance, the court must take into consideration the lawfulness of the decision in question. In the interests of legal certainty, the examining judge analysing the topicality of the provision on which the government is basing its sentencing can take account of a subsequent regularisation decision that has not yet been annulled. However, this does not mean it can simply rule out the government's objection of illegality as regards the regularisation decision. The issue of the lawfulness of the regularisation decision may be decisive for the litigant's reasonable expectations and legal certainty. The appeals judges decide, without examining the legality of the regularisation, to dismiss the objection of illegality against the regularisation permit in favour of legal certainty, which, in the hierarchy of norms, has the same status as the lawfulness of norms. In so doing, they are violating the legal provisions mentioned in the argument in this section" (Cass., 1 March 2010, C.09.0390.N, conclusions by Advocate General Mortier, Juridat).

[84] In a judgment handed down on 21 January 2011 in the case of the non-profit association Clinique Saint-Jean – Kliniek Sint-Jan and others versus the Belgian State (JT, 2011, pp. 366 et seq.), the Brussels court of first instance referred the following preliminary question: "does Article 14ter of the coordinated laws on the Council of State, as inserted by Article 10 of the law of 4 August 1996, contravene Articles 10, 11 and 13 of the constitution, read in conjunction with Article 159 of the constitution and interpreted such that it would prevent ordinary courts from suspending, as per Article 159 of the constitution, the application of a statutory order that was annulled by a judgment of the Council of State but the effects of which are preserved until the date of the court's ruling and such that it would prevent a litigant from challenging the lawfulness of that statutory act, even though the litigant would be able to do so had Article 14ter not been applied, such as if there had never been an appeal to the Council of State regarding the illegality of the irregular statutory instrument?" (opinion published in the Belgian Official Gazette of 1 April 2011) The Charleroi court, for its part, decided to uphold an objection of illegality despite the effects of an annulled regulation having been preserved (Charleroi Civil Court,

One could also ask whether Article 14ter can be applied in the case of an annulment for a violation of European law. The Council of State recently referred a preliminary question on that matter to the Court of Justice of the European Union[85].
Finally, it is not yet clear what specific consequences preservation of effects will have on evaluation of the wrongful nature of the annulled act and compensation for damage caused.

24. Consolidation

Lawmakers regularly intervene to give new force to an administrative act that is about to be adopted or that is already irregular, liable to annulment, suspended or even annulled, depending on the case[86]. The term *consolidation*, as suggested by Prof. Renders, has found something of an echo[87]. It encompasses several types of action: authorisation, legalisation, ratification and declaration of validity. Either the lawmaker intervenes to remove the defects in the act while retaining its administrative nature or the lawmaker rewrites the act by turning its content into a law, decree or ordinance, retroactive or otherwise (but often retroactive). This confirmation or ratification is either planned in the authorisation given to the government or decided ex post. There is a considerable body of case law from the Constitutional Court on these legislative interventions[88].

B. Government liability in the exercise of its regulatory role

25. Application of ordinary law on liability

The government's liability in the exercise of its regulatory role can be incurred. In such cases, ordinary law is applied to government liability – in Belgium, this means Article 1382 of the Civil Code. The government's action or inaction must be classed as wrongful and the harm (violation of a right or legitimate interest) and causal link must be shown. If these conditions are met, there is a civil right to compensation for all damage caused. Such cases are heard by the ordinary courts.
Anyone wishing to request compensation for harm caused by government negligence consisting in the adoption of an illegal act does not need to have the act annulled by the Council of State before filing their claim[89].

26. Wrongful failure to regulate

In regulatory matters, both action and inaction can be considered wrongful. For instance, failure to regulate in a case where the law provides for the adoption of a regulation can be considered wrongful, even if the law does not set a time limit. For example, the king did not adopt a regulation setting out which jobs would entitle their holders to free accommodation. The appellant, Goffin, argued that this wrongful negligence had caused him damage amounting to 78,000 francs. The Court of Cassation viewed this failure to regulate as violation of a political right, which can constitute harm within the meaning of Article 1382. It criticised the reasoning of the Brussels Court of Appeal, which had ruled out that failure to exercise the regulatory role could constitute negligence[90].

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11 February 2011, JT, 2011, p. 368, approving remarks by D. Renders, *L'article 159 de la Constitution prime l'article 14ter des lois coordonnées sur le Conseil d'Etat*).

[85] CofS, 18 January 2011, non-profit associations Inter-Environnement Wallonie and Terre wallonne v. Walloon Region, 210.483.

[86] David Renders, *La consolidation législative de l'acte administratif unilatéral*, foreword by Francis Delpérée, Bibliothèque de la Faculté de Droit de l'Université catholique de Louvain (vol. XXXIX), Brussels, Bruylant, and Paris, LGDJ, 2003, XVIII pp. and 492 pp.

[87] Court of Arbitration, 14 December 2005, 188/2005, ground B.5.8.

[88] K. Muylle and J. Theunis, *La Cour constitutionnelle comme juge de la séparation des pouvoirs : le cas des délégations et des validations*, in *Liège, Strasbourg, Bruxelles : parcours des droits de l'homme, Liber Amicorum Michel Melchior*, Limal, Anthémis, 2010, pp. 113 et seq.

[89] Brussels, 5 October 2006, JT, 2006, pp. 767 et seq.

[90] Cass., 23 April 1971, Pas., I, p. 752; RCJB, 1975, pp. 9 et seq. note by F. Delpérée.

27. Illegality of regulations and error

The question arises as to whether illegality of a regulation is always wrongful. The point at issue is the interpretation of the case law of the Court of Cassation, which states that "unless there is an insurmountable error or another factor allowing exoneration from liability, an administrative authority commits an error when it adopts or approves a regulation that does not take account of constitutional or legal provisions requiring it to abstain from taking action or to act in a certain way, so its civil liability is incurred if this error causes damage"[91]. This begs the question as to whether there are two types of law: laws which require a certain type of action, of which violation would, *ipso facto,* be wrongful (unless there is an insurmountable error or another factor allowing exoneration), and other less specific laws. Violation of these latter laws, it is claimed, is not the same thing as an error: the court should also find that there was a lack of diligence. Legal literature is divided on the issue[92]. The trend is currently towards the idea that most laws have a specific scope, or even that all laws have a specific scope and that illegality is always wrongful unless there is an insurmountable error. This issue goes beyond the scope of my brief contribution.
In a recent study, Mr R. Van Melsen suggested combining the idea that illegality is always wrongful with recognition of a requirement for the government to set aside illegal administrative acts itself. This would mean an extension (which Mr Van Melsen recommends) of the scope of application of Article 159 of the constitution, which, as we have seen, is traditionally interpreted as only authorising the courts to set aside an irregular act (see above, section 20). In the system recommended by the author, a court determining, through a related case, that a regulation was illegal[93] would prevent any government from continuing to apply that regulation. Furthermore, from the moment the regulation was declared illegal, application thereof would be wrongful unless those applying it could prove that there was an insurmountable error. However, the author wonders whether this analysis does not come down to giving an *erga omnes* effect to declarations of illegality based on related cases, bearing in mind that such declarations have traditionally had relative effects[94]. In this connection, I refer to my discussion of the matter above (section 19).

Conclusion

The aim of these brief observations was to provide an introduction to the wealth of issues surrounding disputes on administrative acts in Belgium.

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[91] Cass., 13 May 1982, JT, 1982, p. 772, conclusion by J. Velu.

[92] Recently, Mr David De Roy argued that a distinction should be made between two categories of law (D. De Roy, *La responsabilité quasi-délictuelle de l'admnistration : unité ou dualité des notions d'illégalité et de faute*, in *La protection juridictionnelle du citoyen face à l'administration*, Brussels, La Charte, 2007, pp. 67 et seq.). This position was challenged by Prof. Renders, who would prefer just one category of specific legal provisions (D. Renders, *Droit administratif, T. III, Le contrôle de l'administration*, Brussels, Larcier, 2010, pp. 184 et seq.); see also G. Pijkcke, *Illégalités et caetera. Défaut de base légale, légalité de l'acte administratif et responsabilité des pouvoirs publics*, in *Liber Amicorum Michel Mahieu*, Brussels, Larcier, 2008, pp. 449 et seq.; B. Dubuisson, *Faute, illégalité et erreur d'interprétation en droit de la responsabilité civile*, on Cass., 26 June 1998, RCJB, 2001, pp. 28 et seq.; D. Renders and J.-F. Van Drooghenbroeck, *Erreur de droit et droit à l'erreur*, *Liber amicorum M. Mahieu*, Brussels, Larcier 2008, p. 467; P. Lewalle and L. Donnay, *Contentieux administratif*, third edition, Collection de la Faculté de Droit de l'Université de Liège, Brussels, Larcier, 2008, no. 566; Cass., 25 October 2004, JTT, 2005, p. 106 et seq., conclusion by J. Leclercq; JLMB, 2005, p. 638 et seq., observations by D. De Roy and N.J.W., 2004, p. 1316, note by I. Boone; R.O. Dalcq and G. Schamps, *Examen de jurisprudence, La responsabilité délictuelle et quasi délictuelle*, RCJB, 1995, p. 693 et seq., sp. no. 107; M. Pâques, *L'application de la loi fiscale, Principes de bonne administration en droit administratif et en droit fiscal*, Actualité du droit, 1993, pp. 399 et seq., sp. nos. 51 et seq.; M. Pâques, *De la responsabilité de l'Etat pour violation du droit communautaire*, in *Droit des citoyens et des associations dans le droit européen de l'environnement*, Brussels, Story-Scientia, 1998, pp. 95 to 142.

[93] Mr VAN MELSEN also examines the publication procedure of judgments and postulates, to a large extent, the administration has to have the knowledge of these decisions.

[94] R. VAN MELSEN, op. cit., no. 32.

The organisation of this area of law has given rise to a wide range of protective instruments allowing acts to be annulled or set aside and, if an error has been committed, for appropriate compensation to be provided for any harm caused by the illegal regulation. Failure to regulate can also be penalised.
At present, the main issues under debate are the connections between illegality and error, but these go beyond the scope of this contribution. The balance between lawfulness and legal security is also under discussion. In this connection, much is expected of a potential Constitutional Court decision on the constitutionality of time limits for hearing objections of illegality.