pro facto

Onderzoek naar ‘oneigenlijk gebruik’ van bestuursrechtelijke procedures met het oog op proceskostenvergoedingen

Op (proces)kosten gejaagd?

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Summary

Introduction
Anyone who disagrees with a decision made by an administrative body can file an objection to it and possibly appeal to the administrative court. In some cases, no objection procedure is open, but citizens can file an administrative appeal against a government decision with another administrative body. In order to keep these options open to as many people as possible and to guarantee access to justice, a regulation for the compensation of costs of process in connection with the use of a legal adviser ("legal assistance provided by a third party on a professional basis") (hereinafter: costs of process) has been laid down in the Besluit proceskosten bestuursrecht (Bpb)[1], based on the Algemene wet bestuursrecht (Awb)[2].

Reason
In recent years, the role of professional legal adviser has garnered significant attention, especially in cases related to WOZ valuations, Bpm decisions, traffic and parking fines (Wahv or Wet Mulder. Often, these services are offered on a 'no cure, no pay' (NCNP) basis, meaning the interested party incurs no cost, and the legal aid provider is compensated with the costs of process only if the case is successful. Administrative bodies have the impression that there is a business model for NCNP agencies where it is profitable to file objections and appeals, and in doing so, to carry out numerous procedural actions.

Research questions
The question is whether in these situations there is so-called improper use of proceedings for the purpose of obtaining compensation of costs of process. In this report we describe the research on this topic, focusing on the following main questions:

I To what extent and in what areas of administrative law is there improper use of compensation of costs of process by legal aid providers, and how can that be described?
II What factors in (sectoral) regulations can explain that improper use?
III What regulatory adjustments are possible to prevent improper use?

Working definition
A working definition of "improper use" of administrative law proceedings for the purpose obtaining compensation of costs of process (hereinafter: improper use) was chosen at the

[1] the Administrative Law Litigation Costs Decree
[2] General Administrative Law Act

beginning of the study. This definition was formulated following an initial review of available documentation and literature. The following working definition was chosen:

> Improper use of legal protection procedures occurs when objections and appeals are lodged in accordance with the rules of law, but contrary to the intentions of the legal provisions in the Awb.

It is important to distinguish the concept of "improper use" from "abuse" of law. Abuse involves the unlawful use of rights for the sole purpose of gaining a financial advantage, or to cause damage to the other party (in this context the administrative body). During the research it became clear that in practice there is sometimes a gray area, especially when the interest of the authorized representative is very high compared to that of the interested party.

Document and literature review
The document and literature study aimed to gain insight into the areas of administrative law where improper use may be occurring. After extensive analysis, it was found that literature on (alleged) improper use is limited to the previously known areas of law of the WOZ, Bpm, parking taxes and the Wahv. To this end, previous research on the subject was first examined. The report 'Van beroep in bezwaar', published in 2020, presents the WODC research on working methods and earning models of NCNP legal advisers in WOZ and Bpm. This reveals a picture of a growing market with far-reaching consequences for governing bodies. Because there are differences between the working methods of legal advisers, the conclusion cannot simply be drawn that there is improper use. In the case of the WOZ, researchers conclude that there are also differences in the quality of decision-making among administrative bodies that could possibly explain the rise of NCNP legal advisers.

Especially in the field of the WOZ, this report generated reactions. The union of legal advisers (VRLB) expressed appreciation for the nuanced conclusions of the report. The VNG (and also various municipalities and tax administration organizations) were highly critical of the results, and an investigation into the earning model was subsequently initiated that should provide more insight into the earning model of the legal advisers and the incentives created by the system of compensation of costs of process. De Waarderingskamer conducted its own quantitative research to identify the volume of objections and appeals, and the results of those proceedings with respect to WOZ-value adjustments. In response to both the WODC report and the reactions from the field, the government has indicated that it wants to focus on better involvement of citizens in WOZ valuations, increasing the use of informal contact and reducing the administrative burden of administrative bodies. Policy plans are also being developed for the Bpm to reduce the number of objection procedures.

On March 3, 2023, fifteen tax implementation organizations send a letter to the state secretary of Finance in which these organizations call attention to the major problems in the implementation of the WOZ ("The point at which the WOZ system is bogged down is now close at hand.") and call on him to stop collecting information and to intervene in the laws and regulations as soon as possible. In response to that letter, the secretary of state presents a plan of action, which is largely translated into the proposal for the Wet herwaardering proceskostenvergoedingen WOZ en Bpm[3]. This includes as the most important measures:

[3] Act Revaluation compensation of costs of process WOZ and Bpm.

5. Compensation of costs of process may only be paid to a bank account in the name of the interested party himself. Claims for payment may not be transferred.
6. The compensation of costs of process at the objection stage is multiplied by 0.25 if the decision is revoked (in part).
7. The compensation of costs of process at the appeal, appeal to a higher court or cassation stage is multiplied by 0.25 if the decision is (partially) revoked or modified and multiplied by 0.10 in other cases.
8. Compensation for immaterial damages in WOZ and Bpm cases will be limited to €50 per six months (was €500) by which the reasonable time for settlement has been exceeded.

During consideration of this law, an amendment also makes the measures applicable (to the extent possible) to the Wahv. The law is passed and enters into force on January 1, 2024.

Responses in the literature to the plan of action and the legislative proposal are mostly positive. However, the comment is made that the use of NCNP agencies is not a problem in itself. The concern is raised that focusing excessively, or solely, on limiting compensation of costs of process might unduly restrict access to justice. Specific elements are also criticized in the literature; the direct payment to interested party could be easily circumvented by contract, the lower compensation of costs of process for proceedings in certain jurisdictions could be vulnerable when the principle of equality is to be considered. From the angle of NCNP firms, the risk is pointed out that legal advisers will invest less in selecting promising objections, which could actually increase the number of proceedings.

Case law

The case law study looked at compensation of costs of process under Article 8:75 of the Awb, but also at the possibility of obtaining compensation for immaterial damages if the duration of proceedings exceeds the reasonable period. A first important finding from this study is that the term improper use is not defined in case law either.

Case law has shown that administrative judges generally see no reason to treat legal advisers in the field of, for example, WOZ or Bpm differently from colleagues active in other areas of law. Thus, the Hoge Raad[4] ruled that both types of legal adviser should be paid the flat fee per litigation act/point. Regarding the weighting factors applied - which mean that depending on the case, the amount per point is lower or higher - the judges do not assume that in WOZ and Bpm cases, in principle, only simple and limited work is performed. Hence, a generally a lower fee per point is not deemed justifiable.

The Bpb's powers to set the compensation of costs of process lower or higher are used sparingly, and when they are, it has less to do with the characteristics of the jurisdiction than with the conduct of the agent or administrative body involved.

At the same time, we do see that the past two years have seen a change in the lower courts. Judgments of various courts show that the courts want to provide more custom-made solutions when deciding on entitlement to compensation of costs of process and immaterial damages, with the consequence that lower amounts are being awarded. To what extent the courts of appeals and the Hoge Raad[5] will go along with this is still uncertain at the time of writing

[4] Supreme Court.
[5] Idem.

this report. Moreover, the legal reality has also changed in the meantime with the entry into force of the Wet herwaardering proceskostenvergoedingen WOZ en Bpm[6], which means that the situation in which courts have ruled differently from each other and from rulings of higher bodies has been short-lived.

Interviews and focus groups

First, the interviews and focus groups revealed that giving a clear definition of improper use is very difficult. Improper use and abuse of law are closely related, and the line between them is hard to draw. The fact that in most proceedings there is also a material result to be obtained means that there is no abuse of law. On a case-by-case basis, it is not directly possible to determine whether there is improper use, even when the interest of the representative is (much) greater than that of the interested party themselves. At the system level, there is more consensus. When parties have a business model based on litigating against a large volume of decisions to achieve a significant financial interest precisely by employing numerous legal remedies, this is considered improper use of law by the participants. This is even more the case when execution problems at administrative bodies and/or courts appear to be pursued.

Where do we see improper use?

We note that, for now, improper use is occurring primarily in jurisdictions that are already in the picture in the social and political debate on improper use. In addition, some NCNP agencies seem to be focusing more and more on objections to post-clearance collection of parking tax. In other jurisdictions we did look for signs of the emergence of NCNP firms or forms of improper use, but there did not appear to be any.

Indicators

We find a number of indicators of improper use. For example, many grounds are usually raised in these types of proceedings, usually not selectively considering which grounds are relevant in the specific case. Administrative bodies characterize this as a scattergun approach. In some cases, proceedings are based solely on formal grounds. Related to this, we see that standard grounds are often used which are largely drafted in an automated manner. Another indicator is the utilization of as many procedural actions as possible, even when, according to participants from objection and appeal authorities, this adds no value to the substantive handling of the case. Illustrative of this, according to these bodies, is that legal advisers are often happy to agree to written 'hearings'. The added value is then minimal for the objector, but a point for the compensation of costs of process is still awarded. Finally, it was observed that some of the legal advisers choose to conduct proceedings in a disruptive manner, by submitting grounds or evidence late in the proceedings, or by filing many (unnecessary) cases. Improper use has led to execution problems both within administrative bodies and in the judiciary.

Implementation problems

Implementing organizations emphasize that conducting objection procedures makes considerable demands on available capacity. The general picture painted is that people are always busy reacting, which means that it is not possible to make a structural improvement at 'the front'. The focus in many organizations is now on organizing the objection and appeal process. Judges and hearing officers also note that there is limited hearing capacity, much of which is now being used for cases with a small material interest to interested parties.

[6] Act Revaluation compensation of costs of process WOZ and Bpm.

Causes
The possible causes of improper use can be divided into two groups. On the one hand, the Bpb sets up a system that includes incentives that encourage improper use. The lump-sum compensation fees based on relatively high standard rates (within the context of the aforementioned areas of law) for compensation of costs of process and immaterial damages have had the effect of creating a commercial market, with companies able to make a profit on the compensation of costs of process only, without clients paying having to pay for anything. Direct payment to legal advisers prevents restraint by interested parties to litigate, even in the case of relatively small interests. The previously applied restraint in the judiciary in applying (lowering) weighting factors, also influenced by established lines in higher courts, does not put a brake on improper use either.

There are also factors in the various statutory regulations that encourage improper use. In the case of the WOZ, it has been found that the need for an exact, well-founded valuation is vulnerable to objection. In addition, there are ample opportunities to submit requests for information and valuation principles. The possibility to explain and supplement the content of written objections at a hearing is hardly ever used in practice (sometimes even leading to a written 'hearings'), although costs of process are awarded for this activity. Incidentally, according to legal advisers, written hearings are (also) a result of the way in which administrative bodies schedule and organize hearings. Finally, there is an incentive to submit additional evidence late in the proceedings (in the appeal phase), with which an earlier substantiation of a valuation turns out to be incomplete or incorrect.

With the Bpm, it is well known that the valuation of cars can be subjective, making an objection to the valuation relatively likely to succeed. Moreover, successful objections can be filed against one's own tax declaration. An important factor is also the litigation behavior of some legal advisers in practice. Three legal advisers account for 95% of the proceedings. Despite the deployment of about 150 FTEs on the handling of objections and appeals, de Belastingdienst[7] is forced to grant a portion of the objections without substantive assessment.

In the case of the Wahv, it was noted that penal orders are vulnerable, partly because of complex formal requirements and because there is a very large number of enforcement authorities. The distribution of responsibilities between enforcement authorities, the CJIB[8] and the Public Prosecution Service complicates the organization of quality assurance and the establishment of effective feedback loops. As a result, the learning capacity within the system of responsible parties has remained limited, despite intentions to improve this.

Other factors
Two more general developments emerged during the study that are relevant in this context. First, digitization provides opportunities for NCNP companies to very effectively acquire customers, including among people who only seek information about objection options. In addition, interviewees outlined that the growing distrust in the government has also caused objectors to seek professional legal assistance more often rather than objecting independently.

Risks in other areas
From local governments and the judiciary, participants indicate that they see risks for the expansion of improper use to other areas of law. These risks could occur in the case of:

[7] National Tax Authority.
[8] Central Fine Collection Agency.

- jurisdictions or processes that involve mass decision making by administrative bodies, in a (largely) automated manner.
- a reasonable chance of success of the objection or (administrative) appeal with limited efforts.

Solutions

As of January 1st 2024, the legislature has already adopted a good number of measures intended to make improper use less lucrative and thereby reduce the number of proceedings. Whether the measures are effective and sufficient cannot yet be determined. Further measures are still being examined by the Cabinet. Various ideas have been put forward by interviewees to combat improper use. In the case of the WOZ, one could consider revising the valuation system, by no longer determining exact valuations (but a value range or class), or by no longer valuing annually. In the case of the Wahv, it was suggested that more efforts are made in setting up effective feedback loops in the criminal justice chain. In addition, vulnerabilities with regard to offense codes could be addressed, the provision of information in penal orders could be improved, or a digital arbitration forum could be considered. A far-reaching measure is a system based on the Canadian model, in which exemption would have to be granted for the use of professional legal assistance (for example, only in the appeal phase). This idea, however, was judged undesirable by several interviewees because of the far-reaching and drastic effect on the foundations of the Dutch legal aid system.