IV – Independence of Advisory and Complaint Committees and Final Dispute Resolution by Administrative Courts

Advisory Objection Procedures in the Netherlands: A Case Study on their Usefulness in Dutch Competition Law

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1. Introduction

Article 7:1 of the Netherlands General Administrative Law Act (GALA) states one of the principles of judicial protection in Dutch administrative law: before you can appeal against a decision of an administrative authority to an administrative court, you must first lodge an objection with the administrative authority that adopted the decision.[1] Consequently, there is no access to the courts until the administrative authority has reviewed its decision, and this also applies to fines imposed by the Netherlands Competition Authority (*NMa*). The value of this procedure has regularly been questioned in the past; one of its most notorious critics is a leading Dutch competition lawyer, Mark Biesheuvel, who expressed his dissatisfaction with the objection procedure in the Dutch legal journal *Nederlands Juristenblad* more than 15 years ago. To quote:

> Generally, the procedure involves a time-consuming and wholly unnecessary ritual filing past public servants who have dug themselves into entrenched positions (...) (...) in practice, the procedure regularly amounts to a legal restraining order which wrongly denies individuals access to the courts for long periods of time, sometimes years.[2]

On 1 January 2013, the Netherlands Competition Authority is merging with the Independent Post and Telecommunications Authority of the Netherlands (*OPTA*) and the Netherlands Consumer Authority (*CA*). The new organisation is to be known as the Consumer and Market Authority (*ACM*). To enable the *ACM* to operate effectively and efficiently, a bill is currently being prepared which will

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1 Art. 7:1.1 GALA: "A person who has the right to appeal a decision to an administrative court, must first lodge an objection, unless: [there follows a list of decisions in relation to which this does not apply]".

2 M. Biesheuvel, Weg met bezwaarschriftenprocedure, *Nederlands Juristenblad*, 1996, p. 930.

streamline the procedures and enforcement instruments available to the *ACM*.[3] One of the proposed changes concerns abolishing the objection phase for decisions imposing fines.

The aim of the present article is to discuss the reasons for this proposed change. We will be concentrating on sanctions under the Netherlands Competition Act (*Mw*) and the role played by the Advisory Commission on Competition Act Objections (*Adviescommissie bezwaarschriften Mededingingswet* (*AbM*)). As not all readers will be equally familiar with the objection procedure in Dutch law we shall first discuss it briefly.

2. The Objection Procedure in the GALA[4]

2.1 General

As noted above, under the GALA, an interested party can only contest an administrative decision before a court if he has previously lodged an 'objection' with the administrative authority that took the decision in the first place. This means the administrative authority is required carry out a 'full review' of the decision being contested. By contrast with a judicial appeal, the administrative authority must consider not only the lawfulness of the contested decision, but also policy aspects. Moreover, the review must be carried out with regard to the situation, both in fact and in law, applying at the time of the review, in other words *ex nunc*: in principle this means taking changed policies, changed legal rules, and also changed circumstances into consideration. The objection procedure is thus both about legal protection and extended administrative decision-making.

Under Article 7:2 GALA, before giving a decision on the objection, the administrative authority must give interested parties the opportunity to be heard. For this, it has two options. First, under Article 7:5 GALA, it may conduct a hearing itself, as the OPTA does. Alternatively it can appoint an external advisory committee under Article 7:13 GALA, as the competition and consumer authorities (*NMa* and *CA*) do. Under article 7:13 GALA, an advisory committee must consist of a chair and at least two members, and the chair must not be a member of the administrative authority or work under its responsibility. The chair should not have had any previous involvement in the matter. Although not a requirement, in most cases all members of an advisory committee are independent, as is the case for the competition authority. It is entirely up to the administrative authority whether or not to appoint an advisory committee.

3 *Wetsvoorstel stroomlijning markttoezicht ACM*, at <www.internetconsultatie.nl/materielewetacm>.

4 *See generally*: H.B. Winter, *De Awb-bezwaarschriftprocedure: een praktische handleiding*, Kluwer, Deventer, 2003; L.M. Koenraad, K.H. Sanders, *Besluiten op bezwaar*, Kluwer, Deventer, 2006; *Handreiking bezwaarschriftprocedure Algemene wet bestuursrecht*, Ministerie van Justitie, The Hague, 2004.

It is clear from the legislative history of the GALA that the original purpose of the objection procedure – offering an easily accessible, informal procedure – was to avoid large numbers of appeals to the administrative courts.[5] During the objection procedure, the administrative authority would have the opportunity to repair obvious and simple errors by either taking a new decision or giving better reasons for the original decision, so that disputes between individuals and the administration could be resolved more effectively and the number of judicial appeals reduced. In addition, the objection procedure would serve to ensure that cases that do come before the courts are more clearly defined and better presented. This was supposed to reduce the length of judicial procedures significantly.

2.2 Pros and cons of external advisory committees in objection procedures

The administrative authority is free to decide whether or not to appoint an external committee to hear objections. The literature mentions a number of advantages of appointing an external committee.[6] In the first place, an external committee acts as 'a fresh pair of eyes'. If the aim of the objection procedure is to be able to correct errors as simply as possible, this can best be achieved if the reassessment is carried out by an external, independent body bringing a new perspective to the situation.

A second advantage is that an external committee is preferable from the point of view of procedural justice.[7] An external committee is independent and has no axe to grind, and, because an advisory committee is itself also deemed to be an 'administrative authority',[8] its members must perform their duties impartially, as required by Article 2:4 GALA. It may be supposed that the person or persons lodging an objection and any other interested parties will be more willing to accept the decision on the objection if it is based on the advice of an external committee than if it was handled entirely by the administrative authority itself.

A third advantage can be described as the 'mediator function' of an advisory committee. In accordance with the intention of the GALA objection procedure, the advisory committee must seek to find a solution for the dispute.

Finally, it has been noted as an advantage that an external committee brings expertise into the organisation. This is particularly relevant where the 'administrative authority' is only a relatively small entity, such as a committee in one of the smaller municipalities.

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5 PG Awb I, p. 279; available at: <www.pgawb.nl>.

6 *See* footnote 4.

7 See in general on procedural justice: N. Luhmann, *Legitimation durch Verfahren* (6th ed.), Suhrkamp, Frankfurt am Main, 2001 (1969); John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge Massachusetts, 1971.

8 Administrative Jurisdiction Division of the Council of State 19 March 2003, AB 2003/301 with note by Peters.

Obviously, there are also disadvantages to appointing an external advisory committee. Objections take longer to deal with, are more expensive and, as will be explained below, the committee may not carry out a full review.

Generally, external members of an advisory committee take on the job in addition to other work and so are not available on a full-time basis. This means that the organisation cannot dispose of their time freely, and this may result in longer objection procedures. Another possible disadvantage is the cost. Members of an external advisory committee generally receive a fee for preparing and attending meetings and drafting recommendations. This inevitably leads to higher costs compared to procedures where there is no external advisory committee. Finally, the procedure involves a full review of the decision, which means an evaluation both of the lawfulness and the merits of the decision. Although an external advisory committee is also required to carry out a full review, such committees often fail to review the merits of a decision.[9] This is because committees of this kind often feel uncomfortable commenting on what they regard as the policy and/or decision-making discretion of the administrative authority, and thus generally confine their recommendations to factors concerning the lawfulness of the decision.

2.3 Relationship between Advisory Committee and Responsible Authority

After the hearing, the advisory committee reports to the administrative authority. It advises the authority how to deal with the objection and makes a proposal for the decision to be made on the objection. Under Article 7:13.6 GALA, the recommendation must be given in writing and include a record of the hearing. The administrative authority must consider the review on the basis of the committee's recommendation. As an advisory committee is deemed to be an 'adviser' for the purposes of the GALA, the administrative authority must satisfy itself that the advisory committee prepared its recommendation with due care, both as regards the way it performed its duties and the content of the recommendation (Art. 3:9 GALA). The administrative authority must read the recommendation with a critical eye, as it retains primary responsibility for the decision on the objection. It must always form its own judgment on the objection and must decide what the right decision is in law. Only when the administrative authority has satisfied itself that the examination was carried out with due care and is not defective may it base its decision on the committee's recommendation. If the decision is based on the committee's report, interested parties must be informed of the recommendations (Art. 3:49 GALA).

The committee's recommendations are not binding and the administrative authority is not required to adopt them. However, if an administrative authority

9 See on this concerning review at the municipal level: A. Schwarz, *De adviescommissie in bezwaar: inrichting van de bezwaarprocedure bij gemeenten* (PhD. Groningen), The Hague, 2010, p. 273 et seq.

chooses to involve an advisory committee in dealing with an objection, it cannot simply ignore the committee's recommendations. Under Art. 7:13.7 GALA, it is then obliged not only to state the reasons for its decision on the objection, but also for its departure from the recommendation, and it must enclose the recommendation with its decision.

3. The Advisory Committee on Competition Act Objections

3.1 General

According to Art. 5 of the decree establishing the Advisory Committee on Competition Act Objections (*AbM*),[10] the Advisory Committee is responsible for advising the Netherlands Competition Authority on objections against sanctions (fines and orders subject to a financial penalty) the authority has imposed under Article 62(1) of the Netherlands Competition Act. Currently, the Committee consists of 15 members (lawyers and economists). Six of these have a primarily academic background, seven a judicial, and two are in public service. Its members are independent and have no ties with the Competition Authority.[11] All its members have special experience or expertise in the field of administrative law, European law (specifically competition law), and/or the economy.

The Committee is responsible for hearing interested parties under Art. 7:2 GALA, and this means both the companies concerned and the Competition Authority. Generally, objections are heard by a subcommittee of three or five members. The members involved in handling a case decide the Committee's recommendation by majority vote. If there is an even number of members involved in a case, the subcommittee's chair has a casting vote in the event of a tie. Like other external committees, the Advisory Committee on Competition Act Objections reports to the administrative authority (in this case the Competition Authority) in writing. Here too, the Competition Authority is not bound by the Committee's recommendations and it will be shown below that the Competition Authority relatively often departs from the Committee's recommendations. As explained above, this means that it must give reasons not only for its decision but also for its departure from the Committee's recommendations, and must enclose the report with its decision.

3.2 Relationship to Direct Appeals Act

As noted above, the bill currently before Parliament aims to abolish the objection procedure in relation to sanctions imposed by the new Netherlands Consumer

10 Besluit tot instelling Adviescommissie bezwaarschriften Mededingingswet, *Stcrt.* (Government Gazette) 1998, nr. 146, p. 3.

11 Under Art. 6 of the decree, they must ensure they do not "deal with any case they have in any way been involved in". This obligation also follows from Art. 2:4 GALA. Members of the Committee regularly declare themselves unavailable on this ground when the cases are being allocated.

Authority. It is, however, important to add that it is already possible under current legislation to bypass the objection procedure. Under the *Wet rechtstreeks beroep* (Direct Appeals Act), which entered into force on 1 September 2004, Art. 7:1a was inserted in the GALA, by which a person lodging an objection may, in derogation from Art. 7:1, request the administrative authority to consent to direct appeal to the administrative courts. Under the third paragraph of Art 7:1a, the administrative authority may consent to the request if the case lends itself to such a procedure, but must refuse the request if another objection has been lodged against the decision which does not contain a similar request (second paragraph). It is Competition Authority policy to consent to such requests as a rule. At the time the provision entered into force, the Advisory Committee on Competition Act Objections believed – no doubt encouraged by the many lawyers at hearings moaning about the pointlessness of the whole objection procedure – that this would result in a substantial reduction in the number of objections. Nothing could have been further from the truth.

From the evaluation of the Direct Appeals Act, it emerged more generally that only sporadic use was made of the possibility of bypassing the objection procedure.[12] This reticence was due not to ignorance, but was often a deliberate choice. Attorneys regarded skipping the objection procedure as a missed opportunity. From the evaluation of the Act, it also emerged that where an independent committee advised during the objection procedure, the procedure was more likely to be regarded as a success.

We would add that the Competition Authority regularly departs from the recommendations of the Advisory Committee, particularly where the Committee recommends declaring an objection well founded in whole or in part.[13] Our hypothesis is that the parties believe they have more chance of a successful appeal to the administrative courts if they have the backing of an 'expert report' from the Advisory Committee. From this perspective, the objection procedure affords an additional opportunity for objectors to be 'proved right', albeit only in a favorable report from the Advisory Committee. The worst that can happen is that the Committee will recommend declaring the objection unfounded. In other words, given that *reformatio in peius* is not allowed, objectors stand only to gain from the objection procedure. Add to this the fact that objections and appeals have suspensory effect on a decision imposing a sanction (Art. 63 Competition Act) and it is clear why the objection procedure is so popular in relation to Competition Authority decisions and why so little use is made of the possibility of appealing directly to the administrative courts, avoiding the objection procedure.

12 B.M.J. van der Meulen, M.E.G. Litjens & A.A. Freriks, *Prorogatie in de Awb, Invoeringsevaluatie rechtstreeks beroep*, WODC, The Hague, 2005.

13 See below.

3.3 The Advisory Committee as a 'Zero Tier' Administrative Court

If we look at the practice of the Advisory Committee, there are several points worth mentioning. These are above all based on the experience of the first author as a long-standing member of the Committee. The first is that the Advisory Committee objection procedure is very similar to a first instance appeal before the administrative courts. Its approach is what could be termed 'semi judicial'. After the written objection and the grounds upon which it is based have been received, an 'instruction note' is written, generally by the secretary, for the subcommittee charged with the hearing. An instruction note basically sets out the points that need to be decided and generally takes the form of a draft recommendation. It is, of course, intended only for internal use within the Advisory Committee. Before the hearing is held, the Competition Authority responds within the 10 days referred to in Art. 7:4.1 GALA by sending the parties and the Advisory Committee a written explanatory note. The explanatory note generally addresses the grounds put forward for the objection and is often the central document in the discussion at the hearing. The hearing itself is also similar to a hearing before an administrative court: the objector explains his case, the authority responds, the Committee questions the parties, and the objector may be given the opportunity to reply. This format is reinforced by the fact that the 'individual' in the proceedings is almost always a professional organisation represented by highly qualified lawyers and other legal professionals. The Competition Authority is generally represented by at least a lawyer from its legal department, sometimes supplemented by economic expertise from within the organisation. In other words, the debate at the hearing is a professional one between subject material experts.

It will be clear from the above that, as a rule, the objection procedure is supposed to facilitate a full *ex nunc* review of the original decision. However, in proceedings before the Advisory Committee there is no question of a full review in the sense originally intended by the legislature. In the first place, this has to do with the type of decisions that are subject to the advisory opinion of the Committee. Generally only two questions are in fact relevant: can the authority prove the facts alleged, and do they constitute an infringement of the provisions of the Competition Act? The Committee is, as it were, virtually compelled to carry out an *ex tunc* review. Moreover, given the size of the dossiers, a full integral review of the complex of facts is not really possible. The Committee does not feel it has to repeat the examination of the facts all over again and generally confines itself to deciding whether the authority has proved the facts alleged to the Committee's satisfaction and, bearing in mind the authority's duty of care and/or to give reasons for its decisions, if the Committee is not convinced it will recommend reviewing the case further in this respect. Though Art. 9 of the decree establishing the Advisory Committee does give it the power to hear witnesses and experts even where Art. 7:8 GALA does not apply (i.e. other than at the request of interested parties), this power has never been used as far as we are aware. The main reason for this, in our view, is that an independent investigation of the facts by the Advisory Committee would result in too big a delay in decision-making. Moreover, it is felt that correctly establishing

the facts is above all a matter for the administration. Nor do the purely policy aspects of decisions imposing sanctions really qualify for full review by the Advisory Committee. Though the statutory power to make decisions imposing fines is a discretionary power,[14] this discretion is significantly hedged in by policy rules (e.g. guidelines for fines, leniency reductions etc.) which the Competition Authority is obliged to apply under Art. 4:84 GALA except in 'special circumstances'. Once it has been established that the guidelines for fines are generally adequate for determining the size of the fine, the Advisory Committee is no longer in a position to question the appropriateness of the policy rules in any specific case. Its recommendations are therefore confined, as a rule, to whether or not the administrative authority has applied the guidelines correctly and whether or not there is, in the particular case and having regard for the proportionality principle, a 'special circumstance' which would justify a departure from the policy rules. Essentially, in our opinion, this differs little from way the first-instance administrative courts operate. In short: the objection procedure before the Advisory Committee is very similar to the procedure before a first-instance administrative court, both in terms of procedure and of what is reviewed.

4. The Reasons Given in the Bill for Abolishing the Objection Procedure in Relation to *ACM* Decisions Imposing Fines

Against the background of the above, more general comments, we shall now discuss the reasons given in the bill for abolishing the objection procedure in relation to *ACM* decisions imposing fines.[15] The most important reason given is 'that the benefits of the objection procedure in general do not apply to objections to *ACM* decisions imposing fines'. Apparently, decisions of the *ACM* imposing sanctions are of such a specific and special type that the usual benefits of an objection procedure do not apply.

The proposal also notes 'that abolishing the objection procedure is expected to have a positive effect on the time taken to process cases, so that the *ACM* will be able to keep within the reasonable time required by Article 6 of the European Convention on Human Rights in more cases'. The explanatory memorandum notes that both parties and non-parties benefit from obtaining the earliest possible clarity and legal certainty concerning the interpretation of a rule by the administrative courts.

Finally, the explanatory memorandum mentions as an 'important' advantage that scrapping the objection procedure will lead to a reduction in costs both for trade and industry and for the *ACM* itself. Let us consider these arguments more closely.

14 See Articles 56 et seq. Competition Act.

15 Explanatory memorandum, point 2.3.2 at pp. 14-15.

4.1 Objection Procedure Does not Operate as 'Sieve' in Relation to ACM Decisions

One of the most important advantages of the objection procedure is said to be the way it may act as a 'sieve', offering a way of resolving disputes without the intervention of an administrative court. However, according to the explanatory memorandum, it emerges from figures from the Competition Authority, the Telecommunications Authority and the Consumer Authority for the period 1 July 2009 to 1 July 2011 that this effect is relatively small for decisions imposing fines: 71% of infringers who lodge an objection against a Competition Authority decision end up making an appeal, for the Telecommunications Authority the figure is 91%, and for the Consumer Authority 67%. In our view, this shows that the objection procedure does in fact work for ACM decisions, but to a lesser extent than by comparison with decisions in other areas.[16] A possible explanation, at least as regards Competition Act related decisions, may be that the Competition Authority relatively often departs from the Advisory Committee's recommendations. This point will be discussed in more detail below. Also worth noting is that the effect is even less notable in relation to decisions of the Telecommunications Authority. One possible explanation could be that the Telecommunications Authority does not work with an external advisory committee at all, whereas both the other authorities do. If this hypothesis is correct, it is quite possible that appeals to the courts against decisions of the competition and consumer authorities imposing fines could rise by approximately 20% when the bypass procedure is abolished. In other words, even though the effect is relatively small, it does exist and particularly where use is made of an external advisory committee.

The supposedly special nature of decisions imposing sanctions in competition cases is also demonstrated by the way the Competition Authority treats recommendations of the Advisory Committee. A recommendation is, after all, exactly that: a recommendation, and can thus be departed from. From research currently being carried out at Groningen University into municipal objection procedures, it emerges that municipal authorities depart from advisory committees' recommendations in fewer than 2% of cases.[17] From an analysis of 34 normal Competition Authority cases in the period 1999 to 2009,[18] it emerged that the authority departed, to a greater or lesser extent, from the recommendation of the Advisory Committee in 50% of the cases. In only nine of the 17 cases in which the Authority followed the recommendation did it to do this without any reservation at all. In the other eight cases, it gave different and/or additional reasons for its decision

16 An effect (also referred to as a 'filter' effect) of more than 90% is certainly no exception. *See particularly* K.H. Sanders, *De heroverweging getoetst. Een onderzoek naar de functies van bezwaarschriftprocedures* (PhD Groningen), Kluwer, Deventer, 1998; J.G. van Erp & C.M. Klein Haarhuis, *De filterwerking van buitengerechtelijke procedures. Een verkennend onderzoek* (WODC Cahiers 2006-06), The Hague, 2006.

17 Further information on this study can be obtained from Ms. Rink herself at: e.m.rink@rug.nl.

18 The list was made available to us by the Competition Authority. These were all the 'normal' cases that were handled in that period. Cases involving a sanction imposed via the 'accelerated procedure' (the construction industry fraud) were kept out of the study.

on the objection. Notably, it followed the recommendation in all cases where the Advisory Committee advised declaring the objection unfounded. In other words: the Competition Authority only departed from the recommendation when the Advisory Committee advised that all or part of the objection should be declared well founded. These data provide sufficient basis, in our view, for the hypothesis that the relatively limited effect of the objection procedure as a sieve in relation to decisions imposing sanctions under the Competition Act can to some extent be explained by the fact that the Competition Authority departs from its Advisory Committee's recommendations relatively frequently.

We have, incidentally, also taken a look, albeit a cursory look, at how the administrative courts – both at first instance (Rotterdam district court) and on appeal (Trade and Industry Appeals Tribunal, *CBb*) – view the differences in opinion between the Advisory Committee and the Competition Authority. From our very provisional analysis, it emerges that the district court took the side of the Competition Authority in approximately 60% of cases, while sharing the view of the Advisory Committee in 35%, whereas on appeal the tribunal took the side of the Advisory Committee in 60% of cases and that of the Competition Authority in 20%. These figures afford some basis for the hypothesis that the Competition Authority may well adopt too rigid a position during objection procedures. Further research is, however, necessary on this point.

From our analysis, it also emerges that in 50% of cases the differences of opinion between the Competition Authority and the Advisory Committee concerned factual and evidentiary issues, and the classification of facts in the light of statutory concepts (was X present at meeting Y?; what is the relevant market?; does action X constitute a noticeable restriction of competition? etc.). In 25% of cases the difference of opinion concerned the proportionality of the fines imposed: have the guidelines been correctly applied (was the infringement minor or serious?; has the appropriate multiplication factor been applied?); is the case a 'special case' within the meaning of Art. 4:84 GALA? In only 10% of cases was the difference purely on a matter of law (what is the correct interpretation of Art. 34 Competition Act?). During the passage of the Direct Appeals Act through Parliament it was noted that direct appeal to the administrative courts is particularly valuable 'in cases where the dispute is in any case no longer capable of resolution during the objection phase',[19] for example 'in cases where there is a fundamental difference of opinion on a question of law, in which it is clear from the start that the parties want the opinion of a court'.[20] In our study, as will be clear from the above, we did not come across many cases of the type: 'fundamental differences of opinion on points of law'. Most objections could be summarized as: 'I did not do it; if I did, it was not wrong; and if it was, the fine is too high.'

19 Memorandum further to the report, *Parliamentary Papers II*, 27 563, p. 6.
20 Memorandum further to the report, *Parliamentary Papers II*, 27 563, p. 2.

4.2 No Dossier Building in ACM Cases?

Another benefit of the objection procedure generally also proves less prominent in relation to decisions of the Competition Authority, the Telecommunications Authority and the Consumer Authority, again according to the explanatory memorandum. In general, objection procedures ensure that, where a dispute is nevertheless brought before the administrative courts, the court receives a more clearly defined and better presented case (dossier building). According to the explanatory memorandum this is less the case in relation to fines imposed by the three authorities referred to above. To quote: "The practice at the Competition Authority, the Telecommunications Authority and the Consumer Authority shows, however, that, as a rule, infringers do not present new grounds in the objection procedure compared to the views expressed under Art. 5:50 in conjunction with Art. 5:53 GALA. Infringers have had more than sufficient opportunity to present their views in the pre objection procedure. Moreover, after the parties have been offered the opportunity to present their views in writing, it is customary for the three authorities to organise a hearing at which the parties have the opportunity to explain their views orally. All the arguments of infringers are thus generally already known before the objection procedure."

Although some degree of repetition cannot be denied, it must be said that the objection procedure is in fact the first opportunity for parties to present their objections to the *size* of the fine imposed. The views expressed concern the inspector's report (Art. 59 Competition Act in conjunction with Art. 5:48.1 GALA). Such reports generally contain information about the procedure and the nature of the evidence, an extensive review of the facts and circumstances of the case (organisation, anti-competitive behaviour, agreements, market sharing etc.), a legal determination of these facts (decision, concerted practice, abuse etc.) and an assessment in the light of the relevant statutory provisions (Art. 6 Competition Act, Art. 101 TFEU, etc.), and the allocation of blame among the parties. The report does not contain a draft decision or other information about the fine to be imposed. Indeed, the administrative authority is not obliged to give this information except where specific statutory requirements apply.

Questions of law will therefore land fairly and squarely on the plate of the first instance courts, unless there is some form of 'compensation' in the sense of adjusting the primary decision-making phase. The Dutch competition law association (*Vereniging voor Mededingingsrecht*) has observed: "that the ACM will design the procedure following the report phase in such a way that the parties concerned will be able to express their views on all formal and substantive matters in the decision to be taken. For this, the decision will have to be fully open to inspection. The parties concerned should, for example, be able to comment on the fine and its basis; it should also be possible to hear witnesses at Competition Authority hearings".

In our view, the explanatory memorandum does not give a wholly accurate description of the function of 'dossier building'. It is indeed, particularly as regards

decisions of the Competition Authority and the Telecommunications Authority where parties are generally represented by highly qualified legal practitioners, not surprising that the grounds for appeal submitted to the courts do not differ greatly from the views expressed and the grounds for objection. It is also true that there is a danger of repetition in the three phases of an administrative appeal (expression of views, grounds for objection and grounds for appeal). Nevertheless, as far as dossier building is concerned, it is also important that the often numerous grounds for objection are reduced to a few crucial ones (objections of 100 plus pages, with a recent high of 460 pages are no exception at the Competition Authority). It would be better to describe this as the 'reduction function' of the objection procedure. In other words, a large dossier (in exceptional cases 1 m^3 of paper) is regularly reduced to several manageable points of dispute in the objection phase. If this phase goes, then so does this simplification and the first instance courts will be faced with the full burgeoning dossier.

4.3 Length of Objection Procedure

Under Art. 7:10.1 GALA, the administrative authority must give its decision within six weeks from the day after the day on which the time limit for filing an objection has expired, or within 12 weeks if a committee has been established as referred to in Art. 7:13. Art. 7:10.3 provides that the administrative authority may postpone the decision for not more than six weeks. These time limits are almost never met in objections against Competition Authority decisions imposing a sanction. From data made available to us by the Competition Authority, it emerges that the average period from the time the objection is received until the recommendation is given is 8.9 months. This picture is to some extent distorted by the fact that in most cases a pro forma objection is lodged first, and the grounds for objection are then filled in after a time limit set by the authority, sometimes much later. The time the Competition Authority then needs to take a decision on the objection varies from case to case, most cases being concluded within five months of receipt of the recommendation, but more than 12 months (with a high of more than two years)[21] is no exception.

It is clear from the decisions of the trade and industry appeals tribunal that it is impossible to determine in the abstract what a reasonable time is for procedures under Art. 6 of the Competition Act (and the same applies to Art. 101 TFEU), "but that this must in each case be assessed in the light of the circumstances of the specific case. Account must be taken of the complexity both in fact and in law of the case and the conduct of both the company concerned and the administrative authority, and it is also relevant what is at stake for the company concerned."[22] The

21 See, for example, District Court Rotterdam 4 March 2008, LJN: BC8958: objection lodged on 14 January 2004, *AbM* report of 29 September 2004, followed by the decision on the objection, dated 9 November 2006.

22 *See e.g.* Trade and Industry Appeals Tribunal 3 July 2008, *AB* 2009/305 with note by I. Sewandono, LJN: BD6629; Trade and Industry Appeals Tribunal 7 July 2010, *AB* 2010/235 with note by

diversity and the fact that these proceedings are not very repetitive mean "that it cannot be assumed as a general rule that a reasonable time has been exceeded if the court has not given its decision within two years after the start of the time limit." In two recent decisions dating from August 2012 – relating to fines in connection with fraud in the construction industry – the tribunal arrived at the conclusion that the reasonable time should be set at three and a half years, of which two years could be attributed to administrative decision-making and review in respect of an objection and eighteen months to the first instance judicial proceedings.[23]

Although it cannot be denied that the length of the review in objection proceedings is much greater than the standard period allowed by the GALA, it cannot be said, based on the information made available to us and the published case law, that the duration of the objection procedure has caused great difficulties in relation to Art. 6 ECHR.

4.4 Lower Cost: No Demand for Low Threshold Procedure

According to the explanatory memorandum, creation of a low threshold procedure is also less important in relation to *ACM* decisions imposing fines. To be sure, an objection procedure is cheaper and thus more accessible than an appeal to an administrative court. Clearly, abolishing the objection procedure would result in doing away with the direct costs accompanying the procedure, namely:

- Costs of the advisory committee (fee and secretariat);[24]
- Organization of hearing (report, logistics costs, possible translation fees);
- Competition Authority costs (preparation, hearing, assessment of recommendation, drafting decision on the objection);
- Cost of legal practitioners of objectors and possible other interested parties.

It must, of course, first be noted that the initial costs concerning the preparation of the case, which are currently incurred during the objection procedure, both by the Competition Authority and interested parties, will shift to the judicial procedure. Interested parties' costs for drafting an objection will now be made when the appeal is made to the court. Nor will this be very different for the administrative authority. Little is thus to be expected in the way of benefit or cost saving. Above, we have argued that if the objection procedure were abolished, this should be coupled with 'compensation' in the primary decision-making phase. Obviously this

R. Stijnen, LJN: BN0540. Recently confirmed in Trade and Industry Appeals Tribunal 28 August 2012, case numbers AWB 09/982 and AWB 09/983.

23 Trade and Industry Appeals Tribunal 28 August 2012, case numbers AWB 09/982 and AWB 09/983. In the earlier decision of 3 July 2008 (see previous footnote), a period of 2 years and 6 months was regarded as reasonable for the administrative phase, given the complex nature of the case.

24 When asked, the Competition Authority informed us that there were no public data which would make it possible to work out the cost of the objection phase, for example the total cost of the Advisory Committee.

would entail new costs, both for the administrative authority and for interested parties.

The cost saving anticipated by the government does not therefore appear to be very substantial and will have to be set off against expected higher judicial costs. We have argued above that more appeals will be made to the courts, particularly where competition and consumer authority decisions imposing fines are concerned, and we also expect, certainly in relation to competition decisions, that the work will become more complex for first instance administrative courts, because the 'reduction function' of the objection procedure will have disappeared. In other words, abolishing the objection procedure will mean a shift in costs from the administrative authorities to the courts.

5. Conclusion

It is not our intention in this article to express a preference about the proposed abolition of the objection procedure in relation to *ACM* decisions imposing sanctions as entertained in the bill to streamline the procedures and enforcement instruments available to the *ACM*. Our aim is to give a more complete and accurate picture of the pros and cons than the bill does.

The arguments for abolishing the objection procedure can be summarised as follows: it is true that some of the general aims of the legislature in creating a mandatory objection procedure in the GALA feature less prominently in relation to *ACM* decisions imposing sanctions. Access to an informal, low threshold, cheap review procedure to repair manifest errors of the administration is simply less important in relation to these decisions. If we confine ourselves to competition decisions:

- the decisions are made by a professional, competent organisation and address professional market parties which call in the assistance of qualified legal professionals, generally also during the preparation of the primary decision;
- the decisions are made after a thorough preprocedure, including a hearing at which interested parties can express their views on the report on which the decision-making is based. To a certain extent the exchange of arguments in the objection procedure can be regarded as repetitious. However, if the objection procedure is abolished in relation to these decisions, it will in our view be necessary to reinforce the primary decision-making phase and give interested parties the opportunity to present their views further to a draft decision which includes the size of the proposed fine. If no such changes are made in 'compensation', abolition of the objection procedure will imply a loss of legal protection for companies that are fined;
- the objection procedure in competition cases is highly formalised and judicialised. There is hardly any question of an informal exchange of opinion between the 'individual' and the 'administration' (mediator function);

– the review of competition decisions during the objection procedure leaves little room for a genuine, integral review and is essentially no more than a lawfulness test.

Another advantage of abolishing the objection procedure would on the face of it seem to be a significant time gain, even if the limits set by Art. 6 ECHR do not pose a real problem here.

One of the advantages of appointing an external advisory committee – that expertise is brought in that is lacking within the organisation – is hardly relevant in relation to competition decision-making. However 'expert' the members of the Advisory Committee may be, it cannot be said that they bring expertise into the decision-making process that is lacking at the Competition Authority.

The disadvantages of abolishing the objection procedure can be summarized as follows. Though the objection procedure only operates as a sieve to a limited extent compared to decision-making at the local and regional levels, it cannot be denied that this effect does exist and particularly in relation to the Competition Authority and the Consumer Authority, organisations where the procedure is farmed out to external advisory committees. As regards the limited effect in relation to competition decisions imposing a sanction, this can to some extent be explained by the way the Competition Authority so conspicuously ignores the Advisory Committee's recommendations. We would expect that the effect would be greatly enhanced if the Competition Authority were to follow the recommendations more often. It seems as if the authority, once it has adopted a particular position, is reluctant to review a contested decision on substantive grounds. Abolishing the objection procedure, in particularly in relation to competition and consumer authority decisions where an external advisory committee is involved, must be expected to have a negative impact on the legitimacy of the decision-making process in the eyes of interested parties. It would be well to remember: "that justice should not only be done, but should [...] be seen to be done".[25]

If the objection procedure is abolished, it is also to be expected that the first instance administrative courts will face a significantly increased caseload. Not only because the number of appeals against decisions imposing sanctions will increase, but also because the courts will more often be faced with dossiers that have not yet been reduced to the main points at issue. Certain grounds for appeal (for example concerning the size of the fine) are only independently reviewed for the first time by the first instance courts. In other words, the administrative courts will have to deal with more cases, and each case will take longer to deal with properly, which may in turn give rise to difficulties in relation to Art. 6 ECHR.

It is indeed debatable whether abolishing the objection procedure will result in a substantial cost saving, or whether the costs will not simply be shifted from an administrative authority (*ACM*) to the judiciary. In our view, the cost benefit for

25 *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259.

the parties concerned must also be examined more closely. If the costs of objecting were truly a factor of importance, it would have been reasonable to expect much more use to have been made of Art. 7:1a GALA (application to bypass objection procedure) in the past. Apparently, the companies concerned feel no great need to bypass the objection procedure.

Finally, it is perhaps worth returning to the parliamentary handling of the Direct Appeals Act. After the Act had been debated in the Senate of the Dutch Parliament, the justice minister wanted to clarify one or two points and stressed that direct appeal had to remain the exception:[26]

> Only in very special cases, in which the objection procedure must be regarded as a needless delay in the resolution of the dispute, should it be possible to do without it. Two examples were mentioned in the Parliamentary discussion:
> – cases (...) "in which all concerned have already exchanged arguments during the preparation of the decision so exhaustively that it is already certain that an objection procedure will have no added value";
> – cases in which there is no difference of opinion whatever concerning the determination and interpretation of the factual constellation, but parties need a judicial decision on a point of law to end their dispute.

How special *are ACM* decisions imposing sanctions in actual fact? And are they so special that departure from the general regime under the GALA is justified? We eagerly await the opinion of the legislature.

26 *Parliamentary Papers I*, 27 563, F.

Advisory Committees on Damage Compensation in Zoning and Infrastructural Planning: A Quest for Independence

*Dick Lubach**

1. Introduction

This contribution concerns advisory committees on damage compensation in zoning and infrastructural planning.[1] Only recently have they been regulated in a formal act despite having existed in practice for over 20 years. Based on my experience with several damage compensation committees over the years I will make some observations within the framework of this conference. Although there are mainly two reasons for establishing such committees: independence and competence, I will focus on the first aspect. I will defend the position that, although neither the legislator nor the jurisprudence is convincingly clear in this respect, independence is needed and that in practise this independence is not always guaranteed and sometimes threatened. To develop a convincing argument for this position the reason for independence has to be discussed and the practice of these committees has to be evaluated. To be able to do this properly a short description of the development of the pertinent regulation in Dutch law is useful.

2. Development of Damage Compensation in Spatial Planning Law and the Position of Advisory Committees.

Aside from some rare early examples, the theory and practise of compensation for damages caused by *per se* lawful decisions in the field of physical planning developed in the second half of the 20th century. The predecessor to the current Spatial Planning Act 2008[2] is the Spatial Planning Act 1962.[3] The latter contained, for the first time, a provision for damage compensation (*planschade*). However, there was no legal obligation based on the act to install an advisory committee in the decision-making process.

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1 *Planschade- en nadeelcompensatiecommissies*.

2 Wro: Wet ruimtelijke ordening, *Stb.* (Law Gazette) 2006, 566

3 WRO: Wet op de Ruimtelijke Ordening, *Stb.* (Law Gazette) 1962, 286.

These advisory committees were first introduced in several municipal by-laws and later the administrative courts held that advisory committees had to be consulted in order to comply with the demand of an accurate way of decision-making.

This resulted in specific legal provisions issued in 2008. The Spatial Planning Act 2008 provides the legal basis for national, provincial and municipal orders.[4] These orders contain among others rules for establishing of advisors or advisory committees. Municipalities are bound by the (national) Spatial Planning Order[5] where rules are given for the content of provincial and municipal orders. These are mainly procedural provisions. Most importantly, rules shall be given based on the *competence and independence* of the advisor.[6] An example of these rules can be found in the relevant Municipal Order of the city of Groningen:[7]

> A (subsidiary) member of the committee does not work under the responsibility of the municipal council or the board of mayor and aldermen.
> A counseling member of the committee shall not be involved in the project for which damage compensation is asked.[8]

Another example can be found in the Order on the Damage Compensation Council (*Schadeschap*) Schiphol Airport.[9]

3. Why an External Advice?

From the examples mentioned above we can say that at least[10] two reasons play a role: competence and independence. Apparently the legislator thought it necessary to call upon external advice to deal with a presumed lack of expertise and/or independence. However, a lack of expertise does not as such bring about the need for external advice. It is possible to provide the necessary expertise from within

4 Art 6.7 Spatial Planning Act 2008.

5 Art 6.1.3.3 Besluit ruimtelijke ordening (Bro), *Stb.* (Law Gazette) 2008, 145.

6 Art. 6.1.13 section 2 sub a Spatial Planning Order 2008.

7 Art. 5 sub 4 Procedureverordening voor de advisering tegemoetkoming in planschade, Gemeenteblad Groningen 2009, 144.

8 Art. 6.2 provides for a possibility to challenge the nomination of one or more members of the committee.

9 *Stcrt.* (Government Gazette) 2012, 8910. In art.7 the following provisions are given in order to assure competence and independence of the advisory committees: the advisory committee gives advice to the Decision-making Committee (DMC, the *Besliscommissie* is the competent administrative authority). The advisory committee is nominated by the DMC. The advisory committee consists of three independent experts. There is a list of experts (not composed by the DMC) from which they have to be chosen. The nomination of experts can be challenged.

10 Yet another reason for external advice might be to put policy aspects at a distance. The policy aspects mainly have been dealt with in the decision-making process of the decision that causes the pretended damage. In deciding on the damage compensation claim these aspect do not play a role. At least they should not. Therefore that reason as such does not play a role here and is therefore not dealt with.

the public authority itself. Of course there can be all sorts of good reasons for this to not be feasible, especially in smaller organisations. Since the focus in this contribution is on the aspect of independence we will not elaborate on this issue.

The issue of independence is to be dealt with in a more specific way. First of all, we have to know what is meant by 'independent'. The example of the Groningen[11] order shows that the meaning is twofold:
– An independent counselor does not work under the responsibility of the decision-making public authority;
– An independent counselor is not involved in the project at stake.

This clarifies how 'independence' can be organised. Namely, by putting the counselor at a distance from the subject and object of the decision-making. This aspect of distance is in my opinion important. That is, at least in the type of decision-making discussed in this paper. I will elaborate on that later.

The Groningen order does not however, make clear why we need 'independence'. That is as such rather obvious because – as we have already seen – it has to comply with the rules of the Spatial Planning Order.[12] Nevertheless, it seems appropriate to elaborate on that question.

The notion of independence is related to unbiased decision-making and made without prejudice. That this is important under the rule of law is almost self-evident.[13] Less evident is that external advice is needed to guarantee such of behaviour from a decision-making authority.

De Graaf and Marseille take the position that there is a need for independent external advice only if it is not possible to provide a nonbiased civil servant.[14] And they cannot think of a good reason to prefer external advice when it comes to the issue independence.[15] In that respect they state rather straightforwardly:

> *Regardless the position of the expert opinion – intern or extern – it has to deal with and to focus only on the common interest. And as their definition of independent decision-making is: decision-making in the common interest without the influence of other (individual) interests, every advice -intern or extern-has to be independent. Hence the demand for independence does not ask for external advice.* (translation by author)

This reasoning seems at first conclusive but it does not answer the question at stake here. How can the development described in paragraph 2 be explained? The

11 *See* footnote 8.
12 *See* footnote 6.
13 As shows art. 2:4 General Administrative Law Act (GALA).
14 K.J. de Graaf & A.T. Marseille, Over onafhankelijk en deskundig voorbereide overheidsbesluiten, in: Bart Krans et. al.(eds.), *De deskundige in het recht*, Zutphen 2011, p. 21.
15 Id.

answer given by De Graaf and Marseille[16] that it is a matter of 'tradition and coincidence' is not satisfactory. To find a more conclusive explanation we have to look into the nature of decision-making when it comes to damage compensation claims resulting from changes in zoning and infrastructure.

4. The Nature of Decision-Making on Damage Compensation Claims and the Need for Independence

First of all we have to keep in mind that in the case of damage compensation as dealt with in art 6.1 Wro[17] we do not discuss the lawfulness of the decision that causes the damage for which compensation is requested. The decision to change a zoning plan for example as such requires balancing the different interests at stake.[18] And although financial aspects play a role in finding the appropriate balance,[19] the decision to change a zoning plan is not unlawful because damage compensation ex art 6.1 Wro has not (or not yet) been given. Nor is it mandatory to challenge the decision that causes the alleged damage, to be entitled to damage compensation. In short, in cases dealt with under art 6.1 Wro concern compensation for damages caused by a *per se* lawful decision.[20]

That a decision to change a zoning plan is lawful means that the inherent balance of different interests is correct, not only in the sense that it complies with the law, but also that it is the most appropriate way of serving the common interest.

Serving the common interest is the core business of a public authority, in fact it is the only thing it has to do. In cases such as changing zoning plans it is sometimes rather complicated and difficult to find the proper balance that best serves the common interest. Almost every decision in this field is apt to be challenged. Once a decision has been made and has been held as lawful by a court the decision-making authority is satisfied that the decision has come a long way.

Worthy of discussion is whether the decision-making authority being in that 'state of mind' is able to decide on damage compensation claims completely on its own and still be truly 'independent'.[21] Unlike in a situation where it is confronted with a judgment where what it has done is unlawful and damage compensation is an almost 'logical' consequence, a change of mind is required. The lawful decision has to be checked on a, from the claimants point of view, drop in the desirability

16 Id, p. 33
17 *See* footnote 3.
18 *See also* footnote 11.
19 A zoning plan has to have a sufficient economic base; its realisation has to be financially feasible.
20 Damage in this sense is referred to in Dutch as 'nadeel' and is distinguished from damage caused by an unlawful act, which is called 'schade'. In this paper 'damage compensation' has to be translated from 'nadeelcompensatie' and not in the more common terminology 'schadevergoeding'.
21 'Independent' in the sense of De Graaf & Marseille 2011 *supra*.

of the area and potential harmful effects on his privacy, view etc. all resulting in a possible decrease in the value of his property.

It is clear that in these cases an opinion from an independent and completely separate actor can be useful in order to come to the right decision; although the decision has to be made by the public authority itself. And from the claimant's point of view, they tend to mistrust the appeal decision that comes from the same authority that may have ignored their demand to adapt the zoning plan in the first place.

My experiences over the years show that claimants appreciate members of the advisory committee *not* being civil servants and *not* working under the responsibility of the public authority that has made the harmful decision. The very fact that the advisory committee is not seen as a part of the public authority contributes to the acceptance of a decision that is made in accordance with the given external advice.

However, the position of the external advisory committee should not be mistaken. The committee does not represent the claimant's interest. Although at a distance from the public authority he does not defend the claimant's interests. Nor does he defend the interests of the public authority of course. I do not follow De Graaf and Marseille in the cases discussed here, where they state that a close connection between the advisory committee and the public authority is desirable as it shows that the advisor is capable of giving advice 'in the spirit of the common interest, served by the public authority'.[22]

This does not mean that an external advisor does not have to acknowledge the public authority's obligation to serve the common interest and that its advice has to contribute to reaching that goal. But at least in the cases we are discussing here its position is not the same as the position of the public authority itself.

In my opinion there is a relevant distinction here. A distinction originating from private law could be helpful in this context. In the theory of the legal nature of binding advice a distinction is made between 'pure' and 'impure' binding advice. The first category is advice that is meant to establish a missing element in a legal relationship. Often such advices are asked to provide (expert) information to be able to make an initial decision. The latter is actually a form of litigation.[23] Indeed, also in administrative law the first category is present. For example, expert advice is involved with establishing the degree of disability someone has which prevents them from working entitling them to a disability benefit. Indeed in these situations it is not obvious that distance to the decision maker is required. The

22 Id, p. 33.

23 I do not discuss here the question whether or not advices in administrative law can be seen as binding advices in private law. See A.H. Santing-Wubs, Bindend advies en deskundigenbericht, in: Bart Krans et al. (eds.), *De deskundige in het recht*, Zutphen, 2011, p. 85.

reason for the advice is the lack of expertise on the part of the decision maker. In these situations that expertise can be provided for internally and there is little reason to avoid having a close relationship between advisor and decision maker.

The questions of damage compensation are however of a different nature. As explained earlier they relate to a decision already made that is later judged as lawful. The question of whether or not somebody is entitled to damage compensation has therefore more the character of litigation. And advice in this field resembles in my opinion an 'impure' binding advice, although the advice for the public authority on damage compensation is not binding.

Following this opinion the advice plays an important role in litigation. And in that sense, the appreciation of the independent nature of the committee should not come as a surprise. In these situations it is undesirable that the advisory committee has a (too) close relationship with the public authority. This being so, it might provide an explanation for the described development,[24] leading to the legal obligation to obtain external advice from an external advisory committee, whose independence has to be guaranteed.

5. Practices Menacing the Independency of the Advisory Committee (?)

Jurisprudence rarely rewards complaints regarding to a lack of independence[25] of an advisory committee. In the cases discussed here the explanation for that attitude given by De Graaf and Marseille is unsatisfactory. They state that the court's rather lenient attitude towards an advisory committee's supposed bias be explained by the fact that a close connection between advisor and public authority is an indication of the capability of giving advice 'in the spirit of the common interest, served by the public authority'. That reasoning only applies to the first category of advice as indicated earlier. In those cases the court can judge that a lack of independence is not problematic and therefore dismiss the complaint even in cases where there is indeed a close connection between advisor and public authority.[26]

In the cases at stake here however, the lack of independence can indeed harm the credibility of the committee and the acceptance of the decision in accordance with the advice. Therefore, it has to be seen if there are circumstances that threaten the independence of the advisory committee. Or at least contribute to the idea with the claimant that the committee is not independent.

24 *See* par. 2.
25 *See* De Graaf & Marseille 2011 *supra*, p. 31.
26 *See* footnote 23.

In this respect the following issues prompt discussion:
a. The set-up of the committee and the way their decisions are (pre) structured;
b. The position of the committee towards the claimant on one hand and towards the public authority on the other;
c. The role of the committee in the phases of review and appeal;
d. The role of the committee in mediation.

Ad a. In general there are two options when it comes to establishing an advisory committee in the field of zoning and infrastructure.[27] The first option is to refer to a professional expert bureau that serves several public authorities all over the country. The second is to establish a local committee that only serves the local authority.[28] I will not discuss here the pros and cons of the two options in general but focus on the question of independence. It is clear that when it comes to the question of independence the two options are different. In the first, the advice is prepared and formulated separately and at a distance from the public authority.[29] In the case of a local committee the administrative support often comes from within the municipality itself. The secretary is often a civil servant that works for the municipality. Although obviously he or she is not a member of the committee it is almost inevitable that there is some influence. The relevant documents are compiled and often initially interpreted by the secretary. He or she – especially a (hopefully) very competent person – usually participate in the discussion. And sometimes the committee has to remind itself that the secretary is not a voting member of the committee. Eventually the text of the advice is edited by the secretary, which gives him or her another potential means of exerting influence. In this respect it is advisable that the committee provides a format that can be used in standard cases. In my own practice I have not seen examples of problems in this respect but both the administrative secretary and the members of the committee have to keep their different positions in mind.

Ad b. Claimants are different. Sometimes they are affluent individuals or enterprises who are represented by a lawyer and the expertise of the claimant is not unlike that of the committee. In those cases the committee tends to keep the contact fairly formal. In local practice however, these claimants are a minority. In most cases the claimants are middle class individuals who do not have much expertise, nor the financial means to gain that expertise from a professional lawyer.[30] In these cases a committee must be aware of their position as an independent body. That means that there is a limit to the extent a committee can be 'user friendly'. In this respect it important that the rather lenient position the committee has taken

27 Theoretically establishing an ad hoc committee is not excluded but they are rare and I will not discuss them here.

28 Almost always a municipality.

29 For instance the bureau SAOZ, a bureau based in Rotterdam which works for a municipality in the northern part of the country.

30 Although since the Spatial Planning Act 2008 came into force the legal demands for justification of the claims are more severe (formerly one phrase: 'Help, your decisions cause damage to me' was sufficient to start up the case). Legal assistance or an evaluation report is not obligatory.

in the past towards claimants who fail to comply with the demands to provide the necessary information is now restricted by the legal obligation for the committee to come forward with their advice and for the public authority to decide within the proper time frame.[31]

Ad c. The legal position of the advisory committee is limited to the phase of the initial decision-making process. Strictly speaking, it does not have a role in the following phases of the procedures for legal protection. The objection procedure that aims at reviewing the initial decision provides its own advisory committee.[32]

In the process of appeal it is the public authority that has to, without advice, defend its decision although in practice this is not as clear cut as it may seem here. The objection procedure is designed as an opportunity to rethink the initial decision in full scope. It is obvious that also merits of the advice given in the initial phase will be reconsidered. It is often the case that in the objection procedure the advisory committee in that procedure contacts the advisory committee of the initial decision to discuss the way they have to deal with the points of view expressed in the initial advice. As such that is not surprising. The committee in the objection procedure is a more general advisory committee that is involved in all kinds of cases on a wide scale of subjects. It does not have the specific expertise of the initial advisory committee.

At the appeal phase the complaints often specifically regard the value that can be attributed to the advice. The question is often whether the public authority could have reasonably made the allegedly unlawful decision following the initial advice. Nor should it come as a surprise that the public authority once more contacts the advisory committee to discuss the arguments brought forward in the court procedure to see if these cause a change of opinion with the committee.

As long as one regards the position of the advisory committee as a 'lengthening piece' of the public authority all this does not pose a problem. But it can easily be understood that the independent position of the advisory committee is at risk. It is the public authority that has the opportunity to contact and discuss with the advisory committee in two subsequent phases of the procedure of legal protection. Obviously that opportunity does not exist for the claimant. He will tend to see the committee as a barely independent counselor to his opponent.

Ad d. There is still another position that the committee can take in the relationship between claimant and public authority. That is the role of mediator. To comply with the call for alternative dispute resolution sometimes the members of the committee are asked (by both parties of course) to take the role of mediators. It cannot be the committee itself taking that position because the law does not

31 From 1 October 2009 art. 4:17 GALA provides for financial consequences in the case of a not timely decision.

32 Art 7:13 GALA.

attribute that role to the advisory committee. The members of the committee are asked for their expertise and indeed because of their independence from both parties and 'independence' from their previous position as advisory committee. The role of mediator presupposes a certain distance from the reasoning that is the base of the initial advice leading to the disputed decision. So this role requires independence, it does not threaten it.

6. Summary and Conclusions

Since 2008 specific legislation has called for external advisory committees in the decision-making process concerning compensation for damages resulting from changes in zoning and infrastructural planning. Both expertise and independence can be reasons for the obligatory installment of such committees.[33] Neither the jurisprudence nor the lawmaker is convincingly clear on why exactly the independence of those committees is required. This paper tries to find the reason for advisory committee independence in the litigious nature of the decision on compensation for damages caused by lawful decisions. The idea that the advisory committee can be seen as a 'lengthening piece' of the public authority whose mandate it is to advise 'in the spirit of the common interest' does not take into account that the advice basically is meant to serve the resolution of a dispute.[34]

Once convinced that independence is a value that should not be neglected the existing practice is evaluated. It appears that in particular the local committees are susceptible functioning too close to the public authority. Both the members of the committee themselves as the administrative secretarial support have to keep in mind that they are supposed to take an independent position. The fact that the expertise of the committee is also invoked in the phase of the objection procedure and appeal reinforces the threat to independence. It is clear it is independence that is required if members of the same committee are to play a role as mediator.

33 *See* footnote 7.

34 I am grateful to my colleagues Kars de Graaf and Bert Marseille for the possibility they unknowingly gave me to develop and clarify my rather dormant ideas on this subject by taking the opposite position in their article mentioned in several footnotes above.

Final Dispute Resolution by Dutch Administrative Courts: Slippery Slope and Efficient Remedy

*Kars de Graaf and Albert Marseille**

1. Introduction

Dutch administrative authorities are competent in a number of fields to decide on the legal position of citizens, either in response to an application or *ex officio*. Sometimes the legislator grants discretionary power to a public authority and sometimes the law leaves no room to balance the interests involved. In most cases the decision-making process will lead to a decision that is potentially the subject of judicial review by an administrative court. The classic role of administrative courts is simply to assess the lawfulness of the decision taken. The judgment entails either the statement that the challenged decision is lawful, or the annulment of the challenged decision. If the latter is the case, the public authority will have to decide on the matter again at a later date. At least until that date, there is no final resolution to the dispute.

The courts are independent and impartial with regard to administration in the classical 'separation of powers' sense. The call for final dispute resolution within a reasonable time however calls for effective and efficient administrative adjudication and demands of courts that they direct the plaintiff and the public authority towards a final resolution of their conflict. A simple annulment of the decision by the court is no longer sufficient. Ideally the procedure will end with clarity on the legal position of both parties. This means that it is clear which decision of the public authority applies in the future.[1] If the contested decision is upheld by the court, the decision that applies in the future is of course the contested decision. But what if the contested decision is annulled? The Dutch General Administrative Law Act (GALA) under certain conditions grants administrative courts the power to bring about the final settlement of the dispute even when the contested decision is annulled.

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1 B.J. Schueler, J.K. Drewes et al., *Definitieve geschilbeslechting door de bestuursrechter*, Boom Juridische uitgevers, The Hague, 2007.

This chapter deals with the question of how much effort administrative courts should invest in final dispute resolution and how the use of the powers to bring about final dispute resolution relates to the classic ideas of independence and impartiality and the relationship between administrative courts and administration. To that end, we discuss recent amendments in the GALA that provide courts with more effective instruments and powers to bring about final dispute resolution and case law that proves courts either too careful or surprisingly careless. This chapter is divided into three parts. First, we will explain what the powers of the courts to bring about the final settlement of the dispute imply. Second, we will examine the extent to which those powers are used. Third, we will show the criteria the courts apply when deciding whether they should use these powers in their quest for the efficient offer of effective remedies. We will indicate the limitations of the courts' powers and show that Dutch case law is in some respects moving towards a 'slippery slope'.

2. The Powers of the Court to Bring about Final Dispute Resolution

When an administrative court in the Netherlands comes to the conclusion that the contested decision of a public authority is unlawful and has to be annulled, it has three instruments to prevent the dispute between the parties from continuing while the citizen waits for a new decision by the public authority. These powers are awarded to the courts in Article 8:72 and Article 8:51a GALA.

First, administrative courts can decide that the legal consequences of the annulled decision shall be allowed to stand (Article 8:72(3)(a) GALA). The court can use that power when it is certain that the defect can be repaired and the content of the repaired decision will be exactly the same as the contested decision.

For example,[2] before appealing to a court against a public authority's decision an objection usually has to be lodged against that decision. Before deciding on that objection, the interested parties have to be given the opportunity to be heard (Article 7:2 (1) GALA). When the public authority fails to meet this obligation and subsequently an appeal is lodged against the decision of the public authority on the objection, one of the grounds of that appeal can be that the public authority violated the law by not hearing the person that lodged the objection. The court will certainly award this ground and as a consequence, it will annul the contested decision. Subsequently, it has to decide whether the legal consequences of the annulled decision will be allowed to stand (Article 8:72(3)(a) GALA). There is a fair chance that the court will apply Article 8:72(3)(a) GALA. When the court concludes that in other respects the decision of the public authority is lawful, it is certain that the public authority will take exactly the same decision again. In that

2 This example was already given by government when the competence of the courts was introduced in the GALA in 1994, see E.J. Daalder, G.R.J. de Groot & J.M.E. Breugel, *De parlementaire geschiedenis van de Algemene wet bestuursrecht. Tweede tranche*, Alphen a/d Rijn 1994, p. 470.

case it is more efficient that the court decides that the legal consequences of the annulled decision will be allowed to stand.

Second, the court can determine that its judgment shall take the place of the annulled decision (Article 8:72(3)(b) GALA). The court can only use that power when it is certain which decision the public authority should take to replace the decision that it annulled. Because it is clear which decision has to be taken instead, the court has the power 'to step into the shoes' of the public authority, and to decide the matter in a lawful manner instead of the public authority. The court has this power because it is deemed to be inefficient for the public authority to take a new decision when it is crystal clear what the content of the decision will be. In such a situation, it is far more efficient for the court to take the decision – by determining that its judgment will take the place of the annulled decision – instead of prescribing that the public authority take a new decision.

For example,[3] when a public authority decides that an objection is unfounded and the court has to give judgment concerning the appeal against that decision, the court can conclude that the objection should have been declared inadmissible. The court will of course annul the public authority's decision. Because there can be no discussion regarding the decision the public authority will have to take after the annulment (the objection will have to be declared inadmissible), the court will decide that its judgment shall take the place of the annulled decision and will decide that the objection is inadmissible.

A third, relatively new power of the court is that it can allow the public authority the opportunity to repair shortcomings or unlawful elements that the court found in the contested decision; in Dutch this procedure is called a *bestuurlijke lus*, an administrative loop. This power is not mentioned in Article 8:72 GALA, but in Article 8:51a GALA. If the court uses this power, it will state in a specific, interim judgment that it has found unlawful elements in the contested decision and that it will annul the decision in its final judgment. Until the final judgment the court will however award the public authority time to try and repair the unlawful elements. The public authority's response to the administrative court of first instance could be that it doesn't agree with the assessment of the court and that there is no need to repair any unlawful element. The public authority could also respond either by offering further information or giving improved reasons for the contested decision or it could take a new decision that will be added to what is subject to judicial review by the court. The court can use the power to allow the public authority an opportunity to repair the decision any time it concludes that the contested decision is unlawful and it argues that allowing the public authority that opportunity could be efficient for reaching a final resolution to the dispute. The court is supposed to use the power in situations where it fears that if it does not take control over the settlement of the dispute, the decision-making process

3 *See* E.J. Daalder, G.R.J. de Groot & J.M.E. Breugel, *De parlementaire geschiedenis van de Algemene wet bestuursrecht. Tweede tranche*, Alphen a/d Rijn 1994, p. 470.

necessary for the new decision by the public authority will take too much time. This power was introduced in 2010 in order to reiterate the notion that administrative courts have a responsibility for final dispute resolution.

The Dutch legislator is keen to support the idea that administrative courts have an important role to play in finding ways to stimulate final dispute resolution. On January 1st 2013 it introduced a new relevant article in that respect. Article 8:41a GALA states that administrative courts will resolve the dispute of the parties where possible.

3. Empirical Data: the Use of the Powers to Bring about Final Dispute Resolution

How often do administrative courts make use of their powers to bring about final dispute resolution? To answer this question, we will compare court activity in 2012 with activity in 2007. The years between 2007 and 2012 ushered in two important developments. In the first place, the administrative courts were provided with additional powers (the administrative loop) to try to bring about the final resolution of the dispute, as we have seen in section 2. In addition, since 2008 the case law of the highest administrative courts indicates that courts are able to use their powers of Article 8:72 GALA in increasingly different situations, as will be explained in section 4.

Ideally, we would have looked at the activities of the courts of first instance. After all, if an administrative judge has to decide whether he will use one of his powers to (attempt to) bring about the final settlement of the dispute, it will most likely be a judge in first instance. Research that concerns their decisions can provide us with valuable insights into the effects of the expanded powers of the administrative courts. However, courts in first instance do not publish all their judgments, so it is somewhat difficult to obtain the necessary information concerning their use of these powers. As a consequence, we turned to the two most important Dutch courts of last resort, the Administrative Jurisdiction Division of the Council of State (Council of State) and the Central Appeals Court for Public Service and Social Security Matters (Central Appeals Court), because they publish all their judgments.[4]

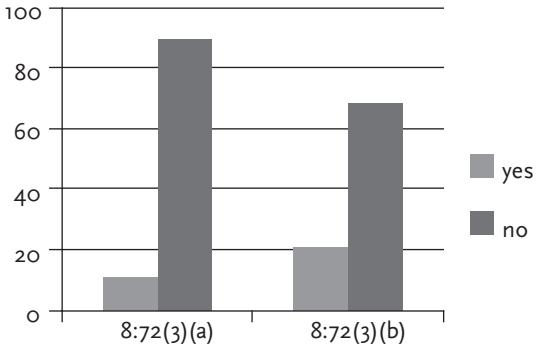
We have analysed a sample of their judgments where they conclude that a decision given by a public authority is unlawful and they therefore have to decide whether it is possible to (attempt to) bring about final dispute resolution, by using their powers of Article 8:72 or Article 8:51a GALA.

4 Council of State: <www.raadvanstate.nl>. Central Appeals Court: <www.rechtspraak.nl>.

Our sample consists of 374 decisions given by these two courts, 200 from the Council of State (101 from 2007, 99 from 2012),[5] 215 from the Central Appeals Court (115 from 2007, 100 from 2012).[6]

We will first focus on the Council of State. We distinguish three different decisions. The first decision that has to be taken when the Council of State concludes that an administrative body's decision must be annulled, is whether it is possible to allow the legal consequences to stand (Article 8:72(3) GALA). If that is not possible, the next decision is whether it is possible to let the courts judgment take the place of the annulled decision (Article 8:72(4) GALA). If that is not possible either, the Council of State has to finally decide whether it will try to bring about the final resolution of the dispute by using the so-called administrative loop (Article 8:51a GALA). In 2007, the administrative courts did not have the power to take this last decision, because Article 8:51a was implemented in 2010.

The first figure shows the results of the two subsequent decisions the Council of State had to take in 2007 when it concludes that a public authority's decision must be annulled.

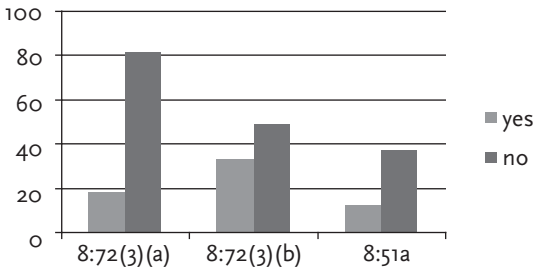


The figure shows that in 11 of 100 cases, the Council of State decided to allow the legal consequences of the annulled decision to stand (the two columns on the left). With regard to the remaining 89 cases, it decided in 21 cases that its judgment should take the place of the annulled decision (the two columns on the right). As a consequence, in 68 of 100 cases in which the contested decision had to be annulled, the Council of State did not succeed in bringing about final dispute resolution.

5 We excluded the procedures concerning immigration.

6 We started our search with decisions published at the end of April, and went subsequently a week ahead and a week back, until we had collected more than 100 decisions from both courts. As a consequence of a more detailed analysis some of them were omitted.

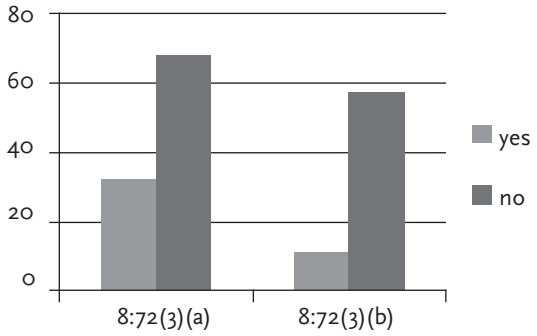
The next figure shows the results of the three subsequent decisions the Council of State had to take in 2012.



The figure shows that in 18 of the 100 cases, the Council of State decided to allow the legal consequences to stand (the two columns on the left). With regard to the remaining 82 cases (the two columns in the middle), it decided in 33 of them that its judgment shall take the place of the annulled decision. With regard to the remaining 49 cases (the two columns on the right), the Council of State decided to use the administrative loop in 23 cases. As a consequence, in 37 of the 100 cases in which the contested decision had to be annulled, the Council of State was not able to bring about the final settlement of the dispute.

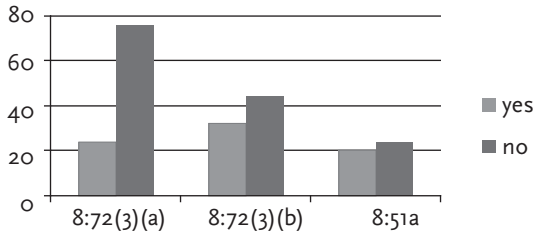
When we compare the 2007 cases with those from 2012, we see an increase in the final settlement of disputes where the Council of State concluded that the contested decision had to be annulled from 32% to 63% of cases. The reason for this increase is not only the introduction of the administrative loop but also an increased use of the two remaining instruments on behalf of the final settlement of the dispute.

If we now switch to the Central Appeals Court, the first figure shows the results of the two subsequent decisions the Central Appeals Court had to take in 2007 when it concluded that an administrative body's decision had to be annulled.



The figure shows that in 32 of 100 cases, the Central Appeals Court decided to allow the legal consequences of the annulled decision to stand (the two columns on the left). With regard to the remaining 68 cases (the two columns on the right), it decided that its judgment should take the place of the annulled decision in 11 cases. As a consequence, in 57 of 100 cases where the contested decision had to be annulled, the Central Appeals Court didn't succeed in bringing about the final settlement of the dispute.

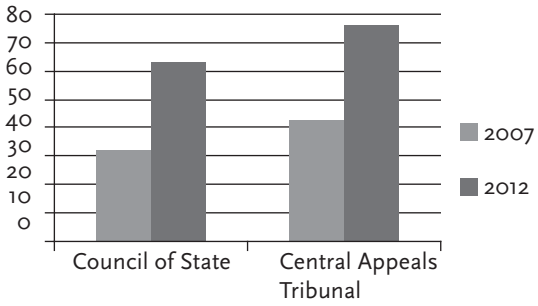
The next figure shows the results of the three subsequent decisions the Central Appeals Court had to take in 2012.



The figure shows that in 24 of 100 cases, the Central Appeals Court decided to allow the legal consequences to stand (the two columns on the left). With regard to the remaining 76 cases (the two columns in the middle), it decided that its judgment should take the place of the annulled decision in 32 cases. With regard to the remaining 44 cases (the two columns on the right), the Central Appeals Court decided to use the administrative loop in 20 cases. As a consequence, only in 24 of 100 cases in which the contested decision had to be annulled, did the Central Appeals Court not succeed in bringing about final dispute resolution, only in 76 did it succeed.

When we compare the figure for 2007 with the one for 2012, we see a significant increase in the number of cases where the Council of State and the Central Appeals Court reach a final settlement for the dispute. The increase is caused partly by the use of the administrative loop but also by an increased use of the powers of Article 8:72 GALA.

When we compare the Council of State with the Central Appeals Court, we observe that the Central Appeals Court used its powers to bring about the final settlement of the dispute in 2007 more frequently than the Council of State did.



Moreover, the increase of the use of these powers (that can be observed in both courts) is more so by the Central Appeals Court than by the Council of State. The most striking difference between the two courts can be observed when we compare their decision concerning the use of the administrative loop. When they conclude that they cannot use the powers of Article 8:72 GALA (in 2012 at the Council of State in 49% of cases and at the Central Appeals Court in 44% of cases), the Central Appeals Court decides in almost half of the cases to use the administrative loop, the Council of State only in one in five cases.

So we can conclude that these two Dutch administrative courts in last instance increasingly make use of their powers to (attempt to) bring about the final resolution of the dispute but that the extent to which they use their powers differs.

What about the district courts? As earlier indicated, their judgement was not investigated. However, other research in recent years suggests that these courts also make more use of their powers to try to bring about final dispute settlement.[7]

4. The Increased Use Explained and Analysed

The figures presented in section 3 paint a clear picture. The percentage of cases where the courts have tried to bring about final dispute resolution has increased in recent years. Although we should emphasise that this development is a reaction to complaints regarding the functioning of the system of administrative jurisdiction

7 P.A. Willemsen, M.C.J. Busscher, N. Groot, P.M. Langbroek & I.L.A. Langerak, Final dispute settlement in numbers. Report of an examination of final dispute settlement in the Utrecht district court, *Transylvanian Review of Administrative Sciences*, 2009, no. 28E, p. 129-146; A.T. Marseille & R.R. van der Heide, De onderbenutting van de mogelijkheden tot finale beslechting door de bestuursrechter, *JBplus* 2008, No. 2, p. 78-92; B.J. Schueler, J.K. Drewes *et al*., *Definitieve geschilbeslechting door de bestuursrechter*, Boom Juridische uitgevers, The Hague 2007; K.A. van der Veer & A.T. Marseille, Besluitvorming na een rechterlijke vernietiging: de achilleshiel van het bestuursrecht, *NJB* 2006, p. 2168-2175; P.A. Willemsen *et al*, Definitieve geschilbeslechting becijferd, *JBplus*, 2010/1, p. 32-48.

in the Netherlands, it also raises some questions. The first question in relation to the numbers presented would be: what triggered the increase?

The answer to that question actually seems simple. First, as of 2010 administrative judges have an additional instrument to try to bring about final dispute resolution: the administrative loop. Second, as of 2008 the case law of the highest administrative courts in the Netherlands has contributed to the increase in the percentage of cases where the courts have put effort into bringing about final dispute resolution. The highest courts have emphasised the role of the courts on this issue. Until 2008, their case law indicated that courts could only use the powers mentioned in section 2 in cases where the public authority does not have a choice when it comes to decision-making once the contested decision has been annulled. Usually the case law would indicate that using these powers – either to determine that the legal consequences of the annulled decision shall be allowed to stand (Article 8:72(3) GALA) or to determine that the judgment shall take the place of the annulled decision (Article 8:72(4) GALA) – is allowed only in cases where the outcome of the new decision-making process is evident and crystal clear. The use of the powers was restricted to situations where only one lawful decision (that should be taken by the public authority) remained and that it is just a matter of efficiency to have the court use these powers.[8] However, in its judgment of the 10th of December 2008[9] the Administrative Jurisdiction Division of the Council of State deviated from this existing case law.

The disputed decision concerned the installation of a traffic sign in a small village called Hattem in the Netherlands. The legislator had granted the public authority wide discretion for taking this decision. The Council of State's judgement has two important aspects.

The Council of State found the lodged appeal well-founded and had decided that it would annul the contested decision. It then explicitly considered that 'when a court decides to annul the contested decision, it ought to assess all possibilities of final dispute resolution, such as the use of the powers awarded in Article 8:72 paragraph 3 and 4 of the General Administrative Law Act'. This meant a drastic change in the way courts were to consider their role in bringing about final dispute resolution. This is the first aspect that is of importance for answering the question of the expanded use of the competences. There is however, an even more important reason. The Council of State furthermore explicitly changed the existing boundaries that courts had used until then to assess whether or not they would use the powers mentioned in Article 8:72 GALA. To bring about final dispute resolution, it considered that from now on the use of the discretionary powers was not restricted to situations where only one lawful decision remains to be taken. The reason: efficiency and effectiveness of administrative jurisdiction.

8 See as an example Administrative Jurisdiction Division of the Council of State 28 June 1999, *JB* 1999/196.

9 Administrative Jurisdiction Division of the Council of State 8 December 2008, *JB* 2009/39.

The Council of State also referred to the independence of the administrative court by mentioning the separation of powers. It stated that issues of discretion would remain in the hands of the public authority and that the court would only be facilitating the efficient bringing about of final dispute resolution. Still, this change in the case law is relevant and important.

This judgment and others that were published later,[10]are examples of the new case law on the use of the powers of the court to bring about final dispute resolution. The new Article 8:41a of the GALA, which encourages administrative courts to put more effort into bringing about final dispute resolution, can be considered a sign of support for this new application of the powers of the court. However, the case law has triggered other, more fundamental questions. Should the court be in charge of final dispute resolution between the parties? What should be the exact role of the court in trying to bring about final dispute resolution? How much effort, time and money should courts invest in trying to achieve final dispute resolution? This is to a large extent unclear.

One of the important issues that remains concerns the discretion awarded to the public authority by the legislator. How will courts deal with the existence of discretion for the public authority on the one hand and the obligation to assess the possibilities of final dispute resolution on the other? In what way is it ensured that the courts do not intervene with the powers of the public authority? These questions are important as far as the separation of powers is concerned but also relate to the judicial independence and the impartiality of the courts. Another issue that courts are confronted with is that final dispute resolution often requires further investigation into the relevant facts. However, the courts do not hold the primary responsibility for gathering and establishing the facts that will lead to a lawful decision. It is the public authorities that are best equipped to undertake the investigation and renew the contested decision. These issues suggest that it is not always for administrative courts to bring about final dispute resolution. Public authorities have power and means to do so. The relatively new instrument of course, reflects this idea: the administrative loop (Article 8:51a GALA). The legislator introduced this instrument assuming it would be helpful in bringing about final dispute resolution while guaranteeing the independence of the administrative courts and the separation of powers. The task of the administrative court remains to simply evaluate the legality of a contested decision. The administrative loop does not have any influence on the power of the public authority to decide on the rights and duties of the applicant.

Effective remedy

There are disputes in Dutch administrative law where administrative courts are generally considered suitable for bringing final dispute resolution about.

10 See for example Administrative Jurisdiction Division of the Council of State 11 February 2009, *AB* 2009/224.

The General Administrative Law Act explicitly demands a final judgment in cases that concern administrative (punitive) fines. Article 8:72a GALA states: "When a decision to impose an administrative fine is annulled by the court, it shall order that the judgment shall take the place of the annulled decision." The reason for this mandatory use of the power to decide that the judgment will replace the annulled decision is said to lie in Article 6 of the European Convention on Human Rights (ECHR) which demands final dispute resolution within reasonable time in cases concerning criminal charges, such as an administrative fine. Article 6 ECHR furthermore demands full jurisdiction by the court in establishing the facts of the case, in determining the culpability of the offender and in assessing how severe the sanction should be to be appropriate.

In cases of government liability for decisions that were annulled by the court and were thus proven unlawful, the Dutch legislator has recently proposed a special procedure for citizens requesting damages. The essence of this special track is essentially a direct request to the administrative court to award damages contrary to the appeal procedure that is normally lodged against a decision by a public authority.[11] Most authors in the Netherlands argue that nothing should stand in the way of final dispute resolution in these kinds of disputes on (fault) liability of the government. The legislator has therefore devised a special request procedure that has to end with a judgment by the administrative court determining the exact liability of the government.

Slippery slope?

For some disputes it is not clear whether administrative courts should have the obligation to reach final dispute resolution. Strangely enough the Dutch legislator did not propose a special procedure for disputes that involve the no-fault liability of public authorities for lawful decisions. Disputes concerning the no-fault liability of public authorities will have to be brought to court by lodging an appeal against a decision of the public authority concerning its own (no-fault) liability.[12] The administrative court will annul the decision when it is unlawful. The court then has to assess the possibilities for final dispute resolution. Although the administrative court is not obliged to achieve final dispute resolution, most authors trust that courts will in general lead the procedure to a judgment on the exact no-fault liability of the public authority.[13] The court could however, refer the case to the public authority to decide in the matter again. Some authors and case law state that it is up to the public authority to establish the facts and when that duty of care is not properly upheld, the court should refer the case to the public authority. Other authors claim that the issue of awarding damages for no-fault liability is, to a certain extent, at the discretion of the public authority and therefore the courts should not be obliged to determine that the judgment will take the place of

11 See *Parliamentary Papers II* 2010/11, 32 621, nr. 2 (proposed Article 8:88 GALA).

12 See *Parliamentary Papers II* 2010/11, 32 621, nr. 2 (proposed Article 4:126 GALA)

13 See B.J. van Ettekoven & R. Ortlep, Zelf in de zaak voorzien en schadevergoeding, *O&A* 2012, p. 2-18

the annulled decision.[14] Until recently there was no case law clarifying this issue. Only recently has the Administrative Jurisdiction Division of the Council of State seemingly accepted that there is indeed discretion for public authorities in these kind of cases.[15]

The most difficulty we have is with the disputes where it is questionable whether the courts are allowed to use their powers to bring about final dispute resolution. We can explain this by giving two examples of somewhat older court judgments.

'Three strikes and you're out'. These words summed up the main idea in a judgment handed down by the district court in Amsterdam in 1998.[16] It decided in a case where the public authority had not provided proper reasons for refusing a subsidy to a zoo three times in a row. Once the court had annulled the decision refusing the subsidy three times, it then decided that it would grant the subsidy by deciding that its judgment should take the place of the annulled decision. It did so by stating that the public authority would, in a potential future procedure, probably not be able to give proper reasons for another refusal. Although this case could be considered somewhat older and concerns a verdict by a district court, it can serve as an example of what the administrative courts deem appropriate when confronted with a public authority that gives poor reasons for a decision several times. There are other, more recent examples.[17]

'No decision within a reasonable time and you are out'. A second example is provided by the District Court of the Hague that based its (unpublished) judgment on the idea that justice had to be delivered within reasonable time. In this case an appeal was lodged against a decision that concerned the reclaiming of disability benefits. The appeal was well-founded and the court considered that because of the long period it had taken the public authority to reach a decision on reclaiming the disability benefits, the court was allowed to determine that its judgment should take the place of the annulled decision. It furthermore decided that the sum that was reclaimed had to be diminished by 10%.

We think that in both cases the question of whether or not the courts were allowed to use the powers of Article 8:72 GALA is worthy of discussion. Although it was presumably acceptable for the courts to decide that their judgments were to take the place of the annulled decisions, we feel that in general there is only one sound reason to do so and that is the situation where only one lawful decision remains to be taken (by the public authority) and it is therefore a question of efficiency

14 *See* R.J.N. Schlössels, Discretionaire aansprakelijkheidsrecht?, *in* T. Barkhuysen, W. den Ouden & M.K.G. Tjepkema (eds.), *Coulant compenseren? Over overheidsaansprakelijkheid en rechtspolitiek*, Kluwer, Deventer, 2012, p. 36-39; also see M.K.G. Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel. Een onderzoek naar nationaal, Frans en Europees recht* (diss. Leyden), Kluwer, Deventer, 2010, p. 424.

15 Administrative Jurisdiction Division of the Council of State 5 December 2012, *JB* 2013/11.

16 District Court Amsterdam 16 April 1998, *JB* 1998/153.

17 *See* Central Appeals Court 24 September 2008, *AB* 2009/281.

that the court uses its powers. It is questionable whether this was the case in both disputes.

Against the judgment in the second example the public authority lodged an appeal and the higher court (the Central Appeals Court) decided that the district court had gone beyond its powers.[18] In March 2012 the Administrative Jurisdiction Division of the Council of State seemingly recognised the point that we are trying to make here.[19] It stated that when applying the power to decide that the judgment shall take the place of the annulled decision any administrative court should have come to the conclusion that the public authority would have come to the same decision and that this decision would be lawful. This new way of stating the possibilities to use the power to bring about final dispute resolution comes suspiciously close to the words of the government when introducing the powers: they should only be used when one lawful decision remains to be taken and using the powers is an efficient remedy. And should not be a first step towards a slippery slope.

5. Final Remarks

The emphasis that both society and the legislator put on final dispute resolution leads to a dilemma for administrative courts. The pressure on the courts to bring about final dispute resolution is increasing but they are not allowed to jeopardise the separation of administrative and judicial responsibilities based on the separation of powers doctrine. Interfering in the discretionary powers of the public authority could be a slippery slope. As a consequence, courts should be alert in their efforts to bring about final dispute resolution in administrative disputes and claim powers to do so. In any case in which an administrative court achieves final dispute resolution, it should be because of efficiency reasons and in situations in which either only one lawful decision remains to be taken or it is certain the public authority will take the same decision again, but now carefully prepared and – as a consequence – lawful. Emphasis on final dispute resolution should never be a reason to disregard or change the balance of the separation of powers. The courts' independence from the executive should be respected.

On the other hand one should not forget that in many cases the proceedings in court may be helpful to come to the conclusion that only one lawful decision remains to be taken. The courts have wide discretion in their efforts to reach the point where final dispute resolution by the courts is simply a matter of efficiency. The legislator has recently tried to create an incentive for the courts to try to settle all disputes where possible by implementing Article 8:41a GALA but it remains to be seen what the effects of this provision will be. So far it seems to have more of a symbolic function than creating real drive for the administrative courts to provide final dispute resolution. In addition, there is a growing awareness that

18 Central Appeals Court 7 June 2000, *JB* 2000/229.

19 Administrative Jurisdiction Division of the Council of State 21 March 2012, *AB* 2012/233.

public authorities are, for the most part, better equipped for achieving final dispute resolution than the courts. We should consider their expertise in establishing the facts and their powers in questions of policy. Only when it is more efficient and effective for the court to bring about final dispute resolution, rather than to leave it to the executive, should the courts be considered legitimate in their action and the courts independence from the executive is sufficiently guaranteed.