

XVIth COLLOQUIUM OF THE COUNCILS OF THE STATE AND THE SUPREME ADMINISTRATIVE
JUDICIAL COURTS OF THE EUROPEAN UNION: Stockholm 15-17 June 1998

NETHERLANDS NATIONAL REPORT.

Prepared by J.A.E. van der Does, member of the Council of State, Justice in the Administrative Law Division

1. Introduction

This report follows the questionnaire prepared by the Supreme Administrative Court of Sweden, a copy of which was sent by President Gunnar Björne on 24 October 1997. The reporter frequently refers to the General Administrative Law Act (Algemene Wet Bestuursrecht; "AWB"), using an English translation prepared by the Translation Department of the Dutch Ministry of Foreign Affairs and Nico Verheij, senior counsel at the Ministry of Justice. A copy of the translation is attached to this national report. Attention is drawn to the fact that the introduction to this translation is no longer correct, because the decision to reorganize the Dutch court system was partly revoked¹.

2. The field of application of the legal review

(2.1) All written rulings ("orders") of an administrative authority constituting juristic acts under public law fall within the scope of the AWB. This category includes decisions; these are written rulings which are not of a general nature. Refusals of applications for decisions also count as decisions. See sections 1:3 and 6:2 of the AWB. Before the AWB came into force, the concept of administrative decisions was not materially different

(2.2) The general rule is that appeals contains an exception: no appeal is allowed against orders containing generally binding regulations or policy rules and orders related to this category. This exception will automatically cease to exist on 1 January 1999, due

¹ Cf. the Government's letter to the Lower House of the States-General nr.25425 dated 25 June 1997 which is in President's Björne's possession

to a provision made in the transitional sections (not included in the translation). The government has asked the Lower House of the States-General to consider postponing this review date; the Lower House has not reacted very favourable which is understandable as the date was inserted by the House itself. This reporter thinks that the House will finally cooperate; it should be pointed out that appeals against a general order are exceptional in our system and no one has the slightest idea of the parties involved and the scope of such an appeal (*erga omnes* effect?)

The Constitution, however, contains a provision generally interpreted as to ensure the competence of civil courts to receive actions when no other court is competent. Hence, an action on a civil law basis (the law of torts) can be brought against a general order thought to be unlawful. It is also noteworthy that another constitutional provision precludes judicial scrutiny of acts of parliament by any court).

(2.3) Since the AWB came into effect, statutory rules have regulated the entire field

(2.4) There are no longer special provisions for the different fields of law; the AWB did away with these

(2.5) The main characteristic of a decision which can be the object of legal review is its binding effect. A decision is not a decision if it has no binding effect (for example, a statement merely containing a repetition of the law is not a decision)

(2.6) See section 8:5 AWB

(2.7) The time limit for lodging a petition is six weeks. This makes it easy to determine the final day. For example: if a decision was issued on a Monday the time limit will expire on a Monday. Before the AWB, time limits were expressed in days or months. Months are of unequal length, and time limit expressed in days may end on a Sunday or public holiday.

(2.8) The question regarding amendments in process is answered in 2.2 above.

3. The substance of legal review.

(3.1) The review covers issues of law and matters of **fact**, with a single exception: in cases concerning taxation the superior court is the tax division of the Supreme Court which only examines issues of law.

(3.2) The scope of the review does not depend on the field of law.

(3.3) (1) Modification of a decision is possible except where the authority competent to issue a fresh decision has a degree of discretion left. In tax law, the amount of tax due is regarded as determined by the law itself and consequently is always determined by the court. There are no differences between lower and superior courts in

this respect. (2) There are no different rules in this respect. (3) The powers of a court of first instance do not differ from those of superior courts.

(3.4) Since the AWB came into effect no important amendments have been planned.

4. Courts exercising legal review

(4.1) (1, 2, 3) Civil and criminal jurisdiction are exercised by Kantonrechtters (Sub-district Courts) Rechtbanken (District Courts), Courts of Appeal and the Supreme Court (the latter only dealing with questions of law). Administrative law matters are dealt with by District Courts in cases concerning decisions regarding public servants and social security and, on appeal by the Central Appeals Tribunal, in tax cases, the Courts of Appeal and the Supreme Court, in certain matters of economic administrative law the Trade and Industry Appeals Tribunal. In certain matters concerning planning and environmental protection the Administrative Law Division of the Council adjudicates without appeal, in all other administrative matters the District Courts are competent with the Administrative Law Division as an appeals court.

(4.1.4) Matters of organization (staff, premises) of all courts are handled by the Ministry of Justice, with the exception of the Council of State and its Administrative Law Division, which have their own budget, voted by parliament, for which the Ministry of the Interior is ultimately responsible. The Council of State, which not a court of law but prepares expert opinions on drafts for Acts and certain Ordinances, consists of members chosen from top-level experienced politicians or civil servants and members selected from among justices of the superior courts, university professors and members of the Bar; they cannot have other regular duties. The Council is theoretically chaired by the King or Queen but in practice by the Vice-President. The heir to the throne is a member by right and exercises this prerogative for a number of years in order to get acquainted with legislative affairs. Councillors of State, with the exception of the heir to the throne, serve as Justices in the Administrative Law Division, but its chambers have to be chaired by a member with a law degree, in most cases with ample experience in other courts. The Administrative Law Division is assisted by Justices selected from former or active members of other superior courts of law, law faculties and the Bar; these do not take part in the work of the Council itself.

(4.2) As to a career as a judge, the following remarks can be made. (1) For the last 50 years, it has been generally accepted policy on the part of the Ministry of Justice to fill approximately 50% of all positions by lawyers who have completed a few years of courses and traineeships after leaving university and to fill the other half with members of the Bar and other legal professions. (2) Switches to a court of a different category are possible, but rare. (3) Recruitment from other professions is dealt with above.

(4.3) The presence of laymen on the bench is exceptional, except in the Administrative Law Division of Council of State; Judges, Justices and State Councillors are appointed for life.

(4.4) Distinctions between fields of competence is made by enumeration in legislation

(4.5, 4.6) The kinds of cases dealt with by different categories of court are set out above under 4.1; 1,2; 3

(4.7, 4.8) The most recent trend has been towards abolishing administrative courts by integrating them into the civil courts. This has been done for the District Courts, but their administrative divisions are still very much on their own. Following the decision referred to at the end of the Introduction (1) to this report and in footnote 1, no attempts have been made to integrate the superior administrative courts into the superior civil courts.

5. The proceedings at the courts,

(5.1) Proceedings before an administrative court are initiated by submitting a reasoned appeal in writing. In most cases, a person who has the right to appeal to an administrative court against an order submits an objection in writing against the order before appealing. This objection is submitted to the administrative authority which issued the order, see chapter 7 of the AWB. The objection proceedings before the administrative authority are designed to alleviate the workload of the courts. Sometimes, as a result of the objection a solution is reached which satisfies all parties concerned and of course these cases do not reach the judiciary. In other cases, independent research has shown that as a result of the objection administrative authorities improve the reasoning leading to their decisions and complete the evidence; this greatly facilitates the work of the courts of law.

(5.2) Proceedings start in writing and are concluded by an oral hearing.

(5.3) The responsibility for the investigation of cases lies with the Court, but the Court is restricted to the facts put forward by the parties; these may merely be amplified. The reason for this is that the administrative authority cannot be held responsible if relevant facts which it could not find by proper investigation were not put forward by the interested party during the objection proceedings. See section 8:69 of the AWB; the first subsection restricts the scope of the third subsection.

(5.4) All kinds of evidence are acceptable but as administrative authorities have to submit their files in full most evidence is in the documents. (5.5) Court fees are set in section 8:42 of the AWB and for superior courts in the Statutes governing their competence. (5.5) Legal aid is possible in certain cases, and parties may or may not be represented by a lawyer. Cases concerning taxes or subsidies are generally two-party processes but in other cases the presence of three or more parties is not exceptional. Parties can have their cost reimbursed, but natural persons may be ordered to pay the costs of administrative authorities only when they have abused the right to appeal; see section 8:75 of the AWB. This restriction follows from an amendment made in the AWB by Parliament and is thought by many to have been a bad idea. In other

respects, procedural rules for administrative courts are special and different from those applicable in civil courts (5.10), but the really material difference is that in civil courts facts are to be put forward by the parties and there is no general responsibility for civil courts to fully investigate the facts. No amendments concerning procedural rules are pending (5.11).

6. The relationship between the civil and penal courts and the administrative courts

(6.1) Article 6 of the European Convention of Human Rights has induced all courts to apply provisions concerning the right to an oral hearing in a similar fashion, even when article 6 cannot be applied directly but merely by analogy. There are (6.2) no provisions enabling a civil or penal court to obtain an opinion from an administrative court or vice versa. In the courts of first instance (District Courts) judges from other divisions may sit in the administrative division and members from different superior courts hold part-time appointments in the Administrative Law Division of the Council of State. (6.4) Matters concerning revocation of driving licenses, aliens' residence permits and building permits are brought before the District Courts (civil division) and in appeal before the Administrative Law Division, expropriation before the District Courts (civil division) and without appeal before the Tax Division of the Supreme Court (only questions of law).

(6.5) Under well-established case law, decisions made by administrative authorities which could have been reviewed by an administrative court and have not been appealed from in such a court cannot be examined by a civil court. The same applies when a decision made by an administrative authority was examined by an administrative court which rejected the appeal. Questions in this section have now ceased to cause practical problem, but (6.7) fresh questions may still arise, for instance when an administrative court uses the powers, conferred by the AWB (section 8:73) to award damages. On this issue no legal provisions are under consideration but some think that legislation is called for (6.8). As to the question of pendency (6.6) no special provisions exist, but recently the Supreme Court has instructed lower civil courts to await judgment by an administrative court in a related case.

7. Miscellaneous.

The positions of the Vice-President of the Council of State could not be sufficiently explained in question 4. The Vice-President is ultimately responsible for premises and staff of the entire organization. He is also responsible for the opinions issued by the Council on proposal for legislation; this part of the work the Council is not a part of its legal review work. The Vice-President does not sit as a Justice in de Administrative Law Division. The Division has its own Presiding Justice, appointed for life from among the members of the Division. The Presiding Justice of the Division is responsible for the organization of the work of the Division

In addition to the answers to question 6, presidents of administrative appeals courts and of the tax and civil law Divisions of the Supreme Court have completely informal meetings. During these meetings, they form common conclusions on questions of jurisprudence which touch two or more of these courts. These conclusions, which are not made public, influence judgments of the Courts concerned but of course they cannot have binding effect.

8th January 1998