

**Consequences of incompatibility with EC law
for final administrative decisions and
final judgements of administrative courts
in the Netherlands**

Report submitted by the delegation of the Council of State of the Netherlands
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Rapporteur: J.H. van Kreveld¹

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The Netherlands
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¹ Member of the Administrative Jurisdiction Division of the Council of State, with the assistance of A. Pahladsingh, legal officer at the Research Department of the Council of State.

I. PRELIMINARY OBSERVATIONS CONCERNING DOMESTIC LAW

For a proper understanding of the answers to the Questionnaire, a brief summary is given below of certain aspects of the Dutch system of administrative law (at A) and the Dutch court system (at B). Some points of terminology are also discussed (at C).

The annexe to this document contains the literal text of those articles (or parts of articles) of the Dutch General Administrative Law Act that are most relevant to the subject of the Questionnaire.

A. The General Administrative Law Act

A.1. The General Administrative Law Act (*Algemene wet bestuursrecht; Awb*) has been introduced in 1994 with general provisions on a number of subjects of Dutch administrative law. Other subjects have been added in 1998. The Act is expected to be broadened to cover more subjects in the years ahead.

A.2. Firstly, the General Administrative Law Act contains a number of general rules of administrative law that apply to (all) *administrative authorities*. However, besides these general rules in the General Administrative Law Act, there are numerous specific statutes and regulations at national level and also numerous regulations at regional and local level that contain additional, sometimes different, rules for specific administrative authorities. It follows that for a proper understanding of the contents of Dutch administrative law it is not sufficient to consider only the General Administrative Law Act.

Moreover, Dutch administrative authorities are required to observe the 'general principles of proper administration'. These principles have been developed in administrative case law over a period of almost a century. Some of these principles have been codified in the General Administrative Law Act, e.g. the principle of due care, the principle of proportionality and the duty to give proper reasons for an administrative decision. The principles of legal certainty and protection of legitimate expectations have been codified as yet only partial in the General Administrative Law Act; so case law remains the main source of law for these principles. Finally, article 1 of the Dutch Constitution holds the principle of equality.

A.3. Secondly, the General Administrative Law Act contains the rules of procedural law for the *administrative courts*. Although the rules in the General Administrative Law Act apply strictly speaking only to proceedings before the administrative law sectors of district courts, these rules have been declared applicable *mutatis mutandis* in separate statutes to the highest administrative courts (see B below). It is intended to elaborate the procedural law of the highest administrative courts and incorporate it fully in the General Administrative Law Act itself.

A.4. Under article 7:1, subsection 1 of the General Administrative Law Act, an appeal to an administrative court – i.e. an application for review of an administrative decision - must generally be preceded by an objection lodged with the administrative authority that took the original decision. After the administrative authority has decided on the objection, under article 8:1 of the General Administrative Law Act appeal may be lodged with the administrative court. However the law provides for cases in which appeal to the administrative court is allowed without lodging previously an objection with the administrative authority.

A.5. Under article 8:81 of the General Administrative Law Act, pending the objection lodged with an administrative authority and pending the appeal to an administrative court, the president of that court may, on request, grant a provisional remedy.

B) Dutch Court system

B.1. In most cases an application for review of an administrative decision (hereafter: 'appeal') can be lodged with the administrative law sector of a district court (*arrondissementsrechtbank*). Thereafter higher appeal lies to one of the four highest administrative courts.

Provision is made in some statutes for direct appeal to one of these highest administrative courts; no appeal may then first be lodged with the district court. So in that case the highest administrative court then hears the case at both first and last instance.

B.2. The Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) is the highest administrative court with general jurisdiction. It always hears cases at last instance. Sometimes it hears cases at both first and last instance.

B.3. There are two specialised highest administrative courts:

- the Central Appeals Tribunal (*Centrale Raad van Beroep*)
- the Industrial Appeals Tribunal (*College van Beroep voor het bedrijfsleven*).

Both these administrative courts usually decide cases at last instance. Only in exceptional cases appeal in cassation lies to the Court of Cassation (*Hoge Raad*), namely against rulings of the Central Appeals Tribunal and the Industrial Appeals Tribunal that are connected with the interpretation of tax law.

B.4. In tax cases appeal lies to the tax law sector of one of the five courts of appeal (*gerechtshof*), and appeal in cassation can thereafter generally be lodged with the Court of Cassation (*Hoge Raad*).

B.5. An informal consultative committee consisting of the presidents of the three highest administrative courts and of two members of the Court of Cassation has been set up to promote the uniform interpretation and application of the general part of administrative law. This consultative committee does not take a ruling; it is set up to facilitate informal coordination.

There have been calls for the position of the committee to be strengthened. To this end proposals have been made to establish a chamber for the uniform interpretation of administrative law. This court should give binding preliminary rulings on matters referred to it by one of the highest administrative courts in the course of proceedings before them.

B.6. Under article 8:72 of the General Administrative Law Act the administrative courts can not only annul the challenged administrative decision, but also (i) include in the judgement an order about the new administrative decision to be taken, (ii) set a time limit for taking the new decision and (iii) determine a penalty for failure to comply with the court order.

B.7. Under article 8:73 of the General Administrative Law Act the administrative court may also award compensation either in the judgement on the application for review or in a separate compensation proceeding. However, this power is not an exclusive power of administrative courts. Actions for damages against public authorities can be brought before the ordinary courts *as well*: i.e. before the civil law sector of a district court (with a right of appeal to a court of appeal and a right of appeal in cassation to

the Court of Cassation). In many cases the interested party therefore has a *free choice* to apply for compensation to either the administrative court or the ordinary court. This item is dealt with in more detail in the answer to Question 14.

C. Points of terminology

C.1. *Administrative decision*. It is assumed that this term is used in the Questionnaire to mean *individual* public law decisions of administrative authorities.

Article 1:3, subsection 1, of the General Administrative Law Act defines an order (*besluit*) as follows: 'Administrative decision means a written decision of an administrative authority constituting a public law act.'

Under article 8:2 of the General Administrative Law Act no objection can be lodged against administrative decisions of a general nature – i.e. generally binding or legislative regulations and policy rules – and no application for review of such decisions can be lodged with the administrative court. Generally binding regulations and policy rules are therefore not deemed to be 'a final decision' in the sense in which this term is used in the Questionnaire.

C.2. *Final administrative decision*. Under Dutch law an administrative decision becomes final:

- (i) if interested parties have not lodged an objection with the administrative authority, that has taken the initial administrative decision, against that decision in time (within six weeks),² or
- (ii) if interested parties have lodged such an objection in time, but this objection is held to be unfounded and interested parties have not appealed to the administrative court of first instance in time (again within six weeks), or
- (iii) if interested parties have appealed in time to the administrative court, but this appeal has been held to be unfounded and interested parties have not lodged in time - again within six weeks - a higher appeal or appeal in cassation, or if no such appeal is possible, or
- (iv) if interested parties have lodged a higher appeal or appeal in cassation in time, but this appeal has been held to be unfounded.

C.3. *Revoke a final administrative decision: withdrawal versus annulment*. The Questionnaire proposes that the word 'revoke' should be used as the general term for the overturning of a final administrative decision both (i) by the administrative authority which took the decision and (ii) by a higher administrative authority or (iii) by a court. In Dutch administrative law the overturning by the administrative authority which took the decision, is known as *withdrawal* ('intrekking'). The overturning by a higher administrative authority or by an administrative court is known as *annulment* ('vernietiging'). The Dutch delegation would prefer to refer to the overturning by a court or by a higher administrative authority as *annulment*.

C.4. *Final judgement of an administrative court*. A judgement of an administrative court of first instance is final either (i) if higher appeal or appeal in cassation is either not possible at all or no longer possible or (ii) if this judgement has been upheld on such a higher appeal or appeal in cassation. Under Dutch law the final judgement of an administrative court can be reviewed only by that court itself and only at the request of a party. Moreover, such review is possible only in the exceptional circumstances specified in article 8:88 of the General Administrative Law Act (see the answer to Question 8).

² Unless direct appeal to the administrative court is allowed (also within six weeks).

II. ANSWERS TO THE QUESTIONNAIRE

1. Are there any procedural means under your national law which allow a final administrative decision to be revoked, if it turns out to be contrary to Community law? Please describe briefly the relevant provisions and national case-law:

a) do the legal provisions have general application or do they relate specifically to the application of EC law?

b) which authority (administrative authority or national court) is empowered under your legal system to take use of the procedural means in question ?

SUBSECTION B OF QUESTION 1: ADMINISTRATIVE AUTHORITY OR NATIONAL COURT?

1.1. Under Dutch law a final administrative decision that subsequently turns out to be contrary to Community law, can be withdrawn only by the administrative authority concerned. So a person who wants to challenge an incorrect final administrative decision, must apply to the administrative authority. Against the response of that administrative authority an appeal may be lodged with the administrative court. Therefore the remainder of the answer to this Question is confined to the possibilities for withdrawal by the administrative authority.

SCOPE FOR WITHDRAWAL BY THE ADMINISTRATIVE AUTHORITY

1.2. There are no *general* rules in the Netherlands for the withdrawal of unlawful administrative decisions. Although there has long been a plan to include general rules of this nature in the General Administrative Law Act, this has not yet led to a result. That is owing to the wide variety of policy fields and situations to be covered.

1.3. However, rules for withdrawal of unlawful decisions on grants have been included in the General Administrative Law Act. In so far as relevant here, the articles 4:48 and 4:49 provide that an administrative authority is empowered to withdraw its final decision or to alter it to the detriment of the grant recipient if the decision:

- a. is incorrect and the grant recipient should have known this, or
- b. is based on incorrect information provided by the grant recipient and the administrative authority would have taken a different decision if it had been supplied with the correct information.

1.4. Other statutes too sometimes provide for the withdrawal of unlawful administrative decisions, including licences. In such cases it is generally provided that withdrawal of an unlawful decision is possible, if the decision was based on incorrect information provided by the applicant and it is reasonable to assume that the administrative authority would have arrived at a different decision if it had received the correct information. In the case of social benefits some specific statutes provide for withdrawal on this ground within five years of the publication of the decision.

Under some statutes regulating social benefits, an unlawful administrative decision can also sometimes be withdrawn within two years, if the error is not attributable to the person concerned but this person may reasonably be expected to have known that the decision was incorrect.

1.5. These specific statutes provide for only limited scope for the withdrawal of incorrect administrative decisions. They do not contain a blanket provision allowing for withdrawal whenever it turns out that the administrative decision was contrary to law.

1.6. Several other statutes do not contain any provision about withdrawal of unlawful administrative decisions. Other statutes provide only for withdrawal in particular cases. In either case it is difficult to determine whether and, if so, when withdrawal is allowed without express statutory basis. According to the case law this depends both on the nature of the administrative decision concerned and on how the general principles of proper administration apply in the specific case. Only a few general observations can be made now about this. In brief, three basic situations can be identified in the case law (subsections 1.6.1, 1.6.2-1.6.4, 1.6.5-1.6.6).

I. FAVOURABLE UNLAWFUL FINAL ADMINISTRATIVE DECISION

1.6.1. If the unlawful final administrative decision is *favourable* to the person concerned, the principles of proper administration – especially the principle of legal certainty and the principle requiring careful assessment of the interests concerned – often imply that the administrative authority refrains from withdrawing the decision or refrains from altering it to the detriment of the person concerned. This applies in particular where the unlawful decision holds the granting of a licence.

The scope for withdrawal seems larger in the case of a financial decision. For example, a final financial administrative decision can also be withdrawn or altered to the detriment of the person concerned:

- (i) if the decision is founded on an error which the person concerned could have noticed if he had been normally attentive, or
- (ii) even if the administrative decision is founded on an error which the person concerned need *not* have noticed, provided that the error is rectified quickly.

II. UNFAVOURABLE UNLAWFUL FINAL ADMINISTRATIVE DECISION

1.6.2. If the person adversely affected by an unlawful final administrative decision – for example a levy or a prohibition that is contrary to Community law – wants to have the decision overturned, he must apply to the administrative authority which took the decision. This authority is, in principle, empowered to withdraw the unfavourable decision.³

However, pursuant to article 4:6, subsection 1, of the General Administrative Law Act, the applicant is obliged to show a new fact that was not known when the administrative decision was taken. Pursuant to article 4:6, subsection 2, of the General Administrative Law Act, the administrative authority is obliged to re-examine the final decision only if the applicant has put forward a new fact. If the applicant does not do so, the administrative authority may, but does not have to, reject the application for withdrawal *without re-examination* of its final decision.

1.6.3. If the administrative authority refuses to re-examine its final decision, an interested party may apply to an administrative court for review of the refusal.

The court will first assess whether the administrative authority was right to hold that the applicant had not shown any new fact. If the court agrees with the administrative authority, it holds the application to be unfounded.

If the court considers that the applicant has forwarded a new fact, it will order the administrative authority to re-examine the final administrative decision.

1.6.4. Also, after a new administrative decision is taken on the basis of fresh examination – resulting in either withdrawal of the final decision or a refusal to do so –, interested parties can appeal to the administrative court. Both the person who has

³ See, for example, the judgement of the Industrial Appeals Tribunal, 8 November 2006, AB 2007, 7.

requested withdrawal and other persons whose interests are directly affected by the withdrawal, may appeal. The administrative court then assesses whether the withdrawal or the refusal to withdraw is lawful.

III. UNLAWFUL FINAL ADMINISTRATIVE DECISION DISADVANTAGEOUS TO A THIRD PARTY

1.6.5. If a final administrative decision is unlawful, also the interests of a third party may be adversely affected, e.g. if an unlawful permit has been granted to a neighbour of the addressed party or if an unlawful licence has been granted to a competitor of the addressed party. If such a third party wants that decision to be revoked, it should first apply to the administrative authority concerned to re-examine that final decision. Once again the administrative authority is obliged to re-examine that final decision only if the third party concerned has put forward a new fact that was not known when the decision was taken.

1.6.6. Even if the third party has shown a new fact, the administrative court will not lightly hold to the detriment of the licence holder that the administrative authority was entitled or obliged to withdraw the unlawful licence. Nonetheless, in a particular case the court might hold, under the principles of proper administration – in particular the principle of proportionality –, that the administrative authority was entitled or obliged to withdraw the licence.

In the event of withdrawal, the administrative authority may have to pay compensation to the licence-holder. Conversely, the administrative authority may be obliged to pay compensation to the third party, if the authority does not withdraw the unlawful licence.

IV. DOES A LATER COURT JUDGEMENT CONSTITUTE A NEW FACT WITHIN THE MEANING OF ARTICLE 4:6 OF THE GENERAL ADMINISTRATIVE LAW ACT?

1.7. Under Dutch case law, a later *court judgement*, from which appears that the final administrative decision was unlawful, does not constitute a new *fact* within the meaning of article 4:6 of the General Administrative Law Act. In such a case the administrative authority is therefore *not* obliged to re-examine its final administrative decision.

1.8. However, this general rule of Dutch case law has been partially superseded by the judgement of the European Court of Justice (hereafter: ECJ) in the *Kühne & Heitz* case. If the four conditions set by the ECJ in *Kühne & Heitz* are fulfilled in a particular case, the administrative authority is obliged to re-examine an application for withdrawal of its final decision.⁴ If *not* all four conditions stipulated in *Kühne & Heitz* are fulfilled, the administrative authority is not obliged to re-examine its final decision.⁵

V. HIGHER ADMINISTRATIVE AUTHORITIES

1.9. Under some statutes a higher administrative authority has power to annul a decision of a provincial or municipal authority on the ground that the decision is contrary to law or to the public interest. This higher authority can exercise this power

⁴ See, for example, the judgement of the Industrial Appeals Tribunal of 8 November 2006, AB 2007, 7

⁵ See, for example, the judgement of the Central Appeals Tribunal of 29 April 2004, JB 2004, 246 (the combination of circumstances referred to by the ECJ in *Kühne & Heitz* was not present); judgement of the Central Appeals Tribunal of 4 January 2006, AB 2006, 180 (the applicant had not contested the administrative decision).

of annulment on its own motion, in other words without application by an interested party. But as the higher administrative authority is also entirely free to refuse an application to annul the decision of the lower authority, such an application is not a very useful way to challenge an unlawful final administrative decision.

1.10. Moreover higher administrative authorities are reluctant to exercise this power to annul, as they do not wish to needlessly curtail the freedom of action of provincial and municipal authorities. In addition, under article 10:37 of the General Administrative Law Act, (i) an administrative decision on which a court has given judgement or (ii) an administrative decision implementing a final court judgement, cannot be annulled by the higher administrative authority on a legal ground that is contrary (or partly contrary) to legal grounds on which the court judgement is based.

1.11. Since this power of annulment of higher administrative authorities is only of limited significance to the subject of the Questionnaire, it will be disregarded below. This also applies to other powers conferred to higher administrative authorities by some statutes, such as the power of a Cabinet minister to issue directions to a provincial or municipal administrative authority.

VI. SUBSECTION A OF QUESTION 1: SCOPE FOR WITHDRAWAL BY ADMINISTRATIVE AUTHORITIES

1.12. As yet there are no provisions in Dutch law providing for the withdrawal of an administrative decision specifically on account of incompatibility with Community law. However, a bill that will provide for withdrawal specifically on account of incompatibility with Community law in respect of one subject - the recovery of unlawful State aid pursuant to a decision of the European Commission or of a judgement of the ECJ - is expected to be presented to Parliament shortly.

CONCLUSIONS IN RESPECT OF QUESTION 1

1.13. The courts have no power to overturn a final administrative decision. The person concerned must first apply to the administrative authority for a re-examination of that final decision. Only after that authority has decided on this application, the person concerned can apply to the administrative court for review of the refusal of the administrative authority to re-examine and withdraw its final decision.

Administrative authorities that have taken a final administrative decision, have power to withdraw this decision in certain circumstances. This is regulated only to a very limited extent in statutory law. In so far as there are explicit statutory powers to withdraw final administrative decisions, these provisions do not yet specifically include withdrawal on account of incompatibility with Community law.

2. Do national provisions concerning the revocation of final administrative decisions by an administrative authority:

- a) grant discretionary powers to decide the matter; or*
- b) provide the obligation to revoke a decision under certain conditions?*

2.1. On the assumption that also Question 2 relates only to the withdrawal of unlawful decisions, the answers to this Questionnaire do not deal with powers of administrative authorities to withdraw a final administrative decision either (i) on account of changed circumstances, changed views or changed policy, or (ii) because the addressed person has not observed his obligations.

GENERAL REMARK

2.2. As has been stated in the answer to Question 1, Dutch statutes confer on an administrative authority explicit powers to withdraw unlawful final decisions only to a limited extent. As far as they do so, legislative arrangements vary considerably. Some statutes confer a discretionary power, others impose an obligation to withdraw the decision. It is not possible to generalise about this: the situation varies from statute to statute.

WITHDRAWAL OF UNFAVOURABLE UNLAWFUL FINAL ADMINISTRATIVE DECISIONS

2.3. Even if a statute does not provide that an unfavourable, unlawful final administrative decision may or must be withdrawn, the courts have assumed still that administrative authorities have *in general a discretionary power* to withdraw those decisions. In the exercise of this discretion the principles of proper administration must be observed, particularly in order to protect the interests of third parties.

2.4. As was already observed in the answer to Question 1, an administrative authority is obliged, if requested to withdraw its final decision, to re-examine that decision (i) if the applicant shows new facts or (ii) if the four conditions set by the ECJ in *Kühne & Heitz* are fulfilled.

2.5. This obligation to re-examination means that the administrative authority must *reconsider* its final decision. This does not necessarily mean that it must *withdraw* that decision. Whether the administrative authority is obliged to do withdraw that decision, depends on the circumstances of the case, considered among others in the light of the principles of proper administration.⁶

3. Does the possibility (or obligation) of revocation of final administrative decisions depend on the reason of its incompatibility with EC law? Please consider the following cases:

a) in the light of the ECJ's subsequent judgement, an administrative decision turned out to be incompatible with EC law or based on the misinterpretation of EC law (as in the Kühne & Heitz and Kempter case)

b) the provisions of national law which provided the legal basis of a challenged decision were incompatible with EC law (as in the i-21 Germany case)

c) an administrative decision infringed EC law or has been issued without giving due consideration to the ECJ's case law.

3.1. It is assumed that Question 3 refers only to the power or obligation to withdraw a decision that is *unfavourable* for the person to whom the final decision is addressed, as for example in the *Kühne & Heitz*, *Kempter* and *i-21 Germany* cases.

3.2. As Dutch law has no provision for the cases referred to at subsections a), b) and c) of Question 3, the distinction between these three cases need not be considered here.

3.3. If the person requesting re-examination of a final administrative decision does *not* show a new fact, the administrative authority has hitherto been obliged to re-

⁶ E.g. the Central Appeals Tribunal held in its judgement of 10 November 2007 (AB 200, 298) that the refusal to withdraw the rejection of the application for an disability benefit was unreasonable.

examine the decision by Dutch courts only if the applicant fulfils all four conditions set by the ECJ in *Kühne & Heitz*. This applies both to a) and b) and c). No judgement of a Dutch court has been found showing that an administrative authority is also obliged to re-examine its final decision if – as in cases b) and c) – there is no ECJ judgement clearly showing that this final decision is incompatible with Community law.

4. *In order to revoke a final administrative decision which is contrary to Community law, is it a precondition that a party (a person concerned):*

a) *challenges (challenges) the decision in the course of the administrative procedure?*

b) *appeals against the decision to the court? Is it sufficient to appeal to the national court of the first (lower) instance or is it necessary to exhaust all means of judicial review?*

c) *takes use of any other available legal means provided under national law? What kind of means (ombudsman, etc.)?*

4.1. It is assumed that Question 4 too refers only to the power or obligation to withdraw a decision that is *unfavourable* for the person to whom the final decision is addressed.

4.2. It is not entirely clear whether Question 4 relates to:

(i) a requirement that the addressed person has challenged the administrative decision before it became final, or

(ii) a requirement that the addressed person takes the initiative of challenging the final administrative decision.

4.3. In so far as Question 4 refers to a requirement that the addressed person has challenged the administrative decision before it became final, the answer is under Dutch law: an unfavourable final administrative decision may be withdrawn even where the addressed person did not *before* that decision became final:

- lodge an objection against that decision with the administrative authority,
- appeal to the court, or
- raise the matter with any other authority.

4.4. In so far as Question 4 refers to a requirement that the addressed person takes the initiative of challenging the final administrative decision, the answer is under Dutch law: an unfavourable final administrative decision may also be withdrawn, if the person concerned did, *after* the administrative decision became final, not take any action to challenge the final decision before the administrative authority itself, a court or any other authority. The administrative authority is entitled to withdraw its final decision on its own motion, although this power is seldom explicitly provided for in statutory law.

5. *As far as the admissibility of revocation of final administrative decisions contrary to Community law is concerned, does it matter whether a party (a person concerned) raises the question of the infringement of Community law in the course of administrative procedure or the proceedings before the national court? (this issue has been raised in the *Kempter case*)*

5.1. In a case where the administrative authority is entitled (or obliged) to withdraw its final decision, the *mere* fact that a person requesting withdrawal did not refer - in the administrative or judicial proceedings prior to the administrative decision

becoming final - to infringement of Community law, Dutch administrative courts in all probability will not consider this as an obstacle to the exercise of the power to withdraw that final decision.

5.2. Admittedly there is still no known court judgement expressly enunciating this principle. But the decisive point already under domestic law seems to be that the administrative court was obliged, under article 8:69, subsection 2, of the General Administrative Law Act, in its judgement on the appeal against the administrative decision before becoming final to *supplement* the legal grounds of the appeal *on its own motion (ex officio)*. This means that the court should have applied in that judgement the applicable rule of Community law on its own motion. Therefore the person requesting withdrawal will not be blamed for not having referred to infringement of Community law in the administrative or judicial proceedings prior to the administrative decision becoming final.

5.3. Aside should be remarked that, if the rule of Community law on which the application for withdrawal is based, is not related to the dispute as demarcated by the appeal against the administrative decision before becoming final, there is no need whatsoever for the administrative authority to re-examine its final decision. In this context it is relevant that, as to be explained in the answer to Question 6, the duty of the administrative court to supplement the legal grounds of the appeal is in principle limited to the scope of the appeal (e.g. the part of the decision as challenged in appeal). Also the obligation of the highest national court to refer, if necessary on its own motion, questions to the ECJ for preliminary ruling (to which Advocate General Bot refers in his opinion in the *Kempter* case) seems, in principle, to be limited to the scope of the appeal against the administrative decision. For further information about this subject, including exceptions to this principle, see the answer to Question 6.

6. Does pursuant to national law the national court reviewing the legality of administrative decisions take into consideration the provisions of Community law:

- a) on request of the parties only*
- b) on its own motion (ex officio)?*

I. SUPPLEMENTING LEGAL GROUNDS BY THE COURT ON ITS OWN MOTION

6.1. Under article 8:69, subsection 2, of the General Administrative Law Act, the administrative court is obliged to supplement the legal grounds on its own motion when deciding on an appeal. This duty of the court is important in cases where parties have failed to produce adequate legal arguments for their grounds of appeal. Of course this obligation apply also to rules of Community law that are within the scope of the appeal. In this respect too there is no difference between national law and Community law.

II. REVIEW BY THE COURT ON ITS OWN MOTION

6.2. As was stated in the answer to Question 5 and explained by the Industrial Appeals Tribunal in its request for a preliminary ruling in the *Van der Weerd* case (C-222/05), Dutch administrative courts may, under article 8:69, subsection 1, of the on General Administrative Law Act, only rule on the points of dispute referred to by the parties. Therefore the administrative court is not entitled to go beyond the scope of the dispute as defined by the parties: it is not entitled to review a part of the administrative decision that is *not* challenged, even if the court considers that part to be contrary to domestic or Community law.

6.3. However, in exceptional cases the administrative court is entitled, under domestic law, to give judgement about items that are beyond the scope of the appeal. This is allowed - and obligatory - only in respect of the application of so-called 'rules of public order.' According to the explanatory memorandum as to article 8:69, subsection 1, of the General Administrative Law Act and according to established case law, these rules concern the statutory provisions on competence and admissibility, namely:

- (i) competence of the administrative authority
- (ii) admissibility of the objection with that authority (has it been lodged in time, by an interested party; does it challenge an administrative decision?)
- (iii) competence of the administrative court
- (iv) admissibility of the appeal to that court (has it been lodged in time, by an interested party; does it challenge an administrative decision?)

6.4. It follows that the administrative court also assesses on its own motion whether the administrative authority kept to the scope of the objection, as is required by article 7:11 of the General Administrative Law Act. The highest administrative courts also decide on their own motion whether the lower court kept to the scope of the appeal against the administrative decision.

6.5. According to the *Van der Weerd* judgement of the ECJ, Dutch courts are obliged, by virtue of the *principle of equivalence*, to review the compatibility of the administrative decision with Community law on their own motion, if the rule in question occupies a position within the Community legal order similar to that of 'public order'.

Articles 11 and 13 of Directive 85/511/EEC, which the referring court had faced with in connection with other matters, but which the parties to the main proceedings *had not raised*, did according to the ECJ not occupy a position within the Community legal order similar to that of the rules of public order referred to at subsection 6.3 above. This is why the ECJ held that the Dutch Industrial Appeals Tribunal was not obliged on the ground of the principle of equivalence to test on its own motion the lawfulness of the administrative measures against the articles 11 and 13 of Directive 85/511/EEC.

6.6. The ECJ held that on the basis of the *principle of effectiveness* parties should have had a genuine opportunity to raise a plea based on articles 11 and 13 in the main proceedings and to derive grounds of appeal from this. The ECJ held that also this requirement had been complied with. It accordingly concluded that also the principle of effectiveness did not require the referring Dutch court to review the administrative decision for its compatibility with articles 11 and 13 of the Directive.

7. Are the powers described in Question 6 treated differently, if the case is examined by the court against whose judgements there is no judicial remedy under national law?

No, in this respect there is no difference between administrative courts of first instance and the highest administrative courts.

8. When an administrative decision which has become final as a result of a judgement of a national court turns out to be contrary to EC law, is it appropriate:
a) to revoke the administrative decision (as in the Kühne case); or
b) to re-examine the judicial proceedings?

I. SUBSECTION B OF QUESTION 8: REOPENING JUDICIAL PROCEEDING

8.1. Under article 8:88 of the General Administrative Law Act only the court that has given final judgement, has power to review that judgement. This review, on request of a party, is allowed only in exceptional circumstances: only on the basis of new facts and circumstances that took place before the judgement was given.

8.2. Under the case law concerning article 8:88 of the General Administrative Law Act the applicant has to show *nova* of a *factual* nature. Therefore court judgements do not qualify as new facts and circumstances. As a consequence an administrative court is not entitled⁷ to review its judgement if incorrectness of this judgement follows from another interpretation of the law in another judgement (of either the same or another court). This also applies if incorrectness of the judgement follows from a judgement of the ECJ; *Kühne & Heitz* judgement did not lead to a change of Dutch case law.⁸ In the case referred to in Question 8, an application to the administrative court to review its judgement therefore will be seldom successful.

8.3. By the way, it should be noted that since 1 January 2003 the sentence of a Dutch *criminal* court can be reviewed if - in brief - (i) the European Convention for the Protection of Human Rights and Fundamental Freedoms has been violated in proceedings leading to a conviction and (ii) it is necessary to review the sentence in order to afford just satisfaction as referred to in article 41 of the Convention.⁹

Dutch Parliament has asked the Government to consider amending article 8:88 of the General Administrative Law Act on order to create the possibility of reviewing the judgement of an administrative court, if it follows from a judgement of the European Court of Human Rights or of the ECJ that the national judgement is contrary to European law. The Cabinet holds there is no reason for such a provision, in view of (i) the right of the interested person to request the administrative authority to withdraw its decision, whether or not in conjunction with compensation (see the answer on subsection A of Question 8) and (ii) the right to sue the State for errors made by the highest administrative courts.¹⁰

II. SUBSECTION A OF QUESTION 8: WITHDRAWAL BY AN ADMINISTRATIVE AUTHORITY

8.4. In the cases to which Question 8 refers, the best course of action for the party concerned is to request the administrative authority which took the final decision to withdraw that decision. If the administrative authority rejects this request, the usual forms of redress may be used, i.e. objection to the administrative authority, and subsequently appeal to the court of first instance and, often, higher appeal to a higher administrative court. Other persons whose interests are directly involved, must be given the opportunity to participate in these administrative and judicial procedures.

Naturally, if the administrative authority grants the request for withdrawal, the persons whose interests are directly affected by this, may lodge an objection with the authority concerned against the decision on the request for withdrawal and may subsequently appeal to the courts.

⁷ See, for example, the judgement of the Central Appeals Tribunal, 17 November 2006, AB 2007, 7 (the applicant had submitted that in its judgement of 27 January 2006 the Central Appeals Tribunal had incorrectly interpreted the *Borawitz* judgement of the ECJ).

⁸ See, for example, the judgement of the Administrative Jurisdiction Division of the Council of State of 27 October 2004, AB 2004, 427

⁹ Article 457, paragraph 1 (3°) of the Code of Criminal Procedure.

¹⁰ House of Representatives, 2004-2005, 29 279, no. 28 (12 August 2005).

9. *The EJ's judgement in the Kapferer case concerned matters of civil law. Do you think that the position of the ECJ (paragraph 24 of the Kapferer judgement) is also applicable to the judgements of national (administrative) courts?*

9. From the ECJ judgement in *Kapferer* follows that, if a final judgement of a national court appears to be contrary to Community law, article 10 of the EC Treaty does not require the national court to set aside national procedural rules in order to re-examine and annul that final judgement. Therefore it is compatible with Community law that Dutch administrative courts hold that they are not entitled to annul a final judgement on the mere ground that this judgement is contrary to Community law. In keeping with this rule the Central Appeals Tribunal recently rejected an application for review of a judgement of that court on the ground (i) that the application did not mention any new facts or circumstances and (ii) that, in view of the *Kapferer* judgement, EC law does not require a national court to set aside article 8:88 of the General Administrative Law Act.¹¹

10. *What is your interpretation of the above mentioned judgements of the ECJ (Kühne, i-21 Germany):*

a) *does the ECJ accept the principle of the procedural autonomy of the Member States; or*

b) *does it mean the imposition of an obligation on the Member States to introduce, if necessary, procedural means to ascertain that the principle of full effectiveness of EC law is respected?*

10.1. In its *i-21 Germany* judgement the ECJ stated in paragraph 57 that in the absence of relevant Community procedural rules, the procedural rules designed to ensure the protection of the rights which individuals acquire under Community law, are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States. So the ECJ certainly accepts the *procedural autonomy* of the Member States.

10.2. However the ECJ adds as a restriction that these domestic rules must comply with the principle of equivalence and the principle of effectiveness. What does this restriction imply?

10.2.1. In *i-21 Germany* the ECJ held that the national rules of Germany were to meet the test of the *principle of effectiveness*.

The ECJ held first of all that it was important that there was a possibility to appeal to the court against the original administrative decision and that it had not been argued that the rules on this possibility were unreasonable. This statement of the ECJ implies that domestic law should provide for a *right of appeal* against the original decision and for reasonable rules for the exercise of this right. So Member States must create a procedure for this purpose. A duty of this kind can hardly be regarded as an infringement of national procedural autonomy.

10.2.2. The ECJ goes on to remind that under the German Administrative Procedure Act, an unlawful administrative decision can be withdrawn even if it has become final. From this consideration of the ECJ it does *not* follow that Member States are obliged to create a withdrawal procedure.

¹¹ Central Appeals Tribunal, 17 November 2006, AB 2007, 7.

10.3. After that the ECJ noted in *i-21 Germany* that it is evident from the German reference judgement that under German domestic law the administration is obliged to withdraw an administrative decision that is manifestly unlawful. The ECJ stated that the principle of equivalence means that, in case a German administrative decision is manifestly incompatible with Community law, the words 'manifestly unlawful' in connection with the obligation to withdraw the final administrative decision must be construed in the same way as in a case where a German administrative decision is manifestly incompatible with domestic law.

10.3.1. It follows that a Member State whose domestic law provides for a withdrawal procedure, should also apply this procedure in respect of rights derived from Community law. From *i-21 Germany* it does, again, not follow that a Member State whose domestic law does not provide for a withdrawal procedure of this kind, is obliged to create such a procedure.

10.4. Finally, in in paragraph 24 of its *Kühne & Heitz* judgement the ECJ held that Community law does not require that administrative authorities be placed under an obligation to re-examine their decisions, which have become final upon expiry of the reasonable time limits for legal remedies or by exhaustion of those remedies. From this consideration of the ECJ it follows implicitly that Member States have to make provisions for a reasonable period during which an appeal may be instituted against the *original* administrative decision. The ECJ did not hold that Member States should make provisions for withdrawal of *final* administrative decisions: in *Kühne & Heitz* too the ECJ departed primarily from national procedural autonomy. Accordingly it referred to the existing possibilities for withdrawal under Dutch procedural law: these domestic provisions must also be applied with regard of rights derived from Community law.

11. Does your national law in the discussed field comply with the principles of equivalence and effectiveness, as interpreted by the ECJ (see e.g.: case i-21 Germany, paragraph 57)? Please state your opinion.

11.1. Dutch law generally complies with both of these principles as far as the rules on the withdrawal of unfavourable unlawful final administrative decisions are concerned.

If the four criteria of *Kühne & Heitz* are fulfilled, under *statutory* Dutch law an administrative authority has no obligation - on request or on its own motion - (i) to re-examine its final decision in the light of an interpretation subsequently given by the ECJ and (ii) to determine on the basis of the results of that re-examination whether the final administrative decision should be withdrawn.

However this obligation is adopted and applied under Dutch case law, since *Kühne & Heitz*. If the request for such a withdrawal is rejected or granted, the usual legal remedies (i.e. appeal to the courts) lie against that decision. This is precisely why the fact that the power of the administrative court to review its own judgement is extremely limited, does not mean an infringement on the principles referred to in Question 11.

11.2. In some academic circles is now argued that the case law on compensation for loss and damage, suffered as a result of a final administrative decision that is contrary to Community law, should be adjusted. On this point see the answer to Question 14.

11.3. A more specific point concerns the possibilities offered by Dutch law to recover, on the instructions of the European Commission, the full amount of any

State aid granted in breach of Community law. The Government thinks that the legal scope for doing this completely, is not adequate. It is expected shortly to present a bill to ensure the full application of Community law, also in this respect.

12. When the case under consideration concerns the revocation of a final administrative decision, is it necessary to interpret your national law in conformity with Community law?

Moreover,

a) does such an interpretation have any influence on the scope of discretion of administrative authorities (the problem was discussed in the case i-21 Germany)?

b) are there any examples of the interpretation of national law in conformity with EC law to be found in the practice of national courts ?

I. INTERPRETATION IN CONFORMITY WITH EC LAW IN GENERAL

12.1. As a general rule - not just in cases involving the withdrawal problem raised in the Questionnaire - Dutch national law is interpreted in conformity with EC law wherever possible. Some court cases where this rule has been applied, concern environmental law.¹² Another recent court judgement concerns taxation law.¹³ Where EC law has not been implemented entirely or correctly in Dutch national law, the administrative courts examine whether the effective implementation of EC law can be guaranteed by interpretation of national statutory law in conformity with EC law. If it turns out that national statutory law offers no scope for this, the administrative court will give direct effect to EC law and rule that the national provision will not be applied.

II. DISCRETION OR OBLIGATION IN RESPECT OF *RE-EXAMINEING* FINAL ADMINISTRATIVE DECISIONS

12.2. The *Kühne & Heitz* judgement has had a major influence on Dutch law regarding the discretion of an administrative authority to re-examine its final decision.

12.3. Article 4:6, subsection 2, of the General Administrative Law Act requires that, if a party requests an administrative authority to withdraw its final decision, this authority is obliged to re-examine this decision case *only* if that party shows a new fact. If that party does not show a new fact, according to article 4:6, subsection 2, the administrative authority has discretion to decide whether or not to re-examine its final decision. Under established case law, a later court judgement does not constitute a new fact within the meaning of article 4:6 of the General Administrative Law Act.

12.4. As a consequence of the *Kühne & Heitz* judgement this statutory discretion to decide whether or not to re-examine a final administrative decision, is now subject to some limitation. Indeed, if the four criteria referred to in *Kühne & Heitz* are fulfilled, the administrative authority is *obliged* to re-examine its final decision. The *Kühne & Heitz* judgement has directed Dutch administrative courts to change their interpretation of article 4:6, subsection 2, of the General Administrative Law Act in cases where all four criteria of *Kühne & Heitz* are fulfilled. In those cases administrative authorities no longer have a discretion but an obligation to re-examine

¹² Administrative Jurisdiction Division of the Council of State, 15 December 1994, AB 1996,

²⁹ Administrative Jurisdiction Division of the Council of State, 31 March 2000, AB 2000, 303.

¹³ Court of Cassation, 10 August 2007, AB 2007, 291.

their final decisions.¹⁴ To this extent article 4:6, subsection 2 is applied in conformity with Community law. The consequence of this is that the discretion, that existed under domestic law, now is limited in this respect.

12.5. However, it is still established case law that if the four *Kühne & Heitz* criteria are *not* fulfilled, administrative authorities under article 4:6, subsection 2, of the General Administrative Law Act still have discretion to decide whether or not to re-examine their final decisions.¹⁵

III. DISCRETION OR OBLIGATION IN RESPECT OF *WITHDRAWING* FINAL ADMINISTRATIVE DECISIONS

12.6. Does it follow from *i-21 Germany* that domestic powers or obligations to withdraw decisions, must be applied in conformity with EC law and that the scope of the discretion granted by national law is limited? No. The ECJ merely cited the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) and noted in what cases, according to the German reference judgement, the power granted by the Administrative Procedure Act to withdraw a decision constitutes an obligation under *domestic* law. As this rule of domestic law has been decisive for the ECJ, there is no indication that the ECJ limited the cope of discretion that was granted by domestic law.

12.7. Does it follow from *Kühne & Heitz* that domestic powers or obligations to withdraw decisions, must be applied in conformity with EC law and that the scope of the discretion granted by national law is limited? In this judgement too the ECJ accepted – in principle – the powers or obligations under domestic law to withdraw decisions, as they appeared from the Dutch reference judgement.

However this reference judgement related only to the type of decision involved in the main proceedings: namely decisions that are *unfavourable* for the addressed party. With respect to the withdrawal of *unfavourable* final decisions Dutch statutes have generally no provision. Nevertheless the courts assume a general – discretionary - power of administrative authorities to re-examine and to withdraw this type of final decisions. The discretion to decide whether or not to withdraw an unfavourable administrative decision, which was assumed to exist in cases of this kind before *Kühne & Heitz*, will, if the four criteria of *Kühne & Heitz* now are fulfilled, presumably be understood as an *obligation* (except where withdrawal would be contrary to the interests of third parties). To this extent the discretion under domestic law to decide whether or not to withdraw a final unfavourable administrative decision appears to have been limited as a consequence of *Kühne & Heitz*.

12.8. However under Dutch law, if the final administrative decision is favourable to the addressed party, the scope for withdrawal is - as explained in the answer to Question 1 - limited, as a consequence of either specific statutory provisions or the principles of proper administration. It does not appear to follow from the *Kühne & Heitz* and *i-21 Germany* judgements, that powers to withdraw final *favourable* decisions must be extended by means of interpretation in conformity with EC law, in a manner that is disadvantageous to the addressed party.

However, this might be different in a case where (i) the final administrative decision is favourable to the addressed party but disadvantageous to a *third* party and (ii) that third party applies for withdrawal of this decision.

¹⁴ Dutch courts very rarely consider the four criteria have been fulfilled, which obliges the administrative authority to re-examine its final administrative decision: court of appeal Amsterdam 12 June 2007, AB 2008, 21 (tax case).

¹⁵ One of many examples: Industrial Appeals Tribunal 28 November 2007, AB 2008, 20.

There are no known judgements of Dutch administrative courts that throw light on these various situations.

13. Do the provisions of national law prescribe any time limit for submitting a motion to revoke a final administrative decision or re-examine the judicial proceedings when the challenged decision or the judgement is contrary to Community law? Do you think that the fourth prerequisite for the revocation of final administrative decisions set in the Kühne case – that the person concerned files a complaint to an administrative authority immediately after becoming aware of the judgement of the ECJ – should have general application? (this issue has been raised in the Kempter case)

13.1. Dutch law provides:

- neither for a time limit for submitting an application to an administrative authority to withdraw its final decision,
- nor for a time limit for submitting an application to an administrative court for review its final judgement.

There are no plans to introduce such time limits in Dutch law.

13.2. *Final administrative decisions.* Until *Kühne & Heitz* Dutch administrative authorities always had *discretion* to decide whether or not to re-examine and withdraw their final decisions. It is assumed that partly in view of this fact, until so far, no actual need has appeared for the inclusion in Dutch law of a time limit for an application to an administrative authority for re-examination and withdrawal of a final administrative decision.

13.3. As a result of *Kühne & Heitz* this administrative discretion has, as far as re-examination of a final administrative decision concerned, become an obligation in cases in which all four criteria of *Kühne & Heitz* are fulfilled. That fact possibly might be a reason for still setting a time limit in Dutch law for the sake of legal certainty of both the administrative authority and other persons that have interest in keeping up the final administrative decision, particularly if administrative authorities under domestic or Community law were to become obliged to re-examine their final decisions in more kinds of cases. The time limit could, for example, be a period of six weeks after the applicant becomes aware or can reasonably be deemed to have become aware of the new fact(s) on which his application for re-examination is based.

13.4. *Final judgements of administrative courts.* The power of reviewing a final judgement is extremely limited by article 8:88 of the General Administrative Law Act. It is assumed that partly in view of this fact, until so far, no actual need has appeared for a time limit for an application to review a final judgement. If the power of reviewing a final judgement would be extended, that might be a reason for still setting a time limit. However, as it is explained in subsection 8.3 of this answer, there are no plans for such an extension.

By the way, it should be noted that as to sentences of criminal courts, since 1 January 2003, the Dutch Code of Criminal Procedure provides for a broader power of reviewing, namely reviewing the final sentence in order to afford just satisfaction as referred to in article 41 of the ECHR (see subsection 8.3 above). In that Code a time limit for the submission of an application for reviewing on that ground is included: under article 458, paragraph 2, of the Code that application must be submitted within three months of the date on which the relevant judgement of the European Court of Human Rights can be deemed to have come to the knowledge of the applicant.

14. What is the relationship (if any) under your national law and practice between the procedure for revocation of final administrative decisions and/or re-examining of the court's proceedings concerning the state liability for damages in case of infringement of Community law, on the other hand (cases C-46/93 and C-48/93 *Brasserie*, (1996) ECR I-1029 and C-224/01 *Köbler*, (2003) ECR I-10239)?
Especially:

- a) are there any formal links between the two types of proceedings?
- b) which national court is empowered to decide on state liability cases (above all, is it an administrative court)?
- c) what are the main factors influencing the choice of the person concerned between the two abovementioned types of proceedings? (e.g.: time limit, costs, burden of proof)
- d) can the two types of proceedings be undertaken concurrently?

INTRODUCTION: DUAL SYSTEM OF ACTIONS FOR DAMAGES

14.1. Question 14 concerns the relationship between two types of proceedings:
- the withdrawal proceedings dealt with in Questions 1-13 and
- actions for damages.

This relationship is complicated under Dutch law, mainly because when introducing the General Administrative Law Act in 1994 Parliament deliberately decided to leave litigants *free to choose* whether to bring claims for damages before the administrative court or the civil court. This *dual system of actions for damages* has produced complex situations. Only the most striking aspects of the subject matter are dealt with below.

14.2. To simplify matters, in this answer on Question 14 applications for review of final *court judgements* are disregarded because, as explained above, those applications can be successful only in very exceptional cases.

The explanation below is further limited to proceedings for withdrawal and actions damages that are instituted by the *addressed party* of the final administrative decision. Proceedings brought by other interested parties, such as neighbours or competitors of the addressed party, are also disregarded in this answer.

14.3. This answer to Question 14 is set up as follows:

- I. action for damages based on the alleged unlawfulness of a final administrative decision, after withdrawal of the decision or after other acknowledgement of the unlawfulness (subsections 14.4-14.7 of this answer)
- II. action for damages without withdrawal of the final administrative decision and without other acknowledgement of the unlawfulness: this action will generally fail (subsections 14.8-14.9 of this answer)
- III. action for damages without withdrawal of the final administrative decision and without other acknowledgement of the unlawfulness: this action may be successful in exceptional cases (subsections 14.10-14.11.1 of this answer)
- IV. action for damages: will the free choice between the administrative court and the civil court be abolished? (subsection 14.12 of this answer)
- V. action for damages based on the alleged unlawfulness of a final court judgement (subsections 14.13-14.14 of this answer)
- VI. free choice between a withdrawal proceeding and an action for damages? (subsection C of Question 14; subsections 14.15 of this answer)
- VII. may a withdrawal proceeding and an action for damages be instituted concurrently? (subsection D of Question 14; subsections 14.16-14.17 of this answer).

I. ACTION FOR DAMAGES ON ACCOUNT OF UNLAWFUL ADMINISTRATIVE DECISION, AFTER WITHDRAWAL OR ACKNOWLEDGEMENT OTHERWISE

14.4. If the person to whom the final administrative decision is addressed, wants to claim damages for an unlawful final decision of the administrative authority, he has the following options.

14.5. *Option 1:* the addressed person applies to the administrative authority to withdraw its final decision. If the administrative authority rejects this application, the addressed person may lodge an objection with this authority. If the objection is held to be unfounded, the addressed person can appeal to the administrative court. He can appeal to the administrative court and ask to annul the administrative decision on the objection and can ask to award him damages against the administrative authority. Under article 8:73 of the General Administrative Law Act, the administrative court may grant this kind of damages only if this court holds that the *appeal is well founded* and that it is plausible that the addressed person has suffered actual loss or damage as a result of the rejection of his application for withdrawal of the final administrative decision.

If the appellant thinks that the damages awarded are too low, he may apply to the *civil court* (i.e. the civil law sector of the district court) in order to obtain additional damages. This is possible only if the *administrative* court has held that the appeal is well founded. The addressed person may appeal against the civil judgement of the district court to a court of appeal (civil court) and may after then lodge an appeal in cassation to the Court of Cassation.

14.6. *Option 2:* the person to whom the final administrative decision is addressed, applies to the administrative authority for damages after this authority either on request or otherwise:

- (i) has withdrawn its final decision on the ground of its unlawfulness, or
- (ii) has acknowledged the unlawfulness of its final decision in another way.

This application must be lodged with the administrative authority within five years of the date on which the unlawfulness of the final decision is established and in any event within 20 years of the date of the final decision.

If the administrative authority rejects the application for damages, the applicant may appeal to the administrative court. The administrative court will proceed on the assumption that the final administrative decision is unlawful (because this has been acknowledged by the administrative authority) and will decide whether the appellant has actually suffered loss or damage as a consequence of the final administrative decision.

Again, if the appellant thinks that the damages awarded are too low, he may apply to the civil court to obtain additional damages. Like the administrative court the civil court will proceed on the assumption that the final administrative decision is unlawful and decide whether the appellant has actually suffered loss or damage as a consequence of the final administrative decision.

14.7. *Option 3:* the person to whom the final administrative decision is addressed, brings an action for damages before the civil court immediately after the administrative authority has, on request or otherwise, (i) either withdrawn its final decision on account of unlawfulness or (ii) otherwise acknowledged the unlawfulness of that final decision. Here too, the civil court will proceed on the assumption that the final administrative decision is unlawful and will decide whether the addressed person has actually suffered loss or damage as a consequence of the decision.

II. ACTION FOR DAMAGES WITHOUT WITHDRAWAL OF THE FINAL ADMINISTRATIVE DECISION OR ACKNOWLEDGEMENT OTHERWISE OF ITS UNLAWFULNESS: THIS ACTION WILL GENERALLY FAIL

14.8. If the person to whom the final administrative decision is addressed, institutes an action for damages without first applying to the administrative authority for withdrawal of the final administrative decision and without the administrative authority having acknowledged the unlawfulness of the final administrative decision in some other way, the action for damages is generally doomed to fail.

If in this case the addressed person brings an action for damages before the civil court, this court will hold that the final administrative decision has acquired 'formal legal force' and is therefore lawful. Therefore the civil court will reject the claim for damages. This applies even where it later turns out that the final administrative decision is incompatible with Community law.¹⁶

The administrative courts have followed this case law of the civil courts. If in this case the addressed person brings a proceeding for damages before the administrative court, this court will hold that the final administrative decision is 'legally inviolable' and that the lawfulness of the decision must therefore be assumed, so as there is no entitlement to damages.

14.9. If the administrative authority has rejected the application for withdrawal of its final decision and the applicant does not challenge that rejection under administrative law within six weeks or does so unsuccessfully, that rejection becomes final. Also in that case an action for damages instituted subsequently will fail on the ground that the administrative decision is final.

III. ACTION FOR DAMAGES WITHOUT WITHDRAWAL OF THE FINAL ADMINISTRATIVE DECISION OR ACKNOWLEDGEMENT OTHERWISE OF ITS UNLAWFULNESS: THIS ACTION IS SUCCESSFUL IN EXCEPTIONAL CASES

14.10. In *very exceptional cases* civil courts and administrative courts consider themselves entitled and obliged to *break through* the formal legal force or the legal inviolability of the final administrative decision and thus consider themselves entitled and obliged to examine whether or not the administrative decision is unlawful *despite the fact that the administrative decision has become final*.

14.10.1. The civil courts consider themselves bound to break through the formal legal force if there is a compelling reason to do so in view of the special circumstances of the case. The civil courts exercise great restraint in applying this exception owing to 'the important interests served by the principle of formal legal force'.¹⁷ The case law shows that civil courts consider such an exception possible mainly in two types of cases.

First, if it is attributable to the administrative authorities that the person, to whom the final administrative decision is addressed, has not used the administrative law remedies available to him. The Court of Cassation has accepted the need for such an exception on just a very few occasions.

Second, the civil courts are prepared to take an exception to the principle of formal legal force if the action before the administrative court which upheld the administrative decision, involved a violation of a fundamental legal principle, as a result of which the case was not dealt with fairly and impartially. No civil court judgements are known in which this exception has actually been applied .

¹⁶ Court of Cassation, 24 January 2003, JB 2003, 44 (Maple Tree)

¹⁷ Court of Cassation, 9 September 2005, NJ 2006, 93 (Valkenswaard)

14.10.2. Also the administrative court may hold in special cases, that the legal inviolability of a final administrative decision does not justify the finding that the decision is lawful. That court may feel justified in applying this exception, if the person to whom the final administrative decision is addressed cannot be blamed for not having used the administrative law remedies available to him.¹⁸

14.11. It has been argued in academic circles that also in certain other cases the fate of an action for damages should not be dependent on the judgement of the administrative court on the appeal that is instituted against the administrative decision before becoming final.

For example, according to some authors, the court hearing a claim for damages (either the civil or the administrative court) should make an exception to the principle of formal legal force in a case in which:

- (i) the criteria of *Kühne & Heitz* have been fulfilled, but
- (ii) still withdrawal of the final administrative decision would be unlawful towards third parties as their interests are paramount, and
- (iii) the findings at (i) and (ii) have been definitively established by the administrative court.

14.11.1. According to this academic opinion, here too a judgement of an administrative court rejecting the appeal against the refusal of an administrative authority to withdraw its final decision, should not prevent the civil or administrative court judging an action for damages:

- (i) from assessing the unlawfulness of the final administrative decision *only towards the addressed person*, and
- (ii) - if the latter court judges that this final decision is unlawful towards the addressed person - from awarding compensation for the loss or damage suffered as a consequence of this final decision.

However, it is unclear whether the case law of civil and administrative courts will move into the direction advocated by these academic circles.

IV. ACTIONS FOR DAMAGES: WILL THE FREE CHOICE BETWEEN ADMINISTRATIVE COURT AND CIVIL COURT BE ABOLISHED?

14.12. One final point should be made in this context. The complications described above are partly due to the legislator's decision, when introducing the General Administrative Law Act in 1994, to allow litigants *to choose* whether to bring an action for damages before either an administrative court or a civil court. As this *dual system* is causing many complications in practice, the Government has set up a study group consisting of judges, lawyers and academics. The study group recently published a draft bill limiting the scope for choice. However, as this draft bill will be the subject of wide-ranging debate, it is unlikely that the Dutch system will become less complex within the coming years.

V. DAMAGES FOR AN UNLAWFUL FINAL COURT JUDGEMENT

14.13. Under Dutch law the civil courts are competent to hear claims for damages for *a court judgement* that is unlawful, even if that court judgement is given by an administrative court. The possibility of an action for damages on account of an unlawful court judgement, was first recognised by the Court of Cassation in its judgement of 3 December 1971 (NJ 1972, 137). The Court held:

¹⁸ Administrative Jurisdiction Division of the Council of State, 7 March 2000, AB 227; Central Appeals Tribunal, 6 April 2000, JB 200/126.

'that only if, in the preparation of a judicial decision, such fundamental principles of law have been neglected that the case can no longer be said to have been dealt with fairly and impartially and if no legal remedy exists or has existed against that decision, the State may be held liable for a violation of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

As far as known, the State until yet has never been held liable on account of a court judgement infringing Community law.

14.14. The criteria of the ECJ's judgement in the *Köbler* case are of a rather different nature. It is assumed that these criteria may imply that State liability for unlawful court judgements now – as a result of *Köbler* - be more readily acknowledged than in the past, at any rate if that judgement encroaches upon Community law, possibly in other cases like infringements of basic human rights too.

VI. FREE CHOICE BETWEEN A WITHDRAWAL PROCEEDING AND AN ACTION FOR DAMAGES?

14.15. It has been seen above that, where a final administrative decision infringes Community law, the person to whom that decision is addressed in practice does not have a real choice between a withdrawal proceeding and an action for damages. If he wants to be successful:

- (i) he should apply to the administrative authority to withdraw its final decision and, if this authority rejects the application, appeal to the administrative court, or
- (ii) should request the administrative authority to acknowledge the unlawfulness of its final decision.

If the addressed person does not take one of these actions, both civil courts and administrative courts will generally assume - in judging any action for damages - that the final administrative decision is *lawful* and will therefore generally reject the action for damages on this ground already.

VII. MAY A WITHDRAWAL PROCEEDING AND AN ACTION FOR DAMAGES BE INSTITUTED CONCURRENTLY?

14.16. It follows from the above that, under Dutch law as it stands, withdrawal proceedings and actions for damages can be instituted concurrently before the administrative court in the cases to which the Questionnaire refers. Under article 8:73 of the General Administrative Law Act damages may be claimed in an appeal proceeding before the administrative court against either (i) the refusal of the administrative authority to re-examine its final decision or (ii) the refusal of the administrative authority to withdraw that final decision. Nonetheless, the court will generally refuse damages if the appeal to the administrative court (the application to the court to annul the administrative refusal) does not succeed.

14.17. If the person to whom the final administrative decision is addressed, would prefer to bring an action for damages before a *civil court*, he must first request the administrative authority to withdraw its final decision and, if this request is rejected, appeal to the administrative court. Only if the applicant succeeds, he can bring an action for damages before a civil court with any chance of success.

15. Please provide any other information concerning national law and its application (above all, the examples of relevant national administrative decisions or court's judgements) which could in your opinion be interesting for the discussed subject matter, but is not covered by the Questionnaire.

There is no other information of sufficient interest for the discussed subject.

ANNEXE

MOST RELEVANT ARTICLES AND SUBSECTIONS OF THE DUTCH GENERAL ADMINISTRATIVE ACT

Article 1:2

1. 'Interested'party means a person whose interest is directly affected by an order.

Article 1:3

1. "Administrative decision" (*besluit*) means a written decision of an administrative authority containing a public law act.

Article 4:6

1. If a new application is taken after an administrative decision has been taken rejecting all or part of an application, the applicant shall state any new facts that have emerged or circumstances that have altered.

2. If no facts or altered circumstances are stated, the administrative authority may, without applying article 4:5, reject the application by referring to its decision rejecting the previous application.

Article 6:7

The time limit for submitting a notice of objection or appeal shall be six weeks.

Article 7:1

1. A person who has the right to apply to an administrative court for review of an administrative decision, shall lodge an objection against the administrative decision before lodging an application for review, unless the administrative decision:

a...; b...; c....;

d. was prepared in accordance with division 3.4.

2. An application may be lodged for review of the decision on the objection in accordance with the regulations which govern the lodging of an appeal against the administrative decision against which the objection was made.

Article 7:11

1. If the objection is admissible, the disputed order shall be re-examined on the basis thereof.

2. In so far as the re-examination provides grounds for doing so, the administrative authority shall rescind the disputed administrative decision and, in so far as necessary, take a new decision replacing it.

Article 8:1

1. An interested party may apply to the district court for review of an administrative decision.

Article 8:2

No application for review may be lodged against:

a. a decision containing a legislative provision or a policy rule

Article 8:69

1. The district court shall give judgement on the basis of the notice of application for review, the documents submitted, the proceedings during the preliminary inquiry and the hearing.

2. The district court shall supplement the legal grounds on its own initiative.

3. The district court may supplement the facts on its own initiative.

Article 8:72

1. If the district court holds that the application for review is well founded, it shall set aside all or part of the disputed administrative decision.

4. If the district court rules holds that the application for review is well founded, it may direct the administrative authority to take a new decision or to perform another act in accordance with its judgement, or it may determine that its judgement shall take the place of the annulled decision or the annulled part thereof.

5. The district court may set the administrative authority a time limit for issuing a new decision or performing another act and, if necessary, grant a provisional remedy ...

7. The district court may determine that, as long as the administrative authority does not comply with a judgement, a penalty to be fixed in the judgement shall be payable by the legal entity designated by the district court to a party designated by the district court....

Article 8:73

1. If the district court holds that the application for review is well founded, it may, at the request of a party and if there are grounds for doing so, order the legal entity designated by it to pay compensation for the damage suffered by that party.

Article 8:77

2. If the district court holds that the application for review is well founded, the judgement shall specify which written or unwritten rule of law or general principle of law is considered to have been infringed.

Article 8:81

1. If an appeal against an administrative decision has been lodged with the district court or, prior to a possible appeal to the district court, an objection has been made or an administrative appeal has been lodged, the president of the district court which has or may have jurisdiction in the proceedings on the merits may, on request, grant a provisional remedy where speed is of the essence because of the interests involved.

Article 8:86

1. If the request is made when an appeal has been lodged with the district court, and the president considers after the hearing referred to in article 8:83, subsection 1, that further inquiry cannot reasonably be expected to contribute to an assessment of the case, he may give immediate judgement on the merits.

Article 8:88

1. At the request of a party the district court may review a final judgement on the grounds of facts or circumstances:

(a) which took place before the judgement,

(b) of which the person who asked for a review of the judgement had no knowledge, and could not reasonably have had any knowledge, before the judgement, and

(c) which, had they been known to the district court previously, might have led to a different judgement.