

**Association of the Councils of State and Supreme Administrative Jurisdictions  
of the European Union**

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***“Preventing Backlog in Administrative Justice”***

**Report submitted by the delegation of  
the Council of State of the Netherlands**

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## **Preliminary observations concerning domestic law**

From 1 January 1994 onwards, applications for judicial review of administrative decisions are, as a rule, lodged with the administrative law sectors of the 19 district courts (*arrondissementsrechtbanken*), established throughout the country. However, statutes other than the General Administrative Law Act (*Algemene wet bestuursrecht*) may provide that application for review of certain orders/decisions or acts of the authorities lies to a specialised administrative court. The main specialised administrative courts are the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), the Central Appeals Tribunal (*Centrale Raad van Beroep*) and the Administrative Court for Trade and Industry (*College van Beroep voor het bedrijfsleven*), while the courts of appeal (*gerechtshoven*) and the Supreme Court (*Hoge Raad*) have administrative jurisdiction in so far tax cases are concerned. In addition, the Leeuwarden Court of Appeal has jurisdiction to hear appeals from the district courts concerning motoring fines (so called 'Mulderzaken').

The basic principle in administrative jurisdiction is that issues of fact may be examined at first instance and on appeal.

In principle, the Administrative Jurisdiction Division of the Council of State is the competent appeal court to review decisions of the district courts, unless the Social Security Appeals Act, the Administrative Jurisdiction (Trade and Industry) Act or the State Taxes Act provides that appeal lies to, respectively, the Central Appeals Tribunal, the Administrative Court for Trade and Industry or the tax division of a court of appeal (in the latter case appeal for cassation on points of law lies to the Supreme Court).

Whatever the competent administrative court, its rules of procedure are governed directly or indirectly by the General Administrative Law Act.

For the purposes of this questionnaire it is worth noting that the House of Representatives recently passed the government's Crisis and Recovery Bill, which is intended to expedite the procedures for major infrastructure projects that are of great importance for employment and the economy. The bill is currently under consideration by the Senate and will not become law until the first of April 2010 at the earliest. Temporary measures designed to speed up the decision-making process including judicial review procedures will apply to the projects and categories listed in the bill. For example, disputes involving projects covered by the Crisis and Recovery Bill must be decided by the courts within six months of receipt of the

application for review. Applications for review must be adequately substantiated within the application period. Moreover, the court may disregard minor substantive defects in an administrative decision provided that this does not prejudice the interests of any of the parties. Whether or not a defect may be disregarded will no longer be determined by the nature of the rule that has been breached but by whether it is likely that interested parties will be prejudiced if the defect is disregarded. This means, in practice, that it must be established that, even if the legal rule concerned had been observed, the same order would still have been made. This is intended to speed up proceedings and, if possible, the final settlement of the dispute. The bill also stipulates that an interested party may invoke legal rules only if they are intended to also protect the interests invoked by him. Finally, the right of administrative bodies to apply for judicial review of decisions made by other such bodies is limited. The Administrative Jurisdiction Division of the Council of State is currently studying how the entry into force of the Crisis and Recovery Bill is likely to affect its caseload and what measures should be taken to ensure that cases can be disposed of within the rather short period prescribed in the bill.

## **I. Techniques for limiting the number of appeals**

*Question 1. Is legal representation required?*

There is no rule of administrative procedure that requires parties to obtain legal assistance or representation. The only exception is where party appeals for cassation in a tax dispute to the Supreme Court and the cassation appeal is heard orally. In such circumstances the parties must arrange for their case to be argued by counsel.

However, the parties are entitled to be assisted or represented in proceedings (section 8:24, subsection 1, General Administrative Law Act). In practice, frequent use is made of legal or authorised representatives. No special requirements are made of such representatives. However, legal or authorised representatives who are not qualified lawyers may be required by the court to produce a written authorisation as evidence that they are authorized to act for the person, institution or organisation they claim to be representing.

*Question 2. Is the Supreme Administrative Court's jurisdiction limited to points of law ('administrative cassation') or can it also rule as an appeals court with cognizance of points of fact?*

An appeal results in a fresh assessment of the dispute in so far as it has been referred to the appeal court.<sup>1</sup> This may involve deciding on both points of law and points of fact. Appeal for cassation of judgments of a court of appeal in tax cases lies to the Supreme Court. In social insurance law the Supreme Court plays a limited role as a court of cassation in certain disputes relating to the levying of contributions. As court of cassation the Supreme Court may rule only on how the lower court has applied the law. Unlike an appeal court it must, in principle, base its judgment on the facts as established in the lower court. The foregoing means that administrative jurisdiction in almost all cases is a jurisdiction on points of facts and law.

*Question 3. Is the right of appeal an absolute right?*

A right of appeal exists only against a final judgment. Interim decisions of a district court (i.e. on procedural issues or order reparation of certain defects of the challenged decision) may be appealed only where an appeal lies against the final judgment in the case concerned, i.e. only if the latter appeal is admissible.

The Dutch law of administrative procedure does not contain a system of leave of appeal.

The right of appeal exists in principle only for interested parties who have, where possible, exercised their right to apply to a district court for judicial review of the original decision (section 6:13 of the General Administrative Law Act, read in conjunction with section 6:24 of that Act). An interested party who has not applied to a district court for judicial review may appeal against the judgment of the district court, if the latter sets aside or partially sets aside the original decision and his interests have been adversely affected by the judgment. Such a party may, for example, be the administrative authority whose decision is overturned, but it may also be a third party. The interest on which the appeal is based must still exist. In addition, the appeal court will not give judgment solely because the case concerns an important matter of principle of an abstract character. Instead, the judgment must be capable of putting the applicant in a more favourable position. If the district court has accepted all the

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<sup>1</sup> However, in immigration cases the scope of review on appeal is very limited.

grounds for review or defences put forward by the party concerned, the latter does not have any interest in lodging an appeal. However, he does have an interest in challenging the rejection of (part of) his grounds by the district court, even if the court has quashed the original decision for other reasons.

Other provisions governing the admissibility of an appeal relate to the period within which it must be lodged, the payment of a court registry fee<sup>2</sup> and the procedural and substantive requirements to be fulfilled by the notice of appeal. For example, it must specify the judgment which is the subject of the appeal and, if possible, be accompanied by a copy of the appealed judgment. The appeal must also state the grounds of appeal and must be dated and signed. No opportunities for rectification exist if the appeal is not lodged in time or the court registry fee has not been paid in time. In those cases the appeal will be declared inadmissible unless there are extenuating circumstances for the failure to meet these requirements or unless with the approval of the court, a payment arrangement is made for the court registry fee. If the requirements for the notice of appeal itself are not met, the applicant is given the opportunity to rectify any defect.<sup>3</sup> If the defect is not rectified within the prescribed period, the court may rule that the appeal is inadmissible. The court tests on its own motion whether the admissibility rules have been complied with.

*Question 4. Are there penalties for abuse of appeal?*

If the administrative procedure is used in a manifestly unreasonable way, the applicant may be ordered to bear the costs of the proceedings. Use is deemed to be manifestly unreasonable if it can be established on the basis of special circumstances that it must have been quite apparent to the applicant that his appeal was entirely without merit. A factor of importance in this connection is the extent of the applicant's experience of conducting administrative proceedings. The mere fact that the applicant did not appear at the hearing does not mean that there has been a manifestly unreasonable use of procedural law. Similarly, where an applicant submits a fresh application and repeats positions previously taken in proceedings that have resulted in court judgments, this does not constitute manifestly unreasonable use if he is, in principle, entitled to make a new request at regular intervals and to seek legal remedies for its refusal.

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<sup>2</sup> Litigants challenging decisions on asylum applications and the detention of aliens with a view to extradition or deportation are exempted from the obligation to pay a court registry fee.

<sup>3</sup> Exceptions to the right of rectification may be made in special statutes, as for example in the Aliens Act 2000 and the Crisis and Recovery Bill mentioned in the introduction.

Legal persons or entities under private law, not being natural persons or administrative authorities, may be ordered to bear the legal costs of the other party at the request of the latter. This is possible only if the legal person or entity that has applied for judicial review or lodged an appeal is held to be entirely in the wrong.

In practice, however, orders for costs are hardly ever made against private parties.

Likewise, an administrative authority that lodges an appeal in circumstances where this constitutes manifestly unreasonable use of procedural law may be ordered to bear the costs of a respondent administrative authority. This would be the case where it must have been clear to the applicant authority that the appeal would be dismissed. Even in these cases, an order for costs may be made only at the express request of the respondent authority.

*Question 5. Do appeals have to go through an admission or authorisation procedure ('leave of appeal')?*

As already noted above in answer to question 1.3, appeals in administrative cases do not have to go through an admission or authorisation procedure.

## **II. Techniques to speed up proceedings**

*Question 1. Are there accelerated procedures for emergency situations?*

If a case is urgent, the court may direct that the case is to be dealt with using an accelerated procedure (section 8:52 of the General Administrative Law Act). The court may exercise this discretionary power either on its own motion or at the express request of (one of) the parties. It may then also shorten various procedural time-limits and restrict the scope of the preliminary examination. An example of a case in which it may be necessary to accelerate the procedure is where a party's interest would be extinguished if the procedure were to run its normal course because the disputed decision is in effect for only a limited period. The courts exercise this power with restraint. In a few cases, however, the legislator has provided that there is an obligation on the courts to accelerate the procedure. This applies, for example, in relation to appeals in cases concerning the admission and expulsion of aliens. And accelerated proceedings will also be obligatory for the category of cases covered by the Crisis and Recovery Bill referred to in the introduction.

If an accelerated procedure is requested, the court will have to decide between the interest which the applicant has in obtaining an accelerated hearing of his case and the interests of other parties involved in the action, in particular whether they have sufficient opportunity to put their case. Matters that must be taken into account are the complexity of the case, the relative positions of the parties and the state of the case law. The complexity of a case may be a reason for refusing a request for an accelerated procedure. The decision to accelerate a procedure or a refusal to do so is a procedural decision against which no independent right of appeal lies.

The parties may request that proceedings be accelerated at any stage. In the case of the appeal courts a request for accelerated proceedings must be submitted in writing and with reasons. The court must inform the applicant within two weeks of receipt of the request whether it will be granted.

If the procedure is accelerated the court may shorten the statutory period for paying the court registry fee, for submitting written observations and for submitting a reaction to an expert's report. Where the court itself sets a time limit, this may be shorter than normal. Nor will any further postponement be granted. The lower limit is the reasonable period within which the relevant act can still be performed. In addition, the court may determine that third parties will not be given the opportunity to submit their views in writing. The hearing of the case will also be expedited.

The court will hear the case in the normal way as soon as it considers that the case is no longer urgent or that this is necessary for making its decision with all due care.

With the exception of the obligatory accelerated proceedings in immigration cases, little use is made in practice by the Administrative Jurisdiction Division of the Council of State of the power to expedite proceedings.

*Question 2. Are there accelerated procedures for appeals that are clearly founded, unfounded or inadmissible?*

The court may switch to summary proceedings during the preliminary examination stage, until the parties are invited to appear in court. In such circumstances, the case is disposed of without a hearing. The power to do so exists where the court clearly lacks competence to hear the appeal or if the appeal is manifestly inadmissible, manifestly unfounded or

manifestly well-founded. The consent of the parties is not required. However, in the interests of due process it is necessary for the reaction of the other party to be taken into account in the assessment before the appeal is held to be well-founded.

As this method of disposing of cases deprives the parties of procedural rights, the requirement of 'manifest' is strictly interpreted. The outcome is said to be manifest where there is no reasonable doubt. The hearing need not be continued as the court can reach a decision without it. However, the court may still decide to hold a hearing even if the outcome is obvious.

Where the court has given a summary judgment without a hearing no appeal is possible, but interested parties may lodge an objection to the judgment.<sup>4</sup> Such an objection is heard not by a different court but by the same one, albeit sitting in a different composition (section 8:55 General Administrative Law Act). The sole issue considered in such proceedings is whether the court was right to give judgment without a hearing. No appeal lies against a judgment given on an objection to a summary judgment. If the objection is held to be well-founded, then normal proceedings resume. If the objection is held to be unfounded or inadmissible, the proceedings end without the possibility of appeal. The need for efficiency and speed are decisive here.

The Administrative Jurisdiction Division of the Council of State has decided that in view of the volume of cases concerning the admission and expulsion of aliens and related cases, they should, wherever possible, be dealt with in summary proceedings and thus disposed of without a hearing. An oral hearing is dispensed with if the grounds of appeal do not raise important issues involving legal uniformity, development of the law or protection of rights in a general sense, and do not raise complicated issues of fact. Under the Aliens Act 2000 the Division may confine itself in such cases to considering the grounds of appeal and giving a summary judgment upholding the appealed judgment. The Division exercises this power to give summary judgments in all cases concerning the admission or expulsion of aliens that are suitable and not merely in exceptional cases.

*Question 3. Are there accelerated procedures for cases that should be straightforward?*

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<sup>4</sup> Where an appeal in an immigration case has been disposed of in summary proceedings, no objection may be lodged to the judgment.

In cases in which a public hearing would serve little purpose the court may decide to dispense with an examination of the case in court if the parties agree. For a description see the answer to question II.6.

It should also be noted here that where application is made for an interim injunction in administrative proceedings the interim relief judge of the district court or the President of the supreme administrative court, as the case may be, may decide that he can give judgment immediately in the proceedings on the merits. This is known as 'short-circuiting'. In practice, it substantially speeds up the proceedings.

The interim relief judge or the President may exercise this power if he considers that further consideration of the case could not reasonably be expected to contribute to an assessment on the merits. The case law of the Administrative Jurisdiction Division of the Council of State shows that the deciding factor is whether the information provided in writing and at the hearing is of such a nature that it may be assumed that further inquiries would not yield any relevant new data. The reason for conferring this power on the interim relief judge or the President is that it benefits legal protection, legal certainty and procedural efficiency, if the parties do not have to wait for judgment longer than is strictly necessary. It is not necessary for the parties to have given consent for the immediate disposal of the case by the interim relief judge of the district court. The same holds good for the President of a special administrative court, except when the latter hears the case at first and final instance. In case of appeal to the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Administrative Court for Trade and Industry immediate disposal is possible only if the application for judicial review was heard by a single-judge chamber of the district court or by the interim relief judge of the district court. Moreover, the possibility of short-circuiting exists only if a hearing is held.<sup>5</sup> If a decision on the merits has been taken in that same judgment, the application for an interim injunction will generally be refused on the ground that it is no longer necessary since judgment has already been given on the merits.

*Question 4. Are appeals heard by a single judge?*

The basic rule is that appeal cases are dealt with by a full-bench chamber. A full-bench chamber consists of three judges. Cases may be referred from a full-bench chamber to a single-judge chamber and vice versa at any stage of the proceedings. The General

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<sup>5</sup> Short-circuiting is possible in appeal proceedings in immigration cases even where no hearing is held.

Administrative Law Act provides no criteria for referral. Factors that can determine whether a case should be dealt with by a full-bench chamber or can be referred to a single-judge chamber are the complexity of the legal issues or the facts, expected differences of opinion and whether the case involves the public interest.

In the practice of the Administrative Jurisdiction Division of the Council of State, cases are referred to a single-judge chamber or full-bench chamber at an early stage of the preliminary examination at the proposal of the President or his deputy.

The accelerated and summary proceedings discussed above at II.1 and II.2 would generally be more suited to a hearing by a single-judge chamber in view of the factors that determine whether a case can be dealt with by a full-bench chamber or a single-judge chamber. To this extent referral to a single-judge chamber can help to speed up proceedings.

*Question 5. Can the obligation to provide grounds be relaxed? (e.g. relaxation of the obligation to respond to all arguments or statements).*

The judgment contains the grounds of the decision. How the obligation to provide grounds is implemented is left to the court. The statement of reasons must make the decision clear and, insofar as possible, acceptable to all parties. If an application for review is held to be well-founded, the judgment must state what legal rule or general principle of law is considered to have been breached (section 8:77, subsection 2, of the General Administrative Law Act). The aim is to promote legal certainty and the development of the law. The Administrative Jurisdiction Division of the Council of State construes the case law of the European Court of Human Rights<sup>6</sup> as meaning that, although article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entails an obligation for courts to provide an adequate statement of the reasons for judgments, it does not require them to provide a detailed answer to every argument.

The scope of the dispute referred to a court is determined by the grounds put forward by the party challenging a decision or judgment, be it that there are cases where a court conducts a judicial review on its own motion. The grounds given for the judgment can relate only to the points of dispute submitted to the court and to what the court must otherwise decide on its own motion or concerning the course of the proceedings. Rulings and decisions which have

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<sup>6</sup> ECtHR 27 September 2001, Hirvisaari v. Finland, no. 49 684/099.

been expressly given without reservation by the court of first instance and have not been disputed are, in principle, excluded from appeal (unless they are reviewed by the court on its own motion). However, if such rulings and reasoning are inextricably bound up with the rulings and decisions that are the subject of the appeal, they may be included by the appeal court in its decision.

In providing grounds for its judgment the court must make clear what procedural, factual and legal issues it has considered, and explain the grounds on which it has arrived at its decision and how it has assessed the arguments put forward by the parties. The reasons given for a judgment should be clear, convincing and logical. The more a court develops the law in a judgment, the more important the judgment will be for future cases and the higher will be the standards applied to the court's reasoning.

In providing grounds for its judgment an administrative court bases itself on the undisputed facts relevant to its assessment of the case. Where relevant facts are disputed, the court must indicate how and by whom they had to be proved. It then explains on what grounds it has concluded that relevant facts have or have not been proved.<sup>7</sup> The administrative court assesses the established and proven facts in the light of written and unwritten legal rules (the legal framework). It also indicates how the assessment of the case is affected if disputed facts have not been proved. When applying legal rules, an administrative court must usually interpret them and is therefore to some extent developing the law.

The pressure to give judgment within the statutory period of six weeks (or, if the period is extended, twelve weeks) after the hearing may be an obstacle to providing detailed grounds for each judgment.

As noted above in relation to question II.2, the Aliens Act 2000 provides for the possibility of 'accelerated disposal' of appeal cases relating to the admission and expulsion of aliens and related cases. The Administrative Jurisdiction Division of the Council of State may confine itself in this connection to assessing the grounds of appeal and, if it considers that they do not warrant setting aside the appealed judgment, give an abridged judgment upholding the original judgment (section 91 of the Aliens Act 2000). The Division can thus uphold the appealed judgment of the district court without giving reasons. However, the Division may, in one and the same judgment, provide detailed reasons for rejecting one ground of appeal and an abridged ruling for the other grounds of appeal. This procedure has been developed in

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<sup>7</sup> This does not apply in immigration cases because, according to the case law of the Administrative Jurisdiction Division of the Council of State, determining the facts is primarily the responsibility of the administrative authority.

order to enable the Division to dispose of a large number of cases quickly and efficiently. The ordinary procedure is reserved for grounds of appeal in which questions are raised that need to be answered in the interests of legal uniformity, development of the law or legal protection in a general sense.

For reasons of procedural efficiency, the General Administrative Law Act gives the administrative courts the power to give judgment orally (section 8:67 of the General Administrative Law Act). An oral judgment must in any event consist of two elements: the decision and the grounds for it. Unlike written judgments, oral judgments are not expressly required to specify the legal rule or legal principle that has been breached in cases where the appeal is held to be well-founded. In view of the nature of oral judgments the grounds and account of the proceedings will be shorter than in written judgments, which saves time.

*Question 6. May procedures be conducted entirely in writing?*

Where an administrative court decides that it does not wish to exercise its right to switch to summary proceedings (as described above in answer to question II.2), but considers that a hearing would very probably serve little purpose, it may determine, with the parties' consent, that no hearing will be held (section 8:57, General Administrative Law Act). This also applies to appeals to the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Administrative Court for Trade and Industry and to appeals to the tax division of the Court of Appeal. However, hearings may not be dispensed with in the case of appeals in cassation to the Tax Chamber of the Supreme Court. The Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Administrative Court for Trade and Industry have adopted the guideline that, in cases where they decide not to hold a hearing, the parties should be given six weeks' notice of the closure of the preliminary examination and when judgment will be given.

If the court considers that a public hearing would serve little purpose, the parties may be asked for their consent to dispense with the hearing.<sup>8</sup> Consent may not be asked for if the parties do not yet have all the case documents. The court will generally make such a request to the parties in writing. If the parties agree to waive a hearing, this does not mean that the court is obliged not to hold a hearing. The parties may also themselves request the court not

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<sup>8</sup> The consent of the parties is not required for dispensing with a hearing in cases involving extension of detention of aliens with a view to extradition or deportation. It should also be noted that although a judgment of a district court concerning the imposition of a detention order can be appealed, the same is not true of a judgment concerning the extension of such an order.

to hold a hearing. The court is entitled to refuse such a request. The parties' consent to dispensing with a hearing will generally be given in writing, although this is not obligatory. The consent must in any event be express and unconditional. If documents are lodged after consent has been obtained, fresh consent should be requested for waiver of the hearing in the light of the new documents.

*Question 7. Can a party not cooperating with the procedure be penalised?*

The parties are not obliged to appear at the hearing unless the court has summoned them (section 8:59, in conjunction with section 8:31, of the General Administrative Law Act).

If a party fails to comply with the summon to appear, provide information, lodge documents or cooperate in an examination by an expert appointed by the court, the court may draw such conclusions from this as it sees fit (section 8:31 of the General Administrative Law Act). A defence that is not lodged in time may still be taken into account in assessing the appeal if it is received ten days before the hearing and is immediately sent to the other parties. If the case is disposed of without a hearing a statement of defence that is lodged out of time may still be included in the assessment if it has been lodged before the closure of the examination of the case.

The court is free to apply whatever sanctions it considers appropriate. For example, if alleged facts remain uncertain the court may interpret them to the detriment of the party in default by holding that they have been proved or not proved, as the case may be. If an applicant fails to comply with the procedure, the court may hold that the appeal is unfounded and, if the use made of administrative procedure is manifestly unreasonable, order the applicant to bear the costs of the proceedings. An appeal may also be held to be inadmissible in such a case, but only if this would be reasonable in view of the nature of the applicant's default. A factor in this connection is whether the actions of this party make it impossible to assess the dispute properly. Before sanctions are imposed for a breach of the obligation to provide information, the court must give the relevant party the opportunity to submit the missing documents or to indicate why certain documents have not been submitted.

*Question 8. Do judges raising legal arguments of the court's own motion have to order deliberations to be begun again?*

By reviewing an administrative decision on its own motion the court fulfils its obligation of assessing compliance with certain legal rules, even if they have not been invoked by the applicant. These are legal rules on matters of public policy, such as those concerning issues of jurisdiction or admissibility.

In view of the requirements of due process and to ensure that parties are not taken by surprise, matters of public policy that have not been recognised by the parties and could determine or help to determine the outcome of the proceedings should be expressly raised during the hearing and the parties be given the opportunity to make known their position on them. If no hearing is held the parties may be given the opportunity to express their views in writing. To enable the parties to determine their position with care and to prevent a situation in which they are taken by surprise, their attention should, if at all possible, be drawn to any relevant public policy issues in good time before the hearing.

Besides a general obligation to review challenged administrative decisions for compliance with public policy rules, the court has an obligation to state additional legal grounds on which the judgement is based on its own motion. This is contained in section 8:69, subsection 2, of the General Administrative Law Act, which implements the maxim *curia ius novit* (the judge knows the law). Where a dispute is referred to an administrative court, it is the court's role to assess it by reference to the applicable objective law, including European Union law having direct effect and any self-executing treaty provision. Within the limits of the dispute the administrative court should, on its own motion, always identify and apply the law relevant to all the arguments put forward by the parties. The parties need not themselves invoke the law. It is up to the court to translate the parties' positions into correct legal arguments by amplifying the legal grounds.

Under the Aliens Act 2000, appeal cases involving the admission and expulsion of aliens and related cases are strictly demarcated by the grounds of appeal put forward by the applicant. The Administrative Jurisdiction Division may confine its judgment to an assessment of the grounds of appeal that have been lodged. These rules on grounds of appeal as contained in the Aliens Act 2000 therefore qualify the maxim *ius curia novit*. In immigration cases the Division is not obliged to complement legal grounds, but may do so if it deems this desirable.

*Question 9. Does the procedure allow for the deadlines for submitting statements and documents to be shortened?*

Deadlines are shortened only where the total period of dealing with the case has been shortened by law or in case accelerated proceedings take place, as described in answer to question II.1.

*Question 10. Does the procedure allow for the use of electronic technology?*

The General Administrative Law Act does not provide for the possibility of using electronic technology to lodge an application.<sup>9</sup> A bill providing for a new section 8:40a was presented to the House of Representatives in February 2009. Under this section, part 2.3 of the General Administrative Law Act, which deals with electronic communications in relation to administrative matters, is declared applicable to communications with the administrative courts. This will allow parties to communicate digitally with the administrative courts in proceedings. Case documents and notices of appeal can then be sent electronically.

*Question 11. Is a case inadmissible if statements, written submissions and documents are not submitted in time?*

Failure to submit additional arguments, documents or defences within the period prescribed by the court for this purpose does not result in an appeal being declared inadmissible, but documents received after the expiry of the prescribed period may be excluded from consideration. Arguments raised or documents lodged at a late stage of an appeal may not be disregarded without any reason being given; the fact that they are being disregarded must be explained. Due process is a factor in this connection.

In general, further documents may be submitted with the notice of appeal or later in the proceedings to explain grounds of appeal lodged in good time. The basic rule is that the further the proceedings have progressed the less reason there is to include a document in the assessment. To ensure the proper course of proceedings the legislator has set the deadline for submission of additional documents at ten days before the hearing (section 8:58 of the General Administrative Law Act). The courts must draw the parties' attention to this deadline in the notice to attend the hearing. However, the ten-day period is not a hard-and-fast limit: the court is entitled to decide that, for reasons of due process, documents that are lodged within the period of ten days before the hearing or even at the hearing may be admitted. Conversely, even where documents are submitted before the ten-day period the court may decide that they are of such a length that it is necessary to postpone the hearing or refuse their admission for reasons of due process. However, there must be good reasons for such a refusal. If documents can be assumed to be known to the parties and provided

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<sup>9</sup> However, section 2:15 of the General Administrative Law Act does provide that an objection or application for review may be lodged electronically (by email) with an administrative authority (administrative review), provided that the authority concerned has indicated that this possibility exists.

that the principle that both parties should be heard is observed, due process need not prevent the inclusion of documents submitted within the ten-day period. In deciding whether a party should be given the opportunity to submit documentary evidence at the hearing despite the objections of the other party, the court must balance the interests of the party submitting the document (and the reasons why he did not do this at an earlier stage of the proceedings before the court of fact) against the interest of the other party to have sufficient facilities for his defence and the public interest in ensuring fair administration of justice. The extent to which the party concerned is to blame for the late submission plays a role. It is necessary to ensure that the other party is not unreasonably prejudiced in putting his case. In a situation in which a party wishes to submit documents without prior announcement at the hearing when the other party is not present, it is in the interests of due process that the court should base its decision on the contents of these documents only if the other party has been given the opportunity to inspect and comment on them. The situation would be different only if the other party's interests cannot be jeopardised by the fact that it has not been given this opportunity or if it must bear the risk of being absent. Examples would be where the absent party was in possession of the document some days before the hearing, its existence was evident from the case file or the content of the document was apparent in some other way from the case file.

The guideline applied by the appeal court judges is that documents that are submitted less than ten days before the hearing are sent back or returned at the hearing, unless the court decides that the documents should be included in the assessment of the case.

If documents are submitted by a party after the ten-day period and are admitted by the court, the other party or parties should be given an adequate opportunity to comment on them. If the document is of such a size and content that a reading break or other improvisation at the hearing is not sufficient, it may be necessary in the interests of due process for the court to exercise its power to stay or reopen the examination of the case in court trial in order to give the other party or parties the opportunity to express their views on the content of the document.

The statutory ten-day period does not exclude the possibility that further facts and circumstances may be raised at the hearing which have not yet been dealt with at a previous stage of the proceedings. At the hearing the court may conceivably discover as yet unknown facts and circumstances relevant to the judgment, either as a result of its own questions or because a party suddenly remembers or realises the relevance of a fact or circumstance prompted by the proceedings in court. Such facts and circumstances should be able to play a

role in the proceedings, provided that this would not unreasonably hamper the other party in conducting its case.

*Question 12. Is there a limit to the number of statements or written submissions?*

The Dutch law of administrative procedure does not limit the number of documents that may be submitted to a court or appeal court. Provided the documents are lodged in time (i.e. more than ten days before the hearing or in keeping with the requirements of due process), the documents will be taken into account in the appeal. Copies of documents lodged by a party are sent by the court registrar to the other parties. Very large documents need not be sent and parties will instead be given the opportunity to inspect them at the court registry during a period fixed by the court. In such a case the parties are entitled to take copies or extracts on payment of a fee.

*Question 13. Is it compulsory to submit a summary statement?*

Before the examination is concluded at the hearing the parties are entitled to make a closing statement (section 8:65 of the General Administrative Law Act). This gives them the opportunity to react to what the other party or parties have put forward or to explain once again their position on what has occurred in court. This right may not be used to raise issues not previously dealt with at the hearing. The parties are not obliged to make a closing statement.

*Question 14. Is it possible to submit new documents, written submissions or written observations once the investigation has been closed?*

The guideline applied by appeal court judges is that unsolicited documents submitted after the examination at the hearing has closed are refused and returned to the party concerned. However, the court may decide that unsolicited documents submitted by a party after the examination of the case has been closed may nonetheless be admitted to the proceedings. In the interests of due process the court should then exercise its power to reopen the examination in order to give the other party or parties the opportunity to express their views on the document (section 8:68 of the General Administrative Law Act). If the court reopens the examination, it will not always be necessary to resume the hearing. In such

circumstances a new hearing need not be held if the express consent of the parties has been obtained.

*Question 15. Can new arguments be raised during the procedure?*

A person applying for judicial review is not limited to the grounds put forward by him in the administrative objection to the original decision. If the application for judicial review is admissible, the applicant may raise any grounds he wishes, even if they have not been previously mentioned in the administrative objection. In other words, the grounds or arguments raised in the administrative stage are not 'funnelled' through to the judicial review stage. However, a reservation is sometimes made in the case law that any new grounds must relate to a part of the original decision that has previously been challenged. This is in keeping with the purpose of section 6:13 of the General Administrative Law Act. According to this provision, no application for judicial review by an administrative court may be made by an interested party who can reasonably be held responsible for not having stated his views or not having lodged an objection to or an application for administrative review of the original decision. This provision is intended to provide an express basis for excluding not only people who have culpably failed to pursue their case at an earlier stage of the proceedings but also arguments relating to parts of the original decision not challenged during the objection procedure. The intention of section 6:13 of the General Administrative Law Act is to ensure that new particulars, grounds for judicial review and documentary evidence relating to a part of the original decision raised during the administrative stage can still be raised in the judicial proceedings. The section does therefore provide for a 'funnel' between the different stages: a person applying for judicial review cannot submit an argument about an independent part of the original decision that could also have been raised in the administrative stage. The case law on the subject is in a state of flux. It is still not always clear what constitutes part of a decision.

In order for an application for judicial review to be admissible it should contain the grounds on which it is based (section 6:5, subsection 1, opening words and (d) of the General Administrative Law Act). No exception is made to this. However, an application may be declared inadmissible only after the applicant has been given the opportunity to remedy his omission. It is therefore sufficient if a pro forma application for review is submitted without reasons within the prescribed period. The grounds may then be added after the expiry of the submission period but within the period for rectification stated by the court. However, the Aliens Act does not provide for the possibility of rectification and an application for judicial review is declared inadmissible if it does not immediately state the grounds on which it is based. The Crisis and Recovery Bill referred to in the introduction also excludes the possibility of rectification in order to avoid delay and expedite the procedures concerned in

the public interest. resulting the latter cases, pro forma applications for judicial review will be immediately declared inadmissible.

If an application for judicial review is admissible, there is no rule nor settled case law preventing the reasoning of the grounds from being amplified after the expiry of the period for their submission, even at the hearing, provided that this is in keeping with due process. However, as a rule the parties are not allowed to amplify the reasoning of their application or defence, as the case may be, long after the exchange of written pleadings, unless they can justify this late reaction. Thus, the parties may not unnecessarily bring in fresh documents of any kind, particularly where these documents could have been of great importance to the written pleadings and could easily have been submitted with the application or defence. The court refuses to take cognizance of entirely new factual arguments or documentary evidence if this would exceed the bounds of due process on account of the stage of the proceedings at which they are introduced. However, if a new argument or information can be examined so easily that it does not require any repetition of procedural steps or necessitate a postponement or stay of the hearing, there is little objection to including it. If, on the contrary, assessment would cause delay the bringing in of the new argument or information will be accepted only if it is evidently relevant to the case, the party concerned is not at fault for the late submission, and his interest in having it included in the examination must prevail over those of the other parties in the speedy disposal of the dispute.

*Question 16. Can new arguments be raised on appeal?*

Since the introduction of the General Administrative Law Act in 1994 there has been a debate on the extent to which parties may submit arguments on appeal which they have not raised at first instance. The answer depends on what is considered to be the primary purpose of appeal proceedings and the function of judgments on appeal.

The purpose of appeal proceedings can be interpreted narrowly or broadly. According to the narrow interpretation, the sole purpose of an appeal is to challenge the judgment of the district court and the main function of the appeal court is to review that judgment. However, according to the broader view an appeal gives the applicant an entirely new chance and enables the appeal court to a fresh review of the challenged decision made by the administrative authority.

In recent years the case law of the Administrative Jurisdiction Division of the Council of State has tended to play down the idea of the new chance and has instead focused on checking the judgment of first instance for errors. The appeal court reviews the correctness of the district court's judgment, in so far as it has been challenged. In consequence, the general rule is that no new arguments may be raised on appeal (this includes arguments based on the ECHR or the law of the European Union). This is known as the 'funnel effect'. The only exceptions are where facts are submitted for the first time on appeal which could not have been raised before the district court and where grounds of appeal are put forward that are inextricably linked with grounds for review already raised before the district court.

By contrast, the other supreme administrative courts have been more inclined to the 'new chance' approach, under which they focus on the original decision made by the administrative authority. As this involves a full reassessment of the decision, new arguments can, in principle, be raised on appeal, even where they could also have been raised at first instance. The position taken by the Central Appeals Tribunal has been that new arguments may be raised on appeal provided the other party has sufficient opportunity to enter a defence to them and the arguments have not been deliberately omitted at first instance. In this approach the only limitation on raising new arguments on appeal is therefore compliance with the requirements of due process.

The two different approaches have, however, lost their sharpness recently and have approached each other to a large extent. In any case, further arguments in support of a submission already made at first instance are admitted . Grounds submitted at first instance may be substantiated on appeal by means of new arguments. Within the limits of the grounds for review raised before the district court, the Administrative Jurisdiction Division of the Council of State, too, allows evidence of new facts to be submitted and hence new factual arguments to be raised. However, the factual basis of the case put forward on appeal may not differ in essence from that which underlay the ground for review argued before the district court.

*Question 17. Are there appeal channels for accelerating the course of the procedure (case of Kudla v. Poland)?*

According to the case law of the European Court of Human Rights, the member States have an obligation under article 6 in conjunction with article 13 of the ECHR to provide effective protection under national law against failures to ensure a hearing within a reasonable time,

even where these are wholly or partly caused by the courts themselves.<sup>10</sup> The member States can comply by providing a remedy which can be used:

1. either to speed up excessively protracted proceedings;
2. or to obtain compensation (retrospectively).

It is apparent from the admissibility decisions of 3 March 2009<sup>11</sup> in the case of *Voorhuis v. the Netherlands* and 16 June 2009 in the case of *Mol v. the Netherlands*<sup>12</sup> that the Dutch Government has recognised that there is no effective remedy under Dutch civil law against breaches of the 'reasonable time' requirement within the meaning of article 6 of the ECHR and has announced that draft legislation is being prepared to provide a remedy in such situations. Although these were civil cases, the undertaking given by the Dutch Government is not confined to civil proceedings. The legislator is at present preparing legislation providing a remedy in administrative proceedings.

The European Court of Human Rights considers that a remedy to accelerate proceedings is the most effective solution. However, it does not exclude the possibility that a State may opt to provide only a compensatory remedy. A remedy of the latter kind already exists in Dutch administrative law. In response to a complaint an administrative court will express a view on a possible breach of the reasonable time requirement and will also extend this to its own contribution to the delay. Simply complaining about the length of the proceedings is in itself sufficient to be construed as a claim for failure to meet the reasonable time requirement under article 6 of the ECHR and as a request for compensation for non-pecuniary damage. Article 6 may be invoked at any stage of the proceedings. There is no need to expressly argue that the delay has caused stress or frustration. Nor is it necessary to provide evidence of the non-pecuniary damage.

To decide what constitutes a reasonable time it is necessary to view the proceedings as a whole. Any delay caused by the administrative authorities may be compensated in the first judicial stage if the district court takes steps to expedite the hearing. Where a district court receives an application for compensation for non-pecuniary damage on the grounds of breach of the reasonable time requirement, it must decide whether there has been a breach so far and, if so, must then determine the amount of the compensation. As stated above, a factor to be taken into account is that delay in one phase of the procedure may be offset by speeding up the next phase of the procedure. However, the district court is not entitled to

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<sup>10</sup> ECtHR 26 October 2000, *Kudła v. Poland*, appl.no. 30210/96.

<sup>11</sup> ECtHR 3 March 2009, *Voorhuis v. the Netherlands*, appl.no. 28692/06.

<sup>12</sup> ECtHR 16 June 2009, *Mol v. the Netherlands*, appl.no. 10470/07.

count on the fact that, if its own judgment will be appealed, the proceedings on appeal will be expedited. Nor may it refrain from expressing an opinion on the reasonable time issue solely because there still is the possibility of appeal. On appeal, the question is whether the district court made the correct decision in the light of the circumstances obtaining when it gave judgment. The appeal court assesses the district court's ruling on the alleged breach of the reasonable time requirement. Where the appeal proceedings have been expedited by the appeal court, this will be no basis for offsetting a breach of the reasonable time requirement existing at the time of the district court's judgment. This is because the district court was required to assess compliance with the reasonable requirement in connection with the objection and application for review independently of the length of time required for any appeal that might be lodged. It follows that compensation is not possible where the appeal court has expedited the appeal proceedings. Compensation is possible, however, in cases where the issue of the breach of the reasonable time requirement is raised for the first time during the appeal proceedings. The appeal court will then examine whether or not the reasonable time requirement has been breached at the moment it gives judgment.

Where the excessive length of proceedings is due to delay in the judicial stage or to the combined slow processing of the administrative and judicial authorities, the appeal court may make the observation in its judgment on the principal action that it suspects the reasonable time requirement may have been breached and then reopen the examination of the case by applying section 8:73 of the General Administrative Law Act in conformity with the provisions of the ECHR. This is because of the need for a coherent approach and for providing the authorities which might have to pay damages for the delay with the opportunity to participate in the proceedings and give their opinion about the issues of delay and damages. When the proceedings are resumed the only remaining issue is whether the reasonable period requirement has been breached and, if so, whether compensation for non-pecuniary damage should be awarded.

In its judgment of 4 June 2008 the Administrative Jurisdiction Division of the Council of State<sup>13</sup> had to consider whether the reasonable time requirement had been breached as a consequence of judicial slowness. At the time of the Division's judgment over five years and eight months had passed since the Minister of Transport, Public Works and Water Management had received the notice of administrative objection. The judicial review proceedings before the district court had lasted for over three years and five months. On the basis of these facts the Division held that the reasonable time requirement could be

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<sup>13</sup> Judgment of 4 June 2008, case no. 200703206/1. On this point see also the judgment of the Central Appeals Tribunal of 11 June 2008, case no. 05/1789 WAO.

presumed to have been breached. The Division concluded that a decision on the request for compensation contained in the complaint should be decided by applying section 8:73 of the General Administrative Law Act, read in conjunction with section 39, subsection 1 of the Council of State Act, as applied in conformity with the ECHR. It therefore directed that the examination of the case be reopened. By applying section 8:26 of the General Administrative Law Act the Division directed that the State of the Netherlands (i.e. the Minister of Justice as the authority politically responsible for the judiciary) should be joined as a party to the proceedings. Where there has also been delay by the administrative authorities, the authority which made the original decision would be summoned to give evidence.

Where an application for compensation for non-pecuniary damage on the grounds of a breach of the reasonable time requirement has been wrongly dismissed by the district court, this is a ground for quashing the judgment on appeal. In that case, in appeal the Administrative Jurisdiction Division of the Council of State will decide the issue of the delay and any damages without reopening the examination of the case and without sending the case back to the district court. In such a case there is no scope for compensation on the ground that proceedings have been expedited on appeal. However, the appeal court may set aside the judgment of the district court on the ground of unreasonable delay only after the Minister of Justice has had an opportunity to explain his position.

The principle of trial within a reasonable time set out in article 6 of the ECHR is also applied by the Administrative Jurisdiction Division of the Council of State in proceedings involving disputes about admission and expulsion of aliens and their naturalisation, in disputes concerning procedures under the Government Information (Public Access) Act, and in disputes between public bodies, although in those procedures article 6 is not applicable according to the Strasbourg case law. This application by analogy is based upon the argument that the principle of legal certainty requires that all judicial proceedings take place within a reasonable time.

*Question 18. What is understood by 'reasonable time' within the meaning of article 6 of the European Convention on Human Rights?*

As regards the question of what constitutes a reasonable time within the meaning of article 6 of the ECHR, a distinction should be made between cases involving a criminal charge and all other cases.

In a judgment of 22 April 2005,<sup>14</sup> which related to a criminal charge within the meaning of article 6 of the ECHR, the Supreme Court formulated a number of general principles and rules relating to the reasonable time requirement in cases involving administrative fines. According to the Supreme Court, the basic guideline is that a case involving a penalty cannot be deemed to have been disposed of within a reasonable time if the proceedings before one of the courts of fact have taken more than two years. This has the following effect at first instance and on appeal.

As regards proceedings at first instance, the basic rule is that they are not deemed to have been disposed of within a reasonable time if the district court does not give judgment within two years of the start of this period, unless there are special circumstances. This period includes the administrative objection stage, because in that stage the criminal charge already exists. In cases involving a criminal charge the relevant period may even include part of the primary decision-making stage, since the person concerned may face the serious threat of a penalty from the moment when he is charged.

As regards appeal proceedings, the basic rule is that the Court of Appeal should give judgment within two years of the lodging of the appeal, unless there are special circumstances.

The Administrative Jurisdiction Division of the Council of State and the Central Appeals Tribunal have adopted the position of the Supreme Court in cases relating to a criminal charge, i.e. in cases of an administrative fine. It follows that in cases involving administrative fines a reasonable time is, in principle, two years for cases that do not go beyond first instance and four years in total where appeal has been lodged. However, the Administrative Court for Trade and Industry applies different criteria in cases involving fines under the Competition Act. It has ruled that a reasonable time is 3.5 years up to and including the judgment at first instance (two years for the administrative objection procedure and eighteen months for the judicial review proceedings). According to the Administrative Court for Trade and Industry a reasonable time in the case of an appeal is two years. The explanation it has given for this longer period is the complex nature of proceedings under section 6 of the Competition Act.

In all other cases (i.e. cases not involving a criminal charge) the Administrative Jurisdiction Division of the Council of State considers, in principle, that a maximum of five years is a

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<sup>14</sup> Supreme Court 22 April 2005, no. 37894.

reasonable time for the total length of the proceedings (a maximum of one year for the administrative objection procedure, two years for the judicial review proceedings at first instance and two years for the appeal proceedings).<sup>15</sup> However, the facts of the case may justify longer periods.

The Central Appeals Tribunal, , on the contrary, applies a maximum period of four years (maximum of six months for the administrative objection procedure, eighteen months for the judicial review proceedings at first instance and two years for the appeal proceedings).<sup>16</sup> An argument in support of the shorter period of four years might be that social security cases require special attention on account of the case law of the European Court of Human Rights.

According to the case law of the Administrative Court for Trade and Industry, what is a reasonable time may differ according to the type of case. In a number of judgments<sup>17</sup> the court has adopted a standard for compensation for non-pecuniary damage where a reasonable time has been exceeded in tax reassessment cases. The basic presumption is that a period of four years for the total proceedings is reasonable (one year from the date of the application for reassessment to the date of the original decision, one year for the administrative objection procedure and two years for the judicial review proceedings that do not go beyond first instance). This gives a total of four years.

However, in two judgments of 25 June 2009 the Administrative Court for Trade and Industry adopted a different standard for other types of case.<sup>18</sup> In principle, three years is considered reasonable for the total length of the proceedings in other cases (one year for the administrative objection procedure and two years for the judicial review proceedings before the Administrative Court for Trade and Industry). The first judgment concerned the lawfulness of measures taken in connection with an outbreak of an infectious animal disease and the second a dispute relating to the Electricity Act 1998.

Where a court refers questions to the Court of Justice of the European Union for a preliminary ruling, it is considered reasonable for the period for hearing the case to be extended. This appears to be in conformity with ECHR case law, which disregards the period

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<sup>15</sup> These periods were expressly stipulated by the Administrative Jurisdiction Division in its judgement of 24 December 2008, case no. 200802629/1.

<sup>16</sup> These periods were expressly stipulated by the Central Appeals Tribunal in its judgement of 26 January 2009, LJN: BH1009.

<sup>17</sup> Judgments of 4 December 2007, LJN BB9360, 3 March 2009, LJN BH6281 and 28 April 2009, LJN BI5037.

<sup>18</sup> Judgments of 25 June 2009, LJN: BJ2560 and LNH: BJ2637.

taken by references to the Court of Justice for a preliminary ruling in determining what constitutes a reasonable time.<sup>19</sup>

Where a second round of proceedings is necessary as a consequence of the setting aside of an unlawful administrative decision, responsibility for the resulting delay is, in principle, attributed to the administrative authority. In other words, the period to be counted does not start anew. The only exception would be where the reasonable time requirement is not breached until the second round of proceedings.

According to the Administrative Jurisdiction Division of the Council of State and the Central Appeals Tribunal, a reasonable time should be calculated in the administrative objection stage from the date on which the administrative authority receives the notice of objection. The period between the application and the submission of the notice of objection is not relevant for determining what constitutes a reasonable time. Where an objection is lodged against a failure to take a decision, the period starts when the objection is lodged. In the case of judicial review proceedings the period starts when the application for judicial review is submitted, even if this is only a *pro forma* application.

Compensation for non-pecuniary damage is awarded for the period by which the reasonable time is exceeded. This delay is the act that causes damage.

#### Examples of cases in which sanctions have been imposed because the hearing did not take place within a reasonable time

The judgment of the Administrative Jurisdiction Division of the Council of State of 24 December 2008 in case no. 200802629/1 was a follow-up to its landmark judgment of 4 June 2008 in case no. 200703206/1 referred to above. In the latter judgment, the Division had held, in brief, that compensation should also be paid in cases where the court had not given judgment within a reasonable time. According to the Division, the request for compensation contained in the complaint should be decided by application of section 8:73 of the General Administrative Law Act in conformity with articles 6 and 13 of the ECHR. The trial was then reopened and the State (the Minister of Justice) was joined as a party. In its judgment of 24 December 2008, the Division considered that, although the judgment of 4 June 2008 did not mark the end of the proceedings, by the time of that judgment more than eleven years and two months had passed since the notice of administrative objection was received. The

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<sup>19</sup> ECtHR 26 February 1998 *Pafitis and others v. Greece*, appl. no. 163/1996/782/98; ECtHR 30 September 2003, *Koua Poirrez v. France*, no. 40892/98.

judgment had not therefore been given within a reasonable time. The Division held that the total length of the proceedings should not, in principle, exceed five years (maximum of one year for the objection procedure, two years for the judicial review proceedings and two years for the appeal proceedings). In this case there were no special circumstances to justify the delay. This meant that the proceedings had exceeded the limit by six years and two months. As the first decision on the administrative objection had not been taken until four years and three months after it had been lodged, the decision on the objection had been set aside by the district court and that judgment had been upheld on appeal, and as the appealed judgment of the district court and the present judgment had been given within a reasonable time, five years and eight months of the delay was attributable to the administrative authority which had taken the original decision. This meant, according to the Division, that the total delay was attributable to the administrative authority. The Division therefore held that the district court had been wrong to rule that the reasonable time requirement had not been breached. Substituting its judgment for that of the district court, the Division went on to hold that it followed from the case law of the European Court of Human Rights, in particular its judgment of 29 March 2006 in the case of *Pizzati v. Italy*, no. 62361/00, that if the reasonable time is exceeded, it can be assumed when deciding on compensation for non-pecuniary damage that this delay has caused stress and frustration. There was no evidence of special facts or circumstances that would justify an assumption that there had been no stress and frustration entitling the applicant to compensation for non-pecuniary damage. On the basis of a standard rate of €500 for each six-month period by which the reasonable time had been exceeded, the Division ordered the administrative authority to pay a sum of €6,000 to the applicant as compensation for the non-pecuniary damage suffered by him.

A similar position was taken by the Central Appeals Tribunal in its judgment of 26 January 2009, no. 05/1789 AWO; 08/4026 WAO-S. This judgment was a direct consequence of the Central Appeals Tribunal's own ruling of 11 July 2008, no. 05/1789 WAO. In this case it had voiced the suspicion that it had itself breached the reasonable time requirement and had held that the examination of the case should be reopened in order to decide on the application for compensation for the breach. The State of the Netherlands was joined as a party to the proceedings under section 8:26 of the General Administrative Law Act. The period that had elapsed between receipt of the notice of objection and the date of the judgment of the Central Appeals Tribunal on 11 July 2008 was over six years and three months. As this was in excess of four years it was necessary to determine for each level of jurisdiction whether the proceedings had lasted longer than justified. In its judgment of 11 July 2008 the Central Appeals Tribunal had held that this was not the case in relation to the administrative authority as an eight-month period was justified for the proceedings on the administrative objection,

and the same was held in respect of the proceedings before the district court. The fact that the proceedings before the Central Appeals Tribunal had lasted for too long was not in dispute between the parties and was also the view of the Tribunal itself. The Central Appeals Tribunal held that on the basis of the facts and circumstances a reasonable time for the proceedings as a whole was four years and two months. This meant that the reasonable period had been exceeded by over two years and one month. This resulted in a compensation award of five times €500 (i.e. €2,500). The Central Appeals Tribunal took into account in this connection that there was no evidence of special facts or circumstances that would justify an assumption that there had been no stress and frustration entitling the applicant to compensation for non-pecuniary damage. The Central Appeals Tribunal therefore ordered the State (i.e. the Minister of Justice), as being responsible for this delay by the judiciary, to pay this amount to the applicant.

Finally, it is worth noting the judgment of the Administrative Court for Trade and Industry of 3 March 2009, no. AWB 07/118. At the hearing it had been argued on behalf of the applicant that she had suffered emotional distress as a consequence of the protracted nature of the proceedings following a cull carried out at her farm and that the reasonable time referred to in article 6 of the ECHR had been exceeded. The Court construed this ground of appeal as an application for compensation for non-pecuniary damage suffered as a consequence of a breach of the reasonable time requirement. In the opinion of the Court the reasonable time requirement would not, in principle, be breached in such a case if the total proceedings had not taken more than four years, given the financial interests involved. As it is also apparent from the case law of the European Court of Human Rights that the length of the overall proceedings should be taken into account, the period ended, in the opinion of the Administrative Court, with the ruling on the substance of the dispute, i.e. on the date of the present judgment. In this case a period of over five years and ten months had elapsed. If the total proceedings have lasted for longer than four years in such cases it is necessary, when determining the damage suffered, to assess for each separate stage of the proceedings whether the delay was justified. The Administrative Court for Trade and Industry concluded that the administrative authority had exceeded the reasonable time by one year and seven months. The appeal was therefore held to be well-founded in so far as it concerned the breach of the reasonable time requirement as referred to in article 6 of the ECHR. Finally, the Administrative Court held that it followed from the case law of the European Court of Human Rights that if the reasonable time requirement was breached, it can be assumed when awarding compensation for non-pecuniary damage (other than in special circumstances) that the delay caused stress and frustration. No special circumstances had been alleged and

were also not considered to be present. The administrative authority was ordered to pay the applicant compensation of four times €500 (rounded up), i.e. a total of €2,000.

### **III. Performance criteria**

***Preliminary note:** the answers to the questions in Part III are given solely from the perspective of the Administrative Jurisdiction Division of the Council of State.*

*Question 1. Are there quantitative and qualitative criteria for measuring the 'performance' of court activity?*

No such criteria have been formally established. However, the following observations can be made in more general terms.

The quality of court activity is measured by reference to the functions of the court. The first function of the administrative courts is assessing the lawfulness of the challenged decision made by the administrative authority and resolving the dispute arising as a result of the decision as efficiently as possible by providing effective legal protection against that authority. In addition, the appeal courts are responsible for developing the law and play an important role in providing guidance to administrative authorities and district courts.

Both legal and practical aspects play a role in the work of the Administrative Jurisdiction Division in reviewing and promoting the legality and quality of decisions of administrative authorities and – in appeal - judgments of administrative courts. The qualitative aspects involve communicating with parties, making courtrooms easily accessible, holding hearings in public, supervising the conduct of hearings, ensuring that cases are disposed of in good time, publishing judgments, formulating judgments clearly and giving reasons for decisions, and arranging contact with the media,. In addition, the professionalism of the administrative courts plays a role in the quality of the judgments. For example, the composition and procedures of the courts, and the legal and judicial skills of the individual members should keep pace with developments in their judicial duties. This is why the Division attaches great importance to individual and collective training, internal and external consultation procedures and the processing and internal consideration of complaints.

Under section 32 et seq. of the Council of State Act, complaints may be made to the Vice-President of the Council of State about the manner in which a member of the Administrative Jurisdiction Division has conducted himself in carrying out the work of the Division, unless the complaint relates to a judicial decision. 'Judicial decisions' include decisions of a procedural nature which are taken in the course of the proceedings and decisions concerning procedural issues and the order at the hearing. Complaints about the content of judgments

are not possible either, because a system of general and special remedies exists for this purpose.

How the work of the judicial authorities is rated can be assessed by, *inter alia*, learned comments, surveys and reactions in legal journals and the media, letters of complaint, and client satisfaction surveys. At regular intervals the Administrative Jurisdiction Division of the Council of State and the Council for the Judiciary carry out a client satisfaction survey in respect of the work of the district courts and the supreme administrative courts.

In 2008 the Administrative Jurisdiction Division introduced a number of measures to safeguard and, where necessary, improve still further the quality of judgments, and intensified its links with the administrative law sectors of the district courts. For example, it drew up general rules on the drafting of judgments, including directions on how to organise them and how to provide sufficient reasons for the decisions taken. These rules will be constantly modified to take account of changing views on the optimal layout and reasoning of judgments. The rules are public but are not binding; they cannot be invoked by parties to the proceedings.

To promote legal uniformity and effective management of court activities, the appeal courts periodically hold informal consultations at both staff and judicial level.

Ensuring the quality of the reasons given for a decision is something to which the Administrative Jurisdiction Division attaches particular importance. If judgments are properly reasoned, this enhances the quality of the decision-making by the court and legitimates the court's decision in relation both to the parties and, in the case of appeals, to the court of first instance. The appeal courts have a special task in directing and guaranteeing the uniform interpretation of administrative law and developing it. The Division is therefore aware that if a judgment is to be properly reasoned, it is necessary to have an understanding of not only the fact of the specific case and the applicable law, but also of the general outline of the Division's own case law, as well as the case law of other high administrative courts and the administrative law sectors of the district courts, and last but not least the case law of Strasbourg and Luxembourg. This also helps to make the decisions more predictable. The Division has drawn up internal guidelines for the different modalities of providing and formulating the grounds of judgments.

An important yardstick for measuring the quality of the functioning of the courts is the time taken to dispose of cases. Unless the proceedings maintain a certain momentum and the

dispute is not only solved in a fair way but also within a reasonable time, every other effort to achieve quality is pointless. A short lead time is an essential aspect of the performance of the courts in terms of the public interest too. The General Administrative Law Act stipulates that judgment must be given in writing within a given period (section 8:66): namely six weeks after the end of the hearing. This period can be extended once for not more than a further six weeks. No sanctions exist, however, for failure to give judgment within the required period. The supreme administrative courts endeavour to give judgment within six weeks of the conclusion of the hearing. If more time is necessary the parties are informed that the period will be extended for a further six weeks. Thereafter the parties have to be kept informed of any unforeseen delay, the reasons for it and how the court will proceed. The courts may also give judgment orally after closing the examination at the hearing (section 8:67 of the General Administrative Law Act). Equally important is the time that lapses between the moment the application is filed and the moment the hearing takes place. In a few cases special legislation has introduced specific periods for decisions by administrative courts. These are indicative periods. For example, in the case of appeals in immigration and expulsion cases the Administrative Jurisdiction Division has to give judgment within 23 weeks of receipt of the notice of appeal. Various other special statutes provide for decisions to be given within 12 months and allow for an extension in special circumstances. However, they differ as regards the moment when this period starts, for example the date of the end of the period for appeal, the date of receipt of the notice of appeal and the date of receipt of the statement of defence. These statutes may provide for shorter periods in special circumstances. In appeal proceedings in cases covered by the Crisis and Recovery Bill referred to in the introduction, the Administrative Jurisdiction Division of the Council of State will have to give judgment within six months of receipt of the notice of appeal. The current period for disposing of appeals to the Administrative Jurisdiction Division is still one year. In practice, this means that appeals in cases covered by the Crisis and Recovery Bill will be accorded a certain priority.

As far as the “normal” cases are concerned and leaving apart external elements of the procedure which are beyond its control, the Division manages to bring cases of first and final instance at a hearing within one year, and cases in appeal within nine months. In the Division’s opinion the point has been reached where further improvements by the Administrative Jurisdiction Division in the disposal of cases will no longer be possible, given the complex logistics of the involvement of parties and their representatives, external experts and witnesses, and full-bench hearings, and such special complications as requests for preliminary rulings and the fact that certain judgments require a complicated process of coordination and drafting as they involve a lawmaking element.

*Question 2. Are there statistical data on the average length of proceedings?*

The statistical data are shown in diagram form. Only data pertaining to the average time taken between lodging of a claim and judgment by the Administrative Jurisdiction Division of the Council of State are given. No data on the average length of a procedure from the court of first instance to the final decision by the Administrative Jurisdiction Division of the Council of State is available.

### Lead times in weeks

	2005		2006		2007		2008	
	Main proceedings	applications for interim relief	main proceedings	applications for interim relief	main proceedings	applications for interim relief	main proceedings	applications for interim relief
Chamber 1	38	11	42	10	45	10	45	20
Chamber 2	35	7	34	6	37	8	40	7
Chamber 3	34	5	36	5	32	5	33	5
Chamber 4	14	2	9	2	8	3	11	2

Chamber 1: spatial planning; Chamber 2: environment; Chamber 3: other appeals; Chamber 4: appeals in asylum and immigration cases. The figures refer to cases in which a hearing was held for Chambers 1, 2 and 3 and without a hearing for Chamber 4.

*Question 3. Are there significant differences in the length of procedures depending on the nature of the case?*

See the table under question III.2. The differences in the length of procedures between Chambers 1, 2 and 3 and Chamber 4 is the result of the provision in the Aliens Act 2000 of 'accelerated disposal' of appeal cases relating to the admission and expulsion of aliens and related cases. See also question II.5.

*Question 4. Are lower courts authorised to request the Supreme Administrative Court's opinion on new points of law?*

Under the Dutch law of administrative procedure there is no provision for a court of first instance to refer an issue to an appeal court for an opinion pending resolution of a dispute submitted to it. If the court of first instance considers this necessary in order to give judgment, it may refer a question involving interpretation of Community law to the European Court of Justice for a preliminary ruling. It should be noted that the appeal courts as final instances are obliged to refer issues of interpretation to the Court of Justice for a preliminary ruling.

In 2004 the government announced a bill that would provide for the establishment of a joint chamber of the supreme administrative courts (i.e. the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Administrative Court for Trade and Industry), to which each of these supreme administrative courts may refer questions for preliminary rulings in appropriate cases in order to ensure the uniform interpretation and

application of doctrines and rules from the general part of administrative law, especially the General Administrative Law Act. This may result in some delay in the disposal of cases in which questions are referred for an opinion, but this is expected to affect only a small number of cases, partly because the question of whether a case should be referred to the joint chamber will be decided by the competent appeal court and not by the parties. Moreover, a preliminary ruling by the joint chamber may speed up other cases where the same issue is at stake.

*Question 5. What is the ratio between number of judges and the number of cases settled each year?*

No data available. The Administrative Jurisdiction Division consist of an average of fifty members, most of whom are part time judges, ranging from four fifth to two fifth, while some members participate in the work of the Division with an incidental frequency only. The Division disposes of an average of 10.000 cases annually.

*Question 6. What is the ratio between number of judges and the number of assistants?*

In the year 2009 the number of judges of the Administrative Jurisdiction Division of the Council of State was 35 converted to full time appointments (FTEs). The staff for the Division (first and sole instance and appeal) consisted of 186, 7 FTEs lawyers.

*Question 7. Are there specialised judges?*

In the Dutch system administrative jurisdiction various appeal courts exist, mainly the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal or the Administrative Court for Trade and Industry, but there are several other courts. This diversity is largely attributable to the historical background of the various fields to which administrative law is applicable. . To determine which court to approach for appeal against a judgment of a district court one has to consult the Council of State Act, the Social Security Appeals Act and the Administrative Jurisdiction (Trade and Industry) Act. The Social Security Appeals Act and the Administrative Jurisdiction (Trade and Industry) Act contain schedules listing a number of statutory schemes in respect of which the Central Appeals Tribunal and the Administrative Court for Trade and Industry respectively have jurisdiction to hear appeals

from judgments of the district courts. Appeals against district court judgments in respect of a statutory scheme not listed in one of these two schedules must be lodged with the Administrative Jurisdiction Division of the Council of State. This division of responsibilities means that by law the Administrative Jurisdiction Division is, in practice, the 'general' appeal court and that the Central Appeals Tribunal and the Administrative Court for Trade and Industry are 'specialised' appeal courts.

The Central Appeals Tribunal acts as the supreme administrative jurisdiction in cases involving social security and public service matters, pensions and student finance. Appeals may also be lodged with the Central Appeals Tribunal against court judgments concerning a decision or other act of an administrative authority in which a public servant is an interested party in his official capacity.

The Administrative Court for Trade and Industry acts as the supreme administrative jurisdiction in cases involving decisions based on certain statutes in the socio-economic field, in particular regulated markets and financial regulation. The main statutes in respect of which the Administrative Court for Trade and Industry is designated as the supreme administrative jurisdiction are the Competition Act, the Telecommunication Act, the Insurance Industry (Supervision) Act, the Credit System (Supervision) Act and the Securities Transactions (Supervision) Act.

In tax cases, appeal on a point of law (cassation) lies from a judgment of a court of appeal to the Supreme Court. The Supreme Court also plays a role – albeit a limited one – as a court of cassation in social insurance cases. Finally, applications for judicial review of decisions made under the Traffic Regulations (Administrative Enforcement) Act may be made to the limited jurisdiction sector of the district courts. Appeal then lies to the Leeuwarden Court of Appeal.

The Administrative Jurisdiction Division of the Council of State has four chambers. Chamber 1 is specialised in spatial planning law and Chamber 2 in environmental law. Chamber 3 acts as general appeal chamber and Chamber 4 hears appeals in immigration and expulsion cases. Each Chamber is subdivided into units and each unit often has its own specific area of expertise. The members of the Administrative Jurisdiction Division of the Council of State are divided among the different divisions and although they may work in more than one division, there is a certain degree of specialisation, for instance in the fields of spatial planning and the environment, but especially in the law of the European Union and the case law concerning the European Convention on Human Rights and Fundamental Freedoms..

The Central Appeals Tribunal has three chambers, each of which deals with appeals in a specific field. The justices of the Central Appeals Tribunal are divided among the three chambers and therefore have their own field of expertise. This specialisation does not have a basis in law, but is the result of internal work distribution.

The Administrative Court for Trade and Industry has two chambers that deal with more or less the same type of cases. Cases are heard either by a full-bench chamber consisting of three judges or by a single judge.