Increasing the efficiency of the administrative courts'powers: a Dutch success story?[1]

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Abstract

The judiciary does not only have to ensure a legally sound and well-conceived judgment, the courts also need to facilitate the proper functioning of society by means of an efficient and effective dispute settlement within a reasonable time. As a result of a joint effort between legal academics, the legislator and the judiciary good results have been achieved in the aim for a fast and definitive dispute resolution in the field of Dutch administrative law. The results we have achieved in the Netherlands could possibly offer inspiration for other countries as well. In this paper I would like to elaborate on the different instruments we have developed in the Netherlands and take a closer look at the possibilities for fast and definitive dispute resolution including the limits of the instruments we need to be aware of.

Keywords: *fast and definitive dispute resolution; administrative law; administrative loop*

1. Introduction

Through a substantive dialogue between litigation lawyers, the administration, the academia and the judiciary in the Netherlands the last seven years good results have been achieved in the aim for fast and definitive dispute resolution in administrative procedures. The reason for this dialogue was found in a political and broader: societal discontent with the deficient ability of the administrative courts to resolve disputes in a fast and definitive manner. The above mentioned discontent has substantially increased as a result of the rise of economic and financial crises. The results we have achieved in the Netherlands in the last 7 years could possibly offer inspiration for other countries as well. In this paper I would like to elaborate on the different instruments we have developed in the Netherlands and take a closer look at the

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possibilities for fast and definitive dispute resolution including the limits of the instruments we need to be aware of.

Previously, when the administrative court annulled the disputed order this mostly didn't provide the parties concerned any reassurance on how their legal case would finally end up. The annulment of the disputed order for the reason that it wasn't based on proper reasons or because the administrative authority didn't gather the necessary information concerning the relevant facts and the interests to be weighed, did not really mean that the litigant had actually won the case. On the part of civilians seeking legal protection an increasing discontent had been heard concerning the fact that most of the annulments turned out to be only Pyrrhic victories. The reason for that is that the administrative authority frequently replaced the annulled order by a substantively largely identical order. As a result the advocacy and the academia called for more attention for the importance of fast and definitive dispute resolution. This call was supported by members of the public administration and by the business sector, who very often had been experiencing uncertainty for many years as to the question if building or infrastructural projects could go through.

2. A legal obligation to definitive dispute resolution

The primary function of administrative courts still is and remains, of course, to examine the legality of the disputed order on the basis of the notice of appeal, the documents submitted, the proceedings during the preliminary inquiry and the hearing. Though, in addition other demands have increasingly been put forward: the judiciary does not only have to ensure a legally sound and well-conceived judgment, the courts also need to facilitate the proper functioning of society by means of an efficient and effective dispute settlement within a reasonable time.

The third periodic assessment of the General Administrative Law Act (GALA) in 2007 closely reflected the aforementioned concerns which turned out to be widespread amongst lawyers, administrators and legal academics. As part of the third assessment of the GALA legal academics put forward the proposal to exercise long-standing powers more frequently. As a result of a joint effort between the judiciary and the legal academics good results have been achieved in the following years. The legislator played an important role as well. He, for example, extended the scope of the power to uphold a disputed order (see below paragraph 3.4) and more importantly he provided the administrative courts with a new instrument: the administrative loop (see below paragraph 4). Moreover the legislator introduced by 1 January

2013 a new section 8:41a in the GALA stating that the administrative courts will resolve disputes as definitive as reasonably possible. This means that there is a legal obligation on the administrative courts to examine in any single case if a definitive dispute resolution is possible. The implication of such a legal obligation is that the Administrative Jurisdiction Division of the Council of State (AJD) when hearing an appeal from a judgment given by the district court, has to examine – at least when the applicant has lodged an appeal on that point – if the district court has met the requirements of section 8:41a GALA. The mere fact that the district court has not met the requirements of section 8:41a GALA already constitutes a reason to annul the judgment of the court.

3. Developments in the case-law of the Council of State

3.1 Exercising long-standing powers more frequently

Two of the most significant instruments in achieving the goal of a fast and definitive dispute resolution after the court having annulled the disputed order, is the power: a. to determine that all or part of the legal consequences of the annulled order or the annulled part thereof shall be allowed to stand (section 8:72 (3a) of the General Administrative Law Act (GALA)); or b. to determine that its judgment shall take the place of the annulled order or the annulled part thereof (section 8:72 (3b) GALA).

What kind of administrative legal-cases lend themselves to exercise the power to determine that the legal consequences of the annulled order shall be allowed to stand or to determine that the judgment shall take the place of the annulled order? In this regard it's important to stress that the essential and fundamental starting point is no longer that the aforementioned powers should not be exercised in other cases than those in which only one decision is legally permitted. In case some discretionary leeway still remains for the administrative authority after the disputed order having been annulled, the administrative court can determine though that the legal consequences shall be allowed to stand or determine that its judgment will take the place of the disputed order, if: **a.** in the meantime the administrative authority has weighed the interests involved properly; **b.** the results of the renewed weighing of interests could stand the test of the court and **c.** the interested parties have had the opportunity in court to express themselves on the renewed weighing of interests.

3.2 The legal consequences of the annulled order shall be allowed to stand

First of all, exercising this power may seem appropriate in case of an infringement of a procedural rule, if it is found that the infringement has been remedied and the disputed order can otherwise stand the test. For example, when the administrative authority failed to obtain an advisory opinion, where this is required by law. If the administrative authority subsequently obtains such an opinion during the proceedings, this rectifies the defect in the order identified by the court. Even when the court rules the appeal well-founded because of an infringement of a substantive legal rule, the possibility of determining that the legal consequences of the annulled order shall be allowed to stand, cannot be excluded. As mentioned before the AJD exercises this power even in cases in which some discretionary leeway seems to be left for the administrative authority to make an order with legal consequences that differ from those of the annulled one. When the court rules that the administrative authority when making the disputed order did not weigh the interests involved properly, it can determine, though, that the legal consequences of the annulled order shall be allowed to stand when the administrative authority holds on to the disputed order, in the meantime has weighed the interests involved properly and – very important – the interested parties have had the opportunity in court to express themselves on the renewed weighing of interests. The courts shall only then determine that the legal consequences of the annulled order shall be allowed to stand if after having weighed the interests involved properly the annulled order can otherwise stand the test.

3.3 The judgment of the court shall take the place of the annulled order

With regard to the power of the court to determine that its judgment shall take the place of the annulled order or the annulled part thereof, there have been similar developments in the case-law of the AJD. That means that even in cases in which some discretionary leeway seems to be left for the administrative authority after the order have been annulled, the possibility of determining that the judgment of the court shall take the place of the annulled order, cannot be excluded. In this context it is important to realize that the power to determine that the judgment shall take the place of the annulled order differs in one respect from the power to determine that the legal consequences of the annulled order shall be allowed to stand: in the latter situation the legal consequences will eventually be the same as those of the annulled order. When the court determines that its judgment will take the place of the annulled order, however, the legal consequences will differ in comparison with the legal consequences of the annulled order. The result can be that interests will be affected of those

persons who were not yet involved in the court proceedings so far. If that is the case, this will be a contraindication for exercising the power to determine that the judgment will take the place of the annulled order. This raises the question in which cases the AJD has exercised this power and the question as to what are its limits. Let us take the category of appeals against an order of the administrative authority that enforcement action is to be taken. For example an order in which the administrative authority states that in a particular case environmental legislation has been or is being infringed by a particular firm. The administrative order contains a time limit within which the firm may prevent enforcement action by taking measures himself. The firm appeals against this order stating that the given time limit is unreasonable short. When the AJD rules this appeal well-founded, the disputed order will be partly annulled as far as the time limit is concerned. Although the administrative authority has a discretionary leeway on this point, the AJD considers it to be possible in particular circumstances to determine that its judgment – in which it decides to extend the time limit with six months – will take the place of the annulled part of the disputed order. That is the case when during the hearing both the firm and the administrative authority turn out to support the proposal of the extension of the time limit.

4. A new instrument in the toolbox of the administrative courts: the administrative loop[2]

4.1 The importance of the administrative loop

It may be seen from the above that the more generous exercise of the two aforementioned mechanisms indeed increases the options for a fast and definitive dispute resolution, but at the same time we do have to note that in many other cases the constitutional position of the judiciary limits the exercise of these instruments. The need for further research by the administrative authority, for example, or the existence of a discretionary leeway for the administration hinders the exercise of the aforementioned powers by the administrative courts in principle. Therefore the legislator has provided the administrative courts with a new instrument by 1 January 2010: the administrative loop. The administrative loop is a statutory provision that regulates the power of the administrative courts to give the administrative authority *the opportunity* to rectify a defect in a contested order (or have it rectified) within such time limit as it may specify; moreover, the AJD, in cases in which appeals or appeals at

[2] This chapter is partly based on the report which the Dutch Council of State has drawn up in favour of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe). See http://aca-europe.eu/seminars/Brussels2012/Netherlands.pdf.

sole and last instance are instituted before her, may *instruct an administrative authority* to rectify a defect in a contested order (or have it rectified) within such time limit as she may specify. If the administrative court applies the administrative loop, it must give an interim judgment indicating as far as possible how the defect can be rectified. It should be noted that the power of rectification may not be exercised if interested parties who have not been party to the proceedings would be disproportionately disadvantaged as a result (see section 8:51a, subsection 1 GALA). It is clear from the case law to date that these provisions have posed little obstacle to the exercise of the power of rectification.

A great advantage of the administrative loop is that by giving the opportunity or the instruction to rectify the defect, the administrative court is able to resolve the dispute in a definitive way, without undermining the discretionary leeway of the administrative authority. A further advantage is that using the administrative loop saves a considerable amount of time compared to the situation in which the administrative court just annuls the disputed order. That is especially the case when the administrative loop is used in an appeal proceeding in second instance before the AJD.

4.2 The procedural embedding of the administrative loop

The administrative courts' specific power of rectification applies to any identified defect. However, it is only worthwhile exercising the power if the defect is capable of being rectified. To apply the administrative loop the court need not have the expectation that after rectification of the defect the authority will allow the order to stand or will give an order having the same effect. The court needs only to expect that the identified defect in the order can be rectified. If, for example, the defect concerns a failure to obtain an advisory opinion, where this is required by law, and the administrative authority subsequently obtains such an opinion, this rectifies the defect in the order identified by the court. However, the content of the advisory opinion may oblige the administrative authority to depart from its original decision. Application of the administrative loop may therefore mean that an order is given that differs from the order found to be defective. There is no point in exercising the power of rectification if the defect is not capable of being rectified, since in such a case the contested order would have to be quashed in any event.

The law does not prevent an administrative court from exercising its power of rectification at an early stage of the proceedings. Section 8:80b, subsection 1 GALA expressly

provides that an administrative court may also give an interim judgment even before the parties have been invited to attend a hearing. However, the AJD makes only very sparing exercise of its power to give an interim judgment before a hearing is held. As a rule, it is safer and more effective to do this only after a hearing. In its interim judgment the administrative court describes the defect it has identified in the order and indicates as far as possible how this can be rectified (see section 8:80a GALA). In the interim judgment the administrative court also determines within what time limit the administrative authority may or – in the case of the AJD – *must* rectify the defect. The administrative authority must notify the district court as quickly as possible whether it wishes to rectify the defect or have it rectified. If the administrative authority decides on rectification, it should notify the district court in writing as quickly as possible how the defect has been rectified. In the case of an appeal or appeal at sole and last instance to the AJD, the administrative authority should notify the court concerned as quickly as possible how the defect has been rectified (section 8:51, subsections 1 and 2 AWB). The administrative court will allow the other parties four weeks, calculated from the dispatch of this notification, in which to make known their views on how the defect has been rectified. This period may be extended where appropriate (section 8:51, subsection 3 AWB). The administrative court will notify the parties how the proceedings on the appeal or appeal at sole and last instance will be conducted. If a hearing has been held in a case in which interim judgment has been given, the administrative court may direct under certain conditions that no further hearing will be held.

Even if the administrative authority rectifies the defect, the AJD, in its final judgment, annuls the disputed order on account of the defect. However, the rectification may be a reason to direct that the legal consequences of the contested order will be allowed to stand in full. If the administrative authority has given a new decision in order to rectify a defect identified by the administrative court, the AJD will decide whether the new order is lawful; if the new order is held to be lawful, any appeal or application for review of the order existing by operation of law pursuant to section 6:19, subsection 1 GALA will be declared to be unfounded, thereby finally resolving the dispute. The old decision, which was held to be defective, is then quashed.

4.3 Constitutional concerns with regard to the administrative loop

4.3.1 Lessons to be learned from Belgium and Germany?

As I mentioned earlier, one of the advantages of the administrative loop is the respect for the separation of powers between the judiciary and the administration in the sense that the exercise of the power to give the administrative authority the opportunity (or to instruct the administrative authority) to rectify the defect in the disputed order the court stresses the primacy of the administration. That does not mean that there is a complete absence of constitutional concerns about the administrative loop. Some scholars have indeed been advocating that to give the administrative authority the opportunity (or to instruct the administrative authority) to rectify a defect in the disputed order would be to help the administration by giving it a second change. That was the main reason why in Germany the 'Bundestag' did not adopt a legislative proposal for an administrative loop in paragraph 113 I of the Verwaltungsgerichtsordnung.[3] It has also been a dominant factor in the judgment of the Constitutional Court of Belgium ruling that the legislative act governing the administrative loop (the VCRO) infringes fundamental constitutional principles.[4] In the Constitutional Court's view the application of the administrative loop can in particular circumstances contravene the principle of impartiality and independency of the court, the principle of 'equality of arms' and the right to have access to court for those interested parties who have not been party to the proceedings yet.

4.3.2 Can the court be said to be impartial when giving its final judgment?

To answer the question what these constitutional concerns mean in relation to the administrative loop in the Dutch GALA, we have to make clear that there is a difference between one administrative loop and another. Both the proposed administrative loop in Germany as the administrative loop in the VCRO in Belgium differ from the administrative loop in the Netherlands in at least one respect. That is that both the (proposed) German as the Belgian loop have just been covering procedural defects in the disputed order, while the Dutch administrative loop covers substantive defects as well. According to Belgian law the court could only apply the administrative loop in cases in which the legal consequences of the rectified administrative order will not differ from those of the disputed one. Those are the cases to which the Dutch administrative courts would in general not apply the administrative

[3] BT-DRs. 13/5098.
[4] Ruling of the Belgian Constitutional Court of 8 May 2014, nr. 74/2014.

loop at all; instead of exercising the power to give the administrative authority the opportunity (or to instruct) to rectify the defect in the disputed order the Dutch administrative courts have the power to decide that an order against which an appeal has been lodged may be upheld by the court, despite an infringement of a procedural (or even: substantive) rule, if it is found that the infringement has not prejudiced the interests of the interested parties (section 6:22 of the GALA). To my opinion there are no such constitutional problems in relation to the Dutch administrative loop as to the degree they have arisen in Belgium. As a result of the application of the Dutch administrative loop the legal consequences can change in comparison to those of the disputed order. That means that the interim judgment does not necessarily give an indication on the outcome of the appeal. Therefore, in applying the administrative loop the administrative court in the Netherlands, in contrast to the Belgian court probably, cannot be said not to be impartial when giving its final judgment.

4.3.3 Equality of arms: helping the administration?

As a result of the application of the administrative loop in the Belgian VCRO the rectification of the defect in the disputed order is supposed to have a retroactive effect.[5] That means that after the rectification the disputed order is considered to be legally sound from the beginning. As a result, the disputed order shall not be annulled and the appeal is to be ill-founded. As pointed out before, this is not the case in the Netherlands. Even if the administrative authority rectifies the defect, the Dutch administrative court, in its final judgment, annuls the disputed order on account of the defect. So, according to Dutch law the rectification has no retroactive effect. And to secure the rights of defense all the parties in the proceedings have the right to express their views on the way the administrative authority has rectified the defect and consequently the court has to review the rectified order in the light of these expressed views.

Can the Dutch administrative loop against this background be said to infringe the principle of equality of arms? I doubt that. Moreover an assessment of the Dutch administrative loop recently carried out by the University of Maastricht, shows us that most of the parties concerned are in favor of applying the administrative loop when possible.[6] This applies both to administrative authorities (off course) and other interested parties. Especially

[5] P. Lefranc, A la recherche de la boucle administrative, Administration Publique Trimestrielle 2012/2, p. 222-231.
[6] Ch. W. Backes and others, Evaluatie Bestuurlijke Lus Awb en internationale vergelijking ("Assessment of the Administrative Loop in the GALA en international comparison"), see http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/12/11/tk-evaluatie-van-de-bestuurlijke-lus.html.

companies appreciate applying the administrative loop. They want to have a final judgment as soon as possible, no matter if they eventually win their case or not. Among civilian parties some concerns have indeed been expressed about the 'helping the administration-effect' of the administrative loop. In this regard we must realize though that the interests of civilian parties will not always be harmed when applying the administrative loop. Civilian parties have an interest in a fast and definitive dispute resolution as well. Moreover it happens quite often that as a result of the administrative loop, the administrative authority complies the application submitted by the civilian interested party. Generally speaking the administrative loop is not a matter of 'helping the administration', but of 'helping society' in reaching a fast and definitive dispute resolution. In fact, in the absence of an administrative loop the obvious course of action would be for the administrative court to annul the disputed order and refer the case back to the administrative authority that will have to start the decision-making process all over again. Not to apply the administrative loop is thereby most of the time nothing more than a way of putting off the evil hour.

5. Conclusions

If we take a look at the caseload of the AJD the question arises as to what results have been achieved in terms of fast and definitive dispute resolution. As recent research points out, the aforementioned powers were exercised frequently and successfully. In 2012 the AJD ruled in 1216 (100%) cases covered by the study that the appeal was well-founded. In 156 cases the AJD applied the administrative loop (12.8%); in 214 cases the AJD determined that the judgment shall take the place of the annulled order (17.6%) and in 218 cases the AJD determined that the legal consequences of the annulled order were allowed to stand (17.9%). In 2013 similar results have been achieved. In 980 (100%) cases the appeal was well-founded. In 98 cases the AJD applied the administrative loop (10.0%); in 191 cases the AJD determined that the judgment shall take the place of the annulled order (19.5%) and in 168 cases the AJD determined that the legal consequences of the annulled order were allowed to stand (17.1%). This means that in approximately 50% of the cases in which the appeal was well-founded the aforementioned instruments to achieve a fast and definitive dispute resolution have been applied. Does this also mean that in approximately 50% of the cases in which the appeal was well-founded a (fast and) definitive dispute resolution has actually been achieved? That is not necessarily the case and depends on the success rates in applying the administrative loop. The administrative loop appears to be quite successful. In approximately

90% of the cases in which the AJD applied the administrative loop the dispute turned out to be resolved in a definitive way.

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