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Review of administrative decisions of government by administrative courts and tribunals

REPORT FOR THE NETHERLANDS

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1. Jurisdiction or competence

1.1. Categories of administrative decisions eligible for review

An interested party may apply to the administrative courts for judicial review of written administrative decisions.

The subject of an application for judicial review is a decision as defined in section 1:3, subsection 1, of the General Administrative Law Act: a written order of an administrative authority constituting a legal act under public law. The various elements of this definition are explained below.

The term ‘administrative authority’ is broadly defined in section 1:1 of the General Administrative Law Act. There are two main categories of administrative authority: (a) an organ of a legal person established under public law (e.g. the State, a province or a municipality) or (b) another person or body invested with any public authority. Various authorities, persons and bodies are expressly stated not to be administrative authorities in that sense as they do not constitutionally belong to the public administration (in the sense of the executive). These include the legislature, Parliament, the judiciary and corporate bodies or offices charged with a scrutinising or advisory role independently of the public administration.

The term ‘legal act’ means an act intended to have an external legal consequence. This means that the order must be intended to have legal consequences connected with the relationship between the administrative authority and one or more other persons or entities. Orders of a purely internal character such as directions about documents to be drawn up are not deemed to be orders in the sense referred to above. The term ‘legal consequence’ is generally deemed to mean the creation, modification or termination of a legal relationship. And a legal relationship may be a right, entitlement, obligation, competence or legal status. Even where an administrative authority lacks the competence to bring about a legal consequence, it will be sufficient for the administrative act to be eligible for review, if the authority concerned intended


N.B.: Unless otherwise stated use was made of the English translation of the General Administrative Law Act as found on www.justitie.nl/onderwerpen/wetgeving/awb/Wettekst_awb/.

2 The term ‘order’ is used hereafter to distinguish the decisions that may be submitted for administrative judicial review from other administrative decisions and acts.
its act to have a legal consequence. In such a case, the assertion of competence is sufficient to assume the existence of an administrative decision that is open to review.

A legal act comes under public law if the administrative authority derives the competence to perform the act from a legal power created especially for the public administration by or pursuant to the law. In certain circumstances an implicit statutory power or even an unwritten public law power is sufficient for this purpose. Even the mere assertion that a power is being exercised under public law is sufficient to assume the existence of an administrative decision. Such a decision is then annulled for lack of competence.

No appeal lies from a decision for the preparation of a legal act under private law.

The order must also be in writing, although there are no other requirements governing its external features. An oral decision is not eligible for administrative review.

In principle, only orders in the above sense are eligible for review by administrative courts. However, the interested party may also raise before the administrative court the issue whether an act constitutes an order in that sense and whether an administrative authority has wrongly failed to make such an order decision. As a rule, an application to the administrative courts for review is preceded by an objection to the administrative authority concerned (bezwaarschriftprocedure). According to settled case law, a decision taken on such an objection is, by definition, a legal act under public law and therefore always constitutes an order within the meaning of the General Administrative Law Act. Such a decision is therefore always eligible for judicial review.

An application for judicial review may be instituted not only against an order, but also against a written refusal to make an order or a failure to make an order in due time. Section 6:2 of the General Administrative Law Act provides that a written refusal to make an order and a failure to make an order in due time are equated with an order for the purposes of statutory regulations governing administrative objection and judicial review.

Physical acts and legal acts under private law do not, in principle, come within the competence of the administrative courts. However, section 8:1, subsection 2, of the General Administrative Law Act lists some other acts which are equated with orders for the purposes of objection and judicial review. These are acts that were protected under administrative law even before the
introduction of the General Administrative Law Act. For example, public servants and their surviving dependants can apply for judicial review of oral decisions, physical acts and legal acts under private law which directly affect their interests in that capacity. Other acts or decisions may be declared by special statute to be subject to judicial review or equated with orders for the purpose of judicial review. An example is section 72, subsection 3, of the Aliens Act 2000, which equates non-legal acts of an administrative authority in relation to an alien with orders.

It follows from the case law that under specific conditions administrative objection and judicial review are possible in relation to mere legal opinions by administrative bodies. Such opinions are pronouncements by an administrative authority on the applicability of statutory regulations which it is charged with implementing. One of the conditions is that the legal opinion must be given by an administrative authority that has powers under public law in relation to the subject matter. In addition, the purpose of the opinion must be to put an end to uncertainty about the legal position in question. A mere reference to the content of a statutory regulation without specific reference to the facts or circumstances of the individual case is not sufficient. A communication about the expected content of an order to be made in the future does not in general constitute an order, unless it may nor reasonably expected that the interested party wait for that order to come. Nor does a legal opinion which has no independent significance but is merely part of a line of reasoning that may possibly result in an order in the future constitute an order. Such notifications may be disputed in due course by means of an objection to or application for judicial review of the order in which they are implied. A notification that a licence is not required for a particular activity is generally not treated as an order.

1.2. Jurisdiction and exclusions

a) Criteria for determining the jurisdictional competence of administrative courts

Under section 1:4, subsection 1, of the General Administrative Law Act an administrative court is an independent authority established by law charged with the administration of justice in administrative matters. It follows from subsection 2 that certain courts belonging to the ‘ordinary’ judicial system are (also) designated as administrative courts.
A distinction is made between hierarchical and geographic jurisdiction in determining which court is competent. The first question is which tier of courts is competent to hear a case at any given stage of the proceedings. The second question is where in the Netherlands the application for judicial review should be lodged.

Which court has jurisdiction to hear an application for judicial review is regulated in sections 8:1, 8:6 and 8:7 of the General Administrative Law Act. The basic rule is that once the preliminary administrative procedure of objection or administrative review has been completed application may be made to the court for judicial review of the order. The administrative law sectors of the 19 district courts function as the general administrative courts of first instance. However, statutes other than the General Administrative Law Act may provide that application for review of certain orders or acts 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 as 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 against 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 a (tax division of a) court of appeal (in which case appeal on a point of law ( cassation) lies to the Supreme Court). The Central Appeals Tribunal hears appeals in cases involving social security law, public service law, pensions and student grants and loans. Appeals against orders made under certain statutes in the socio-economic field, in particular in the field of competition law, lie to the Administrative Court for Trade and Industry. The courts of appeal (tax division) have jurisdiction to hear appeals in tax cases (in which case appeal in cassation lies to the Supreme Court).
Many statutes make exceptions to the principle of judicial review in two instances by providing for cases to be heard by a court of first and final instance. For example, the Administrative Jurisdiction Division of the Council of State hears urban and spatial planning and environmental cases at first and final instance. Under a small number of statutes, mainly concerning benefits and special pensions for war victims and special categories of pension case, the Central Appeals Tribunal hears applications for review as court of first and final instance. Applications for review of orders made in cases concerning socio-economic or agricultural issues lie to the Administrative Court for Trade and Industry as court of first and final instance.

As regards the geographic jurisdiction of the 19 district courts, the place in which the administrative body concerned has its seat determines where cases involving judicial review of orders of lower-tier authorities such as the provinces, municipalities and water boards are heard. Cases concerning other orders, for example those made by the central government, are heard by the district court within whose geographic jurisdiction the person lodging the application for judicial review resides. If the latter is not resident in the Netherlands, the case is heard by the district court within whose geographic jurisdiction the administrative authority concerned has its seat. If applications for review of an order have been lodged to more than one district court having jurisdiction, the cases must be heard by the district court to which the first application was lodged. If the applications were lodged simultaneously, they must be dealt with by the competent district court mentioned first in the Judiciary (Organisation) Act.

b) Administrative decisions that cannot be submitted to review by reason of the nature or substance of such decision

No application for review lies against a decision regarding the procedure for the preparation of an order, unless this decision directly affects the interests of an interested party independently of the order to be prepared (section 6:3 General Administrative Law Act). This helps to ensure that objections and applications for judicial review cannot be lodged against purely procedural decisions. An example is a decision not to hear an interested party in advance when preparing an order. Such a decision can be assessed by an administrative court only in the proceedings on the principal issue.

In addition, applications for judicial review may not be made in respect of certain categories of order such as:
(a) orders containing a generally binding regulation or a policy rule,\(^3\) as well as orders cancelling, introducing or approving a generally binding regulation or policy rule (section 8:2 of the General Administrative Law Act);

(b) orders preparing a legal act under private law (section 8:3 of the General Administrative Law Act);

(c) orders belonging to one of the categories referred to in section 8:4 of the General Administrative Law Act;\(^4\) in general, these are orders which are unsuitable or less suitable for

\(^3\) A ‘generally binding regulation’ is a rule issued by a competent public body that has external effect and is binding on those to whom it relates. Generally binding regulations differ from other orders in that they contain general, abstract rules which are suitable for repeated application in practice without further specification.

A ‘policy rule’ is a general rule, not being a generally binding regulation, which lays down a general rule for the exercise of a power of an administrative authority when weighing different interests, determining facts or interpreting statutory regulations and has been adopted by means of an order. Policy rules regulate the exercise of existing powers; they do not create new powers.

\(^4\) Section 8:4 General Administrative Law Act. No application for judicial review may be instituted against an order:

a) staying or quashing an order of another administrative authority;

b) made in extraordinary circumstances pursuant to a power granted or obligation imposed in any statutory regulation for application in such circumstances;

c) made pursuant to a statutory regulation for the protection of the military interests of the Kingdom of the Netherlands or its allies;

d) for an appointment, unless the appeal is instituted by a public servant as referred to in section 1 of the Central and Local Government Personnel Act or a conscript as referred to in section 1 (b) of the Conscripts (Legal Status) Act, their surviving relatives or their successors-in-title;

e) involving an assessment of the knowledge and ability of a candidate or pupil who has been examined in this respect or has been tested in some other way or establishing assignments or assessment criteria, or containing further rules for such assessment or testing;

f) involving a technical assessment of a vehicle or aircraft or of a measuring device, a part thereof or an auxiliary device;

g) concerning the numbering of lists of candidates, the validity of combinations of lists, the voting procedure, the counting of votes, the determination of vote values and the determination of the result of elections of members of representative assemblies, the declaration of appointment to vacant seats, the appointment of new members of a provincial or municipal council or of the general management of a water authority and the granting of temporary termination of membership of a representative assembly on account of pregnancy and childbirth or sickness;
judicial review and orders involving matters relating to legislation under which provision is made for remedies before other courts;
(d) orders made pursuant to a statutory regulation listed in the schedule to which reference is made in section 8:5 of the General Administrative Law Act.\(^5\) This schedule lists orders that are excluded from judicial review for one or more of the following reasons:
- they are unsuitable or less suitable for judicial review on account of their nature;
- they have been made under an arrangement that provides for a remedy before another court (mainly the civil courts);
- they are mainly of an indicative nature;
- the decision-making procedure of which the order forms part includes other orders that are subject to judicial review;
- the circumstances are such that the decision-making process as a whole may not be burdened with procedures that will slow down the process and offer little real legal protection.

In addition, special statutes may exclude judicial review in respect of certain orders. The civil courts then have a residual jurisdiction. Any exception from the General Administrative Law Act must be formulated in explicit and unambiguous terms.

\(^{5}\) Section 8:5. No application for judicial review may be lodged against an order made under a statutory regulation listed in the schedule to this Act.
1.3. Examples of case law illustrating the extent and limits of the scope of competence of the court in charge of review

- **Legal act as referred to in section 1:3 of the General Administrative Law Act**
  The captain of a naval aircraft must be treated, while performing his duties in that capacity, as an organ of a legal person established under public law (section 1:1 of the General Administrative Law Act). The captain’s power under various sets of regulations to take decisions regarding naval personnel operating the aircraft is an integral part of his duties. Such decisions may be decisions of a purely internal nature or decisions intended to have an external legal consequence. The latter involve an intervention that changes the legal status of an individual public servant. Unlike decisions of a purely internal nature, such decisions constitute orders that are subject to administrative objection or judicial review within the meaning of section 1:3 of the General Administrative Law Act. An intervention changing somebody’s legal status will certainly be deemed to exist where an order made in relation to a public servant has the effect of preventing him from exercising his fundamental rights.
  (Judgment of the Central Appeals Tribunal of 30 October 1997.)

Rules concerning a smoking ban in work areas of the Municipal Social Services have an impact on the employees’ right to private life to such an extent that they cannot be deemed to be of a purely internal nature.
  ( Judgment of the Central Appeals Tribunal of 27 December 2001.)

An order is deemed to be intended to have a particular legal consequence if the consequence is attributable by objective law to the making of the order itself. However, an applicant’s appointment to a job for which he had been taken on was in no way dependent by law on the Dutch Securities Board’s expressing a favourable opinion on his suitability for the job. Nor did an unfavourable opinion on the applicant’s suitability constitute a legal impediment to his appointment to the job in question or to his performance of that job. Even if it could be assumed that the Securities Board had intended to exert pressure on the employer not to appoint or retain the applicant, this would not warrant the conclusion that the contested statements were intended to have any legal consequence. The employment contract between the applicant and the employer was dependent on a legal act under private law, which the Securities Board as such was powerless to prevent or perform. An unfavourable opinion expressed by the Securities
Board on the applicant’s suitability for the job for which he had been taken on was therefore not subject to objection or judicial review.
(Judgment of the Administrative Court for Trade and Industry of 7 July 1994.)

• ‘Under public law’ as referred to in section 1:3 of the General Administrative Law Act
Although there may be no statutory basis for a decision, this does not mean that the decision cannot be treated as a legal act under public law. A written decision of an administrative authority is deemed to be intended to have a legal consequence under public law if the authority concerned, although not competent to bring about the legal consequence, intended to do so by exercising a purported power under public law.
(JJudgment of the Administrative Jurisdiction Division of the Council of State of 12 April 2006.)

Although the administrative authority in question had not expressly indicated that it purported to have the power to make an order or intended to exercise this power in the present case, it had expressed a firm opinion on how the power should be exercised. As it had acted as though it were competent to decide on the application, there was held to be a purported power under public law and accordingly an order that was susceptible to objection and judicial review.
(JJudgment of the Administrative Court for Trade and Industry of 2 February 2006.)

Decisions that are so closely bound up with bankruptcy law that they must be classified as acts under private law cannot constitute orders as referred to in section 1:3, subsection 1, of the General Administrative Law Act. A proper division of responsibilities between the civil and administrative courts means that it is not the job of the administrative courts to adjudicate on questions concerning the distribution of the proceeds of a bankruptcy. Such disputes may be referred only to the civil courts, which have jurisdiction in bankruptcy proceedings.
(JJudgment of the Administrative Jurisdiction Division of the Council of State of 16 July 2008.)

• Susceptibility of generally binding regulations to judicial review (section 8:2 of the General Administrative Law Act)
It is evident from the wording and legislative history of section 8:2 of the General Administrative Law Act that the legislator expressly wished to exclude (for the time being) the possibility of direct judicial review of generally binding regulations and of orders that are so closely connected with them that review of the orders would be tantamount to direct review of the underlying
generally binding regulations. An application for judicial review of an order declaring a collective agreement generally applicable would be equivalent to a direct application for judicial review of the provisions of the collective agreement declared generally applicable. It follows that such an order should be equated with the orders excepted from judicial review as set out in section 8:2 (b) and (c) of the General Administrative Law Act.

(Judgment of the Administrative Jurisdiction Division of the Council of State of 1 October 1998.)

Where it is evident from an order declaring provisions of a collective agreement to be generally applicable that the order is conditional and, until further notice, not applicable to a number of named companies, the order cannot to this extent be classified as or equated with an order excepted from objection and judicial review pursuant to section 8:2 of the General Administrative Law Act.

(Judgment of the Administrative Jurisdiction Division of the Council of State of 14 July 2003.)

An order providing for the adoption of a generally binding regulation has no formal legal effect. Where the binding nature of a regulation is contested and the dispute has not yet been referred to the administrative courts, it must be possible for an individual to bring an action before the civil courts on the grounds that the State has acted unlawfully. He cannot, after all, be expected to allow matters to go as far as a criminal prosecution or the imposition of an enforcement order (for having acted without the requisite licence) in order to establish in law that the order is not binding. Nor can he be expected, where necessary, to apply for the licence, subject to notice that he considers the regulation non-binding. Even if it were necessary to assume that the formal legal effect of the decision granting the licence extends to the opinion of the issuing authority that the relevant regulation is binding, it cannot be accepted that the civil courts are bound by the opinion of the government authority simply by virtue of this formal legal effect. The binding nature of the regulation can always be contested in the procedure of an administrative objection or an application for judicial review of an order applying the regulation. Or, to put it another way, the regulation is susceptible of indirect review, i.e. review in the course of assessing the lawfulness of an order applying the regulation in practice. The criterion applied in cases of indirect review is whether it was reasonable for the legislator to have introduced the regulation in the light of all the interests involved. It is not the competence of the court to determine as it sees fit the value or importance to be attributed to the interest concerned and it must also observe restraint in carrying out such a review.

(Judgment of the Supreme Court of 11 October 1996.)
2. Procedure

2.1. General description of applicable procedural rules

- Rules of procedure

The General Administrative Law Act contains legal rules governing government decision-making and legal protection against government acts. The Act has a layered structure: general provisions are followed by special provisions, which are of an increasingly detailed nature and elaborate the general provisions. The main provisions of importance to administrative procedure are chapter 1 (definitions), chapter 6 (general provisions on objection and administrative review), chapter 7 (special provisions on objection and administrative review) and chapter 8 (special provisions on judicial review).

The uniform provisions of administrative court procedure are contained in chapter 8 of the General Administrative Law Act. This chapter brings together the procedural rules for judicial review before the administrative law sector of the district courts. Rules governing appeals in administrative law cases are contained in special statutes that regulate the organisation of the appeal court concerned, namely the Council of State Act (Administrative Jurisdiction Division of the Council of State), the Social Security Appeals Act (Central Appeals Tribunal) and the Administrative Jurisdiction (Trade and Industry) Act (Administrative Court for Trade and Industry). Most of these special statutes on administrative jurisdiction provide that chapter 8 of the General Administrative Law Act is applicable mutatis mutandis.

The uniform provisions on administrative court procedure contained in chapter 8 allow the courts a certain margin of discretion as to procedural rules. To ensure the uniform application of the procedural powers exercised by their administrative law sectors, the district courts have adopted joint guidelines in the form of the 2008 Administrative Law Rules of Procedure. In the same way, the higher administrative courts – the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Administrative Court for Trade and Industry – have adopted the 2006 Rules of Procedure for Higher Administrative Courts, and the tax divisions of the courts of appeal have adopted the 2005 Rules of Procedure for the Tax Divisions of Courts of Appeal. Although the provisions of these rules of procedure do not qualify as generally binding
regulations, they are binding on the courts by virtue of the general principles of the proper administration of justice and are suitable for application as a set of legal rule in relation to the persons concerned.

The Judiciary (Organisation) Act is also important. This Act provides that the Supreme Court is competent to hear jurisdictional disputes between administrative courts. It also regulates the formation of the administrative law chambers at the district courts. Moreover, the Act contains other provisions applicable to these chambers, for example concerning the legal status of the judges, the number of judges, their impartiality, consultations in chambers and the duty of secrecy.

Unwritten procedural law too plays a supplementary role: the principles of the proper administration of justice, including the right of access to the courts and that of due process, including the right to a decision within a reasonable time and by an independent and impartial court, the right of adequate defence and the right to a properly reasoned judgment. The prohibition of abuse of procedural law is also an example of unwritten procedural law.

Finally, there is international law that influences administrative procedure, such as article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. EC law too sets several requirements for administrative procedure with as a starting point the principle of effectiveness.

- Procedural steps

Under administrative procedural law, the court has a leading role in the conduct of proceedings. This role is, in principle, performed within the limits of the dispute as referred by the parties and is determined by the interest the parties have that the proceedings are conducted efficiently and with due care. The court has wide powers to organise the course of the proceedings and the hearing.

After application has been made to the court for judicial review, the court determines within the limits of the law and the principles of due process how the examination in preparation for the hearing should be organised, how much time the parties will have to perform the procedural
acts, what additional documents and information are needed, whether documents introduced in a late stage of the proceedings can still be taken into account and whether witnesses and/or experts called by the parties may give evidence. In addition, the court has a number of powers that enable it to play an active role. For example, the court can decide whether or not an application for judicial review should be expedited, request information from the parties and appoint experts to examine the facts underlying the order. The court is also free to decide whether or not to exercise these powers. In general, the courts make restrained use of these powers.

The parties are entitled to a number of important procedural rights such as the right to receive or be informed of documents relating to the case as quickly as possible, to give a written explanation, to be involved in the appointment of an expert and to comment on his report, to attend any on-the-spot examination and to have the possibility of addressing the court orally at the hearing. In addition, the parties may attempt to induce the court to exercise the powers granted to him under the General Administrative Law Act. The court must give notice of its decision on any such request by separate letter, in the official record of the proceedings at the hearing or in the judgment. Although the parties may not contest procedural (interim) decisions of this kind independently, they may raise them in any appeal against the ultimate decision. Sometimes the court may exercise a power only with the consent of the parties.
- Prosecutor

There is no public prosecutor in administrative proceedings. Cases are brought before the court by the parties. Nor is there an independent institution linked to the court (such as an advocate general or procurator general) who gives an opinion on the case prior to the decision by the court. An exception to this last rule is the tax division of the Supreme Court. A Bill is pending at the moment to introduce such an institution in administrative proceedings.

- Court procedure – written or oral?

The preliminary inquiry starts after receipt of the application for judicial review. The inquiry consists mainly of written submissions. The administrative authority sends the documents relating to the case to the court and lodges a statement of defence. After the notice of application and statement of defence have been lodged, the court can arrange for the applicant and defendant to lodge further written submissions in the form of a reply and rejoinder. This can sometimes result in the parties reaching agreement, thereby obviating the need for a court decision. Other parties involved in the action are given the opportunity at least once to state their view of the case in writing. During the preliminary inquiry the judge can summon the parties to provide evidence or additional data. If not all the parties are summoned, those that have not been may still request to be allowed to participate in the hearing and give their views. The court may also decide to hold a site visit.

The preliminary inquiry is generally concluded by the decision and the notification of parties that the application for review will be dealt with at the hearing (section 8:56 General Administrative Law Act). The parties are invited to appear at the hearing so that they can state and explain their positions orally in the presence of the court and answer any questions. There are two exceptions to this procedure.

First, until the parties have been invited to appear at the hearing, the court may decide to waive the hearing of the application for review and close the proceedings at the preliminary inquiry stage on the grounds that there can be no reasonable doubt about the outcome of the application (section 8:54 of the General Administrative Law Act). No appeal lies against a decision given pursuant to section 8:54. However, it is possible to lodge a notice of objection to such a decision with the court concerned (section 8:55 of the General Administrative Law Act).
The sole issue considered in such objection proceedings is whether the court was right to give judgment without holding a hearing. Second, the hearing may be omitted if the parties and the court mutually agree on this. These are cases in which a public hearing would add little to the proceedings.

The oral hearing of a case in court gives implementation to the principle that both parties should be heard (*audi et alteram partem*).6

- Single-judge or full-bench chamber

The basic rule is that cases brought before the district court are heard by a single-judge chamber. The justification for this is that in principle there is a right of appeal against the judgment and that on appeal the reverse applies: i.e. as a rule cases are heard on appeal by a full-bench chamber. In cases in which appeal does not lie and judgment is given by the court at first and final instance, the basic rule does not apply and the case is generally heard by a full-bench chamber.

Cases may be referred from a single-judge chamber to a full-bench chamber and *vice versa* at any stage of the proceedings. The General Administrative Law Act provides no criteria for referral. Factors that can play a role in referral to a full-bench chamber are the complexity of either the legal issues or the body of facts, expected differences of opinion, deviation from previous case law or the public importance of the case. A full-bench chamber consists of three judges.

2.2. Conditions for lodging an application for judicial review

The person lodging an application for judicial review of an order must be an interested party and must have lodged the application within the prescribed period and paid the registry fee.7 The application should also comply with a number of procedural and substantive requirements. For example, it must specify the order against which the application is directed and a copy of the order must, where possible, be annexed. The application must state the grounds and must be

6 However, cases concerning aliens are usually dealt with in a written procedure.
7 Applications for judicial review of decisions on asylum applications and detention of aliens are excepted from the duty to pay a registry fee.
dated and signed. If the requirements that the application must be lodged in time and that the registry fee must have been paid are not met, there is no opportunity for rectification. In such cases, the application is declared inadmissible unless the applicant can give good reasons for the failure to comply with the requirements or, with the approval of the court, a payment arrangement is made for the registry fee. If the requirements for the contents of the application itself are not met, the applicant is given the opportunity to rectify the default. If the default is not rectified within the prescribed period, the court may declare the application inadmissible. Whether the admissibility requirements have been met is assessed by the court *ex proprio motu*.

The possibility of applying for judicial review is limited to persons who are an ‘interested party’ in relation to the order concerned. An interested party is a person whose interest is directly affected by an order (section 1:2 General Administrative Law Act). The addressee of an order is, by definition, an interested party. Third parties (non-addressees) too may be interested parties.

Apart from natural persons and legal persons under private law such as associations, foundations, limited liability companies (*NVs*) and private companies (*BVs*), legal persons under public law such as the state, provinces and municipalities and other entities such as professional partnerships or works councils may be interested parties in relation to an order made by an administrative authority. A requirement is that the interests of the natural or legal person concerned should be directly affected by the order.

The interest must be affected as an actual consequence of the disputed order. If this is the case, the person concerned is, in principle, free to dispute any part of the order on the basis of all possible relevant grounds, irrespective of whether this part of the order or these grounds affect his own interest. If someone’s interest is affected by a particular part of an order, he may be treated as an interested party in relation to the entire order. However, this does not apply in full to orders that in fact consist of various separate decisions.

In addition, the interest must be directly affected by the order. In other words, there must be a sufficient causal connection between the interest of the person applying for judicial review and the disputed order made by the administrative authority. The requirement of a direct interest also means that a person will not, in principle, be deemed to be an interested party where he has a derivative interest, for instance in a situation where the order affects the interest concerned only

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8 The possibility of rectification can be excluded by specific Act, as occurred in the Aliens Act 2000.
indirectly (usually through a contractual relationship). However, when the interests of a person applying for judicial review are diametrically opposed to those of the party in relation to whom the order is made, they cannot be treated as derivative interests (see, for example, the judgment of the Administrative Jurisdiction Division of the Council of State of 29 March 2006.) In this case a general practitioner opposed an order made by the Health Care Insurance Supervisory Board exempting a health insurance fund from the obligation to conclude contracts for the provision of GP care. This exemption greatly reduced the chance that the health insurance fund would conclude a contract with the GP concerned for the provision of services for the following year on more favourable terms than in the past. As his business and financial interests were at stake, the family doctor was therefore deemed to be directly affected by the order. It was therefore held that he had his own direct interest in relation to the exemption order, which did not coincide with that of the health insurance fund, and that he should therefore be treated as an interested party. In certain cases the courts have held that a person who has an interest coinciding with that of the person primarily affected should nonetheless be treated as an interested party. For example, in a case in which the landlord and the tenant of a property opposed a traffic measure relating to the street in which the property concerned was situated, both were treated as interested parties. The interests of the tenant/user of the property were evidently affected by the traffic measure. As regards the landlord/owner it would have previously been assumed that he had only a derivative interest, on the assumption that he was acting solely out of a fear that the tenancy agreement would be terminated by the tenant. Nowadays, however, the owner of the property is also deemed to be an interested party in relation to an order if the traffic measures it contains affect his ownership interests. (Judgment of the Administrative Jurisdiction Division of the Council of State of 14 September 2005.)

Another category of cases in which an interest is no longer held to be a derivative interest concerns those in which an order affects an interest resulting from a fundamental right of the person concerned. Thus, when a certain permission is refused a person whose fundamental right may be harmed by this (e.g. his right to respect for his private life) is an interested party even if he is not the person who applied for the permission. (Judgment of the Administrative Jurisdiction Division of the Council of State of 21 November 2007.)

The reason for the relaxation of this rule is that the person primarily affected by a disputed order is often not the person most seriously affected, and it cannot automatically be assumed that he will be willing to take action on behalf of a person with a derivative interest.
In addition, the interest must exist at the time of the application and be capable of being determined objectively: a purely subjective feeling of involvement in the subject matter of an order is not sufficient, no matter how strong that feeling may be. Nor are subjective feelings of dissatisfaction or uncertain expectations sufficient. And the interest must be a personal interest, in other words it must concern an individual natural or legal person and the interest must be capable of being sufficiently distinguished from the interests of other persons. The interest should also be that of the applicant and not of someone else.

The purpose of the requirement that a person who lodges an objection or applies for judicial review should be an interested party is to limit to some extent the possibility for taking such action. This also applies in the case of orders of general scope which can affect the interests of very many people. In the case of traffic orders, for example, it is necessary to determine from case to case whose interests are directly affected by such an order. (Judgment of the Administrative Jurisdiction Division of the Council of State of 3 July 1998.)

The interests of legal persons with a non-commercial objective are deemed to include the general and collective interests which they specifically represent in accordance with their objective and as evidenced by their actual activities (section 1:2, subsection 3, of the General Administrative Law Act). In the case of interest groups it is therefore important from the point of view of their right to apply for judicial review that they can be treated as a legal person, represent a general and collective interest and do this pursuant to their objective under their constitution and as evidenced by their actual activities, and that they represent these interests in particular. The interest represented by them must concern the supra-individual interests of the group as a whole, not the interests of one or more clearly identifiable members. Thus, following the granting of a construction permit for a block of flats, a flat owners’ association applied for judicial review of the order and was held to be an interested party since representing the joint interests of its members was part of its object under its constitution. In view of the possible impact of the building plan on the area where its members lived, the interests of the association were directly affected by the order (Judgment of the Administrative Jurisdiction Division of the Council of State of 14 March 2007.)

A legal person’s object under its articles of association or constitution must not be formulated too widely. If an object is worded in such a way as to virtually coincide with the public interest,
legal person concerned could claim practically any interest involved. For example, a foundation was held not to be an interested party in relation to an order refusing to a brasserie-style restaurant a building permit or granting an exemption from a local land-use plan for two pavement cafés. Under its constitution the objective of the foundation was defined as ‘Doing everything which is or may be in the interests of the Oud Verlaat village centre’. This was held to be insufficiently specific and worded in such general terms that it could not be assumed that the interests specifically represented by the foundation were affected by the disputed order. (Judgment of the Administrative Jurisdiction Division of the Council of State of 22 August 2007.)

2.3. Access to the court: legal assistance or representation

There is no rule of administrative procedure that requires parties to obtain legal assistance or representation. The only exception is where a party appeals in a tax dispute for cassation 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 proving that they are entitled to act for the person, institution or organisation they claim to be representing. In addition, whether or not legal assistance is provided on a professional basis may affect the court’s order for costs. The expense and risk of any acts performed by an authorised representative in the proceedings are borne by the party concerned. If a party explicitly notifies the court that he is represented, the court will in any event send any documents relating to the case to the representative (section 6:17 General Administrative Law Act).

2.4. Use of electronic technology (Internet)

Judicial review by an administrative court is instituted by lodging an application for review with the court concerned (section 6:4, subsection 3, General Administrative Law Act). The application
can be lodged by mail or by fax. The General Administrative Law Act does not provide for the possibility of using electronic technology to lodge an application.\(^9\) 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 litigants to communicate digitally with the administrative courts in proceedings. Case documents and notices of appeal can then be sent electronically.

\(^9\) 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.
2.5. Legal aid

Parties who have insufficient financial means to bear the costs of legal assistance may obtain legal aid under the Legal Aid Act. An application for legal aid is submitted to the Legal Aid Council through the party’s representative or lawyer. The Council determines on the basis of the information about income and capital, and the nature of the case whether the party concerned is eligible for legal aid. The decision of the Legal Aid Council may be appealed.

2.6. Suspensive effect

The basic rule in administrative law is that an objection or application for review does not suspend the operation of the order against which it lies (section 6:16 General Administrative Law Act). Nor does an appeal have suspensive effect. This safeguards legal certainty and ensures the proper functioning of the public administration. If an interested party wishes to have the operation of an order pending an objection or review suspended, he must apply for provisional relief. Notwithstanding the basic rule, the effect of an order may be suspended by or pursuant to special statutory regulation. For more information, see the answer to question 2.8.

2.7. Production of documents by administrative authorities

It is regarded as a fundamental principle of administrative procedure that a party should have access to all documents in the possession of the administrative authority relating to his case. For example, the Central Appeals Tribunal has held that the court is obliged to obtain any missing documents from the administrative authority. (Judgment of 19 December 2001)

Section 8:28 of the General Administrative Law Act provides that if an administrative court requests the parties to provide written information, they have a duty to comply. During the preliminary inquiry the court has the power to request not only the parties but also third persons to supply written information and documents. Administrative authorities are obliged to comply with such a request from the court, even if they are not a party to the proceedings (section 8:45, subsection 2, General Administrative Law Act). No such obligation exists where the request is addressed to persons who are not a party to the proceedings and are not an administrative
authority. If a defendant administrative authority fails to supply the court with documents relating to the case within the prescribed period, the court may apply section 8:44 of the General Administrative Law Act by summoning the administrative authority to appear before the court within two weeks of the expiry of the period for submission of documents. Although administrative authorities which are not a party to the proceedings are obliged to comply with a request for information, there are no sanctions for non-compliance. In such cases the court may summon a recalcitrant authority to testify in court and can compel its attendance, if necessary with the help of the police. Witnesses who are summoned by the court must comply with the summons and give evidence. Failure to comply with these obligations is a criminal offence.

If a party does not comply with the obligation to provide information, the court may draw such conclusions from this as it sees fit (section 8:31 General Administrative Law Act). For example, where a party is in default the court may hold that any alleged facts that remain uncertain will be assumed to have been proven or not proven, as the case may be, to the detriment of that party. Where a defendant administrative authority fails to comply with such an obligation, the most far-reaching consequence is that the application for judicial review is declared well-founded, whether or not accompanied by an order for compensation or an order for costs (see, for example, the judgment of the Administrative Jurisdiction Division of the Council of State of 9 October 1997.)

The obligation to provide documents is not unconditional. If it has good reasons the administrative authority may refuse to provide information or documents or may inform the court that the documents are for its eyes only and may not be disclosed to the other parties involved in the action. According to the settled case law of the Central Appeals Tribunal, mere protection of the private life of those concerned is generally not a sufficient reason for holding that limitation of disclosure is warranted. It is necessary to show that disclosure might possibly pose a real danger to those concerned (see, for example, the judgment of the Central Appeals Tribunal of 10 October 2001).

It is for the court to decide whether the request of an administrative authority to be allowed not to provide certain documents or limit their disclosure is justified. If the court agrees to limited disclosure, it may include the documents concerned in its examination only if the parties who have not been shown the documents have no objection to this. The Administrative Jurisdiction Division of the Council of State has held that a party that withholds consent must, in principle,
bear any consequences (see, for example, the judgment of the Administrative Jurisdiction Division of the Council of State of 27 July 2005). If the court deems it acceptable for the information or documents to be kept completely secret (i.e. from the court as well) the obligation to provide information or documents ceases to apply. If one of the other parties withholds consent for judgment to be given on the basis of documents disclosed only to the judge or if the judge agrees that documents may be kept completely secret, the case has to be judged by judges who have not seen the documents. That is why courts use to have a special chamber for examining whether a request for secrecy is justified.

In keeping with the general legal principles of equality of arms and a public hearing, which are also at the basis of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a request for limited disclosure or complete secrecy is granted by the judge only in very exceptional circumstances. According to the case law of the Administrative Jurisdiction Division of the Council of State, the possibility of limited disclosure provided for in the General Administrative Law Act is hedged around by such safeguards that the right to a fair trial is not essentially compromised (judgment of the Administrative Jurisdiction Division of the Council of State of 13 June 2001). The existence of good grounds for limited disclosure or secrecy is not in fact decisive. If the documents are of great importance to the proper assessment of the disputed order, the judge may reject the request for this reason.

The administrative authority cannot invoke the need for secrecy in a situation where the Government Information (Public Access) Act provides that publication of the information is obligatory, unless a possible exception to this obligation is precisely the point at issue (section 8:29, subsection 2, General Administrative Law Act).

2.8. Emergency or interim procedures

Suspension of a disputed order may be obtained by means of a request for a provisional remedy. A provisional remedy may provide not only for complete or partial suspension of the order but also for other measures such as the granting of a provisional licence.

A request for a provisional remedy is heard by an interim relief judge of the district court or by the President of the higher administrative court, depending on the stage of the procedure.
which the request is made. The interim relief judge or the President, as the case may be, may alter or cancel a provisional remedy that has already been granted. This may occur where circumstances since the judgment on an application for a provisional remedy have changed to such an extent as to warrant alteration or termination of the remedy. In addition, the court which deals with the application on the merits (i.e. not the interim relief judge or the President) may decide either of its own motion or on application to grant a provisional remedy (valid for a limited period) in the final judgment. Such a remedy will generally be granted only if this is necessary because the order is to be set aside in the judgment.

A provisional remedy may be requested only if proceedings on the merits of the case are pending before the court at the same time. There must therefore be a principal action (procedural connection) against the order to which the requested provisional remedy relates (substantive connection). A request for a provisional remedy may be made only by a party to the principal action. The interim relief judge of the district court or, as the case may be, the President of the higher administrative court who is competent to hear the principal action may, on request, grant a provisional remedy if urgency and the interests involved require so. As a rule, the purpose of a provisional remedy is to ensure that if the challenged order is provisionally implemented it does not have irreversible consequences. Grounds for a provisional remedy will exist in particular if the order is considered by the judge or the President to be unlawful. In reaching his decision the judge or the President will balance the different interests of the parties concerned. Judgment on an application for a provisional remedy will be given as promptly as possible. If a provisional remedy is granted this will take effect immediately after the order is given. No appeal lies against an order of the interim relief judge or the President.

A provisional remedy lasts in principle for the duration of the principal action and is therefore relevant only until the merits have been decided on. However, the judge or President may stipulate a later date of expiry.

The provisional remedy does not decide the proceedings on the merits. In practice, however, it may in certain cases be tantamount to a final decision on the dispute. It should be noted that the interim relief judge or the President, as the case may be, may decide that he can give judgment immediately on the merits. This is known as ‘short-circuiting’. The 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 this power of the judge or the President is that it benefits legal protection, legal certainty and legal economy, 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 or by the President of a special administrative court hearing the case at first and final instance. The possibility of short-circuiting also exists on appeal to the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal and the Administrative Court for Trade and Industry, but then 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. The possibility of short-circuiting exists only if a hearing is held. 10 Is a decision on the merits taken, in that same judgment the request for the provisional remedy itself will generally be refused on the ground that it is no longer necessary since judgment has already been given in the principal action.

3. The powers of the administrative courts

3.1. Hierarchy of legal standards

It is the task of the administrative court to assess the dispute referred to it on the basis of the applicable law. Within the limits of the dispute the administrative court must, of its own motion, discover and apply all law relevant to the arguments submitted for its assessment by the parties. The parties themselves need not invoke the specific provisions of the law. It is up to the court itself to translate the parties’ arguments into legally correct arguments by supplementing the legal grounds (section 8:69 General Administrative Law Act).

Orders that are subject to judicial review are assessed by the administrative court in the light of both written and unwritten law. The court is also competent to determine whether a generally binding regulation on which the disputed order is based is compatible with higher legislation or unwritten principles of law. The legal rules by reference to which administrative courts decide disputes generally have the following hierarchy (in descending order of importance): treaties –

10 Shortcircuiting is possible in appeal proceedings in immigration cases even where no hearing is held.

Under article 94 of the Constitution provisions of treaties and decisions by international organisations that are binding ‘on everyone’ take precedence over conflicting national law. An important example of such treaty provisions are the substantive provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). An important example of decisions of an international organisation are the regulations and directives of the European Union.

According to the prevailing doctrine, review for compliance with the law of the European Union is a consequence of this law itself. Under standing case law of the Court of Justice of the European Communities, the EC Treaty has created its own legal order which has been incorporated into the national law of the Member States and which the national courts have to take into account. It follows from the autonomous nature of Community law and the transferral of powers by the Member States that this law takes precedence over any conflicting right of the Member States. The principle of precedence applies to Community law as a whole, in other words to both primary and secondary law and to both written and unwritten Community law. In addition, the principle operates in relation both to the past (i.e. to national rules predating Community law) and to the future (i.e. to national rules of a later date). As regards the legal consequences of this precedence, the European Court of Justice has held that national rules that are incompatible with Community law are inapplicable. This doctrine implies that Community law also takes precedence over the Constitution. Whether the same applies in relation to other treaties is still a matter of dispute in legal doctrine.

Under article 120 of the Constitution the courts in the Netherlands are barred from reviewing the constitutionality of Acts of Parliament. Interpretation of the Constitution is ultimately a matter for Parliament and not for the courts. However, this system is in practice eroded by the obligation for the courts to review also Acts of Parliament for their conformity with treaties, since the most

11 Article 94 of the Constitution reads as follows: ‘Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organisations that are binding on anybody.’
important substantive provisions of the Constitution, especially those relating to fundamental
rights, have also been incorporated into treaties.

If the courts consider that a lower legal provision is incompatible with a higher legal provision –
or with an unwritten principle of law – they will hold that all or part of the lower provision may not
be applied.

3.2. Interpretation of a statutory regulation by the administrative authority: judicial review by the
administrative courts

As noted above, the administrative courts decide on their own motion what legal rules are
applicable, whether they are in force at the relevant time and what they mean. They must also
assess whether a statutory regulation should not be applied, either under article 94 of the
Constitution (incompatible with a treaty or decision of an international organisation) or because it
is incompatible with Community law. The court hearing the case is not bound in this respect by
the legal views expressed by the administrative authority, even if the latter’s views are shared by
all other parties to the proceedings. Legal rules that are in force and applicable may not be
disregarded by the court; they have to be applied and, if necessary, interpreted.

However, the administrative courts do observe a degree of restraint in interpreting legal rules
whose meaning cannot be objectively determined with complete certainty because they have
been deliberately formulated by the legislator in such a way as to leave the administrative
authority concerned a margin of discretion. In applying a statutory rule in respect of which it has
a margin of discretion the administrative authority can therefore adopt a policy that is designed
to ensure a uniform application of the rule concerned. In such cases the court reviews whether
the statutory concepts, in particular open rules, are adequately and reasonably implemented by
the policy in abstract terms. Where the meaning of the policy is in dispute, the court will rule on
whether or not there are grounds for holding that the policy gives an incorrect interpretation to
the rule concerned, or is for other reasons to be deemed unreasonable.
3.3. Interpretation of a treaty by the administrative authority: judicial review by the administrative courts

Judicial review of an administrative authority’s interpretation of a treaty is governed by the same principles as judicial review of its interpretation of statutes (see 3.2 above).

However, the authority that ultimately rules on the interpretation of the EC Treaty and other applicable Community law is the Court of Justice of the European Communities. Dutch courts may, and if their judgment will be a final one must refer a question of interpretation or validity to the Court of Justice for a preliminary ruling.

3.4. Review of the exercise of discretionary powers

The administrative courts examine whether and to what extent the applicable law allows the administrative authority discretion to exercise the relevant power in such a way and to such an extent as it determines, provided that the conditions for application have been fulfilled. Where the legislator allows the administrative authority a margin of discretion, the administrative authority may adopt a policy for the exercise of this discretion in the case at hand and future cases. Such a policy may take the form of either policy rules or standard courses of conduct. Policy rules define in broad outline how a discretionary power will be exercised in cases in which the power can be lawfully used. Although a standard course of conduct fulfils the same function as a policy rule in terms of its scope, it is not – unlike a policy rule – adopted by order. Often, it is simply the product of a series of decisions in individual cases.

The administrative court examines, first of all, whether the applicable law allows any scope for weighing the different interests and whether the limits indicated in the law were respected when the decision was made. The courts observe restraint in reviewing how the administrative authority has exercised its discretion.

If the administrative authority does not have a policy, the court reviews how the interests have been weighed or balanced in the case in question. In view of the political accountability of the administrative authority and the position of the independent judiciary in the Dutch constitutional system, it is not up to the court to decide what would be the most balanced weighing of the
competing interests. The scope of judicial review is limited to deciding whether there is such an imbalance in the weighing of the competing interests that the discretionary power has been exercised in a manifestly unreasonable manner.

The applicable policy is not reviewed by the courts of their own motion, and it is not possible to apply directly to the administrative courts for judicial review of such a policy in abstracto. The policy may be reviewed only in the context of an application for review of an order involving the exercise of the administrative power in a specific case.

If the administrative authority has established a standard course of conduct in relation to the exercise of discretionary powers granted to it, this course of conduct as a rule has to be followed. This ensues not from the law but from principles of proper administration, in particular the principle of equality of treatment and the principle of legitimate expectations. If the administrative authority departs from such a standard course of conduct, the administrative court assesses whether this departure was reasonable.

Where the administrative authority has drawn up a policy rule to exercise a discretionary power, the policy rule is binding in the sense that the administrative authority is obliged to act in accordance with the adopted policy, unless the consequences for one or more interested parties would, owing to special circumstances, be disproportionate to the purposes of the policy rule (section 4:84 of the General Administrative Law Act).

At its broadest, the review by the administrative courts to assess compliance with policy rules takes the following form. First, the court reviews whether, at the abstract level, the policy remains within the framework of the law governing the administrative power. This involves deciding not only about whether the policy implements the purpose of the law in an acceptable way, but also whether it remains within the scope of the administrative power (no abuse of power) and the margin of discretion. The judicial review is to this extent comprehensive. The court then goes on to assess whether the manner in which the policy has been established is in conformity with the law and the principles of proper administration. This involves deciding in particular whether the policy has been formulated with due care in view if the legal interests that may be involved. This too involves a comprehensive review by the court.
Finally, as part of the review of the policy at the abstract level the court determines whether the policy is not unreasonable and not incompatible with the principles of proper administration. The constitutional relationship between the administrative authority and the administrative court means that the latter must observe restraint in reviewing the manner in which the administrative authority has balanced the various interests in the case at hand and in possible future cases. It is sufficient if the policy elaborates in a standard case what the administrative authority (clearly) envisaged. If the administrative court concludes that this is not the case, the policy is unlawful and may not form the basis for specific decisions.

If the administrative court concludes that the policy is acceptable and reasonable at the abstract level, it goes on to examine whether the disputed order has been made in keeping with that policy, provided that the case in question is of the standard type covered by the policy. In normal cases a policy rule should not be departed from. Repeated departures in normal cases covered by the policy rule amount in effect to a change in the policy rule. Any such change should be made, from the point of view of legal certainty, by means of an amendment that is announced publicly. A one-off departure in a normal case is likely to be in breach of the principle of equality of treatment. In a particular case, however, special circumstances may necessitate an exception to the policy. A departure may be warranted if strict compliance with the policy rule is not necessary in view of the scope of the rule and the underlying statutory scheme in the specific case and would cause disproportionate harm to the interested parties. But there should then be special circumstances of which no account was taken when the policy rules were formulated. The question of whether special circumstances occur in a given case (for which no account has been made in the policy) is a question of fact which is reviewed by the court in full. As a rule, the person advocating that the power to depart from the policy should have been exercised, will have to specify the circumstances necessitating this. Whether these circumstances are relevant or, to put it another way, whether it is objectively plausible that the circumstances, if taken into account at that moment, would have made a difference to the content and/or application of the policy is another question which the court reviews in full. Finally, the court has to assess whether the special circumstances that are relevant could or should have prompted the administrative authority to depart from the policy rule. However, the court should observe restraint in reviewing the exercise of the power to depart from the policy rule. The criterion is whether or not the administrative authority acted reasonably in balancing all the different interests involved.
Examples of relevant case-law:

Whether an administrative authority should have exercised the power provided for in section 4:84 of the General Administrative Law Act to depart from a policy rule where special circumstances meant that acting in accordance with the policy rule would have had consequences for one or more interested parties that were disproportionate to the purposes of the rule, is a matter that can be assessed by the court only after it has established that the position taken by the administrative authority – namely that compliance with the policy rule means that the requested licence cannot be granted – is not incorrect in law. It is not for the court to directly assess the administrative authority’s submission that there is no ground for departing from the policy. (Judgment of the Administrative Jurisdiction Division of the Council of State of 20 December 2004)

When the new policy was formulated, its potential consequences for existing buildings and business were expressly recognised and balanced against the interests of providing lasting protection from high water. One result of this was that the principle that non-river-related activities should not be permitted in the winter stream bed could be departed from in certain circumstances in order to allow the expansion of a number of existing activities in the winter stream bed. The circumstances mentioned by the applicant cannot therefore be treated as special circumstances as referred to in section 4:84 of the General Administrative Law Act, which may be a ground for the administrative authority to depart from the policy. Contrary to what the applicant has submitted, there is no reason to carry out an assessment of the different interests relevant to this case. (Judgment of the Administrative Jurisdiction Division of the Council of State of 13 August 2003)

The court finds that the administrative authority concerned applies the policy rule that repayments to be made by persons such as the applicant, who are no longer in receipt of benefits and have an income higher than the applicable social assistance benefit level, are fixed at 10% of the benefit level plus 35% of the difference between the net income (including holiday allowance) and the net benefit level plus municipal allowance (including holiday allowance). This rule is within the limits of what constitutes a reasonable policy. The district court wrongly set aside the order that had been made and, substituting its own decision, fixed the amount of the repayment at €100 per month. In doing so, the district court failed to recognise that the administrative authority concerned had the freedom to determine its policy on this matter and had adopted a policy rule.
What the district court should have reviewed is whether the administrative authority concerned had acted in accordance with the policy and, if so, whether it had done so correctly. It follows that the district court in any event acted wrongly in deciding the case itself and that to this extent the judgment cannot be upheld. The court also finds that the repayment-free amount was not calculated by the administrative authority concerned entirely in accordance with the above-mentioned policy rule. It has not been alleged or shown that there were special circumstances that would justify this departure from the policy rule. Consequently, the order made on the objection lodged on account of a breach of section 4:84 of the General Administrative Law Act has to be annulled. (Judgment of the Central Appeals Tribunal f 14 July 2006)

The power under section 4:84 of the General Administrative Law Act to depart from a policy rule is intended to cover special situations not envisaged when the policy rules were adopted. No such special situation exists in this case, even though the policy was changed between the time when the first application was made and the time when the licence was granted and no transitional arrangements were included in the policy scheme. (Judgment of the Administrative Jurisdiction Division of the Council of State of 6 February 2008)

The administrative authority has argued that it applies the hardship clause exclusively in certain types of case. Although this policy cannot generally be described as unreasonable, by applying the policy here in full the administrative authority failed to take sufficient account of the individual and very special circumstances of this case. As these special circumstances were clearly not taken into account, the order cannot be upheld. (Judgment of the Central Appeals Tribunal of 16 April 1998)

The argument advanced by the administrative authority which adopted the policy rules, namely that departure from the policy rules was permissible, cannot succeed if only because the authority is not an interested party within the meaning of section 4:84 of the General Administrative Law Act. If the administrative authority considers that strict application of the policy rule to a particular category of firms would produce a result contrary to the aim of the policy and the underlying regulations, it cannot depart from the policy rules by applying section 4:84 of the General Administrative Law Act and must
instead change the policy rules. (Judgment of the Administrative Jurisdiction Division of
the Council of State of 10 July 2002)

If application is made for judicial review of an order imposing punitive sanctions (i.e. sanctions
that are intended not only to end a situation inconsistent with a particular rule but also to punish
the person concerned), the proportionality of imposing the sanction must be reviewed in full by
the administrative court. This is because the Dutch administrative courts treat punitive sanctions
as criminal charges within the meaning of article 6 of the European Convention for the Protection
of Human Rights and Fundamental Freedoms. It follows that the criminal law safeguards are
applicable to such sanctions. The restraint which the administrative courts must observe in
reviewing other orders made pursuant to a discretionary power does not apply in this case.

It should also be noted that an order must comply with the principles of due care and reasoning.
An order may be set aside if the principle of due care has been breached because
the facts were not properly examined or the authority wrongly failed to seek advice. In addition, a
sound reasoning of the order should be given. This will not be deemed to have been given if the
order is based on incorrect facts.

3.5. Powers of administrative courts other than quashing the order

When an administrative court quash a disputed order, under specific circumstances it may
decide that the legal consequences of the annulled order will stand, or dispose of the case itself
rather than refer it back to the administrative authority. By exercising these powers the
administrative court can resolve the dispute once and for all.

In those cases in which annulling the disputed order would have an unnecessary or undesirable
impact, the administrative court may decide to allow the legal consequences of the annulled
order to stand (section 8:72, subsection 3 General Administrative Law Act). This is possible only
if the legal position created by the annulled order is correct. The court may exercise this power
for reasons of ‘procedural economy’, namely in situations where the applicant would not benefit
from annulment of the order, or the annulment occurs on account of certain formal defects in the
order while it is certain that after annulment the administrative authority would reintroduce what
is in substance the same order. Allowing the legal consequences to stand is also desirable if the
order has already had consequences in practice which cannot be undone by the annulment. In such cases, annulment of the disputed order may nonetheless be a ground for awarding compensation for any damage suffered.

If the annulled order must be replaced by an entirely different order, the administrative court may consider it appropriate in specific cases to resolve the dispute itself once and for all. For this purpose the court may decide that its judgment will take the place of the order (or part of the order) that has been annulled (section 8:72, subsection 5 General Administrative Law Act). The judgment will then not only annul the order of the administrative authority but also decide that the court decision will take its place. In such cases the administrative authority need no longer make an order. Unlike in the case of an 'ordinary' annulment, the judgment then in a final way clarifies the legal relationship between the administrative authority and the individual(s) concerned, while in case an order is annulled in the ordinary way, what form this legal relationship will ultimately take remains uncertain since an order must still be made by the administrative authority.

If the administrative court disposes of the case itself, it may do no more than the administrative authority could and should have done. It is apparent from the history of the legislation that the court may, in principle, exercise the power to dispose of the case itself only if there is just one decision possible in law after the annulment. Until recently it was considered that if the administrative authority would still have a margin of discretion after annulment of the order, the administrative court should not exercise its power to dispose of the case. The basic assumption was that the court should not usurp the discretion of the administrative authority in cases where a margin of discretion still existed, but that it could dispose of the case where the law to be applied was formulated in such peremptory terms as to leave no margin of discretion. However, according to recent case law, in particular that of the Administrative Jurisdiction Division of the Council of State, it is not always necessary for the administrative court to decide not to finally dispose of the case when the administrative authority still has a margin of discretion. Much greater emphasis is now put on the court’s conviction that the result of the outcome of the dispute would be no different if it were to be referred back to the administrative authority and that the decision is in keeping with the requirements of the law.

A decision by the administrative court to finally dispose of the matter may be the appropriate solution in cases in which the proceedings have already dragged on for many years (e.g. owing to the slowness of the decision-making procedure or the frequency of the lawsuits brought by the
parties) and there is a danger that they will not be completed within a reasonable time (as required by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). The court may also dispose of the case itself if the parties wish to obtain a final judgment and disposal is a relatively simple matter for the court, because during the proceedings it has become clear what new order the administrative authority would make. In case de dispute concerns an amount to be paid or to be paid back, after annulment of the order the court will as a rule fix the amount itself. A final judgment by the court is also the logical course of action in cases in which it is clear that the objection must be declared inadmissible or in which it has been established that the administrative authority concerned lacked the jurisdiction to make the order.

The administrative court will as a rule only decide to dispose of the case itself after the parties have been given the opportunity to comment on any further documents, reports and recommendations. Account should also be taken as far as possible of any interests of third parties to the dispute which may be affected by the outcome of the case.

3.6. Consequences of quashing a challenged order

An order generally has the force of law once it has been made and entered into effect. The system of legal protection under the General Administrative Law Act is based on the possibility of quashing unlawful orders. An administrative court can deprive an order of the force of law only by quashing the order or by suspending it by way of provisional remedy.

If the administrative court considers the order to be unlawful, it holds that the application for review is well-founded and quash all or part of the challenged order. Quashing the order or part of the order generally leads to the annulment of the legal consequences of that order or the part of the order concerned (section 8:72, subsection 2, General Administrative Law Act). In such a case the order is treated in legal terms as if it had never existed. Quashing of the order takes effect, in principle, retroactively (ex tunc): the legal consequences of the order or the annulled part of the order are deemed never to have taken effect. This is a direct and automatic effect of the annulment. The annulment applies erga omnes (in relation to everyone).
As a rule, applications for judicial review relate to orders made by an administrative authority after an objection has been lodged. The primary order, which is not affected by the annulment of the decision on objection, revives as a consequence of the annulment unless the court decides that the primary order is also quashed. The administrative authority is then obliged to reconsider the objection lodged against the original order.

The *de facto* consequences of the challenged order must be distinguished from the legal consequences. The *de facto* consequences of the order are not directly affected by the annulment. However, they are placed in a different legal light by the annulment, mainly because it undermines their legal basis. This may occasion further steps on the part of the administrative authority. For example, the authority may have to undo all or part of that which has been performed in pursuance of the order and/or take further measures (e.g. the provision of compensation). 

Contracts concluded under civil law for the implementation of the order are also treated as *de facto* and not as legal consequences of the order. This applies even if the annulled order was made specifically with a view to the conclusion of the contract: the contract does not cease to be valid simply by virtue of the annulment of the underlying intention of the competent organ of the legal person under public law. Annulment of the order in question will therefore not always necessarily mean that the administrative authority is no longer bound by the contract.

Sometimes further legal acts are performed under public law in pursuance of an order. Often these acts are known as secondary orders. These orders too are treated as *de facto* consequences in the event of annulment of the underlying order. When the underlying order is annulled the legal basis for the secondary order also generally ceases to exist. Although this does not directly affect the existence of the secondary order, it makes the secondary order susceptible to annulment by the court if challenged in law. If the secondary order has become irreversible in law, it can no longer be annulled (in any event not by the court). The secondary order then has formal legal force and is, in principle, a given fact. If a secondary order has been made for the benefit of a public body, this body is in certain circumstances no longer free to make use of it after the underlying order has been annulled, even though the secondary order still has formal legal force.

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13 An example of such a measure would be an order by an administrative authority giving a license for the demolition of a building erected in accordance with a planning permission that was subsequently annulled; this was the case in the judgment of the Supreme Court of 28 February 1975, Woerden Parish Hall.
The annulled order continues to exist as a historical given – and in certain aspects a legal fact. Such an order can still have legal consequences, albeit different from those originally intended. Once an order has been annulled by an administrative court, the making of the order is deemed to have been a tort which, in principle, entails an obligation to pay compensation. The fault of the administrative authority is thus taken to be an established fact. However, this concerns only the relationship between the administrative authority and the applicant at whose request the order has been annulled. The annulment does not establish that the annulled order was also unlawful in relation to third parties (i.e. persons who did not exercise the right to challenge the order in law).

3.7. Means of ensuring that administrative authorities comply with judgments

The judgment takes effect as soon as it has been delivered in public. The purpose of the ruling is to achieve a binding resolution of the dispute and ensure legal certainty for the parties. No special judicial procedure is necessary to enforce a judgment. If the judgment provides for the payment of compensation, court registry fees or other charges, it constitutes a writ of execution (section 8:76 General Administrative Law Act). Administrative authorities that are directed by an administrative court to make a fresh order in keeping with the findings of the judgment almost invariably comply. The court may set a time limit for the fresh order (section 8:72, subsection 5, General Administrative Law Act). If necessary and either at the request of a party or otherwise, the court may rule that if and in so far as the administrative authority does not comply with the judgment within a certain period of time, it will owe an incremental penalty to a party designated by the court (section 8:72, subsection 7, General Administrative Law Act). A penalty of this kind is usually imposed only at ultimum remedium, namely once it becomes apparent that the administrative authority has failed to make a fresh order or has failed to do so in time or in the correct manner, and the interested party applies for review of the failure to make the order in time.

As a failure to make an order in good time is equated with an order (section 6:2 General Administrative Law Act), an objection and thereafter an application for review is possible where a decision is not given in good time by an administrative authority, whether of its own motion or otherwise.
The General Administrative Law Act was supplemented by the Penalty Payments and Judicial Review (Failure to give Timely Decisions) Act on 1 October 2009. The purpose of this legislation is to provide a more effective remedy for members of the public in cases where an administrative authority is slow to make orders. Subject to certain conditions the Act provides for the administrative authority to owe an incremental penalty in the event of a failure to make the requested order in good time. This penalty is owed by the authority from two weeks after the day on which the term for making the order applied for expires, provided that the authority has received a written notice of default from the applicant. The administrative authority owes the applicant a penalty for each day that it remains in default, subject to a maximum of 42 days. The penalty is €20 a day for the first 14 days, €30 a day for the next 14 days and €40 a day for the remaining days.

Failure to make an order in time may result not only in the imposition of a penalty but also in an application for judicial review. Since the entry into force of the Penalty Payments and Judicial Review (Failure to give Timely Decisions) Act, there is the possibility to apply directly to the court in the event of a failure to make an order in time. An applicant is therefore no longer required to first lodge an objection with the administrative authority against its failure to make the order in time. The application for review can be lodged as soon as the administrative authority is in default and two weeks have expired since the date on which the interested party has given written notice of default to the administrative authority. The court decides on this application within 8 weeks (or 13 weeks if the court considers a hearing to be necessary) of receipt of the application and fulfilment of the requirements of admissibility. If the application is well-founded and the authority has still not announced an order, the court will hold that the administrative authority should make an order within two weeks of the date on which the judgment is communicated. It will also impose an incremental penalty on the authority for every day that it fails to comply with the judgment.