Consiglio di Stato

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"Techniques for the protection of private subjects in contrast with public authorities: actions and remedies – liability and compliance"

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Answers to questionnaire: the Netherlands

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"TECHNIQUES FOR THE PROTECTION OF PRIVATE SUBJECTS IN CONTRAST WITH PUBLIC AUTHORITIES: ACTIONS AND REMEDIES - LIABILITY AND COMPLIANCE".

INTRODUCTION

The seminar will analyse the types of actions that can be brought before the administrative judge: action of annulment, action of declaration and action of condemnation. With particular reference to the latter, the seminar will focus on compensatory measures, including damages for loss of opportunity and damages as a result of delay.

The seminar also intends to examine the possibility of any and eventual special or fast-track procedure, for introductory terms and methods which pertain to certain subjects under consideration, for example, for their economic or political relevance, such as those to be found in the sphere of public contracts (see also transversal analysis).

The aim of this questionnaire and of the subsequent seminar is to provide a wider comprehension of the similarities and differences that exist among the various legal systems of the member States insofar as they apply to the situations to be dealt with by the administrative court, paying particular attention to the content and subject matter of the relative rulings.

SESSION I

LEGAL PROCEEDINGS THAT CAN BE BROUGHT BEFORE THE ADMINISTRATIVE COURT

1. **In your legal system, which judges are competent to pronounce on disputes in which one of the parties is the public administration?**
   - An ordinary judge
   - An administrative judge
   - A judge who deals with special areas
   - Others

In the Dutch legal system, the judges that are competent to pronounce on disputes in which one of the parties is he public administration are: the ordinary judge, the administrative judge and judges who deal with special areas.

The jurisdiction of the administrative court is defined by article 8:1 and article 8:3 of the Dutch General Administrative Law Act (GALA). From these articles it follows that an interested party may appeal to the administrative judge against an order of an administrative authority which is not of a general nature. There are four highest administrative courts in the Netherlands.

The general highest administrative Court is the Administrative Jurisdiction Division of the Council of State. The Administrative Jurisdiction Division has competence to review the lawfulness of administrative orders, unless a specialised administrative court has been designated. (Article 8:105 Awb).

There are three specialised administrative courts: 1) the Trade and Industry Appeals Tribunal is the highest administrative court in cases that concern socio-economic questions; 2) the Central Council of Appeals is the highest administrative court in the area of social security matters and cases concerning civil servants; 3) the Tax Division of the Supreme Court is the highest administrative court in tax law. (Chapter 4, *Bevoegdheidsregeling bestuursrechtspraak* and article 28 of the General Tax Act).

The (ordinary) civil court is competent in cases that concern public law acts, in the situation where there is no administrative court entrusted with jurisdiction. The civil judge is only competent to review questions on the grounds that a legal entity governed by public law has committed a wrongful act (art. 6:162 Civil Code).

2. **Which actions can be brought before the administrative court in view of the exercise of administrative powers?**
   - Annulment of administrative acts
   - action of condemnation
   - Other actions

If you have replied 'other actions', please clarify which.

The General Administrative Law Act highlights the following actions:

- Annulment actions of contested administrative orders (including administrative decisions of an individual nature) (art. 8:72 par. 1 GALA);
- Action against a written refusal to make an order (article 6:2(a) GALA);
- Action against a failure to make an order in due time (article 6:2(b) GALA);
- Compensatory actions for compensation of damages suffered as a result of an unlawful decision (art. 8:88 (1)(a) GALA) or an unlawful action in preparation of an unlawful decision (art. 8:88 (1)(b) GALA);
- Compensatory actions for compensation of damages suffered as a result of not making a decision in time (art. 8:88 (1)(c) GALA.

3. **From which sources can actions be brought before the administrative court?**
   - Law
   - Public authority regulations
   - Guidelines
   - Supreme Court rulings
   - Other

In the Dutch legal system, actions can be brought before the administrative court against law, public authority regulations and guidelines.

The GALA provides that actions can be brought against administrative orders (including administrative decisions of an individual nature) that constitute a public law act. Orders can be based on formal legislation, regulations of decentralised bodies (such as provinces and municipalities), and delegated legislation at the level of the government (such as ministerial regulations). In exceptional cases, actions can be brought against administrative orders that are based on a policy rule. This might be the case, for instance, where (favourable) policy rules provide for damages and compensation for lawful government acts.

4. **Which administrative decisions can be challenged?**
   - Administrative acts which have a specific recipient
   - General acts and regulations
   - Acts inherent to the procedure
   - Political acts

In brief, in the Netherlands administrative decisions that take the form of administrative acts which have a specific recipient can be challenged before administrative courts. General acts an regulations can only be directly challenged before civil courts.

Article 8:1(1) GALA lays down the rule that interested parties can lodge an appeal against an 'order' before the administrative court. The GALA defines an 'order' as a written decision of an administrative authority constituting a public law act. However, this does not mean that all 'orders' can be challenged before an administrative court. As a general rule only individualised decisions are susceptible to judicial review by administrative courts. Article 8:3 GALA excludes generally binding regulations as well as policy rules from direct judicial review by administrative courts. Article 8:3(1)(a) GALA states that no appeal may be lodged against an order containing a generally binding regulation or a policy rule. In the Netherlands, the acts mentioned in art. 8:3 GALA can only be directly challenged before the civil courts. Nonetheless, administrative courts do have the competence to *indirectly* review generally binding rules and policy rules when assessing the lawfulness of an individualised decision (*exceptieve toetsing*). This indirect judicial review can, for example, lead to a judgment of the administrative court which states that the general rule on which an individual decision was based is not binding, since it is contrary to general principles of law, general principles of good

administration and/or higher law. In the Netherlands, formal legislation is excluded from the possibility of judicial review: such a 'constitutional review' is prohibited by Article 120 of the Dutch Constitution. Formal laws can only be appealed on the grounds that they are contrary to directly binding international law.

5. **On the grounds of which defects can the annulment of an administrative act be requested?**
   - Breaches of the law
   - Breaches of competence
   - Technicalities and procedural defects
   - Breaches of general principles
   - Other

The annulment of an administrative decision can be requested on the grounds of breaches of the law (see also question 3), breach of competence, breach of (numerous) procedural defects as well on the ground of breaches of general principles. Examples of codified general principles are the principles of care (article 3:2 GALA), the principle of *détournement de pouvoir* which denotes that an administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred (article 3:3 GALA), the principle of proportionality (article 3:4 GALA) and the duty to state reasons (article 3:46 GALA). Other general principles have not been codified in the GALA. Examples of uncodified principles are the principle of legal certainty and the principle of legitimate expectations. Furthermore, the annulment of an administrative decision can also be requested where the administrative authority has acted in accordance with a policy rule, whereas the specific circumstances of the case require that the administrative authority departed from that policy rule. An obligation to depart from policy rules exist where the consequences of applying the policy rule is, for one of more parties, out of proportion to the purposes of the policy rule (article 4:84 GALA).

6. **Can the judge partially annul the challenged administrative act?**

If the administrative judge rules that the appeal against the challenged administrative act is well-founded, the administrative judge can partially annul the unlawful administrative act (see article 8:72(1) GALA).

7. **Can the judge substitute the Administration by modifying the content of the administrative act?**

Yes. The Dutch GALA grants administrative courts the authority to deliver a decision which takes the place of the decision that administrative authority should have taken. Article 8:72(3)(b) of the GALA states that if the district court rules that the appeal against the challenged administrative act is well-founded, it may determine that its judgment shall take the place of the annulled order or the annulled part thereof. As a general rule, this instrument (which is referred to as *zelf in de zaak voorzien*) cannot be used where the contested decision is based on a discretionary power of the administrative authority. Nonetheless, the administrative courts have ruled that, under certain conditions, the courts can apply the instrument even in the situation where, from a legal perspective, more than one decision is possible.

8. **When the judge annuls the challenged act, can he dictate provisions which the P.A. must abide by in the review proceedings of the subject-matter of the litigation?**
   - Yes
   - No

If your reply is affirmative, please elaborate.

Yes. If the administrative court annuls the challenged act, it can direct the administrative authority to issue a new order or to perform another act in accordance with the instructions given by the administrative court (article 8:72(4)(a) GALA). In this respect, the administrative court may decide that legal provisions concerning the preparation of the new administrative order or act shall not or partially remain inapplicable.

9. **When do the effects of the jurisdictional annulment of an administrative act become applicable?**
   - From the date of the adoption of the act (*ex tunc*)
   - From the date on which the judgement becomes final (*ex nunc*)
   - Other

As a general rule, the effects of the jurisdictional annulment become applicable from the date of the adoption of the contested decision ("*ex tunc*").

Article 8:72 GALA states that if an order or part of an order is annulled, the legal consequences of the order or the annulled part thereof shall be void. In this respect, it is noted that the contested decision usually is the decision that has been taken in the objection procedure by the administrative authority. Indeed, according to the Dutch GALA, before lodging an appeal before an administrative court, the interested party needs to file a notice of objection to the administrative authority that made

the order (article 6:4 GALA). During the objection phase the review conducted by the administrative authority is a review *ex nunc.*

10. Can the judge modulate the effects over time of the ruling of annulment of an administrative act?

No. The GALA does not enable the administrative court to modulate the effects over time of the ruling of annulment of an administrative act.

Nonetheless, the GALA does provide for the possibility to extent the provisional remedy which suspended the effect of the primary decision made by the administrative authority (article 8:85(2)(c) jº article 8:72(5) GALA). Furthermore, the administrative court may also grant a provisional remedy in the ruling of annulment in the situation where a provisional remedy has not been granted in the proceedings on the merits. The administrative court shall determine at which moment in time the provisional remedy shall cease to have effect (article 8:72(5) GALA).

11. Can the act of ordering payments for damages be proposed autonomously or must it always be proposed together with other kinds of actions?

Yes. The GALA provides for a special procedure by which the act of ordering payments for damages can be proposed autonomously. This procedure provides for a petition to be presented to the administrative court in which the court is asked to grant the petitioner damages which has been the cause of a decision which has been quashed by the court. The petition can be proposed at the same time as the action of annulment (or the action against a failure to make an order in due time) (art. 8:91 GALA) or separately form the annulment procedures (art. 8:90 GALA). As a general rule, in the situation where the claim for compensation is made *after* the procedure against the contested decision has been closed, the requesting party first needs to lodge a written request for compensation with the relevant administrative authority (Article 8:90 GALA).

The GALA provides for a time-limit within which the compensation claim for damage must be made. According to art. 8:93 GALA, there is a limitation period of five or maximum twenty years for the granting of a petition. This period will not start sooner than the day after which the annulment has become irrevocable.

12. In the light of what kind of behaviour is the compensatory action for damages feasible when dealing with a Public Administration?

- Implementation of an illegal and detrimental administrative act
- Non-observance of the deadline of the procedure
- Lesion of good faith and trust

- Resultant behaviour of the public administration
- Other

The GALA states that the aforementioned (see question 11) administrative petition procedure can be lodged for the following acts:

- Illegal acts (in practice all decisions of an individual nature)
- Illegal factual acts which have been acted out in the preparing of the illegal act itself (for example an illegal advice which has led to an illegal act)
- Acts which have been taking outside the statutory time limits
- All illegal acts (also those of a factual nature) concerning civil servants
- All illegal acts (also those of a factual nature) concerning immigrants (art. 72a Immigration Law)

The illegality of all these acts differs according to the circumstances. The most common breaches of law are the acting contrary to a written law, written or unwritten principles (such as the principle of good faith) and international law (f.e. European Convention on Human Rights or the EU-Treaty).

Acts which are not mentioned in the list above (all factual acts, all acts of a general nature) can be challenged before the civil courts on the basis of art. 6:162 Civil Code.

13. Which are the different kinds of reimbursable damages?

- Material damage
- Non-material damage
- Loss of opportunity

Both material and non-material damage, as well as damage coming from loss of opportunity can be rewarded in the Dutch system. In the Dutch system of state liability for wrongful government acts there are no specific administrative rules on reimbursable damages. The administrative courts tend to follow the general articles on damages as laid down in the Civil Code (CC). The relevant articles are:

Art. 6:95 CC:

> *The damage that has to be compensated by virtue of a statutory obligation to repair damages (due by virtue of law), consists of material loss and other disadvantages, the latter as far as the law implies that there is an additional entitlement to a compensation for such damage.*

Art. 6:96 CC:

> *1. A material loss includes losses suffered as well as missed profits.*
> *2. The following damages also qualify for compensation as material loss:*
> *a. reasonable costs to prevent or limit the damage which could be expected as a result of the event which makes someone liable;*

b. reasonable costs for determining the nature and scope of the damage and of the liable persons;
c. reasonable costs for attempts to get satisfied on the basis of a settlement out of court

Art. 6:106 CC:

1. The injured person has a right of compensation for damage that does not consist of material loss, assessed in conformity with the standards of reasonableness and fairness:
a. if the liable person had the intention to inflict such damage;
b. if the injured person sustained physical injuries or if his honour or reputation is injured or if he is harmed otherwise in person;
c. if the damage consists of harming the memory of a deceased and is inflicted to the not legally separated spouse, the registered partner or a blood relative up until the second degree of the deceased, provided that the memory of the deceased is harmed in such a way that the deceased himself, if he would still be alive, could have claimed damages for injuring his honour or reputation.

As stated, these principles will also apply when the administration has acted wrongfully. In practice, the compensation of non-material damage will not be easily obtained as the legal thresholds for damages are high. In procedures regarding the breach of the reasonable time-limit however, the petition procedure can lead to success relatively easily. In its jurisprudence, the highest Dutch courts have stipulated rules within which time a an administrative decision or a judicial decision has to be granted.

14. Does the omission of lodging an action of annulment result in elision or reduction of the compensatory damages?

Yes. This is a very important precondition for an annulment action to successfully lead to the granting of damages. When the applicant has not in due time (as a rule six weeks after the administrative decision has been taken) lodged an objection or an appeal against an order, the order will have the status of 'irrevocable'. Both the administrative and the civil courts will consider the order to be lawful, in principle regardless of possible substantive or procedural shortcomings. This is called the 'formal legal force' (*formele rechtskracht*) of orders. There are certain exceptions to this jurisprudential rule, for example in the case of decisions which allow activities to take place which entail large risks for persons and their belongings. Persons who are – often years after the order has been taken – damaged as a consequence of these activities, cannot be expected to have lodged appeals against this order, only to prevent possible damage in the future. The Supreme Court has judged thus in a decision lodged against the State in the case of decisions concerning permits granted for the winning of gas in the province of Groningen (SC 19 July 2019, ECLI:NL:HR:2019:1278).

15. In order to award compensatory damages, is proof of the responsibility of the public administration required? If your reply is affirmative, which party is obliged to provide said proof?

As a general rule, the burden of proof of the liability of the public administration lies with the injured party. He will have provisional obligation and the burden of proof of the damage he claims to have suffered. The general principles regarding the burden of proof, as laid down in the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) also apply in cases of state liability for illegal orders and actions. In some cases a less onerous burden of proof is accepted. Again, the winning of gas in Groningen is a good example. Here, the lawmaker has accepted a reversal of the burden of proof for damage to houses in a certain area. This damage is presumed to be caused by earthquakes as a consequence of the winning of gas by the operator of the gas field NAM (which is, strictly speaking, not a public authority). Art. 6:177a Civil Code states that NAM has to proof that there was an 'evident and demonstrable' other cause of the damage.

16. Can the judge convert *ex officio* one action into another?

No. Although the administrative judge is proverbially 'active' (as opposed to the more 'passive' civil courts), the actions lodged by the applicant are leading.

17. Is there a time-limit for the proposition of the compensatory action?

Yes. As explained in our answer to question 11, the general principles on time limitations as laid down in art. 3:310 (1) Civil Code also apply in state liability cases. This article states:

"A right of action to claim damages or a contractual penalty becomes prescribed on the expiry of five years from the day following the one on which the injured person has become aware of both the inflicted damage or the fact that the contractual penalty has become due and demandable and the identity of the person who is liable for this damage or contractual penalty, and in any event twenty years from the day on which the event occurred that caused the damage or that made the contractual penalty become due and demandable (exigible)."

As a general rule, the long limitation period of twenty years applies, but in cases concerning liability, the shorter period of five years applies. According to the Supreme Court this period will start running as soon as the injured party has sufficient certainty that the damage was caused by wrongful or fallible actions by the other party (SC 24 January 2003, ECLI:NL:HR:2003:AF0694).

18. Can the judge rule that the Administration implement an administrative act? If your reply is affirmative, what are the prerequisites for implementation?

Yes. The administrative judge can do this within the limitations of art. 8:72 (4) GALA: If the district court rules the appeal well-founded, it may direct the administrative authority to make a new order or to perform another act in accordance with its judgment, or it may determine that its judgment shall take the place of the annulled order or the annulled part thereof. The judge will only rule that an act has to be implemented if the facts of the case do not allow for his determination that all or part of the legal consequences of the annulled order or the annulled part thereof shall be allowed to stand. When implementing the new act, the public authority has to take into account the facts and circumstances of the law as it stands (*ex nunc*).

SESSION II – SPECIAL PROCEDURES

1. Does your administration have provisions for special procedures

Yes, Dutch administrative procedural law has several special procedures, which are all laid down in the General Administrative Law Act. The most important procedures are the following:

1. Division 3.4 of the GALA provides for the so-called 'pubic preparatory procedure'. This special procedure only applies if this is required by statutory regulation or by order of the administrative authority. The procedure entails that, in the event of an application for an order or the draft of an order to be made on its own initiative, the administrative authority must deposit a *draft version* of the order, together with the documents relating thereto, for inspection for a period of at least six weeks. During this 'inspection period' interested parties, and if decided required by statutory regulation or by order of the administrative authority other parties as well, may state their views on the application or the draft either orally or in writing, at their discretion. After the public participation procedure, the administrative authority will take a final decision on the order.
2. A special procedure for 'related orders' promotes a coordinated and streamlined decision-making process and legal protection for related orders (division 3.5 of the GALA). For instance, the GALA lays down coordination rules for the notification of related orders and provides that one administrative court is competent to review notices of appeal against (one or more of) the related orders.
3. The '*lex silencio positivo*-procedure' laid down in articles 4:20a until 4:20f GALA provides that in the event of failure by the administrative authority to respond to a request for an administrative decision, the administrative decision shall be deemed to have been granted. The *lex silencio positivo*-procedure only applies if this is required by statutory legislation.
4. Appeals against a written refusal to make an order are equated with an order within the meaning of the GALA (see article 6:2(a) GALA and article 6:3(1) GALA). As a consequence, the written refusal to make an order can be subject of a notice of objection procedure (article 7:1 GALA) and is susceptible to judicial review by an administrative court (article 8:1 GALA).
5. Appeals against the failure of a public authority to make an order in due time are equated with an order within the meaning of the GALA (see article 6:2(b) GALA). As a consequence, the failure to make an order in due time can be subject of a notice of objection procedure (article 7:1 GALA) and that against the failure to make in order in due time an appeal may be lodged to an administrative court (article 8:1 GALA);
6. A special procedure with regard to compensation claims. Article 8:88 GALA states that the administrative judge is competent, upon request by a part concerned, to order an administrative authority to compensate damage that the party concerned has suffered as a result of *inter alia* a) an unlawful order; b) another unlawful act for the preparation of an unlawful order; c) a failure to make an order in due time.

7. The administrative courts have the power to render an interim decision, enabling the administrative authority to repair the defect during the proceedings (article 8:51a GALA, article 8:51d GALA and article 8:80a GALA). This procedure is the so called 'administrative loop' (*bestuurlijke lus*). The administrative loop can be applied if the court has established that the decision taken by the administrative is defective, for instance due to a procedural mistake or insufficient reasoning.
8. The 'judicial loop'-procedure laid down in article 8:113 (2) GALA takes place if the appeal court decides that the administrative authority needs to make a new decision. The injured party can only appeal against this new decision at the appeal court.
9. The administrative courts can send cases to the Grand Chamber if they think it is necessary for the unity of law or the legal development. The Grand Chamber consists of five judges. This procedure is laid down in article 8:10a (4) GALA.
10. The administrative courts can ask for a conclusion/opinion by the A-G. Article 8:12a GALA states that the presiding judge can ask the A-G to give a conclusion in a particular case. This opinion is independent, public and reasoned and it helps the judge to make a decision in a particular case.
11. The administrative courts can ask a non-party for information which is relevant for the case and the decision. This is called the Amicus curiae-procedure and it is laid down in article 8:12b GALA. It will help to provide insight in the legal and social consequences of the decision of the court.
12. Article 16 (1) *Tijdelijke wet Groningen* states that the administrative courts can ask prejudicial questions to the *Afdeling* if it is important for the rechtsontwikkeling voor beoordeling van een veelheid aan aanvragen waarin dezelfde vraag zich voordoet.

2. What do the specialities consist of?

- Ways of introducing the appeal
- Procedural time-limits
- Jurisdiction of the court
- Other

For the answer to this question please be referred to the answer under question 1. More specifically:

- The procedure mentioned under no. 1 is 'special' in the sense that it allows for interested parties to let their interest to be weighed in in relation to draft orders, after which they also have the right to lodge an objection against the final decision.
- The procedures mentioned under nos. 3, 4 and 5 give interested parties the right to entail administrative procedures, even though the public authority has not taken a 'positive' decision.
- The procedure mentioned under 6 gives parties the right to ask the administrative judge to condemn a public authority to pay damages, without being required to ask the public authority to take a formal decision (*a substantive decision order*) on his request.

- The procedures mentioned under 7 and 8 are special in the sense that they promote 'final dispute resolution' (*finale geschilbeslechting*). No. 8 is also related to the jurisdiction of the Council of State, who is solely competent, at the exclusion of the competence of the court of first instance.
- The procedures mentioned under 9, 10, 11 and 12 are all relatively new instruments (no. 11 has only come into force since the beginning of 2021) which should enhance the development and unity of administrative law.

3. **The special rites are established:**
   - According to subject (for example, tenders, procedures of expropriation, independent administration authorities)
   - According to actions
   - Both of the above

For the answer to this question please be referred to the answer under questions 1 and 2. More specifically:

- The procedures mentioned under 1 and 2 are established according to subject (being used specifically in the field of spatial law).
- The procedures mentioned under 3, 4 and 5 are established according to action, allowing for interested parties to lodge objections with the public authority and to entail judicial proceedings even though a 'positive' decision has not been taken.
- The procedures mentioned under 6 is established according to action, allowing for the direct access to the administrative judge, without an objection procedure being required.
- The procedures mentioned under 7 and 8 are special according to action, allowing for more effective dispute resolution.

4. **Does your system provide for appeals against the silence of the Administration at the request for an administrative provision presented by a private individual?**
   - Yes
   - No

Yes. As discussed under question 1, appeals against a failure to make an order in due time are equated with an order within the meaning of the GALA (article 6:2(b) GALA). As a result, the failure to make an order in due time can be subject of a notice of objection procedure (article 7:1 GALA) and can be appealed to an administrative court (article 8:1 GALA).

5. **Do the Administrations comply spontaneously with the decisions of the administrative courts?**
   - Yes, always

- No, never
- In the majority of cases, in any case more than in 50% of cases
- Hardly ever, in any case less than in 50% of cases

Our estimation is that administrative authorities spontaneously comply with the administrative court rulings in the majority of cases, in any case more than in 50% of the cases.

6. **In your legal system, is there a special procedure for ensuring the integral execution of the sentence**?

No. The GALA does not provide for a special procedure that concerns the request for the integral execution of the sentence in the situation where it appears that the administrative authority does not comply with a judgement (after the judgment has been handed down).

As a general rule, disputes that concern the execution of the sentence need to be brought before the civil judge in accordance with article 438 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).

The only possibility provided for by the GALA is that the administrative court may determine, in its judgement on the merits, that as long as the administrative authority does not comply with that judgment, an *astreinte* (to be fixed in the judgment) shall be payable by the legal entity designated by the court to a party designated by the court (see article 8:72(6) GALA).

7. **Are the judge's decisions which are not of the last resort immediately enforceable?**
   - Yes
   - No

Yes. As a general rule, the decisions of the administrative courts which are not of the last resort are immediately enforceable. From articles 6:16 GALA and article 6:24 GALA it follows that the objection or appeal to a lower or higher court does not suspend the operation of the order against which it is brought. There are, nonetheless, exceptions to this rule. For instance, according to article 8:106(1)(a) GALA, in the field of social security the effect of judgements by district courts or by preliminary relief judges shall be suspended until the time limit for lodging an appeal to the Central Council of Appeals (which is one of the three highest administrative courts in the Netherlands (as discussed under question 1 of session 1)) expires without being used.

8. **Following the annulment of a decision characterized by discretionary power, the interested party is forced to challenge each of the ulterior negative decisions which have been deemed illegitimate by dint of defects which are different to those identified by the judge or, in alternative, are there certain mechanisms of "reduction" of the aforesaid discretionary power which ensure the definition of the litigation once and for all?**

We find it hard to interpret the question in relation to Dutch administrative law. In general, the GALA does not provide for the general rule that in addition to the annulment of a contested decision, the administrative court may also annul other, ulterior decisions that are similar to the contested decision.

The GALA provides for (other) mechanisms that enable administrative courts to settle disputes 'once and for all'. In this regard, worth mentioning is the rule that if the administrative authority repeals or alters the *disputed order*, the objection or appeal shall be deemed also to have been brought against the new order, unless this order completely satisfies the objection or appeal (see article 6:19 GALA). This article prevents a loss of judicial protection, as the interested party does not need to challenge the new decision in a separate procedure.

Another mechanism that promotes final dispute settlement is the 'administrative loop' (*bestuurlijke lus*): the GALA grants the power to administrative courts to render an interim decision, enabling (or, in last instance, requiring) the administrative authority to repair the defect during the proceedings (article 8:51a GALA, article 8:51d GALA and article 8:80a GALA). The administrative loop can be applied if the court has established that the decision taken by the administrative is defective, for instance due to a procedural mistake or insufficient reasoning. Applying the administrative loop prevents that the decision needs to be squashed and that, subsequently, the administrative authority should take a new decision. More importantly, the administrative loop prevents that the interested party needs to start a separate procedure in order to be able to challenge the new decision taken by the administrative authority.

Furthermore, the GALA also provides for the so-called 'judicial loop' (*judiciële lus*). Article 8:113 GALA states that in the event where the judgement of the higher administrative court directs the administrative authority to take a new decision, the higher court may include in its judgement that it is only possible to lodge an appeal against that new decision with a higher court.

SESSION III – PRECAUTIONARY MEASURES

1. **Does the proposition of an appeal automatically suspend the effectiveness of the administrative act?**

No. In the Dutch legal system, the proposition of an appeal does not entail suspensive effects. This follows from the articles 6:16 GALA and 6:24 GALA. Article 6:16 GALA provides that the objection or appeal shall not suspend the operation of the order against which it is brought unless provided otherwise by or pursuant to statutory regulation. From the article 6:24 it follows that this provision (article 6:16 GALA) shall apply *mutatis mutandis* if an appeal to a higher court or an appeal in cassation may be lodged. Nonetheless, as already mentioned under question 7 of section 3, exceptions to this rule exist, for instance in the field of social security where an appeal to the Central Council of Appeals does have suspensive effects for the ruling in first instance.

2. **In your legal system, are precautionary measures provided for?**

Yes. The possibility of granting a provisional remedy is provided for by the GALA in Title 8.3 on 'Provisional remedies and immediate judgment in the proceedings on the merits'. A provisional measure may be required to protect the interests of one of the interested parties. As specified in article 8:81 GALA, a provisional remedy can be granted where speed is of essence because of the interests involved.

3. **What kinds of decisions can the judge apply as a precautionary measure?**
   - The suspension of the challenged act;
   - (if the subject of the challenge is the refusal of an application) a positive measure which provisionally anticipates the effects of the administrative act being contested;
   - The order to the administration to re-examine the application on the strength of indications contextually provided by the judge;
   - Whatever measure necessary to satisfy, in each case, the precautionary requests presented by both parties

In the Dutch legal system, in administrative cases, the preliminary relief judge can apply as a precautionary measure the suspension of the challenged act as well as a positive measure which provisionally anticipates the effects of the administrative act being contested (the first two options mentioned above).

The most important and most frequently granted provisional remedy is the suspension of the challenged act. Indeed, as mentioned above, as a general rule the objection or appeal shall not suspend the effectiveness of the contested decision.

In addition to the possibility of suspension of the contested act, the provisional remedy could also take other forms. As mentioned, a provisional remedy could entail a positive measure which provisionally anticipates of the effects of the administrative act being contested. In this respect, an example is that as provisional remedy, a provisional license could be granted in the event where the contested act refused the requested license.

However, the provisional remedy could not be whatever measure necessary to satisfy the precautionary requests presented by both parties as account needs to be taken of the role and position of the judge in preliminary relief proceedings. For instance, as a provisional remedy, the preliminary relief judge cannot order the questioning of witnesses during the proceedings on the merits; this has been considered a power of the court that can (only) be applied in the proceedings on the merits (see Central Council of Appeals, 3 November 2009, ECLI:NL:CRVB:2009:BK3694).

4. **What are the conditions for the acceptance of a precautionary request?**
   - The probable validity of the action
   - The probable validity of the action together with a serious prejudice
   - The prevalence of public or private interest, based on the results of the equilibrium/assessment
   - The required prerequisites of trial law to accord precautionary measures vary according to the different types of litigation
   - Other prerequisites (please specify)

As a general rule, the conditions for the acceptance of a precautionary request consist of the probably validity of the action together with a serious prejudice.

According to article 8:81(1) GALA for a provisional remedy to be granted there needs to be immediate urgency because of the interests involved. In this regard, it is required that the (possible) consequences of the contested decision need to be irreversible as well that the preliminary relief judge has serious doubts concerning the lawfulness of the contested decision. In addition to that, a request for a provisional remedy can also be accepted in the event where the contested decision is, following a preliminary assessment, considered to be unlawful – regardless of the question whether the possible consequences of the contested decision are irreversible.

5. **Can the judge force the petitioner to pay bail?**

No. The GALA does not include provisions that grant the administrative court the power to force the petitioner of a preliminary remedy to pay bail. There are, however, provisions in the GALA that lay down rules for the registry fee that is to be paid by the petitioner.

In this respect, article 8:82(1) GALA states that a district court registry fee shall be levied on the petitioner by the registrar. This amount of the registry fee is the same amount as the registry fee to be paid for the notice of appeal in the proceedings on the merits (article 8:82(2) GALA).

The registrar shall refund the registry fee that has been paid a) if the request is withdrawn because the administrative authority or the interested party to whom the disputed order is addressed has informed the president in writing that execution of the disputed order is to be stayed pending the procedure on the merits or b) that the provisional measures as asked will be taken(article 8:82(4)GALA) .

The judgment may order that all or part of the registry fee paid shall be reimbursed by the administrative authority designated by the president (article 8:82(5) GALA). Furthermore, in other cases the administrative authority may reimburse all or part of any registry fee paid if the request is withdrawn (article 8:82(6) GALA).

6. **Are precautionary measures generic?**

Yes. In the Dutch legal system precautionary measures are generic in the sense that they can be applied to all types of procedures that are susceptible to judicial review by administrative courts.

7. **Can a precautionary request be introduced autonomously before the presentation of the main trial proceedings (*ante causam*)?**

Yes. A request for a provisional remedy can be submitted if an appeal against an order has been lodged with the district court or, *prior* to a possible appeal to the district court, an objection has been made or an administrative appeal has been lodged (see article 8:81(1) GALA). In other words, there must be a proceeding on the merits against the contested decision for which the provisional remedy is requested. This requirement is referred to as procedural and substantive connectivity.

8. **In the event of cautionary request *ante causam*, does the precautionary decision of the judge lose effectiveness?**
   - Yes, in the event that the interested party does not initiate main trial proceedings within the mandatory time-limit
   - No, its effectiveness remains intact even if the main trial proceedings have not been initiated within the mandatory time-limit or even if the time-limit has expired

Yes. According to article 8:85(2) GALA the provisional remedy shall in any event cease to have effect: a) as soon as the time limit for lodging an appeal to the district court against the order made on the objection or the administrative appeal expires without being used, (b) in the situation where

the objection or the appeal is withdrawn, or (c) the district court gives judgment, unless a later date is laid down in the judgment. Furthermore, the preliminary relief judge may specify in his judgment when the provisional remedy shall cease to have effect (article 8:85(1) GALA)).

9. **When dealing with the precautionary request, does your legal system provide for specific procedure?**
   - Yes (give details of the main characteristics with regard to: trial deadlines, type of decision, motivational burden, ways for establishing debate)
   - No

Yes. When dealing with the request for a provisional remedy, the GALA provides for a specific procedure. The procedure that governs the provisional remedy procedure, largely follows the rules of proceedings on the merits with the (main) exception that shorter trial deadlines apply.

Article 8:83(1) GALA provides that after the request for a provisional remedy has been submitted, the parties shall be invited as soon as possible to appear at a hearing at a time and place specified in the invitation (article 8:83(1) GALA). The administrative authority shall send the documents relating to the case to the judge within such time limit as he may set. Further documents may be submitted by the parties until one day before the hearing. The district court may summon witnesses and appoint experts and interpreters and the parties may bring with them witnesses and experts.

Article 8:83(3 and 4) provides for the possibility that judgment is given without a court session, and hence without applying rules outlined above. The judge may decide to give judgment without a court session in two situations: 1) the judge manifestly lacks jurisdiction or the application is manifestly inadmissible, manifestly unfounded or manifestly well-founded and 2) where speed is of the essence and the interests of the parties will not be prejudiced by it.

The preliminary relief judge shall give judgement orally or in writing as soon possible. The GALA provides for four possible decisions. Article 8:84 GALA states that the district court shall rule that: (a) the judge lacks jurisdiction, (b) the request is inadmissible, (c) the request is rejected, or (d) the request is granted in whole or in part.

10. **Is the precautionary decision taken unilaterally or collegiately?**
    - Unilaterally;
    - Collegiately;
    - Collegiately, but in the event of extreme urgency, the precautionary decision can be taken temporarily by means of a simple unilateral decree;

In the Dutch legal system, the precautionary decision is taken unilaterally (the first option mentioned above).

According to articles 50 and article 63 of the Judiciary Organisation Act, the management boards of the district courts must establish single-judge chambers to hear and decide cases in which relief is sought as a matter of urgency and must decide their composition. These articles also provides that the person presiding over a single-judge chamber bears the title of 'provisional-relief judge'.

At the Administrative Jurisdiction Division of the Council of State, Applications for provisional relief may be submitted to the President of the Administrative Jurisdiction Division. The president of the Administrative Jurisdiction Division may designate State Councillors to give judgement in provisional relief cases(see article 6 Regulation on the allocation of cases within the Administrative Jurisdiction Division).

In interim injunction proceedings civil cases, the preliminary relief judge must be addressed by the title of 'president'.

11. During the discussion of the precautionary request, can the judge directly define the judgement on the merit?

Yes. Article 8:86 of the GALA provides that, in certain conditions, the preliminary relief judge may directly give judgement on the merits. This possibility only exists if an appeal has been lodged with an administrative court. Furthermore, for giving immediate judgement on the merits, it is required that the preliminary relief judge concludes that after a hearing (as referred to above under question 9) further inquiry cannot reasonably be expected to contribute to an assessment of the case. Furthermore, in the event the judgment is given in first and last instance, it is required that both of the parties grant permission for the preliminary relief judge to give immediate judgment in the main proceedings.

12. Can precautionary measures be challenged before the Supreme Court /Council of State?

No. As a general rule a provisional remediy granted by the preliminary relief judge in administrative proceedings (ex article 8:84 GALA) cannot be challenged before the Council of State/ Supreme Court (see article 8:104(2)(d) GALA and article 28(4)(c)(d) of the General Tax Act).

An exception to this rule is provided for in the situation where the administrative judge (but not in its capacity as preliminary relief judge) grants a provisional remedy in the judgment on the merits (article 8:72(5) GALA). Since, in this case, the provisional remedy is part of the judgment on the merits, it is possible to challenge the provisional remedy before a highest administrative court (including the Administrative Jurisdiction Division of the Council of State and the Tax Division of the Supreme Court (see article 28(3) of the General Tax Act).

In the situation where the preliminary relief judge directly gives judgement on the merits, it is possible to lodge an appeal to a highest administrative court against that judgment (see article 8:86 GALA; article 8:104(1)(b) GALA and article 28(1) of the General Tax Act). However, it is not possible to lodge an appeal against the specific part of the judgement concerning the decision on the request the provisional remedy.

13. Can the Supreme Administrative Court / Council of State, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level?

Yes. As a general rule, the appeal to the Jurisdiction Division of the Council of State shall not stay the operation of the order against which it is brought (article 6:16 and article 6:24 GALA), unless provided otherwise by or pursuant to statutory regulation. As a provisional remedy, the preliminary relief judge of the Administrative Jurisdiction Division of the Council of State may suspend the judgment of a district court against which an appeal before the Administrative Jurisdiction Division has been brought.

14. On average, how many precautionary decisions are taken every year by the Supreme Court/ Council of State in comparison to the overall number of decisions taken?

In the last three-year period (2020/2019/2018), the average number of precautionary rulings was 2688 rulings per year. This number of precautionary rulings accounts for about 20% of the total number of judgments handed down by the Administrative Jurisdiction Division.