



Consiglio di Stato



**Seminar organized by the Council of State of Italy and ACA-
Europe**

**“Law, Courts and guidelines for the public
administration”**

Fiesole (Firenze), Autumn 2021

Answers to questionnaire: Netherlands



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ITALIAN PRESIDENCY ACA - EUROPE
FIESOLE (FIRENZE), 19 OCTOBER 2020

"LAW, COURTS AND GUIDELINES FOR PUBLIC ADMINISTRATIONS"

QUESTIONNAIRE

1. Introduction

1.1 The seminar to be held in Fiesole, on the 19th and 20th October 2020 at the European University Institute, is the first meeting organised by the Italian presidency.

As explained during the initial presentation of the programme for the upcoming Italian presidency, its leitmotiv will be to enhance and foster the value and the experience of "horizontal dialogue" among the highest administrative national Courts, aiming to create and develop a common culture and shared standards in judicial review of the activity of the public authorities.

This "horizontal dialogue", more than "vertical dialogue", aims to focus on examining and comparing modes of judicial decision making and judicial conduct, and the impact of judgments on the activities of public authorities.

Horizontal dialogue between Courts of Member States is the best way to achieve an effective European citizenship, that is to say a common standard of legal protection for citizens and companies living in Europe and dealing with public powers.

1.2 The purpose of this questionnaire and of the subsequent seminar is to provide a greater understanding of similarities and differences among our legal systems, especially regarding:

- a) the interpretation of law by judges;*
- b) the binding effect of judgments both so as to ensure the judges' compliance with the nomophylactic statements of the Supreme Administrative Courts (SACs) and to act as an instrument to address the future action of public administrations in similar cases;*
- c) the effect of the administrative judgments on the activity of public administration and their enforcement;*
- d) the consultative role of the SAC, if existing.*

1.3. The seminar will cover the following topics:

- a) *The method followed by administrative courts in the interpretation of the law, focusing on the criteria applied by judges (including reference to ratio legis, reference to preparatory work, reference to the advice of the SAC regarding the adoption of the law, if existing, etc.). A special focus will be placed on the tools for supporting judicial activity with regard to services for classifying and archiving judgments, e.g. databases and AI instruments.*
- b) *The application of the law by the Court, with specific reference to the nomophylactic pronouncements of the SAC. Jurisprudential stability and the predictability of decisions are important values related to the general principles affirmed by the European Court of Justice such as legal certainty, predictability for citizens and companies of the consequences of their behaviour and the protection of legitimate expectations. Therefore, there will be a special focus on the ways and the procedures, where they exist, through which SACs ensure compliance with the nomophylactic statements in the administrative system.
The “binding or steering effect” of the of Supreme Court judgments: this topic aims to foster mutual understanding of the capacity of administrative judgments to bind the public administration in the subsequent exercise of its power. It covers not only the binding effect on decided case, but it also aims to analyze judgments as instruments to orientate the future action of public administrations in similar cases (i.e. judgement as guidelines).*
- c) *The seminar will also examine the enforcement of the administrative judgment, in case the public administration fails to comply with it spontaneously and correctly, with special reference to judicial enforcement measures provided by each legal jurisdiction, if they exist.*
- d) *Finally, a brief session will be devoted to the consultative role of the SAC, if existing, and its impact on administrative action.*

1.4 It is intended that the Seminar will provide each Supreme Administrative Court with a better understanding both of the decision making process underpinning the judgments of other SACs and of their impact on the activity of public authorities.

In a constitutional democracy, administrative courts are seen as performing a vital function in the interaction between law and administration.

The purpose, to reiterate, is to verify whether it is possible to find or develop a homogeneous method to scrutinize the way public administrations exercise their powers and to guarantee a common standard of legal protection for citizens and companies in all Member States.

The questionnaire which follows represents an initial information gathering exercise the purpose of which is to clarify the interaction of the administrative courts with the law, on the one hand, and the administration, on the other, so as to ensure certainty, legality and quality of justice for citizens and public institutions.

1 SESSION

THE METHOD OF INTERPRETATION OF LAW AND ITS APPLICATION BY THE COURTS

1. The role of the Supreme Administrative Courts in the interpretation of law.

1.1. Does your legal system provide general rules for the interpretation of law?

- ☒ ***No***
- ☐ ***Yes***

1.2. What is the level of general rules for interpreting the law?

- ☐ ***Law***
- ☐ ***Public authority regulations***
- ☐ ***Guidelines***
- ☐ ***Supreme Court rulings***
- ☐ ***Other***

Please explain and give an example.

In the Dutch national legal system, apart from EU law, there are no general rules on how to interpret laws. There is no hierarchy of interpretation methods and no general prohibition on the use of certain interpretation methods. There is one exception, namely regulations in a zoning plan. According to case law of the Administrative Judicial Division of the Council of State (AJD), the intention of the regulator (usually the council of a municipality) can only be used in the interpretation of a regulation if the text of the regulation or the system of the zoning plan do not provide a clear answer.

1.3 What are the criteria for interpretation of the law?

- ☒ ***literal interpretation***
- ☒ ***reference to purpose of law (so-called ratio legis)***
- ☒ ***consistency within the legal system***
- ☒ ***reference to preparatory work***
- ☐ ***reference to the advice of the SAC regarding the adoption of the law, if existing***
- ☐ ***Other***

Explain, if necessary.

1.4. *What criteria do judges apply when there are gaps in the law?*

- ☒ *Analogy (reference to similar ratio of other rules)*
- ☒ *General principles of the legal system*
- ☐ *Other*

Explain, if necessary.

In Dutch law, reasoning by analogy to fill gaps in the law is not possible in criminal matters and in cases about administrative sanctions.

1.5. *Does the SAC elaborate general interpretative criteria?*

- ☒ *No*
- ☐ *Yes*

Please explain and give an example.

The AJD does not elaborate general interpretative criteria, except for a specific area of law: regulations in zoning plans as mentioned in the answer to question 1.2

1.6 *In deciding the case, to what extent does the Court take the following into account and within which limits?*

- EU law (Nice Charter, EU regulations, EU directives) and the judgments of the EU Courts;

- ☐ *never* ☐ *seldom* ☐ *sometimes* ☒ *often*

- The European Convention of Human Rights and the general principles elaborated by the ECHR;

- ☐ *never* ☐ *seldom* ☐ *sometimes* ☒ *often*

- The general clauses of proportionality and of reasonableness.

- ☐ *never* ☐ *seldom* ☐ *sometimes* ☐ *x often*

- The statements (or case law) of the Courts of other countries in similar cases;

- ☐ *never* ☐ *seldom* ☒ *x sometimes* ☐ *often*

- The general interests involved (i.e: order and public safety, environmental protection, consumer protection, the economic, financial and social effects on the labour market)

- ☐ *never* ☐ *seldom* ☐ *sometimes* ☒ *x often*

- *The results of regulatory impact analysis (AIR), if applicable;*

☐ *x never* ☐ *seldom* ☐ *sometimes* ☐ *often*

- *The impact of the decision;*

☐ *never* ☐ *seldom* ☐ *x sometimes* ☐ *often*

☐ *Other*

Please specify.

Answer:

How often the AJD takes EU law and the ECHR into account in deciding cases depends on the area of law. For example, in immigration cases EU law and the ECHR play an important role. The same goes for EU law in environmental law cases (e.g. the Habitat Directive and case law of the ECJ about this Directive).

As to general clauses of proportionality and of reasonableness and the general interests involved, a distinction has to be made between reviewing discretionary decisions of the administration and the interpretation of laws by courts.

In reviewing discretionary decisions administrative courts, including the AJD, cannot substitute their own views on what is reasonable for the views of the administration. In general administrative courts limit their review of the reasonableness of the administrative decision to the question whether the balancing of the interests is not unreasonable. In cases involving human rights judicial review is more strict; punitive administrative sanctions are even subject to full judicial review.

In interpreting laws, the AJD in leading cases (cases which substantially affect the interpretation of a law) often takes into account the consequences/impact of an interpretation for other cases and the broader interests involved. Sometimes this leads to the AJD overturning its case law. For example, in a few recent cases about subsidies for parents to pay for child day care the AJD decided to overturn its case law on the interpretation of the applicable law, because it had turned out that this case law had severe negative financial consequences for parents receiving the subsidies. The AJD can request an advocate-general to write a conclusion in a case to help it in identifying the consequences of an interpretation for other cases and the broader interests involved. In this regard, the AJD has also experimented in a few cases with the instrument of amicus curiae. Other persons/organizations than the parties were invited to make remarks about the case in amicus briefs. After a positive evaluation, the Ministry of Justice has proposed legislation to implement the instrument of amicus curiae in the Dutch General Administrative Law Act. This legislation hasn't yet passed Dutch parliament.

The AJD sometimes (although rarely) takes account of the case law of courts in other countries in similar cases. For example in a judgment in 2018 (ECLI:NL:RVS:2018:2715) about the question whether the Church of the Flying Spaghetti Monster is a religion, the AJD referred to a judgment of the German Oberlandesgericht Brandenburg in support of its decision that the pastafarianism church is not a religion. And in a few judgments in 2013

about the question how to evaluate the position of homosexual refugees that claim to be persecuted in their country of origin if they do not hide their sexual orientation, the AJD referred to judgments from the British Supreme Court and the German Bundesverwaltungsgericht (ECLI:NL:RVS:2013:2422, ECLI:NL:RVS:2013:2424 and ECLI:NL:RVS:2013:2423).

2. Tools for supporting judicial activity.

2.1. Are there any services established in the Supreme Administrative Court responsible for classifying the judgments and drafting their abstracts?

- ☐ No
- ☒ Yes

Answer: In the first place, there is an internal database which includes important judgments of the AJD and abstracts of these judgments. Senior support lawyers decide which judgments have to be included in this database. Supporting staff is responsible for writing abstracts of these judgments and keeping the database up to date. There is also an internal database in which all judgments (around 190.000) are included.

In the second place, several senior support lawyers write abstracts of important judgments of the AJD for case law journals and for the ACA-website.

In the third place, there are several internal digital handbooks for several areas of law in which an overview is given of legal doctrine and important case law. Support lawyers are responsible for keeping these handbooks up to date.

2.2. What other activities do these Services perform?

- ☒ preparation of useful material for the most important judgments of the SAC ;
- ☒ comparative studies;
- ☒ information about new developments in the law and in the case law;
- ☐ training of judges
- ☒ other activities.

Please specify.

Answer: At the AJD every case is prepared by a support lawyer. Support lawyers also draft concept-judgments and write memos about a case if a case is to be presented to an informal working group within the AJD for discussion about new or important legal issues.

There is also a so-called Scientific Bureau (Knowledge Unit ('Kennisunit')) consisting of support lawyers. This unit has several responsibilities:

1. Keeping up to date the internal digital handbook about the General Administrative Law Act
2. Supporting the advocate-general in writing conclusions. This includes looking for relevant case law and articles in law journals and drafting concept-conclusions.
3. Writing memos for working groups within the AJD about broader legal issues in general administrative law.
4. Preparing the agenda for several working groups within the AJD and writing the records of the meetings of these working groups
5. Doing research. For example, the evaluation of the amicus curiae experiment mentioned in the answer to question 1.6 was partly done by a support lawyer of the scientific bureau.
6. Giving lectures to judges and support lawyers working at the AJD about new developments in the law and in the case law.

The Scientific Bureau engages in comparative studies of law in other countries in the aftermath of ACA- and/or AIHJA-seminars or colloquiums. It might engage in comparative study of internal (national) law in its work supporting the advocate general in a conclusion.

2.3. *Are administrative Court judgments stored on a searchable and free database?*

- ☐ No
- ☒ Yes

Please explain.

Answer: the AJD publicizes every judgment on its website, except for two categories of judgments:

- judgments in which the AJD rules a case is manifestly not admissible or unfounded;*
- judgments in immigration law cases in which an abbreviated reasoning is given.*

This means the AJD publicizes about 56% of its judgments on its website (www.raadvanstate.nl). The judgments of the AJD are also publicized on the website of the Dutch judiciary (www.rechtspraak.nl). The Supreme Court (Hoge Raad) publishes all its decisions online. Lower courts publicize of their judgments on this website (3%). This selection is based on certain criteria, for example a judgment will always be selected for publicization when a case has received attention in the media.

2.4. *What kind of database do the administrative judges consult in their daily work?*

- ☒ public and free databases
- ☒ private databases, provided by their institution
- ☐ other

Please explain.

Judges and support lawyers at the AJD can consult the internal databases and handbooks. They can also use internet and external databases to access judgments and digital legal publications (for example Legal Intelligence, Hudoc, Curia, Kluwer Law Navigator). Recently two applications have been made available to judges and support lawyers. These applications contain links to all external databases and digitalized legal publications the AJD has access to and make it possible to search through several external databases at once and to search full text through around 9.000 digitalized legal books.

2.5. Are there projects implementing advanced artificial intelligence systems operating in the decision making process and/or for the preparation of decisions?

- ☒ *No*
- ☐ *Yes*

2.6 If yes, explain the role of the AI systems in the decision-making process (e.g. drafting final decisions, support judges for some significant aspects of the case, such as for example the calculation of damages, etc.)

Answer: Artificial intelligence is not yet used by the AJD. However the AJD has a so-called “sandbox” to experiment with machine learning and Natural Language Processing in order to facilitate anonymising judicial decisions. The AJD is also working together with the other judicial bodies on an AI agenda for the judiciary.

3. The application of law: the “nomophylactic” statements in the administrative judicial system.

3.1. Does the judgment of the SAC have binding effect on lower courts?

- ☒ *No*
- ☒ *Yes*
- ☐ *Only if the SAC decides in special composition*

Answer: Yes: the lower courts are bound by decisions of the AJD about their competence to hear a case and other matters, such as the question if a party to the process is an ‘interested party’ in the meaning of art. 1:2 General Administrative Law Act.

No: There is no legal obligation for lower instance courts to follow decision of the AJD in other cases. However, in practice the lower courts will in general follow the decisions of the AJD in similar cases.

3.2. If the answer to question 3.1. above is no, what percentage of lower court cases comply with SAC decisions?

- ☐ *less than 25%*

- ☐ from 25% to 50%
- ☐ from 50% to 75%
- ☒ from 75% to 100%

A precise percentage cannot be given, because in the Netherlands no research has been done on the question how often judgments of lower courts comply with judgments of the AJD.

3.3. If the answer to question 3.1. above is no, how is the consistency and predictability of court decisions ensured?

Please explain and give an example.

First of all, parties can appeal against a judgment of the lower court to the AJD if they think this judgment conflicts with case law of the AJD. If this is the case, the AJD will annul the judgment of the district court.

Furthermore, it has to be noted that the AJD is not the only supreme administrative court in the Netherlands. Besides the AJD, there are three other last instance courts in administrative law: the Supreme Court (fiscal chamber), the Administrative High Court (Centrale Raad van Beroep) and the Trade and Industry Appeals Court (College van Beroep voor het bedrijfsleven). Each is competent in specified areas of administrative law. In the past, these last instance courts did not apply the General Administrative Law Act uniformly. To improve this situation a few instruments/practices have been established:

- 1. In 2010 an informal working group consisting of judges of all four last instance courts in administrative law has been established by the last instance courts on a voluntary basis to promote the uniform application of general administrative law: the Commission for unity of law in administrative law ('Commissie rechtseenheid bestuursrecht'). In this Commission issues of general administrative law which concern all four last instance courts are discussed. Since 2019 this Commission publishes an annual report. Its decisions are not legally binding but they do have substantial influence.*
- 2. Several judges of the AJD, the Administrative High Court and the Trade and Industry Appeals Court have been appointed as substitute judges in each other's courts and several judges of the Supreme Court have been appointed as substitute judges at the AJD. This enables them to take part in judicial panels of other last instance courts about cases in which issues of general administrative law have been raised. Currently, a law is pending in parliament making it possible to appoint judges of the AJD, the Administrative High Court and the Trade and Industry Appeals Court as substitute judges in the Supreme Court.*
- 3. Since 2013 it is legally possible for the last instance courts in administrative laws to hear cases with enlarged panels of five judges, so-called Grand Chambers, instead of three judges. Grand Chambers are used about twice a year for cases in which important issues of general administrative law have been raised. Grand chambers consist of full time judges of one last instance court and at least one judge who is a full time judge at another last instance court.*

As a result of these instruments/practices, great advances have been made in the uniform

application of general administrative law by the four last instance courts, although not all differences have been resolved yet.

3.4. When solving jurisprudential conflicts or stating principles of law, does the SAC work in a special composition (for example a Plenary Assembly or a larger panel)?

- ☐ No
- ☒ Yes

If the answer is yes, please explain.

Answer: as mentioned in the answer to question 3.3 Grand Chambers are used for resolving important issues of general administrative law

3.5. Is there a specific procedure for referring a question to the SAC working in special composition?

- ☒ No
- ☐ Yes

The Grand Chamber is a special composition as mentioned in the question. The referral of a case to a Grand Chamber is done in joint consultation between the presidents of the high courts.

3.6. If the answer to question 3.5 above is yes, if a judge of the SAC does not agree with the principle affirmed, what can he or she do?

- ☐ it is not possible to disagree
- ☐ it is possible to take a different decision, giving reasons
- ☐ a new referral to the Court is necessary

Not applicable

3.7. In order to guarantee the consistency of jurisprudence among the various sections of the SAC or with another Supreme Court, if such exists, are there organizational mechanisms in place to promote this aim (for example, periodical meetings among judges or among presidents)?

- ☐ No
- ☒ Yes

If the answer is yes, please explain.

Answer: For the instruments/practices to promote uniform application of general administrative law by the four last instance courts in administrative law, see the answer to question 3.3. To ensure uniform application of the law within the AJD, there exist are a number of (informal) working groups within the AJD which meet frequently, where issues are discussed that are relevant for broader discussion, including for reasons of unity of law. Judges at the AJD are not formally bound by the decisions made by these working groups.

3.8. If your judicial system has administrative Courts separated from other Courts (civil ones), which body or Court is entitled to resolve conflicts of jurisdiction between administrative and ordinary courts? (e.g. Tribunal des Conflits).

Answer: In the Netherlands there is no separate body or court to resolve conflicts of jurisdiction between administrative and civil courts. Article 8:71 of the General Administrative Law Act stipulates that if a claim may be brought only before the civil courts, the administrative court shall state in its judgment. The civil courts are bound by this decision. And article 70 of the Dutch Code of Civil Procedure stipulates that if a claim of a litigant is not admissible in the civil courts because he/she could have started proceedings in administrative law, the civil court shall state this in its judgment. The civil court also shall states in its judgment who the competent administrative authority/court is, when it was unclear for the litigant his claim would be not admissible in the civil courts. The administrative authorities and courts are bound by this decision.

SESSION II.

THE IMPACT OF DECISIONS OF SUPREME ADMINISTRATIVE COURT ON THE FUTURE DEVELOPMENT OF ADMINISTRATIVE ACTIVITY

1. To what extent does the administrative judgment bind the public administration in the new exercise of its power?

Please explain.

Answer: This depends on the judgment. When an administrative court annuls a decision it can order the administration to take a new decision in compliance with instructions given in the judgment. These instructions can concern both procedural and substantive matters of the case. Furthermore the administration is bound by parts in the judgment in which the court has explicitly and without reservation found a ground for the decision to be incorrect. In such a case, the administration cannot take a new decision on the basis of that ground.

A special procedure is laid down in article 8:72 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. In this case, the order of the judge takes the place of the annulled decision. The judge will normally not exercise this power in cases which involve a substantial discretionary power of the administration, although this might be otherwise when parties request him to use this power, or in cases concerning fines and damages.

2. *Can the decision of an administrative judge influence the work of public administrations even beyond the objective and subjective context of the case decided?*

- ☐ No
- ☒ Yes

Please explain.

Answer: The annulment of an administrative decision in Dutch administrative law has so-called “erga omnes” effect. This means the annulled decision is no longer valid for the parties involved in the court procedure, but also for other (interested) parties. For example, when a zoning plan is completely annulled, building permits can no longer be issued on the basis of this zoning plan, even when the person requesting a permit was not involved in the case about the zoning plan. It has to be noted that Dutch administrative law excludes generally binding provisions (‘algemeen verbindende voorschriften’ or AVV) from appeal to an administrative court, except zoning plans. The legality of generally binding provisions can only be challenged directly through an action on the basis of article 6:162 Civil Code (governing fault liability) with the civil court. The administrative courts can only pursue indirect or exceptive review where the administrative court reviews whether the provision on which the decision is based is in line with higher law or general legal principles. Administrative courts are not competent to annul a generally binding provision, but can declare such a provision to be invalid. This declaration / judgment is formally only binding to the parties involved in a case, but in practice the administration will in other cases not apply a provision which has been held invalid by a last instance court. Interpretations of the law by a court are also not formally binding for other cases, but in practice the administration will apply the interpretation of the law by a last instance court in other cases, especially when it is a judgement in a leading case.

3. *According to regulatory rules or practices, may the effects of an administrative judgment be extended by the administration itself beyond the case decided?*

- ☐ No
- ☒ Yes

Please explain.

Answer: Legally, a decision has only direct consequences for the case itself. However, the administration might decide to change its policy or change a generally binding legal provision in order to make sure that future cases will comply with the law as applied in the judicial decision.

SESSION III

IMPLEMENTATION AND ENFORCEMENT OF THE DECISIONS.

1. *Is there a specific legal procedure in your system aimed at monitoring and pursuing the full and complete execution of the judgment?*

☒ *No*

☐ *Yes*

1.1 *If the answer to question 1 above is yes, in what percentage of cases are such remedies used?*

Answer: Not applicable

2. *If there is no specific procedure, how does your system ensure the full compliance of the judgment?*

Answer: If a party is of the opinion that the new administrative decision does not comply with the judgment, he or she can appeal against the new decision to the administrative courts according to the regular procedure. The court will then judge whether the new decision is in compliance with the judgment. If not, the court will annul the new decision. After the annulment the administration has to take new decision, except when the court decides to take an administrative decision itself. Sometimes the court decides to take an administrative decision as if it were the administrative authority, but this is not a general rule. The reasons for this are that often the administration has discretion in taking a decision or the court does not know all the facts necessary to take an administrative decision itself. Sometimes this leads to the administration taking several decisions in a row which are all annulled. As can be imagined, this can be frustrating for the parties involved. To alleviate this situation, in 2010 the option of an interlocutory judgment has been introduced in Dutch administrative law. In such a judgment the court points out the errors in a decision and gives the administration the opportunity or order to remedy these errors. Instructions can also be given how to remedy the errors. In the final judgment the court judges whether the administration has succeeded in remedying the errors.

If the administration does not take a (new) decision within the prescribed time limit, it is liable for fixed damages every day it hasn't taken a decision up to a maximum of 42 days after a party has sent the administration written notification it hasn't taken a decision on time. The administration has to take a decision on the amount of damages it has to pay

within two weeks after the last day it was liable for damages. This decision can be appealed against to the administrative courts

A party can also appeal to the administrative court when the administration has not taken a decision within the prescribed time limit. The administrative court will order the administration to take a decision within a time limit.

3. *If there is such a judicial remedy, does it require the judgment to become final?*

☐ *No*

☐ *Yes*

Not applicable

4. *Do judges have the power of substitution, directly or through Commissioners ad acta, in the case of inertia or incorrect execution of judgments?*

☐ *No*

☒ *Yes*

Please specify.

Answer: According to Dutch administrative law, courts have the power to take an administrative decision themselves. However, in general it is not possible for the administrative courts to take administrative sanctions or to issue permits themselves. In these kind of cases the administrative courts can only order the administration to take a decision and determine that, as long as the administrative authority does not comply with the judgment, any damages to be fixed in the judgment shall be payable by the legal entity designated by the court to a party designated by the court.

5. *Is the administration (and/or the official) liable for damages due to non-execution or incorrect execution of the judgment?*

☐ *No*

☒ *Yes*

5.1. *If the answer above is yes, is it within the jurisdiction of the administrative judge to decide on the action for damages?*

Please explain and give an example.

Answer: As mentioned in the answer to question 4, according to Dutch administrative law an administrative court may determine that, as long as the administrative authority does not comply with a judgment, any damages to be fixed in the judgment shall be payable by the legal entity designated by the court to a party designated by the district court. These damages can be claimed through a civil procedure.

The administration is also liable for any damage caused by a new decision which is still unlawful or for not taking a decision within the prescribed time limit. A party can request an administrative court to order the administration to pay compensation for any damage caused by a new decision which is still unlawful or for not taking a decision within the prescribed time limit. However, the general administrative courts are not competent to decide on requests for compensation exceeding 25.000 euro, with the exception of fiscal and social security cases. A party has to start a civil procedure against the administration to claim compensation for amounts higher than 25.000 euro. The civil courts are also competent to decide on claims for amounts lower than 25.000 euro.

SESSION IV

THE CONSULTATIVE ROLE OF THE SAC (IF EXISTING) AND ITS IMPACT ON ADMINISTRATIVE ACTION.

1. Does the SAC play advisory functions for the government or for the public administration?

- ☐ No
- ☒ Yes

1.1 Where the answer to the above question is yes, please specify the kind of acts to which the advisory functions apply.

(More options are possible)

- ☒ primary legislative acts (of parliament or of government)
- ☒ governmental and ministerial regulatory acts
- ☒ resolution of specific questions on request of a public administration, on the interpretation of a law or in the definition of a specific matter.
- ☐ Other

Please specify.

Answer: The advisory function performed by the advisory division of the Dutch Council of State concerns:

- acts of parliament;*
- acts to approve a treaty or to withdraw from a treaty;*
- independent supervision of the complying with the EU Stability and Growing Pact*
- supervision in climate policy (on the basis of the Climate Act)*
- regulations adopted by the government as a whole ('algemene maatregelen van bestuur');*
- the annual budget for the government;*
- reviews whether the draft budget complies with EU fiscal agreements;*
- expropriation decisions of the government;*
- the government and both Houses of Parliament may ask to provide information concerning legislation and public administration;*
- certain conflicts between the Dutch government and a government of one of the Dutch Antilles.*

The Dutch Council of State does not advise on ministerial regulations.

Furthermore, the advisory division advises the government or parliament on a matter of legislation or governance if requested. For example, at the request of parliament the advisory division gave advice about the relation of measures taken in the corona crisis to constitutional rights.

Finally, the advisory division can decide on it's own to give advice to the government when it deems this necessary. For example, in 2018 the advisory division gave an unrequested advice on the effects of digitalization on the rule of law and in 2020 about ministerial responsibility.

2. *The SAC's advice in its consultative role is:*

- ☐ *optional and non-binding*
- ☐ *mandatory and binding*
- ☒ *mostly mandatory but not binding*
- ☐ *optional and, once required, binding*
- ☐ *it depends on circumstances (please clarify)*

Answer: The advice of the advisory division of the Council of State is mandatory and non-binding for:

- acts of parliament;*
- acts to approve a treaty or to withdraw from a treaty;*
- regulations adopted by the government as a whole;*
- the annual budget for the government;*
- expropriation decisions of the government;*

- certain conflicts between the Dutch government and the government(s) of one of the Dutch Antilles. The advice of the advisory division is binding, when the Council's opinion is based solely on legitimacy grounds.

The government and parliament are not obligated to ask the advisory division to provide information concerning legislation or governance. If they ask such information, the advisory division is obligated to provide information. This information is non-binding. An unrequested advice is also non-binding.

3. *In exercising its advisory functions, can the SAC consult experts in economics or statistics in order to assess the economic and social impact of regulations?*

- ☐ No
- ☒ Yes
- ☐ In certain circumstances only (please specify)

Answer: Several members of the advisory division of the Council of State have an expertise in economics/finance and will advise mainly in the economic and social impact of regulations.

4. *Are there forms of collaboration of administrative judges in the activity of the Government or of public administrations? (for example, secondment of individual magistrates to head legislative boards of a Ministry or as members of an independent authority, participation in study commissions, etc.).*

- ☒ No
- ☐ Yes

Answer: As a rule, law prohibits administrative judges to take part in the activity of government or other public bodies. Judges in the Netherlands are allowed to hold a non-judicial function only if this function is compatible with a good performance of their function as judge and with the values of independence and impartiality. A very specific expertise might lead to making an exception to this rule, although this should be compatible with the exercise of the judicial function. Such a rare example happened a few years ago, when a councillor was appointed as the head of a public body responsible for the handling of damage claims in Groningen, caused by earthquakes which are caused by the extraction of gas. These claims might eventually find their way to the AJD. Should these claims be addressed in court, this councillor will not be allowed to judge in these cases.

5. *Can the advisory function of the SAC also consist in the resolution of a specific dispute working as an ADR (alternative dispute resolution)?*

- ☒ No
- ☐ Yes