
Review of final decisions in the Netherlands, Germany and Europe
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1 Introduction

Every decision made by a government administrative authority is presumed to be lawful; but not every administrative decision is in fact lawful. If a legal remedy is unsuccessful or if no legal remedy is lodged, then an unlawful decision will continue to apply. A government which strives to provide legal quality will try to ensure that the various administrative bodies charged with implementing government policy in concrete terms make only lawful decisions. Nonetheless, government decisions always include some which are operative but actually should not be. If an administrative authority discovers that it has made an erroneous decision which has become legally incontestable, the question arises whether it can or should do anything to change this situation and how it can optimally safeguard the legal quality of its decision-making. In a case like this the government authority is faced with a dilemma; is the notion of legal quality best represented by providing legal certainty – and thus by restraint as regards reconsidering unlawful decisions – or by safeguarding lawfulness, and thus by broad powers to change previously made decisions?

In this contribution we attempt to provide insight into this dilemma and also to show how administrative bodies in the Netherlands and Germany solve the dilemma and how much leeway they are given by the court to do so. In this context a discussion of European law is indispensable. We will first explain the dilemma between lawfulness and legal certainty in more detail, for example by examining the arguments on which possible solutions may be based (Section 2). We will then deal successively with the Dutch (Section 3) and German (Section 4) solutions to the dilemma and discuss the influence of European law (Section 5). We will end with some conclusions (Section 6).

2 The dilemma: legal certainty versus lawfulness

2.1 Introduction

If an administrative body has the discretionary power to reconsider a decision which has wrongfully become incontestable, it is faced with a dilemma. Application of the principle of legal certainty would lead to upholding the erroneous decision, whereas giving priority to lawfulness would lead to changing or rectifying the erroneous decision. In the attempt to establish on what conditions an administrative authority can use its power to withdraw erroneous decisions, legal certainty and lawfulness struggle for precedence. Making the principle of legal certainty absolute means that once a decision has been made it cannot be withdrawn, because once established, legal relationships

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1 Of course the requirement of lawfulness implies that a decision should comply with the principle of legal certainty. It is therefore more correct to refer to safeguarding lawfulness. In this contribution we use the term lawfulness for the sake of brevity.
between the government and the public must be predictable and consistent. Making the requirement that decisions should be lawful absolute means that every unlawful decision should be redressed, regardless of the consequences for those involved, because compliance with the law serves the public interest.  

If striving towards lawfulness is allowed to play a role in addition to the requirement of legal certainty, then the principle of proportionality, which for Dutch law is laid down in Article 3:4(2) of the Algemene wet bestuursrecht (General Administrative Law Act), is also important. How important is the interest of redressing the erroneous decision in proportion to the interest of the parties involved being able to act in accordance with the legal status granted to them? It is only if a decision to withdraw a previous decision can be shown to satisfy this principle of proportionality that it can be said to have legal quality. An important factor is to what extent the legitimate certainty that the original decision will be maintained may be violated. The many criteria used to judge whether an appeal to the principle of legal certainty is justified must be considered in determining this.  

Weighing the relevant interests against each other may lead to differentiation in outcomes; for instance, a decision may be wholly or partially withdrawn, and it may be withdrawn with retrospective effect, as of the moment when it is withdrawn or as of some moment in the future. An important factor is whether the decision was unlawful or erroneous right from the outset or whether – after the decision was made – facts, circumstances or the law changed in such a way that the decision can no longer be upheld. Policies can be adopted with regard to possible differentiation in the outcome of the administrative authority’s consideration of the various interests involved. In all of these situations the administrative authority must also consider whether, in the event that the assessment of the relative interests goes against some members of the public, it has an obligation to fully or partially compensate those involved. The principle of proportionality may mean that it does have this obligation if it withdraws a decision.  

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2 See also Scheltema (1984), p. 545-547.

3 For relevant cases reports see Damen et al. (2005), p. 431 ff.

4 In the German literature these two situations are distinguished by the use of the term Rücknahme (§ 48 Verwaltungsverfahrensgesetz (VwVfG; Administrative Procedure Act) for decisions which were originally unlawful and the term Widerruf (§ 49 VwVfG) for decisions which were originally lawful. See Maurer (2002) p. 283.

5 For an example of policy relating to this point, see the Regulation governing the Suspension, Review and Withdrawal of Benefits of the UWV (Employees’ Insurance and Benefits Office) decision, 18 April 2000, Stcrt. (Government Gazette) 2000, 89, last amended on 7 August 2003, Stcrt. 2003, 154.

6 In the Netherlands references are often made in this context to compensation for loss resulting from government decisions on the grounds of the principle of equal distribution of public burdens (‘égalité devant les charges publiques’). See Art. 4:50(2) Algemene wet bestuursrecht and in comparison the limited options in § 48(3) VwVfG.
2.2 Relevant arguments

As we have seen in the preceding section, the principle of proportionality compels a government authority to weigh interests against each other if it wishes to withdraw an erroneous decision. In the following section we will discuss several relevant arguments which in Dutch legislation, literature and case law are assumed to generally play an important role in this consideration of different interests.

The extent to which the party involved knew or should have known that the decision was erroneous

The importance attached to the interest of legal certainty for the party whose legal status will deteriorate if a decision is withdrawn diminishes in proportion to the extent to which he or she could have realized that the government decision was erroneous. This point of departure is to be found in several statutory provisions. For example, with respect to subsidies, the Algemene wet bestuursrecht provides that so long as a subsidy has not been definitively approved the authority can withdraw the subsidy if the recipient knows or should know that it was awarded erroneously. If the authority based its decision on incorrect information deliberately provided by the party involved, then it can certainly be assumed that the recipient ‘knew’. The phrase ‘should have known’ may be applicable if there is a considerable discrepancy between the decision actually made and the decision which might have been expected on the grounds of the relevant statutory provisions. The capacity of the party involved is also of importance.

The consequences for the legal status of the citizens involved

The withdrawal of a decision may lead to either improvement or deterioration in the legal status of those involved. If the withdrawal has only positive consequences for the applicant and there are no third parties who are adversely affected by the change, then the authority can be deemed to have the power to withdraw the decision without further ado. Nevertheless, it is not assumed that the authority has an obligation to withdraw or change a decision which it has ascertained to be erroneous for the benefit of the applicant.

If the withdrawal results in an improvement in legal status for one or more of those involved but a deterioration for others, or if the withdrawal leads only to a deterioration in the legal status of the person involved (for example if a subsidy

8 Art. 4:48(d) Algemene wet bestuursrecht. See also Art. 59(a) Woningwet (Housing Act).
11 This can be indirectly concluded from case law deriving from the Raad van State regarding Art. 4:6 Algemene wet bestuursrecht. See Bröring & Marseille (2002).
is withdrawn), the authority cannot exercise its power without further ado. As we have already seen, the authority must then examine whether the operation of the general principles of proper administration, especially the principle of legal certainty, impedes the exercise of this power. One important factor is how extensive the damage will be for the party who has acquired an excessively favourable legal status if the decision is changed. The greater the damage, the greater the relative importance of this party’s legal certainty will be in proportion to the interests of a potential third party who is adversely affected by the authority’s erroneous decision.

To answer the question of whether an interested party can invoke the principle of legal certainty in order to avert a withdrawal which affects him or her adversely, it is important to establish to what extent the interested party has been able to act on the previous decision; however, this is not a prerequisite for a successful appeal to the principle of legal certainty.  

**How much time has passed**

By making a decision the authority makes it clear that it has completed the process of deliberation as to the question of whether and if so how it will exercise a power. It is not appropriate for a decision to be reversed on the grounds of progressive insight. The authority is deemed to be answerable for the lawfulness of its decision.

Nevertheless, the interested party does not have absolute certainty that the authority will not withdraw its decision. The principle of legal certainty does not seem to be a direct impediment to withdrawing a decision – at least up to the point where there is no longer any legal remedy against an erroneous decision; and of course the authority still has its general power to withdraw decisions. But in exercising this power a valid point of departure may be that the more time has passed, the more importance should be attributed to the interests of the legal certainty of the party involved in proportion to the interests of the lawfulness of decisions. This principle is one of the grounds for setting a time limit of five years for withdrawing a decision to approve a subsidy; in principle this period begins on the date on which the approval is made known.

**The nature of the power by virtue of which the erroneous decision was made**

Administrative powers come in many shapes and sizes. One relevant distinction is that between discretionary and non-discretionary powers. In the literature on administrative law it is assumed that this distinction is of importance in

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14 Chair College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal) 20 July 1989, AB 1990, 88 with note by Eijlander; see also Konijnenbelt (1975), p. 105; Verheij (1997), p. 73; see also Art. 4:49(3) Algemene wet bestuursrecht and in comparison § 48(4) WwVfG.
determining on what grounds the power to withdraw a decision is based. If the original – erroneous – decision was the result of exercising a non-discretionary power and the statutory regulation in force does not include explicit grounds for withdrawing a decision, then the authority does not have the power to withdraw that decision. Nevertheless, cases are known in which an extralegal ground for withdrawing a non-discretionary decision is indicated. In addition, if a discretionary administrative power has been exercised erroneously and the statutory regulation in force also includes provisions about withdrawals, the intention of the Act may be incompatible with revoking the decision on other grounds. Although the administrative body cannot be denied the power to reverse a decision, even if it is on different grounds from those referred to in the special Act, this power would seem to depend more on the intention of the Act than on the nature of the power exercised (non-discretionary or discretionary). After all, no matter how much freedom the authority had in making the decision, as soon as the decision has been made its validity is no longer affected by the nature of the power on which it was based.

The legal standards which the decision must meet

A final significant factor which should be mentioned is the nature of the legal standards which a decision must meet. In one specific area this certainly seems to be making itself felt. Because of the principle of community loyalty laid down in Article 0 of the EC Treaty, there may be more pressure to withdraw decisions which contravene European law than decisions which contravene national law; in fact, in some cases it seems that the administrative authority even has an obligation to withdraw such decisions. It is not inconceivable that the same sort of obligation should be assumed to exist in relation to erroneous decisions which contravene legal rules concerning public order – rules which are not to be applied at the discretion of the parties.

2.3 Conclusion

In Dutch administrative law there is a curious but not really surprising asymmetry between the attention paid to standards applying to the exercise of a power to withdraw a decision to the detriment of one or more of the parties involved and the attention paid to reversals in favour of the parties involved. The most attention is focused on the scope of the administrative authority’s power to reverse something which has been permitted or granted to

19 See Section 5; see also Case C-453/00 Kühne & Heitz [2004] ECR I-837, JB 2004/42 with note by N. Verheij; see also Jans & De Graaf (2004).
the detriment of the party or parties involved. Although various legislative processes in the Netherlands show that the legislators are more and more inclined to give precedence to lawfulness by determining that administrative authorities have an obligation to withdraw what they have erroneously permitted or granted, the focus is repeatedly on considering the relative importance of the interest of proportionality and the general principles of proper administration, especially the principle of legal certainty.

In the section above we have examined various relevant, universal arguments which may be able to help administrative authorities in confronting the dilemma between lawfulness and legal certainty. The question is how the administrative court assesses the administrative authority’s deliberations in regard to this dilemma. Below we will discuss Dutch and German law in turn and examine the influence of European law on the dilemma.

3 The Netherlands

In the Netherlands there is no general legal regulation of an administrative authority’s withdrawal of decisions it has previously made. Any provisions in special Acts pertaining to the possibility of withdrawal standardize the administrative authority’s power to withdraw decisions. In many cases special Acts do not include provisions regarding the withdrawal of decisions and if the case in question involves a discretionary power, the power to withdraw a decision is implicitly assumed to exist. In such cases the power is governed solely by the general principles of proper administration.

Dutch administrative law does include a regulation pertaining to requests made to administrative authorities to use their power to withdraw decisions. This regulation is to be found in Article 4:6 Algemene wet bestuursrecht. Strictly speaking this provision applies only to the situation in which someone whose application has been refused by the authority asks the authority, after the time limit for filing objections or appealing has expired (or after an unsuccessful objection or appeal procedure), to reconsider its refusal, and not to a situation in which the request to reconsider concerns an *ex officio* decision. However, the standard laid down in Article 4:6 Algemene wet bestuursrecht is also applied

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20 See TK 2003/04, 28 916, nos. 2 and 3; see also Hoekstra (2004), p. 1 ff.

21 There are plenty of examples: Art. 59 Woningwet (Housing Act) (withdrawal of building permit), Art. 4:48-4:51 Algemene wet bestuursrecht (withdrawal of a subsidy decision), Art. 8.23 Wet milieubeheer (Environmental Management Act) (withdrawal of environmental permit) and Art. 76 Wet werk en inkomen naar arbeidsvermogen (Work and Income According to Labour Capacity Act) (withdrawal of unemployment benefits).

22 It is conceivable that a special Act might provide a regulation which is different from Art. 4:6 Algemene wet bestuursrecht. Whether Art. 11(4) Social Security (Coordination) Act contains a regulation of this kind was answered in the negative by the Centrale Raad van Beroep (28 July 2005, RSV 2005/256, USZ 2005/341 with note by editor).
when a request is submitted to reconsider a decision made by the administrative authority _ex officio_. In judging a request to reconsider a decision a crucial factor is whether the applicant refers in his or her request to ‘new facts that have emerged’ or ‘circumstances that have altered’. These are facts or circumstances which have arisen after the previous decision was made or which could not be brought forward before the decision was made. If new facts or altered circumstances are mentioned in the application for withdrawal of the decision, reconsideration is mandatory. If not, the administrative authority may invoke its power, laid down in Article 4:6(2) _Algemene wet bestuursrecht_, to deny the request for reconsideration with reference to the original decision. How much leeway does the court give the authority in this context?

The Dutch legal system has several supreme administrative courts. The two most important are the _Raad van State_ (Council of State) and the _Centrale Raad van Beroep_ (Central Appeals Tribunal). These two administrative courts have different views on the leeway an administrative authority has in deciding about requests made by citizens to use their powers to withdraw and change decisions.

### 3.1 The Dutch _Raad van State_

The case law of the _Raad van State_ shows that the administrative authority’s power may never lead to an obligation to grant a request for reconsideration in spite of the absence of new facts that have emerged. Various arguments are put forward to support this view. The first has to do with legislative history. It is assumed that the legislators did not want administrative authorities to have this obligation and that this is why the court is not allowed to review an administrative authority’s use of Article 4:6(2) _Algemene wet bestuursrecht_. If the court were to do so, this would lead to case law criteria concerning the use of the power to reconsider, and that is exactly what the legislators did not want. ‘The legislator wanted the administrative authority’s use of its discretion to be immune from judicial review’.

The _ne bis in idem_ principle is also used to support administrative authorities’ absolute freedom in assessing requests to reconsider, the reasoning being that the court should not express an opinion on a response to a request to reconsider a decision if the decision in question has already been appealed without success. According to the _Raad van State_, ‘the general legal principle which is

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23 It is not always clear whether an application should be regarded as a repeated application or a new application. See for example _Central Raad van Beroep_ 25 November 2005, _RSV_ 2006/46 and _Raad van State_ 3 May 2006, _JB_ 2006/186.

24 From this point onwards, if a reference is made to ‘new facts that have emerged’, it should be taken to include ‘circumstances that have altered’.


defined in relation to administrative decision-making in Article 4:6 Algemene wet bestuursrecht and according to which the same case cannot be tried more than once also applies to the administration of justice, and except for recourse to legal remedies available by virtue of the law the same case cannot be brought before the court a second time. The legal provisions for lodging an appeal are incompatible with a situation in which lodging an appeal against a decision about a repeated application results in the court judging the case as though the appeal were against the previous decision.\[^{28}\]

The ne bis in idem principle does not apply to requests to reconsider decisions which have never been contested. In cases like this the administrative authority's freedom is defended with reference to the time limits for lodging legal remedies. The reasoning is that if the party concerned has failed to lodge a legal remedy on time, the fact that the time limit has expired constitutes an unbreachable barrier to challenging the decision. The administrative court has no discretion on this point. If a party turns to the court after the time limit has expired, the court must refuse to consider the case. The possibility of obtaining a judicial judgement concerning a decision which was not appealed on time by means of a request to reconsider would be detrimental to strict observance of the time limits.\[^{29}\]

The consequence of the Raad van State's point of view is that a refusal on the part of an administrative authority to make use of its power to withdraw a decision, no matter on what grounds, will always be respected.

3.2 The Dutch Centrale Raad van Beroep

In the past, case law of the Centrale Raad van Beroep relating to the discretion an administrative authority has in using its power to withdraw decisions in response to requests has been very different from case law deriving from the Raad van State. If – to put it briefly – an applicant could show that the decision he or she hoped the administrative authority would withdraw was obviously erroneous and the refusal to reconsider it was at variance with the principle of proportionality, the Centrale Raad van Beroep deemed the refusal to grant the request unlawful.\[^{30}\] The Centrale Raad van Beroep seemed to be gradually shifting towards the stance of the Raad van State,\[^{31}\] but a few recent judgments show that there is after all a crucial difference between the two courts.\[^{32}\]

\[^{31}\] Centrale Raad van Beroep 27 January 2006, RSV 2006/124, USZ 2006/96.
\[^{32}\] Centrale Raad van Beroep 3 March 2006, RSV 2006/209, USZ 2006/143, Centrale Raad van Beroep 30 June 2006, USZ 2006/249; for more judgments which reviewed on the grounds of the principle
judgments concerned the phased withdrawal of benefits which a few foreign employees had received by virtue of the Toeslagenwet (Supplementary Benefits Act). The original decisions entailed the payments being gradually reduced between 1 January 2000 and 31 December 2002 and discontinued as of 1 January 2003. A number of the affected recipients raised objections, some of these then appealed and after that appealed to a higher court. This last appeal was successful: the Centrale Raad van Beroep deemed the phase-out unlawful. Then several recipients whose benefits had been wrongfully phased out but who had only objected or had not lodged any legal remedy asked the administrative authority to reverse the phase-out. The authority met their requests to varying degrees. The withdrawal decisions led to several proceedings which revolved around the question of whether in denying the requests of some of those involved to reverse the decision to phase out their supplementary benefits the administrative authority had acted unlawfully.

It was clear that the requests for reconsideration were not based on any new facts that had emerged. All the requests were based solely on the hope that the administrative authority would reconsider not only for those who had gone all the way to the highest court to appeal against the original decisions, but also for those who had done little or nothing about it. The Centrale Raad van Beroep ruled as follows: ‘In view of the fact that no new facts have been brought forward, the question arises whether it can be said that the Employees’ Insurance and Benefits Office [the administrative authority, KJG and ATM] acted in violation of any written or unwritten rule of law or could not reasonably have reached the contested decision. In this context the representative of those involved has invoked the principle of equality (…).’ The Centrale Raad van Beroep then assessed whether the administrative authority’s decision not to use its power to withdraw the decision violated the principle of equality. The outcome of this assessment was negative for the applicants, but the important point is that the Centrale Raad van Beroep carried out the assessment. This shows that it considered that the administrative authority’s reaction to the requests which were not based on new facts was nevertheless subject to assessment by the administrative court.

3.3 Conclusion

The conclusion must be that the Centrale Raad van Beroep is more lenient towards the citizen (and thus more strict towards the administrative authority) than the Raad van State in conflicts about administrative authorities’ reactions to requests to reconsider final decisions even though they are not based on new facts or altered circumstances. The Centrale Raad van Beroep accepts that in certain circumstances the principle of equality may mean that the administrative authority has an obligation to grant such a request, even

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of equality see Centrale Raad van Beroep 28 April 2006 (03/5390), RSV 2006/206, USZ 2006/197, Centrale Raad van Beroep 28 April 2006 (04/3756, 05/6083), USZ 2006/198.
though the party involved let the time limit for lodging a legal remedy expire, or was told by the court that there was nothing wrong with the decision he or she wanted the administrative authority to reconsider.

4 Germany

German administrative law has a general regulation concerning the withdrawal and alteration of decisions; § 48 of the German Verwaltungsgerichtsordnung (VwGO; Administrative Procedure Act) regulates the withdrawal and alteration of decisions which were unlawful at the time they were made (Rücknahme), while § 49 regulates the withdrawal and alteration of decisions which were lawful at the time they were made (Widerruf).

§ 51 VwGO concerns the reconsideration of a previously made decision at the request of an interested party; the term used is Wiederaufgreifen des Verfahrens. § 51 VwGO is closely related to Article 4:6 of the Dutch Algemene wet bestuursrecht. Whereas Article 4:6 Algemene wet bestuursrecht refers to new facts that have emerged, § 51 VwGO makes it a condition that ‘new evidence is available which would have led to a decision that was more favourable for the party involved’. A limitation applies which is similar to that in the Netherlands, namely that the applicant ‘due to no fault of his or her own [the applicant] was unable to put forward the ground for withdrawal in the previous proceedings’. Whereas Article 4:6 Algemene wet bestuursrecht refers to altered circumstances, § 51 VwGO states that the administrative authority must reconsider ‘if the circumstances or legal situation on which the administrative act is based have subsequently changed in favour of the party involved’. A requirement which is included in § 51 VwGO but not in Article 4:6 Algemene wet bestuursrecht is the time limit within which the request must be made: ‘The request must be submitted within three months. This period begins on the date on which the party involved has received notice of the grounds for withdrawal’. On the other hand, like Article 4:6 Algemene wet bestuursrecht, § 51 VwGO makes no reference to standardization of the administrative authority’s discretionary power if there is no question of ‘new evidence’ or a ‘change’ in the ‘circumstances or legal situation’ on which the previous decision was based. What does this mean for the assessment of this category of requests?

In the literature it is assumed that the comprehensive enumeration in § 51 VwGO does not detract from the power of administrative authorities laid down in §§ 48 and 49 VwGO to withdraw previously made decisions, regardless of whether or not one of the grounds for reconsideration referred to in § 51 VwGO has arisen.33 The difference between the situations which do and do not involve one of the grounds for reconsideration referred to in § 51 VwGO is that in the first case the administrative authority has an obligation to reconsider, whereas in the second case it only has the power to do so, although in certain circumstances

33 Maurer (2006), p. 324. All quotations are translated.
this power may become an obligation. The question is then whether someone who asks the administrative authority to review a previously made decision without any of the grounds for reconsideration referred to in § 51 VwGO is entitled to a decision which is ‘ermessensfehlerfrei’; and in the event that there is evidence of ‘Ermessensreduzierung’, whether this party is entitled to reconsideration. This question can be answered in the affirmative. The German Bundesverwaltungsgericht (BVerwG; Supreme Administrative Court) ruled as follows: ‘Finally (...) it should be remembered that § 51 Verwaltungsgerichtsordnung only partially regulates the withdrawal of decisions (...). For special cases, by way of exception, it justifies an entitlement to reconsideration. In the cases it does not cover, reconsideration is also permissible in principle. (...). In special cases there may even be an entitlement to reconsideration’.

The aim of the regulation in § 48 and 49 VwGO is to serve not only the public interest, but also the interests of the individual interested party, when unfavourable decisions are involved. The legal force of decisions does not stand in the way of assuming an obligation to reconsider in certain circumstances, because this legal force is already infringed by the administrative authority’s power to withdraw or change decisions. The interested party’s entitlement to reconsideration is the logical consequence of this: ‘The citizen’s corresponding entitlement does not represent an extension, but only a constitutional complement of this infringement from a subjective legal point of view’.

None of this alters the fact that if the administrative authority is asked to reconsider a decision without one of the grounds referred to in § 51 VwGO being present, the legal force of the original decision is a significant factor. In the case law of the German Bundesverwaltungsgericht it is emphasized over and over again that the principle of ‘substantive justice’ does not have precedence over the principle of legal certainty: ‘The principle of substantive justice is of equal value to the principle of legal certainty’. Substantive justice has precedence only in certain circumstances: ‘without violating legislative freedom, in the assessment of the two principles in certain circumstances the interpretation may be that this precedence exists’.

The German case law does provide examples of judgments in which the special circumstances are described in more detail, but we have not been able to find any judgments in which the German administrative court has come to the conclusion that an administrative body has wrongfully refused to review a legally incontestable decision. Special circumstances may be said to exist if ‘the administrative authority has reviewed its decision in similar cases’.

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35 NJW 1981, 2595.
37 BVerwGE 28, 122, 127.
38 BVerwGE 44, 333, 336.
39 BVerwGE 26, 153, 155.
to the original decision is ‘schlechthin unerträglich’ (absolutely unacceptable), or if the refusal to reconsider the legally incontestable decision must be regarded as a ‘violation of good faith and propriety’. Two things emerge clearly from this short investigation of German administrative law. In the first place, in German administrative law it is completely taken for granted that in certain circumstances the power – formulated in general terms – of an administrative authority to change or withdraw decisions it has made previously may lead to an obligation to make use of that power. It is striking in this context that the legal force or validity of the decision to which this obligation pertains is not regarded as an issue; the power to withdraw decisions already means that the legal force of decisions is relative, and the obligation which occasionally arises from this situation is no more than a logical consequence of that fact.

The second salient point is that in practice ‘occasionally’ actually means ‘rarely or never’. The German administrative court has succeeded admirably in formulating in abstract terms in what circumstances an administrative authority’s power becomes an obligation, but in our exploration of German administrative law we failed to come across any judgments in which an obligation of this kind was taken to exist in a concrete situation.

5 Influence of European law

After our examination of Dutch and German law we arrive at the question of how much influence European law exerts on the extent to which an administrative authority can be compelled to revoke an unlawful decision. A significant judgment in this context is that made by the Court of Justice of the European Communities on 19 September 2006.

The judgment was passed in response to preliminary questions. The case which prompted these questions was an action brought by two telecommunications undertakings (i-21 and Arcor) against the German government (in its capacity as telecom supervisory body). Initially the companies had paid very high fees to acquire telecommunications permits. A third telecom company was not prepared to do this without a fight and filed a lawsuit; the German administrative court decided in its favour. The court ruled that the regulation on which the fees were based was in violation of the German Telekommunikationsgesetz (Telecommunications Act) and of the German Grundgesetz (constitution). The third company’s successful appeal prompted i-21 and Arcor to request withdrawal of the fees imposed on them. The administrative authority refused, after which the two companies lodged appeals and subsequently applied for a

40 BVerwGE 28, 122, 127.
41 BVerwGE 44, 333, 337.
review by the Bundesverwaltungsgericht. This court ruled that the administrative authority’s refusal to withdraw its previous, legally incontestable decision was not in violation of German law. However, the Bundesverwaltungsgericht wondered if this refusal was not at odds with Article 10 of the EC Treaty. This uncertainty led to questions being referred for a preliminary ruling. The most important of these was whether the principle of loyalty laid down in Article 10 of the EC Treaty implied that the administrative authority had an obligation to review the unlawfully imposed – but not legally contested – fees.

The opinion of the Advocate General offered hope for the telecom companies. The Advocate General set the tone by questioning the importance of legal certainty. In the administration of justice, he said, legal certainty cannot be regarded as absolute, because it may constitute an impediment to effective implementation of EU law (see par. 76). An important limitation to the principle of legal certainty is equity. According to the Advocate General, in German law this is a consequence of the fact that the principle of legal certainty must be overridden in certain cases, for instance if it is absolutely unacceptable for a legally incontestable decision to be upheld (par. 77). There is also a more objective limitation to legal certainty, which has to do with the ‘foundation’ and the ‘direction’ of the legal system. Sometimes legal certainty must be contravened for the protection of the founding principles of the legal system (par. 81). There is one important exception: the rights of third parties. If they are threatened, then legal certainty may not be infringed.

Applied to the case of the telecom companies, this means that the legal force of the original decision must be overridden if this decision contravenes ‘the objectives of Community law’ and leads to ‘injustices contrary to its foundations, in particular the requirement of proportionality’ (par. 95), unless there are grounds for justification. According to the Advocate General there is no question of such grounds in this case. On the contrary – quite the opposite seems to be the case (par. 106). It is thus open to question whether it is acceptable that certain interested parties, who had not intended to challenge an administrative decision which was not in their favour, can do so at a later stage because they find out, before the time limit for appeal has expired, that a judgment has been passed which shows that the decision they had accepted was unlawful, whereas other interested parties who had received similar decisions no longer had this option (par. 110 and 113). An additional, more fundamental argument is that ‘maintaining an unlawful measure in force, irrespective of its scope and effects on the legal system, on the basis of the argument that it was “assented to” by its addressee (…) fails to take into account the essential fact that the Administration is bound by the public interest and legality’ (par. 111).

All of these considerations together lead the Advocate General to the conclusion that the German court must interpret § 48 VwGO in such a way that the relevant provisions in Directive 97/13 can be fully implemented (par. 116). He then suggests that the Court answers the preliminary question as follows: ‘Having regard to the duty of loyal cooperation contained in Article 10 EC, Arti-
Article 11(1) of Directive 97/13 requires that assessments to individual licence fees which infringe that provision and have become final because they were not challenged within the prescribed periods should be capable of being reconsidered if, by impeding the attainment of the objectives pursued by the directive, they consolidate situations which are contrary to equity or to the principles underlying Community law. It is for the national courts to interpret their national law in a way which ensures that it facilitates such review, without prejudice to the rights of third parties. The final sentence of the proposed answer seems crucial: if it were up to the Advocate General, the Member States would have an obligation – given the powers vested in them – to interpret their national law in such a way that community law is fully effective, even if this meant that a legally incontestable decision had to be reviewed.

In its judgment the Court of Justice does not go nearly so far. The Court focuses on the question of whether – if there is no European regulation of the matter concerned – the principles of effectiveness and non-discrimination do not imply that the German court should annul the decision to refuse to withdraw the fees.

The Court does not spend much time on the principle of effectiveness. The appeal periods in Germany gave i-21 and Arcor plenty of time to challenge the fees imposed on them. The Court goes into the principle of non-discrimination at greater length. It rules that a consequence of this principle is that if an administrative authority has an obligation under national law to withdraw a decision which is unlawful according to national law, the same obligation applies to a decision which is unlawful according to European law. An obligation of this kind exists in German law when failure to review a decision is ‘absolutely unacceptable’.

The Bundesverwaltungsgericht ruled that the fees imposed on i-21 and Arcor were not based on a regulation which was ‘manifestly unlawful’ in the light of the Telekommunikationsgesetz and the Grundgesetz, and that for this reason the decision to uphold the fees was not ‘absolutely unacceptable’. However, the Bundesverwaltungsgericht did not make the same sort of assessment in regarding the relevant European Directive. The European Court of Justice rules that the Bundesverwaltungsgericht must make this assessment now. Should it come to the conclusion that the regulation on which the fees were based is ‘manifestly unlawful’ in the light of the relevant European Directive, then it must accept the consequences which German law attaches to this qualification. We already know what these consequences are from the Bundesverwaltungsgericht’s order for reference: the administrative authority’s decision to refuse to review the fees must be deemed unlawful.

An important element of this judgment is that the Court gives a clear hint as regards the German administrative court’s assessment. The Court observes that ‘the objectives of that directive, which is among the measures adopted for the complete liberalisation of telecommunications services and infrastructures and is intended to encourage the entry of new operators onto the market, must be
taken into account [...].’ And it continues: ‘In that regard, the imposition of a very high fee to cover an estimation of the general costs over a period of 30 years is such as to seriously impair competition [...].’

How big is the difference between the opinion of the Advocate General and the Court’s judgment? The Advocate General’s point of departure is the incompatibility of the fees with European law, whereas the Court’s is the powers of the national government. The Advocate General is of the opinion that if the national government has the power to withdraw decisions which ‘consolidate situations which are contrary to equity or to the principles underlying Community law’, it must use that power. The Court rules that if the national rules mean that in certain circumstances the administrative authority has an obligation to revoke an unlawful decision, the court must judge whether the contradictory nature of a national regulation means that the administrative authority has an obligation to withdraw it.

The Court is more cautious than the Advocate General in two respects. In the first place, there can only be an obligation to withdraw a decision because it is incompatible with European rules if administrative authorities have an obligation under the national law system to withdraw decisions in certain circumstances. In the second place it is up to the national court to judge whether these circumstances apply in a particular case. As regards this last point, the Court’s judgment conveys contradictory messages; on the one hand the judgment contains a barely concealed invitation to the Bundesverwaltungsgericht to rule that the decision to uphold the fees was unlawful, but on the other hand the judgment expressly gives the German court the freedom to ignore this invitation.

In the meanwhile the Bundesverwaltungsgericht has opted for the latter. In a judgment of 17 January 2007 it decided that the national legislation in question did not constitute manifest unlawfulness within the meaning of the relevant national law. According to the Bundesverwaltungsgericht the concept of manifest unlawfulness implies that there was no reasonable doubt – at the time the contested decision was taken – about its infringement of the law. Applying this to the case at hand it came to the conclusion that it could not be maintained that at the time of the contested decision there was no reasonable doubt that the German telecom legislation involving high fees was incompatible with Article 11 of Directive 97/13. The incompatibility with EC law was only revealed by the judgment of the Court in Arcor itself, and in earlier case law pertinent to the directive.

According to the Bundesverwaltungsgericht, the complexity of the reasoning of the Court of Justice proved that the incompatibility was not at all evident. Finally, the Bundesverwaltungsgericht, relied on a judgment of the Oberverwaltungsgericht Münster – which had decided that the German legislation was compatible – in


\[\text{Joined Cases C-292/01 and C-293/02 Albacom & Infostrada [2003] ECR I-9449.}\]

\[\text{Judgment of 27 October 1999 (13 B 843/99), MMR 2000, 115.}\]
reaching its decision that the national legislation in question did not constitute manifest unlawfulness within the meaning of § 48 VwGO.

6 Conclusion

In various countries administrative authorities are familiar with the dilemma between the principle of legal certainty and the basic point of departure that decisions should be lawful. The dilemma is particularly acute when it comes to the extent of the legal certainty created by an administrative authority’s decisions. If a decision is not legally challenged or challenged unsuccessfully, it is assumed that it is lawful; but this is not necessarily the case. The question is to what extent the fact that an administrative authority has the power to withdraw decisions impacts on the extent to which a citizen can ask the administrative authority to review a decision it has made. In Section 2 we discussed various arguments which serve as starting points in weighing the different interests against each other. However, basically the problem remains the same: legal certainty and lawfulness struggle for precedence.

This conflict is resolved in different ways in the Netherlands and Germany. In the Netherlands one supreme administrative court (the Raad van State) has determined that administrative authorities have ‘judicially free’ discretion, whereas the other supreme administrative court (the Centrale Raad van Beroep) considers that the administrative authority has an obligation to make use of its power if refusing to do so would result in a violation of the principle of equality. The German court’s point of departure is that in each case the administrative authority must weigh up the interests of legal certainty and lawfulness; however, the court gives the administrative authority a large amount of freedom in the way it balances these interests against each other. The influence of European law depends on the Member State involved; its consequences are greater if administrative authorities have an obligation under the Member State’s national law to review unlawful decisions. Therefore in this context it seems that European law has greater consequences in German administrative law than in Dutch administrative law.

From the perspective of European law administrative authorities have a choice. They could take refuge in the judgment of the European Court of Justice, which leaves room for caution. But in striving to enhance the legal quality of their decisions, they could also base their point of view on the conclusion of the Advocate General, who has provided a differentiated framework for weighing up the interests of legal certainty and lawfulness which administrative authorities might use in assessing requests to reopen administrative decisions which have become final.