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General Principles of Law in Administrative Law under European Influence

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Key words – European administrative law, principles of proper administration, judicial assessment, remedies, good administration, ombudsman.

Abstract: Since 1935, general principles of law have represented an important feature in the face of Dutch administrative law and its development. Dutch administrative courts have played and still play an important role in the development of these principles and in bringing them to life. Although the evolution of legal principles has, in the past, depended mainly on the decision-making of national administrative courts, today we can see a shift from national courts to the European ones. European influence whether it is influence of the Court of Justice of the European Union or of the European Court of Human Rights (ECtHR) cannot be overlooked and has today a deep and indisputable impact on changes in the content of several national principles. In the last decade, we have also noted the emergence of a new type of normative standards – principles of good administration. All these changes are often reflected in existing national legal principles and the general principles of administrative law in the Netherlands are not an exception. Because of these reasons, we will discuss in the following article the essential features of the development of general principles of law in Dutch administrative law, while pinpointing the importance of European influences and the possible future of the principles.

Résumé: Depuis 1935, les principes généraux du droit ont représenté une caractéristique importante de l'aspect du droit administratif néerlandais et de son évolution.Les tribunaux administratifs néerlandais ont joué et jouent encore un rôle important dans le développement de ces principes et dans leur création. Quoique l´évolution des principes légaux dépendait autrefois principalement des décisions des cours administratives nationales, on peut voir aujourd´hui un changement de direction partant des tribunaux nationaux vers les tribunaux européens. L´influence européenne, que ce soit l´influence de la Cour de Justice de l´Union européenne ou de la Cour européenne des Droits de l´Homme, ne peut être ignoréeet elle a aujourd´hui un impact profond et incontestable sur les changements du contenu de plusieurs principes nationaux. Durant la dernière décennie, on a pu également remarquer l´émergence d´un nouveau type de modèle normatif – les principes de bonne administration. Tous ces changements se reflètent souvent dans les principes légaux nationaux existants, et les principes généraux de droit administratif aux Pays-Bas ne font pas figure d'exception.

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Pour ces raisons, nous discuterons dans cet article des aspects essentiels de l´évolution de principes généraux de droit en droit administratif néerlandais, tout en mettant l´accent sur l´importance des influences européennes et sur l´avenir possible de ces principes.

Zusammenfassung: Seit 1935 stellen allgemeine Rechtsgrundsätze einen bedeutenden Aspekt in Hinsicht auf das niederländische Verwaltungsrecht und seine Entwicklung dar. Niederländische Verwaltungsgerichte spielten und spielen auch heute noch eine bedeutende Rolle in der Entwicklung dieser Grundsätze und dabei, sie zum Leben zu erwecken. Auch wenn die Evolution der rechtlichen Grundsätze in der Vergangenheit hauptsächlich von den Entscheidungen nationaler Verwaltungsgerichte abhing, können wir heute eine Übertragung von den nationalen hin zu den europäischen Gerichten beobachten. Europäischer Einfluss – ob durch den Gerichtshof der Europäischen Union oder den Europäischen Gerichtshof für Menschenrechte – ist nicht zu übersehen und hat heute eine tiefgehende und unbestreitbare Auswirkung auf Veränderungen im Zusammenhang mit einer Anzahl nationaler Grundsätze. In der letzten Dekade konnten wir die Entstehung eines neuen normativen Standards beobachten – Grundsätze der guten Verwaltung. All diese Veränderungen spiegeln sich oft in bestehenden nationalen Grundsätzen wider und die allgemeinen Grundsätze des Verwaltungsrechts der Niederlande stellen dabei keine Ausnahme dar.

Aus diesem Grund werden im folgenden Beitrag die wichtigsten Aspekte der Entwicklung der allgemeinen Rechtsgrundsätze im niederländischen Verwaltungsrecht eruiert und gleichzeitig die Wichtigkeit des europäischen Einflusses und die mögliche Zukunft der Grundsätze im Einzelnen aufgezeigt.

1. Introduction

In 1935, the Central Appeals Court (*Centrale Raad van Beroep*),[1] the highest Dutch court in civil servants matter, had to deal with an appeal against a quite unpleasant decision of the province of Utrecht. In this decision, the province had, in connection to its combat against the economic crisis of the 1930s, retroactively reduced the wages of its civil servant, which resulted in a legal duty for the civil servants to pay back already paid wages. Until then, the Dutch administrative courts had restricted the assessment of administrative decisions to a test on legality. In the case at hand, however, this yardstick offered no solution because the decision was in accordance with the applicable rules. Therefore, the Central Appeals Court had to find another assessment standard. This standard was the unwritten general principle of legal certainty, which – according to the court – 'forbids the withdrawal retro-actively of

1 In the Dutch system of administrative jurisdiction, there exist four courts, adjudicating in last instance, namely the Central Appeals Court (*Centrale Raad van Beroep* – hereinafter in the notes abbreviated as CRvB), the Trade and Industry Appeals Court (*College van Beroep voor het bedrijfsleven* – hereinafter CBB), the Supreme Court (*Hoge Raad* – hereinafter HR), and the Council of State (*Afdeling bestuursrechtspraak van de Raad van State* – hereinafter ABRvS). In first instance in general, the District Court (*rechtbank* – hereinafter Rb.) is the competent court in administrative matters. In the text, we will we will use the English names.

legally acquired rights, and which must be respected by the administration, even in the absence of a provision of written law'.[2] Because the province's decision was inconsistent with the 'new' principle, it was annulled.

This judgment of the Central Appeals Court marks the beginning of the development of the general principles in Dutch administrative law or – as they generally are called – the principles of proper administration (*beginselen van behoorlijk bestuur*). In this contribution, we will, after a brief account of the justification of the judicial 'discovery' of general principles in administrative law and of the relation between general principles and written law (section 2), depict the further development of these principles. Section 3 contains an overview of the most important general principles that have been recognized by the Dutch courts since 1935. In the overview, a distinction will be made between substantive general principles and formal or procedural ones. Moreover, the growing influence of European law – both of Union law and of the European Convention on Human Rights (ECHR) – will be highlighted as most innovations regarding general principles are nowadays coming from Europe. Section 4 reflects briefly on the problem of remedying violations of especially formal general principles. Finally, in section 5, some remarks will be made on the growing importance of the principles of good administration and development of these principles by other institutions than the courts, especially the ombudsman. In section 6, most important findings are summarized.

As is clear from the foregoing, this contribution will concentrate on the general principles in *Dutch* administrative law and the influence of European law. The development of these principles in the Netherlands is, however, quite similar as – and therefore fairly representative for – the development in other Member States of the European Union (EU), at least those on the continent, to which we incidentally refer.

2. Judicial Discovery of General Principles

The discovery of the first (unwritten) general principle of law, the principle of legal certainty, in the civil servant judgment of the Central Appeals Court in 1935 paved the way for other courts to develop other general principles of law. An important contribution was offered by the Tribunal for Food Affairs (*Scheidsgerecht voor de Voedselvoorziening*) – which is the predecessor of the still existing Trade and Industry Appeals Court (*College van Beroep voor het bedrijfsleven*), the highest

2 CRvB 31 Oct. 1935, *ARB* 1936, p. 168. Dutch academic literature recognizes general principles as standards for reviewing administrative acts already from earlier days. See, for instance, J.J. BOASSON, *De rechter tegenover de vrijheid van de administratie*, Groningen 1911, which already contained an overview of most general principles.

court in economic matters – at the end of and shortly after World War II.[3] In its case law, this tribunal found several 'new' general principles, like the principle of equality, the principle of legitimate expectations, and the principle of proportionality. Subsequently after the World War II, the principle of abuse of power and the prohibition of arbitrariness were discovered by the Supreme Court (*Hoge Raad*).[4] Finally, from the end of the 1970s, the Dutch Council of State (*Raad van State*) contributed to the further development of the general principles by discovering the principle to state reason and the principle of due care.[5]

That the discovery of unwritten general principles in the Netherlands took place in the crisis years of the 1930s and especially after World War II is probably no coincidence. The same happened in France. Although the French Council of State (*Conseil d'Etat*) did apply the so-called *principes généraux du droit* already before the second world war in some isolated cases, the explicit recognition of the principles as a standard for judicial review of administrative decisions came in 1945 in the case *Aramu*,[6] in which the French Council of State for the first time explicitly stated that an administrative act is unlawful if it violates the *principes généraux du droit applicable même en l'absence de texte*.

The question can be posed: why did the French and Dutch administrative courts discover general principles in the crisis years and after the Word War II? In the literature, this question is generally answered by reference to two developments:[7] first, the *enormous increase of delegated legislation*, by which the government was empowered to interfere in more or less every area of policy, especially in the area of economics, and in every inch of the personal life of individuals. This development started already from the end of the nineteenth century but reached its peak in the crisis years and in and after World War II. Moreover, and in the second place, this delegated legislation did not prescribe the conduct of the administration in detail but offered the administration a *very wide*

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3 See F.W. TER SPILL, 'Het Scheidsgerecht voor de Voedselvoorziening', *Bestuurswetenschappen* 1948, pp. 249–274, 'Beleidsbeoordeling bij economische administratieve rechtspraak', *Bestuurswetenschappen* 1949, pp. 288–313, and 'Het Scheidsgerecht voor de Voedselvoorziening', *Bestuurswetenschappen* 1959, pp. 261–284 (Deel I), pp. 361–380 (Deel II), and pp. 439–460 (Deel III).

4 HR 14 Jan. 1949, *NJ* 1949/557 (abuse of power), and HR 25 Feb. 1949, *NJ* 1949/557 (prohibition of arbitrariness).

5 The Council of State was only invested with general administrative jurisdiction in the *Wet Administratieve rechtspraak overheidsbeschikkingen* in 1976.

6 Conseil d'Etat 26 Oct. 1945 (*Aramu*), *Recueil Lebon des arrêts du Conseil d'Etat*, p. 213. See also the contribution of Patrick Morvan elsewhere in this journal.

7 *Cf.* I. SAMKALDEN, *Algemene beginselen van behoorlijk bestuur, Preadvies Vereniging voor Administratief Recht XXIV*, H.D. Tjeenk Willink, Haarlem 1952, pp. 2–8; P. NICOLAÏ, *Beginselen van behoorlijk bestuur, Bestuursrecht – theorie en praktijk*, nr. 9, Kluwer, Deventer 1990, pp. 88–90. See, for a similar explanation in France, Jean de Soto, *Recours pour l'excès de pouvoir et interventionnisme économique, Etudes et document*, Conceil d'Etat 1952.

range of discretion. Therefore, the administrative courts could no longer restrict their judicial review to a test of administrative decisions on legality – because the law did not offer any legal standards – but had to find other judicial standards to protect individuals against the almighty government. These standards are the general principles of law.

The foregoing leads to two subsequent questions, namely where did the courts find these principles (or did they fall from heaven) and are the courts legitimized to discover general principles and apply them towards decisions of the democratically legitimized administration? In Dutch literature, the last question is generally answered in the positive sense because although the courts do not create or invent general principles[8] they can find them in and deduce them from – what is called in the Netherlands – the general legal consciousness (*het algemene rechtsbewustzijn*).[9] The general legal consciousness can be derived from written law (rules), including administrative decisions, but also from unwritten law, which includes in administrative law the unwritten administrative practice. So, general principles do not reflect the moral opinion of an individual judge or court. On the contrary, general principles are presumed to be already present (and hidden) in the legal order and have only to be discovered by the courts. In doing so, the courts in the 1940s and 1950s implicitly already applied the Dworkian criterion of 'fit'.[10] Thus, ethical tendencies are only recognized as general principles of law if they fit in the system of the law and can offer a justification for the legal practice.

After their discovery, general principles have been further developed by the courts. Since 1994, several principles – but not all – have been codified in the General Administrative Law Act (*Algemene wet bestuursrecht*; hereinafter abbreviated as 'GALA'). In the GALA, these principles are codified as a standard of conduct for the administration, although they still also function as a standard for judicial review of administrative decisions and of secondary legislation. However, according to Article 120 of the Dutch Basic Law – as it is interpreted by the Supreme Court[11] – the Dutch courts are not allowed to review Acts of Parliament in

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8 *Cf.* G.J. WIARDA, *Algemene beginselen van behoorlijk bestuur, Preadvies voor de Vereniging voor Administratief Recht XXIV*, pp. 74–77.

9 It is interesting to note that the *Wet Arbo* (1954), which established to Trade and Industry Appeals Court, and the *Wet Arob* (1976), in which the judicial function of the Council of State was regulated, explicitly referred to the 'in the legal consciousness existing principles of proper administration' as one of the assessment standard for the judicial review of the decision by, respectively, the Trade and Industry Appeals Court and the Council of State. These provisions offer therefore a written legal justification for the development of the general principles by these courts.

10 R. DWORKIN, *Taking Rights Seriously*, rev. edn, Harvard University Press, Cambridge, MA 1978, pp. 335–345; see also, for instance, R.S. MARKOVITS, *Matters of Principle: Legal Arguments and Constitutional Interpretation*, New York University Press, New York 1998, pp. 24–31.

11 HR 14 Apr. 1989 (*Harmonisatiewet*), *NJ* 1989/207.

the light of national general principles. This prohibition is mitigated in practice because the courts are allowed and obliged to assess Acts of Parliament in the light of so-called self-executing provisions of international law.[12] This includes Union law and the Union general principles of law and the ECHR.

Moreover, it is interesting to note that in very special circumstances the Dutch courts have accepted the *contra legem* application of certain general principles, namely in case a strict application of the law is manifestly contrary to the principle of equality or the principle of legitimate expectations.[13] So, in these circumstances a(n) (unwritten) general principle prevails above written law. However, cases in which a general principle set aside a written provision of law are very rare. Furthermore, in consistent case law, the European Court of Justice (hereinafter 'ECJ') has declared that in cases concerning the application of Union law *contra legem* application of general principles, and especially of the principle of legitimate expectations, is not allowed. According to the ECJ, 'a practice of a Member State which does not conform to Community rules may never give rise to legal situations protected by Community law' or – in different words – 'conduct of national authority in breach of a precise provision of Community law cannot give rise to legitimate expectations'.[14] In the Netherlands, the European prohibition on *contra legem* application of general principles has led to numerous rejections of appeals based on the principle of legitimate expectations.[15]

3. General Principles of Dutch Administrative Law and the Influence of European Law

3.1. Introduction

Already in section 2, several principles of administrative law that have been developed by the Dutch courts during the past 80 years were mentioned. In this section, we will give an overview of the most important principles[16] and of their

12 According to Art. 94 Dutch Basic Law. The concept 'self executing' is substantively equivalent to the concept of 'direct effect' in Union law. See, for an important example in the case law, HR 16 Nov. 2011 (*Herstructurering Varkenshouderij*), *AB* 2002/52.

13 HR 12 Apr. 1978 (*Doorbraakarresten*), *NJ* 1979/533. See also HR 26 Sep. 1979, *AB* 1980/210 and CRvB 18 Feb. 1975, *AB* 1975/243.

14 Case 5/82 *Maizena* [1982] *ECR* 4601 and Case 316/86 *Krücken* [1988] *ECR* 2213, respectively. According to Case 188/82 *Thyssen* [1983] *ECR* 3721, the same applies to unlawful assurances given by a Union institution.

15 See, for instance, CBB 15 Jul. 1988, *UCB* 1988/52; CBB 25 Sep. 1992, *UCB* 1991/60; CBB 18 May 1996, *AB* 1996/405; CBB 19 Oct. 2005, *JB* 2006/24; CBB 20 Sep. 2007, *AB* 2007/361.

16 See, for an English introduction in Dutch general principles of administrative law, R. SEERDEN & F.A.M. STROINK, 'Administrative Law in the Netherlands', in R. Seerden & F.A.M. Stroink (eds), *Administrative Law of the European Union, Its Member States and the United States – A Comparative Analysis*, 2nd edn, Intersentia, Antwerp/Oxford 2002, pp. 145–193 and P. LANGBROEK, 'General Principles of Proper Administration in Dutch Administrative Law', in B.

content.[17] As indicated in the beginning of this contribution, a distinction is made between substantive general principles, which offer a standard for reviewing the content of an administrative decision, and formal general principles, which offer a standard for reviewing the preparation of and the reasons for a decision. Moreover, we will highlight the growing influence of Union law and of the ECHR on the development of several general principles. To understand the importance of Union law, a few remarks will be made about the 'creation' of general principles by the ECJ and the extent to which the EU institutions and the Member States are bound to Union principles.[18]

It is a well-known fact that during the past 50 years the ECJ has developed a large number of general principles. Most of them are quite similar to the principles that are recognized in the Member States and also form an important source of inspiration for the ECJ. However, the Union principles may not necessarily have the same substance or scope as the national principles from which they are derived, because the ECJ adjusts their content to the needs of the European legal order.[19] Article 19 TEU (former Article 220 EC) forms the basis and justification for the application of the general principles by the ECJ. It states that the ECJ 'shall ensure that in the interpretation and application of the Treaties the law is observed'. From this article, it can be implied that there is more 'law' than the written law provided by the Treaties and by secondary Union law (regulations, directives, decisions). An important category of this other 'law' consists of general principles of law. The most important principles of Union law are the principle of equality, the principles of legal certainty and legitimate expectations, the principle of proportionality, the principle of observance of the rights of defence, the principle to state reasons, and – on the verge of becoming a general principle – the principle of transparency. Several of them have been (partially) codified in the Charter of Fundamental Rights of the European Union (hereinafter 'Charter').

The European principles offer first and foremost a basis for judicial review by the ECJ of the Union's administration and legislation. In addition, they increasingly operate as a standard of review for the actions of the Member States

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Hessel & P. Hofmanski (eds), *Government Policy and Rule of Law: Theoretical and Practical Aspects in Poland and the Netherlands*, Białystok, Utrecht 1997, pp. 83–106.

17 Two general principles, the principles of impartiality and fair play, will not be discussed because they are only very rarely applied by the Dutch courts.

18 See, on European general principles, for instance, T. TRIDIMAS, *The General Principles of EU Law*, 2nd edn, OUP, Oxford 2006; P. CRAIG, *EU Administrative Law*, OUP, Oxford 2006; J.H. JANS *et al.*, *Europeanisation of Public Law*, Europa Law Publishing, Groningen 2007, pp. 115–198.

19 T. KOOPMANS, 'General Principles of Law in European and National Systems of Law', in U. Bernitz & J. Nergelius (eds), *General Principles of European Community Law, European Monographs No. 15*, Kluwer, The Hague 2000, pp. 25–34; X. GROUSSOT, *General Principles of Community Law*, Europa Law Publishing, Groningen 2006.

when they are acting 'within the scope of Union law'. Although academic discussions in borderline cases suggest differently,[20] in a vast majority of cases it is fairly clear when the Member States do act within the scope of Union law, namely always when they implement or apply Union law.[21] This includes the national implementation and application of regulations, decisions, and directives (more precisely of the national law in which a directive is transposed), the application of the Treaty provisions on competition law (including those on state aid), and the national measures that derogate from the free movement of goods, persons, capital, and services.

3.2. Substantive Principles of Administrative Law

Substantive general principles offer a standard of review of the content of an administrative decision. These principles have in common that, always when the courts find a violation of them, the administrative decision must be substantively changed, either by the administration or by the court itself.[22] In this regard, there is a fundamental difference with the formal general principles – which will be discussed in the next subsection – because the violation of these principles does not necessarily mean that the content of the decision is wrong.

3.2.1. Principle of Equality and Non-discrimination

A first important substantive general principle is the *principle of equality*. This principle is a general principle of Union law and is recognized in all Member States including the Netherlands in which it is codified in Article 1 of the Basic Law. In general, it prescribes that, unless there is an objective justification, comparable situations must not be treated differently and that different situations must not be treated in the same way. As regards to this principle, one can easily write a book, and indeed, this has been done by several authors.[23] In this overview, we restrict ourselves to the observation that the application of the principle in the Netherlands

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20 See, for instance, the discussions concerning cases like Case C-307/05 *Alonso* [2007] *ECR* I-7109, Joined Cases C-261/07 and C-299/07 *VTB-VAB* [2009] *ECR* I-2949, and – especially – Case C-555/07 *Kücükdeveci*, Judgment of 19 Jan. 2010, nyr.

21 *Cf.* the scope of the Charter of Fundamental Rights in the EU. According to Art. 51(1), these rights are addressed to the Member States 'when they are implementing Union law'. It is not entirely clear whether the latter is deliberately intended to indicate a departure from the broader scope of general principles provided by the case law of the ECJ.

22 In Dutch administrative law, administrative courts are – under circumstances – empowered to determine that their judgments shall take the place of the annulled decision.*Cf.* Art. 8:72, fourth paragraph, under c, of the GALA.

23 For instance, M. BELL, *Anti-discrimination Law and the European Union*, OUP, Oxford 2002; CH. TOBLER, *Indirect Discrimination*, Intersentia, Antwerp/Oxford 2005; D. Schiek & V. Chege (eds), *European Non-discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge, London/New York 2009.

has been influenced tremendously by the European principle of equality and more specifically by the several (mostly) written European non-discrimination prohibitions, for instance, on grounds of nationality, gender, race, and age.[24] Written non-discrimination principles can, for instance, be found in Articles 18, 45, second paragraph, and 49 TFEU (on the ground of nationality), in Article 157 TFEU (on the ground of gender), and in several directives like Directive 2006/54 (equal treatment of men and women as regards access to employment), Directive 2000/43 (to combat race discrimination), and Directive 2000/78 (General Framework Directive as regards equal treatment in employment and occupation on the ground of religion or belief, disability, age, and sexual orientation).[25]

Very important for the European influence on the national principles of equality was the ECJ's recognition of the concept of indirect discrimination, already in the 1980s. By that time, this concept was virtually unknown in the Netherlands (and also in most other Member States). Indirect discrimination occurs where the effects of certain legal requirements or practices, which do not themselves apply a 'forbidden' criterion like gender or nationality, are discriminatory. At the end of 1980s, the application of this criterion by the Central Appeals Court forced the Dutch legislator to adapt the Dutch legislation in the area of social security because the legislation indirectly discriminated women and was, therefore, inconsistent with Directive 79/7 (equal treatment of men in women in social security matters).[26]

In addition, more recent case law shows that the application of the European principle can have drastic consequences for Dutch legislation. For instance, in 2010, the Central Appeals Court declared the obligatory discharge of civil servants at the age of 65 to be contrary to the European principle of non-discrimination on the ground of age, as it is laid down in Directive 2000/78.[27] In the same year, the District Court of Roermond was of the opinion that the system of selection of medicine students by drawing lots constituted discrimination on the ground of nationality and was, therefore, inconsistent with Article 18 TFEU.[28]

3.2.2. *Principles of Legal Certainty and Legitimate Expectations*

As was indicated in the beginning of this contribution, the principle of legal certainty was the first general principle to be recognized by a Dutch court in 1935. It is also a European principle and is partly – namely in the area of criminal law – codified in Article 49, first paragraph, of the Charter. Both in European and Dutch

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24 See, for the recognition by the ECJ of the principle of non-discrimination on the ground of age, Case C-144/04 *Mangold* [2005] *ECR* I-9981.

25 Directive 2006/54, OJ 2004, L 158/77; Directive 2000/43, OJ 2000, L 180/22; Directive 2000/78, OJ 2000, L 303/16, respectively.

26 CRvB 14 May 1987, RSV 1987/286. The judgment was also based on the principle of equality as is codified in Art. 26 of the International Covenant on Civil and Political Rights.

27 CRvB 26 Apr. 2010, *JB* 2010/167.

28 Rb. Roermond 3 Sep. 2010, *JB* 2010/246.

laws, it prohibits the retroactive withdrawal of legally acquired rights. Furthermore, it offers the basis for the formal requirement that decisions that impose duties on individuals must be clear and unambiguous,[29] and for the Union and Dutch rules that administrative decisions and judicial judgments in principle become final – acquire the status of *res iudicata* – after the expiry of fatal reasonable time limits for legal remedies or by the exhaustion of those remedies.[30]

Closely connected to the principle of legal certainty is the principle of legitimate expectations. Both in Union law and Dutch administrative law, this principle requires the administration to act as far as possible in accordance with the legitimate expectations that have been raised by legislation, individual decisions, policy rules, and precise assurances and promises.[31] The principle was explicitly recognized by the ECJ as a 'part of the Community legal order' in the *Töpfer* case of 1978[32] but was substantively already applied – as an aspect of legal certainty – at the end of the 1950s.[33] Likewise, nowadays, the ECJ in most cases refers to the principles of legal certainty and legitimate expectations jointly. The 'discovery' and development of the Union principle of legitimate expectations is probably inspired by German law, in which the principle is known as *Vertrauenschutz* and is regarded as a fundamental right that can be derived from the German Basic Law. Likewise, in Dutch administrative law, the principle is regarded as an important legal principle and especially the codification of the principle in the GALA in the area of subsidies offers a strong protection for individuals in case of the withdrawal of (even) unlawfully granted subsidies.[34] However, in other Member States – like France and the United Kingdom – the principle was and is less familiar.[35] Probably as a consequence of these national differences, the protection provided by the ECJ on the basis of the principle is less extensive than in German and Dutch administrative laws. Therefore, the debates in both countries concern the limiting effect of Union law on their national principle of legitimate expectations.

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29 Case C-158/06 *Stichting ROM-projecten* [2007] *ECR* I-5103; Case C-248/04 *Cosun* [2006] ECR I-10211.

30 *Cf.* Case 33/76 *Rewe* [1976] *ECR* 1989 and Case C-453/00 *Kühne & Heitz* [2004] *ECR* I-837 (both about the finality of administrative decisions) and Case C-126/97 *Eco Swiss* [1999] *ECR* I-3055 and Case C-2/08 *Fallimento Olimpiclub* [2009] *ECR* I-7501 (both about the finality of judgments).

31 JANS *et al.*, pp. 163–164.

32 Case 11/77 *Töpfer* [1978] *ECR* 1019.

33 See Joined Cases 7/56 and 3-7/57 *Algera* [1957] *ECR* 120.

34 J.B.J.M. TEN BERGE & R.J.G.M. WIDDERSHOVEN, 'The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law', in E.M. Hondius (ed.), *Netherlands Report to the Fifteenth International Congress of Comparative Law, Bristol 1998*, Intersentia, Antwerp/Groningen 1998, pp. 421–452.

35 *Cf.* GROUSSOT, p. 26; S. SCHONBERG, *Legitimate Expectations in Administrative Law*, OUP, Oxford 2000, Chs 2–4.

In the Netherlands, this debate concentrates on the withdrawal and recovery of unlawfully granted subsidies. According to the codified version of the principle of legitimate expectations in the GALA, administrative authorities are, after the final establishment of the subsidy, only allowed to withdraw an unlawful subsidy decision (and recover the already paid subsidy) in exceptional circumstances.[36] In principle, the GALA provision also applies cases in which the authority is confronted with unlawfully granted European subsidies or with national subsidies that constitute illegal state aid. However, in its case law, the ECJ has declared that the application of a national (codified or unwritten) principle of legitimate expectations in Union cases is contrary to the Union principle of effectiveness.[37] According to the ECJ, the application of the principle of legitimate expectations 'assumes that the good faith of the beneficiary of the subsidy is established'[38] and this is not the case if the European rules have been violated. Therefore, in Union cases, the Dutch principle has to be set aside.[39] In reaction to the ECJ's case law, the Dutch government has submitted a draft amendment of the GALA to the Parliament that will specifically facilitate the withdrawal of subsidies in Union cases.[40] So, as regards the principle of legitimate expectations – and differently from other principles – the influence of European law implies a limitation of the legal protection of Dutch individuals.

3.2.3. Prohibition of Arbitrariness and the Principle of Proportionality

The principle of prohibition of arbitrariness was recognized as a standard for review by the Supreme Court at the end of the 1940s. Since 1994, it is codified in Article 3:4 of the GALA as a duty of the administration not to act disproportionate. More precisely, this provision requires that 'the adverse consequences of a decision for the interested parties may not be disproportionate to the purpose to be served by the decision'. The Article is – according to the Dutch government – inspired by the Union principle of proportionality.[41]

To assess whether the Union proportionality principle has been violated, the ECJ generally distinguishes three questions.[42] First, is a measure *suitable* in order to achieve its legitimate objective? Second, is the measure *necessary* to achieve the

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36 Namely only if the establishment of the subsidy by the authority was a manifest error that the recipient of the subsidy should have been aware of (*cf.* Art. 4:49 GALA).

37 *Cf.* Joined Cases 205-215/82 *Deutsche Milchkontor* [1983] *ECR* 2633 and Joined Cases C-383-385/06 *ESF* [2008] *ECR* I-1561 (both about European subsidies) and Case C-5/89 *Bug Alutechnik* [1990] *ECR* I-3453 and Case C-24/95 *Alcan* [1997] *ECR* I-1591 (both about state aid).

38 Case C-336/00 *Huber* [2002] *ECR* I-7699.

39 And is set aside by the Dutch courts. See, for instance, ABRvS 11 Jan. 2006 (*Fleuren Compost*), *AB* 2006/208 (state aid), and ABRvS 24 Dec. 2008 (*ESF*), *AB* 2009/95 (European subsidy).

40 *Kamerstukken II* 2007–2008, 31418, nos 1–3.

41 See PG Awb I, p. 211.

42 This 'three-stage test' is probably inspired by the same test that is applied in German law.*Cf.* JANS *et al.*, p. 144.

objective or can it also be achieved by a less onerous measure? Third, is the – as such suitable and necessary – measure proportionate *sensu stricto*, in the sense that it does not damage the interests of a specific individual or specific group of individuals in a disproportionate manner?

The intensity of judicial review of the principle – and of these three questions – depends on the degree of discretion the authorities enjoy when taking a measure. If their discretion is wide, both in European law and in Dutch administrative law the legality of a measure will only be affected if the measure is *manifestly* disproportionate.[43] This 'marginal' test resembles the (in)famous *Wednesbury* test on unreasonableness, which is a well-known ground for judicial review in the United Kingdom.[44]

In other situations, the authorities enjoy less discretion, and therefore, a more intense judicial scrutiny on proportionality is required. In the first place, this concerns the assessment of national restrictions on the free movement of goods, services, etc. Such restrictions are only allowed if they pursue a justified objective and if the restriction is suitable and necessary to obtain this objective. In an extensive body of case law, the ECJ – as well as the Dutch courts – has set aside national restrictions that were inconsistent with these proportionality requirements. One of the many examples offers a judgment of the Trade and Industry Appeals Court in 2000, in which the refusal to renew the approval of a number of 'domestic' insect repellents was considered a breach of (now) Article 34 TFEU, because the justified objective of the refusal – the prevention of harmful effects on human health – could have been achieved by a less onerous measure, namely be attaching conditions to the granting of the approval.[45] In the second place, limitations on fundamental rights and freedoms must be subjected to a more intense judicial test on proportionality. Both under the ECHR and under Article 52(1) of the Charter such limitations must be provided by law and respect the essence of those rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of the general interests that are recognized by the ECHR or the Union or the need to protect the rights and

43 See, for European law, Case C-331/88 *Fedesa* [1990] *ECR* I-4023 and, for Dutch law, ABRvS 9 May 1996 (*Maxis/Praxis*), *AB* 1997/93.

44 English Court of Appeal 7 Nov. 1947, *Associated Provincial Picture Houses* v. *Wednesbury Co rporation* [1948] 1 KB 223.

45 CBB 18 Jul. 2000, *AB* 2000/451. See, for instance, also CRvB 30 Jul. 2008, *LJN* BD8765, in which the withdrawal of a social security benefit based on the fact that the individual concerned had moved to Scotland for treatment of its alcohol addiction was considered a breach of Article 56 TFEU (freedom of services) because the national social security condition to have residence in the Netherlands was considered to be disproportionate in the case at hand.

freedoms of others.[46] Finally, under Article 6 of the ECHR, the national administrative courts are, in principle, obliged to a full test on proportionality of so-called punitive administrative sanctions that qualify as a criminal charge in the sense of this article, for instance, administrative fines.[47]

3.3. Formal Principles of Administrative Law

In this subsection, attention will be paid to two formal principles of administrative law that are most commonly used by the Dutch administrative courts, the principle of due care and the principle to state reasons. Because the Dutch principle of due care partly covers the Union principle of the rights of defence, both principles will be treated jointly. Furthermore, some remarks will be made about two principles that have – under the influence of Union law and the ECHR – quite recently gained the status of a general principle of administrative law, the principle of reasonable time and the principle of transparency. As indicated before, an important characteristic of formal principles of administrative law is that a violation of them not necessarily means that the contested decision is substantively wrong. Perhaps the content can be upheld by the administration after a more thorough preparation of the decision or after improving the reasons for it. In section 4, we will come back to this point when we discuss the remedies against violations of general principles.

3.3.1. Principle of Due Care and the Union Principle of the Rights of Defence

According to Article 3:2 of the GALA, the principle of due care obliges the administrative authorities when preparing a decision 'to gather the necessary information concerning the relevant facts and the interests to be weighed'. Elements of the principle – like the administrative duty to hear individuals before taking the decision and the duty to ask an advisory council for an expert opinion – have been regulated in detail in the GALA. Typical for the GALA regulation is that the principle of due care is primarily considered as a means for gathering sufficient information by the administration and not as a right of defence for the individual. The same focus was applied to the unwritten principle of due care in the pre-GALA times before 1994. Therefore, GALA contains many exceptions to the duty to hear interested individuals and offers no procedural guarantees about the hearing process, such as the right of sufficient time for the preparation of the hearing and the right of access to the file.

Because of the primarily administrative focus of the Dutch principle, there exists a tension between the principle and the European principle of the rights of

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46 See, for instance, Joined Cases C-317-320/08 *Alassini* [2010] *ECR* I-2213, in which the ECJ – referring to similar case law of the ECtHR based on Art. 6 ECHR – applies this assessment scheme on a limitation of the principle of effective judicial protection of Art. 47 of the Charter.

47 ECtHR 21 Feb. 1984 (Öztürk), Series A, vol. 73.

defence.[48] According to the European principle, an individual is entitled to be heard before an administrative authority adopts a measure, which will adversely affect its interests.[49] This right is codified in Article 41(2) of the Charter. The right to be heard is not an absolute right and may be restricted provided that the restriction is justified by a legitimate objective – for instance, the protection of public health or the combat against terrorism as a matter of national security – and the restriction does not constitute a disproportionate interference that infringes upon the very substance of the right.[50] If there is no such general interest, the authorities will not be able to avoid hearing the individual(s) concerned. Moreover, the individual has the right to be informed about the fact that a measure that will adversely affect its interests is prepared, which includes the right of access to the file, and has the right to sufficient time to prepare its defence.[51]

The tension between the European rights of defence and the Dutch principle of due care already exists since the recognition of the European principle in the case of *Transocean Maritime Paint Association* in 1974.[52] This recognition was based on a comparative study into the existence of the principle in the administrative law systems of the Member States, conducted by the Court's Research and Documentation Centre on behalf of Advocate General Warner, which showed that the principles existed in all Member States except in the Netherlands (and Italy). However only recently, the non-observance of the rights of defence by Dutch authorities has led to the annulment of some decisions in the area of customs by the lower customs courts, although the approach of the matter by these courts is not (yet) consistent. In some cases, a so-called post-clearance recovery decision is annulled by the court, for the sole reason that the customs authorities did not hear the interested companies before the decisions were adopted.[53] In other cases, the same violation of the rights of defence does not result in an annulment of the decision, because the court is of the opinion that the violation does not affect the substance of the decision.[54] At the moment of writing of this contribution, several cases are pending before the Supreme Court. In its opinion, the advocate general has established inconsistencies in the case law of ECJ as regards to the

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48 See already R.J.G.M. WIDDERSHOVEN *et al.*, *De Europese agenda van de Awb*, Bju, The Hague 2007, pp. 78–85 and A. PRECHAL & R.J.G.M. WIDDERSHOVEN, 'The Dutch General Administrative Law Act: Europe-Proof?', *European Public Law* 2008, pp. 81-98.

49 For instance, Case 17/74 *Transocean Maritime Paint Association* [1974] *ECR* 1063 and Case C-32/95P *Lisretal* [1996] I-5373. See JANS *et al.*, pp. 187–196.

50 Case C-28/05 *Dokter* [2006] *ECR* I-5431 (protection of public health); Joined Cases C-402/05P and C-415/05P *Kadi* [2008] I-6351, points 338–441 (combat of terrorism).

51 Case C-349/07 *Sopropé* [2008] *ECR* I-10369.

52 Case 17/74 *Transocean Maritime Paint Association* [1974] *ECR* 1063.

53 Rb. 3 Apr. 2009, *AB* 2009/326; Gerechtshof Amsterdam (Court of Appeal) 21 Apr. 2011, *LJN* BQ2794. In both cases, the courts refer to Case C-349/07 *Sopropé* [2008] *ECR* I-10369.

54 Gerechtshof Amsterdam (Court of Appeal) 4 Mar. 2010, *LJN* BL6952.

question of whether a violation of the rights of defence necessarily must lead to the annulment of the contested decision[55] and therefore advises the Supreme Court to refer this question to the ECJ.[56] Whether the Supreme Court will follow its advocate general remains to be seen.

3.3.2. Principle to State Reasons

Since the end of the 1970s, the principle to state reasons is perhaps the most popular Dutch general principle of administrative law. The principle is codified in GALA and entails two rights for individuals, namely a right to knowable reasons for a decision (Art. 3:47 GALA) and – more importantly – the right to proper reasons (Art. 3:46 GALA), that are reasons that sufficiently justify the content of the decision. Especially, this last requirement is very popular with the Dutch courts because it offers an opportunity for the judicial control of decisions, without going into the substantive merits of the decision. So in many judgments, the courts argue more or less as follows: whether the content of decision is right or wrong I do not know, but I do know that the stated reasons do not give a sufficient justification for the content. So, it is annulled.

The content of the Dutch principle to state reasons is quite similar to its European equivalent, although the Dutch principle has not really been influenced by Union law. In Article 41 of the Charter, the duty to state reasons is explicitly recognized as a requirement of good administration. As regards the legal acts of the Union itself, the principle is codified in Article 296(2) TFEU (former Art. 253 EC), which reads: 'legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, request or opinions required by the Treaties'. According to the ECJ, this obligation is an 'essential procedural requirement', which serves three functions, namely to give an opportunity (1) to the parties to defend their rights, (2) to the Court of exercising its supervisory functions, and (3) to the Member States and to all nationals of ascertaining the circumstances in which the Union institutions has applied the Treaty.[57] The absence or insufficiency of the required reasons leads to the annulment of the decision. Furthermore, in its case law, the ECJ has imposed the duty to state reasons on the authorities of the Member States when they take decision in the scope of Union law.[58] The duty is derived from the principle of effective judicial protection and

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55 Compare, for instance, Case C-135/92 *Fiskano* [1994] *ECR* I-2885, Case C-32/95P *Lisretal* [1996] *ECR* I-5373, and Case C-462/08P *Mediocurso* [2000] I-7183, in which the violation of the principle automatically leads to the annulment of the contested decision, with, for instance, Case 30/78 *Distillers Company* [1980] *ECR* 2229, and Case C-12/87 *Belgium* v. *Commission* [1990] *ECR* I-959, in which a similar violation is not remedied by an annulment because it did not affect the substance of the decision.

56 Opinion Advocate General van Hilten 23 Jun. 2011, *LJN* BR0666.

57 See Case 24/62 *Brennwein* [1963] *ECR* 63.

58 Case 222/86 *Heylens* [1987] *ECR* 4097 and Case C-75/08 *Christopher Mellor* [2009] *ECR* I-3799.

therefore serves the two first mentioned functions of Article 296(2) TFEU, namely the rights of defence of the parties and the opportunity for the national courts to exercise their judicial function effectively.

3.3.3. *Principle of Reasonable Time*

In the Netherlands, the principle of reasonable time is quite young and one might even argue whether it qualifies as a general principle of law in the strict sense that it must be respected by the administration *even in the absence of a provision of written law*. In fact, the discovery and further development of the principle (or requirement) in Dutch administrative law is largely owed to written provisions of European and national laws.

The most influential written provision is without any doubt Article 6 ECHR, although at first glance this article, as well as the reasonable time requirement guaranteed in it, seems only relevant for civil and criminal judicial procedures. However, in its case law, the European Court of Human Rights (ECtHR) has enlarged the scope of Article 6 considerably, and therefore, the article also applies to judicial procedures in most areas of administrative law,[59] namely in procedures concerning all administrative decisions that are decisive for the determination of civil rights and obligations (which include, for instance, decisions in the area of environmental law, economic law, and social security law) and in procedures concerning administrative sanctions that qualify as a criminal charge, like administrative fines.[60] However, the judicial protection in important areas like migrant law and fiscal law (with the exception of fiscal fines) is still not covered by Article 6 ECHR.[61]

Important for the recognition as a principle (or requirement) of administrative law is that the requirement of reasonable time of Article 6 ECHR does not only apply to the procedure before the administrative courts but also to parts of the *administrative* procedure prior to it.[62] In case of 'civil rights' decisions, the requirement must be respected already in a mandatory administrative appeal or objection procedure, prior to the judicial procedure.[63] In case of 'criminal charge'

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59 See P. VAN DIJK *et al.* (eds), *Theory and Practice of the European Convention on Human Rights*, 4th edn, Intersentia, Antwerp/Oxford 2006, pp. 514–557.

60 See, for instance, ECtHR 23 Oct. 1985 (*Benthem*), Series A, vol. 97 (1986) (environmental permit as a civil right), ECtHR 21 Feb. 1984 (*Öztürk*), Series A, vol. 73 (administrative fine as a criminal charge), and ECtHR 19 Apr. 2007 (*Eskelinen*), Application No. 63235/00, in which the broader scope of Art. 47 Charter is one of the reasons to extend Art. 6 ECHR to public function cases.

61 See, for the non-application of Art. 6 ECHR in fiscal matters, ECtHR 12 Jul. 2011 (*Ferrazzini*), Application No. 44759/98. However, Art. 6 ECHR does apply to fiscal fines, because they qualify as a 'criminal charge'. See, for instance, ECtHR 23 Jul. 2003 (*Janosevic*), Application No. 34619/67.

62 VAN DIJK *et al.*, pp. 602–612.

63 ECtHR 28 Jun. 1978 (*König*), Application No. 6232/73, para. 96; ECtHR 9 Dec. 1994 (*Schouten and Meldrum*), Application Nos 19005/91 and 19006/91, para. 50.

decisions, the starting point of the requirement is even much earlier, namely at the moment at which a criminal charge is brought.[64] In general, 'charge' is defined as the official notification, given to the individual by the competent authorities, of the allegation that he has committed a criminal offence – in administrative law, this is done in a decision or draft decision – but in some instances the charge may take the form of other measures that carry the implication of such an allegation and that likewise substantially affect the situation of the individual.[65] Already from that moment, the individual has an interest in a speedy procedure, protected by Article 6 ECHR.

In the Netherlands, the reasonable time case law of the ECHR was 'discovered' by the administrative courts in the middle of the 1990s, but a more comprehensive approach to the requirement only dates from the year 2008.[66] In 2008, the courts recognized that violations of the requirement by the administration or the courts must be remedied by compensating the immaterial damages caused by it. In the next section, this line of case law will be discussed in depth. Another interesting development is that the Dutch administrative courts since the end of 2008 apply the requirement of reasonable time also *outside the scope of Article 6 ECHR*, for instance, in migrant law cases, in tax law cases, and in cases concerning access to information.[67] This case law is, however, not based on an unwritten principle of reasonable time but on the principle of legal certainty. According to the Council of State and the Supreme Court, legal certainty is a general principle of law, which is one of the foundations of Article 6 ECHR and which must be applied in the Dutch legal order independent from (the scope of) Article 6. This 'Dutch' extension of the areas in which the requirement applies is in line with – although not explicitly inspired by – the Union equivalent of Article 6 ECHR, Article 47(2) of the Charter. In Article 47(2), the requirement is not limited to 'civil rights' and 'criminal charge' decisions but applies to judicial procedures concerning administrative decisions implementing Union law. This includes many decisions in, for instance, the area of migrant law and tax law.

Although the ECtHR – and also the Dutch administrative courts – has enlarged the scope of the requirement of reasonable time considerably, the requirement still does not apply to the administrative decision-making process (unless the process results in a criminal charge). The same concerns Article 47(2) of the Charter. However, in Article 41 of the Charter, the right of individuals to have its case treated within a reasonable time is recognized as a right of good

64 ECtHR 27 Jun. 1968 (*Neumeister*), Application No. 1936/63, para. 28.

65 ECtHR 10 Dec. 1982 (*Foti*), Application Nos 7604/76, 7719/76, 7781/77, and 7913/77, para. 52.

66 See ABRvS 4 Jun. 2008, *AB* 2008/229; CRvB 11 Jul. 2008, *AB* 2008/241. See J.C.A. DE POORTER & A. PAHLADSINGH, 'Rechtsvorming rond de redelijke termijn', 2.*JBplus* 2010, pp. 81–102.

67 *Cf.* ABRvS 3 Dec. 2008, *AB* 2009/70 and ABRvS 22 Apr. 2009, 200806094/1/V6 (both migrant law); HR 10 juni 2011, *JB* 2011/62 (tax law); ABRvS 20 May 2009, *JB* 2009/167 (access to information).

administration. In the Netherlands, the same guarantee is offered by Article 4:13 of the GALA. According to this provision, 'an administrative decision shall be made within the time limit prescribed by a statutory regulation of, in absence of such time limit, within a reasonable period after receiving an application'. If the administrative authority exceeds the time limit, an interested individual is entitled to a penalty payment that may mount up to EUR 1,000. Moreover, the individual can lodge an appeal before the administrative courts against the administrative failure to decide in time. In the judicial procedure, the court assesses whether the time limit in fact was exceeded and – if so – the court orders the authority to take the decision within a new (short) time limit set by the court. The exceeding of this time limit is again enforced by a penalty payment. In some areas of administrative law, the Dutch legislator has chosen for the system of *silencio positivo*. In this system – which is prescribed as the general rule for permits within the scope of the Services Directive[68] – a permit is considered to be granted in case the authorities have exceeded the prescribed time limit. So, administrative silence is converted into a (fictional) positive decision.

3.3.4. Principle of Transparency

A final formal principle of administrative law that has been developed in the case law of the ECJ and is increasingly applied by Dutch courts is the principle of transparency.[69] The principle refers to the openness of government and is, in general, concerned with the availability, accessibility, and clearness of governmental information.[70] It offers the basis for the Union and national access to information legislation[71] but is also applied in the context of restrictions of the free movement, in the area of state aid and – especially – in procedures of competitive distribution of so-called scarce economic rights.[72] Scarce economic rights are rights like permits,

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68 See Art. 13(4) of Directive 2006/123 of 12 Dec. 2006, on services in the internal market, OJ 2006, L 376/36.

69 A. PRECHAL & M. DE LEEUW, 'Dimensions of Transparency: The Building Blocks for a New Legal Principle', 1.*Review of European Administrative Law* 2007, pp. 51–62; A. DRAHMANN, 'Tijd voor een Nederlands transparantiebeginsel', in M. Verhoeven *et al.* (eds), *Europees offensief tegen nationale rechtsbeginselen? Over legaliteit, rechtszekerheid, vertrouwen en transparantie, Jonge VAR-reeks 8*, BJu, Den Haag 2010, pp. 143–197.

70 H. ADDINK *et al.*, (eds.), *Source Book Human Rights & Good Governance*, Utrecht 2010, pp. 49–77. A.W.G.J. BUIJZE, 'Waarom het transparantiebeginsel maar niet transparant wil worden', 7.*NtER* 2011, pp. 241–248. A.W.G.J. BUIJZE & R.J.G.M. WIDDERSHOVEN, 'De Awb en EU-recht: het transparantiebeginsel', in T. Barkhuysen *et al.* (eds), *jaar Awb*, vol. 15, Bju, Den Haag 2010, pp. 589–607.

71 See at Union level, Regulation 1049/2001.

72 PRECHAL & DE LEEUW; BUIJZE; C.J. WOLSWINKEL, 'The Allocation of a Limited Number of Authorisations: Some General Requirements from European Law', 2, no. 2.*Review of European Administrative Law* 2009, pp. 61–104; F.J. VAN OMMEREN *et al.*, (eds), *Schaarse publieke rechten*, Bju, Den Haag 2011.

concessions, or subsidies, which are limited in numbers and for which there are more applicants than rights to be granted. The most well-known example of a system of competitive distribution of such rights is the tendering procedure in the area of public procurement. However, also other distribution systems, like auctions and beauty contests, qualify as such.

The principle of transparency is closely connected to other general principles of law such as the principle of legal certainty, the rights of defence, the principles of equality and non-discrimination, the principle to prevent arbitrariness, and the principle of impartiality.[73] In general, one might say that the principle precedes the other principles and thus offers a guarantee that, for instance, the principles of equality and non-discrimination are complied with and 'any risk of favouritism or arbitrariness on the part of the distributing authority' is precluded.[74] The transparency principle has been codified in more or less detail in several Union acts, like the Framework Directive for electronic communications networks and services, the Services Directive, and – of course – the public procurement directives.[75] Moreover, Article 41(2) of the Charter contains a partial codification of the principle, namely of the right of access to the file. The principle was first recognized by the ECJ as a principle of public procurement law[76] but has gradually been developed into a general principle of Union law that also applies outside the scope of public procurement.[77] In this respect, it is of importance that the ECJ considers the principle as a pre-condition for the restriction of the freedoms of establishment and services (Arts 49 and 56 TFEU),[78] so that the principle has also a basis in primary Union law.

The precise meaning of the transparency principle depends on the context in which it is applied. So, in an area like public procurement, the precise obligations that can be derived from the principle are much more detailed than in other areas.

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73 PRECHAL & DE LEEUW; BUIJZE, pp. 241–243.

74 Case C-496/99P *Succhi di frutta* [2004] *ECR* I-3801.*Cf.* also Case 324/98 *Telaustria* [2000] *ECR* I-10745, Case C-458/03 *Parking Brixen* [2005] *ECR* I-8612, and Case C-448/01 *Wienstrom* [2003] *ECR* I-14527.

75 Directive 2002/21 (common regulatory framework for electronic communications networks and services), OJ 2002, L 108/33, Art. 3(3); Directive 2006/123 (services in the internal market), OJ 2006, L 376/36, Arts 9 and 10; Directive 2004/18 (procedures for the award of public works contracts, public supply contracts, and public services contracts), OJ 2004 L 134/114, Art. 10; and Directive 2004/17 (procurement procedures in the water, energy, transport, and postal services sectors), OJ 2004 L 134/1, Art. 10, respectively.

76 Case C-87/94 *Commission* v. *Belgium* [1996] *ECR* I-2043.

77 *Cf.* Case T-297/05 *IPK International* v. *Commission*, Judgment of 15 Apr. 2011, nyr, in which the General Court recognizes the principle of transparency as a fundamental principle for the award of subsidies.

78 Case C-231/03 *Coname* [2005] *ECR* I-7287; Case 324/98 *Telaustria* [2000] *ECR* I-1074; Joined Cases C-203/08 and C-258/08 *Betfair and Ladbroke*, Judgment of 13 Jun. 2010, nyr.

However, in all areas, the principle includes the following obligations:[79] the use of clear and unambiguous language, equal opportunities for all applicants to compete (including equal access to information), the duty to make public distribution standards, and the consistent interpretations of such standards.

In the Netherlands, the principle is a regularly applied standard in the area of public procurement,[80] but applications of the principle can also be found in the case law in other areas. An interesting example offers the judgment of the Council of State in the case of *Schindler*, in which the Council based a duty of transparency on (now) Article 56 TFEU in connection with the principles of proportionality.[81] In the judgment, the decision of the Minister of Justice extending a lottery permit of a monopolist – without offering other parties the opportunity the compete in a tendering procedure – was annulled because it was inconsistent with Article 56 TFEU and the duty of proportionality and transparency implied in the article. Other examples of the application of the principle concern the competitive distributions of municipal permits for games of chances. In several judgments – in which Union law as such did not play a role – the Trade and Industry Appeals Court has applied elements of the transparency principle like the equal opportunity for the (possible) applications of a permit to compete, the equal access to information, and the duty of consistent interpretation of distribution standards.[82] In most judgments, the court considers these requirements to be a part of the principle of due care or connects them to the principle to state reasons,[83] but sometimes it refers to an unwritten principle of transparency.[84] Therefore, it seems a matter of time that transparency will be recognized as a Dutch general principle of administrative law.[85]

3.4. Evaluation

The foregoing overview shows that general principles of law are a well-known phenomenon in Dutch administrative law, that their content is still developing, and that new principles are still discovered. Moreover, it is clear that in recent years most innovations in the area of general principles originate from Europe.[86] The case

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79 PRECHAL & DE LEEUW, p. 58; DRAHMANN; BUIJZE & WIDDERSHOVEN; BUIJZE, pp. 246–247.

80 See, for instance, HR 4 Apr. 2003, *NJ* 2004/35 and HR 4 Nov. 2005, *NJ* 2006/204.

81 ABRvS 18 Jul. 2007, AB 2007/302.

82 CBB 19 Dec. 2007 (Amutron), *JB* 2008/67; CBB 3 Jun. 2009 (Swiss Leisure Group), *AB* 2009/373; CBB 3 Jul. 2009 (Heerlen), *JB* 2009/227; CBB 28 Apr. 2010 (Flash), *AB* 2010/186.

83 CBB 3 Jun. 2009 (Swiss Leisure Group), *AB* 2009/373; CBB 3 Jul. 2009 (Heerlen), *JB* 2009/227.

84 CBB 19 Dec. 2007 (Amutron), *JB* 2008/67.

85 At least according to BUIJZE & WIDDERSHOVEN.

86 Note however that some European principles, like the principle of unjust enrichment (*cf.* Case C-398/09 *Lady & Kid*, Judgment of 6 Sep. 2011, nyr), are not recognized as a Dutch principle of *public law*.

law of the ECJ – and sometimes also of the ECtHR – has considerably influenced the principles of equality and non-discrimination, the principle of legitimate expectations, and the principle of proportionality and will probably force the Netherlands to recognize the rights of defence as an independent principle of law (or as a part the principle of due care). New principles, like the principle of reasonable time and the transparency principle, have their roots in (Union or ECHR) Europe. In general, the European influence on the Dutch administrative principles of law is in favour of the protection of individuals. The only exception to this offers the principle of legitimate expectations of which the protective function is considerably limited in Union law cases.

4. Remedying Violations of General Principles of Law

The development by the courts of large group of general principles of law is as such good news for individuals. However, the practical relevance of all these principles also depends on how violations of general principles are or should be remedied. This question is relatively easy to answer as regards to violations of substantive principles. In general, such violations will lead to the annulment of the contested administrative decision and, in the end, to a decision with a different substantive content that is in favour of the individual. However, in practice, the Dutch courts rarely annul decisions because of a violation of a substantive principle, to our estimation in less than 5% of the cases in which they find a violation of a principle.[87] In the vast majority of cases, the courts apply a formal principle, probably to avoid interference with the content of the decision and – indirectly – with the discretion of the administration. Therefore, the principle of due care and the principle to state reasons are by far the most popular general principles in the case law of the administrative courts.

A violation of a formal principle does not – at least not necessarily – affect the substance of the decision. Therefore, in the case law of the ECJ and of the Dutch courts, violations of, for instance, the rights of defence do not always result in an annulment of the decision (see already sec. 3.3.1). However, even if the court annuls a decision because of a breach of the rights of defence or the principle of due care, it is far from certain that the decision will substantively change. In many cases, the content of the decision may be upheld after hearing the individual that was not heard in the first place, by gathering more information, by granting access to the file, etc. The same applies to the principle of transparency that, in general, also offers only procedural and no substantive protection. So, it is far from certain that a new procedure that observes the transparency requirements will lead to a different outcome. Similarly, a violation of the principle to state proper reasons might be repaired by the administration by improving the reasons of a decision.

87 Note that annulments may also been based on a breach of a statutory provision.

Finally, violations of the principle of reasonable time only affect the legality of a decision if it qualifies as a criminal charge. Both under Union and Dutch laws, an administrative fine is reduced in case the reasonable time limit of Article 6 ECHR is exceeded.[88] However, outside the area of 'criminal charge' decisions, the ECJ and the Dutch courts do not accept that a decision that is substantively correct is annulled for the sole reason that the reasonable time was exceeded.[89] So, although the annulment of a decision might be an effective remedy for violations of formal principles in some cases, in others it is not.

This raises the question of whether there is a need for more effective remedies against violations of formal principles. To our opinion, this question should be answered in the affirmative for two reasons: in the first place, because otherwise there is a risk that these principles will not be observed by the administrative authorities on a large scale and will erode. After all, if necessary, the administration always gets a second chance to repair the violation. That this risk might become reality is shown by the Dutch developments regarding the principle of the rights of defence. As indicated in section 3.3.1, in the Netherlands, this principle is considered an 'alien European concept', of which it is, moreover, uncertain whether violations always should lead to the annulment of a decision. This question is now pending before the Supreme Court. During this period of uncertainty, the Dutch customs authorities have decided not to apply the principle. The second reason for our plea for more effective remedies is a European one. According to Article 13 ECHR, the Member States must provide for effective remedies before a court in case of an alleged breach of the ECHR rights. As will be discussed below, the ECtHR derives from this article a positive obligation to organize effective remedies in case of breaches of the reasonable time requirement of Article 6 ECHR, the only general principle of law codified in the ECHR. A similar guarantee as in Article 13 ECHR is offered by – its Union equivalent – Article 47(1) of the Charter as regards to violations of the rights and freedoms guaranteed by Union law.[90] This includes also breaches of other formal general principles as far as they are recognized as a general principle of Union law, like the rights of defence, the principle to state reasons, and the transparency principle.

To answer the question of what exactly a remedy should provide for in order to be effective, one may draw inspiration from the case law of the ECtHR concerning effective remedies under Article 13 ECHR. As already indicated, in the

88 See in Dutch law, for instance, CRvB 19 Feb. 1996, *RSV* 1996/114; ABRvS 19 Nov. 2003, *AB* 2004/27; HR 3 Oct. 2000, *NJ* 2000/721. See in Union Law, for instance, Case C-185/95 P *Baustahlgewebe* [1998] I-8417.

89 See in Dutch law, for instance, CRvB 4 Dec. 2004, *AB* 2005/73 and CRvB 24 Jan. 2002, *AB* 2002/140. See, in Union law, Case C-385/07P *Der Grüne Punkt* [2009] I-6155.

90 *Cf.* SACHA PRECHAL & ROB WIDDERSHOVEN, 'Redefining the Relationship between "Rewe-Effectiveness" and Effective Judicial Protection', 2.*REALaw* 2001, pp. 31–50.

case of *Kudla*, the ECtHR has derived from the article a positive obligation for the Member States 'to guarantee an effective remedy before a national authority for an alleged breach of the requirement under Article 6, to hear a case within a reasonable time'.[91] In *Kudla* and in subsequent cases, such as *Pizzati* and *Scordino*, the ECtHR has declared that an effective remedy preferably should be a preventive one, by which imminent violations can be prevented from happening. However, the Member States should at least offer the opportunity for compensation, not only of the material damages that an individual has suffered because of the breach of the reasonable time requirement but also of immaterial damage.[92] The amount of immaterial damages should be established by applying the so-called anxiety and frustration criterion. The assumption of this line of case law is that individuals suffer from anxiety and frustration because the time exceeds what is to be regarded as reasonable, even if the contested decision is substantively correct. In our view, the Dutch courts and also the ECJ could follow the same approach not only in cases in which it is confronted with breaches of the reasonable time requirement[93] but also in cases in which a breach of another formal principle is established, which does not affect the substance of a decision however.

5. Possible Future Development of General Principles: Principles of Good Administration and the Role of Ombudsman

Finally, some observations will be made regarding the possible future development of general principles in administrative law. In this respect, a development that is regarded as highly important and can be observed in the last 10 to 15 years is the discovery and emergence of so-called principles of good administration. Nowadays, these principles can be found in several documents laid down by authorities and institutions at the European level[94] and in the Member States.[95] They are further

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91 ECtHR 26 Oct. 2000 (*Kudla*), Application No. 30210/96.

92 ECtHR 10 Nov. 2004 (*Pizzati*), Application No. 62361/00; ECtHR 29 Mar. 2006 (*Scordino*), Application No. 62361/00.

93 Since CRvB 8 Dec. 2004, AB 2005/73, the Dutch administrative courts recognize, in reasonable time cases, the possibility of compensation of (also) immaterial damages according to the anxiety and frustration criterion. In Case C-385/07P *Der Grüne Punkt* [2009] I-6155, the ECJ has established that exceeding of the reasonable time requirement by the General Court in principle may lead to liability under Art. 340 TFEU. However, it has not (yet) recognized the possibility of compensation of immaterial damages according to the anxiety and frustration criterion.

94 Several EU institutions have discovered their 'own' set of principles of good administration. See, for instance, the Code of good administrative behaviour for staff of the European Commission in their relations with the public (OJ L 267, 20 Oct. 2000) or The European Code of Good Administrative Behaviour of the European Ombudsman, subsequently adopted by the European Parliament as Resolution C5-0438/2000–2000/2212 (COS). In addition, the Council of Europe has produced a number of documents directed to good administration and its principles, for instance, Recommendation CM/Rec (2007)7 of the Committee of Ministers to the Member States on good administration and Recommendation Rec (2000)10 on Codes of Conduct for Public Officials.

developed in the academic literature.[96] The principles of good administration partly overlap with the general principles that are already recognized by the courts but go partly beyond them. Because of their character, principles of good administration can be based either on the law (as much as they overlap with general principles) or on norms that exist outside the realm of the law, whether moral or ethical principles. This second group includes principles like the principle of correct treatment and of courtesy, the principle of administrative accuracy, the principle of openness, the principle of adequate information supply, the principle of coulance,[97] the principle of de-escalation,[98] the principle of integrity, etc. Moreover, in academic literature also, the principles of public participation, accountability, and effectiveness are considered to be principles of good administration.[99]

A question to be posed is which of these principles will, in the future, develop into general legal principles that can be applied by the courts as grounds for judicial review. First of all, to our opinion, there does not exist a strict division between general principles of law and principles of good administration.[100] In recent years, we have already witnessed that principles that were first recognized as a principle of good administration, like the principle of transparency and the principle of reasonable time, are gradually now developing into general principles of law. The same may occur with other principles, for instance, the principle of effectiveness, which is already recognized as a general principle of law at the Union level.[101] However, other principles of good administration, like courtesy or coulance, will probably hardly ever gain the status of a general principle of law.

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95 See, for instance, Netherlands Court of Audit, Strategy 2010–2015, Effective and Transparent Performance and Operation of Public Administration, or the Ethical Codex of Public Servant (*Etický kódex štátneho zamestnanca*) adopted by Ministry of Interior of the Slovak Republic.

96 See, for instance, *Principles of Good Administration: In the Member States of the European Union*, Statskontoret 2005, p. 4; HENK ADDINK, *Goed Bestuur*, Kluwer, Deventer 2010; V. NEGRUT, 'The Europeanization of Public Administration through the General Principles of Good Administration', II, no. 2.*AUDJ*, pp. 5–15; or J. WAKEFIELD, *The Right to Good Administration*, Kluwer Law International, Alphen a/d Rijn 2007.

97 See GIO TEN BERGE & PHILIP LANGBROEK, 'The Surplus Value of the Ombudsman', in *The Danish Ombudsman 2005*, Part III, pp. 103–140, Kopenhagen 2005, p. 11, who describe coulance as a moral need (not a legal obligation) of a public body to reach out to a complainant and offer him some compensation in money or goods, for things having gone wrong where no one can be blamed explicitly.

98 According to this principle, administrative authorities should, in their contact with citizens, prevent or limit further escalation of the situation.

99 ADDINK.

100 See, for example, M. REMAC & P. LANGBROEK, 'Ombudsman's Assessment of Public Administration Conduct: Between Legal and Good Administration Norms', IV, no. 2.*The NISPAcee Journal of Public Administration and Policy* 2011/2012, pp. 153–183.

101 *Cf.*, for instance, Case 33/76 *Rewe* [1976] *ECR* 1989 and Joined Cases 205-215/82 *Deutsche Milchkontor* [1983] *ECR* 2633.

This, however, does not mean that these principles are irrelevant for individuals or for the administration, because the courts are not the only institutions that apply and develop principles. An important other institution that offers the citizens protection against administrative authorities – and in doing so has developed its own set of principles – is the ombudsman. Ombudsman institutions exist at the EU level and in most of the Member States. Their task is generally twofold: to assess individual complaints of citizens against conduct of an administrative authority (repressive task) and to create models of good administrative behaviour (preventive task). In the first repressive task, the ombudsmen in general do not only decide whether a complaint can be upheld, but – if it is upheld – they may also give recommendations on the actions the administrative authority should take 'to put things right' in the specific case or/and on more structural measures the authority should take to prevent similar complaints in the future. As part of the second preventive task, ombudsmen have developed and 'codified' guidelines for good administrative conduct. Examples of such guidelines are 'The Principles of good administration' of the Parliamentary and Health Service Ombudsman of the United Kingdom,[102] the requirements of proper administration included in the '*Behoorlijkheidswijzer*' of the Dutch National Ombudsman,[103] or the European Code of Good Administrative Behaviour used by the European Ombudsman.[104]

The assessment standard of the ombudsmen is usually the standard of maladministration or propriety.[105] This standard usually includes the law and general principles of law but also principles of good administration that go beyond legality.[106] Georg Jellinek once stated that *'Das Recht ist nichts Anderes, als das ethische Minimum'* (the law is an ethical minimum),[107] and in line with this

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102 The Principles of Good Administration of the Parliamentary Ombudsman can be found at this Internet site: <www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples/principles-of-good-administration>, 15 Dec. 2011.

103 'De Behoorlijkheidswijzer' of the National Ombudsman can be found in the publications of the National Ombudsman or at this Internet site: <www.nationaleombudsman.nl/informatiemateriaal>, 15 Dec. 2011.

104 The European Code of Good Administrative Behaviour can be found on the Internet site of the European Ombudsman: <www.ombudsman.europa.eu/en/resources/code.faces#hl3>, 15 Dec. 2011.

105 Maladministration is the scope of control of the British ombudsmen and of the European ombudsman. The Dutch ombudsmen apply the standards of propriety. In practice, both standards are quite similar. Nevertheless, especially in the case of the youngest European ombudsmen (for instance, ombudsmen for Eastern Europe), it is possible to find different standards connected mainly with human rights.

106 *Cf.* the European ombudsman, NIKIFOROS DIAMANDOUROS, 'Conference Speech – 4th International Conference of Information Commissioners (2006)', 2, no. 2.*Open Government: A Journal on Freedom of Information* 11 Dec. 2006, p. 9.

107 J. KERSTEN, *Georg Jellinek und die klassische Staatslehre*, vol. 1, Mohr Siebeck, Auf, Tübingen 2000, p. 328.

statement, many of the ombudsmen consider general (legal) principles to be a minimum standard for administrative conduct. Beyond the sphere of the law, ombudsmen have discovered their own principles, which should be complied with by the administration. Examples of such principles are the principles of good administration that were mentioned in the beginning of this section. Thus, in the *Behoorlijkheidswijzer* of the Dutch ombudsman, one can find principles, like courtesy, coulance, or de-escalation, which also function as ombudsman assessment standard when he decides on an individual compliant of a citizen. The Principles of Good Administration of the British Parliamentary Ombudsman include principles like 'Being customer focused' or 'Seeking continuous improvement', which are even more remote from the legal realm.

All these 'new' ombudsmen principles are not legal principles in the strict sense, because ombudsmen decisions in an individual case and also the several guidelines mentioned are not legally binding. However, in practice, they can be as effective as the general principles of law that are applied by the courts for two reasons. In the first place – and as already stated above – different from the courts, ombudsmen do not have to limit themselves to the application of a principle in an individual case but can also give general recommendations on structural measures that the administrative authorities should take into account in order to act in accordance with a principle in future cases. Some of these recommendations and the principles underlying them are – as a next step – 'codified' in more general terms in the ombudsmen guidelines for good administrative conduct, which are published on the Internet. Therefore, they can be known publicly and are perhaps more accessible than the large body of case law of the courts regarding the general principles of law.

In the second place – and perhaps more important – ombudsman decisions are very authoritative, and in practice, the acceptance rate of the non-binding decisions by the administrative authorities is very high. According to the Annual Report 2010–2011 of the British Parliamentary Ombudsman, in 2010 over 99% of its recommendations for a remedy were accepted by the administrative authorities.[108] In the case of the Dutch National Ombudsman, the number of accepted recommendations is only a bit lower. According to the Annual Report 2010, 94% of all recommendations for the year 2009 were accepted.[109] This acceptance rate strengthens the possibility that the ombudsman principles of good administration become a part of the processes and practices of the administration. In the end, this might even lead to a transformation of at least some principles of good administration into general principles of law.

108 Annual Report of the Parliamentary and Health Service Ombudsman 2010–2011, p. 38.

109 Annual Report 2010 of the Dutch National Ombudsman, Scheme 13, p. 152.

6. Conclusion

Since the discovery by the Central Appeals Court in 1935 of the first general principle of law, the principle of legal certainty, general principles are a well-known phenomenon in Dutch administrative law. Their content has mainly been developed by the courts, although some of them have been codified in the GALA in 1994. In recent years, most innovations in the area of general principles originate from Europe. The case law of the ECJ and the ECtHR has considerably influenced the principles of equality and non-discrimination, the principle of legitimate expectations, and the principle of proportionality and will probably force the Netherlands to recognize the rights of defence as an independent principle of law (or as a part the principle of due care). Moreover, new general principles, like the principle of reasonable time and the transparency principle, have their roots in Europe. In general, the European influence on the Dutch administrative principles of law is in favour of the protection of citizens. The only exception to this offers the principle of legitimate expectations of which the protective function is considerably limited in Union law cases.

In the case law of the Dutch administrative courts, formal or procedural general principles, especially the principle of due care and the principle to state reasons, are by far the most popular ones. Although in some cases annulment of a decision on the ground of a violation of a formal principle might be an effective remedy, in others it is not because these violations do not necessarily affect the substantive of a decision and can possibly be repairable by the administration. Therefore, it is argued that there is a need for an additional effective remedy against breaches of formal principles, namely – and in line with ECtHR case law regarding breaches of the reasonable time requirement – the possibility of compensation of immaterial damages according to the anxiety and frustration criterion.

In the near future, the so-called principles of good administration will grow more important. Some of them will probably develop into principles of law and will be applied by the courts, while others will not gain this status. Nevertheless, they are not irrelevant for citizens and for the administration, because they are applied by the European and national ombudsmen as standard for good administrative conduct. Although ombudsmen decisions are legally not binding, their acceptance rate by the authorities is, in practice, very high.

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