Rebalancing indirect judicial review of administrative action in the Netherlands

de Graaf, Kars J.; Marseille, Albert T.; Wever, Marc

Published in:
Indirect Judicial Review in Administrative Law

DOI:
10.4324/9781003164302-7

6 Rebalancing indirect judicial review of administrative action in the Netherlands

Kars J. de Graaf, Albert T. Marseille and Marc Wever

6.1 Introduction

In the Netherlands, administrative courts are competent to review decisions by administrative authorities, but those courts are not competent to directly review administrative decisions containing so-called 'general binding regulations'. In a judicial review procedure regarding a reviewable administrative decision, applicants may, however, claim that a general binding regulation, which provided the legal basis for a decision that is the object of the direct challenge, is unlawful. Such a plea of illegality requires the administrative courts to indirectly review decisions containing general binding regulations. Recently, the highest administrative courts have re-assessed both the scope and the intensity of this indirect judicial review. This chapter first introduces the judicial review of administrative action in the Netherlands (Sections 6.2 and 6.3) and the possibility of having decisions containing general binding regulations reviewed both directly by the ordinary courts and indirectly by the administrative courts (Section 6.3). This contribution does not discuss the (indirect) review of Acts of Parliament in the light of the Constitution, European Union (EU) law or (unwritten) general principles of law. Section 6.4.3 specifically provides insights into the scope and intensity of judicial review of general binding regulations by courts in the Netherlands, while Section 6.5 allows for an assessment of the effectiveness of indirect judicial review of general binding regulations by Dutch administrative courts. To conclude, this chapter provides an overview of the tension between legal certainty and legality in the system of indirect judicial review in the Netherlands (Section 6.6) and offers a perspective on future developments (Section 6.7).

6.2 Judicial review of administrative action in the Netherlands

Under the Dutch Constitution, the adjudication of disputes involving civil law rights and debts is the responsibility of the judiciary.[1] Responsibility for

1 Art. 112 of the Dutch Constitution (*Grondwet*).

DOI: 10.4324/9781003164302-7

adjudicating disputes which do not arise from matters of civil law – e.g., administrative law – may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. One of these Acts of Parliament is the *Algemene wet bestuursrecht*, the General Administrative Law Act (GALA). The GALA grants the competence to adjudicate disputes about certain types of administrative action to the administrative courts. The administrative courts are independent authorities, established by law, and charged with the administration of justice in administrative matters (Article 1:4 (1) GALA).

Not every dispute about every type of administrative action may be brought before the administrative courts. These are only competent to adjudicate a dispute if the legislator has so decided (i.e., if there is basis in the law). Article 8:1 GALA provides the basic rule for the competence of the administrative courts to review administrative action: an interested party (Article 1:2 GALA) may apply for judicial review of a decision (*besluit*) by the administrative court. An interested party (*belanghebbende*) is anyone whose interests are directly affected by the decision of an administrative authority. A 'decision' is defined as a written decision of an administrative authority constituting a public law act (Article 1:3 GALA). Decisions can be of individual scope, meaning they are addressed to a specific person or legal entity, or of general scope.[2] For the purposes of judicial review, some forms of administrative action which are not considered decisions are still treated as reviewable by the court. The most important examples are the written refusal to take a decision and the failure to adopt a decision in due time (Article 6:2 GALA).[3]

6.3 Non-reviewable acts of the administration

As the competence of the administrative courts is limited to administrative decisions, disputes about administrative action not constituting an administrative decision (or not considered as such for the purposes of the possibility of judicial review) cannot be brought before the administrative courts. This includes, for example, civil law acts, such as contracts,[4] or factual administrative action that has no (intended) legal consequences (for instance, the publication of general information on a government website). The courts of general competence retain the competence to adjudicate over such disputes if they arise.

Furthermore, not every type of administrative decision may be directly reviewed the administrative courts.[5] For the purpose of this chapter, the most relevant general exception to the competence of the administrative courts to

2 If a decision (*besluit*) is not general in scope, it is called a 'single-case decision' (*beschikking*). See Art. 1:3 (2) GALA.

3 For example, 'factual' actions concerning civil servants. See Art. 8:2 (1) under a GALA.

4 Decisions that are made in preparation of a civil law act are seen as administrative law decisions, but they are excluded from the competence of the administrative courts. See Art. 8:3 GALA.

5 Articles 8:4 and 8:5 GALA offer examples and refer to a list of decisions against which judicial review by an administrative court is not allowed.

directly review administrative decisions can be found in Article 8:3 GALA. This article states that, although they are considered decisions, no judicial review by an administrative court is allowed of an administrative decision containing a general binding regulation or a so-called 'policy rule' (*beleidsregel*), including decisions repealing, laying down the entry into force or approving such administrative decisions.

There is no definition of what constitutes a 'general binding regulation' in the GALA or other (primary) legislation. From case law, it can be deduced that a general binding regulation is a general and abstract measure that legally binds citizens and the administrative authority and that is suitable for repeated application (in other words, it is not meant for one particular case). The power to create general binding regulations must be conferred on or delegated to an administrative authority by the Constitution or an Act of Parliament. The exclusion of the right to apply for judicial review of decisions containing general binding regulations (adopted by a competent administrative authority) is not absolute. There is an important exception to Article 8:3 GALA: zoning or land use schemes.[6] This exception has always been applicable and can probably be explained by the direct consequences of such schemes on the legal position of landowners.

A 'policy rule' is, in the Dutch legal system, a decision (that is not a general binding regulation) that lays down a general rule for weighing interests, determining facts or interpreting statutory regulations in the exercise of an administrative authority's power (Article 1:3(4) GALA). An administrative authority may establish policy rules in respect of a power conferred to it, which is exercised under its responsibility or which has been delegated by it (Article 4:81 GALA). Policy rules primarily bind the administrative authority itself.[7]

So, why is it that administrative courts cannot directly review decisions containing general binding regulations (and policy rules)? Several reasons can be mentioned here. First, the Dutch political and constitutional tradition has always been characterised by a limited role of the judiciary when it comes to the review of legislation. Article 120 of the Dutch Constitution, for example, prohibits the courts from testing the constitutionality of Acts of Parliament.[8] When the GALA was enacted, the legislator opted to treat administrative decisions containing general binding regulations as legislation instead of as 'regular' administrative decisions. The then dominant view was that control of, and accountability for, this type of administrative action should primarily be democratic and political in

6 Judicial review of zoning schemes adopted by the municipal council on the basis of the Spatial Planning Act (*Wet ruimtelijke ordening*) is allowed. Some specific acts, such as the Electricity Act (*Elektriciteitswet*) and the Gas Act (*Gaswet*), provide other exceptions to this general rule and do allow direct actions against general binding regulations.

7 Administrative Jurisdiction Division of the Council of State (hereinafter: *Afdeling bestuursrechtspraak van de Raad van State* or ABRvS) 16 October 2013, ECLI:NL:RVS:2013:1987.

8 J. De Poorter and others (eds) *Judicial Review of Administrative Discretion in the Administrative State* (1st edition, T.M.C. Asser | Springer, 2019), p. 83.

nature.[9] Second, it was feared that making the administrative courts competent to (directly) review general binding regulations and policy rules would lead to a great increase in the number of cases brought before the administrative courts. Lastly, it was thought that direct judicial review against general binding regulations and policy rules would make it more difficult for the executive branches of the state to fulfil their responsibilities. Interestingly, the exclusion of general binding regulations and policy rules was originally intended as a temporary rule when the GALA was introduced in 1994, but it was made permanent by the legislator in 2013.[10]

The debate did not end with the legislator's decision not to amend Article 8:3 GALA. In 2017, the discussion on judicial review of general binding regulations was renewed and revitalised.[11] At that time, the prevailing opinion in the literature was, and probably still is today, that the exclusion of direct judicial review of general binding regulations and policy rules should be abolished. Four main arguments support this view. First, allowing direct judicial review of general binding regulations by the administrative courts would simplify the current division of competence between the ordinary courts and the administrative courts.[12] Second, it would enhance judicial protection, as administrative court procedures are less costly when compared to ordinary court procedures. Third, it would improve judicial specialisation, as administrative courts could then rule on the application of public law competences more generally. And lastly, it would increase the possibility for interest groups to have general binding regulations reviewed because access to these procedures is considered easier than access to the ordinary courts. However, despite the prevailing opinion and the arguments put forward, the legislator is not inclined to change the status quo at present.

6.4 Review of general binding regulations

Although administrative courts are not competent to directly review decisions containing general binding regulations or policy rules, they can indirectly review these non-reviewable decisions. This possibility is particularly relevant and will be discussed in Section 6.4.1. Furthermore, administrative measures, such as

9 ibid.

10 See *Wet aanpassing bestuursprocesrecht*, Government Gazette 2012, 682.

11 W. Voermans and others, *Algemene regels in het bestuursrecht* (1st edition, Boom Juridische Uitgevers, 2017); R. van Male, 'Een queeste naar balans in de trias. Bespreking VAR-preadvies Besturen met regels, volgens de regels', 4/5 *Nederlands Tijdschrift voor Bestuursrecht* (2017), 123; J. De Poorter and F. Capkurt, 'Rechterlijke toetsing van algemeen verbindende voorschriften', 4/5 *Nederlands Tijdschrift voor Bestuursrecht* (2017), p. 10; Y. Schuurmans, 'Rechtsbescherming tegen algemeen verbindende voorschriften: een voltooide discussie?', 4/5 *Nederlands Tijdschrift voor Bestuursrecht* (2017), p. 128.

12 It should be noted that, if the exclusion (Art. 8:3 GALA) is removed, administrative law courts will still not have jurisdiction to review the lawfulness of Acts of Parliament. As Art. 1:1 GALA determines that the legislator is not an administrative authority, an Act of Parliament may not be regarded as an order.

general binding regulations, that are not reviewable by administrative courts can be declared unlawful (and, therefore, considered a wrongful act for the purposes of liability) by the ordinary courts. Ordinary courts, therefore, have a role in reviewing the lawfulness of general binding regulations; we discuss this role in Section 6.4.2. Finally, in Section 6.4.3, the scope and intensity (or deference) of indirect judicial review of general binding regulations (and policy rules[13]), by both ordinary and administrative courts in the Netherlands, is discussed by showing recent developments in case law.

6.4.1 Indirect review of general binding regulations: administrative courts

The administrative courts play an important role in reviewing the lawfulness of general binding regulations. Although Article 8:3 GALA explicitly states that direct judicial review is not allowed for a decision containing a general binding regulation (or a policy rule), it is possible for administrative courts to indirectly review the lawfulness of these decisions.

The GALA does not contain any provisions enabling the administrative courts to indirectly review the legality of general binding regulations. The competence to do so – and limitations to that competence – are the result of case law from the highest administrative courts in the Netherlands (see Section 6.4.3).[14] So, how does this indirect review (*exceptieve toetsing*[15]) work?

As discussed earlier, an 'interested party' (as defined in Article 1:2 GALA) may apply for judicial review by an administrative court against a decision of an administrative authority.[16] These decisions require a basis in law. In practice, almost all decisions are based upon either a legislative Act of Parliament or a decision by a competent administrative authority containing general binding regulations. For instance, in the past, a ministerial regulation (i.e., a decision containing general binding regulations) on driving proficiency could enable the Dutch equivalent of the Department of Motor Vehicles to issue single-case decisions addressed to individual drivers obliging them to install and use alcohol locks in their cars.[17] If an interested party applied for judicial review of the single-case decision, this

13 In general, this section applies to both general binding regulations and policy rules, although a slightly different approach toward policy rules can be expected in future case law.

14 Administrative courts may also (indirectly) find that an Act of Parliament is contrary to EU law or international law with direct effect or that the application of an Act of Parliament is so disproportionate that the decision based on it must be annulled. See Dutch Supreme Court (hereinafter: *Hoge Raad* or HR) 12 April 1978, ECLI:NL:HR:1978:AX3264, AX2432 and AM4447 (*Doorbraakarresten*). The courts shall, however, not rule an Act of Parliament without legal effect on the basis of a (unwritten) general principle of law. See HR 14 April 1989, ECLI:NL:HR:1989:AD5725 (*Harmonisatiewetarrest*).

15 This Dutch term can be translated in English as 'review by way of exception'.

16 PG Awb II (Parliamentary History GALA), p. 386.

17 ABRvS 4 March 2015, ECLI:NL:RVS:2015:622.

party may, in the context of that judicial review procedure, enter a plea of illegality and, in that way, indirectly challenge the legality of the general binding regulation upon which the decision is based. The administrative court will then review whether this general binding regulation is lawful. The grounds for indirect review are similar to the grounds for direct review. The administrative courts assess whether the general binding regulation is in accordance with higher legislation and with general principles of law.[18] Although interested parties must apply for judicial review against a decision within six weeks (Article 6:8 GALA), there is no temporal limitation on the possibility of indirect judicial review of the general binding regulation that was the basis for the contested, reviewable decision. In other words, the 'age' of the challenged general binding regulation is not relevant as long as the directly challenged administrative decision was not issued more than six weeks prior to the judicial review procedure.

What are the legal consequences of an administrative court ruling that the adoption of certain general binding regulations in a decision was unlawful, either in general or in a specific case? When an administrative court reaches such a conclusion, it will rule that the judicial review of the decision taken by an administrative authority based on that general binding regulation is well-founded (Article 8:70 GALA). The court is required to quash the disputed (reviewable) decision (Article 8:72 GALA). The court ruling formally affects only the litigants involved in the procedure. However, any judgement that considers a general binding regulation to be unlawful *in general* will have a profound effect in practice. The administrative court will, thus, have ruled that this particular general binding regulation is not binding and, therefore, cannot form the basis of any administrative law decision.[19] Other (administrative) courts, when confronted with judicial review applications for decisions based on the same general binding regulation, will, of course, take that into consideration. On the other hand, when an administrative court rules that the application of a general binding regulation is unlawful only *in a specific* case, the legal consequences can be limited to the parties involved in those proceedings.

6.4.2 Direct review of general binding regulations: courts of general competence

What is the role of the ordinary Dutch courts in assessing the lawfulness of decisions containing general binding regulations? Citizens or organisations (such as interest groups) can start proceedings challenging the legality of decisions containing general binding regulations with an ordinary court by filing an action arising from a wrongful act (Article 6:162 of the Dutch Civil Code, *onrechtmatige*

18 For example, ABRvS 3 February 2016, ECLI:NL:RVS:2016:201 (see para. 7.3); ABRvS 16 November 2016, ECLI:NL:RVS:2016:3045 (see para. 3.1).

19 ABRvS 4 March 2015, ECLI:NL:RVS:2015:622.

daad[20]). Because of the principle of separation of powers, it is not possible to bring a claim against the government with the intention of obtaining a court order obliging the competent public authority to withdraw or create a decision containing a general binding regulation or to oblige the legislator to withdraw or create a legislative Act of Parliament.[21] Nor does the ordinary court have the competence to quash or annul the general binding regulation. For this reason, applicants can only ask the courts to award damages or request the court to order the government not to apply or enforce the general binding regulation.[22]

The competence of the ordinary courts to assess the lawfulness of decisions containing general binding regulations has been restricted by the case law of the Dutch Supreme Court. The Supreme Court has stipulated that such a claim is inadmissible when the decision containing the general binding regulation has legal consequences for an individual citizen only after a (single-case) decision is made by an administrative authority on the basis of the general binding regulation, and judicial review of this single-case decision by the administrative courts is allowed.[23] The rationale behind the reasoning of the Dutch Supreme Court is that the possibility of indirect judicial review of decisions containing general binding regulations by administrative courts (*exceptieve toetsing*) provides sufficient legal remedies as well as safeguards allowing the ordinary courts to leave the assessment of the lawfulness of those decisions to the specialised administrative courts. For similar reasons, claims from interest groups (Article 3:305a Civil Code on class actions) have been declared inadmissible by the Supreme Court when the represented individuals had the possibility to apply for judicial review of the decision before the administrative court and could ask that court to indirectly review the general binding regulation.[24]

An exception to this rule that ordinary courts accept is that claims filed by interest groups are admissible in the case law of the ordinary courts when they have standing because a general binding regulation affects not only the interests

20 Art. 6:162 of the Civil Code reads as follows: '1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)'.

21 HR 21 March 2003, ECLI:NL:HR:2003:AE8462 (*Waterpakt*).

22 HR 24 January 1969, ECLI:NL:HR:1969:AC4903 (*Pocketbooks II*). See also HR 16 May 1986, ECLI:NL:HR:1986:AC9354 (*Landbouwvliegers*). It seems to be important in this respect that rights or powers by virtue of civil law may not be exercised in defiance of written or unwritten rules of public law (see Art. 3:14 of the Dutch Civil Code and Art. 3:1 GALA).

23 E.g., HR 9 July 2010, ECLI:NL:HR:2010:BM2314 and HR 22 May 2015, ECLI:NL:HR:2015:1296 (*Privacy first c.s./Netherlands*).

24 HR 3 June 2016, ECLI:NL:HR:2016:1049 (*SCAU/Dutch Universities*).

they represent but also their own interests as a legal entity.[25] As a consequence of the generally accepted procedure wherein the ordinary courts step in when there is no special court offering legal protection, another exception is that claimants whose interests are not directly affected by a decision and, therefore will not have standing before the Dutch administrative courts (Article 8:1 in conjunction with Article 1:2 GALA), are allowed to directly claim the illegality of a general binding regulation with the court of general competence.[26] A final exception concerns general binding regulations which directly impose an obligation on citizens or legal entities. An example is a general binding regulation that prohibits a certain action (without a permit). Such a prohibition is enforceable by an administrative (enforcement) decision, and judicial review against that decision could lead to an indirect review of the general binding regulation. However, the case law of the ordinary courts states that a claim implying direct review of such a general binding regulation is admissible, even though an indirect review by the administrative courts is also possible when judicial review of an enforcement decision is requested. In other words, ordinary courts will not force citizens to violate general binding regulations in order to obtain an administrative (enforcement) decision that can be reviewed by the administrative court.[27] Forcing citizens to deliberately 'trigger' such a decision, merely to open up the possibility for indirect judicial review of the general binding regulation by an administrative court, is considered 'unreasonably onerous' by the Dutch Supreme Court.

6.4.3 Reviewing general binding regulations: scope and intensity

This section discusses both the scope of judicial review of general binding regulations (and policy rules) by Dutch – administrative and/or ordinary – courts, and the intensity of review applied by these courts in reviewing this form of administrative action. In general, (direct or indirect) review of general binding regulations will always entail an assessment by the court as to whether the general binding regulation is in violation of a higher legislative act. This section will address this criterion first. Furthermore, review of general binding regulations may also include an assessment of whether there is a violation of (written or unwritten) general principles of law. This method of reviewing general binding regulations has been developed over time by Dutch administrative courts, and the assessment criteria have recently been refined. This section will address the change in assessment criteria concerning the scope of (indirect) judicial review as well as the intensity of the review applied by administrative courts when assessing general binding rules. Finally, this section discusses the two different legal effects occurring when the court reaches the conclusion that the general binding

25 HR 3 September 2004, ECLI:NL:HR:2004:AO7808.

26 R. Schutgens, *Rechtsbescherming tegen algemene regels: tijd om de Awb te voltooien* (1st edition, Boom Juridische Uitgevers, 2017).

27 HR 11 October 1996, ECLI:NL:HR:1996:ZC2169 (*Leenders/Ubbergen*).

regulations are in violation of a general principle of law. Either the general binding regulation is ruled unlawful and shall be considered non-binding or shall be considered inapplicable for (or ineffective in) that particular case only.

6.4.3.1 Violation of a higher legislative act

In terms of the 'scope' of indirect review, the review of general binding regulations appears relatively straightforward when the regulations are clearly in violation of a higher legislative act. Decisions of administrative authorities containing general binding regulations may be unlawful because the Act of Parliament that was considered to be the legal basis for the general binding regulation, in fact, does not provide a sufficient legal basis for it (*ultra vires*). Alternatively, they may be unlawful because they are considered in violation of higher legislation.

An example of the latter can be seen in a decision adopted by the former municipality of Winschoten in the north of the Netherlands. The general local ordinance of the Municipal Council (based on the Local Government Act) stated that a permit was required for organising events such as travelling circuses. It also explicitly stated that no event may be organised using wild animals (such as elephants, tigers, etc.). When a traveling circus's permit application was refused because that circus used elephants in its show, this local ordinance was indirectly reviewed by the administrative court that had to review the refusal of the permit. Because a formal legislative act at the national level provided exclusive regulations for (wild) animal welfare, the local ordinance was considered unlawful as the Municipal Council was not competent to adopt the general binding regulations on the use of wild animals; therefore, the refusal of the permit was annulled.[28]

The courts have also had experience with general binding regulations that are contrary to either international law or EU law.[29]

In this regard, however, one important issue concerns the 'intensity' of the courts' review when assessing whether a plea of illegality is well-founded and that the regulation is in violation of a legislative act. As mentioned above, the Dutch legislator has allowed the administrative courts to directly review decisions containing general binding regulations if they concern zoning schemes. Indirect judicial review of such decisions by the administrative courts is less intensive than in the case of direct review of the same measures. In cases in which an administrative authority takes an enforcement action, or any other directly reviewable act that is based on the general binding regulations concerning the zoning scheme, the judicial review procedure against such administrative action could entail a plea of illegality aimed at the zoning scheme. When the provisions of a zoning scheme are challenged indirectly, however, the case law specifies that the zoning scheme is only considered unlawful when it is *evidently* in violation of a *clear and*

28 ABRvS 26 August 2009, ECLI:NL:RVS:2009:BJ6075.

29 Trade and Industry Appeals Tribunal (hereinafter: *College van Beroep voor het bedrijfsleven* or CBB) 23 July 2019, ECLI:NL:CBB:2019:291.

concrete higher legislative act, such as a provincial decree or the Spatial Planning Act.[30] This case law of the highest administrative court shows that legal certainty carries more weight with respect to general binding regulations that have been, or could have been, subject to direct judicial review by an administrative court (such as a zoning scheme) than with respect to general binding regulations that cannot be directly reviewed by the administrative courts. It should, however, be noted that, in the Dutch legal order, the majority of general binding regulations are not directly reviewable.

6.4.3.2 Violation of (unwritten) general principles of law

Indirect judicial review of general binding regulations against (written or unwritten) general principles of law, including the principles of good administration, was explicitly addressed for the first time by the Dutch Supreme Court in the famous *Landbouwvliegers* case in 1986.[31] This judgement involved interest groups of crop-dusters who claimed to have suffered a significant loss of income due to a 'decision' (at that time non-reviewable by the administrative courts) of the minister of Agriculture and Fisheries. The decision was based on the Decree on Aircraft Applications of Pesticides – a general binding regulation – that increased the minimal distance that crop-dusters had to maintain from vulnerable areas, such as schools, hospitals and retirement homes. The interest groups entered a plea of illegality against the decree with the ordinary courts, arguing that adopting the decree constituted a wrongful act. The Supreme Court in 1986 ruled that the court was competent to review general binding regulations in light of unwritten general principles of law.

> 'No rule of law prevents the court (...) from declaring that a rule is inapplicable and that its adoption and implementation may be unlawful on the ground that it is arbitrary in such a way that the administrative body concerned (...) could not reasonably have made the "decision" in question'.

In its ruling, however, the Supreme Court also added that, because of the principle of separation of powers between the legislative, administrative and judicial authorities, it is not up to the Court to weigh the different interests at stake in a given situation. This is the task of the administrative authority. Therefore, the review of general binding regulations in light of unwritten general principles of law ought to be restricted to the question of whether the administrative authority acted in violation of the prohibition of arbitrariness. This would be the case, according to case law, if an administrative authority could not reasonably have come to the conclusion reached in the measure. Administrative discretion is, therefore, highly respected in such cases.

30 ABRvS 9 September 2015, ECLI:NL:RVS:2015:2842.
31 HR 16 May 1986, ECLI:NL:PHR:1986:AC9354.

With the *Landbouwvliegers* judgement, the Supreme Court, therefore, introduced the possibility of reviewing general binding regulations in light of unwritten general principles of law but also established that the 'prohibition-of-arbitrariness' test is the only one to fulfil when (unwritten) general principles of law are concerned. The Court specifically ruled that the violation of other (unwritten) general principles of law, such as the principle of due care or the obligation to state reasons for the decision, does not mean that the general binding regulations are unlawful unless it can be concluded that adopting the regulations was clearly beyond the threshold of arbitrariness. The mere violation of an unwritten general principle of law is, therefore, not sufficient to rule a general binding regulation unlawful. This ruling was consistently followed by the Dutch administrative courts in their case law on indirect judicial review of general binding regulations.[32]

Since the *Landbouwvliegers* judgement of 1986, the scope and intensity of indirect judicial review of general binding regulations has continuously been a subject of discussion in the doctrine and among the highest administrative courts. First, over the past decade, administrative courts have indirectly reviewed general binding regulations in light of several other substantive principles of law, such as the principle of legal certainty and the principle of equality,[33] thereby, somewhat implicitly, departing from the *Landbouwvliegers* limitations. Some previously unwritten principles of good governance have been codified in the General Administrative Law Act. Second, there was discussion about the possibility of indirect judicial review of general binding regulations in light of formal – procedural – principles of law, such as the principle of due care and the duty to state reasons. Those questions have recently led to a change in the case law of the administrative courts, refining the scope and the intensity of indirect judicial review. This change is examined in the next section.

6.4.3.3 Refining the scope and the intensity of indirect judicial review

In 2017, the president of one of the highest administrative courts, the Administrative Jurisdiction Division of the Council of State, requested an opinion from Advocate General Widdershoven on the question of the scope and intensity of indirect judicial review of general binding regulations. Although the case has not yet been decided,[34] the Advocate General's opinion has been endorsed by

32 R. Ortlep and M. van Zanten, 'Indringender exceptieve toetsing: herijking van de rechterlijke positie in ons staatsbestel?', 10 *Ars Aequi,* 2020, p. 962, pp. 962–963. Also see ABRvS 29 April 2020, ECLI:NL:RVS:2020:1155.

33 HR 1 December 1993, ECLI:NL:HR:1993:ZC5523; ABRvS 2 November 2016, ECLI:NL:RVS:2016:2927; ABRvS 20 May 2015, ECLI:NL:RVS:2015:1577; Central Appeals Tribunal (hereinafter: *Centrale Raad van Beroep* or CRvB) 15 January 2014, ECLI:NL:CRVB:2014:53; CBB 27 September 2012, ECLI:NL:CBB:2012:BX8799.

34 ABRvS 30 January 2019, ECLI:NL:RVS:2019:260. The proceedings have been suspended because a preliminary question has been asked to European Court of Justice which has, in

two of the four highest administrative courts in other cases.[35] In brief, the opinion first reasons that, in society today, administrative authorities have increasingly been awarded regulatory responsibilities that include rule-making powers. In those cases, the authorities issue general binding regulations rather than decisions affecting only specific individuals.[36] This results in a less clear separation of powers and, as Voermans states,[37] increasingly turns the Dutch democratic constitutional State into one dominated by the administration and in which traditional control mechanisms of the democratic rule of law (judicial control, legality, distribution of powers) are in need of re-assessment. The Advocate General concluded that this requires a shift toward a less restrained indirect judicial review of general binding regulations in order to offer citizens a more appropriate measure of judicial protection against the perceived increased power of public authorities.

In accordance with the opinion of the Advocate General, the administrative courts decided that the intensity of indirect judicial review of general binding regulations should go beyond the threshold of arbitrariness. The courts will assess whether the content of the general binding regulation, or the manner in which it was adopted, may have such serious shortcomings that it cannot serve as a basis for the reviewable act that is the subject of the direct judicial review claim. In this indirect judicial review of general binding regulations, general principles of law and good governance, including the proportionality principle (Article 3:4(2) GALA), the principle of due care (Article 3:2 GALA) and the (unwritten) principle to state proper and appropriate reasons for every decision, form important guidelines. This means that the highest administrative courts in the Netherlands decided that the scope of the indirect review is broadened to also encompass formal (unwritten) general principles of law.

An example of this can be seen in a judgement of the Administrative Jurisdiction Division of the Council of State.[38] The case concerned an administrative fine imposed by the Board of Mayor and Aldermen of Rotterdam because someone had removed part of a residential building from the market without a permit to do so (one of the bedrooms in a building was used for cultivating hemp). Article 21 of the Dutch Housing Act 2014 stipulates that it is prohibited to do this in residential buildings listed in neighbourhoods as designated by the municipal council in the Housing Ordinance (a decision containing general binding regulations). The Housing Ordinance adopted by the Municipal Council designated as such all residential buildings in the municipality of Rotterdam. The administrative court

---

the meantime, rendered its ruling. See Case C-120/19 *College van burgemeester en wethouders van de gemeente Purmerend vs Tamoil BV*, ECLI:EU:C:2021:398.

35 CRvB 1 July 2019, ECLI:NL:CRVB:2019:2016, see para. 7.5.1. ABRvS 12 February 2020, ECLI:NL:RVS:2020:452.

36 Opinion of Advocate General Widdershoven ABRvS 22 December 2017, ECLI:NL:RVS:2017:3557.

37 W. Voermans and others, *Besturen met regels, volgens de regels* (1st edition, Boom Juridische Uitgevers, 2017), p. 14.

38 ABRvS 29 April 2020, ECLI:NL:RVS:2020:1155.

ruled – in short – that the administrative authority had insufficiently substantiated why it is necessary to designate all residential buildings in the entire territory of the municipality of Rotterdam. Because the Housing Ordinance 2017 was, in that respect, poorly motivated, the administrative court could not assess whether it is in conflict with the Housing Act 2014. As a consequence, the relevant section of the Municipal Housing Ordinance was considered inapplicable for this particular case. The decision to impose the fine was, therefore, annulled.

Further, and also in accordance with the opinion of the Advocate General, the courts will exercise less restraint (less deference) when assessing the legality of general binding regulations. The intensity of the indirect judicial review will be dependent on several factors that are explicitly mentioned in the decisions of the court.[39] The intensity of the assessment depends on, among other things, the degree of discretion of the administrative authority, the nature and content of the power awarded by the legislator and the interests involved. The review will be more restrained when the authority has been granted broad discretion because of the factual or technical complexity of the matter or when political considerations can be or have been relevant when making the decision. In this case, the court does not have the power to determine the value or social weight to be attached to the different interests involved in the decision as it sees fit. However, if the general binding regulation has far-reaching consequences for the lives of the interested parties, and if fundamental rights are affected, the courts will scrutinise exercise of discretion more intensively.

6.4.3.4 The legal consequences of indirect judicial review

As discussed above, according to Dutch case law, if a plea of illegality is well-founded, the court may conclude that the general binding regulation is unlawful and non-binding *in general*. If this is the case, any reviewable administrative (single case) decision based on those general binding regulations must be annulled by the administrative courts in judicial review procedures. Such a judgement is likely to have consequences for claimants other than those involved in the administrative court procedure in which the specific plea of illegality was raised. The administrative court may also conclude that the general binding regulation shall be considered inapplicable *in a particular instance*. In that situation, the general binding regulation could possibly be applied lawfully in other situations. The abovementioned recent judgements of some of the highest administrative courts in the Netherlands have clarified this difference in light of the new scope and intensity of indirect review.

The administrative courts state that all general principles of good governance can play a role in the indirect judicial review of general binding regulations. Unlike the opinion of the Advocate General (see para. 8.5 of the opinion), the administrative courts state that a mere breach of formal – procedural – principles

39 CRvB 1 July 2019, ECLI:NL:CRVB:2019:2016.

of law cannot lead to the conclusion that a general binding regulation is non-binding *in general*.[40] However, whenever the administrative court cannot assess whether there is a violation of a higher legislative act because a formal – procedural – principle of law is violated, the court may rule that the general binding regulation shall be considered inapplicable *in the particular instance* and, therefore, cannot be the basis for the specific decision based upon it. When the administrative authority that adopted the general binding regulation has explicitly taken the negative consequences of those regulations (for a particular group) into account, and provided sound reasons, adopting the regulation cannot be considered a violation of the aforementioned formal – procedural – principles of law. The indirect judicial review by the administrative courts will, in those cases, be limited to the assessment as to whether the general binding regulation is in violation of the proportionality principle (Article 3:4 GALA). In that case, the outcome may be that the regulation is either lawful, non-binding or inapplicable in the particular instance.

6.5 The effectiveness of indirect judicial review in the Netherlands

How often do the administrative courts in the Netherlands indirectly review (the application of) general binding regulations? And if they do, what are the results of those proceedings? To answer these questions, the case law of the administrative courts in the Netherlands has been examined. To this end, the website rechtspraak.nl has been used where the judgements of the Dutch judiciary are published.

The judgements published on this website give an impression of the number of cases in which administrative courts indirectly review general binding regulations. However, not all judgements of administrative courts are published on rechtspraak.nl. The website offers a complete overview of the judgements of appellate courts, but only a selection of the judgements of the district courts (administrative law section) are published on the website. Also, we searched for judgements by using the keywords '*exceptieve*' (indirect, literally: 'by way of exception') and '*toetsing*' (review). By doing so, we were able to trace a large number of judgements in which the administrative courts indirectly assessed the lawfulness of general binding regulations. However, it cannot be ruled out that there are other judgements in which the administrative courts have carried out this assessment but in which the terms '*exceptieve*' and '*toetsing*' did not occur. Nevertheless, it can be assumed that the search provides a reasonably complete and representative picture of indirect review by the Dutch administrative courts. The first reason is that searching for related keywords yielded only a very small number of additional judgements. The second reason is that a similar search in 'Porta juris', the

40 CRvB 1 July 2019, ECLI:NL:CRVB:2019:2016, see para. 7.5.1. ABRvS 12 February 2020, ECLI:NL:RVS:2020:452.

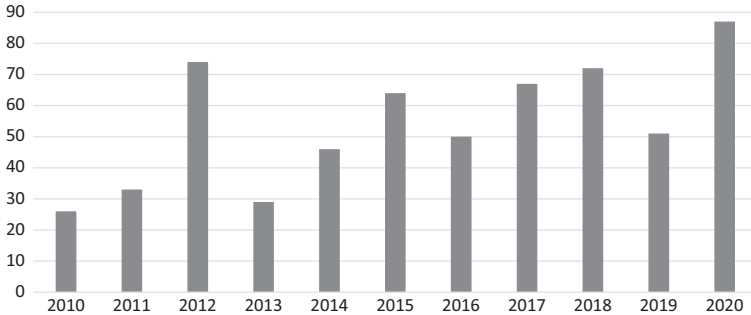

Figure 6.1 Indirect review: number of cases in the Netherlands 2010–2020.

database in which all judgements of Dutch courts can be found, produced barely more results. This indicates that judgements in which district courts carry out an indirect review of general binding regulations are published relatively often.

In our search for the frequency and the way in which courts indirectly review general binding regulations, we first looked at developments over time. Is the number of pleas of illegality constant over time, or is there a noticeable increase or a decrease? We looked at the number of judgements in the years from 2010 to 2020. Over that period, a clear increase can be seen: 24 judgements in 2010 mention the terms '*exceptieve*' and '*toetsing*', while 87 do so in 2020.[41] It is remarkable, as can be seen in Figure 6.1, that the increase is quite irregular.

The differences between successive years are large, so there is no way to conclude that there is a progressive yearly increase in the number of judgements issued by administrative courts mentioning the search terms.

A second finding is that the terms '*exceptieve*' and '*toetsing*' occur relatively frequently in environmental law and socio-economic administrative law cases, but not or hardly ever in tax, social security and immigration law. There may be all sorts of reasons for this, but that indirect judicial review would be less justified or relevant in the latter three areas of law is not one. As discussed above, the precondition for indirect review is that a non-general decision (defined in Article 1:3 (2) GALA) is based on a general binding regulation. This occurs frequently not only in environmental law and socio-economic administrative law cases but also other areas of public law.

The third finding worth noting is that there are 'clusters' of general binding regulations that can be identified. Most striking are the 22 judgements of the Trade and Industry Appeals Tribunal from 2020, in which appellants argued that the decision they wanted reviewed by the administrative court was unlawful because the system of phosphate rights, laid down in general binding regulations,

41 19 of the 24 judgements from 2010 and 77 of the 87 judgements of 2020 actually involved indirect review.

based on Article 23 of the Fertilisers Act (*Meststoffenwet*), was contrary to the European Nitrates Directive.[42] In addition, many judgements feature the court being asked to subject provisions of zoning schemes to an indirect review.[43] The argument most often put forward is that a provision of the zoning scheme is in conflict with the European Services Directive.[44] Finally, it is noteworthy that the Housing Act (*Huisvestingswet*) has also been at the centre of a cluster of five cases concerning indirect review of general binding regulations by the courts. In each case, it was argued that a decision applying a housing regulation drawn up by a Municipal Council was unlawful because the regulation was considered to be contrary to the Housing Act.[45]

A fourth finding concerns the arguments put forward to claim that a general binding regulation should be declared non-binding *in general* or inapplicable *in a particular instance*. As discussed above, the claimant may either argue that a general binding regulation that was the basis for the contested decision is in violation of higher legislation or that it conflicts with one or more general legal principles, such as the principle of due care or proportionality. When appellants request an indirect review, they are significantly more likely to argue the former than the latter. In 2010, five out of every six cases of indirect review alleged a violation of higher regulation; in 2020, four out of every five cases.

How often does indirect judicial review by administrative courts lead to a decision that a general binding regulation should be considered non-binding (leading to the annulment of the contested decision) or inapplicable in the particular instance (leading to the annulment of the contested decision)?

Based on the 24 judgements of 2010 and the 87 judgements of 2020 we analysed, it is not possible to conclusively answer this question. What we do know is that if the court indirectly reviews a general binding regulation, the appellant is considerably more likely to fail than to succeed. In the judgements in which a plea of illegality was raised, only one out of six resulted in the judgement that the relevant general binding regulation was either non-binding or inapplicable in that particular instance. A successful indirect judicial review, in the majority of cases, results in the court deciding that the contested decision may not be based on the regulation in question in the particular case and practically never that the regulation is non-binding.[46]

42 CBB 23 July 2019, ECLI:NL:CBB:2019:291.

43 12 cases from 2020.

44 For example: ABRvS 19 February 2020, ECLI:NL:RVS:520, 595, 616, ABRvS 26 February 2020, ECLI:NL:RVS:2020:595, ABRvS 26 February 2020, ECLI:NL:RVS:2020:616.

45 ABRvS 29 April 2020, ECLI:NL:RVS:2020:1155, ABRvS 29 April 2020, ECLI:NL:RVS:2020:1157, ABRvS 29 April 2020, ECLI:NL:RVS:2020:1161, ABRvS 9 September 2020, ECLI:NL:RVS:2020:2166, ABRvS 16 December 2020, ECLI:NL:RVS:2020:3008.

46 We found ten judgements that held that the contested regulation was inapplicable and six that held that the regulation was non-binding.

What we cannot deduce from our quantitative research and analysis is whether the likelihood of success for an appellant who asks the court to indirectly review a general binding regulation has increased or decreased in the period between 2010 and 2020. It could be assumed that the chance of success in 2020 was higher than in 2010 because the case law of the highest administrative courts indicates that in the past decade their assessment of the legality of general binding regulations has increased in scope and intensity (see Section 6.4.3.3). However, based on our research, the assumption that the probability of success was higher in 2020 than in 2010 cannot be confirmed. Comparing the judgements from 2010 and 2020 shows that indirect review in 2020 was less likely to lead the court to conclude that the general binding regulation concerned was either unlawful (non-binding) or should not have been the basis for the contested decision in the particular instance. In 2010, seven out of the 20 judgements had this result and in 2020, nine of the 77 judgements. Expressed as a percentage, the number of successful applications for indirect review drops from 35% in 2010 to 12% in 2020.

However, it cannot be deduced from these figures that the likelihood of successful indirect review has declined rather than increased over the past decade. A first reason is that the number of rulings from 2010 is too small to draw that conclusion.[47]A second reason is that it is quite conceivable that the increase in the number of cases in which the court is asked to conduct an indirect review explains the decrease in the number of cases in which indirect review is successful. It is possible that this increase is a result of the increased focus of the courts on indirect review, and the attention that the developments in scope and intensity of indirect judicial review of general binding regulations has received. The effect of this could be that claimants ask for indirect review more often but also more often in cases in which the likelihood of success is low. It is, therefore, possible that there have been two simultaneous developments over the past decade: first, a more thorough indirect review by administrative courts of general binding regulations (see above under Section 6.4.3) and, second, an increase in the number of disputes in which the court has been confronted with pleas of illegality. It is not unlikely that these trends cancel each other out.

On the basis of our research, we can state with certainty that the number of disputes involving indirect review of general binding regulations has been increasing over the past decade. However, it is questionable whether the changes in the scope and intensity of indirect judicial review by the administrative courts has also substantially changed the effectiveness of the plea of illegality over the last ten years. If we compare the judgements from 2010 in which indirect review was successful, with those from 2020, it cannot be ruled out that the peculiarities of the

47 Many possible factors could affect the chances of a successful indirect review. The small number of cases does not allow for a statistical analysis of these factors. The difference in the number of successful indirect reviews between 2010 and 2020 could, therefore, very well be coincidental.

case at hand are more decisive for the outcome of the review than the assessment criteria for indirect review set by the highest administrative courts.

6.6 The tension between legal certainty and legality in the Dutch system of indirect review

As mentioned in Section 6.4, in Dutch administrative law, direct judicial review of a decision is only possible within six weeks of issuing the decision. If a claim is not brought within this time frame, or if it was brought unsuccessfully, the decision is deemed to be legal (both procedurally and substantively). In other words, interested parties (and others) have the legal certainty that the decision is no longer at risk of being annulled by the administrative courts. For decisions which contain general binding regulations but are, nevertheless, eligible for direct review, such as zoning schemes, the same rules apply unless a later reviewable act (e.g., enforcement action) is based on the zoning scheme and the scheme is *evidently* in violation of a *clear and concrete* higher legislative act. By contrast, no rule exists for appeals against general binding regulations against which no direct judicial review is possible. Indirect judicial review of administrative decisions containing general binding regulations is not restricted to a certain time limit after the general binding regulation was adopted. Interested parties can apply for judicial review of any reviewable administrative decision based on general binding regulations within six weeks of the notification of the reviewable administrative decision. Indirect judicial review of the general binding regulations is allowed in all of these instances.

This leads to the issue of striking a reasonable balance between legal certainty and legality. This issue is even more relevant, as the scope of the review of general binding regulations is both broad and intense, especially after the case-law developments discussed above. Courts assess the legality of these regulations in light of higher legislation, general principles of law and principles of good administration. If a case concerns rights guaranteed by the Constitution or human rights, the courts' review is more stringent.

All in all, we could argue that the balance between legal certainty, on the one hand, and legality, on the other, has tilted somewhat in favour of the latter. However, this is not necessarily the case, as it is by no means certain that the broadened scope and increased intensity of the reviews will result in more successful indirect judicial review of general binding regulations.

6.7 Conclusions and perspectives for future development

In this contribution, we examined how the courts in the Netherlands review general binding regulations adopted by competent Dutch administrative authorities.

A first finding concerns access to the courts. Administrative courts are, in principle, not competent to directly review decisions containing general binding regulations. Disputes about the lawfulness of general binding regulations must be submitted to a court of general competence. Nevertheless, administrative courts regularly assess the legality of general binding regulations in their judgements

indirectly. This happens in the context of proceedings against a reviewable decision that is based on a general binding regulation. In this procedure, the appellant may claim that the general binding regulation upon which the decision is based is illegal and that the administrative authority was not allowed to apply this general binding regulation when making the administrative decision. This is known as indirect judicial review (in Dutch: *exceptieve toetsing*). Because the administrative courts are allowed to indirectly review the lawfulness of general binding regulations in the context of a judicial review of a decision based on those general binding regulations, the courts of general competence are more reluctant to allow a litigant access to court for a judgement on the lawfulness of general binding regulations. If it is not considered unreasonably onerous for a litigant to wait for a decision of the administrative authority that is based on the general binding regulation with which the litigant disagrees, the ordinary courts will either rule that the request to assess the lawfulness of the general binding regulation is inadmissible or reject the claim.

A second finding concerns the way in which the (administrative) courts review general binding regulations. Over time, the review of general binding regulations in light of the general principles of law and principles of good governance has become increasingly intense. Milestones in this development are the *Landbouwvliegers* case of the Dutch Supreme Court in 1986 and the case law following an opinion of Advocate General Widdershoven in 2017. According to the case law of the administrative courts since 2017, general binding regulations can be found unlawful not only when there is a violation of the proportionality principle but also when the general binding regulations are adopted in violation of substantive and formal principles of law and good governance.

A third finding concerns indirect judicial review of general binding regulations in practice. We cannot deduce from our quantitative research and analysis whether the likelihood of success for an appellant who asks the administrative court to indirectly review a general binding regulation has increased or decreased over the last decade. What is clear is that, in the past decade, the number of proceedings has increased in which a litigant argues that a general binding regulation underlying the contested reviewable administrative decision is unlawful. However, judging by the published case law, the number of judgements in which the court actually rules that general binding regulations are unlawful has not increased.

What future developments can be expected? The more intense indirect judicial review of general binding regulations by the administrative courts is generally well-received and accepted. There remains, however, discussion about the question of whether the administrative courts should be given the competence to directly review decisions containing general binding regulations. There is no consensus yet as to whether this is a good idea. At first glance, allowing direct judicial review would seem to improve access to justice. On closer inspection, however, it is questionable whether litigants would be better off, in practice, because the effects of this changed wording is uncertain. What we do know is that the Dutch legislator has no plans (or ideas) for the future of indirect judicial review in the Netherlands. Developments are left to the case law of the courts.