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Citation

Adriaanse, P. C., Barkhuysen, T., Ouden, W. den, & Schuurmans, Y. E. (2008). Effective Implementation of European Community Law. A facilitating Role of Dutch General Administrative Law. *Transylvanian Review Of Administrative Sciences*, (22), 5-33. Retrieved from <https://hdl.handle.net/1887/12853>

Version: Not Applicable (or Unknown)
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Note: To cite this publication please use the final published version (if applicable).

EFFECTIVE IMPLEMENTATION OF EUROPEAN COMMUNITY LAW

A Facilitating Role of Dutch General Administrative Law

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Abstract

When discussing the influence of Community law on national law the attention often focuses on (removing) conflicts of special national provisions with European law in concrete situations. In this article, however, a different, proactive facilitating approach is chosen, focusing on general administrative law especially as a facilitating instrument for the effective implementation of European law in a broad sense: the 'PF-method'. The central question is whether by means of general provisions of administrative law, in a proactive way, even without European law forcing to this, the legal implementation, application and enforcement of European law may be simplified and facilitated.

Four topics are studied in depth: 'fact-finding in administrative law proceedings', 'recovering state aid granted in breach of EC law', 'the division of liabilities for breach of Community law among various national authorities involved' and 'the embedding of the preliminary proceedings in the national law of administrative procedure'.

Solutions found with regard to Dutch general administrative law may provide inspiration for other member states in search of new or alternative possibilities for implementing EC law as effectively as possible.



*Transylvanian Review
of Administrative Sciences,
22E/2008 pp. 5-33*

1. Introduction

As a result of the expansion and refinement of European Community (EC) law, its implementation into the national legal systems of the member states has received more and more attention in the past decades. This development can also be seen in the Netherlands, in particular as far as Dutch *administrative law* is concerned. This area of law has been and still is strongly influenced by European law. This influence manifests itself in certain special fields of law, such as competition law, environmental law and the law in respect of agriculture and fisheries, but the general standards and principles of administrative law are also subject to such influence. After all, general administrative law regulates (in part) the decisions taken by Dutch administrative bodies in implementing European Community law in the special fields.

When discussing the influence of Community law on national law the attention often focuses on (removing) conflicts of special national provisions with European law in concrete situations. The classical incorporation instruments of direct effect and consistent interpretation of national rules of law in the light of Community law (indirect effect) are important topics in that respect.

In this article, however, we have chosen a different approach, focussing on general administrative law – which in the Netherlands has been for an important part included in the General Administrative Law Act (GALA) – especially as a facilitating instrument for the effective implementation of European law in a broad sense. The central question is whether by means of general provisions of administrative law, in a proactive way, even without European law forcing to this, the legal implementation, application and enforcement (hereinafter: ‘implementation’) of European law may be simplified and facilitated for Dutch regulators, administrative bodies and administrative courts charged with these tasks.¹

This proactive facilitating approach to Dutch general administrative law seems to be rather innovative. Traditionally, the effective implementation of EC law relies primarily on specific statutory regulations specially designed for this purpose based on a direct obligation to that effect from European law.

After this introduction the proposed proactive facilitating approach will therefore be explained in greater detail, whereby it will be indicated on which points it differs from the more traditional method in this connection (section 2). Subsequently four subtopics will be discussed in order to examine and to illustrate whether and, if so, how the applicable general administrative law may contribute to the implementation of European Community law in the Dutch legal system. The four topics concern ‘fact-finding in administrative law proceedings’ (section 3), ‘recovering state aid granted in breach of EC law’, (section 4) ‘the division of liabilities for breach of Community law among various national authorities involved’ (section 5), and ‘the embedding of the preliminary proceedings in the national law of administrative procedure’ (section 6). Solutions found with regard to Dutch general administrative law may provide inspiration for other member states in search of new or alternative possibilities for implementing EC law as effectively as possible. This contribution will be concluded with a few concluding remarks, in which the most important findings will be summarised (section 7).

2. The proactive facilitating method for the implementation of European law

2.1 PF-method

The European influence on Dutch administrative law has not passed unnoticed. In the literature broad attention is given to European directives which must be implemented and to European regulations for which national operational provisions must be drawn up. In both cases it often concerns administrative provisions in the special fields of law. In many cases the specific national implementation provisions that have been drawn up are not complete. For the concrete application of European law and its possible enforcement existing national regulations are (also) used, assuming institutional and procedural autonomy in the application of Community law. Within that framework Dutch scholars regularly discuss the question whether the precondition of effectiveness as formulated in the case law of the European Court of Justice (ECJ) has been met, which implies that the application of national rules in a concrete case must not lead to the situation that exercising the rights granted by the Community legal structure is made impossible or extremely difficult. Much attention is also given to (possible) conflicts between European law and Dutch provisions. Within that framework the classical incorporation instruments of direct effect and consistent interpretation of national provisions (indirect effect) are important topics.

In these discussions the emphasis is often on Community obligations. Scholars examine at what points the Kingdom of the Netherlands fails to fulfil its Community obligations: where has European legislation been insufficiently implemented into Dutch law, where has conflict been observed between European and Dutch provisions and how should such conflict be resolved? In this contribution we will call that approach the traditional method.

As announced, in this article attention will be called to a second perspective on the relation between European law and Dutch (administrative) law. Within this perspective general administrative law is being viewed especially as a facilitating instrument for the legal implementation, application and enforcement of European law. As stated in the introduction, the central question in this respect is whether by means of general provisions of administrative law, in a proactive way, even without European law forcing to this, the legal implementation, application and enforcement of European law may be simplified and facilitated for Dutch regulators, administrative bodies and administrative courts charged with those tasks. Formulated more briefly: can a proactive, facilitating approach - the PF-method - within general administrative law contribute to a more effective incorporation of EC law into the national legal system?

Several related questions do arise. Is it possible to further facilitate the implementation of EC-decisions and other Community law by means of (adjusting) general administrative law? For instance, is it possible to include in the GALA certain parts of national implementing rules which are necessary or desirable from a European perspective, in such a way that omissions in special implementing regulations and related problems may be avoided in practice? Is it possible to provide a general regulation in the GALA for certain legal instruments developed within Community

law and unknown to the Dutch legal system in order to facilitate the implementation practice? Can provisions be included in the GALA to give Dutch administrative courts more handles to work with when European provisions turn out to play a role in national disputes? In other words: can general administrative law – as the GALA has done within the Dutch legal system for administrative law – contribute to the harmonisation, unity and accessibility of national implementing regulations, to a more effective implementing practice and to a more European oriented judicial system? The topics studied in the following sections will serve as a means to try to arrive at a general answer to these questions.

2.2 Legal context

Now that the proactive facilitating method has been opposed against the traditional method and the distinguishing criterion in this respect is that on the basis of the latter method only implementing measures will be taken when European law obliges to this, it is appropriate to briefly pay attention to the general legal context for the incorporation of European law into the national legal system.

First of all there may be concrete obligations for taking implementing measures. Such an obligation most clearly exists when a directive contains the obligation to realise within a certain period national implementing legislation. Such an obligation also arises in the case in which an existing national rule comes into conflict with European law. Although in such a situation it will in first instance be the national court (or the administration) which will have to exclude application of the national rule when an interpretation in conformity with Community law is not possible, there will at the same time arise an obligation for the legislator to change the national rule in order to end the conflict (Lenaerts & Van Nuffel 2005, p. 665-673).

Apart from this kind of cases national authorities are also obliged in a general sense to take implementing measures when this follows from the principle of loyalty to the Community laid down in Article 10 EC. On the one hand, this principle reinforces the obligations which already result from concrete rules of Community law. On the other hand, due to the dynamic case law of the ECJ on this matter, more or less independent supplementary obligations also follow from it, albeit always in relation to other rules of Community law. Article 10 EC asks the member states to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. This obligation applies to all national authorities concerned, including legislator and courts. From Article 10 EC both positive and negative obligations result. On the one hand, States must take measures to ensure the effective operation of Community law. On the other hand, States must also refrain from measures which preclude such effective operation (cf. Jans et al. 2007, p. 37-39). Within the context of this contribution it would carry too far to make an inventory of the obligations which the ECJ has derived from Article 10 EC. It suffices to refer to a quotation of Temple Lang from his study into the meaning of Article 10 EC: “In short, Article 10 is not a legal basis for making justiciable every weakness in the national application of Community rules. However, within the limits summarised above, it does seem (...) to impose a duty on all national

authorities and courts to make the Community legal system work effectively in the way that it was objectively intended to work.” (Temple Lang 2001, p. 93).

From the above it follows that within the framework of the loyalty of the member states to the Community, coupled to Community obligations, facilitating measures are in principle also asked for (cf. Jans et al. 2007, p. 37). However, within the framework of the PF-method one further step is taken: it is examined whether, independent from the existence of Community obligations, measures are conceivable which may contribute (further) to the effective incorporation of European law.

Before proceeding to the four topics of this study, it may therefore be stated in a general sense that the PF-method which we propose consists of several aspects: attention for general administrative law, instead of a case-by-case adaptation of special national legislation in particular fields of law; a focus on facilitating the effectiveness of European law in the national legal order, instead of only remedy breaches; and a proactive approach to the adaptation of national law to European law standards, irrespective of whether a direct obligation in European law exists for this.

3. Fact-finding in administrative law proceedings

3.1 Introduction

For the implementation of European law it is of great importance how and with which intensity the courts review whether a national decision agrees with EC law. In Dutch administrative law it is a significant question whether the courts must themselves investigate if the decision has been taken in conformity with EC law, or that they can suffice with a review whether the administration has sufficiently investigated such conformity. The Administrative Law Division of the Council of State² usually opts for the latter review.³ In that case the courts themselves do not have to carry out all kinds of complicated factual assessments. They then only have to review whether the investigation carried out by the administration has been sufficient, on the basis of principles such as the requirement of due care and the justification principle.

This way of review fits in with the review in general Dutch administrative law. In its ruling the court as a rule does not give a final assessment whereby it establishes the legal relationship between administrative body and interested party. It reviews the legitimacy of a decision, including the legitimacy of the fact-finding on which that decision is based. In the Dutch discourse there is a discussion about this review and then in particular about the question whether the courts should review the fact-finding more intensively and should themselves establish the facts. From a European legal perspective too a more intensive review of the facts may be argued for. Do the courts at present offer private individuals actually enough legal protection, so that they can effectuate their rights derived from EC law and do the courts sufficiently check if the administration has complied with EC law? Only when the facts in dispute have definitively been established, it may be determined whether or not a European legal rule has been correctly applied.

Further to these questions it has been investigated how the Dutch administrative law courts review the fact-finding,⁴ whether this review meets the requirements of EC

law and whether an adjustment of the national review would further the incorporation of EC law (Schuurmans 2007, p. 115-142).

3.2 Judicial review of facts in Dutch administrative law procedures

The Dutch administrative law courts usually do not establish any facts; they review the assessment of the facts by the administration. It is difficult to find out how intensively they do this, since usually very few reasons are given for the factual assessment. It often remains unclear which arguments, supported with which evidence, the parties have put forward in the proceedings. Furthermore, an explicit weighing of arguments and evidence by the court is often lacking. It is then impossible to establish how strictly the court reviews the assessment of the facts by the administrative body. However some data are known from empirical research (Barkhuysen, Damen et al. 2007, p. 290). In cases in which the finding of the facts by the administration is in dispute, the courts give in 28% of the cases a negative judgement about the soundness of the fact-finding. The court mostly formulates its opinion on the facts very cautiously. It then suffices with the conclusion that the administrative body has insufficiently investigated the facts or has given insufficient reasons for its decision. Therefore, when giving a negative assessment, the court leaves in four of the five cases room for the administrative body to arrive at an identical finding of the facts. It follows from this that in very few cases the administrative law court gives a final assessment of the facts.

The question whether this national review is in accordance with EC law may be studied both by means of the traditional method and the PF-method. In the traditional approach breaches of the law are looked for. In that case we are looking for cases in which the ECJ has observed that EC law has been breached, because the national court's review of the fact-finding by the administration has not been strict enough. In this case this traditional approach provides little information. The question of the intensity of the judicial review is so abstract and theoretical that case law mostly does not give a direct answer to this. But it is possible to find cases in which indirect judgements are given about the required judicial review of the finding of the facts. For instance in case law the question is discussed whether the court should accept new evidence and whether it is itself obliged to carry out any further investigation into a fact. In this way it may be found out whether a court must itself investigate the facts by appointing an expert, if a party disputes the scientific evidence in a case about medicine registration. Such case law provides very detailed information about the fact-finding in specific policy areas, but it is difficult to derive from it a general standard for the national judicial review of the finding of the facts. Case after case an administrative court may be faced with the question if and how it should investigate a fact. Each time a preliminary question might be asked about this, but it is likely a court will hardly do this.

This traditional investigation method has led to the situation that in Dutch legal literature it is in general assumed, further to the case *Upjohn II*,⁵ that the method of review in the Netherlands, as explained before, is satisfactory. After all, the Netherlands has never been found guilty of an inadequate review of the facts by the

administrative courts. Moreover, the law of evidence and the rules of fact-finding are part of the law of procedure, which partly belongs to the autonomy of the member state. Taking into account the principles of equivalence and effectiveness, it appears that the equivalence principle is not violated; as said, the review fits in with the one applied in general Dutch administrative law procedures. *Upjohn II* showed that *in that particular policy area* the principle of effectiveness did not require that the national court can substitute its assessment of the facts for the assessment made by the administrative body. It seems that from this case the rule can be derived that if the administrative body has discretion and the fact-finding is of a specialised nature, the national court is not obliged to give its own factual judgement and it may marginally review the fact-finding.⁶ This conclusion sounds cautious, for it is in fact based on a single ruling which is only explicit about reviews in cases in the field of medicine registration.

The aforementioned case *Upjohn II* may not only be used in the traditional method, but it also provides clues for applying the PF-method. The fact that it cannot be expected from the national court to carry out fact-finding on its own is also partly substantiated by the ECJ by pointing at its own method of review.⁷

‘Consequently, Community law does not require the Member States to establish a procedure for judicial review of national decisions revoking marketing authorisations, taken pursuant to Directive 65/65 and in the exercise of complex assessments, which involves a more extensive review than that carried out by the Court in similar cases.’⁸

So, it cannot be required of the national court to apply a more intensive review than that of the ECJ. In this way the ECJ’s own review of the fact-finding sets a standard. The next paragraph will deal with the question to what extent the review of the facts by the Community courts agrees with or deviates from the national review. In this respect the fact-finding in case of direct action has been looked at.⁹ This comparison is an application of the PF-method. If we were to find out that our national review of the fact-finding agrees to a large extent with the review by the Community courts, we have to worry little about the danger of future law infringements (proactive aspect). However if there turn out to be differences between the two methods of review, the question is whether there is sufficient justification for this. An adjustment of the national review might lead to a more effective incorporation of Community law (facilitating aspect).

3.3 Similarities and differences in the review by the Community courts and the national courts

A certain development may be observed in the review of the fact-finding by the Community courts in case of direct action. That process has been extensively described by Craig (Craig 2006). When the ECJ still functioned as court in first instance in case of direct action, the investigation of the facts by the ECJ was very limited. It made almost no use of its investigative powers (Ress 1992, p. 183).¹⁰ In certain cases it has even explicitly acknowledged a marginal review of the fact-finding. In some policy areas administrative institutions of the Community have a large discretionary power,

e.g. in the field of agricultural policy or in the field of protective trade measures. That discretionary power may not only extend to the interpretation of factual standards. If a Community institution must make a complicated factual assessment, the discretion of the administrative body refers to a certain extent also to the fact-finding. In such cases, the Community judicature must limit itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion.

The Court of First Instance (CFI) also applies this marginal review, but a completely different culture prevails within this court. It devotes long considerations to the factual findings and often refers to information which it has obtained from interviews or further to written questions.¹¹ This culture shift was intended. One of the reasons for setting up the CFI was the need for making possible a more intensive assessment of the facts, in particular in cases in which fact-finding is complex (Lenaerts, Arts & Maselis 2006, p. 15). For Dutch administrative law two points are relevant in this respect. In the first place the explicit acknowledgement that in case of complex fact-finding the Community courts must apply a marginal review. In the Dutch doctrine, however, that is no foregone conclusion. In the second place it is striking that, in spite of that marginal review, the CFI uses much judicial activity for reviewing the administrative fact-finding. Moreover the CFI gives fairly extensive reasons for its factual judgement.

We have also examined to which extent (the statement of grounds of) the judicial review differs and whether Dutch administrative law could learn something from the approach chosen by the Community court. Two cases have been studied in greater depth, since in these cases the Community court works out how and in which way it reviews the assessment of the facts by the Community administration.¹² *Pfizer*¹³ and *Tetra Laval*¹⁴ show that the consequence of a marginal review is not that the court studies the evidence globally. The Community court examines if the evidence is factually correct, reliable and consistent and if the administrative body has collected all relevant information. If expert information plays a role in the decision-making, it will be assessed on the basis of principles such as 'expertise, transparency and independence' whether the administration has used this information correctly. The fact that a review is carried out marginally does not affect the requirements of division of the burden of proof, standard of proof and assessment of the evidence.¹⁵ But the consequence of a marginal review is that when no errors or only negligible errors have been made in the fact-finding, the administrative qualification of the facts remains in principle intact.

In a comparison with Dutch administrative law a few matters again attract attention. If the fact-finding in a case is complex, the court will especially review the fact-finding procedure in the preparation of the decision. To this extent there is a clear parallel between the CFI and the Administrative Law Division of the Council of State. Nevertheless, there are also differences. The Dutch administrative law courts review the administrative fact-finding very generally against the requirement of due care, without indicating explicitly which concrete elements are considered. The review

by the Community court has been worked out in greater detail and in its ruling the Court fairly extensively accounts for its review of the factual judgement. By carefully reviewing the fact-finding procedure, the Community court also reviews to a great extent whether the established facts agree with the truth.

As said, both at the Community and the national courts, part of the judicial review focuses on the standards which the administration must observe in the decision-making. The question whether the administration has observed the requirement of due care and the justification principle may start to dominate. The Community courts also apply these principles (Groussot 2006, p. 253-257; Tridimas 2006, p. 406 ff.). Remarkable in this respect is the strong connection which the ECJ and the CFI establish between the procedural requirements and a marginal review of the fact-finding. Since *Technische Universität München* it has been established case law that the court lays extra emphasis on the procedural requirements when a Community institution exercises a discretionary power.

‘However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.’¹⁶

The high requirements set for the investigation and the statement of grounds of the administrative assessment of the facts make it possible for the Community courts to carry out a careful review at law. After all, they can only carefully examine whether the Community institution has drawn logical conclusions from the collected evidence if an adequate statement of reasons has been provided for the decision. The Dutch administrative courts, however, do not explicitly establish a connection between a strict review of the procedural requirements in the decision-making and a marginal review at law.

3.4 How can the implementation of European Community law be facilitated?

The investigation on the basis of the PF-method has revealed quite a lot of differences between the national review of the finding of the facts by the administrative courts and the review by the Community courts. More attention of national courts for the way of review of fact-finding by the Community courts might lead to a more detailed elaboration of the national test of due care. In the case law of the Dutch administrative law courts it might be made explicit that the court is obliged to review whether the evidence is factually correct, reliable and consistent, whether the administrative body has collected all relevant information and has drawn logical conclusions from the evidence. This does not mean that at present the national courts do not apply these requirements. However, making the above-mentioned requirements more explicit would clarify the nature of the Dutch judicial review of the facts and give the parties

to the proceedings more legal certainty. Moreover, the Community case law gives more clarity about the meaning of the concept of marginal review for the assessment of the facts.

A clear review of the administrative fact-finding, which fits in with the Community method of review, may lead to more effective legal protection and definitive dispute resolution. Parties may better be able to estimate whether the finding of the facts will survive the judicial review, and the concrete requirements will guarantee a careful judicial review. When the national courts check more intensively whether a decision based on Community law is based on sound fact-finding,¹⁷ it will reduce the risk that they will fail to see a breach of Community law. In this way the implementation of EC law can be facilitated.

4. Recovery of state aid granted in breach of EC law

4.1. Introduction

By now it must be fairly generally known that the granting of state aid, in whatever form, is no longer possible without taking into account the applicable European Community law. It concerns the basic Articles 87 and 88 in the EC Treaty, secondary legislation, various forms of soft law, and a bulk of case law of the ECJ and CFI. When aid is granted without taking any notice of this European state aid law, there will be a risk that such grant must be considered as unlawful and the aid in question, including the interest on it, will have to be recovered from the beneficiary or beneficiaries. In the Community case law such recovery is seen as the logical consequence of the fact that the state aid in question was granted contrary to Community law. This concrete obligation for a member state could in particular arise from a so-called recovery decision taken by the European Commission.

Starting from the traditional approach to the implementation of Community law obligations, one could in this field await such a recovery decision and consider on a case-by-case basis whether the effectuation of the decision will be possible. How the recovery of unlawful state aid must be legally realised, is left to the law of the member state in which the breach of Community law has been committed. However, a disadvantage of this approach is that when it turns out that the national law is not sufficiently tailored to the recovery of the unlawfully granted aid, or to the collection of the interest enjoyed on it, the member state runs the risk to be faced with infraction proceedings, with all possible financial consequences. After all, the techniques of consistently interpreting national law and if needed excluding the application of national provisions which are contrary to Community law do not offer a solution in all situations. That is certainly the case if no appropriate national legal provisions turn out to exist by virtue of which the Community obligation must be fulfilled. Recent infraction proceedings instituted against the Netherlands are illustrative in this connection, since in a concrete case of unlawfully granted aid to the company Fleuren Compost the Dutch state turned out to be incapable to immediately fulfil the obligation to recover from the recipient in addition to the aid granted also the interest enjoyed on it.¹⁸

Although in respect of realising the recovery of state aid Community law sets in principle only (strict) preconditions, the principle of loyalty to the Community implies in general the obligation for the member states to organise their national law such that they can meet the Community obligations associated with the recovery of unlawful state aid. If they fail to do this, it may lead to proceedings for breach of the Treaty, with all their consequences.

It has therefore been investigated in this contribution, applying the PF-method, if Dutch administrative law (of procedure), quite apart from an immediate recovery obligation, has been sufficiently tailored to carrying out recovery of state aid which has been unlawfully granted and is declared to be incompatible with the common market. Insofar as that does not turn out to be the case, it has been investigated how Dutch administrative law (of procedure) may further facilitate an effective recovery of unlawful state aid, including interest on it (and with it the implementation of European law).¹⁹

4.2 Recovery of unlawful state aid in Dutch administrative law (of procedure)

In the Netherlands there is no general State Aid Act, which includes a single general regulation for the recovery of unlawfully granted state aid. Only for a certain category of ‘administrative’ aid measures, namely subsidies within the meaning of Article 4:21 of the GALA, the GALA provides for generally written provisions about withdrawal, modification and recovery.²⁰

Insofar as the general provisions in the GALA in respect of subsidies are applicable to a certain aid measure, it must be emphasised that the current text of the GALA does not include a single reference to European state aid law. Neither do the provisions which refer to termination of subsidy relations and recovery. Within the framework of the drafting of the GALA attention has actually been paid to state aid law, but at the time the legislator did not consider it very well possible, and neither necessary to include in the GALA general rules in respect of (the recovery of) aid.²¹ So, for the implementation of recovery decisions of the Commission in relation to aid in the form of a subsidy the ‘ordinary’ general subsidy provisions, as included in the GALA, should in principle be taken as starting point.

Only for certain kinds of subsidies, namely granted by various departments at state level, special rules exist about withdrawal and recovery which have been tailored to the recovery of state aid. These rules are implied in the various subsidy framework Acts.²² These regulations tailored to the recovery of state aid cannot be relied upon as regards subsidies of the ministries in question outside the framework Acts and forms of state aid (whether or not in the form of subsidies) from local and regional authorities.

It also occasionally occurs that local and regional authorities have general subsidy regulations with provisions for recovery tailored to the recovery of state aid, but as yet we estimate their number to be very small (Den Ouden, Jacobs & Verheij 2004, p. 257).

However, it appears that it is rather difficult to apply the general provisions in the GALA in their current form in the context of the recovery of unlawful state aid. According to the system of the GALA subsidy amounts or advance payments can

only be recovered if they have been unduly paid (Article 4:57 GALA). This supposes that the legal basis for the payment no longer exists. Here, a problem arises, due to the mandatory limiting grounds for repeal or alteration of administrative decisions underlying the subsidy granted.

Furthermore, on the basis of the current provisions in the GALA it does not appear to be possible to meet the requirement that in addition to the actual aid the interest enjoyed on it will actually also be recovered. Apart from exceptions in special subsidy laws, such as the subsidy framework Acts mentioned above, no basis can be found for this in the written general administrative law.²³

The current provisions in the GALA, for that matter, also fail as regards the limitation periods included in them, both in respect of the repeal of subsidy decisions and in respect of the recovery of unduly paid amounts. According to EC state aid law recovery of unlawful state aid may be ordered up to ten years after the aid has been granted. In Dutch administrative law the power to repeal subsidy decisions and to recover subsidies and advance payments appears on the contrary to be coupled to a limitation period of five years. Only in the subsidy framework Act mentioned it has been explicitly provided that limitation periods from the GALA do not apply to the cancellation or alteration of subsidies which are in conflict with 'obligations of the state under a treaty'. It would benefit the legal certainty if it were also made explicitly possible over the full width of national law to recover unlawful state aid during a period of ten years from the moment the aid was granted, including the interest enjoyed on it.

Still apart from these shortcomings, it appears that the provisions in the GALA about repeal, alteration and recovery, as indicated, can only be applied to a certain category of aid measures, namely subsidies within the meaning of the GALA. For the recovery of other forms of state aid, like tax measures and private law contracts, not being subsidies within the meaning of the GALA, other provisions should in any case be looked for.

For the recovery of some of these aid measures which actually take the form of an administrative decision unwritten public law may at present still offer a solution. The fact is that in administrative case law it is assumed that from unwritten law both an (implied) power to repeal and a power to recover may be derived.²⁴ These powers which have been acknowledged in unwritten law concern in principle unduly paid subsidies, but also apply to other financial provisions under administrative law. However, according to established case law this unwritten public law expressly does not provide a basis for claiming interest. According to the Administrative Law Division of the Council of State for this power a basis is required in written national administrative law.²⁵

4.4 How can the implementation of European Community law be facilitated?

So current Dutch administrative law (of procedure) offers various possibilities for setting the recovery of unlawful state aid in motion on the instruction of the Commission, but it has certainly not yet been tailored on all points to the full implementation of the community obligations in this respect.

Before discussing a few options in Dutch administrative law (of procedure) for the further facilitation of the incorporation of Community law, it should be noted that in some cases from a national legal point of view recovery may also still be realised via another legal route, e.g. via private law. In principle Community law is unbiased as regards the way in which a member state carries out a recovery obligation, provided that it complies with the Community principles of equivalence and effectiveness. However, the chance that in particular the latter precondition of equivalence is breached probably increases when all kinds of legal tricks must be applied in order to be able to carry out the Community recovery obligations, let alone that this will benefit a prompt and effective recovery.

It will for that matter be possible to resolve some bottlenecks by means of a Community friendly interpretation of the applicable national law. But, that does not alter the fact that the legislator will continue to have the obligation to organise the national law in such a way that it will be beyond all doubt that the obligations resulting from Community law can be fulfilled. As regards legislation the following three options are then conceivable for the further facilitation of the implementation of Community law.

The first option is to regulate all legal aspects of granting aid, including the recovery of unlawful state aid, in a general state aid Act, which covers all relevant areas of national law.²⁶ The great advantage of such an Act seems to be that the state aid problem may be fully dealt with at the member state level, whereby traditional demarcations between different areas of law and associated (procedural) impediments will be passed over. On the other hand such an Act will actually be a very draconian measure, which under pressure of Community law may actually be applied in the national law, but which fails to do justice to the different characteristics of the various areas of national law.

The second option is to create as few rules as possible on the general level and to actually provide recovery possibilities in special regulations on both the national level and the local and regional level. In order to create a comprehensive system for the recovery of unlawful aid via this option, it is required that all regulations, agreements and other relevant legal documents which may regulate the various forms of granting aid will explicitly provide for the possibility to undo the aid, including interest enjoyed on it. On both the central state level and the local and regional government level this requires an enormous wave of legislation and besides a great alertness in situations of atypical granting of aid which does not very well fit in with current regulations. This solution for making Dutch law on the recovery of unlawful state aid Europe proof will encourage a great fragmentation, which from the viewpoint of transparency and legal certainty is undesirable, and sometimes it will just be forgotten.

The third option in our opinion is the golden mean: neither one general regulation, nor just many special provisions, but aiming to connect with already existing general regulations in the various areas of national law. In this way justice can be done to the various areas' own systems and still be provided for recovery methods which have a general character.²⁷ As already noted above, in the past when drafting the GALA the Dutch legislator did not consider it necessary to provide for a regulation aimed at the recovery of state aid. The argument for this was that the Community restrictions

on the exercise of national subsidy powers would directly result from Community law.²⁸ Although the latter argument is in itself correct, it does not alter the fact that nevertheless a problem arises when there are no national powers in this respect. Precisely for those situations the national legislator should provide an appropriate regulation.²⁹ By now it seems that the Dutch legislator has itself also been convinced of the necessity of this.³⁰

With a view to an effective implementation of the recovery of unlawful state aid it is advisable to explicitly include in the GALA in any case a possibility for the repeal of favourable decisions because of conflict with the Community law in respect of granting aid. Further, a general basis for the power to recover unduly paid amounts and a basis for the power to claim interest in the case of unlawfully granted state aid over the whole period in which the beneficiary has enjoyed the aid should be laid down in the GALA. Under the influence of Community regulations and case law the scope of the state aid issue is by now so broad, that the GALA is actually the most appropriate place for a regulation in administrative law.

These solutions found in Dutch general administrative law may, even if not strictly necessary or applicable in every case of recovery of state aid, facilitate the proper implementation of European Community law in this field of law, in the interest of all actors concerned.

5. The division of liabilities for breach of Community law among various national authorities involved

5.1 Introduction

Within the Community legal system many legal rules are addressed to the member states. This implies that from those legal rules in first instance rights and obligations result for the national governments as representatives of those member states. That does not alter the fact that in their daily practice many local and regional administrative authorities are also faced in many ways with European law. After all, for all government bodies it applies that they must comply with Community law. So local and regional regulations must not come into conflict with Community law and the daily administrative practice of local and regional administrative bodies must also be given shape within the limits resulting from European law. For instance, when awarding public contracts the tendering directives must be observed and within the subsidy policy the Community state aid law discussed above must be taken into account. Local and regional authorities must also regularly make an effort to implement European regulations. Examples are the effectuation of the Structural Funds and the enforcement of Community legal rules, e.g. in the field of environmental protection. In both activities local and regional authorities play an important role in the Netherlands.

Given the complex matter of EC law, local and regional authorities are not always sufficiently aware of their role in its implementation, effectuation and enforcement. That fact is well-known in the Netherlands. For that reason in the past years many measures have already been taken to improve the level of knowledge of European law

of local and regional authorities.³¹ Nevertheless, mistakes are being made. Especially the affair in connection with the local implementation of the European Social Fund by the manpower services organisation (*arbeidsvoorzieningsorganisatie*) taught that the failure to comply with Community legal rules by local and regional bodies may cost dearly to the member state the Netherlands (and so to the government). Over the period 1994/1996 the inadequate implementation led to 157 million euro being recovered by the European Commission.

In the Netherlands this issue has led to an intensive discussion about the question of whether and how the government can accomplish that local and regional authorities will fulfil their Community obligations. In this discussion, which continues until this day, two questions take central place. The first question concerns the supervisory instruments of the central government. In spite of the fact that from European case law no clear obligations for the member states can be derived, in the Netherlands a great deal of thought is devoted to the question whether it is possible to shape administrative supervisory powers in such a way that fulfilment of Community obligations by local and regional authorities, if needed, may be enforced effectively by the government, while justice will also be done to specific principles of Dutch constitutional law.³²

The second question is related with the costs which may be connected with breaches of European law by local and regional authorities. If the State (i.e. the central government in the Netherlands) is held liable for this by private individuals or by the European Commission, the State cannot defend itself by referring to the local or regional authority, as is apparent from the case law.³³ So, when irregularities lead to a penalty, fine, recovery of European money or other financial sanctions, the State must pay. Whether the State can recover such costs from the 'culprit' is a question which must be answered according to the national legal rules.³⁴ Dutch law does so far not offer many possibilities in that respect. Viewed from the traditional method there is neither any reason for making further rules; after all, so long as the government can be held responsible and pays, the Netherlands fulfils the Community obligations. However, in practice it turns out that for instance the absence of a clear right of recourse has led to other measures by the central government in order to retrieve 'lost money' and so to prevent financial deficits. This procedure led to risk-avoiding behaviour by local and regional authorities: they no longer wanted to have anything to do with European subsidies. This led the Netherlands to being in danger of losing large sums of European money, with all the associated social consequences. From a proactive perspective there is therefore every reason to ask the following question: how may an administrative right of recourse be given shape in such a way that justice will be done to the responsibilities of the various national authorities involved in the implementation of Community law?

These two questions have been investigated from the perspective of general administrative law as an instrument for the possible facilitation of the effective implementation of EC law (De Kruif & Den Ouden 2007, p. 233-256). Is it useful to draw up (more) general rules of administrative law about administrative supervisory powers and recourse of costs from local and regional authorities in case of breach

of EC law? Can general administrative law facilitate in this way the incorporation of EC law?

5.2 Supervision

As said, from a European law perspective responsibility and liability towards the EC for the fulfilment of Community obligations by local and regional authorities lie with the central government. However, in Dutch constitutional law local and regional authorities are traditionally given much freedom of action (autonomy). So it is important for the legislator to find a balance between the obligations and responsibilities which result from Community law on the one hand and the principles of the Dutch form of government on the other hand.

Recently the Dutch government published an official standpoint entitled 'The European dimension of supervision. EU law and the relation between state and local and regional authorities'.³⁵ In this publication the government establishes that the current statutory supervisory instruments of the government are failing. Classic enforcement instruments, of which suspension and annulment of decisions of local and regional authorities are the most important ones, are not always sufficient. After all, they cannot be used to force local and regional authorities to act, which is often actually needed in order to be able to fulfil Community obligations. The current Dutch regulations about neglect of duties by local and regional authorities neither offer a solution. There is discussion about the scope of these regulations, but it is certain that Community obligations which have not been transposed into national legislation are not covered by them. Moreover, often it is not the government which can act correctively under a regulation on neglect of duties. Usually the power of decision moves up to a higher local or regional authority.

The Dutch government tries to find the solution for these problems especially in a power for ministers to give so-called 'special instructions' whose nature may be both preventive and repressive. With such instruction powers the supervisory instruments of the government may be made 'Europe proof'.

A preventive, special instruction implies that in an individual case a minister gives a specific order to another government body in respect of the fulfilment of Community obligations. Dutch law already includes such a power in the European Subsidies Supervision Act (*Wet Toezicht Europese Subsidies*). From the parliamentary papers to this Act it becomes clear how the government views the concrete application of this power. In those papers the government emphasises the far-reaching nature of the instruction. Therefore this power must be used sparingly. In the European Subsidies Supervision Act it has been laid down that before giving an instruction a minister must first consult with the local or regional administrative body involved. It has also been laid down in the European Subsidies Supervision Act that – apart from urgent cases – the minister may only give an instruction after he has set a period in which the default may be remedied or prevented by the local or regional administrative body itself. So, the instruction is an 'ultimum remedium': an instrument that will only be relevant when such matters as information, advice, codes of conduct and consultations have not led to the desired result. Finally, from the explanatory memorandum it is

apparent that when giving an instruction the minister cannot suffice with simply pointing at a Community obligation or with establishing that such obligations must be fulfilled by the local or regional authorities called upon. Instructions must contribute to a proper implementation of the Community law in question. The government wants to accomplish this 'by forcing the administrative body in question to comply with this regulation in a manner as indicated by the central government, respectively to observe the preconditions set'.³⁶ A preventive instruction must therefore be rather concrete.

The cabinet's standpoint shows that it is not intended to provide a general preventive instruction authority to ministers, for instance in the GALA. As yet it will have to be examined for each sub-area and so for each specific statutory regulation if introduction of this far-reaching power is desirable.

According to the cabinet, in new legislation the ministers must also get the general power to give repressive instructions to local and regional authorities. That possibility is needed for cases in which the European Court of Justice, the Court of First Instance, the Dutch courts or the European Commission establish that in a concrete case a local or regional authority has failed to fulfil Community obligations. When the failure to fulfil a Community obligation by a local or regional authority consists of failing to act, a classic suspension or annulment power is of no good, as already noted above. After all, the local or regional authority fails to take the necessary decisions. But in accordance with the principle of loyalty to the Community and the practical circumstance that the central government is liable for the Community, it is necessary according to the government that the central government can give mandatory instructions. For this power too the government emphasises in the official standpoint that legal conditions must apply. The central government may only use this instrument when after using lighter instruments the local or regional authority remains in default, and the application itself must be legally regulated.

The government does not indicate in which statutory regulation that power might be laid down. Since it concerns a general power, regulation in the GALA seems obvious. The fact is that Title 10.2 GALA already contains a regulation on the supervision of administrative bodies. The power to give repressive instructions may be added to this, so that it applies in all policy areas without this having each time to be determined in specific regulations.

5.3 Division of liability

In the standpoint of the government it is also established that in the Netherlands it is not simple to recover from the local or regional authority involved any financial losses resulting from the failure to fulfil obligations. Those losses may exist of fines imposed on the Netherlands under Article 228 EC, or other losses for the central government, e.g. consisting of the recovery of European subsidies by the Commission. It may be doubted whether the non-compliance with Community obligations by local or regional administrative bodies can be qualified as an unlawful act *against the State* (Schutznorm issue) (Cf. Braams 1996, p. 977 and Widdershoven 2000, p. 247).³⁷ If that is not the case, the losses cannot be recovered under private liability law. It is

therefore desirable to come to a right of recourse under public law, whereby losses may be recovered insofar as they have been caused by a failure of a local or regional administrative body.

For errors in the implementation of the structural funds such right of recourse under Dutch public law has already been laid down in the European Subsidies Supervision Act. The government has announced that it will draft legislation which provides for a general right of recourse. Regulation in the GALA seems obvious.

5.4 Risk inventory

Research has shown that in the Netherlands it regularly occurs that private individuals contest decisions of local and regional administrative bodies because of breach of Community law. It happens less often that private individuals hold local and regional authorities liable for the losses resulting from this. As far as we could verify, in those proceedings the State is only held (jointly) liable insofar as the (alleged) unlawful act of the local or regional authorities involved is (partly) due to the central government. Well-known examples are cases in which the delayed or incorrect implementation of directives into Dutch legislation plays a role. Because of this local and regional authorities must carry out legislation which does not pass the European legal muster. So it concerns cases whereby the central government has (also) been negligent. In this sort of cases losses cannot be avoided with stricter or broader supervisory instruments. Moreover recovery of the losses from the local or regional authorities is then not really obvious. More than that, for these cases a 'reversed right of recourse' of the local or regional authorities on the State is sometimes argued for.

We do not know of any examples of situations in which the Dutch State is sued for breach of European law by local and regional authorities, e.g. since the local or regional authorities cannot or do not want to pay.³⁸

When the European Commission is of the opinion that local and regional authorities act contrary to Community law, it may eventually lead to an infraction procedure by virtue of Article 226 EC. In this context, no Dutch cases are known in which such a procedure has led to the imposition of a sanction as provided in Article 228 EC. Apparently local and regional authorities are usually prepared and capable to remedy breaches of Community law observed by the Commission or a (European) court. That is apparently not only the case in the Netherlands: in Belgium, where already since 1980 a 'substitution mechanism' exists for those cases, this possibility has so far never been used.³⁹ So in this area there neither seems to be great (financial) risks for the Netherlands.

Then there only remain the 'other losses' which may be the consequence of breach of Community law by local and regional authorities. We have already mentioned the example of the contributions which the Netherlands received in the period 1994-1999 from the European Social Fund (ESF) and of which part has been recovered by the Commission, after irregularities in the implementation had been observed. This case of a defective implementation and enforcement of Community incentive measures is not an isolated case, as is for instance shown by the recent commotion

in the Netherlands in connection with the implementation of the European Fund for Regional Development (EFRD).

It has therefore been investigated if in these cases breach of Community law by the local and regional authorities involved in the implementation and the resulting recovery by the Commission might have been avoided when supervisory powers for the government and a division of liability between the various national authorities involved had been better regulated in the Dutch legislation. A study of the Dutch ESF case law and the literature about the ESF affair led to the conclusion that such is not plausible. If at the time the competent minister would have had the authority to issue preventive instructions, the implementation of the ESF in the Netherlands would probably not have been greatly different. The picture emerges that the concrete requirements which ESF projects had to satisfy in the nineties did not follow very clearly from the applicable European regulations, that the Dutch implementation regulations left much to be desired, that the central government did not always adhere to the legal rules that were available and to the interpretation given to them by the Commission and that subsidy recipients (mostly local and regional authorities) sometimes used the scope offered to them in this way. There was certainly no question of a unilateral, stubborn refusal by local and regional authorities to fulfil their Community obligations. It therefore does not seem probable that in those circumstances the competent minister would have been able to make a meaningful use of a power to give preventive instructions. Qualitatively better implementation regulations could have contributed more to a correct implementation practice.

5.5 How can the implementation of European Community law be facilitated?

Does this then mean that the extension of the ministerial powers in the field of administrative supervision and the regulation of a right of recourse under public law will have no effect in practice? Will it not improve the effective incorporation of European law? In other words: do we have here an example of a case in which a proactive approach involving a lot of effort and resources leads to rather unappealing results?

This conclusion cannot be drawn from the research. In cases in which local and regional authorities are (jointly) responsible for breaches of Community law in practice it sometimes turns out to be difficult to let these authorities bear the losses resulting from those breaches. That is an undesirable situation: passing on the financial risks is probably one of the most effective ways to force local and regional authorities to study more closely the European regulations and to become aware of obligations resulting from them. But it will need further thought how to give shape to that right of recourse. Especially when the right of recourse is combined with supervisory powers for the central government. All kinds of awkward questions lie in wait. Is a central government which supervises local and regional authorities not jointly responsible for any errors made? Can local and regional authorities evade their responsibility and liability by asking in awkward cases for an instruction from the minister? And will the supervisory powers be seriously used in practice? Reports of the Dutch General Court of Auditors and the Dutch case law on the implementation of European incentive measures show that in practice it will not even be easy to

provide an adequate framework for monitoring activities afterwards. From this the picture emerges of a heavy administrative work load. In these circumstances it seems to be a too ambitious plan for the Netherlands to successfully implement *preventive* supervision which will result in an effective reaction to interim signals in the form of specific, preventive instructions. From the perspective of limiting the financial risks for the State it therefore seems sensible to be sparing with the introduction of preventive instruction powers.

From studying the question to what extent Dutch general administrative law may contribute to the (more) effective implementation of Community law the conclusion in respect of administrative supervision is that there seem to be possibilities for this. Although in general no specific requirements about the organisation of the administrative supervision in the member states can be derived from EC law (Cf. Meuwese & Den Ouden 2005, p. 89-108), setting up such supervision may actually help to improve the implementation and enforcement of Community law by local and regional authorities. The latter will probably act more carefully because they run financial risks. So the PF-method may lead to desirable results. A clearly shaped inter-administrative right of recourse laid down in Title 10.2 of the GALA seems in this respect especially attractive. From the perspective of the administrative practice, where lack of clarity about the financial risks leads to behaviour by which risks may indeed be avoided, but which can have other unpleasant consequences, it also seems desirable that a well thought-out inter-administrative right of recourse is worked out. An example is the underutilization of budgets which Europe has made available to the Netherlands (Cf. Lagrouw, Den Ouden & Groothuis 2006, p. 303-307). So, the regulation of mutual government liability from a European perspective is a subject which deserves our attention in the coming years.

6. The embedding of the preliminary proceedings in the national law of administrative procedure

6.1 Introduction

The preliminary proceedings procedure at the ECJ play a large role in the process of the incorporation of European law, since it enables the national courts to properly implement European law at the national level. In particular, the preliminary proceedings have enabled the ECJ to give shape to its role as engine of the European integration process. Almost all important legal concepts, such as supremacy and direct effect of Community law and the liability of member states for its breach, have been developed by the ECJ further to preliminary questions. In this way the cooperation with the ECJ through the preliminary proceedings does not only serve to an important extent the unity of law (by ensuring a uniform interpretation of European law in all member states), but is also crucial for the development of law (Meij 1999, p. 140). In addition the preliminary proceedings contribute to the legal protection of private individuals. The fact is that private individuals have only to a limited extent direct access to the CFI and the ECJ and depend chiefly on the national courts for legal protection in cases in which European law plays a role (Vermeulen 2001, p. 47-49).⁴⁰

Dutch administrative courts are responsible for a large part of the preliminary questions submitted from the Netherlands to the ECJ (Cf. Meij 1999, p. 154-155; Mortelmans, Van Ooik & Prechal 2004, p. 59-62). These questions often concern the interpretation of specific (material) rules, but it also regularly happens that it concerns issues which directly touch on the modelling of general administrative law (of procedure) and thus also often on the Dutch GALA. Examples of the latter are the tenability of appeal periods, ex officio review, the adequacy of fixed compensation of legal costs, the review obligation in case of conflict with European law and liability for breach of European law (Cf. Widdershoven et al. 2007, par. 7.4).⁴¹ So, preliminary proceedings are not only of interest for the correct application of European law in a concrete case, but also for modelling the material and procedural (administrative) law in a general sense, within the framework of the GALA or otherwise.

Starting from this great importance of properly functioning preliminary proceedings the embedding of this procedure in Dutch general administrative law (of procedure) has been studied on the basis of an analysis of literature and case law. Central question was how Dutch general administrative law (of procedure) may further facilitate the proper functioning of the preliminary proceedings (and with it the implementation of European Community law). For this purpose attention is paid in particular to the Dutch legal practice in this respect, whereby we have also looked for bottlenecks and solutions to them.⁴²

6.2 The preliminary proceedings in Dutch general administrative law (of procedure)

The research has shown that for the question of whether and, if so, how a matter must be referred to the ECJ, the Dutch administrative courts rely almost entirely on Article 234 EC and the case law of the ECJ on this article. For this reason the European law in respect of the preliminary proceedings as well as the 'practical suggestions' in this respect which the ECJ has published are to a great extent decisive for the Dutch legal practice.

The most urgent problem of the preliminary proceedings is that they take too long. It has been noted that there is a risk that for that reason courts may decide not to refer a matter. From the viewpoint of the development and effective implementation of European law – in which the preliminary proceedings play a crucial role – this is questionable, but otherwise not always incomprehensible. It is important that this problem will be speedily dealt with, especially by extending the processing capacity in Luxembourg. If this does not happen, it will become difficult to maintain the case law in respect of state liability for the improper application of European law in cases in which wrongly no preliminary questions have been asked.

On the more national (Dutch) side of the preliminary proceedings no great problems arise in the sense that there is conflict with European law. According to the traditional method one might therefore opt for not taking any further actions. However if we look from the viewpoint of the PF-method to the way in which the preliminary proceedings have been embedded in Dutch administrative law, a number of issues may be pointed out in respect of which facilitating measures might be relevant for promoting the

effective incorporation of European law. Concisely stated, in this respect it concerns material restraint of the national courts in respect of asking questions, a lack of coordination between the various (highest) administrative courts (the Netherlands has as many as four of them), a too varied practice in respect of the structure of referral orders by the courts and associated national proceedings and the unclear position of the parties involved. The lack of a regulation in respect of a number of specific procedural issues is a further point of special interest. For instance, formally the GALA does not provide for an 'interlocutory ruling', but in practice it is nevertheless used by Dutch administrative courts for referral; there is no possibility of appeal from such a ruling and at present under the GALA the courts cannot ex officio grant injunctive relief pending the preliminary proceedings while the effective operation of Community law may give reason for this.

6.3 How can the implementation of European Community law be facilitated?

To further facilitate the implementation of European law in this respect three measures have been proposed, which have been discussed in outline and whose implementation still requires further study.

To start with, a regulation must be included, preferably in the GALA, in respect of the preliminary referral, whereby the 'suggestions' published by the ECJ are a useful starting point. There are also examples of this in other European countries, so that a comparative law study may contribute to an adequate regulation.⁴³ An alternative to this might be to supplement the various rules of procedure of the administrative courts (policy rules to which the various courts have bound themselves in principle, but do not have the status of law) with provisions about the preliminary proceedings.

In addition it is of great interest that the (substantive) coordination of (material) referral problems between the courts involved will be improved. Some proposals have also been made for this, whereby it has been established that the desirable coordination may probably be achieved most effectively when the Supreme Court is placed at the top of the administrative legal system (with maybe a sort of leave to appeal system in order to avoid that proceedings take too long). The fact is that in the current organisational framework the formal partitions between the different administrative law courts involved have an impeding effect. A further aspect is that in the proposed new framework better coordination with civil law and criminal law will also be possible, fields in which the influence of European law is increasing.

Finally it has been proposed to further intensify the training of judges in European law. A better

knowledge of and sensitivity for European law – of course always in relation to the relevant national law – will achieve that except for better reasoned referral orders the judge involved may also be able to make at a better selection of which cases to refer and which not. In this way a better training might also contribute to limiting the influx of cases at the ECJ and with it to a solution of the greatest bottleneck in the current preliminary proceedings, namely its too long duration.

7. Conclusion

The study on the four subtopics of this paper shows that the proposed PF-method may enhance the effective implementation of European Community law in the national (Dutch) legal system in several ways.

A basic law of general administrative law, such as the GALA, fulfils an essential function in this respect. Given the general nature of this statutory regulation, the provisions included in it may be formulated in such a way that they can ensure an effective incorporation of Community law on various special fields of law. Already now the GALA offers examples of European oriented provisions of a general problem solving or facilitating nature. For instance in Title 1.2 it has been provided that the usual statutory obligations to seek advice or hold consultations do not apply when taking implementation decisions that are necessary for the implementation of binding orders of bodies of the European Communities (EC), so that such decisions might be taken faster and simpler.

In this study various other provisions of general administrative law, although not all necessarily resulting from Community law obligations, have been proposed which may simplify the implementation of EC law for Dutch administrative bodies. For the recovery of unlawful state aid a general regulation with such purpose seems to be indispensable in order to be able to fulfil Community obligations. With a view to a better embedding of the preliminary proceedings in Dutch administrative law a general regulation in the GALA has been proposed. It offers an example of how national general administrative law may facilitate the implementation of Community law. The same applies for a regulation still to be designed for an inter-administrative right of recourse for those cases in which local and regional authorities make errors which lead to liability and losses for the member state the Netherlands. When it will be possible to confront local and regional authorities with the financial consequences of their negligence, they will probably act more carefully when observing or implementing European rules of law.

In order to give concrete shape to general rules of law which may safeguard or facilitate Community law in the national legal system, some further study and thought will be required. It should be taken into account that two legal systems, the European and the national (Dutch), are literally coming together. In that respect the PF-method does not differ from the traditional method: in order to be able to be really effective, new rules of law will always have to be formulated in a careful and balanced manner, taking into account the basic principles and special features of the national legal system, applied in a Community context.

It is not only the legislator which has responsibilities in this field. This study shows that an important role has also been reserved for the highest administrative courts. They can facilitate the incorporation of Community law into the national legal system by choosing in their case law, when applying national provisions of general administrative law, the approach which fits in with relevant European case law and the approach used or the requirements formulated in the latter in this respect. In this way a more intensive check by the national courts whether a decision is based on sound fact-finding may not only contribute to effective legal protection and definitive

dispute settlement, but it will also reduce the chance that the court will fail to see a breach of Community law. In addition, in relation to the preliminary proceedings attention has been drawn to the importance of coordination in respect of (material) referral questions between the courts involved and to the importance of intensifying the training of judges in European law.

With this it may be concluded that using the PF-method may be meaningful in the sense that it improves the incorporation of European law. This removes a number of disadvantages of the traditional method, which implies that the legal implementation, application and enforcement of European law is simplified and facilitated for Dutch regulators, administrative bodies and administrative courts charged with those tasks.

The measures for facilitating the incorporation of European law which have been proposed on the basis of the PF-method enhance the legal certainty. The use of the PF-method may further contribute to more coherence between national law and European law now that this method may be used to trace earlier and solve the so-called 'reversed discrimination' of national law compared to European law. Furthermore the use of this method may also reduce the risk that conflict arises with European law by untimely or inadequate implementation of European legal provisions with all associated legal and financial consequences. Contrary to the traditional method, a proactive approach further also offers more possibilities to still actually influence the policy-making and legislation on the European stage instead of assuming a defensive attitude. However, it should be kept in mind that the use of the PF-method requires a substantial investment both in time and money. Nevertheless the advantages of the use of this method are so evident that we are of the opinion that we must be willing to make the necessary investments for this. These investments will repay themselves in the long run. After all, if the national law is proactively tailored to the effective incorporation of European law, the chance of infraction proceedings will considerably diminish and consequently the chance that the member state will be ordered to pay penalties because of breach of Community law.

Finally, does the use of the PF-method have no other than financial limits? In our opinion it certainly has. The usefulness and necessity of its use must always be carefully weighed, whereby the problem of a level playing field must be kept in mind. By a too strict implementation of European law or an overzealous enforcer citizens and businesses may be substantially prejudiced compared to subjects of other member states. Proper balancing is essential.

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Endnotes

- ¹ This approach has been worked out in greater detail in the introduction to the volume Barkhuysen, T., den Ouden, W. & Steyger, E., *Europees recht effectueren* [Effectuating European Law], Alphen aan den Rijn: Kluwer, 2007, p. 1–7.
- ² The ALDCS is the highest national administrative court charged with the general jurisdiction in administrative law cases.
- ³ See about this investigation obligation of the administrative body Jans, J.H., ‘De reflexwerking van het Europese recht op het formele zorgvuldigheidsbeginsel’ [The reflex effect of European law on the requirement of due care], in: M. Herweijer et al. (eds.) *Alles in één keer goed. Juridische kwaliteit van bestuurlijke besluitvorming* [Everything correct in one go. Legal quality of administrative decision-making], Deventer: Kluwer, 2005, p. 155–169.
- ⁴ This research is reported in Barkhuysen, T., Damen, L.J.A. et al., *Feitenvaststelling in beroep* [Fact-finding by Dutch administrative law courts of first instance], The Hague: Boom legal publishers, 2007.
- ⁵ Case C-120/97, Upjohn II [1999] E.C.R. I-223.
- ⁶ Case C-120/97, Upjohn II [1999] E.C.R. I-223, par. 33 and 34.
- ⁷ See also De Búrca, G. & Ryall, Á., ‘The ECJ and Judicial Review of national Administrative Procedure in the field of EIA’, in Ladeur, K.-H. (ed.), *The Europeanisation of Administrative Law. Transforming national decision-making procedures*, Aldershot: Ashgate/Dartmouth, 2002, p. 154 ff.; Tridimas, T., *The General Principles of EU Law*, Oxford: Oxford University Press, 2006, p. 448 and 449.
- ⁸ Case C-120/97, Upjohn II [1999] E.C.R. I-223., par. 35.
- ⁹ In this comparison use has been made of the chapter ‘Law, Fact and Discretion’ in Craig, P., *EU Administrative Law*, Oxford: Oxford University Press, 2006, p. 429–481.
- ¹⁰ Ress refers to a study from 1982 which shows that in almost 30 years the Court had only heard 120 witnesses (28 cases) and had appointed 11 experts (8 cases).
- ¹¹ As an illustration reference could be made to the rulings *Pfizer* and *Tetra/Laval*, which will be discussed below.
- ¹² This does not mean that these two cases are representative for the Community review of fact-finding. They are however of interest since they explicitly go into the nature of the review and since in the *Tetra Laval* case a complaint has been submitted to the Court of Justice about a too intensive review by the Court of First Instance. Moreover the ruling seems to have been formulated in such a way that it may serve as a guideline for future cases. See J. Schwarze, *European Administrative Law*, London: Sweet&Maxwell 2006, p. clii.
- ¹³ Case T-13/99, *Pfizer Animal Health SA v Council* [2002] E.C.R. II-3305.
- ¹⁴ Cases T-5/02, *Tetra Laval v Commission* [2002] E.C.R. II-4381 and C-12/03, *Commission v Tetra Laval* [2005] E.C.R. I-987.
- ¹⁵ Craig 2006, p. 466 emphasises that the court has the last word in determining the standard of proof which the administrative body must observe.
- ¹⁶ Case C-269/90, *Technische Universität München* [1991] E.C.R. I-5469, par. 14.
- ¹⁷ In Case C-173/03, *Traghetti del Mediterraneo* [2006] E.C.R. I-5177, par. 37–40 the European Court of Justice emphasises that the assessment of facts and evidence by the court is an essential part of the judicial task.
- ¹⁸ Currently, this case is pending.
- ¹⁹ See Adriaanse, P.C., ‘Terugvordering van onrechtmatige staatssteun. Knelpunten en oplossingen in het Nederlandse recht’ [Recovery of unlawful state aid. Bottlenecks and solutions in Dutch law], in Barkhuysen, T., Den Ouden, W. & Steyger, E. (eds.), *Europees recht effectueren* [Effectuating European law], Alphen aan den Rijn: Kluwer, 2007, p. 200–231; Adriaanse,

- P.C., 'Application of EU State Aid Law in the Netherlands (Report for FIDE 2006), in Nemitz, P.F. (ed.), *The Effective Application of EU State Aid Procedures. The Role of National Law and Practice*, Alphen aan den Rijn, Kluwer Law International, 2007, p. 291-316. See also Luja, R.H.C., *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation* (PhD thesis Maastricht), Antwerp: Intersentia, 2003.
- ²⁰ From a comparison of this national legal concept of subsidy in the GALA with the Community concept of state aid, in the light of relevant case law and parliamentary history, it turns out that the two concepts only partly coincide. See Van Angeren, J.R. & Den Ouden, W., 'Subsidierecht en staatssteun' [Subsidy law and state aid] in: Hessel, B. et al., *Staatssteun op het grensvlak van bestuursrecht, Europees recht en fiscaal recht*, preadviezen [State aid at the interface of administrative law, European law and tax law, preliminary advice] VAR series 134, The Hague: Boom Legal Publishers 2005, p. 83-107; Adriaanse, P.C., *Handhaving van EG-recht in situaties van onrechtmatige staatssteun* [Enforcement of EC law in situations of unlawful state aid], Deventer: Kluwer, 2006, p. 231-233.
- ²¹ *Kamerstukken II* [Parliamentary Papers II] 1993/94, 23 700, no. 3, p. 28-29.
- ²² See e.g. the Public Health (Subsidy) Framework Act, *Staatsblad* [Netherlands Bulletin of Acts and Decrees] 1998, 178.
- ²³ See ABRvS [ALDCS] 10 July 2002, *AB* 2003, 123, annotated by NV; ABRvS 4 May 2005, *AB* 2005, 395, annotated by WdO; ABRvS 11 January 2006, *AB* 2006, 208, annotated by WdO.
- ²⁴ See ABRvS 21 October 1996, *AB* 1996, 496, annotated by NV; ABRvS 11 January 2006, *AB* 2006, 208, annotated by WdO; ABRvS 2 August 2006, *JB* 2006, 274.
- ²⁵ See ABRvS 10 July 2002, *AB* 2003, 123, annotated by NV; ABRvS 4 May 2005, *AB* 2005, 395, annotated by WdO; ABRvS 11 January 2006, *AB* 2006, 208, annotated by WdO.
- ²⁶ See also Polak, J.E.M. & Den Ouden, W., *Harmonisatie van bestuursrecht. De verschuivende horizon van het algemeen bestuursrecht en het subsidierecht in Nederland*, Preadvies voor de vereniging voor de vergelijkende studie van het recht van België en Nederland [Harmonisation of administrative law. The moving horizon of the general administrative law and the subsidy law in the Netherlands, Preliminary advice for the association for the comparative study of the law in Belgium and the Netherlands], Deventer: Kluwer, 2004, p. 165-166. In this connection they also mention the possibility of adding a new chapter on state aid to the Dutch Competition Act.
- ²⁷ That does not alter the fact that it may be sensible to also take into account the possibility of the unlawful granting of aid and its recovery in special regulations.
- ²⁸ Parl. Gesch. Awb III [Parliamentary History General Administrative Law Act III], p. 174.
- ²⁹ *Kamerstukken II* [Parliamentary Papers II] 2003/04, 29 279, no. 16, p. 12.
- ³⁰ *Kamerstukken II* [Parliamentary Papers II] 2003/04, 29 702, no. 3, p. 17-18.
- ³¹ For instance, a special knowledge centre 'Europa decentraal' (<http://www.europadecentraal.nl>) and a Coordination point for State aid by local and regional authorities operating within the Ministry of the Interior and Kingdom Relations have been set up.
- ³² See for a recent example the PhD thesis of Van der Sluis, C.N., *In wederzijdse afhankelijkheid, Nationaal bestuurlijk toezicht in Europees perspectief* [In mutual dependence, national administrative supervision in a European perspective] (thesis Erasmus University Rotterdam 2007).
- ³³ In Case C-302/97, Konle [1997] E.C.R. I-3099, the Court holds: 'It is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. A Member State cannot, therefore, plead the distribution of powers

and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis.’ Case C-302/97, *Konle* [1999] E.C.R. I-3099, par. 62. Classic examples of infraction proceedings against the State because of non-compliance with Community obligations by local and regional authorities are e.g. Case 77/69, *Belgian wood* [1970] E.C.R. 237; Case 163/78, *Aerosols* [1979] E.C.R. 371; Case 73/81, *Belgian surface water* [1982] E.C.R. 182 and Case C-33/90, *Campania* [1991] E.C.R. I-5987. This case law is still valid as witnessed by the recent cases C-388/01, *Italian museums* [2003] E.C.R. I-721 and Case C-87/02, *Lotto Zero* [2004] E.C.R. I-5975.

³⁴ This follows from the system of Article 226 EC: the member state is liable for the failure to fulfil European obligations. Community law has nothing to do with the internal division of powers of member states. In addition, Article 10 EC implies that compliance with Community law is not only an obligation of the central government, but also of local and regional authorities of a member state (see also: Case 103/88, *Costanzo* [1989] E.C.R. 1839). These basic principles have been worked out in case law. Attention may be drawn to the *Konle* case cited above and Case C-424/97, *Haïm* [2000] E.C.R. I-5123. From the *Konle* and *Haïm* rulings it follows that Community law does not oppose that local and regional authorities are held liable when this follows from national liability law. An example of the application of Dutch liability law in case of liability claims between government bodies is given by the case *Acciardi II* (Rb Amsterdam [Amsterdam District Court] 11 September 1996, *JB* 1996, 237).

³⁵ *Kamerstukken II* [Parliamentary Papers II] 2003/04, 21 109, no. 138.

³⁶ *Kamerstukken II* [Parliamentary Papers II] 2000/01, 27 572, no. 3, p. 6 and 18.

³⁷ In Germany there seem to be comparable problems. See e.g. H.G. Dederer, ‘Regress des Bundes gegen ein Land bei Verletzung von EG-recht’, 2001, *NVWZ*, p. 258-264.

³⁸ As happened in France in the case which eventually led to the ECHR ruling of 26 September 2006, *AB* 2007, 83, annotated by T. Barkhuysen and M.L. van Emmerik (Campoloro), in which the Court has established that in accordance with Article 1 European Convention on Human Rights the central government is responsible for ensuring treaty obligations and is liable for a breach of the European Convention on Human Rights by local and regional authorities.

³⁹ By virtue of Article 68 § 7 Constitution in conjunction with Article 16 § 3 of the Special Act of 8 August 1980 for the reform of the institutions and the Special and ordinary Acts of 5 May 1993 on the international relations of the communities and the regions it has been provided that ‘when the State is sentenced by an international or supranational court of justice as a result of non-compliance with an international or supranational obligation by a Community or a Region, the State can act in the place of the Community involved or the Region involved for the execution of the ruling part of the decision on the condition that (enumeration of conditions).’ See about this provision Ingelaere, F., ‘De nieuwe wetgeving inzake de internationale betrekkingen van de gemeenschappen en de gewesten’ [The new legislation in respect of the international relations of the communities and the regions], 1993, *TBP*, p. 807-820, annotation p. 816-817 and by the same author ‘De Europeesrechtelijke raakvlakken van de nieuwe wetgeving inzake de internationale betrekkingen van de Belgische Gemeenschappen en Gewesten’ [The European legal interfaces of the new legislation in respect of the international relations of the Belgian Communities and Regions], 1994, *SEW*, p. 67-89, annotation p. 76-79.

⁴⁰ With references to relevant rulings of the ECJ. Cf. Case C-263/02, *Jégo-Quéré* (very limited admissibility of private individuals in appeal pursuant to Article 230 EC against EC Regulations).

⁴¹ See also Jans, J.H., *Doorgeschoten?, Enkele opmerkingen over de gevolgen van de Europeanisering van het bestuursrecht voor de grondslagen van de bestuursrechtspraak* (oratie Groningen) [Gone too far? Some remarks on the consequences of the Europeanisation of the administrative law for the foundation of the administration of justice in administrative matters (inaugural lecture Groningen)], Groningen 2005.

⁴² See with extensive references to sources Barkhuysen, T., 'De inbedding van de prejudiciële procedure in het Nederlandse bestuursrecht' [The embedding of the preliminary proceedings in Dutch administrative law], in Barkhuysen, T., Den Ouden, W. & Steyger, E. (eds.), *Europees recht effectueren* [Effectuating European law], Alphen aan den Rijn: Kluwer, 2007, p. 325-350.

⁴³ See the reports on http://193.191.217.21/en/colloquiums/colloq_en_18.html.