FINAL DISPUTE SETTLEMENT IN NUMBERS: REPORT OF AN EXAMINATION OF FINAL DISPUTE SETTLEMENT IN THE UTRECHT DISTRICT COURT

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Abstract

In the Netherlands the administrative court sometimes has the possibility to settle the case without jeopardizing the separation of administrative and judicial responsibilities based on the separation of powers doctrine. This paper addresses the question of how often administrative courts use the powers they currently have for final settlement of disputes and whether they make optimal use of these powers.

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1. Introduction

1.1. Background

This article addresses the question of how often administrative courts use the powers they currently have for final settlement of disputes and whether they make optimal use of these powers. The article is based on a research report commissioned by the Utrecht District Court. In the autumn of 2007, Utrecht University's Institute of Constitutional and Administrative Law and the Administrative Law Section of the Utrecht District Court organized a study afternoon about the final settlement of disputes. The Administrative Law Section wished to examine any possible options for administrative courts to use their procedural and ruling powers in order to contribute to the final settlement of the disputes presented to them. On this occasion, the parties agreed to assess this new court policy after one year in order to examine the degree to which actual final settlement proved possible and successful. The present study is based on this cooperation between the Utrecht District Court and the Montaigne Centre of the Utrecht University's School of Law. The core research questions in this Utrecht report coincide with the article of A.T. Marseille and R.R. van der Heide, '*De onderbenutting van de mogelijkheden tot finale beslechting door de bestuursrechter*' (Marseille and Van der Heide, 2008, pp. 78-92).

This article does not aim to analyze the margins that the administrative court has to uphold legal consequences or to substitute its decision for that of the administrative authority. This aspect is now briefly covered by a description of the current conditions for courts to do so.

First, for upholding legal consequences, the basic premise is that courts can only uphold the legal consequences if the defects on which the annulment is based can be fully remedied. Otherwise, the premise is that courts can only use their power to uphold legal consequences if it is established that the administrative authority will legally have to take the same decision when ruling on the same case a second time. This premise has since been corrected. In recent rulings, the Administrative Law Division[1] found as follows:

> 'If a decision is annulled, the court shall examine the options for final settlement of the dispute, where it should be considered whether there is reason to apply Article 8:72, paragraph 3, of the General Administrative Law Act (Awb) and uphold the legal consequences of the decision. As the Division held before, in case no. 200705490/1 of 26 March 2008, upholding the legal consequences does not require that only one possible decision remains. In a case such as the present one, in which a decision

1 See ABRvS 26 March 2008, case no. 200705490/1; ABRvS 10 December 2008, JB 2009/39; Vz. ABRvS 27 March 2009, case no. 200901078/2/H1; ABRvS 6 April 2009, case no. 200803001/1; ABRvS 10 June 2009, 200806623/1/H2. Also compare C.L.G.F.H. Albers in ABRvS 20 February 2008, JB 2008/76. (ABRvS = Administrative Law Division of the Council of State; Vz. = Chairperson.)

is annulled due to interests not having been properly weighed, in view of the administrative authority's freedom of policy and for judicial efficiency there may be reason to uphold the legal consequences of the decision, if the administrative authority sticks to its decision, this time properly weighing the relevant interests and allowing the other parties involved sufficient opportunity to respond. The decisive factor is whether, after this new weighing of interests, the content of the annulled decision will pass the test of judicial review.'[2]

A second option for final settlement of a dispute is for the court to substitute its own decision for the challenged decision of the administration. This latter power is used if upholding the legal consequences is not an option. With respect to the option of substitution based on Article 8:72, paragraph 4, Awb, the legislator has stated that the rule is that the administrative court can only do so if legally only one possible decision remains after the court has annulled the decision challenged.[3] This means that in principle the administrative court cannot take an administrative decision itself and substitute this for the challenged decision if the latter is based on a discretionary power. This is to some extent open to qualification, however, because even if the challenged decision is based on a discretionary power, it may be that the result of the required weighing of interests to which the administrative authority would come is sometimes already known from the documents before the court.

Both when the court substitutes its decision for that of the administrative authority and when the legal consequences of the administrative decision are upheld, the court's decision must be grounded on a full and current statement of the facts. In addition, the interests of third parties must be included in the weighing of interests. If the court substitutes it decision for that of the administration, this will also involve any unknown third parties that are not party to the conflict, which is different when the legal consequences are upheld. The last condition for final settlement is that the practical and technical execution should be feasible for the court.

In addition to upholding the legal consequences and the substitution of the administration's decision, this article distinguishes a third instrument for the final settlement of disputes: the court may render a judgment that includes far-reaching clarification regarding the aspects that the administrative authority must consider when taking a new decision. In this case, the court rules on the substantive part of the dispute and leaves the practical and/or technical details to the administrative authority (Schueler, 2007, pp. 173-174). Below, this manner of final settlement will be referred to as 'channeling' of the case or of the margins that the administrative authority has when issuing a new decision.

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2 From ABRvS 10 December 2008, JB 2009/39. Also see ABRvS 26 March 2008, case no. 200705490/1; Vz. ABRvS 27 March 2009, case no. 200901078/2/H1; ABRvS 6 April 2009, case no. 200803001/1; ABRvS 10 June 2009, 200806623/1/H2. Also compare C.L.G.F.H. Albers in ABRvS 20 February 2008, JB 2008/76.

3 PG Awb, p. 460 (PG = parliamentary history).

1.2. Structure

Section 2 will describe the research questions and the research method. Section 3 presents the empirical research results for the questions of how often the existing powers are used and how optimal this use is. It will also try to explain these results. Section 4 will close this article presenting a conclusion.

2. Research questions and method

2.1. Marseille and Van der Heide

The Utrecht study is largely based on the questions and method that Marseille and Van der Heide used in their article as previously mentioned (Marseille and Van der Heide, 2008). First, therefore, we will briefly describe Marseille and Van der Heide's article.

According to Marseille and Van der Heide 'various publications have shown that there is still too little clarity with respect to two crucial aspects of the options that administrative courts have for final settlement. This mainly concerns the question of how often the existing powers are used; and how often they are not used where they could have been used with only little effort' (Marseille and Van der Heide, 2008).

For this reason, Marseille and Van der Heide analyzed the extent to which courts used their powers for final settlement of a dispute. Their study from 2007 included 299 court judgments of five different courts, 104 of which were annulments (Marseille and Van der Heide 2008, p. 82, note 23). They mainly focused on upholding the legal consequences and substituting the administrative authority's decision by a decision of the court itself.

Then they examined the effort it would have taken the administrative court to apply Articles 8:72, paragraphs 3 and 4, Awb (Marseille and Van der Heide, 2008, p. 85). They did so by determining what the ground for annulment was for the cases that were simply annulled (referred to as 'simple annulments') and subsequently assessing how much effort it would have taken the court to reach final settlement by substitution of the administrative authority's decision or by upholding the legal consequences (Marseille and Van der Heide, 2008, p. 86). They conducted their study on the basis of three recent studies.[4]

2.2. Utrecht 2008

In our study, we used mostly the same method to answer the same questions for the Utrecht District Court: how often do courts use their powers for final settlement of a dispute and how optimal is the result?

4 A study in 2004 analysed 101 judgments of five different district courts, one in 2006 analysed 141 judgments of one district court, and one in 2007 analysed 104 judgments. The judgments analysed in 2007 came from the archives of five different district courts. Marseille and Van der Heide's article includes no further details on the selection of the judgments or on their exact origin.

The study is based on a list of all cases included in the electronic administration files that were declared well-founded in 2008, leaving out the judgments in the field of tax law and the law concerning aliens. This totals 228 cases, 201 of which we examined. Of the remaining 27 cases, 11 cases were on the list but could not be found anywhere in the electronic archive or in the paper archive. The other 16 cases were consolidated cases.[5] The study also covered 23 cases added from *www.rechtspraak.nl*[6], which were also handled in 2008 and were declared well-founded but were not included in the list mentioned above.[7]

As mentioned, Marseille and Van der Heide limited their study to cases where the legal consequences were upheld and cases where the court substituted its own decision for that of the administrative authority. Our study also includes judgments where the court 'channeled' the margins in which the administrative authority may operate when taking a new decision.

The following section presents the results of the Utrecht study and compares them with those of Marseille and Van der Heide. We will limit this comparison to the part of Marseille and Van der Heide's study that relates to 2007, since that is the most recent.

3. Research results

This section presents the results of the Utrecht study and compares them with those of Marseille and Van der Heide's study from 2007.

3.1. General overview

Tables 1, 2, and 3 present the total results. The following subsections will describe further details of Table 2 and Table 3 and will compare the results with those of Marseille and Van der Heide from 2007.

The Utrecht study is limited to the legal fields of social security, the environment and construction works and other/miscellaneous. As stated, tax law and the law concerning aliens were excluded, due to the very particular characteristics of these fields of law. We did not examine how many cases reached final settlement for each individual field of law.

Table 1 shows the number of files analyzed for each field of law and makes a distinction between disputes between two parties and disputes between multiple parties. The table shows that 2008 saw a large number of judgments on cases which involved two parties in a dispute relating to social security.

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5 This means that one single judgment has several file numbers, because the case involved several claimants. We included these cases as one single case in our study, in view of the coherence with the decisions opposed by the claimants.

6 This website contains a large number of judgments rendered by the Dutch courts.

7 We were unable to find an exact explanation for cases being listed on www.rechtspraak.nl but not included in the archives. Despite careful selection of files, there might be some inconsistencies. This might be due to inaccurate data entries.

Table 1: Number of files analyzed for each field of law

Field of law ↓ Number of parties →	Two parties	Multiple parties
Social security	130	4
Environment and construction works	32	15
Other/miscellaneous	42	1

Table 2: Data comparison between the Utrecht study results and those by Marseille and Van der Heide

Study	Utrecht District Court 2008	Percentage	Marseille and Van der Heide	Percentage
Number of judgments	224	100,0%	104	100,0%
Final settlements	73	32,6%	31	29,8%
Upholding legal consequences	31	13,8%	11	10,6%
Substitution of administrative decisions	42	18,8%	20	19,2%
Simple annulments	151	67,4%	73	70,2%
Final settlement possible	15	6,7%	26	25%

This table distinguishes two categories. For the Utrecht District Court, the column labeled 'final settlements' includes judgments in which the court used its powers under Article 8:72, paragraph 3 (upholding legal consequences) and Article 8:72, paragraph 4, Awb (substitution of administrative decisions). In 32.6 percent of the cases that were declared well-founded in 2008, the Utrecht District Court produced final settlement. In Marseille and Van der Heide's study regarding final settlements in 2007, 29.8 percent of the judgments produced a 'final settlement'.

The table shows the number of 'simple annulments'. In the Utrecht study, 67.4 percent of the cases involved simple annulment. This concerns the cases where the court declared the appeal well-founded, but without upholding the legal consequences or substitution. In Marseille and Van der Heide, these cases amount to 70.2 percent. The row labeled 'final settlement possible' includes simple annulments for which final settlement could have been reached with relatively little effort but where the court failed to do so. For the Utrecht District Court, this amounted to 6.7 percent of the judgments. In Marseille and Van der Heide's study, a total of 25 percent of cases that were considered well-founded was annulled and referred back to the relevant administrative authority, whereas Marseille and Van der Heide believed that final settlement would have been possible.

Table 3 distinguishes three categories. For the Utrecht District Court, the column labeled 'final settlements' includes judgments in which the court used its powers under Article 8:72, paragraph 3 or Article 8:72, paragraph 4, Awb, or in which it channeled the case. This last subcategory constitutes 5.8 percentages of the cases. Marseille and Van der Heide did not consider the channeling aspect.

Table 3

Study	Utrecht District Court 2008	Percentage
Number of judgments	224	100,0%
Final settlements	86	38,4%
Upholding legal consequences	31	13,8%
Substitution of administrative decisions	42	18,8%
Channeling	13	5,8%
Simple annulments	138	61,6%
Final settlement possible	2	0,9%

If the channeled cases are considered as final settlements and not as simple annulments then only 61.6 percent of the cases involved simple annulment. This concerns the cases where the court declared the appeal well-founded, but without upholding the legal consequences, substitution or channeling the decision. In that case the Utrecht District Court produced final settlement in 38.4 percent of the cases.

The row labeled 'final settlement possible' includes simple annulments for which final settlement could have been reached with relatively little effort but where the court failed to do so. For the Utrecht District Court, this amounted to 6.7 percent of the judgments, when adding the channeled cases to the simple annulments. If the channeled cases are considered as final settlements, this is only 0.9 percent.

A possible conclusion is that the Utrecht District Court seizes most every opportunity to use its powers or instruments to produce final settlement, unlike the courts in Marseille and Van der Heide's study. After all, the difference between the results of Marseille and Van der Heide and those of the Utrecht study cannot be completely explained by the fact that Marseille and Van der Heide placed the judgments in which the court channeled the future decision in the category of 'simple annulments'. The difference is too large for that to be the case. Section 3.3 will take a detailed look at these differences and try to explain them.

3.2. Substitution of administrative decisions, upholding legal consequences and channeling

This subsection compares the Utrecht results for the substitution of administrative decisions by the court's own decision and upholding legal consequences with the relevant results in Marseille and Van der Heide.

3.2.1. Substitution of administrative decisions

Marseille and Van der Heide

Marseille and Van der Heide studied the number of cases in which the court substituted its own decision for the challenged administrative decision, analyzing the court's role in the application of its power to substitute. They distinguish three

different types of substitution. In the first category, *'Court takes amended decision'* the court substitutes a decision of its own for that of the administration because based on substantive findings the court itself has established what the only legally correct decision would be, or is. In substantive terms, as Marseille and Van der Heide argue, this first category is the only situation that involves 'substantial' substitution (Marseille and Van der Heide, 2008, p. 83).

The second category includes cases where the court responded to or consulted with the parties and took a legally correct decision with which the parties agreed, subsequently substituting this decision for that of the administration according to the parties' wishes. This they compare with the situation in which the administrative authority, with the procedure pending, applied Article 6:18 Awb and took a new decision, because it concluded that the challenged decision was unlawful. The difference is that in the former situation it is the court, not the administrative authority that takes the new decision (Marseille and Van der Heide 2008, p. 83). The table places this under *'Court substitutes at parties' request'*.

The third category includes cases where the court officially found that the appeal could not result in a judgment regarding the lawfulness of the challenged decision, because in the appeal proceedings the administrative authority incorrectly assessed the appeal on its merits. The court did not reach a substantive judgment on the use of the substantive power included in the decision challenged. The table indicates this as *'Court officially finds the appeal inadmissible'*.

Looking at the results of Marseille and Van der Heide from 2007, it is striking that in most cases the court officially substituted a decision of its own for that of the administration. This is true for 14 out of the 20 cases in which the administrative authority's decision was substituted. In 5 cases the court substituted because based on substantive findings the court itself established what the only legally correct decision was. There was only one case in which the court used its power to substitute at the request of the parties.

Utrecht 2008

Table 4

Marseille and Van der Heide 2007		
	number	percentage
Court takes amended decision	5	4.8%
Court substitutes at parties' request	1	1%
Court officially finds the appeal inadmissible	14	13.5%
Total	20	19.2%

Table 5

Utrecht District Court 2008		
	number	percentage
Court takes amended decision	33	14.7%
Court substitutes at parties' request	2	0.9%
Court officially finds the appeal inadmissible	7	3.1%
Total	42	18.8%

Our study shows that in Utrecht, for 33 out of 224 files the court substituted its own decision for that of the administrative authority based on substantive findings. In considerably fewer cases, the court officially substituted the administrative decision challenged by its own decision after having officially found that the appeal was inadmissible. This applies to only 7 of the cases. What occurred least frequently was that the court used its power to substitute at the parties' request. This concerned two cases. The conclusion is that in 2008, the Utrecht District Court substituted in 42 of 224 cases.

When comparing these two tables, the first remarkable point is that in 2008 the court used its power to substitute in a considerable higher number of cases by taking an amended decision based on substantive findings: no less than 14.7 percent, where 2007 saw only 4.8 percent. In 2008, the number of cases in which the court officially found the appeal inadmissible and substituted the administrative authority's decision was considerably smaller than in 2007: 3.1 percent in 2008 and 13.5 percent in 2007. The number of cases in which the court used its power to substitute at the parties' request is practically equal, with 1,0 percent in 2007 and 0.9 percent in 2008.

When comparing the total number of cases in which the administrative authority's decision was substituted by a decision of the court without distinguishing between the various categories, the total for 2007 is 19.2 percent and for 2008 it is 18.8 percent. The conclusion is that there is little difference in the number of cases in which the court used its power to substitute.

The lower number of cases in which the court officially found that the appeal was inadmissible may be explained by the relatively large number of social security cases in the Utrecht study, although we cannot be sure about this.

3.2.2. Upholding legal consequences

Marseille and Van der Heide

Marseille and Van der Heide's article does not include a separate table for upholding legal consequences. The presentation and description of their results, however, do offer sufficient information to assess the use of the power to uphold legal consequences and to make a comparison on this point.

For upholding legal consequences, Marseille and Van der Heide distinguish three categories. The first category includes the cases in which the court's role is limited to the observation that, although the challenged decision is unlawful and must be annulled, the legal consequences can be upheld (Marseille and Van der Heide, 2008, p. 83). Our table includes this under *'Limited to observation'*.

The second category includes the cases in which the court observes that, although the decision challenged is unlawful and should be annulled, the legal consequences can be upheld, but where this is not based on the court's own analysis. In these cases, the court reached this conclusion based on information actively supplied by the administrative authority, e.g. in a supplement to the substantiation of the decision in the statement of defence (Marseille and Van der Heide, 2008, p. 83). Our table labels this as *'Administrative authority takes action'*.

The third category included the cases in which the legal consequences must be upheld as a result of an action taken by the court, e.g. asking questions during the hearing with the administrative authority (Marseille and Van der Heide 2008, p. 83). Our table calls this *'Court takes action'*.

The results from Marseille and Van der Heide's study show that the court's role is almost always limited to the observation that the legal consequences of the decision to be annulled can be upheld, therefore without any action taken by the administrative authority or by the court (Marseille and Van der Heide, 2008, p. 83).

Utrecht 2008

The results for the Utrecht District Court also show that the majority of cases in which the legal consequences of a decision are upheld, this is done based on the simple observation that the legal consequences can be upheld. This was true for 24 out of 31 cases in which the legal consequences were upheld. Only in 5 cases the legal consequences of the annulled decision were upheld based on information actively submitted by the administrative authority ('Administrative authority takes action'). In only 2 out of 31 cases the legal consequences were upheld after action taken by the court, i.e. by asking questions during the hearing.

Table 6

Marseille and Van der Heide 2007		
	number	percentage
Administrative authority takes action	unknown	unknown
Court takes action	unknown	unknown
Simple observation	unknown	unknown
Total	11[8]	10.6%

Table 7

Utrecht District Court 2008		
	number	percentage
Administrative authority takes action	5	2.2%
Court takes action	2	0.9%
Simple observation	24	10.7%
Total	31	13.8%

As indicated in the table, Marseille and Van der Heide's results present no details regarding the question of whether the judgment involved a simple observation or action taken by the administrative authority or the court. It is still possible, however, to compare the total number of cases. The conclusion is that in 2008, there was an increase of 3.2 percent point in the number of cases for which the legal consequences were upheld. In 2007, the total number of cases in which the legal consequences were upheld was 10.6 percent and in the Utrecht study this was 13.8 percent.

3.2.3. Channelling

Marseille and Van der Heide's study distinguishes two categories of final settlement: 'substitution' and 'upholding the legal consequences'. In Subsection 1.2 we described that we distinguish a third category: channeling, or substantive channeling, of the

8 For this number, see Marseille & Van der Heide, 2008, p. 82, note 23.

administrative margins for the new decision to be taken after annulment. This way, a dispute can reach final settlement, without the court using its powers under Article 8:72, paragraph 3 or 4, Awb. The Utrecht study, unlike Marseille and Van der Heide, also examined the options to substantively channel a case. The dispute will be solved if the court's judgment is complied with. This type of cases often concerns cases where the administrative authority only needs to take a practical decision, e.g. making a calculation.

The Utrecht study found 13 cases in which the court channeled a decision, making this a percentage of 5.8.

3.3. Grounds for annulment and options for final settlement

This subsection describes the judgments in which the court decided on annulment of the decision *without* using its power to substitute or upholding the legal consequences. As observed in Subsection 3.1, in Marseille and Van der Heide's study this was true for 73 of the 104 cases (70.2 percent) and in the Utrecht study for 151 out of 224 files (67.4%).

We analyzed whether the court could have used its powers under Article 8:72, paragraph 3, and paragraph 4 Awb. We did not analyze whether the court could have channeled the case, since this is difficult to establish. The question whether the legal consequences could have been upheld or whether the administration's decision could have been substituted by a decision of the court has three possible answers: it would have been possible, it would not have been possible, or it might have been possible. The question whether it would have been possible to further channel the case, however, cannot be answered this straightforwardly, but represents a more fluent process. This is because the court may partly channel the administrative margins upon substitution, but at the same time could have, or at least might possibly have, given the administrative authority more detailed instructions.

The simple annulments were examined for two characteristics. The first characteristic is the ground for annulment based on which the challenged decision is annulled. This means that for each judgment, the challenged decision was analyzed for the defect based on which the decision was annulled. The second characteristic is the option for final settlement. This means that we analyzed each judgment on whether the court might have been able to use its power to uphold the legal consequences or to substitute the administration's decision by a decision of its own.

Marseille and Van der Heide also established the grounds for annulment based on which decisions were annulled, for the judgments that resulted in annulment of the challenged decision but not in final settlement. They distinguished six grounds for annulment and placed each judgment in one of these categories.

The first two categories are of a procedural nature: *power of the administrative authority* and *the appellant's right to appeal*. The ground *power of the administrative authority* includes the cases in which the court finds that the challenged decision was taken without the relevant authority having the power to do so. The second category, *appellant's right to appeal*, includes cases in which the administrative authority failed

to recognize someone as interested party or incorrectly found a certain failure to meet a deadline to be inexcusable.

The third and fourth categories are *insufficient substantiation* and *insufficient fact finding*. The ground *insufficient substantiation* pertains to cases in which the court finds that the substantiation of a decision is lacking, incorrect or incomplete. For *insufficient fact finding*, the court finds that the administrative authority's decision was not preceded by sufficient examination of the facts, e.g. because the administrative authority based the challenged decision on an incomplete expert's report.

The fifth and sixth categories are *incorrect establishment of facts* and *incorrect qualification of facts*. There is an extremely fine line between these two categories, which is difficult to define.[9] In both cases, the administrative authority's examination of the facts was sufficient. In the event of an *incorrect establishment of facts*, however, the administrative authority has drawn the wrong factual conclusion from the facts at hand. This may be the case, for example, if the administrative authority concluded that a case involved permanent living in a holiday home, while this conclusion cannot be found to be based on the available facts. In the event of an *incorrect qualification of facts*, the wrong legal consequence has been assigned to the established facts (e.g. when someone has, incorrectly, not been qualified as a 'disabled person' under the Disability (Reintegration) Act) (Marseille and Van der Heide, 2008, p. 90).

Grounds for annulment: Marseille and Van der Heide

Marseille and Van der Heide analysed 73 files for the grounds based on which they were annulled (Marseille and van der Heide, 2008, p. 87).

Table 8

Marseille and van der Heide 2007		
Ground for annulment	number	percentage
Power of administrative body	2	2.7
Appellant's right to appeal	6	8.2
Substantiation	17	23.3
Insufficient fact finding	28	38.4
Incorrect establishment of facts	9	12.3
Incorrect qualification of facts	11	15.1
Total	**73**	**100**

9 Marseille and Van der Heide do not define the difference between these two categories. They do give an example of a case that involved incorrect establishment of facts, followed by an example that involved incorrect qualification of facts. Marseille & Van der Heide 2008, pp. 86-90.

This table shows that substantiation and insufficient fact finding are by far the most frequent grounds for annulment: they make up 61.7 percent of the number of simple annulments. By contrast, the power of the administrative authority and the appellant's right to appeal make up less than 11 percent of the number of simple annulments. Drawing the wrong conclusions from the available facts (incorrect establishment of facts and incorrect qualification of facts) accounts for a little more than a quarter: 27.4 percent of the number of simple annulments.

Grounds for annulment: Utrecht 2008

In our Utrecht study, we divided the judgments that included simple annulment into the same categories as those in Marseille and Van der Heide. The table below compares the Utrecht results with those of Marseille and Van der Heide.

Table 9

Utrecht District Court 2008				
	Marseille and Van der Heide 2007		Utrecht District Court 2008	
Ground for annulment	number	percentage	number	percentage
Power of administrative authority	2	2.7	0	0.0
Appellant's right to appeal	6	8.2	6	4.0
Substantiation	17	23.3	76	50.3
Insufficient fact finding	28	38.4	52	34.4
Incorrect establishment of facts	9	12.3	1	0.7
Incorrect qualification of facts	11	15.1	16	10.6
Total	**73**	**100**	**151**	**100**

There are a number of clear differences. The number of cases that result in annulment based on a procedural ground for annulment (power of administrative authority and appellant's right to appeal) in Marseille and Van der Heide is higher than in the Utrecht study: 10.9 percent against 4.0 percent. This may partially be explained by the fact that as a policy, the Utrecht District Court never refers cases back based on a lack of power of the relevant administrative authority. The fact that the Utrecht study includes fewer procedural annulments automatically means that the percentage of annulments based on other grounds is higher.

The number of cases resulting in annulment based on 'insufficient substantiation' is remarkably high in this study: 50.3 percent, against 23.3 percent in Marseille and Van der Heide.

Another notable difference is in the annulments based on an incorrect establishment of facts: in Marseille and Van der Heide's study, this includes 12.3 percent of simple annulments, and in the Utrecht study 0.7 percent.

After Marseille and Van der Heide established the grounds for annulments on which the judgments were based, they examined the extent to which it would have

been possible for the court to use its powers under Article 8:72, paragraphs 3 and 4, Awb (Marseille and Van der Heide, 2008, p. 87).

In order to do so, they divided the judgments into three categories: '*possible*', '*might have been possible*' and '*not possible.* The category '*possible*' includes the cases for which the court could have produced final settlement with little extra effort. The category '*not possible'* includes the cases in which the court could not have produced final settlement, or would have had to make a great effort. The category '*might have been possible'* includes the cases in which it is unclear whether the court could have produced final settlement using its legal powers.

Options for final settlement: Marseille and Van der Heide 2007

Marseille and Van der Heide report the following results (2008, p. 90):

Table 10

Marseille and Van der Heide 2007		
Category	number	percentage
Possible	26	35.6
Might have been possible	13	17.8
Not possible	34	46.6
Total	**73**	**100**

This shows that in almost half of the cases (46.6 percent) it was not possible for the court to produce final settlement. In more than one third of the cases (35.6 percent), however, the court did have the opportunity to produce final settlement, but did not actually do so. For almost one fifth of the cases (17.8 percent), it cannot be ascertained whether the court could have used its powers under Article 8:72, paragraphs 3 and 4, Awb.

Options for final settlement: Utrecht District Court

In the Utrecht study, we followed Marseille and Van der Heide's model and analyzed the judgments for the options for final settlement. The table below presents the results and compares them with Marseille and Van der Heide:

Table 11

	Marseille and Van der Heide 2007		Utrecht District Court 2008	
Category	number	percentage	number	percentage
Possible	26	35.6	15	10.1
Might have been possible	13	17.8	1	0.7
Not possible	34	46.6	135	89.2
Total	**73**	**100**	**151**	**100**

What is striking is that the number of cases in which the court does not produce final settlement – in spite of having the opportunity – is much smaller in the Utrecht study than in Marseille and Van der Heide, in whose study the cases that could have been settled are a significant part of the total.

The differences might be explained by the various grounds for annulment on which the judgment is based. We will go into these aspects below.

Links between the grounds for annulment and the options for final settlement

Now that we have examined the grounds for annulments and the options for final settlement, we can analyze the link between these two characteristics. Are decisions that were annulled on certain grounds for annulment more suitable for final settlement than decisions annulled on other grounds?

Marseille and Van der Heide

In order to answer this question, Marseille and Van der Heide examined the options for substitution for each ground for annulment. The results are as follows (Marseille and van der Heide, 2008, p. 91):

Table 12

Marseille and Van der Heide 2007							
Category	Power	Procedure	Substantiation	Fact finding	Establishment of facts	Qualification of facts	Total
Possible	1	0	4	2	9	10	26
Might have been possible	0	0	13	0	0	0	13
Not possible	1	6	0	26	0	1	34
Total	2	6	17	28	9	11	73

Based on this table and an analysis of the specific circumstances, Marseille and Van der Heide drew the following conclusions (Marseille and van der Heide, 2008, pp. 87-89):

- *Power:* If a decision is annulled due to a lack of power, the court has options for final settlement. Marseille and Van der Heide describe the example of a subsidy application, on which not the municipal council (*gemeenteraad*) but the mayor and aldermen (burgemeester en wethouders) should have decided. In such cases, the court could ask the mayor and aldermen to adopt it as their own, and thus settle the case;
- *Procedure:* Few options for final settlement, since the decision has not been considered on its merits;
- *Substantiation:* Substitution is difficult, since it remains unclear whether the challenged decision is correct, due to the lack of substantiation;
- *Insufficient fact finding:* Final settlement is not possible, since the facts on which the decision is based are unclear;
- *Incorrect establishment of facts:* Final settlement is possible;

- *Incorrect qualification of facts:* Final settlement is possible.

Utrecht 2008

In our Utrecht study, we also analyzed the link between the grounds for annulments and the options for substitution, using the table in Marseille and Van der Heide:

Table 13

Utrecht District Court 2008							
Category	Power	Procedure	Substantiation	Fact finding	Establishment of facts	Qualification of facts	Total
Possible	0	0	2	0	0	13	15
Might have been possible	0	0	1	0	0	0	1
Not possible	0	6	73	52	1	3	135
Total	0	6	76	52	1	16	151

We can draw the following conclusions:

- *Power:* The Utrecht study did not include any annulments based on a lack of power, and thus no conclusion can be drawn on this point;
- *Procedure:* The Utrecht study found 6 annulments based on a procedural defect. Such declarations stating that the appeal is well-founded are not suitable for final settlement;
- *Substantiation:* 76 judgments stated that the appeal was well-founded based on a lack of substantiation. Although 2 judgments were suitable for final settlement and one judgment might have been suitable for final settlement, the great majority of these judgments were not suitable for final settlement due to lack of substantiation;
- *Insufficient fact finding:* 52 judgments stated that the appeal was well-founded due to insufficient fact finding. None of them was suitable for final settlement;
- *Incorrect establishment of facts:* The judgments examined in the Utrecht study included one statement that the appeal was well-founded based on incorrect establishment of facts. This judgment was not suitable for final settlement.
- *Incorrect qualification of facts:* In 3 cases that involved an incorrect qualification of facts, final settlement was still impossible. In the remaining cases final settlement would have been possible.

Comparison

Before comparing the results, we would like to make two observations. First, when in doubt about the question of which ground for annulment the court used and about the question of whether final settlement would have been possible, we checked these details with the relevant judge. Second, we should emphasize that the information

described above represents research results. We are aware that nowadays more and more often courts try to find options for final settlement in the event of insufficient fact finding and annulments of substantiation (Schueler *et al.*, 2007 and Barkhuysen *et al.*, 2007).[10]

When comparing the results for the link between grounds for annulment and options for final settlement, this leads to the following conclusions. The results for the 'procedural' ground for annulment are similar: Both in Marseille and Van der Heide's study and in the Utrecht study, the conclusion is that when the appeal is considered well-founded on procedural grounds, the dispute is not suitable for final settlement.

For the 'substantiation' ground, the conclusion is that there is a considerable difference between the two studies, not for the 'possible' category, but mainly for the 'might have been possible' category. Unlike Marseille and Van der Heide, for annulments due to a lack of substantiation, we hardly ever concluded that final settlement might have been possible. We believe this may be explained by the fact that in cases of a lack of substantiation, it is usually impossible for the court to produce final settlement without the administrative authority offering further explanation.

For the 'insufficient fact finding' ground, we can conclude that the results of the two studies are very similar. Although Marseille and Van der Heide found 2 cases where final settlement would have been possible, for most cases final settlement would have been difficult to achieve.

For the 'incorrect establishment of facts' ground, we can conclude that there are considerable differences. In Marseille and Van der Heide, all 9 cases could have reached final settlement. The Utrecht study only included 1 annulment on the basis of incorrect establishment of facts, where final settlement would not have been possible.

The last ground for annulment is 'incorrect qualification of facts'. The results in this category are similar. Marseille and Van der Heide conclude that final settlement would have been possible for 10 out of 11 cases. In our study, this category includes 13 out of 16 cases. What is striking is that in the Utrecht study these 13 cases were placed under 'channeling', and were only regarded as simple annulments for the sake of comparison in this section.

4. Conclusions and recommendations

This study served to analyze the way that the Utrecht District Court used its options for final settlement in the year 2008. Marseille and Van der Heide previously reported on a similar study, executed in 2007. We compared our results with theirs and have reached the following conclusions.

The Utrecht District Court seized most opportunities it had for final settlement. This conclusion is based on two observations. In the first place, the Utrecht District Court produced a relatively high number of final settlements. In the second place, of the cases where the court does not produce final settlement, final settlement might

10 See the CRvB judgment of 18 December 2008, AB 2009, 18 annotated by A. Tollenaar (CRvB = Central Appeals Tribunal for the public services and for social security matters).

only have been possible for a small number of cases. After all, in only a very small number of cases (0.9 percent), the court could have produced final settlement. In Marseille and Van der Heide's study, this was 25 percent. We should note, however, that we consider the cases where the court channeled the case – thus informing the parties where they stand – as final settlement as well. The corrected percentage is 6.7%.

This second conclusion needs some important additional comments, however. One of the causes is the large number of annulments based on a lack of substantiation. For this ground for annulment, final settlement is difficult to achieve. Therefore, it seems that for the Utrecht District Court the administrative loop offers the best opportunity for improvement. When, after applying the administrative loop, the decision proves substantively correct, the court can uphold the legal consequences. If it proves impossible to uphold the legal consequences, after applying the loop it will at least be possible to produce a more substantive judgment, in the sense that citizens and administrative authorities receive better insight into the decision yet to be taken. We also recommend careful analysis of whether the case really involves a lack of substantiation and whether it does not actually involve incorrect establishment of facts, for example. If the court finds that the case involves incorrect establishment of facts, it will, or might, be able to offer the parties more clarity. Moreover, final settlement will then be easier to reach.

References

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