

René J.G.H. Seerden (ed)

Administrative Law of the European Union, its Member States and the United States

A Comparative Analysis

109

Third edition



intersentia



Editor:
René Seerden

Administrative Law of the European Union, its Member States and the United States

A COMPARATIVE ANALYSIS

Third Edition



Editor:
René Seerden

Administrative Law of the European Union, its Member States
and the United States

Third Edition

Intersentia Ltd
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

ISBN 978-1-78068-109-2
D/2012/7849/97
NUR 823

© 2012 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover illustration: © Danny Juchtmans

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

No part of this book may be reproduced in any form, by print, photocopy, microfilm or any other means, without written permission from the authors.

Administrative Law of the European Union, its Member States and the United States

A COMPARATIVE ANALYSIS

FOREWORD TO THE FIRST EDITION

About two years ago René Seerden and Frits Stroink started working out the idea of writing an introductory book about comparative administrative law in Europe. One reason for this idea was the necessity of providing the students in the European Law School at Maastricht University with some materials about administrative law, particularly in (several of) the Member States of the European Union. We believed that a suitable and up-to-date comparative introductory description of administrative law of at least five EU countries was missing and would be very worthwhile to realise.

Now in the fall of 2002 – the text for this book was concluded on 1 July 2002 – we are happy to introduce this book. After several e-mails we managed to find native authors who wanted, within a certain framework and within a set period of time, to write about the administrative law in Belgium, Germany, France, the Netherlands, Sweden and the United Kingdom. Unfortunately the author for Sweden withdrew, but we managed to find authors who wanted to write about administrative law at the level of the European Union and in the United States of America. This means that this book deals with seven systems of administrative law. We hope that it is possible in the future (in subsequent editions) to extend this book with at least three other European countries.

In closing the short foreword to this book, we thank all the authors for their participation. Of course, without them this book could not have been realised. We also want to express our gratitude to Chris Fretwell for the English editing of most of the chapters and especially to Marjo Mullers, for the production of the camera-ready copy for this book. Naturally, the final responsibility for its completion lies with the editors. We hope that this book will provide the reader with a concise synopsis of the state of administrative law at the level of the European Union, in the various EU Member States and the United States of America.

René Seerden and Frits Stroink
Maastricht, August 2002

FOREWORD TO THE SECOND EDITION

In the spring of 2006 I started with the proceedings of the second edition of this introductory book about comparative administrative law, because the first edition proved to be very worthwhile for especially students in the European Law School at Maastricht University (but also at other universities).

The intention was to get this second edition in the bookstores in the beginning of 2007. Due to e-mail delivery problems my message to the authors to get started did not receive many of them. In the late fall of 2006 this became clear and I had to wait somewhat longer before all the draft contributions – here and there a new co-author joined – received me.

Now in the fall of 2007 – the text for this book was concluded in the spring of 2007 – I am very happy to introduce the second edition. Although it was the second edition various e-mails were necessary to get all the contributions timely and (as much as possible) within the set format. Apart from an up-date a few important new elements are addressed by the authors, especially enforcement by and liability of the administration. I decided for the second edition not to enlarge the number of States. One of the reasons is that the book is of an introductory nature and the number of pages is more or less restricted. An enlargement of the number of states is maybe something for a next edition.

In closing the short foreword to this book, I thank all the authors for their (renewed) participation. Of course, without them this book could not have been realized. I also want to express my gratitude to Frits Stroink, who acted as my co-editor in the first edition and during the completion of this second edition got other responsibilities. A special thank you goes to Marjo Mullers, for the production of the camera-ready copy. Although it was the second edition it was not an easy job to ‘synchronize’ the various contributions. Naturally, the final responsibility for its completion lies with me. I hope that the second edition like the first edition of this book will provide the reader with a concise synopsis of the state of administrative law at the level of the European Union, in the various EU Member States and the United States of America.

René Seerden
Maastricht, October 2007

FOREWORD TO THE THIRD EDITION

In the beginning of the summer of 2011 the publisher and I talked about a third edition of this book. We agreed not to enlarge the number of States since the number of pages is more or less restricted and adding a 'new' state would mean skipping an 'old' one.

In January 2012 the co-authors of the second edition let me know that they were willing to participate again and would send in their updates/changes around the beginning of May 2012, so that there was time for possible editorial comments. The intention was to get this third edition ready before September, so around the beginning (at some universities at least) of the new academic year.

The proceedings for the third edition lasted somewhat longer than expected because a few co-authors needed some extra time for the updates/changes of their contribution. I expect that the book will be for sale in the bookstores around October 2012.

More problematic is that the author for Belgium after she agreed to come with an update around half July 2012 broke this promise. A last e-mail from my side to give her time until 1 August remained unanswered. Unfortunately this means that Belgium is not in the third edition anymore and no time was left to deal with a new country. That is something for a next edition.

Now I am very happy that Marjo Mullers started the production of the camera-ready copy. A special thank for her again. I also want to express my gratitude to Danielle Wenders, who succeeded Frits Stroink as co-author for the Dutch contribution. Last but not least I thank the other authors for their (renewed) participation. Without them this book could not have been realized. Of course some did better than others in the sense that the first did not confine themselves to a simple update (in time) of the previous contribution but came with a more substantial change regarding proposed items by me, such as the exact contents of the court proceedings (remedies, test), the fees for and costs of these proceedings, the possibility of claiming financial compensation and the (growing) European dimension.

The aim of the third edition is the same as for the first and second one: the book is to give introductory insight into administrative law in various States and will provide the reader with a concise synopsis of the state of administrative law at the level of the European Union, in the various EU Member States and the United

States of America. Hopefully the third edition will like the first two editions help especially students at Maastricht University but also at other universities to get this introductory insight into administrative law.

René Seerden
Maastricht, August 2012

LIST OF CONTRIBUTORS

France

Prof. dr. Jean-Bernard Auby, Professor of Public Law (Chair: Changes in Governance and Public Law), Sciences Po Paris (jeanbernard.auby@sciences-po.org)

Lucie Cluzel-Metayer, Maître de Conférences, University of Paris II (lucie.cluzel-metayer@u-paris2.fr or luciecluzel@gmail.com)

Germany

Prof. dr. Meinhard Schröder, Emeritus Professor of Public, International and European Law, Faculty of Law, University of Trier (meinhard.f.schroeder@web.de)

Netherlands

Dr. René Seerden, Associate Professor of (Comparative) Administrative and Environmental Law, Faculty of Law, University of Maastricht and Administrative Judge at the District Court of Maastricht (rene.seerden@maastrichtuniversity.nl)

Daniëlle Wenders, Senior Legal Advisor Ministry of Safety and Justice (d.w.m.wenders@minvenj.nl)

United Kingdom

Dr. Katharine Thompson, LLB MA PhD, Senior Lecturer, Department of Law, De Montfort University, Leicester (kht@dmu.ac.uk)

Dr. Brian Jones, Consultant, Planning and Environmental Law, Herbert Smith Plc, London and Honorary Professor, University of Wales (brian.jones@uwclub.net)

European Union

Prof. dr. Rob Widdershoven, Professor of European Administrative Law, University of Utrecht (r.widdershoven@law.uu.nl)

United States

Prof. dr. Philip Harter, Scholar in Residence, Vermont Law School and Earl F. Nelson Professor of Law Emeritus, University of Missouri, Columbia (pharter@vermontlaw.edu)

TABLE OF CONTENTS

Foreword to the First Edition..... v

Foreword to the Second Edition.....vii

Foreword to the Third edition ix

List of Contributors..... xxiii

Introductory Remarks 1

Jean-Bernard Auby and Lucie Cluzel-Métayer

Administrative Law in France 5

1. Definition and Scope of Administrative Law 5

1.1. Historical Background 5

1.2. Scope of Administrative Law. Matters submitted to Administrative Law 6

2. Legal Design of the Administration 7

2.1. Public Legal Persons and Public Organs 7

2.2. Legal Arrangement of the State..... 8

2.3. Local Government 9

3. Substance of Administrative Powers. Administrative Acts 11

3.1. Public Powers 11

3.1.1. Enforcement..... 15

3.2. Administrative Contracts 17

4. Administrative Norms. Administrative Legality 18

4.1. Hierarchy of Norms 18

4.2. Constitutional Rules 20

4.3. International Rules 21

4.4. Legality 21

5.	Administrative Litigation. Protection of the Citizens against the Administration	23
5.1.	The Organization of the Courts.....	23
5.2.	Jurisdiction of Administrative Courts.....	24
5.3.	Standing.....	28
5.4.	Grounds of Review	31
5.5.	Administrative Liability	32
5.6.	Costs.....	35
6.	Conclusion	35
	Bibliography.....	37
	Websites.....	37

Meinhard Schröder

	Administrative Law in Germany	39
1.	Introduction.....	39
1.1.	The Concept of Administration.....	39
1.2.	Administration under the Governance of Constitutional Law	41
1.3.	Influence of the Law of the European Union.....	43
1.4.	General Administrative Law vs Specific Areas of Administrative Law	43
1.5.	Public Law vs Private Law.....	43
1.6.	The Sources of Law.....	44
1.7.	Fundamentals of Administrative Law	46
2.	Administrative Organization.....	47
2.1.	General Structure of Federal Administration (<i>Bundesverwaltung</i>)	48
2.2.	General Structure of the Administration of the States (<i>Landesverwaltungen</i>).....	49
2.3.	Administration on Behalf of the Federation (<i>Bundesauftragsverwaltung</i>)	50
2.4.	Joint Tasks (<i>Gemeinschaftsaufgaben/ Verwaltungszusammenarbeit</i>)	51
2.5.	Municipal Administration (<i>Selbstverwaltung</i>)	51
3.	Forms of Action of the Public Administration	54
3.1.	Administrative Act (<i>Verwaltungsakt</i>)	55
3.1.1.	According to the Subject-Matter	57
3.1.2.	According to the Consequences.....	57
3.1.3.	According to the Legal Limits on the Administrator	58
3.2.	Statutory Order (<i>Rechtsverordnung</i>)	58
3.3.	By-law (<i>Satzung</i>).....	59
3.4.	Guidance (<i>Einzelweisung</i>)	59
3.5.	Administrative Regulation (<i>Verwaltungsvorschrift</i>).....	59
3.6.	Administrative Planning (<i>Plan</i>).....	60
3.7.	Real Act or Simple Sovereign Action (<i>Realakt/ schlichtes Verwaltungshandeln</i>).....	61
3.8.	Administrative Contract (<i>Verwaltungsvertrag</i>).....	62
3.9.	Administrative Private Law Acts (<i>privatrechtliche Handlungsformen</i>)	65

4.	Administrative Proceedings	65
4.1.	Material and Procedural Rules	66
4.1.1.	Substantive Principles	66
4.1.1.1.	The Principle of Legality of the Administration (<i>Gesetzmäßigkeit</i>)	66
4.1.1.2.	Equality (<i>Gleichheitsgrundsatz</i>)	66
4.1.1.3.	Principle of Proportionality (<i>Grundsatz der Verhältnismäßigkeit</i>)	67
4.1.1.4.	Legal Protection for <i>Bona Fide</i> Acts (<i>Vertrauensschutz</i>)	67
4.1.1.5.	Principle of Economy (<i>Grundsatz der Wirtschaftlichkeit</i>)	68
4.1.2.	Procedural Principles	68
4.2.	The Informal Procedure	68
4.2.1.	Beginning of the Administrative Procedure	69
4.2.2.	Administrative Progress	69
4.2.3.	Termination of Administrative Proceedings	70
4.3.	Special Administrative Proceedings	70
4.3.1.	Procedures Dealt with by a Single Authority	70
4.3.2.	Formal Procedure (<i>förmliches Verfahren</i>)	71
4.3.3.	Planning Procedure (<i>Planfeststellungsverfahren</i>)	71
4.3.4.	Appeal Procedure (<i>Rechtsbehelfsverfahren</i>)	71
4.4.	The Participants and their Rights	72
4.4.1.	The Participants	72
4.4.2.	Hearing of the Participants (<i>Anhörungspflicht</i>)	72
4.4.3.	Duty to give Information and Advice (<i>Auskunftsrecht</i>)	72
4.5.	Consequences of a Defective Administrative Procedure	73
4.5.1.	Invalidity (Nullity) of an Administrative Act	73
4.5.2.	Appealability (Voidability) of an Administrative Act	74
4.5.3.	Curing of Defects	74
4.5.4.	Irrelevance of Defects	74
4.5.5.	Re-interpretation (<i>Umdeutung</i>) of an Illegal Administrative Act	74
5.	The Basis of Judicial Review in Administrative Matters	75
5.1.	How Intensive is Review by the Courts?	76
5.2.	Overview of the Judicial System and Administrative Courts	77
5.3.	Conditions for Judicial Relief	81
5.3.1.	Scope of Administrative Jurisdiction (<i>Zuständigkeit</i>)	81
5.3.2.	Participants (<i>Beteiligte</i>)	81
5.3.3.	Forms of Suits (<i>statthafte Klageart</i>)	82
5.3.4.	Right of Action (<i>Klagebefugnis</i>)	84
5.3.5.	Objection (<i>Widerspruch</i>)	85
5.3.6.	Time Limit (<i>Frist</i>)	86
5.3.7.	Absence of Sub-Justice (<i>Rechtsschutzbedürfnis</i>)	86
5.4.	Rules Governing Court Procedure	86
5.5.	Court Decisions and Remedies	87
5.5.1.	Court Decisions	87
5.5.2.	Remedies	88
5.6.	Interim Relief	88
5.7.	Costs	89

6.	Enforcement of Administrative Law	89
6.1.	Introduction	89
6.2.	Legal Framework	90
6.3.	Main Principles of Administrative Enforcement	90
6.3.1.	Execution of Money Claims (<i>Beitreibungsverfahren</i>)	91
6.3.2.	Enforcement of Administrative Acts	91
6.3.2.1.	General Premises of Enforcement	91
6.3.2.2.	Proceedings	91
6.3.2.3.	The Means of Coercion (<i>Zwangsmittel</i>)	92
6.3.2.4.	Execution by Substitution or Substitute Performance (<i>Ersatzvornahme</i> , § 10 VwVG)	92
6.3.2.5.	Penalty Payment (<i>Zwangsgeld</i> , § 11 VwVG)	92
6.3.2.6.	Immediate Constraint (<i>Unmittelbarer Zwang</i> , § 12 VwVG)	92
6.4.	Legal Protection by Judgement or by Objection	93
6.5.	Interim Relief	93
7.	State Liability and Rights to Compensation	93
7.1.	Sources and Principles	93
7.2.	§ 839 <i>Bürgerliches Gesetzbuch</i> / Article 34 of the Basic Law (<i>Amtshaftung</i>) and its Requirements	94
7.2.1.	Civil Servant (<i>Beamter</i>)	94
7.2.2.	Breach of Official Duty (<i>Amtspflichtverletzung</i>)	94
7.2.3.	Fault (<i>Verschulden</i>)	95
7.2.4.	Damage (<i>Schaden</i>)	95
7.3.	European Law Aspects	95
7.4.	Compensation for Expropriatory Action	95
7.5.	Compensation for Non-pecuniary Infringements	96
7.6.	Other Claims	96
7.7.	Legal Protection	96
8.	Recent and Future Developments	96
9.	Summary and Conclusions	98
	Bibliography	99
	Websites	100

René Seerden and Daniëlle Wenders

	Administrative Law in the Netherlands	101
1.	Introduction	101
1.1.	What is Administrative Law?	101
1.2.	General Administrative Law Act (<i>Algemene wet bestuursrecht</i> , Awb)	103
1.3.	(The use of) Administrative Powers	105
2.	Who has Administrative Powers?	107
2.1.	Organs and Legal Persons	107

2.2.	Decentralization versus Deconcentration and Independent Administrative Organs	110
3.	What Instruments are Available to the Administration?	111
3.1.	Actions of Administration (under Public Law)	111
3.2.	Administrative Decisions governed by Public Law (<i>besluiten</i>)	112
3.2.1.	Administrative Decisions in Individual Cases (<i>beschikkingen</i>)	112
3.2.1.1.	Individual Decisions on Application and <i>Ex Officio</i> Decisions in Individual Cases	113
3.2.1.2.	Individualized Decisions addressed at One or Several Persons and Decisions Relating to Objects	113
3.2.1.3.	Decisions <i>in Personam</i> and Decisions <i>in Rem</i>	114
3.2.1.4.	Discretionary and Mandatory Decisions	114
3.2.1.5.	Decisions Granting Rights and Posing Obligations	114
3.2.1.6.	Perpetual and Temporary Decisions	114
3.2.2.	Administrative Decisions of General Application (<i>besluiten van algemene strekking</i>)	115
3.2.3.	Administrative Actions and (possible) Appeal to the Administrative Court	116
3.2.4.	Résumé	117
3.3.	Use of Private Law by the Administration	119
4.	What are the Norms with which the Administration has to comply?	123
4.1.	Introduction: Hierarchy of Norms	123
4.2.	Principles of Proper Administration (<i>algemene beginselen van behoorlijk bestuur</i> , ABBB)	126
4.2.1.	Due Care	126
4.2.2.	Prohibition of Bias	126
4.2.3.	Specificity and <i>détournement de pouvoir</i>	127
4.2.4.	Prohibition of Arbitrariness	127
4.2.5.	Proportionality	127
4.2.6.	Reasoning	128
4.2.7.	Good Faith, Legal Certainty and Equality	128
4.2.7.1.	Good Faith	128
4.2.7.2.	Legal Certainty	129
4.2.7.3.	Equality	129
4.2.8.	Procedures of Decision-Making	130
4.2.8.1.	Failure to take a Decision	131
4.2.8.2.	Decision on Objection	131
5.	Legal Protection against Administrative Action	131
5.1.1.	Towards Enactment of the Awb	132
5.1.2.	Enactment of the Awb	134
5.2.	Administrative Proceedings	135
5.3.	Access to the Courts	137
5.3.1.	Present Court System	137
5.3.2.	Appeal to the District Court	141

5.3.2.1. Right to Appeal	141
5.3.2.2. Interested Parties	141
5.3.2.3. Schutznorm.....	142
5.3.2.4. Exhausting Administrative Remedies and the Scope of the Dispute	142
5.3.3. Proceedings at the District Court.....	143
5.3.3.1. Principles of Due Process	143
5.3.3.2. Scope and Grounds of Review	144
5.3.3.3. Review of Discretionary Power.....	144
5.3.3.4. Recours Subjectif and/or Objectif.....	146
5.3.3.5. Recent Developments	147
5.3.4. Judicial Dispute-Settlement Powers	148
5.3.4.1. Remedies	148
5.3.4.2. Additional Remedies.....	148
5.3.4.3. Judicial Dispute-Settlement Powers during the Procedure.....	150
5.3.4.4. Recent Developments and Sequence of Remedies.....	151
5.3.4.5. Damages	152
5.3.4.6. Costs.....	153
5.3.5. Right to Provisional Ruling (Interim Relief)	154
5.3.6. Complaints at the (National) Ombudsman.....	154
6. Enforcement of Administrative Law.....	155
6.1. Administrative Law Enforcement	156
6.2. Civil Law Enforcement.....	159
6.3. Penal Law Enforcement.....	160
6.4. Criminal Enforcement by Administrative Authorities	161
7. Compensation for (Un)lawful Actions of the Administration (Financial Liability).....	162
7.1. Compensation for Unlawful Actions of the Administration	162
7.2. Compensation for Lawful Actions of the Administration.....	163
7.3. Liability Procedures in the Near Future	164
8. Conclusion	165
Bibliography.....	167
Websites.....	168
Annex: Key provisions General Administrative Law Act (<i>Algemene wet bestuursrecht</i>).....	169

Katharine Thompson and Brian Jones

Administrative Law in the United Kingdom.....	177
1. Introduction.....	177
1.1. What is Administrative Law?.....	177
1.2. The Constitutional Context.....	178
1.2.1. Terminology	178

1.2.2.	Supremacy of Parliament	179
1.2.3.	Human Rights Act 1998	181
1.2.4.	Supremacy and the EU	182
1.2.5.	Separation of Powers	183
1.2.6.	The 'Rule of Law'	183
1.2.7.	Royal Prerogative	184
2.	The Distribution of Administrative Powers.....	185
2.1.	Institutions of Government.....	185
3.	How are Administrative Decisions made?.....	188
3.1.	Sources of Power.....	189
3.1.1.	Parliamentary Legislation	189
3.1.2.	Delegated Legislation.....	189
3.2.	Inquiries.....	192
3.3.	Inspections	194
3.4.	Licensing	195
3.5.	Public Participation and Open Government.....	196
3.6.	The Use of Private Law by the Administration.....	197
3.6.1.	Contractual Powers	197
3.6.2.	Enforcement of Standards.....	198
4.	Non Judicial Redress of Grievances	201
4.1.	Ombudsmen	201
4.2.	Tribunals	203
5.	Judicial Review.....	206
5.1.	General Points	206
5.2.	Filing a Claim for Judicial Review	209
5.3.	Remedies in Judicial Review	210
5.4.	Standing.....	211
5.5.	Public/Private Divide.....	212
5.6.	Exceptions to 'Procedural Exclusivity'	215
5.7.	Matters which are not Reviewable	216
5.8.	Legitimate Expectations.....	218
5.9.	Grounds for Judicial Review	220
5.9.1.	Illegality	220
5.9.2.	Irrationality	222
5.9.3.	Procedural Impropriety	226
6.	Liability of Public Authorities	230
7.	Conclusion	233
	Bibliography.....	234
	Annex: Civil Procedure Rules Part 54.....	237