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Peter Wattel as administrative-law advocate general: the right man in the right place at the right time

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1. Introduction

Peter Wattel has been a State Councillor in special session in the Administrative Law Division of the Council of State since 1 January 2018 and works there as an Advocate General. He has since held similar positions at the Trade and Industry Appeals Tribunal and the Central Board of Appeal, the other two highest administrative courts.

He took office at a time when administrative law was at a crossroads. Should we continue with the old, formalistic approach, with plenty of room for administrative bodies to get away with mistakes or decisions that can be criticised in other ways? Or should we start a development towards a more citizen-friendly administrative law with enough room for the courts to correct administrative bodies?

The hypothesis of this contribution is that the conclusions, i.e. opinions, that Peter Wattel has reached since taking office, have significantly contributed to the choice of the second option of a more responsive and more legally protective administrative law.

In order to test the value of this hypothesis, the five opinions that he presented on behalf of the Administrative Law Division will be dealt with chronologically below. The two opinions on behalf of the Trade and Industry Appeals Tribunal have not been included for reasons of length and specificity.[1] No opinion was found in a case before the Central Board of Appeal. The essence of the opinion will be discussed and, where possible, the manner in which the relevant highest administrative courts followed it up will be considered.

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1 These are ECLI:NL:CBB:2018:187 (about fines for violation of the Fertiliser Act) and CLI:NL:CBB:2019:658 (about the demarcation of objects in WOZ assessments). For their processing, see the judgments with numbers ECLI:NL:CBB:652, 653 and 64 and ECLI:NL:CBB:2020:364, respectively.

2. Opinion of 4 April 2018 on special circumstances in the collection of a penalty payment

The case in which this opinion[2] – Peter Wattel's first in this role on behalf of the highest administrative courts – was made concerns the recovery of amounts by the State Secretary of Infrastructure and the Environment due to the illegal storage of waste imported for processing at a site in Hardenberg. The State Secretary had previously imposed a penalty payment on the importer of the waste. Because the importer failed to remove and process the waste in time, the government itself removed the waste (administrative coercion). The State Secretary collected the forfeited penalty payment and recovered the costs of removing the waste from the importer. However, according to the importer, there were circumstances in which the State Secretary should have moderated the amounts or waived the collection altogether, partly because the various penalties would make the company go bankrupt and put him in debt for the rest of his life.
The President of the Administrative Law Division asked Advocate General Wattel which special circumstances administrative bodies and the administrative courts should take into account when making enforcement decisions. He asked that special attention be paid to the offender's financial capacity. The President also wanted to know whether an administrative body should investigate special circumstances on its own initiative, such as possible concurrence with sanctions imposed by other administrative bodies.
According to the Advocate General, the administrative body must take all relevant circumstances into account when collecting amounts. This includes special circumstances such as an offender's financial strength and concurrence with other remedial sanctions. According to the Advocate General, an administrative body does not have to investigate the existence of such circumstances of its own accord, insofar as the burden of proof of such circumstances lies with the offender. The offender's financial capacity and concurrence with other sanctions of which the administrative body does not have to be aware are circumstances that an offender must prove. The administrative body does have to take into account the circumstances known to it and give the offender the opportunity to present and prove special circumstances.
The administrative court reviews the administrative body's decision and must therefore also take into account the special circumstances that the administrative body took or should have taken into account.
In this case, the State Secretary concluded that, apart from the concurrence of two periodic penalty payments, the importer of the waste materials had not demonstrated any special circumstances; the State Secretary was therefore entitled to collect the periodic penalty payment and to recover the costs of the administrative coercion. However, the collection of the periodic penalty payment must be mitigated, because the periodic penalty payment had been running for some time in con-

2 ECLI:NL:RVS:2018:1152.

junction with a similar one imposed by the Municipality of Hardenberg. He also concludes that the European law principle of defence had been violated, but that no consequences had to be drawn from that in this case.
The importer of the waste has now withdrawn its appeal. This brought the proceedings before the Administrative Law Division to an end. No further decision has therefore been taken in this case. However, the opinion was involved in another collection case.[3] In that case, the Division found that, in principle, an interested party cannot successfully put forward grounds in the proceedings against the recovery decision or the decision to recover costs that it brought forward or could have brought forward against the order for a periodic penalty payment or administrative coercion. This is possible only in exceptional cases. An exceptional case may be deemed to exist, for instance, if it is evident that no offence has been committed or the person involved is not an offender.

3. Opinion of 20 March 2019 on the principle of legitimate expectations

The President of the Administrative Law Division of the Council of State subsequently asked Advocate General Peter Wattel to deliver an opinion in a case concerning a roof terrace in Amsterdam. An inhabitant of Amsterdam was ordered to remove a roof terrace from her house by the municipality of Amsterdam, because she did not have a permit for the terrace. If she failed to do so, she would have to pay a penalty. According to the woman, however, the building inspector and other officials at the time assured her that no permit was needed for the roof terrace and that she would be left alone. She therefore believed that the municipality would not impose a penalty payment on her.
The Advocate General was asked, among other things, to address the question when statements made on behalf of a government body can create a legitimate expectation that the government body will not impose a recovery sanction (such as a penalty payment or an administrative order). The Administrative Law Division furthermore wanted to know which requirements such a statement must meet and whether violation of legitimate expectations can be repaired by compensation.
According to the Advocate General, if the administrative court has to assess whether a government body that has created legitimate expectations that should be respected, it must follow three steps in his opinion[4]. First of all, there must be a promise, or an utterance that the citizen may interpret as a promise. Secondly, the promise must have been made by the administrative body itself, or by a person who the citizen could reasonably assume expressed the current views of the competent administrative body. The third step is to weigh up the interests of the person to whom the promise was made, the interests of third parties (such as neighbours

3 ECLI:NL:RVS:2021:1306.

4 ECLI:NL:RVS:2019:896.

or competitors) and the interests of society. According to the Advocate General of the Council of State, the case law should be changed in order to make it possible to assume easier that the first two steps have been met, and the emphasis should be more on balancing interests. This would also make it possible to sooner address the question of whether the citizen who has a legitimate expectation is entitled to compensation.
He recommends that legitimate expectations should be accepted more quickly than in the past in a way that is more in line with the citizen's perception of the world. This can be achieved by setting less strict requirements for the competence of the public official who makes promises and by introducing a possibility of compensation for cases in which actual fulfilment of legitimate expectations is impossible due to third-party interests.
The Administrative Law Division subscribed to the opinion, applied the three steps in its ruling on the roof terrace, and ruled that the woman's reliance on the principle of legitimate expectations was successful.[5] Applying the third step, the Administrative Law Division ruled that, although the principle of legitimate expectations does not extend so far that justified expectations must always be honoured, the municipal authority 'should reasonably have refrained from enforcement'. The roof terrace had been there for 25 years, the municipality did not enforce the law earlier even though it knew about the roof terrace, there had been no complaints from the neighbours and there were also roof terraces on the adjacent properties.

4. Opinion of 11 March 2020 on the reconsideration of a decision to impose or not to impose a recovery sanction

If an administrative body is asked to take action against a violation, it may decide to impose a restorative sanction. But the administrative body may also refrain from doing so. This is what happened in the case that prompted the chairman of the Administrative Law Division to request an opinion from Peter Wattel.
Greenpeace had asked the Minister of Agriculture, Nature and Food Quality (the **Minister**) to take action against Dutch timber companies importing wood from the Amazon area, among others. The wood may have been felled illegally there. The Minister warned several companies, but did not impose sanctions. Greenpeace objected to this, but the Minister persisted in her decision. The President of the Administrative Law Division asked Advocate General Wattel to address this type of situation in an opinion, in which, even after reconsideration of the objection, the imposition of a reinstatement sanction for a violation of the EU Timber Regulation was refused.
According to Wattel in his opinion[6], recovery sanctions must be effective and proportionate. The reconsideration of decisions whether or not to impose such sanc-

5 ECLI:NL:RVS:2019:1694.

6 ECLI:NL:RVS:2020:738.

tions must therefore lead to effective and proportionate sanctions. What matters is that the standard to be enforced is actually applied. The purpose and scope of that standard therefore determine which facts, circumstances and policy must be considered relevant in the reconsideration. This usually means that the administrative body 'must consider both the then and the now, as well as everything around it and in between', according to the Advocate General. He also discusses other issues, such as the imposition of a sanction to prevent the repetition of a violation.
Finally, Wattel noted that no administrative fines can be imposed in the Netherlands for violations of the European Timber Regulation. In his opinion, it is contrary to EU law if the Public Prosecutor chooses not to prosecute companies for violations of the Timber Regulation, as in this case. He also believes that the Minister could make more use of the possibility of withdrawing timber from the market. He furthermore recommended reversing the burden of proof on timber importers as to whether they have taken the necessary precautions.
The Administrative Law Division concurred almost entirely with Wattel's opinion.[7] The Minister must take *old* circumstances into account, i.e. the situation as it was at the time of the previous decision, but also *new* developments, according to the Division. If a violation has occurred, it must be ended or it must be prevented from happening again. The Minister must use the review to assess whether a measure is necessary. If so, the measure must be effective and proportionate.
The Minister must therefore assess whether she still has to impose measures on two companies to prevent the import of illegally felled wood from the Amazon. Such measures – such as the imposition of a penalty – serve as a big stick for companies to comply with the obligations of the European Timber Regulation. The Minister must therefore reconsider her earlier decision, also taking the new developments into account. In doing so, the Administrative Law Division has already considered the Minister's point of view that remedial sanctions are no longer necessary due to the new developments. It appears that three companies have not been importing timber for a long time. The imposition of a reinstatement sanction no longer makes sense in those cases. Two other companies appear still to be importing timber. For these two companies, the Minister must assess in her new decision whether she can and must impose a reinstatement sanction.

5. Opinion of 7 July 2021 on the intrusiveness of the administrative law test and the significance of the principle of proportionality

In February 2021, the President of the Administrative Law Division asked Advocates General Wattel and Widdershoven to deliver an opinion on the judicial proportionality test in three specific legal cases. These are two cases in which a mayor closed down a residence for a year and for six months, respectively, after drugs had

7 ECLI:NL:RVS:2020:2571.

been found there. The last case concerns the decision to collect a penalty payment for repeated violation of the Housing Act (illegal rental). The opinion is important first and foremost for these three legal cases, but also for the review by the administrative courts of numerous other cases, such as those concerning benefits.
The administrative judge must adjust the proportionality test of administrative measures, such as a house closure or a penalty payment. This is the opinion of Advocates General Widdershoven and Wattel in their opinion on this subject.[8] The administrative judge should test the proportionality of administrative measures, as is done in European law. The administrative judge should furthermore let the intensity of his review depend on the concrete interests involved in an administrative measure and on the question to what extent that measure affects fundamental rights. In addition, the Advocates General are of the opinion that the administrative courts should also be able to test an administrative measure against the principle of proportionality if the law provides that the measure must be imposed.
The main recommendations of the Advocates General are as follows:

- When assessing the proportionality of an administrative measure, such as a house closure or a penalty payment, the administrative courts should follow the three-step proportionality test from European law. This means that an administrative measure must be assessed in terms of (1) suitability for the aim pursued, (2) necessity (is there no less drastic measure that is just as effective?) and (3) the individual effect of the administrative measure (e.g. the duration of a closure or the amount of a penalty payment).
- The intensity of the administrative judge's assessment of the proportionality of an administrative measure should depend on the weight of the public and private interests involved in such a measure and on the extent to which the measure affects fundamental rights. The existing strict distinction between only two possible intensities of review (cautious and intrusive) should disappear.
- The cases in which an administrative measure can be imposed may be regulated in a policy, a general binding regulation (e.g. a ministerial regulation) or a law passed by parliament. In the first two cases, the judicial proportionality test is not limited by the Constitution or any other rule, according to the Advocates General. An administrative judge may disapply a policy or a general binding regulation in a specific case if an administrative measure based on it has a disproportionate effect. The judge may also declare such a regulation non-binding if the application of the regulation structurally leads to disproportionate results. The generally binding rule can then no longer be applied at all and will have to be replaced.
- The situation is different if the administrative measure is to be imposed on the grounds of a law that has been passed by parliament. In that case, in principle, there is room for a proportionality test only if there is a basis for it in European law or directly effective international law. However, the administrative courts

8 ECLI:NL:RVS:2021:1468.

may interpret the law as far as possible in the light of the general principles of law, including the principle of proportionality.
- If this does not help, the administrative court cannot declare the law non-binding. It can disapply the law in a specific case, but only if the disproportion is the result of a circumstance that was not considered by the legislature.
- If the legislature has included this circumstance in its considerations, the administrative judge has no possibility to intervene, because the Constitution prohibits this. The judge will then have to apply the law. The Advocates General do recommend that in such a case the administrative judge state in his or her ruling that the law violates the legal principles. It is then up to the government and parliament whether they want to attach consequences to this.
- The Advocates General believe that the time is ripe for a less strict interpretation of the review prohibition in the Constitution. This would give the courts more room to test laws passed by parliament against general principles of law, such as the principle of proportionality. They are of the opinion that the ban on review should eventually disappear from the Constitution.

This is a groundbreaking opinion that calls for a reconsideration of long-standing case law on the relationship between courts and administrative authorities. The Administrative Law Division subscribed to the opinion on the main points.[9]
According to the Administrative Law Division, the question whether and, if so, how intensively the administrative court tests the proportionality of a government decision depends on many factors. That test differs from case to case. When testing against the principle of proportionality, the administrative courts will distinguish between the appropriateness, necessity and balance of the challenged government decision.
Following one of the recommendations in the opinion, the administrative courts will, when testing the principle of proportionality, distinguish between the appropriateness, necessity and balance of the government decision. If there is reason to do so, the administrative courts will test (1) whether the decision is suitable to achieve the objective, (2) whether it is a necessary measure or whether a less far-reaching measure would have sufficed and (3) whether the measure is balanced in the specific case. This is an explicit renunciation of the 'arbitrariness' criterion.
The question whether and how intensively the administrative court reviews the principle of proportionality depends on many factors and will differ from case to case. Contrary to what the Advocates General suggested, the variety in reviewing the principle of proportionality cannot be reduced to three standard situations. It is much more of a sliding scale, whereby the administrative judge can apply all variations, from full to restrained. The intensity of this test is determined by the degree of policy freedom the government has to make a decision, but also by the objective that the decision serves and by the weight it carries. Another important factor is whether and to what extent the interests of the citizens and companies involved are affected.

9 ECLI:NL:RVS:2022:285, 334 and 335.

The more important these interests are, the more serious the adverse consequences of the decision are; or the more intensively the decision infringes on human rights, the more intensively the administrative court will review the decision.
When applied to the specific case of the house closure in Harderwijk, the Administrative Law Division is of the opinion that, in weighing up the interests, the mayor paid too little attention to the interests of the tenant and his (partly underage) children. It is not clear from the decision that the mayor had asked himself whether the family could still return to the accommodation after the closure if the housing corporation dissolved the rental agreement and possibly placed the family on a 'black list'. The mayor must include the answer to this question in his new decision. In doing so, he must again assess whether the consequences for the family are not disproportionate in relation to the purpose of the house closure. Because the house has not been closed to date, the mayor will also have to assess whether it is still necessary to close the house.

6. Opinion of 16 February 2022 on the recovery of childcare allowance overpayments

This case concerns a Spanish teacher at an intermediate vocational school with an employment contract for 9.21 hours per week. She is actually present at the school two full days a week. Her two children make use of childcare two days a week. The Tax Administration/Benefits department set the childcare allowance for the year 2017 at € 5,687, on the basis of a statutory calculation which, in the case of non-school-age children, classifies 140% of the contracted hours as childcare hours. Because she had received a higher advance payment, the Tax Administration/Benefits department reclaimed € 3,850 from her. The woman requested that this decision be reviewed, but the Tax Administration/Benefits department rejected this request. According to the Tax Administration/Benefits department, only paid work is taken into consideration in determining the right to childcare benefit. The woman considered this unjust, because she worked more hours than stated in her employment contract, such as setting up a teaching programme, preparing lessons and attending team meetings. According to her, the interpretation of the concept of 'hours worked' by the Tax Administration/Benefits department is disproportionately disadvantageous in her case.
When calculating the right to childcare benefit, the term 'hours worked' must be interpreted as the hours on which the employee and employer agree in an employment contract, and not the number of hours that the employee actually spends working. This is the advice of Advocate General Peter Wattel in his opinion on this case.[10] According to Advocate General Wattel, the legislature, in view of the unambiguous legislative history, used the term 'hours worked' in the Childcare Benefit Decree to refer to the working hours on which the employee had agreed with the employer.

10 ECLI:NL:RVS:2022:516.

He does not consider this interpretation contrary to the principle of equality. The comparison with self-employed entrepreneurs that the woman made does not hold. There are important differences between the situation of a self-employed person and that of an employee. He also sees no reason to declare the provision containing the concept of 'hours worked' inadmissible or inapplicable in this specific case. The amount of the childcare allowance is linked to the number of hours worked with a wide margin of discretion in order to keep the system financially manageable and to prevent fraud and abuse. In making this link, the legislature took into account, for example, irregular working hours, unpaid overtime and travel time by increasing the number of hours worked by 40% in order to determine the childcare benefit for non-school aged children. The Advocate General recommends applying the proportionality principle to the recovery in cases like this. This would mean a nuance in the case law of the Administrative Law Division, which assumes that only the irrevocable, final determination of the benefit can be revised and not the recovery itself. However, according to the Advocate General of the Council of State, this does not lead to a different outcome in this case, as he does not consider the principle of proportionality to have been violated either.
At the time of writing, the Administrative Law Division has yet to rule on this case. It is clear that this is a sensitive case because of the great social uproar that has been caused by the strict recovery practice with regard to benefits such as those at issue here.

7. To conclude

It follows from the foregoing, first of all, that Peter Wattel has issued opinions on issues that are of great importance for the development of administrative law. How much room is there for customisation in sanctioning and collection procedures? Under what circumstances can the government be considered bound by promises? And last but not least: how thoroughly should the administrative courts review decisions and what role does the importance of being able to offer effective legal protection play in this regard?
In his opinions, Peter Wattel opted to offer citizens more protection based on customised solutions, thereby deviating from established, more restrained case law. At the same time, however, there is always a nuanced approach with sufficient regard for the government's interests and an effective implementation practice.
Next, it can be noted that Peter Wattel has also been an influential Advocate General, since the vast majority of his opinions have been followed by the Administrative Law Division, also in sensitive cases.
This confirms the hypothesis put forward in the introduction to this contribution. Peter Wattel has actually made a serious contribution to the choice for a more responsive and more legally protective administrative law. The importance of this cannot be underestimated. Hence the title of this contribution: 'Peter Wattel as administrative law advocate general: the right man in the right place at the right time'. Hopefully, this will remain the case for a long time to come, as will his other activities.