



Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.



**Council of State of Belgium**

**Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union  
With the collaboration of the Council of State of Belgium**

**Increasing the efficiency of the Supreme Administrative Courts' powers**

**THE NETHERLANDS**

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## Questionnaire

### ISSUE 1: The ‘administrative loop’, or the power to rectify the legality of an administrative decision

#### Question 1:

In your country’s legal system are there provisions laid down in the constitution, in law or in regulations that regulate the powers of an administrative court to rectify a defect in a contested decision? If so, what are the specific powers?

#### Answer to question 1:

Yes, there are statutory provisions in the Netherlands that regulate the powers of administrative courts to rectify defects in a contested decision by means of an ‘administrative loop’. The powers are as follows:

- a) a district court – which is the administrative court of first instance – may *give an administrative authority the opportunity* to rectify a defect in a contested decision (or have it rectified) within such time limit as it may specify; moreover, the Administrative Jurisdiction Division of the Council of State, the Central Appeals Court for Public Service and Social Security Matters and the Administrative Court for Trade and Industry, in cases in which appeals or appeals at sole and last instance are instituted before them, may *instruct an administrative authority* to rectify a defect in a contested decision (or have it rectified) within such time limit as they may specify;
- b) if the administrative court applies the administrative loop, it must give an interim judgment indicating as far as possible how the defect can be rectified;
- c) the administrative court may direct in its interim judgment that if a new decision is given the preparations for it need not comply (or fully comply) with the requirements specified in part 3.4 of the General Administrative Law Act (AWB).

These powers are laid down in the statutory provisions contained in the Annexe. It should be noted that the power of rectification may not be exercised if interested parties who have not been party to the proceedings would be disproportionately disadvantaged as a result (see section 8:51a, subsection 1 AWB, and the corresponding provisions of the Council of State

Act, the Social Security Appeals Act and the Administrative Jurisdiction (Trade and Industry) Act).<sup>1</sup> It is clear from the case law to date that these provisions have posed little obstacle to the exercise of the power of rectification.

**Question 2:**

Besides having the power to quash a contested decision, do the administrative courts in your country have other powers to rectify the defects in such a decision or have them rectified? If so, explain your answer.

**Answer to question 2:**

As noted above in answer to question 1, the administrative courts may give an administrative authority the opportunity to rectify or instruct it to rectify a defect in a contested decision (or have it rectified) within such time limit as they may specify. Even if the administrative authority rectifies the defect, the Administrative Jurisdiction Division, in its final judgment, quashes the contested decision on account of the defect. However, the rectification may be a reason to direct that the legal consequences of the contested decision will be allowed to stand in full. This power is conferred on the administrative courts in section 8:72, subsection 3 AWB.

If the administrative authority has given a new decision in order to rectify a defect identified by the administrative court, the Administrative Jurisdiction Division will decide whether the new decision is lawful; if the new decision is held to be lawful, any appeal or application for review of the decision existing by operation of law pursuant to section 6:19, subsection 1 AWB will be declared to be unfounded, thereby finally resolving the dispute. The old decision, which was held to be defective, is then quashed.

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<sup>1</sup> See sections 46, subsection 6, second sentence and 49, subsection 6, second sentence of the Council of State Act, sections 17, subsection 6, second sentence and 21, subsection 6, second sentence of the Social Security Appeals Act and sections 19, subsection 6, second sentence and 22, subsection 6, second sentence of the Administrative Jurisdiction (Trade and Industry) Act.

**Question 3:**

If question 2 has been answered in the negative, explain your answer the reasons for limiting the power of administrative courts to quash a contested decision or denying the administrative courts the power to rectify the defect identified by them (or have it rectified).

**Answer to question 3:**

As Dutch administrative courts have the power to rectify any defect identified by them in a decision (or have it rectified), question 3 requires no further discussion.

**Question 4:**

What specific powers do administrative courts have to rectify a defect identified by them or have it rectified? Explain your answer.

**Answer to question 4:**

The specific powers of administrative courts to rectify a defect identified by them or have it rectified have already been discussed in answer to question 1.

**Question 5:**

Does the administrative courts' specific power of rectification apply to every defect in the contested decision and to all types of administrative decision?

**Answer to question 5:**

a) The administrative courts' specific power of rectification applies to any identified defect. However, it is only worthwhile exercising the power if the defect is capable of being rectified. To apply the administrative loop the court need not have the expectation that after rectification of the defect the authority will allow the decision to stand or will give a decision having the same effect. The court need only expect that the identified defect in the decision can be rectified. If, for example, the defect concerns a failure to obtain an advisory opinion,

where this is required by law, and the administrative authority subsequently obtains such an opinion, this rectifies the defect in the decision identified by the court. However, the content of the advisory opinion may oblige the administrative authority to depart from its original decision. Application of the administrative loop may therefore mean that a decision is given that differs from the decision found to be defective.

There is no point in exercising the power of rectification if the defect is not capable of being rectified, since in such a case the contested decision would have to be quashed in any event. An example of a case in which a defect would be deemed incapable of rectification is where a person who has been ordered either to demolish an illegal structure or face a penalty payment for continued failure to comply cannot be treated as the infringer. In such a case the obvious course of action would be for the administrative court itself to resolve the case.

b) The administrative courts' specific power of rectification applies to all types of administrative decision. In any event the law does not exclude application of this power for a particular type of decision. However, when the bill to introduce the administrative loop was under consideration, the government took the position that the loop should not, in principle, be applied in an application for a review of an administrative fine. Reference was made in this connection to section 8:72a AWB, under which an administrative court which quashes a decision to impose an administrative fine is itself obliged to decide on the imposition of a fine. In keeping with the government's position on this subject, the Administrative Jurisdiction Division does not apply the administrative loop in disputes about administrative fines or in disputes about punitive sanctions other than administrative fines.

#### **Question 6:**

At what stage of the proceedings and under what conditions can the administrative courts exercise this specific power of rectification? Explain your answer.

#### **Answer to question 6:**

The law does not prevent an administrative court from exercising its power of rectification at an early stage of the proceedings. Section 8:80b, subsection 1 AWB expressly provides that an administrative court may also give an interim judgment even before the parties have been

invited to attend a hearing. However, the Administrative Jurisdiction Division makes only very sparing use of its power to give an interim judgment before a hearing is held. As a rule, it is safer and more effective to do this only after a hearing. Nonetheless, application of the power of rectification before a hearing could be considered where a decision is manifestly defective.

The power of rectification may also be exercised in interim relief proceedings (see the judgment of the president of the Administrative Jurisdiction Division of 31 August 2010, no. 201004275/2/R1). The power may also be exercised if the president, in response to a request for interim relief, considers that it would be appropriate to give immediate judgment on the merits of the case (see the judgment of the president of the Administrative Jurisdiction Division of 28 April 2011, nos. 201010202/1/T1/R3 and 201010202/2/R3).

**Question 7:**

In exercising its power to rectify a defective decision can an administrative court itself rectify the defect that has been identified in the contested decision (power to reverse decision)? Explain your answer.

**Answer to question 7:**

No, the administrative courts do not have this power. By law the administrative courts only have the power either to give the administrative authority the opportunity to rectify the defect or to instruct it to rectify the defect.

**Question 8:**

If not, is the authority required – in the context of the exercise of the specific power to rectify a defective decision – to rectify the defect identified by the court? Explain your answer.

**Answer to question 8:**

The district court may *give the administrative authority the opportunity* to rectify a defect in the contested decision (or have it rectified) within such time limit as the court may determine.

It is up to the administrative authority to decide whether it wishes to make use of this opportunity. It is not obliged to do so.

The Administrative Jurisdiction Division, the Central Appeals Court for Public Service and Social Security Matters and the Administrative Court for Trade and Industry, in cases in which an appeal or appeal at sole and last instance is lodged with them, may *instruct* an administrative authority to rectify a defect in a contested decision (or have it rectified) within such time limit as they may determine. In such a case the administrative authority is obliged to comply with this instruction.

**Question 9:**

How do the proceedings continue once an administrative court decides to exercise or has exercised its specific power of rectification? Explain your answer.

**Answer to question 9:**

In its interim judgment the administrative court describes the defect it has identified in the decision and indicates as far as possible how this can be rectified (see section 8:80a AWB). In the interim judgment the administrative court also determines within what time limit the administrative authority may or – in the case of the Administrative Jurisdiction Division of the Council of State, the Central Appeals Court for Public Service and Social Security Matters or the Administrative Court for Trade and Industry – must rectify the defect. This time limit may be extended (see section 8:51a AWB). The administrative authority must notify the district court as quickly as possible whether it wishes to rectify the defect or have it rectified. If the administrative authority decides on rectification, it should notify the district court in writing as quickly as possible how the defect has been rectified. In the case of an appeal or appeal at sole and last instance to the Administrative Jurisdiction Division of the Council of State, the Central Appeals Court for Public Service and Social Security Matters or the Administrative Court for Trade and Industry, the administrative authority should notify the court concerned as quickly as possible how the defect has been rectified (section 8:51, subsections 1 and 2 AWB).

The administrative court will allow the other parties four weeks, calculated from the dispatch of this notification, in which to make known their views on how the defect has been rectified. This period may be extended where appropriate (section 8:51, subsection 3 AWB).

The administrative court will notify the parties how the proceedings on the appeal or appeal at sole and last instance will be conducted within four weeks of:

- (a) receipt of the administrative authority's notification to the district court that no use will be made of the opportunity to rectify the default or have it rectified;
  - (b) expiry of the time limit without rectification;
  - (c) receipt of the views;
  - (d) expiry of the time limit without submission of views.
- (see section 8:51c AWB)

If a hearing has been held in a case in which interim judgment has been given, the administrative court may direct that no further hearing will be held, if:

- (a) the administrative authority has given notification that it will not make use of the opportunity to rectify the defect or have it rectified or, despite being instructed to do so, that it will not rectify the defect;
- (b) the administrative authority has allowed the time limit to expire without rectifying the defect;
- (c) the parties have submitted their views on how the defect has been rectified;
- (d) the parties have allowed the time limit to expire without submitting their views, unless parties could be disadvantaged as a result. (See section 8:57, subsection 2 of the AWB)

If the case has not been heard in court, the administrative court may, with the parties' consent, direct that there will be no hearing (see section 8:57, subsection 1 AWB).

After the interim judgment and the rectification procedure described above, a final judgment will be given in the dispute. If the administrative authority has given a new decision, this will be reviewed by the court before which the case is pending. It is not necessary to submit a fresh appeal against or application for review of this decision. The application to have the decision quashed is deemed by operation of law to extend to the rectified decision. If the case is pending before an appeal court and application for review of the rectified decision is made to the district court, the latter will refer the case to the appeal court (see section 8:13a AWB).



In the final judgment the court need only consider the grounds for review/appeal that have not yet been reviewed in the interim judgment. The practice of the Administrative Jurisdiction Division is to rule on as many grounds as possible in the interim judgment. In principle, the rulings given in the interim judgment cannot be reconsidered in the final judgment. To that extent the interim judgment contains decisions that are effectively final.

If the administrative court comes to the conclusion that the administrative authority has not rectified the decision (or not done so sufficiently), it may, if necessary, apply the administrative loop again, either by giving the administrative authority a further opportunity to rectify the continuing defect or by instructing it to do so. Not until the final judgment does the administrative court decide whether the administrative authority should be ordered to reimburse the applicant for the court fees, pay the applicant's legal costs and reimburse the claimed loss or damage.

**Question 10:**

How is the action to quash affected if the defective decision is rectified? Is the review/appeal still valid? Must or can the rectified decisions be disputed in another review/appeal? Explain your answer.

**Answer to question 10:**

The defective decision is still the subject of review/appeal. Even if the decision has been rectified, it is generally quashed by the Administrative Jurisdiction Division in its final judgment. This provides a basis for ordering the administrative authority to pay the legal costs of the applicant. The quashing of the decision also provides a basis for holding in the final judgment that the administrative authority must reimburse the applicant for the fees paid by him to the court. Moreover, the quashing provides a basis for granting the applicant's claim for compensation.

It was noted above in answer to question 9 that the rectified decision is reviewed by the court before which the case is pending. It is not necessary to submit a fresh appeal against or application for review of this decision. The application to have the decision quashed is deemed by operation of law to extend to the rectified decision. In the final judgment the court

also decides on this automatic appeal against or application for review of the rectified decision.

**Question 11:**

What are the experiences with this specific power of rectification vested in the administrative court in your country? Is this power exercised frequently and successfully?

**Answer to question 11:**

The Administrative Jurisdiction Division's experience of this specific power of rectification is positive. In the majority of cases in which the administrative loop has been applied the defect in the decision has been rectified and the dispute finally resolved.

The Administrative Jurisdiction Administrative Jurisdiction Division intends to exercise the power of rectification in even more cases in the future. It is currently engaged in a project designed to ensure final resolution of disputes in certain designated areas of law. However, application of this power of rectification does increase the workload for the Administrative Jurisdiction Division and its support services. Whereas the Administrative Jurisdiction Division's involvement formerly ended once the contested decision was quashed, it now continues after an interim judgment has been given. Once the administrative authority has rectified the decision the Administrative Jurisdiction Division must reconsider the case, generally some four to six months after the interim judgment, and arrive at a final judgment in the dispute. Nonetheless, the introduction of this specific power of rectification is to be welcomed. Where this power is exercised, the applicant can generally be sure of a much quicker resolution of the case than would otherwise have been possible.

**ISSUE 2: Power to award compensation and action for annulment**

**Question 1:**

Are you familiar with the system of compensation as an alternative to annulment?

**Answer to question 1:**

No. This possibility is not available under Dutch law.

**Question 2:**

What is the extent of the compensation and how is it calculated?

**Answer to question 2:**

Not applicable as question 1 has been answered in the negative.

**Question 3:**

What is the impact of penalising an unlawful decision by awarding compensation on the decision itself?

**Answer to question 3:**

Not applicable as question 1 has been answered in the negative.

**Question 4:**

Does your court have the power to settle compensation for the damage caused by the unlawful decision it has previously annulled? If so, is this an exclusive power or is that power also granted to other courts?

**Answer to question 4:**

(1) Yes, if the Administrative Jurisdiction Division of the Council of State quashes a decision, it has the power, at the request of a party that has suffered damage, to order the administrative authority that has given the decision to pay compensation for the damage. The statutory basis for this power is section 8:73, subsection 1 of the General Administrative Law Act.

If the extent of the damage cannot be immediately determined the Administrative Jurisdiction Division may, when giving judgment quashing the decision, direct that the examination of the case be reopened in preparation for a further judgment on the issue of compensation. See section 8:73, subsection 2 of the General Administrative Law Act.

(2) A plaintiff is not in fact bound to seek compensation in the proceedings in which he requests that a decision be quashed. He may instead choose to wait until after the decision has been quashed and then apply for compensation to the administrative authority that gave the quashed decision. Where the injured party disagrees with the administrative authority's decision on the issue of compensation he may apply for review to the district court and, if he disagrees with the district court's judgment, then appeal against it to the Administrative Jurisdiction Division of the Council of State.

(3) Alternatively, a plaintiff may decide to seek compensation for the quashed decision by bringing a civil lawsuit against the public body of which the administrative authority responsible for the decision forms part.

(4) All administrative courts of appeal and of first instance have the power referred to at (1) and (2) to order an administrative authority that has given a decision subsequently quashed to pay compensation to an injured party, at that party's request. Likewise, all administrative courts of appeal and of first instance have the power referred to at (2) to hear an appeal against or application for review of an administrative authority's decision on a request for compensation submitted to it after its decision on the original subject of dispute has been quashed.

### **Question 5:**

What is the extent of the compensation and how is it calculated?

### **Answer to question 5:**

Full compensation must be paid for the damage caused by a quashed decision. When applying to have a decision quashed the plaintiff may in the same proceedings request compensation for certain items of damage. At a later stage the plaintiff may request the administrative

authority to pay compensation for other items of damage or otherwise seek compensation for these items of damage by bringing a civil lawsuit against the legal person of which the administrative authority responsible for the decision forms part.

### **ISSUE 3: The effectiveness of enforcement of the rulings of administrative courts**

#### **Question 1:**

Do the administrative courts in your country have the means to ensure actual implementation of their rulings and judgments by the authorities?

#### **Answer to question 1:**

When quashing a contested decision an administrative court has the power to order the administrative authority concerned to give a fresh decision or perform some other act in accordance with the judgment. The administrative court may also set a time limit within which the decision must be given or act performed and, if necessary, make an order for interim relief. Furthermore, the administrative court may direct that if the administrative authority fails to comply with the judgment, it must make a penalty payment to a designated party as long as it remains in default.

If it is clear what decision must be given after the original is quashed the administrative court may itself give the decision. In that case the judgment will take the place of the quashed decision. If the administrative court quashes a decision to impose an administrative fine, it is itself obliged by law to decide on the imposition of a fine. Once again, the judgment will take the place of the quashed decision.

These powers and obligations of administrative courts are contained in sections 8:72 and 8:72a of the General Administrative Law Act.

#### **Question 2:**

Do the administrative courts have the power to order the authority to enforce their rulings and judgments (power of injunction)?

**Answer to question 2:**

When quashing a contested decision an administrative court may make orders designed to enforce its judgment. The orders it may make have been described in answer to question 1. If an administrative authority fails to comply with the administrative court's judgment, the interested parties may once again apply to the court. If the administrative authority has failed to give a decision in time, the administrative court must instruct it to give a fresh decision within two weeks of the judgment and direct that it must make a penalty payment for each day that it fails to comply with the judgment (see sections 8:55b and 8:55d of the General Administrative Law Act). Where time is of the essence and the decision on the application for review cannot be awaited, an interim order may be sought from the interim relief judge.

If the administrative authority declines to pay the compensation awarded by the administrative court to the plaintiff, the judgment of the administrative court will constitute an enforceable order. On the strength of this order the plaintiff may institute civil proceedings for payment of the compensation against the legal person of which the administrative authority forms part.

**Question 3:**

Have all your country's administrative courts been granted this power of injunction?

**Answer to question 3:**

Yes, although it should be noted that if an administrative authority fails to comply with a judgment of the supreme administrative court the plaintiff must first seek redress before the lower administrative court. Where a lower administrative court is asked to enforce its own judgment but this is subsequently quashed by the supreme administrative court, a decision given by an administrative authority as a result of the quashed judgment will be set aside by the supreme administrative court.

**Question 4:**

Can your country's administrative courts sentence the offending authority to pay a penalty or a fine?

**Answer to question 4:**

No, as noted in the previous answers, the administrative courts only have the power to order an administrative authority to make a penalty payment to the applicant for as long as the authority is in default.

**Question 5:**

What happens where the authority has enforced the ruling or judgment but this enforcement is not in line with the authority of *res judicata*?

**Answer to question 5:**

In such a case the judgment that has acquired the force of *res judicata* should still, in principle, be enforced. Any different, later judgment of a higher court does not constitute a ground for revision of the judgment given between the original parties.

In very special circumstances, the administrative authority concerned may be obliged to alter its decision at the request of the party concerned. An example would be where there are special circumstances as referred to in paragraph 45 of the judgment of the European Court of Human Rights of 19 February 1998 in *Bahaddar v. the Netherlands*, case number 145/1996/764/965, or special circumstances as referred to in the judgment of the Court of Justice of the European Communities of 13 January 2004, no. C-453/00, in *Kühne & Heitz N.V.* Where there are special circumstances as referred to in the latter judgment, an administrative authority has an obligation, on account of substantive claims derived from Community law, to reopen a decision that has become final. Under Dutch law there are no circumstances in which an administrative authority can refuse to comply with a court order.

## **Annexe**

### **• General Administrative Law Act (application for review to district courts)**

#### Part 8.2.2a. Administrative loop

##### Section 8:51a

1. The district court may give the administrative authority the opportunity to rectify a contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.
2. The district court determines the time limit within which the administrative authority may rectify the defect. It may extend this time limit.

##### Section 8:51b

1. The administrative authority must notify the district court as quickly as possible whether it wishes to rectify the defect or have it rectified.
2. If the administrative authority decides on rectification of the defect, it should notify the district court in writing as quickly as possible how the defect has been rectified.
3. Within four weeks of the dispatch of the notification referred to in subsection 2, the parties may make known in writing their views on how the defect has been rectified. The district court may extend this time limit.

##### Section 8:51c

The district court notifies the parties how the proceedings on the application for review or the appeal will be conducted within four weeks of:

- (a) receipt of the administrative authority's notification to the district court that no use will be made of the opportunity to rectify the default or have it rectified;
- (b) expiry of the time limit without rectification as referred to in section 8:51a, subsection 2;
- (c) receipt of the views; or
- (d) expiry of the time limit without submission of views as referred to in section 8:51b, subsection 3.



## Part 8.2.5. The hearing

### Section 8:57

1. With the parties' consent the district court may direct that no hearing will be held.
2. If the application for review has already been dealt with at the hearing, the district court may direct, after applying section 8:51a, that no further hearing will be held if:
  - (a) the administrative authority has given notification that no use will be made of the opportunity to rectify the defect or have it rectified;
  - (b) the time limit referred to in section 8:51a, subsection 2 has expired;
  - (c) the parties have submitted their views on how the defect has been rectified; or
  - (d) the time limit referred to in section 8:51b, subsection 3 has expired, unless parties could be disadvantaged as a result.
3. If the district court directs that no hearing or further hearing will be held, it will close the hearing.

## Part 8.2.7. Interim judgment

### Section 8:80a

1. If the district court applies section 8:51a, it will give an interim judgment.
2. The interim judgment will indicate as much as possible how the defect can be rectified.
3. Section 8:72, subsection 4 (b) and sections 8:77, 8:78, 8:79 and 8:88 apply *mutatis mutandis*.

### Section 8:80b

1. The district court may also give an interim judgment before parties are invited to attend a hearing of the district court.
2. The district court may also give an interim judgment orally. Section 8:67, subsections 2 to 5, applies *mutatis mutandis*.
3. The district court may, if necessary, make an order for interim relief. In that case it will decide when the interim relief will cease to apply.
4. Interim relief as referred to in subsection 3 will in any event cease to apply as soon as:
  - (a) the application for review is withdrawn; or
  - (b) the district court has given judgment as referred to in section 8:66, subsection 1, unless a different date is specified in that judgment.

**• Council of State Act (appeal at sole and last instance and appeal to the Administrative Jurisdiction Division of the Council of State)**

Section 46 (appeal at sole and last instance to the Administrative Jurisdiction Division)

(.....)

6. The Administrative Jurisdiction Division may instruct the administrative authority to rectify a defect in the contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.

Section 49 (appeal to the Administrative Jurisdiction Division)

(.....)

6. The Administrative Jurisdiction Division may instruct the administrative authority to rectify a defect in the contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.

**• Social Security Appeals Act (appeal at sole and last instance and appeal to the Central Appeals Court for Public Service and Social Security Matters)**

Section 17 (appeal at sole and last instance to the Central Appeals Court for Public Service and Social Security Matters)

(.....)

6. The Central Appeals Court for Public Service and Social Security Matters may instruct the administrative authority to rectify a defect in the contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.

Section 21 (appeal to the Central Appeals Court for Public Service and Social Security Matters)

(.....)

6. The Central Appeals Court for Public Service and Social Security Matters may instruct the administrative authority to rectify a defect in the contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.

• **Administrative Jurisdiction (Trade and Industry) Act**

Section 19 (appeal at sole and last instance to the Administrative Court for Trade and Industry)

(.....)

6. The Administrative Court may instruct the administrative authority to rectify a defect in the contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.

Section 22 (appeal to the Administrative Court for Trade and Industry)

(.....)

6. The Administrative Court may instruct the administrative authority to rectify a defect in the contested decision or have it rectified. The previous sentence does not apply if interested parties that are not parties to the proceedings could be disproportionately disadvantaged as a result.