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The Duty to Give Reasons in the European Legal Area a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law

I. Introduction

1. *Anno* 2016, the law of many European countries anchors a general duty for members of the executive and their administrations to give reasons for their decisions (administrative acts). The EU, as a supranational legal order, knows a similar obligation for its institutions and administrative bodies. For the purpose of this contribution, the term ‘duty to give reasons’ covers the obligation for the administration to communicate the reasons for its decisions on its own initiative, at least to those that are directly affected by them.

2. In a 21st-century (western) context, it may seem quite inconceivable that national administrations would not be obliged to give reasons for their decisions. In many states, however, the duty to give reasons is quite a recent achievement. For the judiciary, the modern state has always accepted that its judgments have to be underpinned by a proper and full justification. This principle is enshrined in most constitutions and is enforced by the highest courts.² It has taken much longer for a duty of

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² For Belgium, see *Article 149 of the Constitution*; for the Netherlands, see *Article 121 of the Constitution*. In France, the duty to provide reasons for the courts is recognised and upheld by the highest courts as having constitutional value. In the EU, *Article 36 of Protocol no. 3 to the TFEU* provides that the ECJ’s judgments shall state the reasons on which they are based. Even though the guarantee of reasoned judgments is taken for granted by many nowadays, it is still regularly debated. See e.g. M. Adams, *De argumentatieve en motiveringspraktijk van hoogste gerechtshoven: rechtsvergelijkende beschouwingen*, “Rechtskundig Weekblad” 2009, vol. 72, issue 36, p. 1498–1511; Vlad E. Perju, *Reason and Authority in the European Court of Justice*, “Virginia Journal of International Law” 2009, no. 49, p. 307–378.

reason-giving to become a fundamental guarantee for citizens faced with the (coercive) power of the executive or the administration. Moreover, unlike other guarantees developed over the years to offer protection against a malfunctioning, secretive or arbitrary administration, such as the regime of the ombudsman or freedom of information, the duty to give reasons is only poorly covered by doctrinal literature. The right to reasons and the practice of administrative reason-giving has been called a 'somewhat undertheorised' feature of both the US and EU tradition of administrative law.³

3. This article has a double aim. The first part (II) contains the results of a thorough comparative analysis of the duty to give reasons as conceived by and guaranteed in three European national legal systems, *i.e.* Belgium, the Netherlands and France, on the one hand and the supranational system of the EU on the other hand. The focus is on *general* similarities and differences; the article does not scrutinise details. The following questions are addressed:

- What are the legal sources that enshrine the duty to give reasons?
- What are the rationales behind such a (more or less) general duty for the administration?
- What is the scope of the duty?
- And its purport?
- Which sanction(s) does the administration risk in case of non-compliance?

4. The use of comparative analysis in the European legal sphere is often located in the promise of the identification of a European common ground. Our comparative analysis indeed confirms that the selected European legal systems share a core understanding of what the duty to give reasons entails. At the same time, it also reveals some important differences in the way that each of these systems individually conceives of that duty. By using comparative tables after most of the sections, we try to facilitate the efforts of the reader to keep an overview.

5. Considering the aim of our comparative analysis, every single national European legal system would, in principle, have been equally eligible to be included in this study. Our selection of national legal systems comprising Belgium, France and the Netherlands allows us to demonstrate that even legal systems whose traditions of administrative law are strongly intertwined have developed such regimes of mandatory reason-giving for their administrations that they all have their own features and sometimes differ on fundamental points.

6. The second part (III) of the article is more evaluative in nature. It aims to shed a light on the role that the duty to give reasons plays or could

³ J. L. Mashaw, *Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance*, "Faculty Scholarship Series" 2007, Paper 1179, p. 101.

play for the legitimacy of administrative decision-making. It starts from the hypothesis that the duty to give reasons, as defined in this article, as such has great potential as a mechanism of accountability. Procedural guarantees play an increasingly important role in the attempts of modern governments to achieve the goals of transparent and accountable administration. We rely on the work of Jerry L. Mashaw and Hans Peter Nehl to give a proper theoretical underpinning to the role that the duty to give reasons plays (or can potentially play) in achieving accountability through transparency. We argue that the duty to give reasons, as conceived of by the legal systems that we have studied, has at least the potential of creating an effective form of accountability in the relationship between the administration and individuals affected by its decisions. Even though it does not offer a guarantee of genuine 'public' accountability, it mitigates the vertical link between the administration and those subject to its decisions. In doing so, it contributes to the emancipation of citizens as autonomous individuals in their relationship to state actors.

7. In our final conclusions (IV), we establish, however, that even a comparative analysis of only four European legal systems reveals that not all of them effectively and to the same extent approach the duty to give reasons as such an inalienable, fundamental right of citizens, linked to their moral autonomy and thus to the value of human dignity. As far as the future is concerned, the question arises whether the EU will foster harmonisation in this regard and whether this will eventually lead to the recognition of an individual fundamental *right* to receive reasons for administrative decisions, recognised throughout Europe.

II. The duty to give reasons: a comparative analysis of four European legal systems

A. The legal sources of the duty to give reasons (WHERE?)

8. This article studies the duty to give reasons as a general guarantee, applicable to administrative acts in all or most sub-sectors of public of administrative intervention. Sometimes, however, specific legal (typically legislative) regimes, applicable to just one branch of administrative law or one type of decision, may impose specific duties on decision-makers. These may involve special, often more far-reaching requirements or may give further specifications as to the range of the duty to give reasons. A discussion of these *leges speciales* and of the question of how they relate to the general duty to give reasons falls outside the scope of this contribution.

9. In France, the courts have dismissed the recognition of a general principle of administrative law that obliges the administration to give

reasons for its decisions.⁴ Only in those cases where either the legislation or case law⁵ has requires a statement of reasons will the administration be subject to an obligation to justify its decision explicitly.⁶ This lack of an always applicable duty to give reasons has made some doctrine conclude that ‘*le secret administrative*’ still, to some extent at least, survives in France.⁷ The duty to give reasons was given a substantial statutory enshrinement in 1979, in an act specifically dedicated to this legal guarantee (hereinafter: LMAA, *Loi relative à la motivation des actes administratifs*).⁸ Since 1 January 2016, this act has been abolished and its provisions are now part of the *Code des relations entre le public et l’administration* (hereinafter: CRPA).⁹ The application of the provisions on the duty to give reasons is not restricted to one or a number of specific sub-sectors of administrative law, making their scope ‘general’ within the meaning of this study. They do, however, only apply to decisions of a certain nature or purport (*infra*).¹⁰

⁴ *Conseil d’État* 7 juillet 1978, no. 01593, CEVAPIC; The judgment revealed that ‘les décisions des autorités administratives n’ont pas, en règle générale, à être motivées ; que, s’il est fait exception à cette règle pour les décisions de certaines autorités collégiales, en raison notamment de leur mode de fonctionnement et de la nature de leurs attributions, la motivation n’est obligatoire, lorsque la décision émane d’une autorité personnelle, qu’autant qu’elle est expressément prévue par un texte’; *Conseil Constitutionnel* 1 juillet 2004, no. 2004-497 DC: ‘[L]es règles et principes de valeur constitutionnelle n’imposent pas par eux-mêmes aux autorités administratives de motiver leurs décisions dès lors qu’elles ne prononcent pas une sanction ayant le caractère d’une punition.’ Both judgments are discussed in: O. Gabarda, *Vers la généralisation de la motivation obligatoire des actes administratifs? Enjeux et perspectives d’évolutions autour du principe de la motivation facultative*, “*Revue Française de Droit Administratif*” (“RFDA”) 2012, p. 61, 62.

⁵ J.-L. Autin, *La motivation des actes administratifs unilatéraux, entre tradition nationale et évolution des droits européens* “RFDA” 2011, no. 137–138, p. 85, 93; N. Songolo, *La motivation des actes administratifs*, la site de la «Village do la Justice. La communauté des métiers du Droit» ; <http://www.village-justice.com/articles/motivation-actes-administratifs,10849.html> (12.02.2015). The Conseil d’État has, for instance, required a statement of reasons for the decisions of so called ‘*organismes professionnels*’ or ‘*autorités collégiales*’ (see previous footnote).

⁶ See: M. Gros, *Droit administratif. L’angle jurisprudentiel*, L’Harmattan, Paris 2012, p. 141: ‘[La motivation] a donc toujours été une exception, la règle étant l’absence de motivation’.

⁷ J.-L. Autin, *La motivation des actes administratifs unilatéraux, entre tradition nationale et évolution des droits européens* “RFDA” 2011, no. 137–138, 85, 93; P.-L. Frier, J. Petit, *Droit administratif*, Montchrestien 2012, p. 348.

⁸ Loi no. 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l’amélioration des relations entre l’administration et le public.

⁹ They are enshrined in *Livre II, Titre 1er, Chapitre 1er* of the Code.

¹⁰ See: J.-L. Autin, *La motivation...*: ‘Cette intervention du législateur doit être correctement appréciée: elle opère un changement quantitatif indéniable en multipliant les hypothèses de motivation obligatoire mais sur un fondement qualitatif inébranlable: l’absence de principe général.’

10. Just like France, Belgium has a separate statutory act that anchors the duty to give reasons: a federal¹¹ legislative act of 1991¹², hereinafter abbreviated as the WMB (*Wet Motivering Bestuurshandelingen*). The scope of this act is not limited to a list of specific types of decisions; in principle, it applies to all areas of administrative intervention. In three recent judgments, the Belgian Constitutional Court has suggested that the WMB has now obtained constitutional status. Consequently, the various Belgian legislatures (at the federal level and at the level of the regions and communities) cannot derogate from the protection that it offers. More precisely, they are obliged to uphold the principle that the reasons have to be communicated *together* with the decision, so that those reasons can lead to an informed choice about whether or not to seek judicial redress.¹³

11. In the Netherlands, the so called ‘General act administrative law’ (*Algemene wet bestuursrecht* or *Awb*) dedicates a separate section (3.7) to the duty to give reasons.

12. Within the EU legal order, a general obligation to give reasons for the EU institutions is anchored in the second paragraph of Article 296 of the TFEU, which states that ‘[l]egal acts shall state the reasons on which they were based and shall refer to any proposals, initiatives, recommendations, requests or opinion required by the Treaties’. Another legal basis for a general duty to give reasons is found in Article 41 of the Charter of Fundamental Rights of the European Union, which enshrines the right to good administration. This right includes ‘the obligation of the administration to give reasons for its decisions’. Note that the treaty defines reason giving by the administration as a duty, whereas the charter confers a (fundamental) right on citizens derived from a duty or obligation.¹⁴ Since the Lisbon Treaty entered into force, the Charter has obtained a binding legal status and can be enforced by the national and European courts.¹⁵

¹¹ Belgium is a federal country. The Constitutional Court has ruled that it falls within the competence of the federal legislature to enact general rules on the duty to give reasons, which also apply to the regions and communities. See: I. Opdebeek, A. Coolsaet, *De wet motivering bestuurshandelingen: een korte, maar revolutionaire wet*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure, Brugge 2013, p. 13–15. The Constitutional Court protects this competence and does not allow for the regional legislatures to derogate from the protection offered by the act. See: GwH 19 December 2013, no. 169/2013.

¹² Wet 29 July 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen, BS 12 September 1991.

¹³ GwH 8 May 2014, no. 74/2014; GwH 16 July 2015, no. 103/2015; GwH 29 October 2015, no. 152/2015.

¹⁴ See *infra*, where we will discuss the conception of reason-giving as a ‘right’. See also: O. Gabarda, *Vers la généralisation...*, p. 61, 68: ‘*La Charte a cependant franchi une nouvelle étape en faisant référence à un droit subjectif à la motivation intéressant tous les citoyens de l’Union et en élargissant le champ d’application de la motivation obligatoire*’.

¹⁵ See Article 6(1) of the TEU: ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of

The question arises whether this right to good administration targets only the EU institutions themselves, or also the administrations of the Member States. Pursuant to Article 51 of the Charter, which defines its scope, '[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' The first paragraph of Article 41, however, refers explicitly to 'the institutions and bodies of the Union', which seems to imply that it does not affect Member States.¹⁶ However, as unwritten general principles of law, recognised by the ECJ in its case law, the principles of good administration, such as the duty to give reasons, are applicable to Member States when they implement EU law.¹⁷ The analysis in this article, will focus, however, on the duties imposed on the EU institutions themselves.

Finally, the 'duty to justify reasons' is also enshrined in the European Commission's Code of Good Administrative Behaviour¹⁸, a soft law instrument providing, according to its foreword, 'a guide for Commission staff in their relations with the public'. Pursuant to Section 6 of the Code, members of the public may lodge complaints concerning a possible breach of the principles set out in this Code, which will be treated by the relevant Commission services.

Schematic overview

Legal source of the duty to give reasons as a (quasi) general obligation	
Belgium	Specific, separate statutory act on the duty to give reasons (WMB) with constitutional value.
France	Until recently: specific, separate statutory act on the duty to give reasons (LMAA). Since 1 January 2016: part of a general statutory act on the relations between the administration and the public (CRPA).
The Netherlands	Part of a general statutory act on the global functioning of the administration (Awb).
EU	(Quasi)-constitutional ¹⁹ value (TFEU), fundamental right (Charter), general principle of law (case law) and anchored in soft law (Code).

7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

¹⁶ K. Kaňska, *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights* "European Law Journal" 2004, vol. 10, no. 3, p. 296, 309; M. V. Kristjánssdóttir, *Good Administration as a Fundamental Right*, "Icelandic Review of Politics and Administration" 2013, vol. 9, issue 1, p. 237–255. See also: *Case C-482/10 Teresa Cicala v Regione Siciliana* 2011, ECR I-14139, recital 28.

¹⁷ See: H. C. H. Hofmann, B. C. Mihaescu, *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, "European Constitutional Law Review" 2013, vol. 9, issue 01, p. 73–101.

¹⁸ Published in OJ L 267, 20 October 2000.

¹⁹ We do not take a position here on whether the EU treaties do or do not have constitutional value, but they do constitute the highest written norms in the EU legal order.

B. The rationales behind the duty to give reasons (WHY?)

13. In France, Article L211–2 of the CRPA mentions the purpose or goal of the act, i.e. ‘to inform natural or legal persons, without delay, about the reasons underlying the unfavourable individual administrative decisions that concern them.’ The duty to give reasons has to contribute to the development of a relationship of confidence between the administration and citizens, in which transparency plays a key role. More precisely, citizens have to be able to gain a better comprehension of a decision, which makes it easier for them to challenge it with the courts.²⁰ One author compares the duty to give reasons to the legislation on freedom of information and concludes that, although these guarantees should not be confused, they both initiate from the same concern: increasing transparency within the administration.²¹

14. The Belgian federal legislature has discerned three separate motives behind the enactment of the WMB: to provide legal subjects with better information, to facilitate oversight by administrative authorities and the judiciary and to ensure due or thorough decision-making. The first goal is of primary importance and was inspired by the belief that if citizens were informed about the reasons behind decisions, this would increase acceptability and could change the mind of the citizen who would otherwise be inclined to seek judicial redress.²² Or, if the reasons were unacceptable to the citizen, his/her right to challenge them would be more effective. This ties in with the second goal: the workload of the courts which have to assess the legality (lawfulness and reasonableness) of administrative decisions is reduced if the administration itself has to reveal its motives. The final motive departs from the premise that the administration will ‘think twice’, if it has to provide reasons for its decisions, leading to more careful and balanced assessments.²³

²⁰ N. Songolo, *La motivation...* Although the Council of State has refused to recognise a general duty to give reasons (*infra*), it has deemed it possible to demand of the administration, in the course of a judicial procedure, an explanation as to the reasons underlying the challenged administrative decision. If the administration refuses to do so, the burden of proof is reversed and the facts stated by the applicant are accepted as being correct. See: *Conseil d’État* 28 mai 1954, no. 28238, Barel. See: J.-L. Autin, *La motivation des actes administratifs...*, p. 85, 91–92.

²¹ Y. Gaudemet, *Droit Administratif*, Lextenso éditions, LGDJ, Paris 2012, p. 179.

²² This goal has not been fulfilled, however. The WMB has given rise to more, not less litigation before the (administrative) courts. A shift in grounds for a review has taken place: citizens now increasingly challenge the (lack of) reasons of administrative acts. See: I. Opdebeek, A. Coolsaet, *De wet motivering bestuurshandelingen: een korte, maar revolutionaire wet*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 3, 11.

²³ I. Opdebeek, A. Coolsaet, *De wet motivering bestuurshandelingen: een korte, maar revolutionaire wet*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 3, 8–11 with multiple references to the parliamentary documents and debates preceding the WMB, to case law and to legal doctrine.

15. In the Netherlands, an authoritative textbook on administrative law mentions the following rationales for the duty to give reasons: fostering the rationality of decision-making, contributing to the duty of state bodies to give account for their actions, facilitating judicial protection and adding consistency to administrative decision-making.²⁴ A book on general principles of good administration discerns a similar list of rationales: because of the duty to give reasons, the administration is forced to give due consideration to the contents of the decision, the acceptability of its decision increases, knowledge about policy increases, the consistency of policy improves, the number of appeals with the courts reduces and the interested party is better able to assess whether an appeal is useful.²⁵ Yet another textbook, however, goes one step further by adopting a more principled approach. It accepts that citizens hold a claim to an explanation by the administration, because the powers that the latter holds, are able to influence the individual's 'possibilities of self-development'. From this perspective, citizens are not merely considered as 'objects' of administrative action, but as conscious individuals who want to understand, explain, accept or challenge decisions that are taken with respect to them. 'Consequently, the duty to give reasons is an extension of the general duty for state institutions to give account to the community and its members.'²⁶ This rationale behind reason-giving, which takes the dignity of the individual as a human being as its starting point, will be discussed more thoroughly under title III.

16. As 'policy rationales' underlying the duty to provide reasons in the EU, CRAIG mentions:

- from the perspective of the affected parties: a more transparent decision-making process ('so that they can know why a measure has been adopted')²⁷;
- from the perspective of the decision-maker: 'an obligation to give reasons will help to ensure that the rationale for the action has been thought

²⁴ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, Kluwer 2010, p. 462.

²⁵ H. F. T. Pennarts, *Beginselen van behoorlijk bestuur*, Maklu, Apeldoorn-Antwerpen 2008, p. 51.

²⁶ J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 431–432.

²⁷ See also: J. Schwarze, *European administrative law*, Sweet and Maxwell, London 2006, p. 1400–1401 with reference to the case law, which regards this goal as primary: 'The statement of reasons for a sovereign measure is primarily intended to assist the addressees, they will discover from the reasons what motives have induced the authority to adopt the measure, thus enabling them more easily to judge the chances of success of any challenge of the act.' and 'In the foreground there is always the relationship between the authority and the addressee of sovereign measures.'

through, since having to explain oneself, and defend the rationality of one's choice, is always a salutary exercise²⁸;

- from the perspective of the European Court of Justice (ECJ), ‘the existence of reasons facilitates judicial review by, for example, enabling the Court to determine whether a decision was disproportionate.’²⁹

Other authors mention largely the same objectives, but add to this list the avoidance of arbitrariness.³⁰ According to SCHWARZE, ‘the statement of reason is an authoritative source of information’, since ‘[i]ndications of a defect of substance can be revealed in the statement of reasons.’ This is especially so when it comes to the scrutiny of discretion exercised by the institution.³¹ Pursuant to the case law of the ECJ, the purpose of the duty to give reasons anchored in Article 296 of the TFEU is ‘first, to enable the persons concerned to ascertain the reasons for the measure so that they can assess whether it is well founded and, secondly, to enable the competent court to exercise its power of review.’³²

Another rationale behind the duty to give reasons in EU law is the conferred nature of the Union's competences, enshrined in Article 5(2) of the TEU. The statement of reasons should clarify why the EU institution has deemed it legitimate to act. Such as justification is important from an intra-EU viewpoint, to justify why one of the institutions rather than the other was competent, as well as from a ‘vertical’ perspective, i.e. in the relationship between the Union and its Member States.³³

Finally, it has been argued that the duty to give reasons contributes to the principle of transparency, enshrined in Article 1(2) of the TEU.³⁴

²⁸ See: *Ibidem*, p. 1401: the author speaks of the promotion of ‘administrative self-regulation’. See also the references in: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht in het Europees bestuursrecht*, “Tijdschrift voor Bestuurswetenschappen en Publiekrecht”, 2012, 67, 3, p. 140.

²⁹ P. Craig, *EU administrative law*, Oxford University Press 2012, p. 340–341 with references to the case law of the ECJ.

³⁰ H. C. H. Hofmann, G. C. Rowe, A. H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press 2011, p. 200–202 with many references to case law.

³¹ J. Schwarze, *European...*, p. 1403 with references and 1411–1412.

³² See e.g. Case C-550/09 *E and F*, 2010, ECR I-06213, recital 54.

³³ See e.g. Case C-370/07 *Commission of the European Communities v Council of the European Union*, 2009, ECR I-8917, recitals 38 ff. Geert De Baere, case note Case C-370/07, 2010, SEW 477, 478. See also: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 146.

³⁴ ‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken **as openly as possible** and as closely as possible to the citizen.’ (Emphasis added.) This position was, for instance, adopted by Advocate General Kokott in an opinion, delivered on 23 April 2009, in Case C-370/07, cited in the previous footnote (see recitals 57 and 58 of the opinion). See the reference (as well as another reference to an opinion of AG Sharpston in the same sense) in: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 141.

17. The conclusion of this comparison could be that, in all legal systems, the duty to give reasons is a tool that offers legal protection to citizens in a preventive way, but also assists in the full accomplishment of an effective system of *ex post facto* legal protection, by the courts. On the one hand, it forces administrative bodies to reflect on the legality, quality, rationality, reasonableness and fairness of their decisions, which may prevent bad decision-making in the first place. On the other hand, it provides citizens with a basis on which they can build an argumentation for the courts, should they decide to challenge the decision. Consequently, legal protection of the individual is a key concern of the duty to give reasons.

18. Although not equally present in all four systems examined here, there is a more modern rationale that underlies (general, as well as specific) legal duties to give reasons as well: that of fostering the responsibility and accountability of the administration. Accountability is indeed increasingly mentioned as one of the values to which reasoned decision-making contributes. One French author, for instance, notes that the ambitions of the duty to state reasons have changed and evolved over the years: it is now expected to contribute to the goal of achieving '*une démocratie administrative*'.³⁵ Much of the statements that have been made in this regard, however, have remained vague and have not addressed the preconditions for a causal relationship between reason-giving and accountability. Title VII of this article is dedicated to this question.

C. The scope *ratione personae* and *ratione materiae* of the duty to give reasons (WHO and WHEN?)

1. Who is subject to the duty to give reasons? (WHO?)

19. The first question that arises when it comes to the scope of the duty to give reasons is how each of the legal regimes described above delineates the scope of the duty to give reasons *ratione personae*. Who, which parts of the administration, is subject to the general duty? In Belgium, the legislature has chosen to submit all 'administrative authorities' subject to the jurisdiction of the Council of State, the general and highest administrative court, to the regime of the WMB (Article 1). The delineation of the concept of 'administrative authority' (*administratieve overheid / autorité administrative*), for which no statutory definition exists, is a complex and much-debated issue, that will not be discussed here.³⁶ For the purpose of this article, it is sufficient to say that it includes all traditional persons

See also: A. Buijze, *The principle of transparency in EU law*, PhD dissertation, Utrecht University 2013; <http://dspace.library.uu.nl/handle/1874/269787> (14.03.2015).

³⁵ J.-L. Autin, *La motivation...*, p. 85, 86, 89 and 98.

³⁶ For an overview, see: S. De Somer, *Toepassingsgebied *ratione personae* van de Wet Motivering Bestuurshandelingen*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 17–54.

and bodies within the executive (the federal, regional and community Governments, their central administrations, the public institutions that depend on them, i.e. most autonomous public bodies, at least as far as they have a public-law form as well as local governments and their satellite bodies in a public-law form³⁷). Following a judgment of the Constitutional Court that discerned a discrimination in the overall exclusion of the legislature and the judiciary from the duty to give reasons, it is now accepted that the so-called ‘administrative’ acts of these institutions that can be challenged before the Council of State, are also subject to the duty to give reasons.³⁸

20. In the Netherlands, the Awb applies to so called ‘*bestuursorganen*’ (administrative organs). A general definition is found in Article 1:1 of the Awb. The criteria and exceptions enshrined in this provision are quite comparable to those that are applied in Belgium and comparable difficulties of interpretation have arisen.³⁹ Bodies pertaining to the legislature or judiciary qualify as ‘*bestuursorgaan*’, if and to the extent that they take decisions or perform acts *vis-à-vis* civil servants.⁴⁰

21. The French LMAA did not specify which state bodies are subject to the duties enshrined in it. It contained only a delineation *ratione materiae*. Article L211–1 of the CRPA now mentions that the provisions on ‘*motivation*’ apply to all administrations mentioned in Article L100–3, 1° of the Code. These include the state administration, the so-called ‘*collectivités territoriales*’ (the most important are the regions, departments, provinces and municipalities) and the autonomous public bodies that depend on them.⁴¹ The provisions also apply to organisations or persons responsible for a mission of public service that is of commercial or industrial nature, but only to the extent that these organisations or persons take decisions that relate to the execution of such missions.

22. Article 296 of the TFEU applies to all institutions of the Union that fulfil either legislative or administrative tasks.⁴² As explained earlier, the

³⁷ Private-law bodies are only considered ‘administrative authorities’ and to the extent that they have been invested with ‘coercive powers *vis-à-vis* third parties.

³⁸ See Article 14, §1, 2° RvS-Wet: this includes, *inter alia*, decisions with regard to staff or with regard to public procurement procedures, which are considered administrative rather than legislative or judiciary in nature.

³⁹ See e.g. S. E. Zijlstra, *Bestuurlijk Organisatierecht*, Kluwer 2009, p. 43–58.

⁴⁰ See Article 1:1 (3) Awb: an exception is provided for civil servants with life tenure working for the Council of State or the General Chamber of Audits.

⁴¹ ‘[Les] établissements publics administratifs et les organismes et personnes de droit public et de droit privé chargés d’une mission de service public administratif, y compris les organismes de sécurité sociale.’

⁴² See: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, who refer to the old Articles 190 and (later) 253 of the former Treaty, where the European Parliament, the Council and the Commission were explicitly named.

duty to give reasons as an unwritten general principle of law has a broader scope and applies to the Member States whenever they implement EU law.⁴³

Schematic overview

Scope <i>ratione personae</i> of the duty to give reasons as a (quasi) general obligation	
Belgium and the Netherlands	Delineation via general notions (' <i>administratieve overheid</i> ' resp. ' <i>bestuursorgaan</i> ') – these cover at least all traditional administrative bodies as well as those pertaining to the other state powers, if they take specific decisions of administrative nature.
France	Delineation via enumeration, which covers the administrations of the state and the territorial entities, (the most important categories of) autonomous public bodies and the organisations with commercial or industrial tasks to the extent that they take decisions embedded in a public service mission.
EU	All EU institutions that fulfil legislative or administrative tasks (Parliament, Council and Commission, as well as their administrations and satellite bodies) and the Member States that implement EU law.

2. Which decisions fall within the scope of the duty to give reasons? (WHEN?)

a. The rule

23. In Belgium, the duty to give reasons only applies to (all) unilateral acts with an individual scope that aim to generate legal consequences for one or more legal subjects or for another administrative authority (Article 1 of the WMB).⁴⁴ The limitation to acts with an individual scope implies that normative or rule-making administrative acts (by-laws or regulations) do not fall within the scope of the WMB.⁴⁵ Because the reasons have to be provided in the (text of the) administrative decision itself, the decision also has to be a written one. This implies that tacit or implicit administrative decisions⁴⁶ fall outside the act's scope.

24. In France, providing a statement of reasons for unilateral administrative acts is optional, except in those cases where an explicit legal

⁴³ *Supra*, para 12.

⁴⁴ An elaborate discussion is found in: I. Opdebeek, A. Coolsaet, *Toepassingsgebied ratione materiae van de wet motivering bestuurshandelingen*, in: *Formele motivering van bestuurshandelingen*, I. Opdebeek, A. Coolsaet (eds.), die Keure 2013, p. 55–76.

⁴⁵ This does not mean, of course, that these acts should not be inspired by correct, rational and reasonable justifications. These do not, however, have to be mentioned in the normative decision itself. The legal basis for this substantive duty to give reasons is a general principle of administrative law. See e.g. RvS 28 June 2012, no. 220.035, Goutière.

⁴⁶ For instance: when a Flemish local government does not take a decision on an application for a building permit within the period prescribed by the Flemish Code on Urban Planning Law (*Vlaamse Codex Ruimtelijke Ordening* or VCRO), it is presumed that it has taken a negative decision. This negative decision can subsequently be challenged via an administrative appeal at the provincial level. See Article 4.7.18, § 2 VCRO.

provision or a principle developed in case law obliges the administration to give reasons.⁴⁷ The most general, cross-sectorial obligation is found in the CRPA, which encompasses decisions of two different purports: ‘*les décisions individuelles défavorables*’ (Article L211-2 CRPA) and ‘*les décisions individuelles dérogatoires*’ (Article L211-3 CRPA).

As far as the first category is concerned, that of ‘unfavorable acts’, the act enshrines, however, a limited list of (types of) decisions that are subject to the duty to give reasons (Article 1). These include decisions that restrain the exercise of public liberties or, in a general way, constitute police measures (1), impose a penalty (2), submit the granting of a permit to restrictive conditions or impose constraints (3), revoke or repeal a decision that creates rights (4), entail a prescription, a foreclosure or an expiration (5), refuse a benefit the granting of which constitutes a right for those persons who comply with the legal conditions to obtain it (6), refuse a permit, except when the notification of the reasons could impair one of the secrets or interests protected by the provisions in the second to fifth paragraph of Article 6 of the *Loi portant diverses mesures d’amélioration des relations entre l’administration et le public* (7) or, finally, reject an administrative appeal that is obligatory prior to any judicial claim pursuant to a legislative or regulatory provision (8).

The unfavorable nature of a decision has to be judged in relation to the (direct) addressee only and not in relation to other, third parties (implying that these persons cannot invoke a right to obtain a reasoned decision on the basis of these provisions).⁴⁸

As far as the second category is concerned, i.e. the individual administrative decisions that derogate from general rules in a statute or a by-law, it should be noted that this covers favourable as well as unfavourable decisions.⁴⁹

This delineation *ratione materiae* implies that acts with a general scope (*les actes réglementaires*) and individual decisions that are favourable for those directly affected are not subject to the provisions on the duty to give reasons.⁵⁰ The decisions named by the CRPA constitute an exhaustive

⁴⁷ Literature notes, however, that, considering the increase of legal dispositions imposing a duty to state reasons, the time may have come to reverse the principle. See: O. Gabarda, *Vers la généralisation...*, p. 61–71. Both the French *Conseil d’État* and *Conseil Constitutionnel* have, however, rejected the recognition of a general principle that requires the administration to give reasons for its decisions: *supra*, footnote 4.

⁴⁸ See e.g. *Conseil d’État* 30 décembre 2009, no. 297433, Emile Reilles: ‘[P]our l’application de cet article, l’appréciation du caractère défavorable d’une décision doit se faire en fonction des seules personnes physiques ou morales qui sont directement concernées par elle’. See the criticism in Olivier Gabarda, *Vers la généralisation...*, p. 61, 65.

⁴⁹ Articles L211-7 and L211-8 contain provisions on the duty to give reasons in the sphere of social security, i.e. specific to one branch of public law. They are not discussed here.

⁵⁰ O. Gabarda, *Vers la généralisation...*, p. 61, 64.

and limitative list.⁵¹ Research by the French doctrine has revealed that the *Conseil d'État* gives a restrictive interpretation to the categories of decisions enumerated in the former LMAA, now in Articles L211-2 and L211-3 of the CRPA.⁵²

Pursuant to Article L211-4 CRPA, the so called *décrets en Conseil d'État*⁵³ can, if necessary, specify the categories of decisions that have to be reasoned in the application of the CRPA. Up until now, no such *décrets* have been issued.⁵⁴ This has not prevented the French Prime Minister from issuing, however, soft law documents (*circulaires*) containing interpretations of the act in terms of its scope *ratione materiae*.⁵⁵ The *Conseil d'État* has, however, ruled that these documents cannot be enforced *vis-à-vis* citizens, nor can they derive a right to a statement of reasons from them.⁵⁶ It is the courts themselves and, in the end, the *Conseil d'État* as the highest administrative court, that has the final say on the interpretation of the law. This has given rise to an impressive amount of case law of a 'complex' and 'evolving' nature⁵⁷, of which even a rudimentary discussion falls outside the scope of this article.⁵⁸

25. The Netherlands occupies an intermediate position. Here, the duty to give reasons, as it is currently conceived of in the Awb, applies to all written unilateral administrative decisions ('*besluiten*'), except for the actual by-laws ('*algemeen verbindende voorschriften*'), i.e. real normative acts, containing rules with a general scope.⁵⁹ It does not, however, discriminate

⁵¹ J.-L. Autin, *La motivation...*, p. 85, 93–94 with a reference to case law.

⁵² *Ibidem* p. 97: 'En définitive, il s'avère que le Conseil d'Etat reste fermement attaché à l'état du droit antérieur et limite au maximum la portée de la nouvelle législation, ce que déplore majoritairement la doctrine mais ce qui est conforme à l'idée que les exceptions à un principe, formulées par un texte législatif ou réglementaire, sont d'une interprétation stricte.' See also: J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation de l'acte administratif*, in: *JurisClasseur Administratif*, LexisNexis, version of 28 June 2014, with updates until 1 July 2015, paras 11 and 23.

⁵³ Special regulatory acts, issued by the French Government, for which the *Conseil d'État* intervenes as an advisory body.

⁵⁴ J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation...*, para 25.

⁵⁵ See the references in: O. Gabarda, *Vers la généralisation...*, p. 61, 64.

⁵⁶ See: (the references in) M. Gros, *Droit administratif...*; J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation...*, para 26.

⁵⁷ J.-L. Autin, *La motivation...*, p. 85, 96.

⁵⁸ Literature speaks of '*l'appréciation prétorienne du champ d'application de la motivation*'. See: M. Gros, *Droit administratif...*, p. 142–148. An extensive overview of interpretative case law is found in: J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation...*, paras 27–88.

⁵⁹ See Article 3:1 (1) b of the Awb. Just like in Belgium (*supra*, footnote 46), these acts have to be reasoned pursuant to a general principle of administrative law that requires all decisions to be based on sound grounds. It helps the courts to determine whether the (regulatory) act has been adopted with a reasonable goal. See: J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 380; H. F. T. Pennarts, *Beginselen van...*, p. 64 with references to case law. See also

between quasi-normative decisions (such as the so called ‘policy rules’ or ‘*beleidsregels*’) and individual, adjudicatory, administrative acts. In order to qualify as a ‘*besluit*’, a decision has to be written.⁶⁰ The provisions on the duty to give reasons anchored in the Awb consequently do not apply to tacit or implicit decisions.

26. The EU differs substantially from the three domestic systems studied here – and from most other national European systems of public law for that matter⁶¹ – since the duty to give reasons in Article 296 of the TFEU extends to legislative acts as well. The case law of the ECJ has more generally revealed that all (unilateral) acts that (can) generate legal consequences fall within the scope of the duty to state reasons. This means that all acts that qualify for judicial review under Article 263 of the TFEU are subject to this duty.⁶² Most authors who write on the duty to give reasons in EU law depart from a dichotomy, i.e. the distinction between individual decisions on the one hand and legislative documents, i.e. directives and regulations, on the other hand. There is, however, a third category of decisions that is often forgotten: that of subordinate legislation or by-laws. These are binding normative acts that are not issued by the legislative branch, but by the executive in the person of the European Commission.⁶³ The basis for these ‘quasi-legislative’ powers is found in Articles 290 and 291 of the TFEU. A distinction is made between ‘delegated measures/acts’ on the one hand and ‘implementing measures/acts’ on the other.⁶⁴ Literature has established that the a large number of

Article 118 of the Directions for Legislation, applicable to administrative regulations as well and binding for civil servants who prepare legislative drafts in the Netherlands: the preamble has to mention the reason behind the enactment of the regulation.

⁶⁰ Pursuant to Article 1:3 of the Awb, a ‘*besluit*’ is a written decision issued by an administrative organ, containing a legal act of public law nature.

⁶¹ P. Craig, *EU administrative...*, p. 341.

⁶² Case C-370/07 *Commission of the European Communities v Council of the European Union*, 2009, ECR I-08917, recital 42: the duty to give reasons ‘which is justified in particular by the need for the Court to be able to exercise judicial review, must apply to all acts which may be the subject of an action for annulment.’

⁶³ It is assumed that EU agencies, which also pertain to the EU executive, cannot be entrusted with rule-making powers, pursuant to the *Meroni* doctrine. See e.g. M. Chamon, *EU agencies: does the Meroni Doctrine make sense?*, “Maastricht Journal of European and Comparative Law” 2010, vol. 17, issue 3, p. 281.

⁶⁴ ‘Delegated measures are to be used to amend or supplement non-essential elements of legislation’, whereas ‘implementing measures are to provide greater uniformity to the application and implementation of EU legislation by setting out in greater detail its implications, be this through further rules or individual decisions’: D. Chambers, G. Davies, G. Monti, *European Union Law*, Cambridge University Press 2014, p. 68. Implementing acts are not necessarily normative in scope. The power to take implementing measures can also, under certain circumstances, be conferred on the Council (Article 291(2) of the TFEU).

these instruments has been issued over the past years.⁶⁵ They adopt the names of ordinary legislative instruments, with addition of the adjectives ‘delegated’ or ‘implementing’ (e.g. ‘delegated directive’). Evidently, these acts can be challenged before the EU courts, which makes them subject to the duty to give reasons.

27. The further definition of the types of decisions that fall within the scope of the duty to give reasons has mostly taken place within and is often specific to the various sub-sectors of EU law. SCHWARZE notes, for instance, that, in competition law, the Court has ruled that only legal acts that conclude competition proceedings have to be reasoned, not the preparatory measures.⁶⁶

Schematic overview

Scope <i>ratione materiae</i> of the duty to give reasons as a (quasi) general obligation		
Belgium	Open system comprising all unilateral acts with an individual scope that aim to generate legal consequences for one or more legal subjects or for another administrative authority.	Implicit decisions excluded.
France	Closed system comprising two types of unilateral acts with an individual scope: ‘ <i>decisions individuelles défavorables</i> ’ and ‘ <i>decisions individuelles dérogatoires</i> ’.	Special regime for implicit decisions (<i>infra</i> , para 30).
The Netherlands	Open system comprising all written unilateral administrative acts, except for by-laws.	Implicit decisions excluded.
EU	Open system comprising all unilateral acts that (can) generate legal consequences, whether their scope is legislative, regulatory or individual.	Not applicable.

b. Exceptions to the rule

28. The Belgian WMB provides a limitative list of exceptions to the rule of giving reasons for individual administrative acts. The duty does not apply if the statement of reasons:

- 1° jeopardizes the external security of the State;
- 2° has the potential of disturbing the public order;
- 3° risks detracting from the respect for a person’s private life;
- 4° risks detracting from provisions imposing a duty of silence.

As exceptions to a guarantee that offers legal protection to citizens, these grounds have to be interpreted narrowly.⁶⁷ Pursuant to Article 5 of the

⁶⁵ D. Chambers, G. Davies, G. Monti, *European...*, p. 68. See also the discussion in: H. C. H. Hofmann, G. C. Rowe, A. H. Türk, *Administrative Law...*, p. 524–535.

⁶⁶ J. Schwarze, *European...*, p. 1409 with reference to case law. See also p. 1404–1405 on the question whether acts in the sphere of contracts have to be reasoned and p. 1407–1409 on staff matters.

⁶⁷ I. Opdebeek, A. Coolsaet, *Uitzonderingen op de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 77, 79 and the references there.

WMB, urgent necessity does not constitute an exception: in this situation, administrative authorities are still obliged to comply with all requirements prescribed by the act.⁶⁸

29. This approach contrasts with Article 3:47 of the Dutch Awb, which provides the possibility for the administration not to provide reasons immediately, when the decision is notified, but to do so later, within a week after the notification, if this is necessary for reasons of urgency. Furthermore, Article 3:48 Awb provides that the statement of reasons can be omitted if it can be reasonably assumed that there is no need for it. If an interested party nonetheless makes a request for reasons within a reasonable period of time, then those have to be provided as soon as possible. This primarily applies to favourable decisions that do not involve the rights of third parties.⁶⁹

30. In France, the list of decisions that are subject to the duty to give reasons enshrined in Article L211-2 of the CRPA already contains at least one exception or restriction: decisions denying a permit do not require a statement of reasons when this could impair one of the secrets or interests protected by Article L311-5, 2^o, a-f of the CRPA.⁷⁰ Subsequently, Article L211-6 of the CRPA stipulates that if absolute urgency has prevented compliance with the duty to provide reasons, this does not entail the illegality of the act. However, if an interested party asks for the statement of reasons to be communicated to him/her, within the period available to initiate a procedure for judicial review, the authority that has made the decision will have to comply with this request, within a period of one month. Pursuant to the last paragraph of Article L211-6, the provisions of the law moreover do not derogate from the legislative texts that prohibit the disclosure of the publication of facts protected by (a duty of) secrecy.⁷¹

Article L232-4 of the CRPA contains a balanced solution for the lack of reasons in a tacit or implicit decision. If such an implicit decision covers one of the situations anchored in Article 1 or 2 of the act, it does not become illegal because of the mere fact that it does not contain reasons. However, if an interested party requests reasons for an implicit negative decision within the period available to start a procedure for judicial review, this request should be granted within a month. In this case, the period available to start a procedure for judicial review against this decision will be extended until two months after the day on which the reasons are communicated to the interested party.

⁶⁸ See: *Ibidem*, 77–100 for a full discussion of the relevant case law with regard to the scope and interpretation of the exceptions.

⁶⁹ G. A. C. M. van Ballegooij, T. Barkhuysen, W. den Ouden en J. E. M. Polak, *Bestuursrecht in het Awb-tijdperk*, Kluwer 2008, p. 96.

⁷⁰ This includes, for instance, national defence policy.

⁷¹ See: J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation...*, p. 90–91.

Literature emphasises that the courts give a strict interpretation to these exceptions. If the administration wishes to rely on the duty of secrecy, the courts assess whether the duty to give reasons would truly affect the duty of secrecy. As far as the exception based on urgency is concerned, a study of the case law reveals *'une apprehension extrêmement restrictive'*.⁷²

31. As far as the EU is concerned, doctrinal research has revealed that EU law does not know any real exceptions to the duty to give reasons, in the same way the national systems studied do. There are, however, certain situations in which the extent of the duty to give reasons is tempered or moderated. This is the case, for instance, when the interested party was involved in the decision-making process in a way that has allowed him/her to be informed about the reasons behind the result.⁷³ The duty of professional secrecy⁷⁴ and the fact that the time available to reach a decision is limited⁷⁵ may also influence the scope of the duty to give reasons.⁷⁶ However, 'the Court is conscious of avoiding the hollowing out of the obligation to provide reasons on the basis of claims regarding the need for secrecy, speaking of the need to preserve the 'essential content' of the requirements to give reasons.'⁷⁷

In a more recent case concerning the lack of any mention of a legal basis on which the Council had deemed it justifiable to act – a requirement that is taken very seriously by the Court (*supra*) – the Court refused to accept the justification of time pressure.⁷⁸ 'Consequently, the Court is careful not to let practical objections be decisive when it comes to fundamental constitutional principles', a case note concluded.⁷⁹ The Court has, however, accepted that other practical impediments may influence the contents of the duty to give reasons, acknowledging that, for certain⁸⁰ decisions '[t]

⁷² M. Gros, *Droit administratif...*, p. 152. See also: J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation...*, p. 101.

⁷³ See the discussion and the references in: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht in het Europees bestuursrecht*, (2012) 3 TBP 136, 146–147.

⁷⁴ *Ibid*, with reference to Case 121/76, *Alessandro Moli v Commission of the European Communities*, [1977] ECR 1971.

⁷⁵ *Ibidem*, with various references.

⁷⁶ See also the other examples given in: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 143.

⁷⁷ H. C. H. Hofmann, G. C. Rowe, A. H. Türk, *Administrative Law...*, p. 202 with a reference to Case 89/79 *Bonu v Council*, 1980, ECR 553; Joined cases 296 and 318/82 *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v Commission*, 1985, ECR 809. In the latter case, the Court suggested that 'the Commission could have excluded from publication those facts which it considered to be covered by the obligation of professional secrecy' (recital 28).

⁷⁸ Case C-370/07 *Commission of the European Communities v Council of the European Union*, 2009, ECR I-08917, recital 53.

⁷⁹ Geert De Baere, case note Case C-370/07 [2010] SEW 477, 480.

⁸⁰ Those that require substantial assessments, consisting of various calculations and depending on a variety of parameters and/or facts, which are therefore complex and technical in nature.

he degree of precision of the statement of reasons [...] must be weighed against practical realities and the time and technical facilities available for making such a decision.⁸¹

Finally, it should be noted that Article 52(1) provides for a possibility to limit the exercise of the rights and freedoms recognised by the Charter, as long as these are provided by law and respect the essence of those rights and freedoms. ‘Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

Schematic overview

Exceptions to the duty to give reasons as a (quasi) general obligation

Belgium	Four exceptions in WMB; restrictive interpretation: 1° external safety; 2° public order; 3° private life; 4° duty of silence. Urgency does not constitute an exception.
The Netherlands	Two exceptions in the Awb: 1° no need for reasons 2° urgency, albeit with a corrective mechanism.
France	Three exceptions in the CRPA, restrictive interpretation: 1° protected secrets, 2° absolute urgency, albeit with a corrective mechanism and 3° tacit decisions, albeit with a corrective mechanism.
EU	No real exceptions, only situations in which the duty is tempered. Urgency (time pressure) will not be (easily) accepted.

D. The purport of the duty to give reasons (HOW?)

32. Once a decision is subject to the duty to give reasons, what are the implications of this obligation? Which requirements characterise this duty?

1. Time and place of the statement of reasons

33. In Belgium, the reasons for the decision have to be mentioned in the (written) decision itself (Article 3 of the WMB). It is not sufficient that they are mentioned in the letter of notification, since this does not always allow the court to be sure that the competent authority, i.e. the same as the one that has taken the actual decision, has also provided the reasons.⁸² The statement of reasons cannot be contained in any other document that is

⁸¹ Case C-15/65, *Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1965, ECR 1081; Jürgen Schwarze, *European...*, p. 1409.

⁸² RvS 10 December 2010, no. 209.565, De Dobbeleer; I. Opdebeek, A. Coolsaet, *Draagwijdte van de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen*, (eds) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 129, 130 ff.

issued after the decision has been notified either, especially not in one that is first submitted or revealed at the stage of judicial review.

34. In France, as a rule, the reasons are provided in the same text as the actual decision, but it has been accepted that they are part of a letter attached to the decision as well, as long as they are notified simultaneously.⁸³ The essential precondition is, of course, that the interested party is aware of the existence of the (separate) document that contains the reasons.⁸⁴ The Courts do not accept a notification of reasons either after the decision has been notified or before the (actual and final) decision has been notified (*'la motivation anticipée'*).⁸⁵ Note that there is an exception, however, for cases of absolute urgency (*supra*).

35. The Dutch Awb (Article 3:47) stipulates that the reasons have to be provided together with the notification of the decision. This implies that the decision and the statement of reasons do not have to be part of the same text, but have to be notified simultaneously. The reasons may, for instance, be mentioned in a separate letter, attached to the actual decision.⁸⁶ As mentioned earlier, Article 3:47 of the Awb provides for an exception to this rule in cases of urgency. The need to apply this provision may, for instance, be felt in legal enforcement cases, where quick action is required.⁸⁷ *Infra*, it will be explained that the technique of the 'administrative loop' in the Netherlands allows for a lack of reason-giving or deficiencies in the statement of reasons to be 'repaired' in the course of an administrative appeal or a judicial procedure. This means that (a part of) the statement of reasons will only be notified at a later stage. Literature notes, however, that the legal basis of the decision cannot be (essentially) changed in the course of such a procedure.⁸⁸ The Courts will not annul a decision on the grounds that the statement of reasons was not notified together with the decision, but only at a later stage, if the applicant's interests were not affected by this deficiency.⁸⁹

36. In the EU, it follows from the formulation of Article 297 of the TFEU that 'in general, the statement of reasons will share the same form as the legal act to which it refers, because both are intimately linked together'.⁹⁰

⁸³ P.-L. Frier, J. Petit, *Droit...*, p. 350 with references to the case law of the *Conseil d'État*.

⁸⁴ N. Songolo, *La motivation des actes administratifs*, Village de la Justice. La communauté des métiers du droit; <http://www.village-justice.com/articles/motivation-actes-administratifs,10849.html> (10.02.2015).

⁸⁵ See: M. Gros, *Droit administratif...*, p. 148 with various references to the case law of the *Conseil d'État*; J.-Y. Vincent, Guy Quillévére, *Fascicule 107-30: Motivation...*, paras 114-116.

⁸⁶ H. F. T. Pennarts, *Beginselen van...*, p. 52-53.

⁸⁷ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht...*, p. 464.

⁸⁸ *Ibidem* 464 with references to case law and literature.

⁸⁹ *Ibidem*, p. 464.

⁹⁰ Jürgen Schwarze, *European...*, p. 1405 with references.

This implies that the statement of reasons must be issued at the same time as the decision.⁹¹ The case law of the ECJ has clarified that this means: in the (text of) the act itself.⁹² Just like in Belgium, it is not sufficient that the reasons are mentioned in a later, related act.⁹³ *A fortiori*, ‘a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court’.⁹⁴ The same is true more generally for written or oral explanations given after the appeal before the court has already been filed.⁹⁵

It should be noted that the reasons for acts of a legislative or normative nature will typically be mentioned in the recitals of the preamble, which, in EU law, is part of the same text as the act itself.

37. In all the systems studied, one important exception exists with regard to the rule of notification in the decision or its notification. The legislature and/or the courts accept that the administration, in its decision, refers to what has previously been stated in another written piece that was part of the administrative process: i.e. reason giving through referral. Typically, these documents are advisory in nature.

38. In the Netherlands, Article 3:49 of the Awb stipulates that reference to an advisory opinion that was issued in view of an administrative decision suffices as a statement of reasons, if the advisory document itself contains the reasons and if it was or will be notified. The courts have added to this provision an additional requirement: it is up to the administration to verify whether and to what extent the opinion is sound or valid, i.e. the ‘*vergewisplicht*’ or ‘duty to ascertain’. The advisory procedure and the result have to be free from flaws, both formally (the composition and functioning of the advisory body) and substantively (the contents of the opinion). The latter means that the advisory opinion itself has to comply with the requirement of ‘soundness’ of the reasons in Article 3:46 of the Awb (*infra*).⁹⁶

39. The Belgian Council of State has acknowledged, in its case law, that reason-giving by reference to other documents (typically a preparatory act, such as an advisory opinion) is possible, if the following requirements have been (cumulatively) fulfilled: (1) the content of the piece to which reference

⁹¹ *Ibidem*, p. 1406.

⁹² See e.g. Case C-291/98 P *Sarrió v Commission*, 2000, ECR I-9991, recitals 73 and 75.

⁹³ E.g. Case C-370/07 *Commission of the European Communities v Council of the European Union*, 2009, ECR I-8917, recital 53.

⁹⁴ E.g. Case C-195/80 *Michel v Parliament*, 1981, ECR-2861, recital 22; Joined cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd (ENS) and Others v Commission*, 1998, ECR II-3141.

⁹⁵ E.g. Case T-349/03 *Corsica Ferries France v Commission*, 2005, ECR II-2197, recital 287.

⁹⁶ G. A. C. M. van Ballegooij, T. Barkhuysen, W. den Ouden en J. E. M. Polak, *Bestuursrecht...*, p. 96.

is made has to be notified to the person affected by the decision, (2) the piece to which reference is made has to comply with the requirement of 'adequacy', enshrined in Article 3 of the WMB (*infra*) itself, (3) the decision has to agree with the document to which reference is made and (4) there may be no contradictory opinions.⁹⁷ Denys had derived a fifth, more implicit condition from the case law; the opinions referred to have to comply, both formally and substantively, with the requirements of due diligence, as a principle of good administration ('*zorgvuldigheidsbeginsel*').⁹⁸ This condition is comparable to the above-mentioned 'duty to ascertain' upheld in the Netherlands, since it is up to the final decision-maker to verify whether the act complies with these standards.

40. In France, the administrative courts have acknowledged, albeit exceptionally, that a statement of reasons can be construed via a reference to other documents.⁹⁹ The case law of the *Conseil d'État* reveals that this is only possible, if the conclusions of these documents themselves comply with the legal requirements on the duty to give reasons and if the final decision-maker agrees with the conclusions (of, for instance, the advisory document) and makes them his own.¹⁰⁰ Reference to a document that itself refers to another document containing the reasons behind its content or conclusions is not valid: *renvoi sur renvoi ne vaut*.¹⁰¹

41. The ECJ accepts references to an earlier (individual) act that contains the grounds on which other, later (individual) decisions are based.¹⁰² CRAIG derives from this case law that '[w]hen a decision established a new principle, or applied it in a novel fashion, there would have to be sufficient reasons in the decision itself, but on some occasions the Court will sanction the incorporation of reasons from another instrument'¹⁰³. Reference to vague documents, such as invoices that cannot be precisely identified, does not suffice.¹⁰⁴

⁹⁷ I. Opdebeek, A. Coolsaet, *Draagwijdte...*, p. 129, 133–134 with multiple reference to the constant case law. For a recent example, see: RvS 13 March 2004, no. 226.734, de NV Baeck & Jansen.

⁹⁸ See (the references in): S. Denys, *Advisering in het bestuursrecht*, Administratieve rechtsbibliotheek: algemene reeks, die Keure, Brugge 2013, p. 839–987.

⁹⁹ E.g. Conseil d'État 9 novembre 1984, no. 44983, comité dauphinois d'hygiène industrielle; O. Gabarda, *Vers la généralisation...*, p. 61, 64. *Contra*: M. Gros, *Droit administratif...*, p. 149 referring to Conseil d'État 17 juin 1983, no. 28115, X.

¹⁰⁰ See the references in: J.-Y. Vincent, G. Quillévéré, *Fascicule 107–30: Motivation...*, p. 109.

¹⁰¹ *Ibidem*.

¹⁰² Case C-16/65 *Schwarze*, 1965, ECR 1081. See also e.g. Case C-119/97 P *Ufex and Others v Commission*, 1999, ECR I-1341, recital 57: '[T]he statement of reasons for an administrative act may refer to other acts and, in particular, take note of the content of an earlier act, especially if it is connected.'

¹⁰³ P. Craig, *EU administrative...*, p. 342 with reference to Case C-16/65.

¹⁰⁴ Case T-306/00 *Conserve Italia v Commission*, 2003, II-5705, recital 55, cited in: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 151.

Schematic overview

Time and place of the statement of reasons		
Belgium and EU	In the act itself.	Reference to advisory documents or other documents allowed under conditions.
France and The Netherlands	– Notification simultaneously with the act; in the act itself or in an accompanying letter. – Exceptional arrangement in cases of urgency.	Reference to advisory documents or other documents allowed under conditions.

2. Content of the statement of reasons**a. General requirements**

As to the actual content of the duty to give reasons, the Belgian WMB prescribes that the decision should mention the legal and factual considerations underlying the decision. It furthermore requires an ‘adequate’ (*afdoende / adéquat(e)*) statement of reasons (Article 3). This means that, first of all, the decision should mention the legal grounds on the basis of which it has been taken (the relevant statute, by-law,...). Moreover, the facts that have given rise to or are relevant to the decision have to be made explicit. Whether a statement of reasons is ‘adequate’ is in turn evaluated on the basis of two sub-criteria. First of all, the courts will assess whether it has sufficient ‘carrying capacity’: can it truly support the decision in its full scope? This will only be the case if the reasons are clear, correct, pertinent, non-contradictory, specific and precise; standard formulations are out of the question. Second of all, the statement of reasons has to be ‘proportionate’ in relation to the importance of the decision as well as the degree to which it involves a discretionary assessment.

Research has revealed that these criteria and sub-criteria have given rise to an impressive amount of case law, issued by the Council of State, the various special administrative courts and – in some cases – the civil courts. Naturally, they require a case-by-case assessment, meaning that compliance is highly dependent on the specific circumstances of the case.¹⁰⁵

42. In the Netherlands, a distinction is made between (the qualitative requirements that govern) the notification and possibility for the parties addressed to know the reasons (*kenbaarheid*) of the decision on the one hand and (those that govern) the substantive capacity (*draagkracht*

¹⁰⁵ For an elaborate overview, see: I. Opdebeek, A. Coolsaet, *Draagwijdte*..., p. 129, 141 ff.

(*igheid*)' of the reasons¹⁰⁶ provided on the other hand.¹⁰⁷ These correspond to the formal and substantive aspect of the duty to provide reasons respectively.

The formal pillar of the duty to give reasons implies that the statement of reasons is sufficiently clear. Cryptic or incomprehensible considerations hamper both the formal and substantive requirement of the duty to give reasons.¹⁰⁸

As far as the substantive aspect is concerned, Article 3:46 of the Awb prescribes that an administrative decision has to be underpinned by a 'sound' (*deugdelijke*) statement of reasons. According to legal doctrine, this means that the decision has to be 'carried by rational and consistent considerations', that the reasons must carry the administrative act 'factually and logically' and that the arguments mentioned should have 'sufficient weight to justify the decision'.¹⁰⁹ Other literature mentions the values of consistency, conclusiveness and intelligibility as relevant criteria. A lack of internal contradictions, of a refutation of argument brought forward by the addressee in the course of the administrative process¹¹⁰ or of an explanation why an advisory opinion was not followed, are examples of deficiencies that violate the requirement of soundness.¹¹¹ Another important requirement is that the statement of reasons has to be sufficiently specific and tailored to the decision.¹¹² Considerations that are true in general, without any indication why they would also be valid in the case at hand, are insufficient. The same is true if a merely formal statement of reasons is provided that abstracts from the facts.¹¹³ Nevertheless, the statement of reasons can

¹⁰⁶ J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 380.

¹⁰⁷ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, Kluwer 2010, p. 463; G. A. C. M. van Ballegooij, T. Barkhuysen, W. den Ouden en J. E. M. Polak, *Bestuursrecht in het Awb-tijdperk*, Kluwer 2008, p. 95–96; H. F. T. Pennarts, *Beginselen van behoorlijk bestuur*, Maklu 2008, p. 52.

¹⁰⁸ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in...*, p. 466. See also: G. A. C. M. van Ballegooij, T. Barkhuysen, W. den Ouden en J. E. M. Polak, *Bestuursrecht in...*, p. 96.

¹⁰⁹ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in...*, p. 463.

¹¹⁰ See also: H. F. T. Pennarts, *Beginselen van...*, p. 54; J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 433.

¹¹¹ J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 380–381 with multiple references.

¹¹² R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in...*, p. 466.

¹¹³ H. F. T. Pennarts, *Beginselen van...*, p. 54. Other examples of deficiencies that affect the statement of reasons substantively are: the lack of, the insufficiency or the incorrectness of facts; the lack of an assessment of (relevant) interests; the applicable law, policy rules or policy is not mentioned at all or is mentioned incorrectly; the legal qualification is incorrect; the arguments of interested parties are not addressed or are addressed insufficiently or incorrectly; the statement of reasons is contrary to the law; the statement of reasons is inconsistent or inconclusive (H. F. T. Pennarts, *Beginselen van...*, p. 55–57, based on analysis of the case law).

be more concise in the case of large amounts of routine decisions (the so-called ‘decision factory’) than in the case of stand-alone and unique decisions (‘decision studio’).¹¹⁴ Yet another text book warns, however, that it is impossible for the legislature to define ‘soundness’ for each and every situation. Therefore, case-by-case analysis is always necessary.¹¹⁵

Another substantive requirement for the duty to give reasons anchored in Article 3:47(2) reads that the decision ‘as much as possible’ mentions the statutory provision pursuant to which the decision has been made.

43. The French CRPA prescribes that the statement of reasons has to be written and has to include an account of the legal and factual considerations that constitute the foundation of the decision.¹¹⁶ Abstract reasons will not be accepted; the decision has to be based on precise and circumstantial facts and has to consider the case and the personal situation of the affected party.¹¹⁷ The statement of reasons has to be sufficiently detailed (concise and complete at the same time¹¹⁸) and has to avoid formulaic wording (‘*formulaires-types*’).¹¹⁹

44. Article 296 of the TFEU obliges the EU institutions to refer, in their statement of reasons, to ‘any proposals, initiatives, recommendations, requests or opinion required by the Treaties’. Pursuant to the settled case law of the ECJ¹²⁰, moreover, the statement of reasons:

must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the

¹¹⁴ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in...*, p. 465 with multiple references. In the same sense: J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 433.

¹¹⁵ G. A. C. M. van Ballegooij, T. Barkhuysen, W. den Ouden, J. E. M. Polak, *Bestuursrecht in...*, p. 95. See also: R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in...*, p. 465, and J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 432, 464: the authors note that ‘giving reasons is custom work’.

¹¹⁶ Article L211-5.

¹¹⁷ O. Gabarda, *Vers la généralisation...*, p. 61, 64. In the same sense: N. Songolo, *La motivation des actes administratifs*, Village de la Justice. La communauté des maetiers du droit; <http://www.village-justice.com/articles/motivation-actes-administratifs,10849.html> (10.02.2015).

¹¹⁸ J.-Y. Vincent, G. Quillévéré, *Fascicule 107-30: Motivation...*, p. 108.

¹¹⁹ M. Gros, *Droit administratif...*, p. 149-150 with references to the case law of the *Conseil d’État*. See also: J.-Y. Vincent, G. Quillévéré, *Fascicule 107-30: Motivation...*, p. 108.

¹²⁰ Case C-367/95 *Sytraval and Brink’s France v Commission*, 1998, ECR I-1719, recital 52 (emphasis added), cited by P. Craig, *EU administrative...*, p. 341.

interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190¹²¹ of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question [...].

Literature stresses that the extent of the duty to give reasons requires determination 'on the basis of the particular facts of each case'.¹²² According to CRAIG, the statement of reasons (in any case) has to contain a 'specification of the Treaty article on which the measure was based; the factual background to the measure; and the purposes behind it'.¹²³ However, '[t]he context in which individual decisions are taken will be important in determining the extent of the duty to give reasons.' In competition law, for instance, it has been acknowledged that 'the Commission is not obliged to adopt a position on all the arguments relied on by the parties. It is sufficient if it sets out the facts and legal considerations having decisive importance for the decision'.¹²⁴

Because of the institutional nature of the EU, i.e. a supranational order that has no other competences or powers than those granted by the Treaties, the duty for the EU institutions to mention the legal basis of an act is a particularly important aspect of the statement of reasons. '[T]he failure of to refer to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements if the legal basis for a measure may be determined from other parts of the measure. However, such explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis'.¹²⁵

Some authors argue that, in the EU, the ability of the reasons to carry the decision, i.e. their lawfulness, relevance and reasonableness, is not

¹²¹ Now Article 296.

¹²² H. C. H. Hofmann, G. C. Rowe, A. H. Türk, *Administrative Law...*, p. 202 with references. See also: J. Schwarze, *European...*, p. 1406: 'In principle, it is the case that the statement of reasons, which must be in the form laid down for the legal act, must contain the considerations of fact and law which determined the decision. The Court of Justice has, however, articulated a series of points which in individual cases will determine the scope of the necessary statement of reasons.'

¹²³ P. Craig, *EU administrative...*, p. 342 with references to the case law.

¹²⁴ *Ibidem*, 343. See e.g. Case T-5/93 *Tremblay v Commission* 1995 ECR II-185, recital 29.

¹²⁵ Case C-370/07 *Commission of the European Communities v Council of the European Union* 2009 ECR I-8917, recital 56; see also the case note by: G. De Baere in 2010 SEW 477 ff; D. Keyaerts, *Behoorlijke wetgeving in de rechtspraak van het Hof van Justitie 2008–2009*, 2 TVW 2010, p. 103, 116; K. Lenaerts, P. Van Nuffel, *Europees recht*, Intersentia 2011, p. 81.

usually considered as an aspect of the duty to give reasons, but there are exceptions.¹²⁶

Finally, the EU Commission's Code of Good Administrative Behaviour mentions the following with regard to the standard of reason-giving:

A Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned. As a general rule full justification for decisions should be given. However, where it may not be possible, for example because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of individual decisions, standard replies may be given. These standard replies should include the principal reasons justifying the decision taken. Furthermore, an interested party who expressly requests a detailed justification shall be provided with it.

Given the high standards upheld in the case law of the ECJ, it is doubtful whether this flexible and lenient approach, if applied in practice, would survive judicial scrutiny.

b. The (relevance of the) distinction between decisions with an individual and general scope

45. This dichotomy is (only) relevant in the context of the EU, where legislative and other normative acts fall within the scope of the duty to give reasons. It should be noted, however, that, like most legal systems¹²⁷, the EU struggles with the precise delineation of 'regulatory', 'normative' or 'rule-making' acts or decisions with a general scope *vis-à-vis* measures with an individual scope. For instance, it has been argued that some 'acts of general application', such as anti-dumping acts, may directly affect individuals, implying that a stricter standard will be applied in terms of reason-giving.¹²⁸

46. It is clear from the case law of the ECJ that the standard against which the statement of reasons is tested is stricter in the case of decisions with an individual scope, compared with those of general nature.¹²⁹ In one of its milestone judgments, the Court has ruled that:

The extent of the requirement laid down by Article 190 of the Treaty to state the reasons on which measures are based, depends on the nature of the measure in question.

¹²⁶ J. H. Jans, R. de Lange, S. Prechal, R. J. G. M. Widdershoven, *Inleiding tot het Europees Bestuursrecht*, Ars Aequi Libri 2002, p. 247 with reference to (as far as the exception is concerned) Case T-37/92 *BEUC and NCC v Commission* 1994 ECR II-285, recitals 43 ff.

¹²⁷ For France, see e.g. J.-Y. Vincent, Guy Quillévé, Fascicule 107–30: *Motivation...*, p. 33.

¹²⁸ H. C. H. Hofmann, G. C. Rowe, A. H. Türk, *Administrative Law...*, p. 200. See also: J. Schwarze, *European...*, p. 1414 with references.

¹²⁹ Case C-18/62 *Barge v High Authority*, 1963 ECR 531; J. Schwarze, *European administrative law* (Sweet and Maxwell 2006) 1406 (see also p. 1412).

It is a question in the present case of a regulation, that is so to say, a measure intended to have general application, the preamble to which may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve on the other.

Consequently, it is not possible to require that it should set out the various facts, which are often very numerous and complex, on the basis of which the regulation was adopted, or *a fortiori* that it should provide a more or less complete evaluation of those facts.¹³⁰

CRAIG notes that '[w]here a measure was of a general legislative nature it was necessary for the EU authority to show the reasoning which led to its adoption, but it was not necessary for it to go into every point of fact and law. Where the essential objective of the measure had been clearly disclosed there was no need for a specific statement of the reasons for each of the technical choices that had been made.'¹³¹ 'The Court may well demand greater particularity where the measure challenged is of an individual, rather than a legislative nature,' the author continues.¹³²

SCHWARZE warns, however, not to take the duty to give reasons for legislative acts all too lightly, since it 'ensures that a certain level of publicity is given to the motives of the legislature':

[T]he reasoning of normative acts in Community law must not be reduced to a formality, since, given the secrecy of the deliberations of the Council and Commission, the institutions which are called upon to apply the law rely very heavily upon detailed information about the meaning and purpose of a regulation in order to effect an appropriate interpretation of its provisions.¹³³

Finally, the Court has accepted that the statement of reasons for a legislative act, *in casu* a regulation, 'must be considered and assessed in the context of the complex of regulations of which this act is an integral part'.¹³⁴

c. The relevance of the (degree of) discretionary power involved

47. In Belgium, it is accepted that, when there is no room for discretionary power or appreciation whatsoever, a reference to the applicable legal norm

¹³⁰ Case C-5/67 *Beus GmbH v Hauptzollamt München* [1968] 125.

¹³¹ P. Craig, *EU administrative...*, p. 342 with reference to Case C-122/94 *Commission/Council*, 1996 ECR I-881, recital 29 and Case 84/94 *United Kingdom v Council*, 1996 ECR I-5755, recitals 74 and 79. See also e.g. Case C-304/01 *Spain v Commission*, 2004 7655, recital 51; (the references in) H. C. H. Hofmann, G. C. Rowe, A. H. Türk, *Administrative Law...*, p. 199; K. Lenaerts, P. Van Nuffel, *Europees...*, p. 587.

¹³² P. Craig, *EU administrative...*, p. 342 with references. For a more detailed overview of the difference in scope of the duty to give reasons for individual and normative (legislative) acts in the EU, see: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 144–146.

¹³³ J. Schwarze, *European...*, p. 1415–1416.

¹³⁴ Case C-78/74 *Deuka v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1975 ECR 421; J.-L. Autin, *La motivation...*, p. 85, 91.

suffices for compliance with the duty to give reasons.¹³⁵ Conversely, the duty to give reasons becomes stricter if the degree of discretionary power of the administration increases.¹³⁶

48. As far as the Netherlands is concerned, the degree of room for appreciation or discretionary freedom possessed by the administration will also influence the range of the duty to give reasons. In case of a complex assessment of interests, the statement of reasons will have to be more elaborate than in the case of a technical application of law.¹³⁷ Pursuant to Article 4:82 of the Awb, reference to a consistent line of conduct suffices to comply with the duty to give reasons, if and to the extent that this constant line of conduct has been anchored in a so-called ‘policy rule’ (*‘beleidsregel’*). In Dutch law, a policy rule is a general rule, contained in a decision, which is not a by-law (a real normative decision, containing enforceable rules), regarding the assessment of interests, the establishment of facts or the interpretation of statutory rules in the exercise of an administrative body’s competence. Administrations typically use these instruments to streamline their discretionary powers and to increase the predictability, legal certainty and equality of their decisions. However, the administrative body has to assess the specificities of the case, in order to verify whether it is necessary to deviate from the policy rule.¹³⁸ The lenient arrangement of Article 4:82 of the Awb does not apply in case of an alleged constant policy that has not been incorporated in a policy rule.¹³⁹

49. In the EU, the ECJ has acknowledged that

where the Community institutions have [...] a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.¹⁴⁰

With regard to the duty to give reasons, the Court has acknowledged that, if a decision comprises a specific assessment of a situation (meaning

¹³⁵ I. Opdebeek, A. Coolsaet, *Draagwijdte...*, p. 129, 149 with reference to the preparatory documents of the Senate (Verslag Senaatscommissie, *Gedr. St. Senaat*, BZ 1988, nr 215/3, 14 and 17) and to case law.

¹³⁶ *Ibidem*, p. 151. See e.g. RvS 12 February 1997, no. 64.486, Colleye.

¹³⁷ R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht...*, p. 465 with multiple references.

¹³⁸ *Ibidem*, p. 463–464 with references to case law; G. A. C. M. van Ballegooij, T. Barkhuysen, W. den Ouden, J. E. M. Polak, *Bestuursrecht...*, p. 95.

¹³⁹ Constant case law. See e.g. Rechtbank ‘s-Hertogenbosch 25 June 2010, 202162 / FA RK 09-6083.

¹⁴⁰ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte*, 1991 ECR I-5469, recital 14; K. Lenaerts, P. Van Nuffel, *Europees...*, p. 587.

that it involves an appreciation of facts and circumstances), it is partially outside the jurisdiction of the court. However, if – and by reason of the fact that – review of the Court is limited in those cases, whereas the margin of appreciation given to the administration is large, the duty to give reasons must be (all the more) strictly observed.¹⁴¹ Literature concludes from this case law that decisions have to ‘be more thoroughly reasoned the greater the discretionary power of the Commission’ and that there is a clear link ‘between the range of the available discretion and the scope of the duty to give reasons.’¹⁴²

50. In France, there are not sufficient clues in the case law or legal doctrine that the degree of discretionary power has a substantial effect on the standard used by the Courts to assess compliance with the duty to give reasons.

d. Situations in which a more enhanced / stricter duty to give reasons applies

51. In Belgium, it follows from the case law that the following circumstances give rise to an enhanced duty to give reasons: the administration deviates from a (non-binding) advisory opinion, a settled policy, previous decisions or the normal procedures; the arguments brought forward by the affected party or parties are refuted; an exception is granted; the most far-reaching or intrusive measure is chosen; the administration exercises a conditional power; the administration takes a decision that is not obvious.¹⁴³

52. Pursuant to Article 3:50 of the Dutch Awb, an administrative organ that makes a decision and deviates from an advisory opinion that was given in view of that decision by virtue of a statutory provision, has to mention the deviation explicitly and has to provide a justification for it in its statement of reasons. Literature notes that, for opinions that are not obligatory pursuant to statutory law, the same obligation exists, but is based on the general principles of administrative law, rather than on the Awb.¹⁴⁴

PENNARTS also mentions the following examples of (other) situations (derived from the case law) in which the duty to give reasons becomes stricter: the administration takes a punitive penalty; it decides not to enforce the law although an illegal situation exists; expectations have been

¹⁴¹ Case 36/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft and Others v High Authority*, 1960 ECR 857.

¹⁴² J. Schwarze, *European...*, p. 1410 with reference to the cited judgment and other case law.

¹⁴³ All discussed in: I. Opdebeek, A. Coolsaet, *Draagwijdte...*, p. 129, 163–167.

¹⁴⁴ J. A. Damen, J. L. Boxum, K. J. de Graaf et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009, p. 433.

raised, but the administration does not fulfil them; there is an unequal treatment of equal cases.¹⁴⁵

53. As far as the EU is concerned, an enhanced duty to give reasons exists if there is a deviation from a constant decision-making practice.¹⁴⁶ The same is true in cases where the recipient or addressee of a decision has not been able to communicate his/her concerns on the basis of the duty to be heard.¹⁴⁷ Article 296 of the TFEU explicitly requires a referral to any proposals, initiatives, recommendations requests or opinions required by the Treaties. Contrary to what one may expect and to what is the case in the national systems discussed here, this does not imply an obligation to mention on the basis of which facts or data the Commission decided not to follow an (advisory) opinion.¹⁴⁸

Schematic overview

Situations in which the courts have already acknowledged that¹⁴⁹ an enhanced duty to give reasons applies

Belgium	<ul style="list-style-type: none"> – Deviation from a non-binding advisory opinion. – Deviation from a constant policy / previous decisions. – Deviation from the normal procedures. – Refutation of arguments brought forward by affected parties. – Granting of an exception. – Adoption of the most far-reaching or intrusive measure. – Exercise of a conditional power. – Unobvious decision.
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¹⁴⁵ H. F. T. Pennarts, *Beginselen van...*, p. 58.

¹⁴⁶ J. H. Jans, R. de Lange, S. Prechal, R. J. G. M. Widdershoven, *Inleiding tot...*, p. 247 with reference to Case C-228/99 *Silos*, 2001 ECR I-8401, recital 28: 'However, it is also accepted that, although the reasons for a decision in a line of consistent decisions may be given in a summary manner, for example by a reference to those decisions, the Community authority must give an explicit account of its reasoning if the decision goes appreciably further than the previous decisions [...]'. See also Case 73/74 *Papiers Peints v Commission*, 1975 ECR 1491, recitals 31 and 33.

¹⁴⁷ Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 147 with reference to e.g. Case T-181/08 *Tay Za v Council* [2010] ECR II-1965, recital 94: 'If the party concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that decision [...]'.
¹⁴⁸ Case C-448/06 *cp-Pharma* 2008 ECR I-5685, recital 38; D. Keyaerts, *Behoorlijke wetgeving...*, p. 103, 117. See also the references in: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 142. The authors speak of a 'mere formal requirement'.

¹⁴⁹ This table mentions only those situations that have already been recognised as intensifying the duty to give reasons in the case law of the respective legal systems. It is quite possible that, in the future, these lists will evolve. Furthermore, the situations mentioned for all four systems reveal shared rationales: all situations in which either unobvious or particularly far-reaching decisions are made (from the citizen's viewpoint) seem to be targeted.

The Netherlands	<ul style="list-style-type: none"> – Deviation from an advisory opinion. – Punitive penalties. – Decision not to enforce the law in the case of illegalities. – Unfulfilled expectations. – Unequal treatment.
EU	<ul style="list-style-type: none"> – Deviation from a settled decision-making practice. – No right to be heard.

E. What are the sanctions or legal remedies in case of non-compliance?

54. In the Netherlands, a failure to comply with the duty to give reasons can give rise to an annulment by the administrative courts.¹⁵⁰ Pursuant to Article 6:22 of the Awb, however, this annulment does not have to be pronounced if it is plausible that the interested parties have not been harmed by the violation of, *in casu*, the duty to give reasons.¹⁵¹ Whereas it is generally assumed that this technique can only be applied in cases of merely formal deficiencies (the formal aspect of the duty to give reasons in the Netherlands: see *supra*, para 43), the case law of the Council of State has caused doubt as to whether it cannot also be applied to the substantive pillar of the duty to give reasons, *i.e.* the contents and carrying capacity of the statement of reasons.¹⁵² Another way in which the courts can avoid an annulment, is by offering the administrative body the possibility to correct the lack or insufficiency of a statement of reasons, in the course of the procedure. This is known as the ‘administrative loop’ (*bestuurlijke lus*).¹⁵³

55. In Belgium, the situation looks quite similar. The duty to give reasons is considered a so-called ‘substantial formal requirement’ (*substantieel vormvoorschrift / forme substantielle*), signifying that it constitutes a ground of review used by the Council of State.¹⁵⁴ The Council offers legal redress in the form of an annulment. The same applies to most other (special) administrative courts. The civil courts who apply Article 159 of the Belgian Constitution, can declare an administrative decision inapplicable in a pending case¹⁵⁵ because it does not comply with the duty to give reasons. The Belgian Council of State, however, mitigates the automatic annulment of a decision that does not comply with the duty to provide reasons (because reasons are lacking or because the statement is insufficient). In

¹⁵⁰ Article 8:72(1) of the Awb.

¹⁵¹ This provision also applies to administrative appeals.

¹⁵² See ABRvS 26 February 2000, no. 199901856 and the case note by J. Verheij in 2002, AB 42. The Council suggests that Article 6:22 can also be applied in cases where the statement of reasons does not have sufficient ‘carrying capacity’, as long as the applicant is not disadvantaged by this application. It could be argued, however, that the deficiency at stake, *i.e.* the lack of notification of an advisory document, was formal rather than substantive. Cf. R. J. N. Schlössels, S. E. Zijlstra, *Bestuursrecht in...*, p. 463 and H. F. T. Pennarts, *Beginselen van...*, p. 57.

¹⁵³ Article 8:51a–8:51d of the Awb.

¹⁵⁴ Article 1, §1 of the RvS-Wet.

¹⁵⁵ This is not an annulment and it does not have value *erga omnes*.

a number of judgments, the Council has ruled that it would not pronounce an annulment in those cases where the applicant's interests have not been harmed, because (s)he clearly knows the reasons underlying the decision. This implies that the applicant has learnt about these reasons in some other way and that the circumstances were such as to assure that his/her right to defend him-/herself against the decision was not hampered.¹⁵⁶ The Council of State consequently adopts a teleological approach, assessing whether the goals behind the duty to provide reasons have been fulfilled. Similarly, the Council refuses to annul a decision in those cases where all discretionary power is lacking and where the administration will (have to) take a decision with exactly the same contents, should the challenged administrative act be annulled.¹⁵⁷ In 2014, Belgium had also introduced the 'administrative loop' in the procedure before the Council of State.¹⁵⁸ Its scope, however, was more limited than that of its Dutch counterpart, primarily because the law stipulated that the correction of this deficiency could not affect the contents of the decision. This implied that only formal deficiencies qualified for the application of this technique. As far as the duty to give reasons is concerned, one could think of a statement of reasons that refers to and relies on an advisory document that has not been notified to the applicant (although this is a requirement: *supra*, para 39).¹⁵⁹ In 2015, however, the provisions on the 'administrative loop' were found unconstitutional by the Belgian Constitutional Court and were annulled.¹⁶⁰

56. In France, the administrative courts will annul a decision that does not comply with the duty to give reasons as conceived of by the CRPA, because it is either lacking or its content is insufficient. Mere formal deficiencies amount to a so-called '*vice de forme*'¹⁶¹, an aspect of the act's '*légalité externe*', whereas more substantive scrutiny of the reasons provided constitutes a question of '*légalité interne*'.¹⁶² Note that Article L211-6 of the CRPA contains a special arrangement in case of absolute urgency (*supra*). If the administration has no discretionary power whatsoever (in case of a so-called '*compétence liée*'), the Council of State will nevertheless not annul the act.¹⁶³

¹⁵⁶ See e.g. RvS 15 October 2012, no. 220.998, Neiryneck; I. Opdebeek, A. Coolsaet, *Draagwijdte van de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen* (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 129, 132–133 and 189–195 with various references.

¹⁵⁷ E.g. RvS 24 September 1997, no. 68.266, Iserentant.

¹⁵⁸ Art. 38 of the RvS-Wet.

¹⁵⁹ See the suggestions in: P. Lefranc, *Ceci n'est pas une boucle administrative*, in: *De hervorming van de Raad van State* (eds.) M. Van Damme, Die Keure 2014, p. 51, 69.

¹⁶⁰ GwH 16 July 2015, no. 103/2015.

¹⁶¹ N. Songolo, *La motivation des actes administratifs*, <http://www.village-justice.com/articles/motivation-actes-administratifs,10849.html> (12.03.2015).

¹⁶² J.-L. Autin, *La motivation...*, p. 85, 92; M. Gros, *Droit administratif...*, p. 151.

¹⁶³ E.g. Conseil d'État 3 novembre 1995, no. 122794, le Préfet des Yvelines: '[Q]u'il résulte de ces dispositions que le maire de Buc était tenu de prendre les deux arrêtés

57. In the EU, the duty to provide reasons has been labelled ‘one of the essential procedural requirements within the meaning of the first paragraph of Article 173 of the EEC [now Article 263 of the TFEU], breach of which gives rise to a claim,’¹⁶⁴ which can lead to annulment. Deficiencies in the statement of reasons may, however, be ‘neutralised’ by the fact that the applicant clearly knows and understands these reasons. In those cases, the decision is deemed lawful and not in violation with the duty to give reasons.¹⁶⁵ The Court is, however, reluctant to accept submissions by defending and intervening parties who argue as if compliance with the duty to give reasons would be a mere question of (excessive) formalism.¹⁶⁶ Pursuant to the second paragraph of Article 264 of the TFEU, the ECJ can decide to state which of the effects of the act which it has declared void shall be considered definitive. This has been applied in cases where the illegality of an act was located in the duty to give reasons.¹⁶⁷ Finally, EU law considers the duty to give reasons as a ‘public policy plea’ or a ‘*moyen d’ordre public*’, signifying, amongst other things, that the Courts can bring it up in the course of the procedure, even if the applicant has not mentioned it in their submissions.¹⁶⁸

58. When it comes to the duty to give reasons and legal protection against non-compliance, many other questions arise. Like many violations of the law, a violation of the duty to give reasons may also, depending of

du 18 juin 1985 tendant à la dépose des deux panneaux implantés par la société ODIP respectivement aux nos 836 et 1500 de la rue Louis Blériot ; que le moyen tiré du défaut de motivation de ces arrêtés municipaux au regard des exigences posées par la loi du 11 juillet 1979 est par suite inopérant.’ See: J.-Y. Vincent, G. Quillévéré, *Fascicule 107-30: Motivation...*, para 118.

¹⁶⁴ J. Schwarze, *European...*, p. 1401.

¹⁶⁵ Case 275/80 *Krupp v. Commission*, 1981 ECR 2512, recital 13; The knowledge that a person has more generally plays a role as well. See: J. Schwarze, *European...*, p. 1411.

¹⁶⁶ See Case C-370/07 *Commission of the European Communities v Council of the European Union*, 2009 ECR I-8917.

¹⁶⁷ *Ibidem*, recitals 63 ff.

¹⁶⁸ See e.g. Case T-318/00, *Freistaat Thüringen v Commission*, 2005 ECR II-4179, recital 109: ‘The Court of First Instance also notes that it does not have all the information necessary to enable it to carry out its review on the merits of the contested decision and that it is therefore necessary for it to raise of its own motion the plea alleging failure to state reasons on this point in the contested decision [...]’; Hanns Peter Nehl, ‘Good administration as procedural right and/or general principle?’ in: H. C. H. Hofmann, A. H. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, Chelhamten 2009, p. 322, 326. See also: Y. Benfquih, K. Deckers, D. Verhoeven, *De motiveringsplicht...*, p. 136, 154–155; K. Lenaerts, P. Van Nuffel, *Europees recht*, Intersentia 2011, p. 586. In Belgium, most case law agrees that the duty to give reasons does not constitute a ‘*moyen d’ordre public*’: I. Opdebeek, A. Coolsaet, *Aard van de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013, p. 109, 120. The same is true for France: M. Gros, *Droit administratif...*, p. 151.

course on the applicable rules in each legal system¹⁶⁹, give rise to claims for compensation of damages. It will, however, not be easy to establish a clear causal link between non-compliance with the duty to give reasons and the damage suffered. These and other questions go beyond the objective and scope of this article.

Summary

In the three national systems studied, as well as in the EU, a violation of the duty to give reasons will lead to an annulment, unless the applicant (or his interests) has (have) not been harmed. The Netherlands, moreover, offers a possibility of improving a statement of reasons that is insufficient via the technique of the ‘administrative loop’.

III. The duty to give reasons as an instrument that fosters accountability through transparency

A. The relationship between transparency, the duty to give reasons and accountability

59. The core idea behind the duty to give reasons is that it offers transparency on the level of the motives or justifications that have inspired a decision. Even though the word seems to have become one of the mantras of administrative law¹⁷⁰, transparency is not an independent or stand-alone value. As a principle of good governance, transparency should rather be regarded as a means to an end.¹⁷¹ Indeed, the duty to give reasons has no value if it is considered an instrument that aims to foster transparency for its own sake: it serves a more substantive goal. Our hypothesis is that, in the context of the duty to give reasons, that ‘end’ could be fostering the accountability of modern administrations.

60. The relationship between transparency and accountability or legitimacy requires clarification. Is transparency indeed a ‘means’ to accountability? Considering, as we have just argued, that transparency is a means to an end, it should be emphasised that transparency in its most basic form, i.e. openness, does not in itself constitute a form of accountability. BOVENS, famous for his conceptual work on accountability,

¹⁶⁹ In France, the legal doctrine defends and derives from the case law that a violation of the duty to give reasons, as a so-called ‘*illégalité externe*’, does not constitute a ‘*faute*’ and cannot give rise to a claim for damages. See: M. Gros, *Droit administratif...*, p. 151. More nuanced: J.-Y. Vincent, G. Quillévéré, Fascicule 107–30: *Motivation...*, p. 123.

¹⁷⁰ See e.g. E. Scholtes, *Transparantie, icoon van een dolende overheid / Transparency, symbol of a drifting government*, Lemma 2012.

¹⁷¹ Not all literature supports this premise, though. For different positions on transparency as having intrinsic rather than instrumental value and *vice versa*, see: A. Buijze, *The Principle of Transparency in EU law*, BOXPRESS 2013, p. 36–51.

makes a distinction between ‘accountability as a virtue’ as opposed to ‘accountability as a mechanism’. The first phrase covers values such as transparency, participation and dialogue, whereas the latter covers those provisions and procedures that correspond to BOVENS’ actual definition of accountability (*sensu stricto*) as ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences’.¹⁷² Forms of ‘accountability as a virtue’,¹⁷³ which do not presuppose a relationship between an actor and a forum, relate to a ‘willingness to act in a transparent, fair and equitable way’¹⁷⁴ and actually represent principles of good (public or corporate) governance.¹⁷⁵ If anything, accountability as a virtue is a ‘normative concept’, which presents a ‘set of standards for the evaluation of the behaviour of public actors’.¹⁷⁶ Accountability as a (social) mechanism, on the other hand, relates to an ‘institutional relation or arrangement in which an agent can be held to account by another agent or institution... And the focus of accountability studies is not whether the agents have acted in an accountable way, but whether they are or can be held accountable *ex post facto* by accountability forums’.¹⁷⁷

61. According to Bovens, transparency is not enough to constitute accountability in the strict, relational sense:

Open government and freedom of information are very important prerequisites for accountability in the context of European governance, because they may provide accountability forums with the necessary information. However, transparency as such is not enough to qualify as a genuine form of accountability, because transparency does not necessarily involve scrutiny by a specific forum.¹⁷⁸

62. Pursuant to PAPADOPOULOS, transparency is a necessary condition for accountability, but does not constitute a form of accountability in itself because it does not allow for sanctions to be imposed.¹⁷⁹ A similar reasoning

¹⁷² M. Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, “European Law Journal” 2007, no. 13, issue 4, p. 447, 450.

¹⁷³ M. Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, “West European Politics” 2010, no. 33, issue 5, p. 946, 946–967.

¹⁷⁴ *Ibidem*, p. 949.

¹⁷⁵ *Ibidem*, p. 961.

¹⁷⁶ *Ibidem*, p. 946, 947 and 949.

¹⁷⁷ *Ibidem*, p. 948.

¹⁷⁸ M. Bovens, *Analysing and Assessing...*, p. 447, 453. In the same sense: D. Curtin, *Holding (Quasi)Autonomous EU Administrative Actors to Public Account*, “European Law Journal” 2007, no. 13, issue 4, p. 523, 532.

¹⁷⁹ Y. Papadopoulos, *Problems of Democratic Accountability in Network and Multilevel Governance*, “European Law Journal” 2007, no. 13, issue 4, p. 469, 474. In the same sense: A. Meijer, S. Grimmelikhuisen, G. J. Brandsma, *Transparantie. Verbreedt*

is found in the work of MULGAN, who points out that only if those who receive information also have the right to demand it and to seek remedies there can be talk of accountability. 'Purely voluntary or grace-and-favour transparency does not amount to accountability.'¹⁸⁰ Whilst procedural guarantees and especially duties of consultation and transparency indeed involve citizens in the decision-making process in a much more direct way than the procedures of representative democracy do, they often lack the element of genuine debate and interaction and always lack the element of an instant possibility to sanction those responsible for decision-making.

63. There is little doubt that the duty to give reasons creates a type of transparency that is 'relational' in nature. It involves an actor, explaining him- or herself to a forum, which is protected by a legal guarantee on the basis of which it can force the actor to justify him- or herself. Moreover, the violation of this procedural guarantee is subject to sanctions, considering the possibility of referring the matter to the courts, where relief can be offered to the claimant seeking justice. Therefore, we can conclude that the process of giving a proper justification for an administrative decision involves more than just transparency for the sake of transparency. It is an argumentative process that provides targeted information. An important condition for transparency to lead to effective accountability is indeed that it leads to the disclosure of relevant information only. One can easily think of situations in which too much openness, too much information could lead to disinformation and could thus defeat the purpose of accounting. Too much transparency can, paradoxically, lead to opacity. The fact that all the systems studied require the statement of reasons to be clear and tailored to the specific decision and the facts at hand shows that, sometimes, a concise statement of reasons may be better from the viewpoint of quality than a long and elaborate one. The qualitative thresholds that the courts apply and uphold are particularly important in this regard.

en versterkt openbaarmaking de publieke verantwoording?, in: *Handboek publieke verantwoording*, (eds.) M. Bovens, T. Schillemans, Lemma 2009, p. 205, 211.

¹⁸⁰ R. Mulgan, *Holding power to account: accountability in modern democracies*, Palgrave Macmillan 2003, p. 10, 11. See p. 10: 'If scrutiny and transparency never resulted in remedial action, including, where necessary, the punishment of those found responsible for improper action, the process of accountability would be seriously incomplete. The full core sense of accountability thus includes the right of the account-holder to investigate and scrutinize the actions of the agent by seeking information and explanations and the right to impose remedies and sanctions.' And p. 101: 'Freedom of information, on the other hand, though more extensive in the areas covered is more restricted in accountability processes, being confined to the prior stage of *information* and justifying, without offering opportunities for critical *discussion* or *rectification* (except in the case of correcting personal misinformation).'

B. The duty to give reasons as a mechanism for accountability: a question of human dignity?

64. In times where the administrative realm has become so vast and varied that the electoral process can no longer guarantee full and complete oversight, the executive increasingly derives its legitimacy from alternative sources. One of these sources are procedural guarantees, such as the duty to give reasons. In the United States, procedural guarantees, such as duties to consult and give reasons, are conceived of as mechanisms that, apart from providing legal protection to those directly affected, have to offer guarantees against non-elected power and thus contribute to the democratic legitimacy of administrative decision-making. The Administrative Procedure Act (APA) has played a central role in this regard.¹⁸¹ It should be noted that the APA also targets rule-making powers, whereas most procedural safeguards in Europe have been primarily designed to be applied to decisions with an individual scope.¹⁸² This also explains why along the way the APA's rules and procedures started to be conceived as safeguards for both the quality and legitimacy of the decision-making process. In most European traditions, the need to employ procedural rules and guarantees in order to strengthen the legitimacy of administrative decision-making has only emerged in recent decades, as legislatures started to entrust the executive with ever broader discretionary powers, amongst which rule-making powers.

65. Since then, accountability has become a central concern of European public lawyers in an era of multilevel governance, involving a plethora of state and non-state actors that today constitute the 'government'. This is especially true in the context of EU supranational decision-making. LINDSETH has characterised the EU political and legal order as 'administrative, not constitutional'. In his famous work on power

¹⁸¹ S. Rose-Ackerman, *The Regulatory State*, in: *The Oxford Handbook of Comparative Constitutional Law*, (eds.) M. Rosenfeld, A. Sajó, Oxford University Press 2012, p. 671, 672 on the APA: 'This legal framework can be understood as a way to assure the democratic acceptability of policymaking delegation.' See also p. 674: 'The APA's requirements for notice, hearings, and reason-giving help to assure third-party participation and to limit closed-door decision-making. Even though the constraints are nominally procedural, they have substantive effects.' See also: C. Donnelly, *Participation and expertise: judicial attitudes in comparative perspective*, in: *Comparative Administrative Law*, (eds.) S. Rose-Ackerman, P. Lindseth, Edward Elgar, Cheltenham 2010, p. 357, 358. The author points out that 'originally conceived as an aid to agencies in gathering information, the APA's 'notice and comment' procedure 'became significantly more participatory over the late 1960s and 1970s onwards'.

¹⁸² In most states, the goals behind legislative or other rule-making acts are contained in separate documents, such as explanatory memoranda, nowadays mostly published on the websites of legislative assemblies, but not part of the actual text of the legislative document. In the EU, on the other hand, the preamble of a normative text constitutes an impartible piece of the text itself.

and legitimacy in the EU context¹⁸³, he argues that the Union's genesis lies in acts delegated from the Member States to the EU. Since the EU is, essentially, a regulatory order, this process is very much comparable to the transfer of powers to a regulatory agency. The relationship between the Member States and the Union can therefore be compared to that between a principal and an agent. Approaching the EU as an administrative legal order and rejecting its distinct, independent constitutional nature, as LINDSETH does, explains a lot about the legal principles that govern the relationship between the EU on the one hand and its Member States as well as their legal subjects on the other hand. These will be predominantly administrative in nature. This explains why the duty to give reasons, as a general safeguard, in the EU context applies to normative as well as individual acts. In this model, the position of the EU legislature, as a normative body, should not be compared to that of a legislative body in a full-fledged constitutional order like the national one. As an agent with conferred powers, the EU has to provide reasons for all its decisions in order to build and maintain its legitimacy. It owes this duty to the Member States and their citizens.

66. From this perspective, it may seem that the duty to give reasons, along with other procedural guarantees, first and foremost fulfils a compensatory role. It fills a legitimacy gap created by modern institutional arrangements that often go hand in hand with a reduced influence of the mechanisms of representative democracy. It does so by creating a direct link between the administration and the administered and by reinforcing judicial protection. This would imply, however, that in a perfectly centralised model, without a supranational context or without phenomena such as agencification, the duty to give reasons would lose its *raison d'être*. Or does the duty to give reasons find its justification in a more fundamental rationale?

67. The American scholar MASHAW has argued that 'the reasons most commonly advanced for reason giving in both the EU and the US systems tend to ignore reason giving's most fundamental function – the creation of authentic democratic governance.'¹⁸⁴ In order to substantiate his argument, he refutes the mere recourse to 'reasons of the consequentialist sort' for reason-giving.¹⁸⁵ What he means is that US and EU administrative law 'tend to treat the right to reasons as a contingent right, one that is parasitic on other substantive or procedural rights or institutional arrangements'.¹⁸⁶ In the US, the right to reasons 'is conventionally understood as parasitic

¹⁸³ P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State*, Oxford University Press 2010.

¹⁸⁴ J. L. Mashaw, *Reasoned Administration...*, p. 101.

¹⁸⁵ *Ibidem*, p. 103.

¹⁸⁶ *Ibidem*, p. 105.

on other rights or on the necessities of effective judicial review.¹⁸⁷ Consequently, it is no stand-alone right, but a ‘contingent’ one.¹⁸⁸ More precisely, in individual, adjudicatory cases, the courts use reason-giving to ensure that the right to a hearing is respected and ‘is not a charade’, which contributes to decision-making on the basis of reliable evidence. According to the author, this makes the right to reasons ‘wholly instrumental’.¹⁸⁹

In short, due process requirements of procedural protection, including the requirement of reason giving, are part of a social welfare calculation that weighs and balances the importance of the individual’s substantive claim, and the likely contribution of any particular procedural requirement to the accurate determination of that claim against the government’s interest in effectiveness and efficiency.¹⁹⁰

68. As far as rule-making powers are concerned, the situation is similar. The APA grants the affected parties a right to comment on draft rules or regulations. Since the 1960s and 1970s, ‘[c]ourts routinely return decisions to administrative agencies on the ground that the rationale provided is inadequate to explain some critical fact or issue that the agency was required to consider.’¹⁹¹ Here, reason-giving facilitates judicial review where the administration enjoys broad discretionary powers.¹⁹² Whilst many regard the APA as an instrument that, apart from legal protection, also fosters legitimacy via democratic participation¹⁹³, MASHAW is skeptical.

69. More important for our analysis, however, is that the author discerns a similar role for the duty to give reasons in EU law, making him conclude that

in both American and European Union jurisprudence, the right to receive reasons is a sort of derivative right. It facilitates individual decision making about whether to contest official decisions, protects rights to individualised adjudication, and promotes the monitoring activities of both political and legal institutions. And reasons in both systems have a special value in maintaining vigorous judicial review along the treacherous boundary between law and

¹⁸⁷ *Ibidem*, p. 105.

¹⁸⁸ *Ibidem*, p. 111.

¹⁸⁹ *Ibidem*, p. 106–107. Emphasis added.

¹⁹⁰ *Ibidem*, p. 107.

¹⁹¹ *Ibidem*, p. 110.

¹⁹² *Ibidem*, p. 111: ‘The proceduralisation of rationality – the conversion of the demand for nonarbitrariness into a demand for understandable reason giving – rephrases the question of whether the agency’s action is reasonable in some substantive sense as a demand that the agency demonstrate a reasoning process. The demand for reasons and yet more reasons, at least rhetorically, keeps the court within its appropriate domain. The agency may make policy choices, so long as it explains how its exercise of discretion is connected to its statutory authority and to the technical facts that have been developed through the rulemaking proceeding.’

¹⁹³ *Supra*, p. 65.

policy. From this perspective, the fundamental value of reason giving is political and legal accountability. The requirement that administrative officials give reasons is merely a crucially important means to that end.¹⁹⁴

70. This analysis is in line with what our comparative analysis has revealed¹⁹⁵: in all the systems studied, the duty to give reasons first and foremost aims to contribute to a fair and effective system of judicial protection. As such, this is a very valuable goal to pursue. Moreover, as such, it already indicates that the duty to give reasons reinforces the accountability of the administration. This is because judicial protection amounts to legal accountability, which has an individual as well as a public dimension, because courts and their decisions are in principle open and accessible to all. In that regard, the duty to give reasons is a necessary precondition for the courts to be an effective, rather than an illusory or symbolic venue for account-giving and responsiveness.

71. However, this perspective on the way in which and the extent to which the duty to give reasons can play a role as an accountability mechanism, may be too narrow. MASHAW argues that the real reason for reason-giving is (or should be) located in the moral autonomy of the individual, in the sense that

to be subject to administrative authority that is unreasoned is to be treated as a mere object of the law or political power, not a subject with independent rational capacities. Unreasoned coercion denies our moral agency and our political standing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of powers.¹⁹⁶

Because of the large coercive and discretionary power of administrators, decisions require a justification and legitimisation beyond the (in the case of administrative decisions often remote or indirect) mechanism of elected representation. Adopting the Aristotelean view of responsibility and the Kantian perspective on human dignity, MASHAW argues that ‘the fundamental reason for accepting law, or any official decision making, as legitimate, is that reasons can be given why those subject to the law would affirm its content as serving recognizable collective purposes.’¹⁹⁷ The author argues that the right to reasons should be treated as a ‘fundamental, rather than a contingent or derivative human right. Authority without reason is literally dehumanising. It is, therefore, fundamentally at war with the promise of democracy, which is, after all, self-government.’¹⁹⁸

¹⁹⁴ *Ibidem*, p. 115.

¹⁹⁵ Title II, B.

¹⁹⁶ *Ibidem*, p. 104–105.

¹⁹⁷ *Ibidem*, p. 117–118.

¹⁹⁸ *Ibidem*, p. 118.

72. A theory about the rationales behind reason-giving that is close to that of MASHAW, is found in the work of NEHL. According to NEHL, formalised procedures ‘are essentially determined by two fundamental rationales, namely rationality and efficiency on the one hand and individual protection on the other.’¹⁹⁹ Rationality and efficiency are labelled ‘utilitarian justifications’.²⁰⁰ The author suggests that this

needs to be completed by – and opposed to – a somewhat overlapping dignitary or protective justification of process rules in general and procedural rights in particular. This concept essentially takes into account the impact of administrative decisions on the individual who is subject to the exercise of public power. The recognition of personal dignity, autonomy and freedom as inalienable fundamental values has as its corollary the need effectively to protect them against arbitrary and unlawful encroachments on the part of the public bodies.²⁰¹

The more the protective justification is emphasized, the more it grants procedural law a value of its own and, accordingly, increases its legitimizing function from the standpoint of the citizen,’ the author argues.²⁰² He is sceptical about the extent to which the case law of the EU courts considers the duty to give reasons as an instrument that fosters participation. The instrument is still primarily conceived of as one that serves legal protection as a value of the rule of law than as one with a legitimising, democratic role. He contrasts this view with that of the US courts with respect to agency rule-making.²⁰³

73. MASHAW argues that the fundamental right to know the reasons behind an administrative decision has ‘important implications for the ongoing project of democratic governance in unavoidably administrative states.’²⁰⁴ More precisely, ‘[r]easoned administration is not only fundamental to our understanding of ourselves as independent moral agents, but to the future of the democratic project itself.’²⁰⁵ ‘Reason giving thus affirms the centrality of the individual in the democratic republic. It treats persons as rational moral agents who are entitled to evaluate and participate in a dialogue about official policies on the basis of reasoned discussion. It affirms the individual as subject rather than object of law.’²⁰⁶

¹⁹⁹ H. P. Nehl, *Good administration as procedural right and/or general principle?*, in: H. C. H. Hofmann, A. H. Türk, *Legal Challenges in EU Administrative Law...*, p. 322, 343.

²⁰⁰ *Ibidem*, p. 343–344.

²⁰¹ *Ibidem*, p. 345.

²⁰² *Ibidem*, p. 346–347. Emphasis added.

²⁰³ *Ibidem*, p. 349.

²⁰⁴ J. L. Mashaw, *Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance*, “Faculty Scholarship Series” 2007, Paper 1179, p. 105. Emphasis added.

²⁰⁵ *Ibidem*, p. 123.

²⁰⁶ *Ibidem*, p. 118.

MASHAW's analysis thus links the reason behind reason-giving directly and without any need for further reasons, to the most central feature of administrative power: its coercive nature.

C. The duty to give reasons as a mechanism for public accountability?

74. The conclusion of our analysis thus far is that the duty to give reasons definitely plays a role as an accountability mechanism, but that its role is strongly linked to the relationship between the administration and individuals affected by a given decision. 'Public' accountability, however, goes beyond the relationship between the administration and direct stakeholders. It involves the public as a whole. The duty to give reasons, as it is currently conceived of and delineated in the EU and in the domestic systems studied here, targets individuals directly affected by the decisions taken and not, or at least not primarily, the public as a whole. Multiple characteristics that are shared by all or the majority of the systems studied in this article demonstrate this. One example is that, in order for a referral to an external document to be permissible, the courts assess whether that document is known / has been notified to the applicant as an affected party. Another example is the fact that a lack of or a deficiency in the statement of reasons does not amount to an illegality or (a slightly different situation) does not lead to an annulment if the applicant has acquired knowledge of the reasons in another way. In both instances, the interests of the applicant are central. Finally, the three national systems studied in this article do not apply the duty to give reasons to by-laws, but limit it to adjudicatory acts, which by definition address only one or a limited number of citizens.

75. We have seen that the extent to which information is revealed via the duty to give reasons is directly proportionate to the other, more stand-alone goals that it serves. The legal systems that were analysed in this article have indeed adopted a teleological approach towards the scope of the duty to give reasons: the information provided has to allow for the rationales behind the duty to be fulfilled. These rationales mostly relate to the reinforcement of the position of the individual who is affected by the decision in question. Accepting that the duty to give reasons should contribute to public accountability would imply major changes in terms of scope and range. It could, for instance, require that the administration actively and explicitly weighs its decision against all possible aspects of the public interest at stake and clarifies, in writing, which policy trade-offs it has made to reach a certain decision. As for decisions that involve broad discretionary powers, i.e. those for which the duty to give reasons is considered especially important, this degree of transparency would be a particularly heavy burden for the administration to carry. Moreover, if public accountability becomes a central goal of the duty to give reasons, normative decisions, that, per definition apply to the entire population or

a large group of people, should be brought under its scope, as is the case in the EU. Such an extension is worth considering for national systems where this is not the case, such as those studied in our comparative analysis. EU law demonstrates, however, that the standards and requirements for the duty to give reasons are substantially less far-reaching than those for individual decisions.

76. In sum, the duty to give reasons does not constitute a full-fledged mechanism of 'public' accountability, but it does provide effective accountability in the relationship between those directly affected by a decision and the administration. Since this type of accountability serves the moral autonomy of the individual and – thus – human dignity, it is, however, no less fundamental than 'public' accountability *sensu stricto*.

IV. Final conclusions and a look to the future...

77. This article had a double purpose. Firstly, it intended to demonstrate that the way in which the duty to give reasons is conceived of in various European legal systems still varies. This raises the question of whether there is such a thing as *the* duty to give reasons as a shared concept of European administrative law. Moreover, the differences vary in nature: they concern the status (constitutional or not), scope and range of the various 'duties' to give reasons. As most of the conclusions of the descriptive analysis were summarised in a schematic form throughout this analysis, they will not be reiterated here.

78. Secondly, our aim was to investigate whether and to what extent the duty to give reasons is part of a general trend in which procedural guarantees become central to securing the administration's accountability in the modern state. The central question was whether the type of transparency provided by the duty to give reasons is conducive to more accountable and therefore more legitimate administrative decision-making. And, if so, how does it achieve that aim? It is obvious that the duty to give reasons contributes to legal accountability via the courts. Relying on the work of other scholars, however, we argued that there could be a deeper, more fundamental link between the duty to give reasons and accountability to citizens affected by administrative decisions. The duty to give reasons serves citizens' moral autonomy by making the administration directly accountable to them for single coercive decisions. This implies that the duty to give reasons is not so much fit to be an instrument for *public* accountability, but has the potential of creating a genuine relationship of accountability in the relation between the administration and the directly affected parties.

79. This approach of the duty to give reasons as a mechanism that is strongly linked to individual human dignity seems to encourage a shift in terminology or discourse from a 'duty' to 'give' reasons to a '(fundamental) right to receive reasons'. By anchoring the duty to give reasons in Article 41

of the EU Charter of Fundamental Rights, the EU has made a first step in that direction. Unlike the other fundamental rights of the Charter, however, Article 41 does not directly affect the Member States. The question arises whether there is a link between the reason not to make Article 41 applicable to the Member States and the fact that there are still important differences between the way in which various European legal systems conceive of 'good administration' and the various duties or principles subsumed under that umbrella. It is not unlikely that the Member States have made a conscious choice to reserve as much freedom as possible to uphold their own, home-grown standards of procedural justice, even when they implement or apply EU law. This could explain the limited scope of Article 41. It has been argued that the rights and principles mentioned in Article 41 of the Charter 'mirror some basic rationales of procedure or 'procedural justice' common to all European administrative systems',²⁰⁷ 'Basic' seems a crucial adjective in this statement: many of these principles of procedural justice still differ when it comes to their precise scope and range.

80. To what extent do the four legal systems that we have analysed reveal features of the notion of the duty to give reasons as an individual fundamental right? It seems that some of them are much closer to such an approach than others.

One important indicator to us seems to be the extent to which each system allows for exceptions to the duty. An essential feature of a (qualified) fundamental right is that it can be limited, but only for (specific) reasons or objectives of general interest. This is also acknowledged by Article 52(2) of the Charter. As our comparative analysis reveals, some Member States are quite liberal in allowing for exceptions to the duty to give reasons, whereas others are not. 'Urgency', for instance, is accepted as a reason for exception in the Netherlands and France (with a possibility of later rectification), but not in Belgium. The EU itself seems to adopt the most restrictive approach, since it does not accept real exceptions to the duty to give reasons, but only situations in which the duty is tempered. This comparative result seems to be in line with the recent 'upgrade' that the duty to give reasons has received in both the EU and Belgium. As we have explained, the duty to give reasons has (quasi-) constitutional status in the EU (via the TFEU and Article 41 of the Charter). In Belgium, the Constitutional Court has only very recently suggested that the WMB has constitutional value.²⁰⁸

Another indicator is the scope *ratione materiae* of the duty to give reasons. We have seen that France applies the duty to give reasons only to certain categories of administrative decisions. A fundamental right to receive reasons, which finds its basis in the moral autonomy of individuals, should arguably encompass all unilateral administrative decisions. Recently,

²⁰⁷ H. P. Nehl, *Good administration...*, p. 322, 323.

²⁰⁸ *Supra*, para 10.

a French author has argued that the lack of recognition of a general duty to give reasons, applicable to all administrative decisions (*supra*), is hard to reconcile with the fundamental right anchored in Article 15 of the *Déclaration des Droits de l'Homme et du Citoyen*, which states that '*la société a le droit de demander compte à tout agent public de son administration*'.²⁰⁹

81. The question arises whether and to what extent the EU can play a further harmonising role in this regard. As explained above, the EU applies the principles of good administration, as general principles of law, to the Member States when they implement EU law. The EU legal order has been characterised as one of 'adversarial legalism', signifying that it 'combines centrally formulated prescriptive rules and a diffuse and fragmented process of enforcement which depends crucially on judicial review to ensure compliance'.²¹⁰ This decentralised mode of implementation and enforcement has forced the ECJ 'to impose some measure of uniformity on national administrative processes in order to ensure effective enforcement of EU rules and standards'.²¹¹ Hence, EU law may influence domestic law, also outside those areas where the Member States have to comply with the European standard.²¹² The future will reveal whether the EU will indeed have a unifying impact²¹³ and whether this will eventually lead to the full recognition and implementation of a genuine fundamental 'right to receive reasons' throughout the European legal area.

82. In any case, the search for common European principles of administrative law remains high on the agenda of legal academia. Recently, a group of academics called ReNEAL (Research Network on EU Administrative

²⁰⁹ O. Gabarda, *Vers la généralisation...*, p. 61, 63.

²¹⁰ S. Rose-Ackerman, P. L. Lindseth, *Comparative Administrative Law: Outlining a Field of Study*, "Windsor Yearbook of Access to Justice", 2010, p. 435, 447.

²¹¹ *Ibidem*, p. 447.

²¹² In order to avoid a 'two-speed justice': J. Bell, *Mechanisms for Cross-fertilization of Administrative Law in Europe*, in: *New Directions in European Public Law*, (eds.) J. Beatson, T. Tridimas, Hart 1998, p. 147, 160.

²¹³ The French doctrine expects that the limited scope of the duty to give reasons in France will be put under increasing pressure due to the influence of EU, especially considering the entry into force of Article 41 of the Charter. See O. Gabarda, *Vers la généralisation...*, p. 61, 67–70; J.-L. Autin, *La motivation...*, p. 85, 99; K. Michelet, *La Charte des droits fondamentaux de l'Union européenne et la procédure administrative non contentieuse*, "Actualité Juridique Droit Administratif" 2002, p. 949, 954 and 955. Others have argued more broadly, outside the strict context of the duty to give reasons, that French administrative law has undergone a 'procedural transformation under the influence of European integration' (D. Custos, *Independent administrative authorities in France: structural and procedural change at the intersection of Americanization, Europeanization and Gallicization*, in: S. Rose-Ackerman, P. L. Lindseth, *Comparative Administrative Law*, Edward Elgar, Cheltenham 2010, p. 277, 283). See also: J. H. Jans, R. de Lange, S. Prechal, R. J. G. M. Widdershoven, *Inleiding tot het Europees Bestuursrecht*, Ars Aequi Libri 2002, p. 249: the authors suggest that the duty to give reasons, as conceived of by EU law, will have an influence on national standards in this regard.

Law) have formulated what seems to be a proposal for a European ‘administrative procedure act’, labelled the ‘ReNEUAL Model Rules 2014’. The initiative is based on comparative research and cooperation between academics from various Member States. If implemented, its impact on domestic law would, however, be rather limited. Book III, on single-case decision making, for instance, which also mentions the duty to give reasons²¹⁴ is applicable to administrative procedures by which an EU authority prepares and adopts a decision as defined in Article III-2.²¹⁵ It only applies to administrative procedures by which a Member State authority prepares and adopts a decision as defined in Article III-2 insofar as EU sector-specific law renders it applicable, or insofar as a Member State chooses to accept it.

83. The Model Rules are an academic and not an official document, but ReNEUAL has also expressed its support²¹⁶ for the European Parliament’s Resolution of 15 January 2013 containing recommendations to the Commission on a Law of Administrative Procedure of the European Union. This initiative is inspired by the desire to codify the rules of administrative procedure applicable in the EU legal order. Its preamble refers to ‘a core set of principles of good administration [...] currently widely accepted among Member States’.²¹⁷ It also considers that ‘a European Law of Administrative Procedure could strengthen a spontaneous convergence of national administrative law, with regard to general principles of procedure and the fundamental rights of citizens vis-à-vis the administration, and thus strengthen the process of integration’.²¹⁸ It therefore requests the European Commission ‘to submit, on the basis of Article 298 of the Treaty on the Functioning of the European Union’²¹⁹, a proposal for a regulation on a European Law of Administrative Procedure’. In an Annex, it therefore

²¹⁴ Article II-29: (1) The public authority shall state the reasons for its decisions in a clear, simple and understandable manner. The statement of reasons must be appropriate to the decision and must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the decision in such a way as to enable the parties to ascertain the reasons for the decision and to enable the competent court to exercise its powers of review. (2) The duty to provide reasons in cases of composite procedures will be shaped by the respective roles of the EU and the Member State in making the decision, as set out in Article III-24.

²¹⁵ ‘Decision’ means administrative action addressed to one or more individualised public or private persons which is adopted unilaterally by an EU authority, or by a Member State authority when Article III-1(2) is applicable, to determine one or more concrete cases with legally binding effect.’

²¹⁶ <http://www.reneual.eu/> (16.02.2015).

²¹⁷ Recital O.

²¹⁸ Recital S.

²¹⁹ This article reads: 1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration. 2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European

anchors ‘detailed recommendations as to the content of the proposal requested’. Pursuant to recommendation 4.8, that concerns the duty to state reasons:

Administrative decisions must clearly state the reasons on which they are based. They shall indicate the relevant facts and their legal basis.

They must contain an individual statement of reasons. If this is not possible due to the fact that a large number of persons are concerned by similar decisions, standard communications should be allowed. In that case, however, any citizen who expressly requests an individual statement of reasons should be provided with it.

The European Parliament’s Committee on Legal Affairs has recently prepared a proposal for a Regulation on the Administrative Procedure of the European Union’s institutions, bodies, offices and agencies. The proposal, however, does not apply to the administrations of the Member States.²²⁰

Note on the language, period of research and list of abbreviations

The authors have strived to ensure that all translations from Dutch and French to English remain as close as possible to the original text and/or their intentions.

This article is based on research that was finalized on 15 February 2016; developments after that date could not be included.

Awb (the Netherlands)	Algemene wet bestuursrecht (General act administrative law)
CRPA (France)	Code des relations entre le public et l’administration
BS (Belgium)	Belgisch Staatsblad (official journal of Belgium)
ECJ	European Court of Justice
GwH (Belgium)	Grondwettelijk Hof (Constitutional Court)
LMAA (France)	Loi relative à la motivation des actes administratifs
RvS (Belgium)	Raad van State (Council of State)
RvS-Wet (Belgium)	Statute governing the organization and functioning of the Belgian Council of State
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Wet (Belgium)	Statute voted at the federal level in Belgium
WMB (Belgium)	Wet Motivering Bestuurshandelingen (Act on the duty to give reasons for administrative acts)

Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

²²⁰ See http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2016/01-28/1081253EN.pdf.

Bibliography

- Adams M., *De argumentatieve en motiveringspraktijk van hoogste gerechtshoven: rechtsvergelijkende beschouwingen*, “Rechtskundig Weekblad” 2009, vol. 72, issue 36.
- Autin J.-L., *La motivation des actes administratifs unilatéraux, entre tradition nationale et évolution des droits européens* “RFDA”, 2011, no. 137–138.
- Ballegooij van G. A. C. M., Barkhuysen T., den Ouden W., Polak J. E. M., *Bestuursrecht in het Awb-tijdperk*, Kluwer 2008.
- Bell J., *Mechanisms for Cross-fertilization of Administrative Law in Europe*, in: *New Directions in European Public Law*, (eds.) J. Beatson, T. Tridimas, Hart 1998.
- Benfquih Y., Deckers K., Verhoeven D., *De motiveringsplicht in het Europees bestuursrecht*, “Tijdschrift voor Bestuurswetenschappen en Publiekrecht” 2012, no. 67(3).
- Bovens M., *Analysing and Assessing Accountability: A Conceptual Framework*, “European Law Journal” 2007, no. 13, issue 4.
- Bovens M., *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, “West European Politics” 2010, no. 33, issue 5.
- Buijze A., *The Principle of Transparency in EU law*, BOXPRESS 2013.
- Chambers D., Davies G., Monti G., *European Union Law*, Cambridge University Press 2014.
- Chamon M., *EU agencies: does the Meroni Doctrine make sense?*, “Maastricht Journal of European and Comparative Law” 2010, vol. 17, issue 3.
- Craig P., *EU administrative law*, Oxford University Press 2012.
- Curtin D., *Holding (Quasi)Autonomous EU Administrative Actors to Public Account*, “European Law Journal” 2007, no. 13, issue 4.
- Custos D., *Independent administrative authorities in France: structural and procedural change at the intersection of Americanization, Europeanization and Gallicization*, in: Rose-Ackerman S., Lindseth P. L., *Comparative Administrative Law*, Edward Elgar, Cheltenham 2010.
- Damen J. A., Boxum J. L., de Graaf K. J. et al., *Bestuursrecht (1) Deel I*, Boom Juridische Uitgevers 2009.
- De Somer S., *Toepassingsgebied ratione personae van de Wet Motivering Bestuurshandelingen*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013.
- Denys S., *Advisering in het bestuursrecht*, Administratieve rechtsbibliotheek: algemene reeks, die Keure, Brugge 2013.
- Donnelly C., *Participation and expertise: judicial attitudes in comparative perspective*, in: *Comparative Administrative Law*, (eds.) S. Rose-Ackerman, P. Lindseth, Edward Elgar, Cheltenham 2010.
- Frier P.-L., J. Petit, *Droit administratif*, Montchrestien 2012.
- Gabarda O., *Vers la généralisation de la motivation obligatoire des actes administratifs? Enjeux et perspectives d'évolutions autour du principe de la motivation facultative*, “Revue Française de Droit Administratif” (“RFDA”) 2012.
- Gaudemet Y., *Droit Administratif*, Lextenso éditions, LGDJ, Paris Cedex 2012.
- Gros M., *Droit administratif. L'angle jurisprudentiel*, L'Harmattan, Paris 2012.

- Hofmann H. C. H., Rowe G. C., Türk A. H., *Administrative Law and Policy of the European Union*, Oxford University Press 2011.
- Hofmann H. C. H., Türk A. H., *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, Chelhamten 2009.
- Hofmann H. C. H., Mihaescu B. C., *The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case*, "European Constitutional Law Review" 2013, vol. 9, issue 1.
- Jans J. H., de Lange R., Prechal S., Widdershoven R. J. G. M., *Inleiding tot het Europees Bestuursrecht*, Ars Aequi Libri 2002.
- Kańska K., *Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights* "European Law Journal" 2004, vol. 10, no. 3.
- Keyaerts D., *Behoorlijke wetgeving in de rechtspraak van het Hof van Justitie 2008–2009*, 2 TVW 2010.
- Kristjánisdóttir M. V., *Good Administration as a Fundamental Right*, "Icelandic Review of Politics and Administration" 2013, vol. 9, issue 1.
- Lefranc P., *Ceci n'est pas une boucle administrative*, in: *De hervorming van de Raad van State* (eds.) M. Van Damme, die Keure 2014.
- Lenaerts K., P. Van Nuffel, *Europees recht*, Intersentia 2011.
- Lindseth P. L., *Power and Legitimacy: Reconciling Europe and the Nation State*, Oxford University Press 2010.
- Mashaw J. L., *Reasoned Administration: the European Union, the United States, and the Project of Democratic Governance*, "Faculty Scholarship Series" 2007, Paper 1179.
- Meijer A., Grimmelikhuijsen S., Brandsma G. J., *Transparantie. Verbreedt en versterkt openbaarmaking de publieke verantwoording?*, in: *Handboek publieke verantwoording*, (eds.) M. Bovens, T. Schillemans, Lemma 2009.
- Michelet K., *La Charte des droits fondamentaux de l'Union européenne et la procédure administrative non contentieuse*, "Actualite Juridique Droit Administratif" 2002.
- Mulgan R., *Holding power to account: accountability in modern democracies*, Palgrave Macmillan 2003.
- Opdebeek I., Coolsaet A., *Aard van de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013.
- Opdebeek I., Coolsaet A., *De wet motivering bestuurshandelingen: een korte, maar revolutionaire wet*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure, Brugge 2013.
- Opdebeek I., Coolsaet A., *Draagwijdte van de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013.
- Opdebeek I., Coolsaet A., *Toepassingsgebied ratione materiae van de wet motivering bestuurshandelingen*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013.
- Opdebeek I., Coolsaet A., *Uitzonderingen op de formele motiveringsplicht*, in: *Formele motivering van bestuurshandelingen*, (eds.) I. Opdebeek, A. Coolsaet, die Keure 2013.

- Papadopoulos Y., *Problems of Democratic Accountability in Network and Multilevel Governance*, "European Law Journal" 2007, no. 13, issue 4.
- Pennarts H. F. T., *Beginselen van behoorlijk bestuur*, Maklu, Apeldoorn-Antwerpen 2008.
- Perju V. E., *Reason and Authority in the European Court of Justice*, "Virginia Journal of International Law" 2009, no. 49.
- Rose-Ackerman S., Lindseth P. L., *Comparative Administrative Law: Outlining a Field of Study*, "Windsor Yearbook of Access to Justice" 2010, vol. 28, issue 2.
- Rose-Ackerman S., *The Regulatory State*, in: *The Oxford Handbook of Comparative Constitutional Law*, (eds.) M. Rosenfeld, A. Sajó, Oxford University Press 2012.
- Schlössels R. J. N., Zijlstra S. E., *Bestuursrecht in de sociale rechtsstaat*, Kluwer 2010.
- Scholtes E., *Transparantie, icoon van een dolende overheid / Transparency, symbol of a drifting government*, Lemma 2012.
- Schwarze J., *European administrative law*, Sweet and Maxwell, London 2006.
- Songolo N., *La motivation des actes administratifs*, la site de la «Village do la Justice. La commune des metiers du Droit»; <http://www.village-justice.com/articles/motivation-actes-administratifs,10849.html> (12.02.2015).
- Vincent J.-Y., Quillévéré G., *Fascicule 107-30: Motivation de l'acte administratif*, in: *JurisClasseur Administratif*, LexisNexis, version of 28 June 2014, with updates until 1 July 2015.
- Zijlstra S. E. *Bestuurlijk Organisatierecht*, Kluwer 2009.

Obowiązek uzasadniania decyzji administracyjnych jako instrument przejrzystego i rozliczalnego procesu decyzyjnego w administracji? Analiza porównawcza zapisów prawa administracyjnego belgijskiego, holenderskiego, francuskiego oraz Unii Europejskiej

Streszczenie

Obowiązek uzasadniania decyzji uważany jest powszechnie za niezbędną gwarancję procesową dostępną dla obywateli we wszystkich nowoczesnych europejskich systemach prawa administracyjnego. Analiza porównawcza przeprowadzona w niniejszym artykule pokazuje jednak, iż nadal istnieją poważne różnice pomiędzy wyobrażeniami dotyczącymi tego obowiązku w różnych systemach prawnych w Europie. W opracowaniu zaprezentowano argumenty przemawiające za istotną rolą obowiązku przedstawiania uzasadnienia pod kątem sprzyjania przejrzystości oraz rozliczalności postrzeganych jako zasady dobrego rządzenia. Jako instrument zapewnienia rozliczalności administracji analizowany obowiązek ma swe ograniczenia, odgrywa on jednak pewną rolę w stosunkach pomiędzy administracją a osobami podlegającym jej konkretnym (zazwyczaj indywidualnym) decyzjom. W tym kontekście pojawia się pytanie, czy status obowiązku przedstawiania uzasadnienia ewoluuje w stronę statusu posiadanego przez jednostkowe prawo człowieka.

Słowa kluczowe: obowiązek uzasadniania decyzji administracyjnych, Europa, perspektywa porównawcza, przejrzystość, rozliczalność

The Duty to Give Reasons in the European Legal Area: a Mechanism for Transparent and Accountable Administrative Decision-Making?
A Comparison of Belgian, Dutch, French and EU Administrative Law

Abstract

The duty to give reasons is generally thought of as an indispensable procedural guarantee that is offered to citizens in all modern European administrative law systems. The comparative analysis carried out in this article, however, reveals that important differences continue to exist between the way in which various legal systems within Europe conceive of that duty. The article furthermore argues that the duty to give reasons has an important role to play in the furtherance of transparency and accountability as principles of good governance. However, it also has its limitations as an instrument for keeping the administration accountable. Up until today, the duty to give reasons primarily has a role to play in the relationship between the administration and those individuals that are subject to its specific (mostly individual) decisions. In that context, the question arises whether the status of the duty to give reasons is evolving towards that of an individual human right.

Keywords: duty to give reasons, Europe, comparative perspective, transparency, accountability