

QUALITY, IMPLEMENTATION AND ENFORCEMENT

A study into the quality of EC rules and the impact on the implementation and enforcement
within the Netherlands

*Wim Voermans, Philip Eijlander, Rob van Gestel,
Ivo de Leeuw, Adriënne de Moor-van Vugt en Sacha Prechal*

Research Institute for Legislation
Catholic University of Brabant (the Netherlands)
December 2000
Commissioned by the Ministry of Justice

Contents

CHAPTER 1

Introduction

1. Reason for the research
2. Research objective
 - 2.1 *The term legislative quality*
 - 2.2 *Procedural and substantive quality*
 - 2.3 *Implementation and concept of implementation*
3. Definition of the research problem
 - 3.1 *Cause and effect*
 - 3.2 *The EC decisions and instruments examined*
 - 3.3 *Approach to the case studies*
4. Research methods
5. Circle of respondents
6. Research stages
7. Structure report
8. List of respondents

CHAPTER 2

Public access to information on the environment

1. Character sketch of the Directive
2. Interviews
3. Case law
4. Literature
5. Conclusions

CHAPTER 3

State aid for research and development

1. Brief character sketch of the Community framework regulations on State aid for research and development
2. Interviews
3. Case law
4. Literature
5. Conclusions

CHAPTER 4

Requirements relating to the occupation of road haulage operator and road passenger transport operator

1. Brief character sketch of the Directives
2. Interviews
3. Case law
4. Literature
5. Provisional conclusions requirements for admission to the occupation of road haulage operator and road passenger transport operator

CHAPTER 5

Waste

1. Brief character sketch of the EC decisions
2. Interviews

3. Case law
4. Literature
5. Provision conclusions EC regulations on waste

CHAPTER 6

German case law

1. Introduction
2. Case law in the field of public access to information on the environment
3. Case law in the field of waste
4. Provisional conclusion

CHAPTER 7

Conclusions

1. The quality of EC regulations examined in four files
 - 1.1 *The files*
 - 1.2 *Presentation of the conclusions*
 - 1.3 *Context*
2. The quality of EC regulations in this research project: some provisional conclusions
 - 2.1 *Lawfulness*
 - 2.2 *Implementation and enforcement*
 - 2.3 *Efficiency and effectiveness*
 - 2.4 *Subsidiarity and proportionality*
 - 2.5 *Mutual harmonization*
 - 2.6 *Simplicity, clarity and accessibility*
 - 2.7 *Other qualitative problems*
3. Research into the quality of EC decisions
4. Policy focused on the improvement of the quality of EC regulations
5. The most important research results
6. Epilogue and prospects

CHAPTER 1

INTRODUCTION

1. Reason for the research

Over the past years, the Netherlands has advocated the improvement of the quality of European regulation within the European Union – partly on the basis of its own experiences and policy views. This has resulted in, for example, the declaration (no 39) appended to the Treaty of Amsterdam concerning the editorial quality of Community legislation and the international conference ‘Quality of European and National Legislation’ organized between 24 and 27 April 1997 in Scheveningen (the Netherlands) by the ministries of Justice and Economic Affairs in collaboration with the European Commission and the T.M.C. Asser Institute. On 22 December 1998, the European Commission, the Council and the European Parliament concluded an interinstitutional agreement – partly initiated by the Netherlands – for the promotion of the quality of European regulation. To date, the respective guidelines refer, in particular, to the editorial quality.

However, in the government’s opinion, the formulation of quality standards with respect to the contents is also necessary at a European level.¹ The other EU Member States and the EU Commission also frequently subscribe the importance of the quality of - the contents of - the legislation. The Dutch government therefore intends to put the quality of European regulation back on the agenda in the short term in consultation with the EU Presidency.²

Partly in that context, the Ministry of Justice has initiated research, based on a number of selected regulations, into any qualitative defects of EC provisions. Based on the research results, the Netherlands will – insofar as the research necessitates this – take specific steps at EC level to increase the quality with respect to the contents, according to the recently published policy document ‘Policy on Legislative Quality’ (*Wetgevingskwaliteitsbeleid*)³.

2. Research objective

The analyses conducted in this research are primarily focused on gaining insight into the extent in which European regulations fall short of a proper quality and, as a result, lead to problems in the implementation, application and enforcement. This broad question has various dimensions that, since 1991, have been examined in several Dutch research projects (*inter alia*, conducted by the Tilburg Centre for Legislative Matters⁴. To date, like the findings of the Koopmans Working Party, these research projects examined, in particular, the *general notions* of the link between the quality of European regulations and the manner of implementation, application and enforcement within the Netherlands. They focused mostly on the lack of (sufficient) harmonization of European and national policy-making but also on the

¹ See Parliamentary Documents II 1999/2000, 24 475, nos 1-2.

² See *Wetgevingskwaliteitsbeleid en wetgevingsvisitatie* (‘Policy on Legislative Quality and Legislative Visitation’), Parliamentary Documents II 1999/2000, 24 475, nos 1-2, p. 2.

³ See policy document *Wetgevingskwaliteitsbeleid en wetgevingsvisitatie*, p. 22.

⁴ A few examples of those research projects: Review of Legislation Projects Committee (or CTW), *Implementatie van EG-regelgeving in de nationale rechtsorde* (‘Implementation of EC Regulations in the National Legal System’), The Hague, 21 December 1990, CTW 90/22 V.J.J.M. Bekkers, J.M. Bonnes, A.J.C. de Moor-van Vugt and W.J.M. Voermans, *Brussel en Nederland: tegenliggers, spookrijders of reisgenoten?* (Brussels and the Netherlands: Opposing Vehicles, Ghost Riders or Travel Companions?), Zwolle 1993, J.M. Bonnes, *Uitvoering van EG-verordeningen in Nederland* (‘Implementation of EC Resolutions in the Netherlands’), diss. KUB, Zwolle, 1994, Sacha Prechal, *Directives in European Community Law*, diss. UvA, Amsterdam 1995, N.E. Bracke, *Voorwaarden voor goede EG-wetgeving* (‘Requirements for proper EC legislation’), diss. UvA, Amsterdam 1996, and *Improving the Quality of Legislation in Europe*, conducted under the auspices of the T.M.C. Asser Institute, A.E. Kellerman et al (Eds.), The Hague/Boston/London 1998.

problem of the sometimes defective quality of EC decisions. Procedure and content are closely related in the conclusion of European regulations and determine, for the major part, the quality of European rules.⁵

The research seeks to gain more insight into the connection or relation between defects in the quality of EC regulations, in particular EC Directives, and problems occurring in the implementation and enforcement of those regulations after they have been transposed into national regulations. The research seeks, in particular, to identify practical problems in the implementation and enforcement and to examine to what extent these problems are caused directly by defects in European regulation. The identification of these problems in the implementation and enforcement will mostly be based on case law and experiences with enforcement.

The two research objectives lead to two types of results, firstly, the information regarding the relation and the possible causal link between defective legislative quality and national implementation and enforcement problems, and, secondly, the information regarding the types of problems with which implementation and enforcement institutions and authorities are faced as a result of defective EC regulations.

2.1 *The term legislative quality*

In order to research the quality of EC Directives, it is important to clarify what exactly is meant by the 'quality' of EC provisions. It is, above all, a matter of perspective what the quality of legislation must be taken to mean. In the Netherlands, the term 'quality' is closely related to the broader concept of the rule-of-law and administrative quality of legislation as described, *inter alia*, in policy document 'Views of Legislation' ('*Zicht op wetgeving*').⁶ In the Netherlands, the quality of legislation is based on the extent to which a regulation complies with the conditions of a. lawfulness, b. implementation and enforcement, c. effectiveness and efficiency, d. subsidiarity and proportionality, e. mutual harmonization and f. simplicity, clarity and accessibility. Naturally, the Dutch concept of quality cannot always be transposed into European regulations even though many aspects of the Dutch policy on legislation may be generalized. The quality standard for European regulation must primarily be found on the basis of the objectives pursued in a Community context with the existing regulatory instruments. At the Conference 'Quality of European and national regulations in the internal market' ('*Kwaliteit van Europese en nationale regelgeving in de interne markt*') held in Scheveningen in April 1997⁷, both the Director-General of the Council Legal Service, J-C Piris, and the deputy Director-General of the European Commission Legal Service indicated what the term quality of European regulation must be taken to mean.⁸ In

⁵ Often heard complaints are that European regulation is frequently inaccessible, vague and formulated obscurely, or unnecessarily Directive, inconsistent, too complex and/or insufficiently structured (See, *inter alia*, N.E. Bracke, *Voorwaarden voor goede EG-wetgeving*, diss. UvA, The Hague, 1996; H. Hijmans, *Over de kwaliteit van Europese regelgeving* (*On the quality of European regulation*), *RegelMaat* 1997, p. 192-198 and C.W.A. Timmermans, How can one improve the quality of Community legislation, *CMRL*, 1997, p. 1229). The reason for these qualitative defects, leading to problems in the interpretation and implementation of EC law, are, *inter alia*, the lack of institutionalized attention for legislation in the European Union. Until recently, specific experts developed the major part of legislation without any 'legislative eye' being involved. See also Wim Voermans, *Europese Aanwijzingen voor de regelgeving in een interinstitutioneel akkoord* (*Objets trouvés*) (*European Instructions for Regulation in an Interinstitutional Agreement* (*Objets trouvés*)) in *RegelMaat* 6, 1999, p. 230-232.

⁶ Parliamentary Documents II 1990/91, 22 008, nos 1-2.

⁷ For a summary of the contents of this meeting, please refer to H. Hijmans, *Over de kwaliteit van Europese regelgeving*, in *Regelmaat* 1997/5, p. 192-198.

⁸ See J.-C. Piris, *The Quality of Community Legislation: the Viewpoint of the Council Legal Service* (p.25-38) and C.W.A. Timmermans, *How to improve the Quality of Community Legislation: the Viewpoint of the*

combination, their approach means that the following issues are decisive for the quality of EC regulations:⁹

1. necessity of the regulation;
2. proportionality;
3. subsidiarity;¹⁰
4. selection of the right instrument;
5. (restriction of the) volume of regulations, the regulatory density and the regulatory expenses;
6. coherency with existing measures;
7. requirement of due care, in the sense of prior consultation of interested parties;
8. implementation and enforcement;
9. editorial quality, in particular, compliance with Community requirements applying to the editing of EC decision;¹¹
10. the accessibility (*inter alia*, in the form of management, consolidation and codification of regulatory texts).

2.2 Procedural and substantive quality

Apart from many similarities, there are some noticeable differences between the Dutch concept of quality and the Community concept of quality, including, in particular, attention for issues such as subsidiarity, the selection of the right Community instrument, attention for deregulation and requirement of due care (in the form of consultation of interested parties). Naturally, this difference is related to the position of EC regulatory processes in relation to our national legislative processes, and the experiences gained with legislation in Europe. The discussion concerning the quality of legislation within the EU is relatively new: it has left its traces in the standards set for legislation. The new aspect has two consequences, firstly, the discussion of what quality of EC provisions actually means, and to what extent and in which context it fulfils a role, has only just commenced, and there are as yet few actual quality standards, and secondly, the division of responsibility with respect to the quality of legislation is not yet clear. In 1997, Piris made a distinction between two aspects that are of vital importance to the growing European awareness regarding the quality of EC legislation, i.e. the attention for the 'procedural' or technical quality (in particular, the attention for legislative aspects of a provision such as editing, terminology, accessibility, etc) and the substantive quality (*qualité substantiel* relating to matters such as the necessity of the provision, subsidiarity, selection of the right instruments, implementation and enforcement, proportionality and the expenses and effects of a provision).¹² The results of the policy on quality by the European institutions are mostly related to the procedural quality of provisions, where – due to the fact that they are no politically or policy sensitive issues – measures contributing to the editorial quality of EC provisions could be initiated rapidly.¹³ The quality standards used there hardly deviate from the technical standards laid down for Dutch legislation. The development of a Community legislation policy intended to improve the substantive quality of EC provisions is much more complicated. Analyses in the field of the

European Commission (p.39-59), in: A.E. Kellerman et al (Eds), *Improving the Quality of Legislation in Europe*, The Hague/Boston/London 1998.

⁹ Points 1, 2, 4, 6 and 7 are also put forward as requirements for EC legislation in the 1993 Sutherland report. See the European Commission's notification of 16 December 1993 COM (93) 361 def.

¹⁰ In the sense of Article 5 EC Treaty.

¹¹ In particular, the requirements laid down in the Interinstitutional Agreements on 22 December 1998 with respect to the joint guidelines for the editorial quality of the Community legislation (*O.J. C* 1999, 73/1).

¹² See J.-C. Piris, *ibid* 1998, p. 28.

¹³ See the aforementioned Interinstitutional Agreement concerning joint guidelines for the editorial quality of Community legislation of December 1998.

substantive quality of legislation and measures to improve this quality in the future touch the core of European political and administrative decision-making processes, as shown by the discussion on the 1995 Molitor Committee report.¹⁴ The committee's rather far-reaching proposals in the field of deregulation could not count on a wide level of support. One consequence of the Molitor group's recommendations was the SLIM project.¹⁵ In this project, the European Commission proposed to have SLIM teams examine sectors (originally four) of the Internal Market.¹⁶ One difference with the Molitor group's activities is that the SLIM operation takes place under the chairmanship of the European Commission while the Member States and other parties (corporate sector and consumers) are directly involved. These SLIM projects – initiated in 1996 – that, apart from deregulation, also review the administrative expenses and corporate effects of European provisions, have not yet led to any really tangible results.¹⁷

The Netherlands has also sought to contribute to an actual policy on quality in the field of the substantive quality of EC provisions. In the run-up to the Dutch Presidency, as part of the Market Mechanism, Deregulation and Legislative Quality project, the working party on the quality of EC legislation (Koopmans Working Party) was set up. Following an analysis of the defects in legislation, the Quality of EC Legislation project submitted a number of proposals, including:

- to attain increased discipline at an EC level in the choice between the Directive and Regulation instrument;
- to further develop and expand the guidelines for the quality of EC legislation;
- to set up a Community body reviewing the quality of legislation.¹⁸

The proposals were first brought to the attention of the other Member States and institutions of the European Union at the start of 1996. The subject has furthermore been included at various occasions in the Intergovernmental Conference (IGC). On 15 July 1996, a Protocol was submitted to the European Union Treaty (Treaty of Amsterdam), although it must be noted that this protocol only concerned the Koopmans working party's proposal to develop new guidelines in the field of the improvement of the editorial quality. The working party's proposals in the field of the substantive quality were not directly feasible.¹⁹

¹⁴ In the summer of 1994, the European Commission set up the Molitor group (named after the chairman) instructing it to examine the entire field of legislation for possibilities of deregulation. The group is composed of independent experts, *inter alia*, from the corporate sector, the trade unions and the academic world. The Molitor group examined four areas of legislation, i.e. legislation on the environment; legislation on working conditions; food hygiene (legislation on condiments); and the machine Directive. In 1996, the European Commission presented the group's final report to the European Council in Cannes. The report contains a large number of more or less practical recommendations for deregulation, simplification and improvement of the quality of legislation in the aforementioned areas. In addition, the report argues for a 'change of culture' in the field of the use of legislation.

¹⁵ An acronym of *Simpler Legislation in the Internal Market*, COM (96) 204 def.

¹⁶ On the basis of the SLIM team's activities and recommendations, the Commission wishes to submit proposals to adjust the respective EC provisions. The following areas of EC legislation are examined: - 1st phase (1996): Intrastat, building products, mutual recognition of diplomas, ornamental plants; 2nd phase (1997): VAT, fertilizers, combined nomenclature for foreign trade, banking services; 3rd phase (1998): electromagnetic compatibility, insurances, social security rights. To date, the SLIM teams' recommendations have not led to extensive deregulation operations or major adjustments to EC provisions.

¹⁷ See, *inter alia*, the report of State Secretary Benschop in last March to the Lower House, Parliamentary Documents II 1999/2000, 221 501-01, no 137.

¹⁸ See *De kwaliteit van EG-regelgeving* (The Quality of EC Legislation) report by the working party on the quality of EC legislation, The Hague 1995. See also the report of the activities by the working party on the quality of EC legislation in the context of the Market Mechanism, Deregulation and Legislative Quality project, Parliamentary Documents II 1996/97, 24 036, no 54.

¹⁹ See also H. Hijmans, *ibid*, 1997, p. 198.

For this research project, this means, *inter alia*, that while there may be a rather clear awareness of quality and a developing policy on quality with respect to the procedural quality of EC provisions, there is much debate with respect to both the exact contents of what may apply as the substantive quality of EC legislation and to the question regarding the manner in which an improvement must be realized in this field. Partly for this reason, it is more useful to use the rather definite Dutch notions and standards of quality for the review of the quality of EC legislation. Moreover, with a view to the manner in which they are, for example, put into operation in the Directions for Legislation, the Dutch quality standards seem to encompass most of the European quality standards – including the substantive.

2.3 Implementation and concept of implementation

This research examines the quality of EC provisions and the consequences of this quality for the implementation and enforcement. Most of the EC provisions examined are EC Directives. These Directives must be implemented in the Dutch legal system to realize the intended result. The process whereby national law is amended conform Community law is usually referred to as the ‘implementation’ of EC law.²⁰ We use a broad concept of the concept of implementation which means that we also include measures to realize Community law in the Dutch legal system that are not generally binding provisions – such as actual measures.²¹ Like Mortelmans and Van Rijn²², we take implementation of EC Directives to mean both the *transposal* and the *implementation* of EC Directives. The transposal mostly refers to the efforts made by the Member States to introduce EC Directives in the national law, i.e. the translation of the result required by the EC Directive into national forms and means. It concerns a specific operation focused on the ‘first-degree’ realization of Community law. We agree with Mortelmans and Van Rijn that implementation in the form of implementation must be taken to mean the measures (other than transposal measures) taken to complete a Community provision. Such measures may consist of the *adjustment* of national rules to Community law (e.g. by repealing a national measure that is in conflict with Community law), taking measures to ensure the implementation (by means of the introduction of measures or the designation of implementing bodies) or enforcement of Community law (e.g. by means of the introduction of sanctions or forms of legal protection). This concerns the ‘second-degree’ realization of Community law, by laying down provisions that supervise the introduction and effectuation of Community law within national law as it were.

3. Definition of the research problem

Partly as a result of the foregoing, the research has the following definition of the problem:

‘What is the relation between the quality of EC decisions and the problems observed in the implementation, application and enforcement of the regulations in those fields?’

The research of this problem is based – for the aforementioned reasons – on the Dutch qualitative criteria from the policy document ‘Views of Legislation’.

It concerns the following criteria:

- lawfulness;
- implementation and enforcement;
- effectiveness and efficiency;

²⁰ See Ph. Eilander and W. Voermans, *Wetgevingsleer* (Legislative theory), The Hague, 2000 p. 258 ff.

²¹ For a restrictive concept of implementation, please refer to the concept as laid down, for example, in Direction 328 of the Directions for Legislation.

²² Compare K.J.M. Mortelmans, T.P.J.N. van Rijn, *Europese regelgeving en Nederlandse implementatie* (*European Legislation and Dutch Implementation*), *Nederlands tijdschrift voor bestuursrecht* 1992, no 2, p. 78-79.

- subsidiarity and proportionality;
- mutual harmonization;
- simplicity, clarity and accessibility.

The criteria are, *inter alia*, put into operation in various tools and directions, of which the Directions for Legislation are the most important. In several respects, those Directions for Legislation are solutions, based on experience, for qualitative problems that may arise in legislation.

Cause and effect

The central research topic focuses on the impact of the quality of EC provisions on the implementation and enforcement of those regulations within the Netherlands. For various reasons, it is not always easy to establish the cause-and-effect relation in this context. The problems in the implementation and enforcement of EC provisions may arise for a number of reasons. For example, the problems in the enforcement of a regulation may be caused by an inadequate interface of the (implemented) EC regulation with national legislation and the ancillary enforcement practices. A lack of enforcement capacity may also cause problems, just as the manner in which the EC regulation is implemented into the Dutch legal system. Not every problem occurring in the implementation and enforcement of EC provisions, even where the quality of the EC regulation may be defective, may *therefore* be attributed directly or indirectly to the EC regulation concerned. The causal links between the quality of EC provisions and implementation and enforcement problems may be complex. For example, some problems may be caused by the Dutch transposal method or our national system of enforcement.

The examination of those causal links in this research is based on a method enabling a clear review of the links. Following a general survey – via literature and case law research – of the implementation and enforcement problems arising from an EC regulation, via interviews with key persons – selected in consultation with the client – the causal links are examined. A further literature study is also conducted in relation to the second step of the assessment of the cause-and-effect relationship.

The EC decisions and instruments examined.

In order to gain specific and more detailed insight into the nature and the extent of the implementation and enforcement problems that may ensue from the qualitative defects in EC provisions, this research is based on a case study into a number of selected implementation paths. This research examines the following EC provisions – relating to different areas of policy:

- Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (*O.J.* 1996 L 124) as amended by Directive 98/76 (*O.J.* 1998 L 227);
- Community framework regulations on State Aid for research and development (*O.J.* 1996 C 45) as amended (*O.J.* 1998 C 48);
- (related) EC decisions on waste (75/442, 91/689, 259/93, 94/62, 94/67 and 1999/31);
- Directive 90/313 on the freedom of access to information on the environment (e.g. in relation to parts of Directives 67/548, 89/369, 90/219, 91/414, 96/82, 97/11, 98/8);

The client has chosen the resolutions and instruments. This selection was representative in the sense that the preparatory group of departmental experts giving advice in this respect had selected a number of files that are regarded as ‘averagely’ problematic: the research did not include the files with – as known - the most serious qualitative problems nor the fields with no

or few quality-related problems. The representative value of the selection is therefore based on the seriousness – according to the preparatory group – of the qualitative problems at issue.

Next, the client and the interdepartmental preparatory group made a random choice from the selection, by mutual consultation, resulting in the four aforementioned decision/instrument clusters. The expertise of members of the preparatory group with respect to certain fields played a role in this choice, which means that the choice for the policy areas and topics is partly based on the portfolios of the preparatory group members. The selection method may therefore best be described as an ‘educated guess’. Such a direction in the selection of the files is certainly justified with a view to the set-up of this research, which is solely intended to provide an indication of the problems and bottlenecks that may ensue from the qualitative problems of EC decisions.

3.3 Approach within the case studies

The study of the quality of these EC regulations and any problems related thereto in the field of implementation and enforcement was conducted in three analysis tiers, namely:

A. *Analysis of case law* focusing on bottlenecks in the field of the quality in the sense of the applicability of the regulations at issue. The following questions were discussed in this cluster:

1. Which of the EC regulations to be examined include provisions that – both before and after the transposal into national law – have given rise to any disputes and judgments of both the national courts and the EC Court of Justice partly on account of their quality?
2. Which provisions does it concern and what is the nature of these (for example, are they Community or transposed national provisions?)
3. Do the cases examined concern problems that are directly the result of qualitative defects in the EC provision?

B. Bottleneck analysis of implementation and enforcement practices

The bottleneck analysis of implementation and enforcement practices seeks, in particular, to find bottlenecks in the field of the qualitative aspects of the implementation and enforcement of the legislation examined.

The following issues will be raised in this respect:

1. Which of the selected EC regulations contain provisions that may give rise to bottlenecks in the implementation, application and enforcement in practice?
2. Which of the selected EC regulations contain provisions that are not or insufficiently complied with and/or enforced or otherwise fail to attain the objective pursued by the legislator?
3. What regulation (the EC regulation or the national implementation regulations) causes the bottlenecks signaled in the field of the application, implementation and enforcement and in what stage (preparation of the EC regulation, the preparation of the implementation regulation or the implementation and enforcement stage itself) are these bottlenecks caused?

C. Analysis of the technical quality of EC legislation

Some aspects of the quality of EC legislation are difficult to examine on the basis of case-law analysis or bottleneck analyses in the field of implementation and enforcement practices. Particularly in the field of the qualitative aspects of mutual alignment of the EC rules themselves and with respect to national (implementation) rules, as well as the qualitative aspects of simplicity, clarity and accessibility of legislation. Problems that

occur in this respect often lead to considerable and indirect bottlenecks (e.g. in the interpretation or comprehension of the legislation). These ‘communication aspects’ of EC legislation are nevertheless included in the research. Special attention is drawn to the following issues:

1. Which of the selected EC regulations include provisions that contain bottlenecks in the field of accessibility, simplicity and clarity of the regulations and what are the consequences of these bottlenecks now and possibly in the future?
2. Have any implementation measures based on the selected EC regulations given rise to problems regarding the transposal itself, such as infraction proceedings on account of incorrect, incomplete or tardy implementation? If so, to what extent are those problems related to the quality of EC regulations?

Synthesis

The concluding section of this research connects subanalyses A-C in the sense that it examines if and to what extent the bottlenecks signaled in subsections A-C lead, either directly or indirectly, to problems in the implementation and enforcement of the (implemented) EC regulations. In addition, the consequences ensuing from combinations of the problems signaled will be examined.

4. Research methods

The research is conducted by means of a combination of legal and social-science research methods using both the analysis of literature (including case law) and interviews. The interviews are based on standard questionnaires (see appendix 1).

5. Circle of respondents

The social-science section of the research was conducted by means of interviews with key persons that fulfilled a role in:

- a. the transposal of the EC Directives at issue in the Netherlands;
- b. the implementation or enforcement of the (transposed) EC provisions in the Netherlands.

The research – with the character of a quick scan – is therefore almost exclusively oriented at a national level. A broader set-up was not possible in view of the set-up and completion time of the research.

During the research, interviews were conducted with 14 persons. Please find the list of the respondents in paragraph 8 of this chapter.

6. Research stages

The research has a most limited completion time. This means that the research results are merely provisional indications of links between the quality of EC legislation and problems in the implementation and enforcement of that (implemented) EC legislation. More research is needed to really ‘substantiate’ such indications – in a scientific sense -, but the links examined between the quality of EC legislation and implementation and enforcement problems subsequently occurring in the Netherlands may be useful as *examples*.

7. Structure of the report

This report presents the research results of this project. The report is divided as follows. This chapter, Chapter 1, renders account of the structure and approach of the research conducted

and formulates the central definition of the research problem. Chapter 2 reports on the research into Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (1996 L 124), as amended by Directive 98/76 (1998 L 227). Chapter 3 reports on the research into the Community framework regulations on State aid for research and development (1996 C 45) as amended (1998 C 48). Chapter 4 presents the research results with respect to the examination of Directive 90/313 on the freedom of access to information on the environment (e.g. in relation to parts of Directives 67/548, 89/369, 90/219, 90/220, 91/414, 96/82, 97/11, 98/8) and Chapter 5 includes the research into the (related) EC decisions on waste (75/442, 91/689, 94/62, 94/67 and 1999/31). The conclusions and recommendations of the research are included in Chapter 6.

8. List of respondents

Ms C.S. Bol
Ministry of Economic Affairs
Legal Affairs Department

Mr J.H.G. van den Broek
VNO/NCW (Confederation of Netherlands Industries and Employers)
Environmental Affairs Section

Mr B.J. Clement
Ministry of Transport, Public Works and Water Management
Central Department of Legal Affairs

Mr A.P. Dijkstra
Ministry of Housing, Spatial Planning and the Environment
Environmental Protection Directorate

Mr P.J.J. Drost
Ministry of Housing, Spatial Planning and the Environment
Legal Affairs Department

Mr R.A. Hallo
Foundation for Nature Conservation and Environmental Protection
Legal Affairs Department

Mr A.L.W. van Herk
Ministry of Transport, Public Works and Water Management
Directorate-General for Passenger Transport

Mr H.A. Meijer
Ministry of Housing, Spatial Planning and the Environment
Radiation and Waste Department

Mr H.Pasman
Government Road Transport Agency (RDW)
Legal and Administrative Affairs Department

Ms A.M. Sewandono
Ministry of Housing, Spatial Planning and the Environment
Legal Affairs Department

Ms B.M. Veltkamp
Ministry of Justice
Legislation Department

CHAPTER 2

1. Character sketch of the Directive

Directive 90/313 refers to free access to information on the environment. The underlying idea is that it is important to involve the people concerned in environmental issues. By means of provisions increasing access to information on the environment, the Directive contributes to an increased awareness of environmental issues that may improve environmental protection.¹ On the one hand, it concerns access to information held by public authorities and, on the other hand, it concerns active provision of information to the public by the government. Furthermore, the intention is to reduce any inequalities within the Community as regards access to information. After all, less access to information may result in unequal conditions of competition.

The Directive is based on Art. 130 S (old) EC Treaty. It lays down minimum requirements for the Member States to realize free access to information on the environment. Further reaching measures may however be taken on the basis of Art. 130 T.

As appears from Article 1, the Directive intends to ensure freedom of access to information on the environment held by public authorities, to ensure dissemination of such information and to set out the basic terms and conditions on which such information should be made available. Article 2 of the Directive contains definitions of ‘information relating to the environment’ and ‘public authorities’.

‘Information relating to the environment’ shall mean any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on the activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes;

Public authorities are any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity.

Information relating to the environment must be made available to any (natural or legal) person without his having to prove an interest.

Art. 3 lists a series of exceptions for which Member States ‘may provide’ that a request ‘may be refused’.

It concerns cases where the provision of information may violate:

¹ See the Commission’s report on the discussions concerning the Directive, dated 29 June 2000, COM (2000), 400 def.

- the confidentiality of the proceedings of public authorities, international relations and national defence;
- matters which are, or have been, sub judice, subject to preliminary investigation proceedings, under disciplinary enquiry or subject to investigation proceedings;
- commercial and industrial confidentiality, including intellectual property;
- the confidentiality of personal data and/or files;
- material supplied by a third party without that party being under a legal obligation to do so;
- material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

Part of the information may be submitted in cases where one of the exceptions occurs.

A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications. A request may also be refused if it is manifestly unreasonable or formulated in too general a manner. A public authority must respond to a person requesting information within two months. The reasons for a refusal must be given. A person whose request has been refused must be given the opportunity to seek a judicial or administrative review of the decision (Art. 4). A reasonable charge may be made for supplying information (Art. 5). Art. 6 states that Member States must also ensure that 'bodies with public responsibilities for the environment' and under the control of public authorities as referred to in Art. 3 supply information relating to the environment. Art. 7 describes the active duty to supply information. Art. 8 indicates that a review of the operation of the Directive will occur after 4 years. Art. 9 includes a communication obligation with respect to the 'main provisions' adopted by the Member States in the field. The Directive must be implemented not later than 31 December 1992.

2. Interviews

Information from the interviews is supplemented by information from parliamentary documents and the Commission's review report of the Directive. This is indicated in the text.

Preparation of the Directive

During the preparation of the Directive, the Ministries of General Affairs and Economic Affairs have sought to adjust the contents, *inter alia*, with respect to the special position of the Crown. Under the Government Information Act (*Wet openbaarheid bestuur*, or Wob), a request for information must be refused in cases where it may endanger the unity of the Crown. It concerns any possible differences of opinion between ministers and the Queen. However, the attempt to include this in the Directive has failed. The interviews do not indicate any other influences in the preliminary stage.

Generally, the respondents note that the contribution of social organizations etc. is accidental, it depends whether they become aware of it in some way. The corporate sector is often involved as departments value their opinion, according to one respondent. However, this involvement is only sought at a later stage when it is expected that the corporate sector may be against it, according to another respondent. Suggestions are not always used, and in cases where they are being used, the government's position may sometimes change at the last minute.

In one respondent's opinion, the Commission must take more initiative to become familiar with opinions from outside. If there is a consultation round of the Member States, the environmental organizations are not informed. The Commission does communicate with European environmental organizations.

In addition, it is regarded as a problem that the Commission changes repeatedly during the preparation, without any progress report being drawn up. In such cases, the information is

restricted to the more official moments when proposals are submitted. It remains unclear what occurs in the interim stages (e.g. after the first meeting of the Council's working party). It therefore also remains unclear how one point is reached or in what manner amendments are made. Nor is there any information available on the positions adopted by the different Member States.

Implementation

The subject comes under the ministries of General Affairs, Home Affairs and Housing, Spatial Planning and the Environment. This division is not in line with the division of policy fields at the Commission where the Directive comes under DG 11 (environment).

The original position of General Affairs was that Dutch legislation already complied with the Directive. The Ministry of Housing, Spatial Planning and the Environment disagreed. The Government Information Act in combination with the Environmental Protection Act (*Wet milieuhygiëne*) and the Chemical Substances Act (*Wet milieugevaarlijke stoffen*) were nevertheless designated as the implementing provisions.² The formulations were not exactly the same, but the general opinion was that the actual application would not lead to any differences.

This was reported to the Commission in a letter of 12 August 1992. The Commission informed them that this was insufficient (in a letter of 20 October 1992). In particular, the grounds for exception referred to in Art. 10 paragraph 2 under b and g of the Government Information Act posed a problem. Subparagraph b implies that information may be refused in the event that financial or economic interests of the State or other public-law bodies are decisive in the weighing-up of interests. Subparagraph g indicates that information may be refused where the supply of information may lead to disproportional preference or prejudice of parties involved or third parties. These two grounds are not in line with the Directive. At that stage, the *Stichting Natuur en Milieu* (Nature and Environment Foundation) threatened to lodge a complaint with the Commission. In order to preclude legal proceedings on the part of the Commission, it was eventually decided to amend the law.³

In February 1996, a proposal was submitted to supplement the Wob by means of a combination of specific and referential implementation. This means that the definition of information relating to the environment was included in Art. 1 Wob. As regards the exceptions, reference was made to the Directive.⁴ The Council of State criticized this technique. This criticism was taken over by the standing parliamentary committee for Home Affairs after which the legislative proposal was amended and the grounds for exception were included in Art. 10 Wob.⁵

Implementation and enforcement

As far as known, there are few problems with the application of the Directive. According to one respondent, this is more the result of the Dutch government's attitude than of the quality of the Directive. Legislation on access to government information has a longer history in the Netherlands. For that reason, one tends to ensure that there is broad access to government information and to interpret the applicable rules in a broad sense. Before the implementing legislation, the direct effect of the provisions of the Directive was invoked.⁶ The judgments concerned are discussed in par. 3.

² See the overview in Parliamentary Documents II, 1995/96, 24613, no 3.

³ See also Parliamentary Documents II, 24 613, no 5.

⁴ See legislative proposal, Parliamentary Documents II, 24 613, no 2.

⁵ See Parliamentary Documents II, 24 613, B and no 6.

⁶ District Court Utrecht 24 November 1994, *M&R* 1995/4 no 51 and *JB* 1995/1, p. 48-49; District Court Roermond 20 January 1997, *JB* 1997/3, p. 232-237.

One respondent stated that the interpretation of the term ‘commercial information’ from the Wob is not in line with the Directive. However, the Commission does not regard this as a problem.

More in general, one respondent believes that the European Commission is unable to provide sufficient supervision and monitoring. There is a shortage of capacity. In addition, it is carried out by lower ranking, often young, public officials that do not carry much weight, have a limited network, etc. For reviews, they depend to a large extent on input from outside. According to this respondent, it would be an added value if there were a mechanism where citizens and environmental organizations may lodge their complaints. However, the supervision and monitoring should not depend upon it. It was suggested to have some kind of Ombudsman conduct a legal review of the transposal of a Directive.

At a national level, a review of the effects would also be useful. In many cases, the local authorities are hardly aware of the applicable European regulations. The central government should educate and guide the local authorities, according to one respondent.

After-care

This Directive must be assessed after four years under Art. 8. Each Member State has submitted a report on its application. A synthesis thereof has been included in the European Commission’s report. The Dutch report shows that there were few problems, partly due to the fact the law had not been amended at the time of the report and no experience had therefore been gained with the application.⁷

In this respect, there was the problem that Member States had failed to realize that they had to produce a report after four years. Statistical material was requested but could not be provided since it had not been maintained. A full review was therefore not possible.

In 1998, the so-called Treaty of Århus was concluded. The EC and the 14 Member States in the context of the United Nations signed this treaty. The treaty is inspired by the Directive on access to the information on the environment, but it contains many changes and improvements in comparison. According to the explanation on the proposal for a new Directive, the new Directive was in fact negotiated in Århus.⁸

As stated above, further to the review and on the basis of the Treaty, a new Directive is being prepared. During the preparations, the Commission not only involved the Member States but also NGOs and practical experts. In addition, the Commission has analyzed the complaints lodged, the infraction proceedings and the preliminary questions to the Court of Justice. The *Stichting Natuur en Milieu* has drawn up a list of recommendations for the Commission, included as an appendix to the review report.⁹ Upon request, the Ministry Housing, Spatial Planning and the Environment was unable to find this list of recommendations. The respondents regarded this preparation method by the Commission as most exceptional. The Netherlands also participated in the preparations. The Ministry of Economic Affairs contacted the VNO/NCW (Confederation of Netherlands Industries and Employers) to be informed of the employers’ view of the new provisions on commercial information.

One criticism is that the Lower House is informed too late of the contents of this new Directive. Experience has shown that where a Member State wishes to make a contribution, it

⁷ Letter of the Permanent Representation of the Netherlands to the European Union, no 4557, dated 23 April 1997.

⁸ See Proposal for a Directive of the European Parliament and the Council on free access of the public to information on the environment, COM (2000), 402 def.

⁹ Recommendations for the Review and Revision of Directive 90/313/EEC on the Freedom of Access to Information on the Environment, published in March 1998; referral on p. 9 of COM (2000), 400 def.

must do so at an early stage. By the time the Lower House is involved, this moment has long passed.

3. Case law

The Directive has given rise to some cases in the Netherlands, in particular, prior to its implementation. The Court of Justice has given its opinion in preliminary rulings and an infraction procedure on the interpretation of some provisions in the Directive. In this research, no case law was found with respect to the harmonization with other Directives on the environment including access or secrecy provisions. Literature does draw attention to this: see par. 4 of this chapter. Overall, there is not much case law and the case law does not indicate any major problems.

The Netherlands

A few judgments have been rendered on the meaning of Article 3 paragraph 2 Directive 90/313 (exceptions) in the Netherlands. These revolved around the question of the relationship between the exceptional provisions of the Directive and the exceptions in the Wob.

- The *Stichting Natuur en Milieu* had requested the Gas Management Plans of the Gas Union (*Gasunie*) at the Ministry of Economic Affairs. According to the District Court, these plans were issued on terms of confidentiality to the government and therefore came under the ground for exception of Article 10 paragraph 1 opening sentence and under c (commercial information). This ground for exemption is absolute, according to the District Court. Was this interpretation in accordance with Art. 3 paragraph 2 of the Directive? Was a weighing-up of the interest of confidentiality and the interest of public information necessary? The phrase ‘may be refused’ from the Directive might indicate the latter. The District Court believes that a weighing-up of interests is not obligatory under this article, referring to the French and English text of the Directive (not providing a solution), the structure and objective of the Directive.¹⁰ The annotator in *JB*, Koning, does not agree with the District Court and believes that the Directive does encompass a relative ground for exception.
- As regards a sand extraction site in Weert, two reports were drawn up relating to the use and exploitation of the site. Access to these reports was refused on the basis of the Wob grounds for exception. One report on account of the economic and financial interest of the Municipality of Weert (Art. 10 paragraph 2 under b Wob) was refused because the report served as a counter appraisal with respect to the report of the sand extractor himself and as such fulfilled a role in the negotiations. The other report was refused because it contained commercial information (Art. 10 paragraph 1 under c Wob). The District Court assumes that Directive 90/313 has direct effect. The information in the reports is regarded as falling within the scope of the definition ‘information relating to the environment’ as it concerns activities having (potentially) an unfavourable effect on the environment. The District Court further assumes that the exception allowed for in the Directive with respect to the commercial and industrial information is equal to the exception in Art. 10 paragraph 1 under c Wob. However, the Directive has no equivalent to Art. 10 paragraph 2 under b and this ground may therefore not be used.¹¹

¹⁰ District Court Utrecht 24 November 1994, *M&R* 1995/4, no 51 and *JB* 1995/1, p. 48-49, Langeloo.

¹¹ District Court Roermond 20 January 1997, *JB* 1997/3, p. 232-237.

- Fishing vessels in the cockle fisheries have a black box registering the fishing locations and the fish intensity per quadrant. The information is gathered on a printout for all vessels mapping out the entire season. Two environmental organizations requested this printout by invoking the Wob. The refusal by the Ministry of Agriculture, Nature Management and Fisheries was based on Art. 10 paragraph 2 under d: the interest of inspection, control and supervision would oppose it. During the preliminary-injunction proceedings, the question was raised whether Art. 10 paragraph 2 under d constituted a correct implementation of Directive 90/313. The President evaded this issue, as he did not want to decide by preliminary injunction whether the Directive has direct effect. Annotator Klijnsstra suggested that the Directive has such effect and that, furthermore, Art. 10 paragraph 2 under d may be regarded as an implementation of Art. 3 paragraph 2 third indent of the Directive. This states that the ground for exception with respect to matters which are, or have been, sub judice, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings.¹²

One judgment is rendered with respect to the question to which institutions the Directive applies.

- Steel manufacturers have concluded a long-term agreement on the improvement of the energy efficiency with the Ministry of Economic Affairs. The exact energy savings activities are laid down in agreements with NOVEM BV, the Dutch undertaking for Energy and the Environment. These documents were not submitted to the ministry on purpose in order to evade the Wob requests. The District Court considers this to be unheard-of and allows the appeal of the Ministry of Economic Affairs against the refusal of the request by referring to the spirit and the intention of the Wob. However, Directive 90/313 had already taken effect in this period. Annotator Klijnsstra points out that NOVEM may be regarded as a 'body of public responsibility in the field of the environment' and is supervised by public authorities as referred to in Art. 6 of the Directive and that NOVEM is therefore obliged to allow a Wob request. However, the Directive is not referred to in this judgment.¹³

Recently, judgment was rendered on the relationship between the general provisions on access to information in the Wob and the special secrecy provisions in Art. 22 of the Pesticides Act (*Bestrijdingsmiddelenwet*).¹⁴ This latter Act has implemented Directive 91/414.

- Tissen requested access to all documents destined for the Pesticide Authorization Board used to admit the pesticides Basalit and Tanalith: all documents regarding the decision-making, the applications for admission themselves and the ancillary research reports. Tissen wished to review by means of these documents whether these substances are less harmful to the environment than the pesticides previously used in the company. The matter focused on the relationship between the exceptions of Art. 10 second paragraph under c and g (commercial and industrial information and preference and prejudice of the parties involved, respectively) and the secrecy provisions of Art. 22

¹² District Court Leeuwarden 12 March 1999, *M&R* 2000, 34.

¹³ District Court Rotterdam 2 December 1994, *M&R*, 1995/3, no 48.

¹⁴ Administrative Law Division Council of State 10 August 2000, *NJB* 2000/38, p. 1880-1881.

Pesticides Act. In principle, there is a secrecy obligation under Art. 2:5 Awb (confidential information) regarding the composition of pesticides. Art. 22 provides an exception to this in the event that these substances are harmful to persons, animals or plants. However, if any commercial information is revealed as a result, this must remain confidential. This provision is an implementation of Art. 14 Directive 91/414 (plant protection) which article is based on the protection of commercial and industrial information, but exempts certain information from confidentiality, such as the name of dangerous substances and any ways of rendering substances/products harmless. The Administrative Law Division indicates that the principle of the *lex specialis* applies in this case: as there is a special and exhausting regulation for the disclosure/protection of information relating to pesticides, this applies exclusively. The Division concludes that Tissen's request is wrongly reviewed in the light of the Wob instead of the Pesticides Act. The Division did not enter into the question whether the minister might have applied Art. 10 second paragraph under g. This part of the article is not applied pursuant to Art. 10 fourth paragraph in cases where the request concerns information relating to the environment.

The Court of Justice

To date, the court has passed two judgments with respect to the Directive concerning information on the environment. One judgment concerned a preliminary ruling and one infraction proceedings. The third case is still pending and also concerns infraction proceedings. The Federal Republic of Germany is a party in all three cases.

Court of Justice 17 June 1998, C-321/96, Wilhelm Mecklenburg v Kreis Pinneberg

Preliminary questions relating to the interpretation of Art. 2 under a and Art. 3 paragraph 2 Directive.

- Art. 2 under a: definition information relating to the environment, in particular the part 'activities or measures designed to protect these, including administrative measures and environmental management programmes'. The question was raised whether the statement of views given by a countryside protection authority in development consent proceedings is covered by this definition. The Court believed that it was, if that statement is capable of influencing the outcome of those proceedings as regards interests pertaining to the protection of the environment.
- Art. 3 paragraph 2: 'preliminary investigation proceedings'. Do the preparations of an administrative-law measure fall within the meaning of this term? The Court believed so, if the preliminary investigation proceedings arise from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure.

Court of Justice 9 September 1999, C-217/97, Commission v Germany

Infraction proceedings due to incorrect transposal. Four questions were raised.

- May bodies acting in a judicial capacity be excluded fully from the scope of application? The Commission rejected this as it found that they also perform administrative activities and this information must be made available. The Court did not agree that the bodies acting in a judicial capacity have information on the environment obtained outside their judicial activities.
- Art. 3 paragraph 2: 'preliminary investigation proceedings'. ? Do all preliminary administrative proceedings fall within the meaning of this term? The Court believed so

only if the preliminary proceedings arise from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure.

- Art. 3 paragraph 2: Germany had failed to include that in case of an exception; information must be supplied in part.
- Art. 5: Germany also provided for a charge to be made even if a request for information was refused.

C-29/00 Commission v Germany

The Commission has brought an action against Germany because it interprets part of Art. 3 paragraph 4 in a most procedural manner, i.e. that the government is solely obliged (within the period of two months) to give an indication of whether or not the information will be supplied without indicating when the information will be supplied. No ruling is available with respect to this matter.

4. Literature

Various literature has been published in this field, including:

- R.E. Hallo (ed), *Access to Environmental Information in Europe, The Implementation and Implications of Directive 90/313/EEC*, London, The Hague, Boston 1996
- M. Klijnsma, *Openbaarheid in het milieurecht* (Free Access to Information in Environmental Law), Deventer 1998,

The Commission's review report: *Report from the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Directive 90/313 of 7 June 1990 on Freedom of Access to Information on the Environment*, COM (2000) 400 def.

The book edited by Hallo concerns a comparative law study of the operation and application of the Directive in the EU Member States.

In various countries (Belgium, Denmark), the interpretation of the Directive leads to problems, as the terms are open to diverging interpretations. The implementation and application led to many problems in Germany as free access to government information by the citizens does not form part of the German administrative culture. The Directive is therefore interpreted in a most restrictive manner and implemented in a most restrictive manner. Greece satisfies the procedural requirements but the implementation practices are such that people are sent from one body to the next and back again. Withholding information has been made too easy. This is also a problem in Italy; sanctions on this behaviour are, as in the United Kingdom (UK), sorely missed.

The Irish report states the following problems: the time-limit for a response to a request is too long, the requirement of legal protection can be interpreted in various ways and it is therefore not clear, the costs scheme leave much room for high charges, the form in which the information is made available must enable effective consulting, the list with exceptions is too long, no sanction can be imposed on withholding information.

In Luxembourg, the term 'unfinished documents' was interpreted in such a broad sense that it was easy to base a refusal of information on this.

In Portugal, the Directive is implemented by including it in general provisions on access to information. Problems that occur relate to the slow treatment of requests, the strict interpretation of the term information relating to the environment and the fact that the law does not apply to relevant information held by private-law entities. In the UK, this is a problem with respect to privatized institutions with a public task. In Spain, the Directive has hardly been implemented as it provides too many opportunities for not doing so. For example,

the exceptions are too indeterminate, the provisions on the costs do not include a minimum or maximum sum to be charged. The Spanish law provides for a tacit refusal of a request.

The *Klijnstra* dissertation provides a detailed examination of Directive 90/313. Please find below a summary of the most important points in relation to the quality of the Directive.

He is of the opinion that the term 'information relating to the environment' is defined broadly and, as a result, virtually all information relating to the environment is covered. The definition is less specific compared to the Commission's proposal, but it is more flexible. He finds the description of 'public authorities' not clear. For example, the question arises whether it concerns all public authorities or merely those that have specific powers in the field of the environment. The formulation 'with responsibilities relating to the environment' may also refer to both. He also considers the category referred to in Art. 6, bodies with public responsibilities for the environment and under the control of public authorities, to be too vague. For example, it is unclear to what extent private-law bodies fall within the scope of this provision. One might support the view that companies with an environmental permit also belong to the category of Art. 6, according to Klijnstra.

Klijnstra also indicates that the Directive does not state unequivocally whether the grounds for refusal must be interpreted as absolute or relative. The formulation 'may be refused' seems to point in the direction of the relative approach, as a result of which one may deduce that the interest of confidentiality must be weighed up against the interest of free access by the public.

A weak point of ground for refusal is that the term 'proceedings' is fairly vague. For example, it is not clear how this concept relates to the decision-making procedures. Klijnstra signals that ground c (matters which are, or have been, sub judice, or under enquiry etc.) may have caused some countries to assume that the administrative preparations of a decision may be excluded. He also criticizes the provision because information with respect to a matter that has been sub judice at any time may be refused. Ground d (commercial confidentiality) is much debated as it is unclear what falls within the meaning of this term. For example, information on emissions must be made available but an analysis of this may reveal much about secret processes.

As regards the legal protection, Klijnstra believes that the lack of provisions relating to the costs of the proceedings is a deficiency, as is the lack of the opportunity for third parties to appeal against the supply of information, e.g. in cases where commercial secrets are revealed.

Apart from Directive 90/313, there are some special European regulations on free access to information in the field of the environment; Klijnstra describes 17 regulations. Some of these are older than Directive 90/313. However, the Directive does not contain any provisions on the relationship with the special Directives and, as a result, it remains unclear whether the principle of the posterior/anterior rule or the principle of the *lex specialis/generalis* applies. The later special Directives refer to 90/313 but these references are, in turn, not clear. The Directives use other terms and criteria and do not include an explanation as a result of which it is most difficult to find out what the objective, intention and mutual relationship is. In most special regulations, free access to information is required in cases of very specific information, e.g. an application for a permit. The question then arises whether the general regime with respect to free access to information applies to the other information falling within the scope of the regulation, or not.

Next, Klijnstra discusses some harmonization problems. As indicated above, no problems have (as yet) become clear in the case law or in practice with respect to the harmonization.

- The relationship between Directive 90/313 and specific confidentiality provisions and/or special provisions on free access to information. Various regulations on free access to information relating to substances that are harmful to the environment such as Directive 67/548 (packaging),

90/219, 90/220 (both genetically modified micro-organisms), 91/414 (plant protection substances) include provisions on the basis of which companies may request the confidentiality of their commercial information. The grounds and the type of information differ due to the grounds for exception of Directive 90/313/ As the special Directives fail to indicate how this confidentiality of commercial information relates to the general provisions on free access to information, it remains unclear whether 90/313 or the special Directives take precedence. Klijnstra believes the latter in view of the principle of the *lex specialis/generalis*.

- Some special Directives refer to 90/313 by means of the phrase ‘without prejudice to’. This is the case, for example, in Directive 91/414 (plant protection substances). It is likely that it means that Directive 90/313 must be applied supplementary, but this is not entirely clear.
- Klijnstra criticizes the differences in terminology with respect to the grounds for confidentiality ensuring the protection of commercial information. Commercial information is described as ‘industrial and commercial information including intellectual property’ in Directive 90/313. Special Directives refer to ‘business or commercial secret’ and to ‘industrial and business secret’. According to Klijnstra, this may also be a matter of translation.
- Klijnstra devotes a separate discussion to the new Seveso Directive (96/82) that took effect in 1999. This Directive includes obligations of active disclosure of information, such as, for example, the security report. In addition, there is the obligation of passive disclosure (making available information upon request) to which a limitative number of exceptions apply. In addition, the operator may submit a request for confidentiality of sections of the security report.
The Directive includes no provision on the relationship with 90/313, which is most difficult with respect to the passive disclosure and the exceptions for this. 96/82 provides broader possibilities for exceptions, but these are facultative. A Member State may therefore implement fewer exceptions than provided for in 90/313. In addition, the question arises whether the terms *information relating to the environment* (90/313) and *information* (96/82) have the same meaning.

The *Report of the Commission* is based on national reports, on complaints and on the contribution of non-governmental organizations. The review occurred on the basis of Art. 8 of the Directive.

The review shows that, on the one hand, problems have occurred in the determination of the exact meaning and scope of the Directive. On the other hand, it concerned problems of implementation.

Matters of interpretation

- Information relating to the environment: The definition posed problems for the Netherlands as there were insufficient criteria to determine which information does or does not refer to environmental aspects. For example, the question was raised whether it solely and exclusively concerned ‘the

state of the environment' or also related aspects such as activities or measures that seek to protect the environment.¹⁵

Similar questions have arisen in other Member States: for example, the question whether information on the public health effects of the state of the environment falls within the scope of the definition, or information on radiation or nuclear energy, on financial or needs analyses in support of projects likely to affect the environment.¹⁶

- Public authorities: In some cases, the public authorities claimed that their responsibilities did not relate to the environment and so refused to give access to environmental information.
- The exceptions are too broad.
- In some countries, the phrase in Art. 3(4) is interpreted literally: they respond to the request but do not supply the requested information. See also the aforementioned procedure C-29/00.
- A fictitious refusal is also regarded as a refusal. This results in a conflict with the obligation to state reasons as referred to in Art. 3(4).
- In various countries, the question was raised whether quasi-public or private bodies with a public task also fell within the formula: bodies with public responsibilities for the environment, referred to in Art. 6.

Matters of implementation

- slow handling of requests, long appeal procedures;
- unreasonably high charges for the costs.

5. Conclusions

In general, the Directive complies with the qualitative requirements laid down for this research. The Directive is lawful, effective and efficient and complies with criteria of proportionality and subsidiarity. As regards the effectiveness, it may be noted that the Directive operates properly in the Netherlands mostly due to the fact that the matters of interpretation and implementation are treated broadly. The overview of practices in other Member States demonstrates that this may also be different.

The Directive scores below par on the following points:

- Implementation and enforcement
- Mutual harmonization
- Simplicity, clarity and accessibility

Implementation and enforcement

The research does not show any problems regarding the implementation and enforcement in the Netherlands, but it does show problems in other Member States. This is due to the circumstance that in a closed administrative culture, people are less inclined to implement the Directive in a broad sense. The Directive leaves much room for different interpretations and has extensive possibilities for exceptions. In addition, the time limits are long and the obligation to respond is not sanctioned. It is therefore most difficult for the applicants for information in Spain, Germany, Greece, Italy and Portugal to obtain information.

¹⁵ From the summary in the Dutch report in COM (2000) 400 def., p. 39

¹⁶ COM (2000) 400 def, p. 4.

Mutual harmonization

Directive 90/313 is a Directive formulated in general terms concerning information relating to the environment. There are various specific Directives in this field with confidentiality clauses and obligations to grant access to information. In many cases, the relationship with Directive 90/313 is not regulated, in other cases, the harmonization is unclear. However, the interviews do not indicate that this gives rise to any problems. Case law only presents one case where the minister had applied the Government Information Act (*Wet openbaarheid van bestuur*, or: Wob) where he should have applied legislation based on a special Directive. Noticeably, the central issue was not the relationship between the Wob provisions on information on the environment and the Pesticides Act (*Bestrijdingsmiddelenwet*), but the relationship between the Wob and the Pesticides Act in general.

Simplicity, clarity and accessibility

Although the 9 articles of the Directive may not be regarded as complicated or inaccessible, there are many questions with respect to the meaning of the various provisions. It is striking that many Member States raise questions with respect to the exact meaning of the key terms of the Directive (information relating to the environment, public authorities), and the interpretation of the exceptions. As a result, the Directive sometimes proves difficult to apply. In the Netherlands, this is not a problem as people are accustomed to broad access to government information and the interpretation has been harmonized, where possible, with the Wob. However, in countries where this is not the case, various questions regarding the interpretation and implementation were raised. The Commission acknowledges in so many words that several aspects of the Directive must be revised (definitions, more exact description of the exceptions, terms) and has therefore submitted a proposal for a new Directive.

CHAPTER 3

STATE AID FOR RESEARCH AND DEVELOPMENT

1. Brief character sketch of the notification Community Framework Regulations on State aid for research and

According to Article 157 paragraph 1 (new) of the EC Treaty, the Community and the Member States must ‘stimulate a better use of the industrial potential of the policy on innovation, research and technological development’. Naturally, the objective must be realized with due regard to the competition rules.

The long-term framework programmes for Research and Technological Development constitute a significant instrument for the realization of the objectives by stimulating:

- the implementation of research programmes and programmes in the field of technological development and demonstration by promoting the cooperation with and between undertakings, research centres and universities;
- the promotion of the cooperation in the field of Community research, technological development and demonstration with third countries and international organizations;
- the distribution and exploitation of results of activities in the field of Community research, technological development and demonstration;
- the stimulation of the training and mobility of researchers throughout the Community.

In some circumstances, the aid for Research and Development may also be regarded as State

¹ O.J. 1996 C 45 as amended O.J. 1998 C 48.

aid in the sense of Article 87 (1) of the EC Treaty. The closer the Research and Development project is situated to a commercial application, the greater the chance that **that State aid will** have a distorting effect on the common market.

Research and Development activities performed by public higher-education institutions or public research institutions without a profit motive – possibly for or in collaboration with businesses – will usually not be regarded as State aid, provided the requirements of § 2.4 are satisfied. Public authorities may, with due observance of the policy framework's limiting conditions, contract out research and development assignments to businesses, provided the public tendering procedure is applied. If research and development assignments are contracted out to a business without a non-competition clause, State aid is assumed.

In the review of the applicability of Article 87 paragraph 3 under c of the EC Treaty, including a derogatory provision for aid that does not adversely affect the common interest, the Commission will draw particular attention to the type of research, the beneficiaries, the aid intensity, the availability and other factors referred to in the framework regulations.

The intended aid must – in accordance with the procedural regulations applying to all types of measures – be reported on the basis of the notification Community Framework Regulations on State aid for research and development (hereinafter: notification R&D) according to a fixed procedure and standard form.

In the determination of the aid intensity allowed, the Commission takes the nature of the project or programme, general policy considerations relating to the competitive position of the European industry and the risk of distorting the competition and the impact of this on the trade between Member States into account. In general, the standard of 50% of the costs of the project is applied to industrial research, for (technical) feasibility studies it varies from 50 to 75% while pre-competition development has a standard of 25%. These percentages may be increased for projects and programmes with a transfrontier character or for the implementation of a Community framework programme.

The Commission – in order to gain more insight into the actual stimulating effect of State aid on R&D – wishes to have quantifiable information at its disposal. The Member States must therefore draw up annual reports with respect to approved aid schemes.

2. Interviews

Background

It is important that it does not concern a Regulation or Directive, but a notification in the form of a so-called policy framework for the granting of funds for research and development by the Member States. It is a policy document with guidelines on the basis of which the Commission reviews the aid application. This means that there is no implementation in the actual (strict) sense of the word. However, (national) subsidy schemes are established and subsidy decisions are taken in the field of research and development that must fall within the limiting conditions, in particular with respect to State aid, of the Community Framework Regulations. An example in the field of Economic Affairs is the Subsidies Economy, Ecology and Technology Decree (*Besluit subsidies economie, ecologie en technologie*).

This special status of the framework regulations also determines to a large extent the course of proceedings during the preparation and implementation.

Quality of the regulations

The framework regulations are really a policy document rather than regulations; an explanation is lacking. The result is that – even more so than in the case of, for example,

Directives – the text contains many general, unclear and vague parts. The criteria are – partly as a result – not very conclusive. In practice, this often leads to diverging interpretations. For example, the division of research types and stages in three parts: fundamental, industrial and pre-competition. The classification in one of the stages determines the allowed extent of the State aid. In practice, it is still unclear at what stage the research is. Nor is the exact meaning of the terms public educational institution and public research institutions clear.

In addition, problems occur in the practical implementation because the regulations are drawn up for projects and project subsidies, while subsidies are also granted to institutions for the benefit of research and development activities in a certain period. In some other respects, the framework also lags behind the new developments in practice.

A third bottleneck is the unclear relationship with the tendering rules. Due to the absence of a specific reference to the tendering Directive for public authorities, it is uncertain to what extent assignments must be tendered in accordance with this Directive in order to preclude the presumption of aid. This is particularly relevant with respect to assignments below the thresholds of the Directive.

Preparations

These framework regulations are a matter for the Commission. The Commission lays down the framework; Member States have the possibility of rejecting the final text, however, this is not an attractive option as all measures in that field will then be up for discussion and may be classified as unjustified aid.

During the preparations, the Member States may send comments to the Commission. It must be noted that experience has shown that this makes little difference. Contributions are discussed in the so-called Multilateral Consultations on Aid (or MSO). The Commission consults this consultative body. The MSO does not have any powers; it is a consultative platform for dialogue between Member States.

The ministries concerned participate in the preparatory national consultations; apart from Economic Affairs, the Ministry of Housing, Spatial Planning and the Environment and the Ministry of Transport, Public Works and Water Management are also involved in this case. Local government representatives may reply in writing; they may also communicate via the Ministry of Home Affairs.

In practice, any attempts to influence the decision-making are confined to the main policies; technical contributions have no priority, also in view of the special character (no Directive, but policy framework).

During the preparations of the current regulations, the Netherlands has raised objections with respect to a few points. However, this has not resulted in any adjustments; the Commission is entitled to lay down the framework and to disregard any objections from the Member States.

National Implementation and Enforcement

As stated above, the framework concerned does not lead to actual implementation in the sense of transposal. The Community policy framework must however be taken into account with respect to the granting of funds for research and development and the adoption of any regulations in this field.

In practice, it mostly concerns the relationship between State aid for research and development and the Community framework. The Commission monitors the implementation and enforcement via notifications and any possible complaints. Under certain circumstances, the Member States are requested to report whether and how they have adapted regulations to the policy framework.

Any problems or issues during the implementation may naturally be submitted to the

Commission. It must be noted that, in this field, the Commission is most hesitant to interpret the framework broadly; this would encourage other Member States to grant State aid.

Review and after-care

The framework is primarily reviewed at Community level; the framework regulations are revised every four years. There is no systematic review or after-care. There is no major social opposition; it is clear that businesses wish to receive more aid in the field of research and development. At times, large Dutch businesses raise objections to the regulations via the Ministry of Economic Affairs. Incidentally, a business must repay unjustified aid. A discussion may then follow whether the government could have prevented this.

Case law

The notification examined has not led to any relevant case law.

Literature

In the field of the literature examined, no literature has been found that discusses problems or reviews the implementation or enforcement practices in the field of the notification.

Conclusions

The Community policy framework regarding State aid for research and development is a policy document including guidelines on the basis of which the European Commission assesses any notifications of aid within this area. The framework regulations necessitate, contrary to the other regulations examined, no implementation as such via transposal by the Member States, but it does set preconditions for any (subsidy) schemes to be laid down in the Member States. The Commission has the power to lay down this framework; the Member States may submit their objections, comments and suggestions. However, the Commission's will is decisive. Even in cases where the Member States do not wish to accept the framework regulations, this would not be an attractive option in practice as all measures could then potentially be regarded as unjustified aid. This means that any attempts to influence the decision-making are not likely to succeed in practice.

This special status, content and procedure mean that these 'regulations' occupy a special position within this research project. The framework regulations are more like a policy document. Such a policy document that does not have to be implemented cannot be easily compared to Directives that must be 'transposed' into national regulations. However, some (qualitative) requirements can also be set for a Community review framework with a view to its application.

The research has shown that the vague wording of the framework regulations and the lack of any explanation on them may give rise to uncertainty and ambiguity with respect to the assessment of State aid by the Commission, on the one hand, and the tenability of the Member States' (subsidy) schemes, on the other hand. In a sense, the use of vague wording and terms that are open to diverging interpretations is inevitable in legislation. However, this may be resolved simpler and quicker within a limited 'interpretation community' than within a broad and multicultural interpretation community such as the European Union.

Another question that arises, is whether it would not have been more effective to – in view the interest of the material – to opt for a different instrument than framework regulations. This increases, on the one hand, the legal certainty and, on the other hand, the contribution possibilities of the Member States. This question is all the more topical now that it is intended to convert the existing policy frameworks in the field of State aid into

Regulations. These will be based on the exemption Regulation on State aid from 1998.² Currently, the European Commission believes that it is too premature to do so. After all, a disadvantage of working with a Regulation is that it reduces the flexibility of the exemption regulations. The regulations of the European Communities do not yet include compromises – in the field of the instruments to be selected – that provide both the necessary flexibility and also legal certainty.³

As regards the lawfulness, implementation and enforcement, as well as the proportionality and subsidiarity, simplicity, clarity and accessibility (apart from the objection referred to in the preceding paragraph), the notification hardly gives rise to any objections or problems.

CHAPTER 4

Requirements relating to the occupation of road haulage operator and road passenger transport operator

Brief character sketch of the Directives

The Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (*O.J.* 1996 L 124) provides for a coordination of the national requirements for admission to the occupation and the professional competence of the road haulage/passenger transport operators. Apart from realizing the actual exercise of the right of establishment, the Directive wishes to contribute to the reorganization of the transport market, the improvement of the quality of services rendered and the increase of road safety. Three qualitative criteria must be met – in the sense of the Directive - in order to be admitted to this occupation: good repute, appropriate financial standing and professional competence. The Directive 96/26 instructs Member States to incorporate the requirements of good repute, appropriate financial standing and professional competence in the system of licenses that governs the admittance to the occupation of road haulage operators within the Member State.

As regards the requirement of *good repute*, the licence must be made conditional on the licence applicant or licence holder having no convictions for serious criminal offences (including offences of a commercial nature), not having been declared unfit to pursue the occupation and not having been convicted repeatedly of serious offences against the rules in force concerning the pay and employment conditions in the profession or the transport activity. The amending Directive 98/76 (*O.J.* 1998, L 227) provides for the additional requirements that serious offences against the rules in force concerning the pay and employment conditions in the profession, of rules regarding road haulage or road passenger transport (in particular the rules relating to drivers' driving and rest periods), rules relating to the weights and dimensions of commercial vehicles, road safety and vehicle safety, the protection of the environment and the other rules regarding the professional liability that may lead to a refusal and/or withdrawal of the licence.

The requirement of *appropriate financial standing* means that the licence applicants or licence holders must have available sufficient resources to ensure proper launching and proper administration of the undertaking. A number of items (funds, cash at bank, assets, security etc) must thereby be taken into account. The Member States are free to determine the manner in which the financial standing is calculated as long as an undertaking has available a capital

² Regulation 994/98.

³ The Netherlands will bring up the problem of the shortage of regulatory possibilities for European institutions and the ancillary problem of the hierarchy of Community regulations at the European summit in 2001, The State of the European Union, Parliamentary Documents II, 2000/20001, 24 407, no 1. See also the Council of State's annual report 1999, p. 79.

and reserves with a minimum value of ECU 3 000 per vehicle and/or ECU 150 per tonne of the maximum authorized weight of the road haulage vehicles used by the undertaking. The Netherlands has implemented this by requiring a credit of NLG 40,000 to be demonstrated by the applicant.

In order to satisfy the requirement of *professional competence*, the road transport operators must possess knowledge of the subjects referred to in the annex to the Directive. In order to assess the level of knowledge, a body designated by each Member State must conduct a written examination. The amending Directive 98/76 increases the requirements of professional competence. Under the amending Directive, the road haulage operators must have professional competence at a harmonized minimum level, in the commercial field in particular. The amending Directive further introduces a system of uniform testing methods for the organizations of the examinations in the field of the requirements of professional competence. The same amending Directive 98/76 gives the Member States the power to exempt from examinations applicants who provide proof of at least five years' practical experience in a transport undertaking at management level or holders of certain diplomas. A person who fails to comply with this requirement may still be granted permission if he designates another person to the authorities who does satisfy the requirements of good repute and professional competence and who performs the effective and continuous management of the business.

If the applicant is not a person, the person who effectively and continuously performs the management of the undertaking must satisfy the good-repute requirement. The Member States may also require other persons of the undertaking to comply with this condition. The requirement of professional competence must then be satisfied by one of these persons. In addition, the Member States stipulates under which circumstance an undertaking, may be continued, for a maximum period of one year, possibly by persons not complying with the requirements. Undertaking that already performed the occupation prior to a certain date do not have to comply with the Directive either.

The licence may be revoked in the event that the three qualitative criteria are no longer met. The Member States shall see to it that the aforementioned persons are able to defend their interests by appropriate means. In cases where serious offences or minor, repeated offences against the transport rules are committed by road transport operators from another Member State that may lead to a withdrawal of the authorization to practise as a road transport operator, information on the offences and the sanctions imposed is furnished to the Member State of establishment. If a Member State withdraws an authorization to practice as a road transport operator, the Commission must be informed, which shall in turn pass the necessary information to the Member States concerned.

2. Interviews

Preparations

According to one respondent, the Ministry of Transport, Public Works and Water Management, where possible, seeks to be involved in the preparations of EC decisions, preferably in the preliminary stage during which the Commission itself is preparing a draft. Partly on account of this attitude, but also and especially on account of the expertise in the field of road transport, inland navigation and other fields, the Department is in some way involved in the consultations by the Commission's expert groups. Because Dutch public officials act as experts in those groups, it is possible for the Netherlands to exercise influence on the conclusion of EC decision, and also on the quality of the intended regulations at an early stage. The Dutch Commission officials – usually policy officials – may in principle contribute at a policy level, but consultations are sometimes conducted with the legislation

officials. This way, attention may be drawn to the legislative quality of intended draft regulations at an early stage. Sporadically, Dutch legislative officials from the Ministry of Transport, Public Works and Water Management prepare parts of the draft text for the intended Directive in conjunction with Commission officials. Participating in the preparations of the Commission itself has significant advantages, but it is not up to the Member States themselves: ultimately, it is the Commission that determines who participates. Much also depends on the existing contacts within the policy area or the project concerned between the Commission and the Netherlands.

Usually, the first Dutch contribution occurs when there already is a draft text for a Directive or a Regulation proposal. The contribution occurs via the contribution of the Dutch views in Council working parties or committees. However, it is more difficult to exercise actual influence via the work in Council committees or working parties than via the Commission's expert groups with regard to the quality of the intended regulations. The contribution nearly always has a policy-oriented character. The Council working parties and committees are virtually exclusively composed of policy officials. The Permanent Representative must also contribute the Dutch position in a strategic manner. Due to the proportional composition of the committees and working parties, he will only be able to secure two to three political or policy items that are important to the Netherlands. Legislative items or items that are otherwise related to the general legislative quality of the intended Directive or Regulation, but that are nevertheless not of major importance, will not be given priority in such a game. Strategically, it is often more useful to skip the minor or less important items during the discussions and to put all energy into and focus on a few major items. It sometimes happens that, during the negotiations, Dutch expertise is required with respect to a certain item, for example, because there is something missing in the draft, or a specific Dutch situation has not been taken into account. In such cases, the Commission occasionally requests, for timesaving purposes, a proposal from the Netherlands, for example, to repair an omission in the draft for the Directive. Entire sections of the Directive are then submitted to the Commission. This happened, for example, in the field of a Directive that set technical requirements with respect to inland navigation, and had drawn insufficient attention to the section on sailing inland navigation. The section on sailing inland navigation was then presented to the Commission as a full section for the Directive by the Netherlands. Such a situation naturally provided major opportunities to make contributions that – also – have advantages in the field of the legislative quality. However, this occurs rarely: according to one respondent, in such a case much also depends on the subject at issue and Dutch expertise in specific areas.

Involvement implementation bodies in the preparations

In the preparations of the Directives on the requirements relating to the occupation of road haulage operator and road passenger transport operator, the National Transport Inspectorate (or RIV) – for inspection – and the National and International Road Transport Foundation (or NIWO) – for the granting of – were involved. This occurred at an early stage, as the Ministry of Transport, Public Works and Water Management uses the chain approach. The implementation bodies are promptly informed if anything is underway that may affect them. The use of this is limited as the comments of implementers, according to one respondent, are hardly taken into account in Brussels. In general, the implementation and enforcement effects of intended regulations are hardly assessed during the preparations of Community regulations in the present field, according to the respondents. Intentions are frequently expressed to draw

¹ The NIWO stimulates Dutch internal and transfrontier haulage and defends the interest of this transport at Dutch and foreign bodies. The Licence Issuing Committee on haulage (or CVB), a separate body of the NIWO is responsible for the granting of licenses.

more attention to the implementation aspects in the preparation of Community regulations, but it does not actually happen. This is possibly due to the fact that it has no (political or policy) advantages for the Commission and the Council to put much effort and time in implementation and enforcement aspects of an intended Directive. A complicating factor in this respect is that attention for the implementation and enforcement of Community regulations is in fact a shared responsibility of the Community and the Member States.

Quality of the Directives

As far as the respondents could see, the legislative quality of the Directives on the requirements relating to the occupation of road haulage operator and road passenger transport operator at issue did not pose a real problem. In general, the most important implementation problems are due to the fact that the structure of Dutch legislation deviates from the structure of the intended Directive, according to one of the respondents. This is hardly related to the legislative quality of the Directive itself. A frequently occurring problem in the field of the legislative quality is that the inner consistency of the European legislation is weak. The terms used are often inconsistent and not clear; they often have the character of a compromise. This means that some vague terms are deliberately unclear to preclude problems during the negotiations. For example, in the amending Directive on admission to the occupation of road haulage operator and road passenger transport operator, Directive 98/76 (O.J. 1998 L 227), you may lose your licence as an undertaking if you commit a 'serious offence' against the statutory regulations in the field of, *inter alia*, the pay and employment conditions in force in that occupation.² In that respect, the following question may, for example, arise: do the stipulations from the collective bargaining agreement (or CAO) fall within the scope of this? This is not immediately clear.

Other qualitative problems in the preparations

A problem that nearly always emerges – according to one of the respondents – is that there is little 'horizontal' communication within the Community. For example, DG 20 prepares a Directive on drinking water applying to drilling rigs, ships etc, while DG 7 is preparing a Directive for technical requirements for ships also including technical requirements for drinking water tanks. If the Netherlands, in the event of conflicting requirements in those Directives, seeks recourse at the Commission, it becomes clear that the DG's focus exclusively on their own activities and are reluctant to discuss one another's competence. Any ensuing problems are by definition sent to the other DG and vice versa. The Commission does not interfere where such conflicts occur. The moment of integration is up to the Member States. The DGs draw up their own Directives and are not concerned with the other DGs.

The overlaps of horizontal Directives (regulating a specific field such as public access or safety) and sector-oriented Directives (in a specific Community policy area such as agriculture, traffic and transport) also cause problems, from the perspective of the Member States. According to one of the respondents, sector-oriented Directives may include a supervisory provision that is not included or differently included in a horizontal supervisory Directive. One is then faced with two different regimes. This should naturally be harmonized, but this is not always the case.

According to one of the respondents, a recurring problem in the preparation of Community legislation is that some form of institutional legislative attention at the level of

² See Article 1 third paragraph Council Directive 98/76/EC of 1 October 1998 amending Directive 96/26/EC on admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations.

the Commission is lacking. There are internal instructions for legislation for the Commission, laid down, *inter alia*, in the Interinstitutional Agreement of December 1998, but that is it. At the level of the Commission, there is hardly any specific legislative expertise: almost all Commission officials are policy officials. Partly as a result of this, the Directives often have the character of a policy document. The technical aspects of legislation are deliberately left to the Member States. The translation of the Directive's policy wishes into legislation must occur there. It has been suggested that this is the reason why the Commission sometimes opts for a Directive where a Regulation would also have been possible. After all, in the case of a Regulation, the Commission is responsible for all aspects of the provisions. And therefore, in a legal sense, also for the technical quality of the legislation. Where they opt for a Directive, this responsibility and the ensuing liability for the details may be shifted to the Member States. According to one of the respondents, the problem of the emphasis on the policy-oriented character of Directives in particular cannot really be resolved. After all, the political dimension weighs heavily in the preparation of Community legislation. The negotiations draw little attention to the product of legislation and the specific value and problems pertaining to this. This is a matter of cultural differences. Apart from Germany, Denmark and the Netherlands, the other Member States seem indifferent about it. Even the 1998 Interinstitutional Agreement – including instructions and points for special attention in the field of the (in particular the editorial) quality of legislation – seems hardly or not to be taken into account at a Community level.

However, the respondent concerned notes that the directly damaging or negative effects of the defective legislative quality of EC Directives are often limited. Usually, it is possible to remove the most qualitative defects in the Directive – particularly with respect to the technical aspects – during the transposal of the contents of the Directive in the Netherlands. In addition, the potentially damaging effects are also restricted by the Commission's attitude itself. During the control of the implementation of the contents of the Directives, the Commission focuses mainly on the contents: are the policy objectives attained as a result of the Directive. The Commission pays little attention to the technical aspects of the legislation, it focuses purely on the contents. It even happens that, for example, the Ministry of Transport, Public Works and Water Management – often at the instigation of the Ministry of Justice or the Council of State – implements the provisions with due care and in accordance with the Directive, but that the Commission gives a reasoned advice or initiates infraction proceedings because the (policy) objective of the Directive is not attained by this literal transposal or approach. It therefore happens that the Ministry of Transport, Public Works and Water Management, according to one of the respondents, feels trapped between the requirements set to the transposal measures by the national legislative quality policy and the policy-oriented approach used by the Commission during its control of the manner of implementation.

Transposal of the Directive into the Dutch legal system

According to the respondent, no major problems have occurred in the Netherlands with respect to the implementation in a narrow sense (the *transposal*) of the Directives relating to the occupation of road haulage operator and road passenger transport operator. In the Netherlands, it is usually immediately clear which Department(s) is/are primarily responsible for the transposal of a Directive. Moreover, it is usually clear which parties are primarily responsible for the implementation and enforcement. The parties involved in the implementation and enforcement are also involved in the preparation of the national implementation measures. These measures are subjected to an implementation test. In this test, the consequences of the implementation measures for the implementation in the field of organization, personnel, finances, etc. are outlined and calculated. The test is often conducted

in the form of a project in which, apart from the implementation body, the policy and legislation departments of the Ministry also participate.

Overly conscientious implementation

Problems that do occur in the transposal are often related to the Dutch need to be especially conscientious, according to the respondents. As in this case. The Directives at issue provide for requirements of professional competence. The Directive lists a number of points regarding which (future) road haulage and road passenger transport operators must demonstrate their knowledge of several issues. It is conceivable – and it is believed that this does occur in some Member State – that this knowledge is tested on the basis of the list of points in the annex to the Directive in a short meeting with the examination committee. Subsequently, the candidate who has passed the examination receives a diploma and, as a result of this diploma, a licence. In the Netherlands this is more complicated. The examination regarding the requirements of professional competence set by the Directive is designated to two independent foundations (SBE for road haulage and SEP for passenger transport). These foundations are entrusted with the examination of these requirements of professional competence. For this purpose, specialist didacticians/test developers are used to translate these requirements of professional competence into learning objectives and to develop educational material on the basis of this. The operators are first given a thorough training and then have to sit the examinations. This approach means that differences may arise between the Netherlands and other Member States where the examinations may not be as thorough. Such problems emerge once operators are admitted on the Dutch market with foreign diplomas that are easier to obtain. This is difficult to explain to the Dutch sector, while it may also lead to a situation where Dutch people go to another EC country to obtain a diploma (that is after all recognized in the Netherlands). According to one of the respondents, this is a problem that cannot be directly traced back to defects in the quality of the Directive. It is the result of the manner in which the Directive is implemented in the Netherlands. The same problem also occurs in the field of vehicle tests – in particular with regard to the emission requirements – carried out before a registration number is issued. The test is less strict in other Member States – e.g. in Germany. Car importers therefore first register their vehicles in Germany (where the test is less strict). Once the vehicle is registered, it may not be rejected here, unless it has most serious defects. The conscientiousness of the Dutch implementation therefore gives rise to U-turn constructions.

Rectification

One problem that did not occur in the Directives at issue, but that generally does play a role, according to a respondent, is that once the Directive is adopted by the Council and it becomes clear that some errors have crept in, for example in the translation, or any other (grammatical) errors in the text, it is most difficult to rectify this and it entails much work. In order to rectify an error successfully, much depends on the Permanent Representative's attitude. What does he want to do? The Ministry of Transport, Public Works and Water Management rates the Permanent Representative very highly in this respect as he really makes an effort to discuss rectifications at the Commission. However, it is difficult to keep abreast of the results of a rectification. Rectifications are often published in the Official Journal without any further announcement. A notification is usually not sent to the organization of public officials that has requested the rectification. The public official that has requested the rectification should really check the Official Journal on a daily basis to see whether the request is honoured. This lack of communication on the part of the Commission does however concur with the general picture: the feedback and communication with respect to problems concerning already adopted

³ See also paragraph 4 of this chapter that shows that different examination requirements and examination methods are used in the different Member States.

Directives between the Member State and the Commission is generally poor. The Commission does not regard problems and queries with respect to adopted Directives as a policy priority. The development of new policies and new Directives are the first priority.

Implementation and enforcement

According to the respondents, the implementation of the Directives at issue did not pose any specific problems as the implementation institutions, partly as a result of their involvement in the preparations, were well prepared for their task. However, some problems did occur in the enforcement. The problems mostly concerned the fact that the Directive provides that an operator needs a licence when he exploits one or more vehicles having a payload of more than 3,5 tonnes or a total weight of more than 6 tonnes. No licence is required for the so-called private transport operators, i.e. operators that only transport for the benefit of their own undertaking. The Directive does not provide for a solution for the question of how it must be checked whether someone is a private transport operator. Partly for that reason, the Netherlands has concluded a scheme that obliges the private transport operators to register. The check can then be conducted based on the registration certificate. However, the registration regulations mean that vehicles having a payload of less than 3,5 tonnes or a total weight of less than 6 tonnes must also be registered. This means in turn that all kinds of small undertakings, such as plumbers etc. should have to register. This does not happen, as a result of which the enforcement is impossible and the regulations are therefore not enforced.

A second enforcement problem concerns the control of the good-repute requirements laid down in the Directive for road haulage operators and road passenger operators that are obliged to have a licence. How to control someone's good reputation as a transport operator? The criteria laid down in the Directive are vague and difficult to use for an enforcement body such as the National Transport Inspectorate (or RVI). During the implementation, the point system was introduced, but the result of this is that large transport undertakings may quickly lose their licence. The criterion 'serious offence' referred to in several provisions is difficult to use in enforcement practices, particularly with regard to licence holders. According to one of the respondents, it is even difficult to apply to licence applicants. Since the withdrawal of an issued licence is a discretionary power, this means for the control difficulty with respect to the good reputation that a licence will rarely be withdrawn for reasons of a demonstrated bad reputation. As the requirements in the Directive are not clear and draw little attention to the possible impact of the enforcement, these Directive provisions actually fail to produce the desired effect. The lack of enforcement arising from the qualitative defects of a Directive has not led to any major legal problems. The respondents indicate that this frequently occurs, also in regulations in the field of Community Road Traffic Law.

A problem frequently faced (although not with respect to the Directives at issue) by, in particular, the Government Road Transport Agency (or RDW) - that was consulted in the context of this research - is that, where a Directive is not implemented in time in the Netherlands, the law must be enforced in accordance with the Directive as a result of the EC Court of Justice's case⁴. The sector is usually informed beforehand of the RDW's intention to implement a Dutch provision, following the end of the implementation period, in accordance with the Directive, whereby it is also explained what the interpretation in accordance with the Directive of the Dutch provision entails. A problem occurring in the interpretation in accordance with the Directive with respect to requirements for vehicle is that the sector is informed of the interpretation in accordance with the Directive, but the police officers in the Netherlands, using the Vehicle Regulations that do not include the interpretation in accordance with the Directive of some regulations, do not investigate in accordance with the

⁴ See e.g. EC Court of Justice case C-106/89 Marleasing.

Directive. The RDW leaflets are not directly implemented in the Vehicle Regulations and therefore not implemented in the enforcement practices. As a result, there is a discrepancy between the manner in which the RDW admit vehicles on the road via a test or practice in accordance with the Directive, while the police takes them off the road on the basis of the Vehicle Regulations. This is due to the fact that the police and judicial authorities are not involved in the preparatory negotiations and the implementation review with respect to the implementation measures. The Ministry of Transport, Public Works and Water Management involves them in a separate path in the implementation of Community legislation.

Feedback of results and after-care

Although much information on the implementation and transposal of a Directive must often be sent to the Commission, there is often no real and systematic feedback of implementation and enforcement experiences, according to the respondents. Where information from implementation and enforcement practices must be submitted to the Commission, it is often not clear what is done with this information, apart from cases where it concerns an overall review. In cases where there is no obligation to submit the enforcement information, the Commission often appears to be not really interested. For example, the RVI draws up (annual) reports including important information on the enforcement practices with respect to (originally) Community provisions. The impression is that Europe is not really interested in this. The European legislative process is in a number of respects very one-dimensional: once a Directive is adopted, the job is done in the opinion of the Commission, according to one of the respondents. For example, systematic reviews of the experiences gained with Directives initiated by the EC are relatively rare.⁵

The lack of interest of, for example, the Commission, but also of the Council for review results with respect to the implementation and enforcement of Directives does not increase the Member States' enthusiasm to initiate any reviews at their own initiative, according to the respondents. If it happens at all, it merely forms part of a broader policy review. On the contrary: The fields regulated entirely by Brussels are at no time reviewed in the Netherlands. It is costly and experience has shown that not much is done with the results. It might nevertheless have an important positive effect on the quality of Community legislation. It is now considered important to make a contribution during the preparations of Community legislation. Once a Community provision is adopted, experience has shown that it is difficult to change it or exercise any influence on it. Community legislation is very much 'a gamble'. This is also a problem within Europe itself. Not only is little attention drawn to implementation problems (and few possibilities to do so), the existing instruments also provide little room for any quick and effective response to changed circumstances, new insights or implementation experiences. The legislative machine of Brussels is too slow to do so. A possible solution might be the further development of the hierarchy of Community regulatory instruments in order to create more flexible forms to amend and maintain (particularly implementation) regulations. There should also be broader possibilities of delegation in the Netherlands with respect to implementation legislation, where much Community 'after-care' is to be expected in the sense of (technical) amending Directives, according to the respondent involved. This might reduce the problems in this field. The current amendment system – especially where comitology is used – is a considerable burden to the implementation bodies.

Case law

⁵ Community legislation on the removal of waste (and other environmental measures) is an exception. In this field, there is a systematic review of the experiences with the implementation of the EC Member States on the basis of Directive 91/692. For more details, please refer to Chapter 5 of this study.

Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (*O.J.* 1996 L 124) and the amendments made to this by Directive 98/76 (*O.J.* 1998 L 277) have as such not lead to any Community or national case law.

Literature

In 1998, Lisette van Herk defended a doctoral thesis in Utrecht (the Netherlands) entitled 'Employment Terms at a European Level: Research into Community or Transnational Regulations in Road Haulage'.⁶ Van Herk also included the Directives on admission to the occupation of road haulage operator and road passenger transport discussed in this chapter in the research on which the dissertation is based. Van Herk examined the material of both Directives when the amending Directive 98/76 (*O.J.* 1998 L 277) was being prepared. Her findings with respect to the conclusion and implementation of, in particular, Directive 96/26 (*O.J.* 1996 L 124) are, insofar as it concerns the qualitative aspects of the legislation, as follows.

The first problem signaled by Van Herk concerns the scope of the Directive. In principle, the Directive applies to undertakings with vehicles the payload of which exceeds 3,5 tonnes or the total weight of which exceeds 6 tonnes. Member States may lower these thresholds and may furthermore exempt certain undertakings from the Directive, which may lead to considerable differences in the application of the Directive by the Member States. In addition, as already put forward in the preceding paragraph with respect to the interview results, the Directive applies to transport for third parties and not to private transport. A problem is how the Member States may check the private transport. If this is insufficient, there is the risk that requirements of admittance may be evaded because transport operators establish themselves as a private transport operator.⁷

Van Herk signals a similar problem with respect to the term 'serious offence' of regulations in force, laid down in the context of the control of the (future) operator's good repute. The interviews in the preceding paragraph also showed that this is a difficult term to use, especially in the context of enforcement. Van Herk once more signals the risk that, as it is up to the Member States themselves to define the exact meaning of 'serious offence' that this may lead to differences in the application by the Member States. These differences in the application may in turn give rise to strategic behaviour on the part of the transport operators involved who may seek to establish themselves in the Member State with the mildest regime.⁸

Van Herk also signals problems in the field of the professional competence tests, in part related to the quality of the Directive. Considerable differences between the Member States seem to occur, in particular, in the field of the organization of the examination methods and the requirements laid down for the examination. This arises from the circumstance that the material and the examination subjects are laid down at Community level, but the level of the examinations is not.⁹ Once more, as the final criteria are not determined and tested at a Community level but at the level of the Member States, differences may occur between the Member States. As a result, it is possible that establishment as an operator may be easier in one Member State than another, since the requirements are less strict there. This means that increasingly more independent persons (may) establish themselves who run significant risks

⁶ Published as a dissertation by the publisher of the University of Utrecht and also published on the Internet at <http://pablo.ubu.ruu.nl/~proefsch/01802424/inhoud.htm>.

⁷ E.J.M. van Herk *Employment Terms at a European Level: Research into Community or Transnational Regulations in Road Haulage*, Utrecht 1998, p. 133.

⁸ See Van Herk, *ibid.*, p. 134.

⁹ This is a technique that is also used for Community competence requirements that must be reviewed or tested by the Member States. In this respect, see also J.J.J. Tromm *Legal Aspects of Community Transport Policy 10* (*Juridische aspecten van communair vervoersbeleid*), The Hague 1990, p. 413, who also refers to this problem in the Directive at issue.

as they are often paid per kilometer and are not bound by collective bargaining agreements.

Provisional conclusions on requirements relating to the occupation of road haulage operator and road passenger transport operator

An analysis of Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (*O.J.* 1996 L 124) and the amendments made to this by Directive 98/76 (*O.J.* 1998 L 277) with respect to the legislative quality is striking in two respects. Firstly, the Directives have defects with respect to the legislative quality and, secondly, those defects are or cannot (or hardly) be solved in the Community or the Dutch legislative process, while, at the same time, this has hardly any clear negative (legal) consequences.

The application of the aforementioned qualitative criteria learns that the Directives on requirements relating to the occupation of road haulage operator and road passenger transport operator do not directly pose difficulties with respect to the *lawfulness*, but that there are some problems concerning the *implementation and enforcement* of the Directive. These problems are mostly due to the fact that the criteria provided by the Directive with respect to the control of the requirements of professional competence and good-repute are most difficult to implement and enforce and at times impossible to implement and enforce (resulting in non-enforcement). In cases where these criteria can be observed successfully, there is the problem that different Member States may apply them differently, which may give rise to the problem of strategic establishment in the country with the mildest regime. That, in turn, leads to the problem that safeguards (e.g. collective bargaining agreements) for employees in the country of the original establishment of the operator concerned can be undermined by a search for the most favourable establishment regime.

The qualitative problems of the Directives with respect to the *effectiveness and efficiency* are closely related to the problems regarding the implementation and enforcement. After all, an examination of the Directives shows that because parts the criteria provided in the Directive with respect to professional competence and good-repute are so difficult to apply the competent enforcement authorities cannot supervise them. This does not directly lead to distinct problems. A correct ‘paper’ implementation means that deficiencies in the enforcement are not detected in any way nor lead to Community intervention.

Qualitative defects of the Directives with respect to the requirements of the occupation of road haulage operator and road passenger transport operator that frustrate the enforcement in any way, e.g. because the criteria applied cannot be enforced, will often not or hardly give rise to acute legal problems. If the Directive does not provide a regime itself, there are hardly any ‘stake-holders’ or interested parties with respect to the enforcement of burdensome transport measures in EC Directives, such as examined in this context. People will not often initiate (infraction) proceedings at a Community or national level in this respect. The major part of the actual enforcement of Directives correctly implemented as such is not supervised by the Commission. Although the Commission’s right to information and verification in theory includes the enforcement practice relating to transposed EC law by the Member State, this supervision is difficult to effectuate in practice. After all, for the effectuation of the supervision, the Commission must rely on information to be provided by the Member States. The information will often be the provided in the form of compulsory notifications. The notifications usually refer to measures, but hardly or not to existing enforcement practices. Although the Commission may investigate the enforcement practices at its own initiative, there must be a specific reason for this, e.g. an incident or the necessity of systematic evaluation. This does not occur systematically. However, any deficiencies in the enforcement

do give rise, as Van Herk notes with respect to the Directives at issue, to different applications of Directives or even to the non-application of specific parts of Directives. Such deficiencies in the enforcement form part of the 'silent losses' that may be incurred as a result of the defective legislative quality of EC provisions.

The research into the Directives at issue shows that the *subsidiarity and proportionality* raise few objections. They provide coordination of the national requirements relating to the occupation and professional competence of transport operators. Apart from concluding the actual exercise of the right to freedom of establishment, the Directives intend to contribute to the restructuring of the transport market, the improvement of the quality of services rendered and increased road safety. This set-up and these objectives of the Directives fall within the scope of Article 5 EC Treaty regarding the performance of the Community. The requirements relating to the occupation of road haulage operator and road passenger transport operator may solely be coordinated at Community level. The problem of the Directives is that it gives the Member States fairly much room to interpret the Directive's requirements relating to the occupation of road haulage operator and road passenger transport operator. A different approach to the – review of – requirements relating to professional competence, leads to different regimes in the Member States. In some Member States it is therefore easier to obtain a certificate of professional competence – and as a result a licence – than in other Member States which may have negative side-effects, such as strategic establishment in Member States with the mildest regime.

As regards the *mutual* harmonization, the Directives at issue do not give rise to many objections either. The Directives are implemented via amendments to the Passenger Transport Decree (*Besluit personenvervoer*) based on the Passenger Transport Act (*Wet personenvervoer*) and the Road Haulage Decree (*Besluit goederenvervoer over de weg*). There were no real problems with respect to the harmonization of the Directive and the Dutch law, to that extent that delegation provided by the Passenger Transport Act to bring the Passenger Transport Decree in line with the contents of the Directives was a little 'thin'. This basis is broadened by the legislative proposal for the new Passenger Transport Act 2000 by means of a new Article 6 and a new Article 77 that also provide a possibility of implementing future EC Directives of a technical nature more rapidly by delegation.¹² However, a – more general – feeling is that the DG's in Brussels generally seem to focus solely on their own legislation and that the mutual harmonization of Directives from different DG's is sometimes inferior, to such an extent that conflicting Directives are drawn up. There is no Community remedy in this respect.

The Directives also give rise to some objections with respect to the *simplicity, clarity and accessibility* complicating the implementation and application. However, it must be noted that the research carried out into the Directives also showed that most problems relating to the EC Directives with respect to legislative techniques (in particular, editing, formulation and structure of the regulation) are usually resolved by the Member States themselves. The fact that the Commission does not strictly control the legislative techniques in the implementation measures, but bases its review on the realization of the policy objectives in the Directives also puts the problems regarding simplicity, clarity and accessibility into perspective. A Directive must above all be simple, clear and accessible to the persons that must realize the contents of the Directive within the Member State at whom the Directive is directed. Problems also occur in that respect, as it is difficult for the Member States, after the Directive is adopted, to

¹¹ E.J.M. Van Herk, *Arbeidsvoorwaardenvorming op Europees niveau* ('Terms of Employment at a European Level'): research into Community or transnational regulations on road haulage transport, dissertation University of Utrecht (the Netherlands) 1998, p. 133 ff.

¹² Legislative Proposal for new rules concerning public transport and restricted bus transport (Passenger Transport Act 2000), Parliamentary Documents II 1998/99, 26 456.

communicate with, for example, the Commission with respect to any (interpretation) problems. There are rectification proceedings for clear errors in the text of Directives, but as the parties submitting a proposal for rectification are not kept informed of the outcome, this tool often overshoots the mark. There are hardly any other possibilities of feedback or explanation with respect to the exact meaning of the text, apart from the explanation offered in the considerations of the preamble.

In the Directives at issue, the term ‘serious offence’ seems particularly unfortunate and causes confusion in the context of the good-repute control of undertakings. After all, it is difficult to see how such a term must be transposed into Dutch regulations. Does it refer to a deliberate violation or to recidivism, the extent of the harmful effects of the violation or must it be interpreted otherwise? Does it refer to violations by the entrepreneur in personam or the undertaking as a legal person or does it also include the undertaking’s employees?¹³ Connected with this is the confusion regarding the term ‘regulations in force’. Do they also include collective bargaining agreements? In the Directives at issue, the combination of unclear terminology and the impossibility of feedback to the Commission mean that an actual good-repute review with respect to the current licence holders is not possible. A literal application of the requirements referred to in the Directive would mean that undertakings employing many employees would lose their licence easier than small undertakings. Even a proportional point system (considered in the Netherlands) would have a disproportional negative effect on large undertakings. Another effect of this ambiguity is that the good-repute review can hardly be carried out. This is referred to above as a type of ‘silent loss’ that EC decisions may incur as a result of any qualitative defects.

CHAPTER 5

Waste

Brief character sketch EC decisions

This chapter examines a cluster of more or less connected EC decisions in the field of waste, namely: the ‘Framework Directive’ on waste 75/442, Directive 91/689 on the management of hazardous waste, Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (or EVOA), the packaging Directive 94/62, Directive 94/67 on the incineration of hazardous waste and Directive 1999/31 on the landfill of waste.

The *Framework Directive* on dating from 15 July 1975, 75/442/EEC (amended by Directive 91/156/EEC) lays down general rules for the management of waste. For this reason, the Directive first of all gives a definition of the term waste in Art. 1 under a: ‘Waste = any substance or object in the categories set out in Annex I which the holder disposes of or intends or is required to dispose of.’ Annex I consists of 15 categories of waste and, in addition to the 15 specific kinds/types of waste also contains a common category including ‘any materials, substances or products which are not contained in the above categories’. As a result, the referential meaning of Annex I is limited. This definition of waste in the Directive deviates at some points from the description chosen by, for example, the Dutch legislator in Article 1.1 of the Environmental Management Act (*Wet milieubeheer*), and as we shall see below, this has caused the necessary problems in case law and the implementation. It is by now clear that the scope of the term ‘waste’ depends considerably on the meaning ‘to dispose of’. For the remainder, Article 2 explicitly excludes a number of substances, such as radioactive, waste,

¹³ Article 3 first paragraph of Directive 96/26 refers to ‘undertaking’ that is an ambiguous term in this context.

¹ The word framework Directive is in italic print as it is no real framework Directive in the sense of an integrated approach to the issue of waste.

waste resulting from the extraction of mineral resources, decommissioned explosives etc., from the scope of the Directive.

Article 3 contains the most important objective of the Directive by determining that the Member States must take appropriate measures to *prevent* the production of waste. They must further develop clean technologies and clean products and stimulate the *recovery* of waste. Under Article 4, the recovery or disposal of waste must take place without endangering human health and without using processes or methods which could harm the environment. According to the Court of Justice, this is a program provision that indicates which objectives the Member States must pursue without imposing any actual measures. However, according to the second paragraph, the Member States must prohibit the abandonment of waste. The principles of *proximity* and *self-sufficiency* laid down in Article 5 of the Directive are of the utmost importance. These principles mean that the Member States, in cooperation with other Member States, must establish an adequate network of disposal installations enabling the Community as a whole to become self-sufficient and the Member States to move towards that aim individually. The disposal network must be set up in such a manner as to enable waste to be disposed of in one of the nearest appropriate installations.

As the above principles solely relate to the *disposal* of waste, the Directive must be interpreted in such a manner, according to the Court of Justice, that both principles do not apply to the recovery of waste (e.g. recycling and re-use).² It is not clear what the exact meaning of these principles is and how they relate to one another. After all, self-sufficiency may conflict with the principle of proximity if an appropriate disposal installation is located, for example, just across the border of another Member State.

Article 7 obliges the Member States to draw up waste management plans to attain the objectives referred to in Article 3, 4 and 5. They may take measures to prevent movements of waste which are not in accordance with their waste management plans, provided the Commission and the Member States are informed of such measures (in timely fashion) and with due regard to the provisions of the EVOA. Under Articles 9 and 10, the establishments concerned with the disposal (Annex IIA or the recovery, as referred to in Annex IIB, of waste) must obtain a permit. However, an exemption from this may be granted in some cases under Article 11. This exemption possibility of the obligation to obtain a permit applies both to establishments conducting their own waste disposal at the place of production, and under some circumstances to establishments that carry out waste recovery.

The Framework Directive contains further provisions with respect to the registration of collectors, transporters or brokers of waste (Article 12), obligations for the Member States to carry out inspections (Article 13), an obligation for the establishments to keep a record (Article 14) and a provision on financing. In accordance with the 'polluter pays' principle as laid down in Article 174 EC Treaty, the costs of the waste disposal (Article 15) must be born by: the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9; and/or the previous holders or the producer of the product from which the waste came.

The *Directive on Hazardous Waste* 91/689 that is based on Article 2 of the Framework Directive and came into force on 27 June 1995 aims at harmonizing the Member States' legislation concerning the controlled management of hazardous waste. Article 1 fourth paragraph of the Directive defines what must be regarded as hazardous waste, referring to a Community list of substances that have one or more of the properties listed in Annex III (e.g. explosive, carcinogenic, mutagenic, etc.)³ In addition, waste is at any rate hazardous if it contains one or more of the properties listed in Annex II in the opinion of a Member State and is reported to the Commission. These substances are subject to an examination in accordance

² EC Court of Justice C-203/96, Düsseldorf.

³ Adopted by decision 94/904, *O.J.* 1994 L, 356/14.

with the procedure of Article 18 of the Framework Directive with a view to amendment of the Community list. Implementation problems have occurred, as described below, with respect to the question of whether the Member States also have the power to consider waste as hazardous waste in the event that it does not contain one of the properties listed in Annex III.⁴

It is, however, clear that the Directive does at any rate not apply to domestic waste that may contain potentially hazardous substances or has hazardous properties.

In several respects, Directive 91/689 contains supplemental and stricter regulations in relation to the Framework Directive, for example, where it concerns: the record and identification of hazardous waste that must be discharged of (Article 2 first paragraph), keeping hazardous and non-hazardous waste separate (Article 2 second paragraph), restrictive measures to counteract the mixing of different types of hazardous waste (Article 2 third paragraph) restrictions with respect to the exemption possibility of the permit requirement laid down in Article 11 of the Framework Directive (Article 3), stricter requirements with respect to the keeping of records (Article 4) and special measures regarding packaging (Article 5). In addition, Article 6 contains a specific plan requirement for the management of hazardous waste, to date provided for in the Netherlands by the so-called Long-term Plan Disposal of Hazardous Waste (*Meerjarenplan Verwijdering Gevaarlijk Afval*, or MJGA).⁵

Article 7, finally, contains an 'escape clause' on the basis of which the Member States, in cases of emergency or grave danger, may take all necessary steps to ensure that hazardous waste is so dealt with as not to constitute a threat to the population or the environment. In such a case, they may derogate from the Directive, if necessary. Although the Directive does not contain a minimum harmonization clause, stricter national measures are deemed to be possible, since the Directive is based on the former Article 130S EC Treaty (175 new).⁶

The *EVOA or Basle Regulation 259/93* on transfrontier movements of waste within, into and out of the European Community, which came into force on 6 May 1994, is in part meant to implement the Basle Convention in the Member States in a harmonized manner. This occurs by regulating the supervision and control of transfrontier movements of waste in a uniform manner insofar as possible.⁷

In addition, the EVOA must ensure that the Community complies with a number of other international-law obligations, such as Article 39 of the Lomé IV Convention between the EC and ACP States (old European colonies in Africa, the Caribbean and the Pacific) from 1985. Article 39 of the Convention provides that hazardous and radioactive waste may not be exported to these countries from the EC (and not via another country, so-called indirect export). Article 18 EVOA regulates this by means of a prohibition of all export of waste to ACP States, unless it concerns waste that is imported into a Member State for processing and returns to the ACP State of origin after processing.

In addition, the OECD Council to which all EU countries are parties also took a decision in 1992 with respect to the supervision of transfrontier movements of waste destined for recovery operations that has some overlaps with the EVOA.⁸ Partly due to the international-law framework, the harmonization with the Framework Directive on waste and

⁴ Fornasar Case, EC Court of Justice case C-318/98, *O.J.* 1998 C 327/10.

⁵ As this Long-term Plan has (not yet) a statutory basis in the Environmental Management Act (or Wm), it may be doubted whether Article 6 has been transposed correctly. As this will be repaired by the legislative proposal *Parliamentary Documents II* 26 638, this will not be discussed in more detail.

⁶ See J.H. Jans, H.G. Seventer and H.H.B. Vedder (Eds), *European Environmental Law in the Netherlands* (Europees milieurecht in Nederland), The Hague 2000, p. 580.

⁷ See for the Basle Convention text: <http://www.unep.ch/basel/>.

⁸ See J.H. Jans et al, *ibid*, The Hague 2000, p. 585.

the already signaled derogations in the national use of terms, the implementation of the EVOA has become a most complicated matter.⁹

The EVOA, like the Directive on hazardous waste, is based on the former Article 130S EC Treaty (175 new), which lays down the principal environmental-law dimension. Due to the introduction of the Regulation with direct effect, some provisions from the Environmental Management Act regarding import, export and transit have ceased to have effect. The EVOA itself is subdivided into five titles: 1. scope and definitions, 2. shipments of waste between Member States, 3. exports of waste, 4. shipments of waste within Member States, 5. transit of waste through the Community.

The EVOA applies to all waste covered by the definition of waste in Art. 1 of the Framework Directive on waste and therefore to both waste that is disposed of and waste that is recovered. Although the EVOA excludes some special types of waste, such as radioactive waste and waste generated by the normal operation of ships (Art. 1 paragraph 2) from the scope of the Regulation. However, it is important that the major part of the Regulation does not apply to waste covered by Annex II (green list). It concerns an extensive list, e.g. all solid art materials, paper, waste arising from agriculture and horticulture, glass, ceramics, et cetera. The EVOA, like the Framework Directive, is based on three principles: proximity and self-sufficiency and priority for recovery.

Title II of the EVOA (Articles 3 –12) concern the *shipments of waste between Member States*. Within this title, a distinction is made between waste for disposal (Articles 3 –5) and waste for recovery (Articles 6 – 11). As regards the latter category, there is a relatively flexible regime. In both cases, however, there is a notification procedure that results in the authorization or refusal of the shipments. The waste intended for *disposal* is also subject to a permit that may be granted or denied by the Member State of destination. Naturally, the basic principle is that there is free movement of waste, as there is a market for waste (trade), and therefore a free movement of goods (see EC Treaty). However, the Member States may pursue their own policy to so an extent that they may prohibit the shipments. This is regulated in Article 4 third paragraph EVOA. This provides that:

- in order to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels, Member States may prohibit general or partial shipments of waste;
- in *specific* cases import, for example, may be prohibited in order to implement the principle of self-sufficiency or where an installation has to dispose of waste from a nearer source (e.g. Belgium wishes to ship waste to the Netherlands to be incinerated in an installation, but the Dutch installation is full due to the processing of Dutch waste from a nearer source); in order to ensure that the shipment is in accordance with waste management plans; it therefore concerns a specific waste shipment;
- and thirdly, if it is necessary, on account of national laws and regulations relating to environmental protection.

It must be assumed that Article 4 third paragraph is a limitative summary of the possible grounds for refusal. As regards waste intended for *recovery*, the procedural requirements regarding export depend on which wastes it concerns (green, amber or red list). A prior written authorization solely applies to the red list of wastes (Article 10). For amber-list wastes, there is an obligation to report to the country of destination and the possibility of lodging an objection within 30 days, after which tacit consent is assumed to have been

⁹ For further details, refer to A.M.E. Veldkamp, Shipments of Waste (*Overbrengen van afvalstoffen*), Deventer, 1998.

granted (Article 8 first paragraph).¹⁰ The green list has no procedural requirements. The grounds for objection listed in Article 7 fourth paragraph are furthermore more restrictive than the grounds of objection for shipments for disposal. Problems mainly occur where it concerns mixed wastes, e.g. domestic waste (green list: no strict rules) is mixed with waste from the amber list.¹¹

The regulations regarding the shipment of waste do not apply to shipment within a Member State (Article 13 first paragraph). The Regulation solely requires that the Member States (also) introduce an appropriate system of supervision for that must be coherent with the system of the Regulation (Article 13 second paragraph). The Member State may also decide to apply the system provided for by the EVOA to internal shipments (Article 13 fourth paragraph).

Title III (Articles 14 – 18) **exports of waste** makes a distinction between a) exports of waste intended for disposal, b) exports of waste intended for recovery and c) exports of waste to ACP countries. In principle, a ban on exports applies to group a)! Article 14 EVOA regulates this but makes an exception for exports to countries that are parties to the EFTA and parties to the Basle Convention, in which case the PIC procedure (prior authorization and possibility of lodging an appeal under Article 4 third paragraph) applies. Furthermore, if the exporting country has reason to believe that the waste will not be managed in an environmentally sound manner, the export shall also be banned.

In principle, a ban on exports also applies to wastes from group b) destined for recovery as referred to in annex V (supplemented to the EVOA at a later stage), except those to countries to which the OECD decision of 30 March 1992 ‘concerning supervision of transfrontier shipments of waste destined for recovery’ applies. See Article 16 EVOA. Once more, if the country of importation objects or if there are doubts concerning the question whether the waste will be managed in an environmentally sound manner, the ban shall apply. Insofar as export is allowed, the competent authority of dispatch subject the export permit to the requirement that the wastes concerned must be managed in an environmentally sound manner throughout the shipment and at the place of destination.

The ban on export also applies to wastes from group c) (Article 18) unless it concerns waste that is imported into a Member State for processing and will be exported to the ACP country of origin after the processing.

Title IV **imports of waste into the Community** for disposal is, in principle, prohibited (Article 19 EVOA), except for EFTA countries that are parties to the Basle Convention and for other countries that are parties to the Basle Convention or with which the EC and its Member States have concluded treaties guaranteeing that the disposal operations carried out in an authorized centre and complies with the requirements for environmentally sound management. However, the aforementioned PIC procedure and the obligation to furnish evidence that they do not have the necessary facilities dispose of the waste in an environmentally sound manner (Article

¹⁰ According to one of the respondents, tacit consent does not occur in practice in the EU.

¹¹ See the Beside case EC Court of Justice C-192/96, AB 1998, 339. The Ministry of Housing, Spatial Planning and the Environment discovers eight shipments of artificial packaging in a warehouse that should contain domestic waste, but samples shows that they contained different wastes from artificial materials, and so much that it could not longer be regarded as domestic waste. The Minister ordered that the shipments be returned to Germany. Besides lodging an appeal resulting in a preliminary question. Outcome: the decisive factor in determining which obligations apply to a shipment of waste is not the origin (households, industry) but the composition of the shipment. If a large quantity of the shipment consists of amber-list wastes, it must be treated according to amber-list regulations.

19 third paragraph). The country of destination authorizes the import only in the absence of objections on its part or from the other competent authorities concerned. Under Article 20 second and third paragraphs, these objections must be based on the grounds referred to in Article 4 third paragraph EVOA. The import of waste for recovery is also prohibited (Art. 21), once more with the exception of countries to which the OECD decision applies or the countries are parties to the Basle Convention or with which the Community has concluded bilateral agreements.

Title V *transit of waste* is, in principle, allowed, subject to several requirements: Articles 23 and 24 EVOA.

Finally, the EVOA has a number of common provisions relating to the prohibition of illicit trade (Article 26), the obligation to provide a financial guarantee or equivalent insurance covering costs for shipment (Article 27), the procedure of general notification for periodic shipments of waste having the same physical and chemical characteristics (Article 28), a ban on mixing wastes during shipment (Article 29) and a general obligation of due care for the producer of the waste (Article 34).

The *Directive on packaging 94/62* is based on the former Article 100A (95 new) of the EC Treaty and, on the one hand, intends to guarantee the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition by harmonizing national measures concerning the management of packaging and packaging of waste, and, on the other hand, to realize a high level of environmental protection (Article 1). Firstly, by drawing up regulations for prevention, re-use, recovery and recycling of packaging waste (Articles 4 – 6).

On the basis of Article 3 of the Directive, packaging must be taken to mean: ‘all products made of any materials of any nature to be used for containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer. ‘Non-returnable’ items used for the same purposes shall also be considered to constitute packaging’. The same Article 3 defines terms such as reuse, recovery and recycling, whereby the term waste is brought in line with the Framework Directive on waste.

In accordance with Article 4 in conjunction with Article 9 of the Directive, the Member States *must* ensure, in order to promote prevention of unnecessary packaging waste, that the volume and weight, as well as the harmfulness of the packaging is reduced to a minimum. Article 5, furthermore, provides that the Member States *may* promote the reuse of packaging in an environmentally sound manner. As regards the recovery and recycling of packaging waste, the Directive, on the other hand, sets specific tasks in Article 6 in the sense of reduction percentages, minimum requirements and targets, whereby the sixth paragraph enables the Member States to pursue more ambitious objectives. In the latter case, the Member States must inform the Commission of this objective of further reaching environmental measures and the latter must verify that these measures do not constitute an arbitrary means of discrimination or a disguised restriction on trade between Member States. It is noticeable that the relationship between Article 6 sixth paragraph and the primary EC law, in particular Article 95 EC Treaty, remains vague.

Pursuant to Article 7 of the Directive, the Member States must set up systems for the return, collection and recovery, and provide for collection, reuse or recovery of packaging and packaging waste. In accordance with Article 15 of the Directive, economic instruments may be used for this, although it is not clear exactly what that means. Article 8, however, in order to promote collection, reuse and recovery does provide for a system of marking and identification to classify different types of packaging material. By virtue of Article 9, the

Member States must ensure that three years from the date of entry into force of the Directive, packaging may be placed on the market only if it complies with all essential requirements defined by the Directive including Annex II. If necessary, these requirements will be harmonized in future by means of harmonization, but in the absence of this, the Member States must for now recognize one another's national standards (Article 9 second paragraph).

As regards certain concentrations of materials occurring in packaging, such as heavy metals, Article 11 of the Directive, however, already lays down specific requirements. According to Article 13, the Member States must provide proper information to the users of packaging, *inter alia*, on markings, available return systems and their role in contributing to reuse, recovery and recycling of packaging. Finally, Article 17 contains a periodic obligation to report on the application of the Directive and Article 18 provides that the Member States may not impede the freedom to place on the market of packaging which satisfy the provisions of the Directive.

Directive 94/67 on the *incineration of hazardous waste*, based on the former Article 130S EC Treaty, aims at establishing measures and procedures to prevent or, where that is not practicable, to reduce as far as possible negative effects on the environment, in particular, the pollution of air, soil, surface and groundwater, from the incineration of hazardous waste, as well as preventing the resulting risk to human health.

Firstly, in accordance with Article 5, certain preconditions must be taken into account with respect to the reception of waste for incineration. In addition, operating conditions and emission limit values must be set up and maintained for incineration plants for hazardous waste in the Community (Article 1). Under Article 6 of the Directive, the incineration plants must be designed, equipped and operated in such a way that the waste is incinerated as complete as possible. For that purpose, the installations must, *inter alia*, be equipped with burners which ensure that a certain minimum incineration temperature is realized at all times and exhaust gases must be discharged by means of a sufficiently high stack.

Under Article 7, the emission of certain substances released by incineration must remain within certain emission limit values. It must also be prevented that pollution discharged into the air shifts to discharges into the water. In order to counteract this, the wastewater from an incineration plant may only be discharged subject to a permit as referred to in Article 8 of the Directive.

On 29 October 1998, the Commission submitted a proposal for a new Directive on the incineration of waste, *inter alia*, to comply with the UN-ECE Convention on transfrontier, long-distance air pollution and to be more compatible with the IPPC Directive. In order to attain this, the emission of substances such as nitric oxygen, sulphur dioxide, hydrogen chloride, heavy metals, furans and dioxins, into the air, the soil, and in surface and ground water will be bound to (new) limit values.

Directive 99/31 on the *landfill of waste*, also based on the former Article 130S EC Treaty aims at preventing or reducing as far as possible negative effects of the landfill of waste on the environment, in particular the pollution of surface water, ground water, soil and air, and on the global environment, including the greenhouse-effect, as well as any resulting risk to human health from land filling of waste, during the whole life-cycle of the landfill (Article 1). For this purpose, the Directive encompasses, *inter alia*, regulations concerning the opening, management, closure and after-care of landfills.

With a view to this, the landfills are divided into three categories, namely: for hazardous waste, for non-hazardous waste and for inert waste (Article 4). Article 5 of the Directive regulates which waste and treatment are not acceptable in landfills. For this purpose, this provision includes increasingly stricter reduction percentages that must reduce the

quantities of waste going to landfills in future, also with a view to the reduction of the emission of greenhouse gases, such as methane. The waste to be accepted in the different classes of landfill must be considered appropriate in accordance with Article 6.

The substances referred to in Article 5 third paragraph of the Directive may not be accepted in landfills. Articles 7 – 9 include provisions regarding the granting of permits, such as the information that must be submitted upon the application, the financial security to be provided by the applicant and the technical expertise of the landfill operator and the supervision and control of the landfill of waste. Article 11 further obliges the Member States to introduce an acceptance procedure for waste in accordance with the permit requirements. During the operational phase of a landfill, the operator must conduct the supervision and control programme described in Annex III (Article 12) and following the closure of the landfill, the operator continues to be responsible for the maintenance, supervision and control with a view to the after-care pursuant to Article 13. Article 10 provides that the costs of the landfill of waste including the costs of the after-care must be covered by the price to be charged for the landfill in accordance with the ‘polluter pays’ principle. Existing landfills must be adapted to the requirements of the Directive within a period referred to in Article 14. Article 15 includes an obligation to report every three years on the implementation of the Directive. And Article 18, finally, regulates that the implementation term of the Directive expires on 16 July 2001.

2. Interviews

A general feeling among the respondents is that they are often involved too late and too much on an ad hoc basis in the preparations of Directives relating to the environment. Especially, the bodies entrusted with the implementation and enforcement, comment on the lack of systematic attention for the implementation and (in particular) the enforcement aspects of the present Directives relating to environment. For example, the Environmental Protection Inspectorate is not involved systematically. Sometimes they are and sometimes they are not involved in the preparations of the (implementation of) EC Directives relating to the environment, the completion of the form and the formulation of the Dutch position. According to a respondent, the enforcement is generally insufficiently taken into account in the preparation of Directives and Regulations on waste. According to him, this often means that problems occur unnecessarily in the enforcement at a later stage. One example of this is the regulation in the EVOA that the notifier of, for example, a shipload must return a shipment of waste not complying with the requirements of European legislation to the country of origin. However, the problem is that in the event that a front man is used, the European law has no powers to hold this front man liable. Another experience concerns the provisions in the field of the Community regulations in the field of preserved wood. Special disposal restrictions apply to preserved wood involving the country of origin of the wood. However, if the Inspectorate discovers a freight of preserved stakes, the country of origin is often impossible to determine. Early involvement of the Inspectorate in the preparations of the EC Directive concerned might have prevented this problem, but the enforcement does generally not seem to be a real priority according to one of the respondents. The Ministry of Housing, Spatial Planning and the Environment conducts an implementation test with respect to the implementation measures (or the EC decision where it concerns a Regulation) in the preparation of the implementation of EC Directives, but this test is usually conducted by the Ministry’s policy departments. The Inspectorate is often only involved at management level.

A general problem acknowledged by the respondents from the implementation and enforcement bodies, the respondents from the Ministries and the respondents from interest groups is the moment at which the intention to draw up EC Directives or draft Directives is announced. In the experience of the respondents, the Netherlands is often informed at a late

stage, i.e. when there already is a Commission proposal. Experience has shown that the stage prior to the Commission proposal is a stage where real contributions may be made – particularly with respect to more technical and legal aspects. The policy officials at the Commission may at times overlook some elements. If the elements that may lead to problems are commented on at an early stage – according to the experience of one of the respondents – the Commission is willing to listen to those arguments, as long as there is no hidden agenda, e.g. to seek to attain a higher level of environmental protection in an indirect manner.

In order to make an earlier contribution, much depends on the contacts maintained by Dutch public officials with their colleagues in Brussels. Experience shows that if you know about an intended measure at an early stage, you are likely to be involved sooner. However, usually, the Netherlands is only informed ‘officially’ of environmental measures by the time the Community standpoint is concluded. In such a case, it is much more difficult to make a contribution with respect to technical and legal aspects. These are – due to the lack of time – put at the bottom of the list of priorities.

Enforcement bodies, such as the Environmental Hygiene Inspectorate, are generally, in their opinion, informed too late of the existence of the intended EC provisions. This is especially a problem with respect to Regulations. Businesses and enforcement bodies must be informed in time in order to make preparations for the new situation. One should not suddenly confront them by means of an announcement in the Official Journal.

As regards representatives of interest groups, the extent to which and the time at which they are involved in the preparations often depend on personal contacts with persons working at the Commission or national policy departments.

One of the respondents furthermore notes that in her opinion, a timely contribution by the legislative jurists is lacking in the preparations of Directives. According to this respondent, not only is the lack of a timely legal contribution from the Member States felt, but the same also applies to the involvement of legislative jurists at the level of the Commission. The jurists present are too busy with infraction proceedings and insufficiently involved in the preparation of the Directives, while policy officials, who usually focus mainly on the contents, are dominant. Another respondent points out that, more generally, the national parliaments are also involved much too late in the preparations of EC decisions. Once they are informed, they often fail to formulate their own opinion and do not put any questions to the Minister concerned. This would make little difference as the Commission proposal is by then adopted by the Council. What can the Lower House do about that?

The person concerned also wondered why the department responsible for the subject at issue may not inform Parliament earlier? Experience has shown that, if you wish to make a contribution, you must be involved at a very early stage.

Quality of the provisions on waste

Opinions differ with regard to the quality of the EC provisions on waste. The quality of the regulations in this field has frequently been criticized, particularly with respect to the term ‘waste’. However, according to one of the respondents, the quality of the provisions on waste may not be so bad. In particular, the EVOA is very complicated, but this is also the result of the complicated nature of the material. Much has to be regulated. Based on that view, according to the respondent concerned, the result is not so bad. There are some articles that really should have been different, in his opinion: for example, Article 11 listing the *green* wastes. That article was inserted at the last minute but in the wrong chapter. It should have been included in the general chapter; not where it is now. And Article 26 should also have been different. The provision on enforcement is very much based on the situation where the notification requirement lies with the country of origin. The Dutch authorities often use intermediaries. This situation is not included in the provision on enforcement.

Another respondent is less understanding for the position of European legislation and finds that the decisions on waste – examined in this research – are quite simply of poor quality.¹²

All respondents refer to the problems concerning the definition of the terms ‘waste’, ‘recovery’, ‘disposal’ etc. However, not everyone seems to agree on the reason why the differences and deviations between the national and European terminology lead to problems. According to some respondents, the problems concerning the terms are the result of the fact that EC decisions are a compromise and it is therefore not always possible to formulate in clear wordings. Other respondents also blame the Member State more directly as they would at times deliberately ignore the European terminology. Respondents from different sides also refer to the tension that may arise between EC legislation and international law, e.g. between the EVOA and the Basle Convention. In particular, in cases where both the EC and the Member States are parties to such a Convention, friction may arise if the Commission is not inclined to take action to remove (alleged) irregularities and the Member State itself may take action, which may in turn lead to protests from other Member States arguing that the objectives of harmonization are thereby endangered.

Moreover, one respondent stated that if implementers ask him how they must deal with, for example, a difference between the EVOA and the Basle Convention, they are advised to adhere to the EC decision as this legislation is more mandatory! Another respondent, however, noted that he regarded it odd that, in his experience, contacts concerning the quality of EC rules are usually maintained via the specialist departments rather than via the Ministry of Justice.

Implementation

Naturally, the problems relating to the quality of the EC Directives and the terms used, as discussed above, have led to problems in the transposal of the Directives on waste. Until recently, the Netherlands – partly on account of problems with respect to Community regulations and alignment problems with Dutch regulations – opted for a terminology that differs on some points from the European terminology.¹³ For example, the national term ‘to dispose of’ (*verwijderen*) in the Environmental Management Act differs from the EC-law term. In national environmental law, the term ‘to dispose of’ (in a broad sense) encompasses both the final disposal of waste and the recovery of waste. The national term ‘to dispose of’ (in a broad sense) therefore equals the Community term ‘to dispose of’ (*zich ontdoen van*). This choice is also the result of the Court of Justice’s judgment in the *Tombesi* that showed that the Court considers that ‘to dispose of’ encompasses both acts leading to the recovery of waste. This judgment is discussed in more detail below.

Another problem concerns the implementation of the term ‘hazardous waste’ in the *Directive on hazardous waste* 91/689.¹⁵ Article 1 fourth paragraph of the Directive defines what hazardous waste must be taken to mean referring to a Community list of wastes that have one or more of the properties described in Annex III. Other wastes that have one or more of the properties of Annex III in the opinion of a Member State and are reported to the

¹² To underline this, the researchers are given a list of 5 pages with all kinds of vague terminology and unclear elements encountered by the respondent concerned in the environmental provisions examined in this research. The research has used this list.

¹³ The legislative proposal to amend to Environmental Management Act (structure disposal of waste), Parliamentary Documents II 1999/2000, no 26 638 will be fully in line with the terminology from the Directives on waste.

¹⁴ *Tombesi* judgment, EC Court of Justice, 25 June 1997, *M&R* 1997, no 100.

¹⁵ As already indicated in paragraph 1, this Directive is based on Art. 2 of the Framework Directive on waste of 15 July 1975 75/442/EEC. The Directive on hazardous waste entered into force on 27 June 1995 and its aim is to harmonize the legislation of the Member States relating to the controlled management of hazardous waste.

Commission are also regarded as 'hazardous waste'. The Commission examines whether the reported wastes and reviews whether they must be added to the list. In this respect, implementation problems occurred where it concerns the question of whether the Member States may also designate waste as hazardous waste in the event that it does not have any of the properties listed in Annex III to the Directive.¹⁶ However, it is clear that the Directive does at any rate not apply to domestic waste that may potentially contain any hazardous waste or have any hazardous properties.

Apart from problems with respect to the transposal of the terms, the scope and the alignment with Dutch regulations, some specific problems occurred in the transposal of the Community regulations on waste at issue.

The first problem is related to the comitology. Some Directives on waste provide that a committee must adopt further rules prior to a certain date. This date is already established. However, it frequently happens that a committee fails to conclude the further rules in time. If it is decided in such a case to provide for national regulations in anticipation of such further rules, one is nevertheless at risk of being in default while the actual committee is really at fault in such a case.

Another problem more specifically concerning the contents of the Directives on waste is that, according to one of the respondents, certain wastes on the list of wastes may quite suddenly 'change colours', for example, as a result of agreements and regulations within the OECD. The Dutch enforcement bodies anticipate this – in case it happens - by including a so-called 'toleration period' so that businesses are not taken by surprise.

However, some respondents from the enforcement bodies have stated that the tardy implementation has not posed any major problems. The implementation is in accordance with the Directives. In a few cases, it seems as if the Netherlands refrains from implementing some sections on strategic grounds. For example, Directive 75/442 has not yet been implemented. The section relating to 'waste brokers' is not regulated, partly due to the fact that it is almost impossible to enforce this in the Netherlands, according to one of the respondents.

Enforcement and implementation of the Directives and regulations on waste

In general, the respondents are positive about the enforcement system opted for in the Netherlands with respect to the implementation of the Directives on waste. Although it concerns a system that grants powers of enforcement to both the central Environmental Hygiene Inspectorate and the local authorities – as a result of which provinces and central government are at times faced with one another's responsibilities – but, essentially, this system puts the powers where they belong, according to the respondents.

Problems often occur in the operation of terms such as 'hazardous wastes'. A recurring complaint in the interviews is that it is not always clear in the implementation and enforcement practices where it (no longer) concerns a waste and how a distinction must be made between, for example, the removal and the recovery and the landfill and recycling of waste.¹⁷ On the one hand, this is the result of the terminology used in the EC regulations themselves and, on the other hand, it is a problem caused by the Court of Justice's case law and the Dutch approach – followed until recently. Meanwhile, the intention is to resolve the problems of unclear terminology in this respect in the Environmental Management Act by an amendment whereby the terminology is brought in line with the Community terminology. The

¹⁶ Fornasar case, EC Court of Justice C-318/98, *O.J.* 1998 C 327/10, MenR 2000, no 83, note Jans.

¹⁷ Compare Parliamentary Documents II 1999/2000, 26 638, no 6, p. 9-10.

Commission itself seeks to improve all this by developing further criteria that may be used for the further specification of terms such as recovery and disposal acts.¹⁸

The problem is worsened by the differences of opinion or differences in the use with respect to the terms that may exist between central and local authorities. Paragraph 4 further examines the enforcement problems caused in part by the terminology.

Notwithstanding the problems arising from the uniform application of the terms that are difficult to apply due to their very nature, the respondents believe that the enforcement authorities in the Netherlands, especially in comparison to their foreign colleagues, are well prepared for their task, both in terms of equipment and the powers granted to them.

A striking characteristic of the enforcement of EC decisions in the field of waste is the different ways of cooperation between the enforcement authorities from different Member States. For example, in order to optimize the enforcement of the EVOA, a network is developed, at the initiative of the Dutch Environmental Hygiene Inspectorate, of authorities in Europe responsible for the enforcement of these regulations. This network, named 'TFS' (Transfrontier Shipments of Waste) forms part of the EU IMPEL network (Implementation and Enforcement of Environmental Law). The objective of the IMPEL/TFS network is to promote the collaboration between different enforcement bodies in Europe, to improve the quality of the enforcement and to exchange know-how, experience and enforcement methods.¹⁹ The result of the IMPEL/TFS meetings is that agreements are concluded with respect to joint enforcement paths and projects whereby, for example, a specific sector is analyzed. Until recently, there was the problem that the Commission ignored part of the results of the IMPEL/TFS meetings. The Commission did not wish to recognize the status of IMPEL/TFS automatically: after all, it is set up by the Member States and as such has no powers in the context of the EU and the enforcement policy of EU rules relating to the environment. Where the feedback of enforcement experiences via the IMPEL/TFS is incomplete, there is some feedback of those experiences via the correspondents' consultations with the Commission. These consultations are usually attended by an enforcement agency.

Apart from these types of consultations, there are also many Directives relating to the environment that require the preparation of reports on the environment including the experiences gained with the implementation and enforcement. A special Directive is drawn up for the standardization and 'rationalization' of those reports on the environment (Directive 91/692).²⁰ This latter Directive has also increased the number of Directives on the environment that must now comply with this requirement to report to the Commission (usually) every three years on the implementation of the Directive concerned. The

¹⁸ In a resolution of the Council of Ministers further to the Community strategy on the management of waste (O.J.97 C 076), the Commission is requested to develop further criteria. The Commission is preparing these criteria.

¹⁹ This organization recently (May 2000) held a conference in Caserta (Italy) discussing the problem of transfrontier processing of waste. During the conference, feedback with respect to the performance of enforcement actions took place and agreements were concluded with respect to future projects. The project results concerned a better compliance with the enforcement of inland shipping and joint enforcement of road transports at the borders. In addition, information from the Environmental Hygiene Inspectorate shows that over 10% of the transfrontier waste is conducted by rail. Germany will set up an international project for enforcement of these waste transports. Another subject concerned the involvement of Interpol in the fight against international environmental crime. Interpol held a presentation with respect to the work carried out by this international police organization. In addition, the role and the involvement were discussed with the participants. The Ministry of Housing, Spatial Planning and the Environment's Environmental Hygiene Inspectorate is preparing a proposal to intensify the Interpol tasks (proposed as Green Interpol). A proposal to improve the enforcement of the EVOA was also discussed. In September 2000, a joint proposal relating to increased enforcement and implementation was presented to the European Commission requesting it to use this in the review of the Regulation. See Parliamentary Documents II 2000/2001, 22 243, no 49.

²⁰ Directive 91/692, Standardization and rationalization of reports relating to the environment.

Commission, in turn, draws up a report of this that is then published. These reports on the environment may also be useful to the Commission to compel Member States to amend their implementation legislation. Particularly in the field of waste, the Commission is, according to one of the respondents, most active in doing so; much attention is drawn to details. The reports quickly result in notices of default. Otherwise, the Commission hardly monitors the experiences of the Member States with respect to the implementation and enforcement on a systematic and permanent basis, but the latter are, of course, due to their obligation to report, in principle, forced to supervise this themselves.

3. Case law

Case law on the confusion of terms

For years now, the definition of the term waste in Directive 75/442 has given rise to questions. However, one must not immediately conclude that the quality of the description of the terms in this Directive is *therefore* far below par. From a Dutch perspective, this is often all too easily said, without remembering how difficult it is to formulate terms that may be applied without any 'translation problems' in all Member States with their different languages, cultures and law systems.²¹ The problems often relate to the willingness of Member States to let go of their own, familiar terms (in part) and exchange these for new and unfamiliar terms and distinctions. Nevertheless, the term waste, in particular, has given rise to an abundance of case law compared to some key terms in the other Directive (relating to the environment).

The Vessoso & Zanetti case, for example, concerned the question of whether substances and objects that may be used for economic reuse fall within the scope of the term waste referred to in the Framework Directive. In that case, the Court found that the question whether the holder's intention to exclude economic reuse of a substance of which he disposes is not decisive in the answer to the question of whether it concerns a waste.²² A Member State that excludes, in its national legislation, substances that are suitable for economic reuse from the term waste in the sense of the Framework Directive acts in violation of Directives 75/442 and 78/319.²³ The aforementioned Tombesi case added to this that: 'the system of supervision and management introduced by the Directive intends to encompass all objects and substances of which the owner disposes, even where they may be of commercial value and are collected for commercial purposes with a view to recycling, recovery or reuse'. In the Inter-Environment case, the Court further established that the term 'to dispose of' in the sense of the Framework Directive does not merely include disposal but also the recovery of substances. In addition, the Court determined that the mere fact that a substance is directly or indirectly included in an industrial process does not mean that this substance would not fall within the scope of the term waste in the sense of Article 1, under a of Directive 75/442/EEC on waste, as amended by Directive 91/156/EEC.²⁴

As a result of this judgment, problems shifted from interpretation to the exact scope of the terms disposal and recovery. Although the Annexes IIa and IIb to the Framework Directive may be useful in this respect, they do not suffice, partly due to the fact that it concerns a non-limitative summary. In 1997, the Administrative Law Division therefore asked preliminary questions in the ARCO-chemie and Dorpsbelang Hees cases. The Court of Justice has rendered judgment in these cases. They show that the European concept of waste from the

²¹ The word translation must be interpreted in a broad sense.

²² EC Court of Justice, consolidated cases 206/88 and 207/88, *M&R* 1992, 45 and case 359/88, *M&R* 1992, 94, note Jans.

²³ This judgment is confirmed in case C-422/92, *Commission v Germany*, *Jur* 1995, 1-1097.

²⁴ Inter-Environment, case C-129/96, *M&R* 1998, 65, note Jans and Van Rossem.

Framework Directive must be interpreted more broadly than in our country in the light of Article 1.1 Environmental Management Act.²⁵

According to the case law of the Dutch administrative law court, a substance ‘that may be recovered in an environmentally sound manner without any further treatment and without making any further provisions’ is not regarded as waste.²⁶ As the court apparently was not too sure about this, it asked two preliminary question regarding this in the Arco-chemie and Dorpsbelang Hees cases: a) is the mere circumstance that a substance may be subjected to a recovery act referred to in Annex IIB to the Framework Directive sufficient to conclude that it does not (no longer) concern a waste? and b) if not, must the use as a fuel of a substance be regarded as (the recovery of) a waste if this may take place in an environmentally sound manner without any intensive treatment?²⁷

The Court’s reply shows clearly that the term waste must be interpreted broadly, revolving around the words ‘to dispose of’ in Article 1 of Directive 75/442.²⁸ The objective of the Directive and the principles of Community policy on the environment must also be taken into account in the interpretation. In addition, the Court notes that the mere circumstance that a substance may be subjected to an act referred to in Annex IIB to the Framework Directive is not sufficient to conclude that it concerns ‘disposal’ and that the substance must therefore be regarded as a waste. For the answer to the question of whether the use as fuel of a substance may be regarded as ‘disposal’, it is not relevant whether that substance may be recovered as a fuel in an environmentally sound manner without any intensive treatment. The fact that this use as a fuel is a common method of recovery and that the substance is a waste according to social standards may, however, be regarded as a clue for ‘disposal’. The circumstance that a substance used as a fuel is the residue of a production process of another substance, that this substance is not eligible for any other disposal method, that the composition of the substance is not suitable for the use made of it or that special preventive steps for the protection of the environment must be taken for that use may also be regarded as clues to characterize the substance as a waste. Whether it is in fact a waste must ultimately be established with due regard to all circumstances, taking into account the objective of the Directive and the fact that its effectiveness may not be affected.

However, after this judgment, it remains unclear to what extent the Court regards the summary of the criteria, that may be useful for the answer to the question whether it concerns a waste, as a limitative summary.²⁹ Nothing really points in that direction, but it does imply that the legal uncertainty continues with respect to the (other) criteria that apply in the determination of whether any substance is a waste or not.³⁰ As a result, the problems easily shift towards the demarcation between other terms, such as when it concerns recovery and no longer disposal or common acts with non-waste. This is most difficult for the practical implementation and enforcement, as this distinction is not clear either, while it may well have legal consequences, for example, the applicability of the permit requirement under Article 11

²⁵ EC Court of Justice 15 June 2000, consolidated cases C-418/97 and 419/97, *JM* 2000, 129.

²⁶ See, *inter alia*, Administrative Law Division 19 May 1992, *AB* 1992, 598, note Drupsteen, Administrative Law Division 27 June 1994, *AB* 1994, 606 note Drupsteen, Administrative Law Division 28 March 1995, *M&R* 1996, 65, note Addink etc.

²⁷ Compare Administrative Law Division 25 November 1997, *AB* 1998, nos 1-2, note Backes.

²⁸ EC Court of Justice 15 June 2000, *M&R* 2000, 84.

²⁹ H.H.L. Krans *Waste is Waste* (Afval is afval), *JM* 2000, p. 608.

³⁰ See for a proposal for solutions J.R.C. Tieman, *The Broad Waste Term* (Het ruime begrip afvalstof), *M&R* 2000, p.229-236. Tieman introduces, for example, the criterion of a continued or permanent use in accordance with the original destination to designate substances as waste in the sense of the Framework Directive.

of the Directive.³¹ It is therefore not surprising that the Administrative Law Court has already put some preliminary questions to the Court of Justice. Meanwhile, the legal uncertainty continues for the implementation practice. In part, this might be resolved by developing some kind of explanatory memorandum indicating in further detail how certain terms, concepts and definitions must be interpreted. The Court often refers to the objective and the intention of the Directive, but this is often formulated in such general terms in the considerations that it hardly provides directions for either the court or the practice. However, the interviews also showed that the quality of the terms is often affected to a large extent by the entire process of negotiations preceding the conclusion of a Directive. Odd articles are often the result of political discussions. The quality drifts to the background. For example, exceptions to exceptions are included to 'get Member States on board'. This often leads to unnecessarily complicated provisions from a technical point of view. At times, a 'broad' description is deliberately opted for as it is difficult to oversee whether the practices in the Member States may otherwise be sufficiently fall within the scope of a Directive.

4. Literature

Much research has been conducted and much literature has been published in the field of the EC decisions at issue with respect to the Community policy on waste in the Netherlands (and). For example, some recently dissertations by J.W. van de Gronden, *The Implementation of EC Environmental Law by Decentralized Authorities (De implementatie van het EG-milieurecht door decentrale overheden)* (1998)³³, A.M.E. Velkamp, *Shipments of Waste* (1998)³⁴ and B.M. Velkamp, *Implementation of EC Directives on the Environment in the Netherlands (Implementatie van EG-milieurichtlijnen in Nederland)* (1998)³⁵, but also many other studies. It would be far beyond the scope of this research to even attempt to give some kind of representative outline of the results and opinions in the literature on the quality of EC Directives and the consequences for the implementation and enforcement. We have therefore opted for a functional use of the literature, i.e. to discuss it on the basis of the interviews and case law examined.³⁶ However, we would like to briefly discuss some noticeable issues that were discussed in the literature with respect to the quality of EC regulations in the field of waste.

Enforcement

In particular, the enforcement of the EVOA – that, due to its connection with the other Community regulations on waste is given as a key example – has led to many problems from the start. Despite the fact that a specific enforcement policy was developed for this Regulation and that collaboration between the partners within the national enforcement network seems to be increasingly fruitful, there are still several bottlenecks. According to recent literature, the government regulations selected and the unclear EVOA framework of terms and the related regulations on waste *inter alia*, cause these problems.³⁷

³¹ Article 11 provides the possibility of exempting organizations or undertakings that recover waste from the permit requirement. However, the competent authority must lay down general regulations per type of activity including the type and quantity of wastes and the conditions under which the activity may be exempted

³² See, *inter alia*, H. Somsen (Ed.), *Protecting the European Environment*, Glasgow 1996.

³³ Diss. University of Utrecht, Deventer 1998.

³⁴ Diss. University of Utrecht, Deventer 1998.

³⁵ Diss. University of Amsterdam, Deventer 1998.

³⁶ See, *inter alia*, paragraphs 2 and 3.

³⁷ See A.M.E. Veldkamp, *The Enforcement of the EVOA: a New Challenge for National Enforcement Bodies?* (De handhaving van de EVOA: een nieuwe uitdaging voor nationale handhavers?), in: I.M. Koopmans and J.M. Verschuuren, *Enforcement of European Environmental Law in the Netherlands (Handhaving van Europees milieurecht in Nederland)*, The Hague, 2000, p.? (to be published).

In Veldkamp's opinion, the fact that the market for treatment of waste acts in a manner opposite to those of ordinary products where the assets (price of treatment) precede the costs (environmentally sound treatment) for the parties that take care of the treatment of waste is insufficiently taken into account in the drawing up of the EVOA. After all, all parties involved have an economic interest in cheap, poor-quality and fraudulent methods of treatment. According to her, the control system cannot possibly counterbalance this.³⁸ Veldkamp therefore believes that it must be examined whether the financial structure of the treatment market may be altered to such an extent that payment only occurs after it has been demonstrated that the wastes are issued in an environmentally sound manner, referring to the system that applies to the granting of agriculture subsidies. In addition, Veldkamp argues for the introduction of Community liability for shipments of waste in her dissertation.³⁹

Apart from the fact that it is not clear whether the Community waste term in the Framework Directive on waste (as discussed above) is in accordance with the waste term in Article 1.1 (1) in the Environmental Management Act, the enforcement bodies – in practice including not only the regional environment inspectorates but also, for example, the regional police force – will frequently be faced with the question of whether the wastes encountered in the course of inspections of transports must be regarded, for example, as a raw material to which the EVOA does not apply.⁴⁰ Non-specialist investigating officers will often lack the know-how and expertise to answer that question. This means that there is the risk that uncertainty and doubts on the part of the enforcement bodies may lead to a restrained attitude in the supervision of the compliance with the EVOA, especially, as it may not always be expected that specialists on specific wastes are present during regular inspections. The technical expertise is scarce resulting quickly in a fairly extensive shortage of enforcement.⁴¹

Although the complexity of the concept of waste and the continuing discussion on this as a result of the case law are most difficult in practice, this is not the only bottleneck, according to, *inter alia*, Gilhuis. According to him, the waste sector generally needs a brighter policy of supervision and enforcement including further differentiation in the supervisory intensity at different types of businesses and various acts with respect to waste; a consistent use of the different instruments of enforcement (without necessarily expanding the toolbox of the enforcement bodies), a proper alignment of the enforcement bodies' policy, promotion of an increased technical expertise on the part of the enforcement bodies etc.⁴²

Nevertheless, the EVOA simply contains a number of unclear provisions (see appendix), e.g. with respect to illicit trade. Article 26 regulates both the situation where illicit trade is performed by the dispatcher and by the recipient, but not which party must act in cases where both parties are involved, which is not all inconceivable. In addition, especially where it concerns the imposition of administrative-law sanctions, it is sometimes unclear how the jurisdiction is divided and to what extent the administrative enforcement powers etc may be enforced in another Member State. Any action against unregistered waste brokers continue

³⁸ Ibid Addink and Backes, *ibid*, p.294-295.

³⁹ A.M.E. Veldkamp 1998, *ibid*, p. 217 and 375.

⁴⁰ According to the Tombesi case EC Court of Justice 25 June 1997, *M&R* 1997, no 100, substances or objects that are suitable for economic reuse also fall within the scope of the Community waste term. The Netherlands, however, makes a distinction between waste and secondary raw materials, as it believes that the latter is not disposed of. See F.J.C.M. de Kok, *Waste or (Secondary) Raw Material* (Afvalstof of (secundaire) grondstof), *M&R* 1995, p. 132-137.

⁴¹ See also G.H. Addinks and Ch.W. Backes, *Enforcement of Environmental Legislation on Waste* (Handhaving van milieuregelgeving inzake afvalstoffen), in: Committee on administrative-law and private-law enforcement (*Commissie bestuursrechtelijke en privaatrechtelijke handhaving*), *High-level Enforcement* (Handhaven op niveau), Deventer 1998, p.283.

⁴² See P.C. Gilhuis, *On Waste, Market and Law* (Over afval, markt en wet), in: Ph. Eijlander et al (Ed) *The Environment and the Market* (*Milieu en markt*), Tilburg 1998, p. 53-54.

to pose practical problems as only registered brokers and traders may act as notifier under the EVOA and the current legislation does not include a registration system for internally operating waste brokers.⁴³ It is furthermore noticeable that the term ‘notifier’ is not always clear in implementation practices, while the central point of application for administrative requirements (such as the permit requirement in case of disposal) are tied up in the EVOA.⁴⁴

At other times, it does not seem to be well-founded which wastes are put on the (green, amber or red) list, shown by the fact that, for example, transfrontier shipments of waste (deep-frying) fat that are used in animal feed may not be subjected to a permit system.⁴⁵

Information obligations

In the context of the interviews, it was also discussed that in the area of Directives on the environment – contrary to many other Community policy areas – there is a fairly general obligation to report on the environment for the Member States with respect to the implementation of EC decisions relating to the environment. This information obligation is added to many other information obligations already in force with respect to Community law, such as the obligation to notify technical and the general (incidental) information obligation applying on the basis of the Community fidelity of Article 10 EC Treaty. Van de Gronden has argued, particularly with a view to decentralized government, also covered by the regime of these obligations, for streamlining the information obligations in the field of the environment within the Netherlands, by linking information requirements entered into by decentralized government to national measures, such as already occurs in, for example, Article 5.5 of the Environmental Management Act.⁴⁷

Directive on packaging and implementation by means of an agreement

Another issue that has drawn attention in literature concerns the possibilities of using alternative implementation methods. From the point of view of the legislative quality and legislative policy, the fact that Directive 94/62 is (partly) transposed into the Dutch legal system by means of an agreement is undoubtedly remarkable and open to discussion. First, a brief summary of the implementation system. On 1 August 1997, the Ministerial Regulation on packaging and packaging waste entered into force.⁴⁸ In the Regulation, the individual producers and importers are, *inter alia*, obliged to collect their used packaging to such an extent that certain percentages may be reused or recovered as a substance. Article 2 of the Regulation provides the opportunity for producers and importers to conclude an agreement with the Minister, other authorities and private parties from the packaging sector.

Producers and importers that are parties to the agreement are exempted from satisfying the Regulation’s requirements with respect to collection, reuse, recovery and reporting on an individual basis. With a view to this, the Packaging Agreement II was concluded on 15 December 1997, between the Minister of Housing, Spatial Planning and the Environment, the Association of Netherlands Municipalities (or VNG) and trade associations from the entire packaging chain with respect to the reduction of packaging waste. The agreement includes

⁴³ Parliamentary Documents II 1998/1999, 26 638, no 3, p. 29.

⁴⁴ E.g. illustrated by Administrative Law Division 07 September 1999, *KG* 1999, 308.

⁴⁵ See Parliamentary Documents II 2000/2001, 22 343, no 49, p. 22.

⁴⁶ Under Directive 98/34/EC on an information procedure in the field of standards and technical regulations (*O.J.* L 204), the so-called *Directive on Notifications*, as amended by Directive 98/48/EC (*O.J.* L 217).

⁴⁷ See J.W. van de Gronden, *ibid.*, p. 459-460.

⁴⁸ *Staatscourant* 4 July 1997, no 125. The implementation period had by then already expired by more than a year (30 June 1996). The excuse that the Directive on notifications requires a stand-still period before the ministerial regulation was allowed to come into force is not valid as, considering the notification date (18 June 1996), the regulation could not have come into force in time.

reduction targets and regulates the installation of a Packaging Committee that must supervise the compliance with the agreement.

The advantage of joining the agreement for producers is, *inter alia*, that they are no longer bound by the obligations of the Ministerial Regulation on an individual basis, they have to fulfil them as a group. For example, the group of producers producing plastic packaging must realize a certain reduction as a group; a producer that may reduce more on cardboard packaging material may then produce more plastic for a while as its plastic reduction is realized by another producer that is able to reduce more on plastic. In other words, this means flexibility. However, the European Commission raised some objections against this implementation method. It objected, for example, to the use of derogating definitions and terms in the Ministerial Regulation compared to the Directive. On 9 June 1998, the Commission officially declared the Netherlands to be in default. One of the reasons for this was that the construction of the Ministerial Regulation including an 'escape clause' (joining the agreement) did not provide sufficient legal security that the objectives of the Directives with respect to reuse and recovery would be attained. In reply to the notice of default, the Minister of Housing, Spatial Planning and the Environment argued that implementation by means of an agreement is not at all as free of obligations as suggested by the Commission. The reason for this is that the Packaging Agreement includes stipulations with respect to amendments and notices of termination if the objectives laid down in the agreement are not attained (in time). However, in order to meet the Commission's objections, the Minister decided to include new stipulations in the Regulation on packaging and packaging waste that in effect meant that certain exemptions for parties to the agreement are cancelled if the reduction percentages referred to in the Directive are not attained. The Minister did however state that it is unlikely that the parties to the agreement will fail to attain the objectives of the Directive in time as they have undertaken to make every effort to prevent this.⁴⁹

Dutch literature has not only criticized the implementation of the Directive on packaging by means of an agreement, but also the decision to link the packaging agreement to a Ministerial Regulation instead of a General Order in Council.⁵⁰ Pursuant to Article 21.6 sixth paragraph of the Environmental Management Act, such an implementation method may only be opted for 'if the rules are solely intended to implement a decision by an international-law organization binding on the Netherlands'. The Instructions on regulations (Instruction) also stipulate that delegation to a Minister is solely allowed where it concerns the incorporation of international regulations in Dutch legislation that leave no room to the legislator, without prejudice to minor issues, for making any policy-oriented decisions.⁵¹

However, such decisions had to be made in the Regulation on packaging and packaging waste as this required the attainment of the objectives of Article 6 of the Directive by 1 August 1998, and is therefore less restrictive in this respect. In addition, the Ministerial Regulation, in some respects, included more ambitious objectives than the Directive itself. Although the latter, subject to strict conditions, does leave some room for this, the conclusion that it involves no policy-oriented decisions cannot be drawn.

⁴⁹ *Staatscourant* 1999, no 116, p. 12. The 1998 Annual Report of the Packaging Committee, Utrecht 1999, shows, however, that the Minister had been optimistic as the percentages realized are disappointing and will not be realized in 2001 without any additional effort. According to W. Douma, *Implementation of the Directive on Packaging* (Implementatie van de Verpakkingsrichtlijn), in: I.M. Koopmans en J.M. Verschuuren, *Enforcement of European Environmental Law in the Netherlands*, The Hague 2000 (to be published), the annual report furthermore shows that different measuring methods are used to measure the environmental performance of businesses resulting in different outcomes.

⁵⁰ Compare, *inter alia*, W. Douma, *Dutch policy on packaging recycled* (Het Nederlandse verpakkingsbeleid gerecycled), *M&R* 1998, p. 210.

⁵¹ See also Instruction 339.

From the point of view of legislative quality and legislative policy, a discussion on the implementation of Directives by means of an agreement, e.g. the Directive on packaging, is valid. After all, it is often assumed that Directives must be implemented by means of legally binding instruments. Implementation by means of agreements would only be possible where the Directive itself (explicitly) states it.⁵² This is not the case in Directive 94/62. Moreover, Article 22 of the Directive seems to point in another direction as it includes the following text: 'The Member States must introduce the necessary legislative, regulatory and administrative measures prior to 30 June 1996 in order to comply with this Directive and shall publish these.' As an agreement is neither a statutory nor an administrative-law measure, the co-implementation in this manner seems, at first sight, to be unlawful.

However, opinions differ in this respect. Some authors make a distinction between Directives that create rights for private individuals and Directives that do not. In the former case, there would be no room for implementation by means of an agreement, but it would be lawful in the latter case.⁵³ In a notification from the Commission to the European Parliament on the use of agreements, it is furthermore argued that agreements relating to the environment may be used to implement obligations arising from Directives, as long as these private agreements are binding to parties and enforceable by law.⁵⁴ A Recommendation published on the same day, emphasizes the fact that implementation by means of an agreement must be able to safeguard the result of the Directive and that agreements must otherwise also comply with the requirements of transparency, credibility and reliability.⁵⁵

In addition, a number of practical requirements must be satisfied, e.g. compliance with the agreement must be supervised, non-compliance is sanctioned and the agreement must be submitted to the Commission. A Council resolution adds that the agreements must contain clear objectives, legal certainty is required and the Directives must be transposed into national legislation 'in the usual manner'.⁵⁶ This final remark is really full of paradoxes as implementation by means of an agreement is the not at all a 'usual' implementation method. For example, there are very few Directives that explicitly provide the opportunity of implementing by means of an agreement.⁵⁷ One of the first exceptions to this is Article 10 of the draft Directive on end-of-life vehicles, but a striking element of this Directive is that it contains certain safeguards to ensure that the Directive is complied with.⁵⁸ For example, the Directive contains the 'additional security' that, in case of non-compliance with an agreement, Member States must implement the relevant provisions of this Directive by legislative, regulatory or administrative measures.⁵⁹ This may appear to be legal quibbling, but it does mean that the parties to the agreement know (beforehand) what is expected of them. In our opinion, the European legislator should not only comment on implementation methods by means of recommendations, notifications and resolutions, but also indicate more clearly in the Directive itself what is expected of the Member States. This would also send a clear message to the courts on what provisions to apply to the Member States. Currently, the Court's case law may show that a statutory framework is necessary for the transposal of Directives by means some kind of self- , but is often unclear what is actually meant by this.

⁵² L. Krämer, *EC Environmental Law*, London 2000, p. 279.

⁵³ See J.W. van de Gronden, *ibid*, 1998, p. 69 and B.M. Velkamp, *ibid*, 1998, p. 65-67.

⁵⁴ COM (96) 561 def.

⁵⁵ Recommendation 96/733, *O.J.* 1996, L 333, p. 59.

⁵⁶ Resolution of 7 October 1997, *O.J.* 1997, C 321, p. 6.

⁵⁷ See also J.H. Hans, H.G. Sevenster and H.H.B. Vedder (Eds), *ibid*, The Hague 2000, p. 214.

⁵⁸ See COM (2000), 166 def.

⁵⁹ Article 10 third paragraph under f.

⁶⁰ e.g. EC Court of Justice case C-340/96, *Commission v United Kingdom* (drinking water).

5. Provisional conclusions EC legislation on waste

Introduction

It is no easy task to determine the quality of European legislation in the field of waste. It is in particular most difficult to isolate the problems that are directly related to the manner in which European legislation is concluded, the quality of the contents and the manner of implementation by the Member States. Firstly, because any treatment of waste is an intrinsically complicated matter regarding which, moreover, national, European and international law are frequently at odds. The complexity of the provisions on waste is, *inter alia*, caused by the fact that waste:

- a) has different faces, e.g. rubbish in the streets, the return of bottles to the supermarket, incineration on sea or landfill of waste on a landfill site, etc;
- b) usually has a negative economic value as a result of which much money can be earned by, for example, mixing different types of waste (e.g. chemical waste and domestic waste so that it can be land filled as cheap domestic waste);
- c) not merely concerns disposal, but also prevention by the use of specific raw materials, improved product development (durable products), the use of less packaging material (smaller products, less separate packaging) and
- d) a transfrontier problem is that there is trade in waste between Member States, whereby the internal market is involved, as the import and export restrictions are not always justified from an environmental point of view and may cause distortion of competition, and 'last but not least' there is
- e) the problem of 'waste tourism' (illicit trade) to countries outside the European Union where disposal is often much cheaper in practice, as it is subject to less far-reaching environmental obligations.

Due to the fact that waste disposal has so many aspects, European law and national law are also based on diverse concepts. This increases the chance of friction and conflicts. The differences of interpretation between, for example, the provisions on waste laid down in treaties such as the Basle Convention relating to the disposal of hazardous waste, domestic waste and residues of the incineration of domestic waste and the import of these wastes for re-use in the importing country concerned, the primary (EC Treaty) and secondary (EVOA) European law show the full scale of the complexity of this area of policy. For example, it is doubtful whether the EVOA is a proper elaboration of the Basle Convention. Overall, there seem to be four points of possible tension between both regulations:

- a) the Basle Convention provides for an absolute ban on imports (Art. 4 paragraph 1), while the EVOA only provides for this where it is necessary for the application of the principles of proximity, priority for recovery and self-sufficiency (Art. 4 paragraph 3);
- b) the so-called PIC procedure (where the requirement of prior permission of the recipient country is essential) solely applies under the EVOA with respect to the red list (hazardous waste), while it applies to all wastes (broader than red list EVOA) under the Basle Convention;
- c) the principle of self-sufficiency may not be invoked for recovery of waste under the EVOA (Düsseldorf!), while under the Basle Convention the principle of self-sufficiency must be applied at all times;

⁶¹ It must be noted that the criteria referred to in this article solely apply to the transport of waste for disposal: as regards waste for recovery, the EVOA applies even stricter criteria.

- d) a ban on exports in principle under Basle versus the EVOA principle of allowing exports (solely a technical difference of legislation?)⁶²

In addition, as regards the law on waste, there is often a wide gulf between 'the law in the books' and 'the law in action'. Research shows that, for example, where it concerns the control of transfrontier transport of waste, the physical scale of the number of transports and the transported quantity of bulk waste is such that it is virtually impossible to establish a perfect control system for this. For example, the total number of mandatory notification of waste transports for the Netherlands from and to other EU Member States under the EVOA was estimated at 750,000 per annum in 1995. If we take into account that the supervision of fraud relating to transports requires much technical expertise, it is clear that this quickly leads to a considerable shortage of enforcement.⁶³ In other words, it is not easy to determine to what extent the quality of the European regulation as such is responsible for problems relating to the implementation and enforcement of provisions on waste.

Other issues, such as the lack of time, manpower and resources in the supervision of the compliance within the Member States also fulfil an important role. Considering that the enforcement of European environmental law as the final link in the regulatory chain has only been given a high priority in the Netherlands and abroad over the last few , it is important to refrain from drawing hasty conclusions that our problems are solely or for the major part caused by the defective quality of the European regulations on waste.

Nevertheless, this quality is subject to criticism, in particular, as regards the comprehensibility and transparency of the following EC decisions on waste: the 'Framework Directive' on waste 75/442, Directive 91/689 on the management of hazardous waste, Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (EVOA), the Directive on packaging waste 94/62, Directive 94/67 on the incineration of hazardous waste and Directive 1999/31 on the landfill of waste.

As regards the *lawfulness*, the Directives at issue do not immediately give rise to any objections, although the EVOA Regulation does not appear to be entirely in accordance with the Basle Convention (see the comments in the preceding paragraph). For the practical implementation and enforcement, this means that dilemmas may arise between the two 'masters' that must be served. However, the Dutch experiences do not immediately indicate that the differences between EVOA and the Basle Convention will lead to significant implementation or enforcement problems. But it is noticeable that, in practice, there are clear opinions on the application of either the Basle Convention or the Community provisions on waste. However, in reply to questions regarding the most applicable regime, the respondents in the interviews do indicate that the Community provisions must be complied with, as they would be more mandatory. The fact that, as yet, no problems have occurred in this respect, does however not guarantee that they will not occur (even in the near future).

Fairly serious problems relating to the Community provisions on waste do occur with respect to the *implementation and enforcement*. Problems occur at different levels. At the first level, there is the problems that implementation and enforcement authorities believe that they are insufficiently involved in the preparation of (the implementation of) Community

⁶² Compare Ch.W. Backes, *Van den Bosch naar Basel en terug: Enkele opmerkingen over the juridisch kader voor grensoverschrijdend afvalstoffenvervoer* (From Den Bosch to Basel and Back: Some Comments on the Legal Framework for Transfrontier Shipments of Waste), Oration Tilburg, Deventer 1997.

⁶³ See G.H. Addink and Ch.W. Backes, *Handhaving van milieuregelgeving inzake afvalstoffen*, ('Enforcement of Environmental Provisions on Waste') in: Commission of administrative-law and civil-law enforcement, High-level Enforcement, Deventer (the Netherlands) 1998, p. 283.

⁶⁴ Compare, inter alia, A. de Moor-van Vugt, *Stalen vuist of fluwelen handschoen (SteelFist or Velvet Glove?)* in: B. van Klink and W. Witteveen, *De overtuigende wetgever* (The Convincing Legislator), Deventer 2000, p. 228.

provisions on waste. Issues that are expected to lead to bottlenecks in the enforcement of the Community provisions (to be transposed) are therefore not signaled and, as a result, the provisions can subsequently not be implemented. An example given concerns the provision in EVOA that obliges the notifier of, for example, a shipment to return a waste cargo that has not been transported across the frontier in accordance with the European provisions to the country of origin. However, the problem is that in the event that, for example, they use a front man from abroad, the European law lacks the means to directly call on such a front man.

Problems relating to the implementation and enforcement also occur, at a second level, with respect to the use of terms such as 'hazardous waste', 'disposal' and 'useful application' from the Community provisions on waste. The nature of the selected regulation system using appendices and (quickly) changing lists is so complex that its practical use with respect to the implementation and enforcement is most difficult, in particular, where the implementation and enforcement are partly decentralized, as is the case in the Netherlands. A repeated complaint is that, in practice, it is unclear when it (no longer) concerns waste and how to distinguish between, for example, disposal and useful application of the landfill and recycling of waste. It is expected that the amendment to the Environmental Management Act (*Wet milieubeheer*) and the further criteria currently prepared by the Commission will only provide a partial solution.

A third dimension is closely related to the complexity of the Community provisions on waste. As the provisions on waste have a most technical and specialist character, a high level of expertise is required for the implementation and enforcement of the provisions within the Member States. The necessary expertise is not always available in the national implementation and enforcement of those provisions on waste resulting in a lack of enforcement.⁶⁵ A positive element in this context is the spontaneous initiatives carried out by the enforcement authorities within the Member States to discuss and harmonize the experiences and efforts with respect to the enforcement within the area of the EVOA via the IMPEL/TSF network. A problem is that the status of this network is not yet certain and the Commission does not yet recognize TSF as a full-fledged advisory body of the Community. Apart from these collaboration initiatives, the mandatory notification for Member States also has a positive effect on the implementation of the provisions of waste. Under Directive 91/692, the Member States have a three-yearly mandatory notification relating to the provisions on waste. The Commission seriously reviews and publishes the notifications on the performance of the provisions of waste. In many cases, they are also used as the basis for a notice of default.

Further to the problems of the provisions of waste with respect to the implementation and enforcement, the regulations examined also have defects with respect to the *effectiveness and efficiency*. The Directives on waste also incur 'silent losses' in the realization of the Community policy on waste in the sense that certain parts of the provisions on waste cannot be enforced, either on account of the complexity of the provisions or on account of a shortage of the necessary expertise in the enforcement. Contrary to other areas of policy, the area of Community policy on waste has certain feedback mechanisms (IMPEL/TSF network and the mandatory notification on the environment) that contribute to more supervision by the Commission, although with intervals. A specific problem examined in relation to the Directives is the fact that the direction used in the Directives of waste with respect to the means to be used or not to be used by Member States to attain a Directive's objective.

Based on the example of agreements on the environment concluded by the Dutch government for the implementation of the direction, it appears that Europe, at times, says two

⁶⁵ Generally, close collaboration is required in these fields for an effective enforcement while this is often not the case in practice. In this respect, see, *inter alia*, A.B. Blomberg, *Integrale handhaving van milieurecht* ('Integral enforcement of environmental law'), The Hague (the Netherlands) 2000.

different things. On the one hand, there are recommendations and calls from the European Parliament and the Council to promote self-regulation and agreement practices and, on the other hand, there is a fairly rigid prosecution practice by the Commission and the where it concerns the use of these flexible implementation instruments. In our opinion, the European legislator should not only regulate the implementation methods in recommendations, notifications and resolutions, but also make it clearer in the Directives themselves what is expected of the Member States. This would also send a clear message to the Court on what must apply by law in the Member States and it would preclude such ‘accidents’ as occurred with respect to the packaging agreement II.

As regards the *proportionality and subsidiarity*, the regulations examined give rise to few objections, although the method in which a Member State must maintain lists on waste in the event that it wishes to apply stricter requirements is fairly elaborate and perhaps disproportionately burdens those Member States that have decentralized the implementation of the provisions on waste.

As regards the *mutual harmonization* of provisions, the EVOA and the Basle Convention are not harmonized properly. We already discussed this problem. The use of framework Directives and the EVOA Regulation have initiated a functioning harmonization between the Community provisions on waste. Further harmonization in this respect may ensue from the efforts made by the Commission to lay down further criteria for the use of the terms waste and disposal.

The provisions on waste show a substantial lack of quality with respect to *simplicity, clarity and accessibility*. Many Community provisions on waste use, where it concerns central definitions and terms, complex and quickly changing annexes. Taking into account that Dutch legislation often refers via dynamic references to those lists, this means that the regulations concerned are difficult to access for parties involved (both the government and citizens, companies and institutions) as a result of which there is, for example, uncertainty as to what must or must not be regarded as waste. The use of complex and technical terms is not a problem as such (and inevitable), the problem is posed by the context in which those terms must be interpreted and applied. The fact that Dutch legislation on the environment originally opted for a different terminology than Community legislation with respect to disposal increases the problems in this respect exponentially. The intentions of the legislative proposal Amendment to the Environmental Management Act (structure waste disposal), parliamentary documents II 1999/2000, no 26 638, to bring the terminology in line with the Directives on waste must therefore be applauded.

CHAPTER 6

GERMAN CASE LAW

1. Introduction

The research team also examined some experiences with respect to the regulations at issue in the Federal Republic in Germany. The scope of the research did not allow for an in-depth study of German experiences. A law-comparative study would then have to be conducted first, into the experiences with respect to the quality of EC regulations and the impact of this quality on the implementation and enforcement in Germany.

The present analysis concerns a quick scan of German case law in the field of the EC regulations at issue. The following research method is applied. During some days, research was conducted in the German on-line Juris database in Maastricht with the assistance of an

⁶⁶ The possibility of using agreements as an implementation instrument has meanwhile been further restricted by the Court in the Court of Justice judgment of 22 April 1999, C-340/99, *NTER* 2000, p. 148-150.

expert . This resulted in 58 relevant cases. 44 cases were related to the Community regulations on waste and 14 to the access to information on the environment. As regards the regulations in the other fields examined in this research, no judgments from the German courts were found.

2. Case law in the field of access to information on the environment

The German case law in the field of the Community regulations examined with respect to access to information on the environment is interesting as Germany has conducted proceedings before the Court of Justice in the context of an infraction procedure due to the incorrect implementation of the Directives on access to information at issue.

The Court of Justice's judgment of 9 September (Commission v Germany) especially concerned the question whether, as Germany had done, the bodies acting in a judicial capacity are all excluded from the scope of the Directive and the question whether preliminary administrative procedures would fall within the scope of the exception of preliminary investigation proceedings. The Court believed that the full exclusion of bodies acting in a judicial capacity was fair and that the exception of preliminary administrative procedures was lawful insofar as they arise from the need to obtain proof.³ Within the German provisions, it was deemed unacceptable that costs must also be reimbursed for applications for information that are refused and the provision refusing to furnish any information in cases where a ground for refusal applies.

In this respect, the Court's case law also clarified many aspects: especially with respect to those questions – charges and information from preliminary administrative proceedings in an administrative procedure – some disputes had arisen.⁴ Recently, following the subjects at issue in the Court's case law, some cases have arisen with respect to the charges for applications for information on the environment. For example, the question whether information on the environment under Art. 5 of the Directive on access to information on the environment also requires the provision of information free of charge in cases where the user applies for the information with a profit motive. On 7 March 2000, the Bundesverwaltungsgericht stated that in such cases, a reasonable charge may be made.⁵ In addition, the Bundesverwaltungsgericht stated that information on the environment also includes information regarding the financial government efforts to promote environment-friendly production processes.⁶

3. Case law in the field of waste

The majority of the cases found in the field of waste concerns the EVOA that also has direct effect in Germany and the Directives. It appears that Germany has also struggled, both before and after the EVOA, with the question where it concerns a waste in the sense of Directive 74/442 and how a distinction may be made between, for example, 'disposal' and 'recovery' and 'landfill' and 'recycling' of waste. The definition of the term 'waste' in Directive 75/442 also gives rise to many questions in Germany, as in the . Until 1995, Germany used a strict interpretation of waste, whereby wastes destined or suitable for economic reuse were not included in the terms waste of Directive 75/. However, in the Vessosso & and the

¹ Mr A. Bessems.

² C-217/97, Commission v Germany.

³ See also EC Court of Justice 17 June 1998, C-321/96, for a similar judgment.

⁴ See e.g. the judgment of Oberverwaltungsgericht Nordrhein-Westfalen 28 July 1997, *NVwZ* 1998, 888.

⁵ BVerwGE 27 March 2000, *NVwZ* 2000, 913-915.

⁶ BVerwGE 25 March 1999, BVerwGE 108, 369-379.

⁷ See Chapter 5 paragraph 3 of this study.

⁸ See BVerwGE 26 May 1994, BVerwGE 96, 80-86 (LT). In this case, the Bundesverwaltungsgericht noted that ashes and plaster are not regarded as waste as they form part of construction materials via reuse.

Commission v Germany, the Court of Justice interprets the term waste in a much broader sense. It also includes wastes suitable for reuse. A Member State that excludes wastes suitable for economic reuse from the concept of waste in the sense of the Framework Directive in its national legislation therefore acts in violation of Directives 75/442 and 78/319.¹¹ In Germany, this shift has given rise to many cases, especially as the Bundesverwaltungsgericht had committed itself to a more strict interpretation of the term waste. As in the Netherlands, there were questions with respect to the (safe) incineration of and manners in which to dispose of waste in an environmentally sound manner.¹³ All were included in the broad concept of waste –also by the German court.

Germany encountered more problems with respect to the concept of waste in relation to the transfrontier shipment of waste. They concerned, in particular, the difference between the bans on exports to EU countries and non-EU countries. A question that was posed to the BVerwGE – following several previous judgments from courts in the federal states – was whether or not it is in violation of the German Constitution and the EU Treaty to subject the transports of old textiles to the Czech Republic and Slovakia to the EVOA obligation of the compulsory notification. After all, this export relationship seems to fall outside the scope of EU powers. According to the Bundesverwaltungsgericht, such a notification requirement is both compatible with the German Grundgesetz and primary Community law.¹⁴ Meanwhile, on 29 July 1999, the Bundesverwaltungsgericht submitted a preliminary question asking whether the notification requirements for exports of certain ‘safe’ wastes outside the EU as implemented by the federal state of Baden-Württemberg are not in violation of other bilateral and multilateral obligations guaranteeing free trade.¹⁵ The European Court of Justice has not yet rendered a preliminary decision.

4. Provisional conclusion

The German case law shows that more or less similar problems exist with respect to the use of terms. In particular, the term waste where the combination of the term waste and the broad interpretation given to this term by the EC Court of Justice also gave rise to problems and disputes in Germany. The case law of the German administrative court with respect to the question whether the EU may require mandatory notifications for transfrontier waste transport to non-EU-countries is special. Although the Bundesverwaltungsgericht has determined that neither the German Constitution nor the EU Treaty itself impedes such an obligation, the question remains whether this obligation may be maintained in the light of international agreements on free trade (e.g. GATT agreements).

CHAPTER 7

Conclusions

1. The quality of EC regulations examined in four files

⁹ EC Court of Justice, consolidated cases 206/88 and 207/88, *M&R* 1992, 45 and case 359/88, *M&R* 1992, 94, note Jans.

¹⁰ EC Court of Justice case C-442/92, *Commission v Germany*, *Jur* 1995, 1-1097.

¹¹ This judgment is confirmed in the EC Court of Justice C-422/92 case, *Commission v Germany*, *Jur* 1995, 1-1097.

¹² Verwaltungsgericht Neustadt 20 August 1999, *AbfallPraxis* 1999, 27-28.

¹³ See BVerwGE 27 June 1996, *NVwZ* 1996, 1010 and Oberverwaltungsgericht für das Land Nordrhein-Westfalen 10 August 1998, *NVwZ* 1999 91-92.

¹⁴ BVerwGE 19 November 1998, *NVwZ* 1999 1111-1112.

¹⁵ BVerwGE 29 July 1999, *NVwZ* 1999 1228-123 in the appeal against the Verwaltungsgerichtshof of Baden-Württemberg judgment of 24 November 1997, *ESVGH* 48, 98-108.

The research team has examined and assessed the quality of a number of selected EC Directives in relation to the impact of the quality of those EC regulations on their application, implementation and enforcement in Member State the Netherlands. In order to assess this, four clusters of Directives were reviewed to assess to what extent and in what respect their quality is defective and what the consequences of this are for the application, implementation and enforcement of those Directives. The quality standard used is composed of the requirements as outlined in the context of the Dutch legislative policy in the policy memorandum 'Views of Legislation'.¹ In the light of this, the research team has examined the question of how the EC regulations score with respect to the quality dimensions a. lawfulness, b. implementation and enforcement, c. efficiency and effectiveness, d. subsidiarity and proportionality, e. mutual harmonization and f. simplicity, clarity and accessibility.

1.1 The files

The research team has examined four clusters of EC regulations – selected by the client – mostly including EC Directives. It concerned the following clusters:

- Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (*O.J.* 1996 L 124) as amended by Directive 98/76 (*O.J.* 1998 L 227);
- Community framework regulations on State Aid for research and development (*O.J.* 1996 C 45) as amended (*O.J.* 1998 C 48);
- (related) EC decisions on waste (75/442, 91/689, 259/93, 94/62, 94/67 and 1999/31);
- Directive 90/313 on the freedom of access to information on the environment (e.g. in relation to parts of Directives 67/548, 89/369, 90/220, 91/414, 96/82, 97/11, 98/8);

As indicated in paragraph 3 of Chapter 1, these resolutions were selected by the client in consultation with a preparatory group according to the method of the 'educated guess'. On the basis of their professional experience, members of an interdepartmental preparatory group selected files known to them and regarded as 'averagely' problematic: neither the files with – as known - the most serious qualitative problems nor the files with no or few quality-related problems were included in the selection. The representative value of the selection is therefore based on the seriousness – according to the preparatory group – of the qualitative problems at issue. This circumstance alone means that this study is merely an orientation and the results only provide an indication. The research method applies is neither representative with respect to the policy areas, at a national or Community level.

1.2 Presentation of the conclusions

The specific file-results and the conclusions pertaining thereto were already discussed in the previous chapters of this report. This concluding chapter compares the interim conclusions, listed in the final paragraph of each chapter, in order to draw a final conclusion on the EC regulations examined. This also means that the specific file-conclusions are not discussed here. We refer to the interim conclusions at the end of each chapter for those.

1.3 Context

Following the final conclusions in this chapter, we shall – in order to review the research results in their context – briefly examine previous research conducted into the quality of EC regulations and the results arising therefrom. In a concise overview, we shall discuss the extent to which the analyses and conclusions from that research concur with our research

¹ Parliamentary Documents II 1990/91, 22 008, nos 1-2.

results. This comparison also provides insight into the question to what extent the solutions and remedies suggested – discussed thereafter - are valuable with respect to the bottlenecks and problems signaled in this research.

2. The quality of EC regulations in this research: a summary of the provisional conclusions from the file-analyses.

The research team examined various Directives and other EC decisions in different areas of policy with a view to qualitative defects and the impact of these defects on the implementation and enforcement of EC decisions in the Netherlands. The qualitative criteria used were based on Dutch qualitative criteria as formulated in the policy document ‘Views of Legislation’. Even in cases where the approaches to quality differ between the European Union and the Netherlands, the Dutch criteria have some validity and force that may be useful to a review of EC decisions. On the one hand, this is the result of the fairly broad and therefore general – at times even universal – character of the Dutch criteria and, on the other hand, of the mutual relationship between the Community notions and standards of quality in development and the Dutch. A review on the basis of the Dutch qualitative criteria provides the research with respect to the EC legislation examined with the following – concise - overview of the impact of the quality of EC legislation on the implementation and enforcement in the Netherlands.

2.1 Lawfulness

As regards the lawfulness, the Directives examined did not give rise to any considerable problems. A problem relating to the lawfulness occurred within the area of waste. The circumstance that, apart from the EVOA Regulation, the Basle Convention essentially regulates the same substance is a bottleneck to the extent that the Convention and the Regulation differ in some respects. The question is whether the Convention or Regulation has priority, especially in view of the fact that the EC is party to the Basle Convention. As yet, no ‘accidents’ have occurred with respect to the implementation and enforcement, but that is certainly no guarantee for the future.

2.2 Implementation and enforcement

The problems relating to the implementation and enforcement belong to the most urgent problems of quality encountered in this research project. The problems in this field have different causes. The most important causes are:

- a. In the preparation of a Directive, insufficient attention is drawn to the implementation and enforcement of the Directive itself, and/or the implementation measures required on the basis of the Directive. The research includes examples of this with respect to the Directives on waste that – in view of the weighing-up of interests necessary to determine what may be regarded as waste – impose a great burden on the enforcement and implementation institutions to put the term ‘waste’ into operation.
An ancillary problem – also encountered in the examination of other Directives – is that implementation and enforcement institutions are at times incapable of or unable to implement EC Directives. This problem is not always caused by the problems related to the quality of the EC rules themselves or the quality of their preparation (the problem may well be due to the implementation method of the Member States). However, in combination with the few direct possibilities of feedback of the experiences with the implementation and enforcement to the European Commission, it causes the stagnation of the implementation and enforcement of an (implemented) Directive. Examples of this are the Community requirements laid down for the licence

for road haulage operator and road passenger transport operator and the amendments to those. The research shows that the enforcement authorities can hardly enforce some of those .

The nature of the EC Directives on waste is at times so specialist that regular supervisors or investigating officers are not or hardly capable of applying these. The required expertise is not always available. Although Member States are responsible for the implementation and enforcement of EC decisions but without any Community support, they are often unable to do so. Especially where the implementation and enforcement of EC legislation have transfrontier dimensions, this exceeds the strictly national implementation and enforcement possibilities of a Member States.

Nevertheless, for the major part, the Member States are left to their own devices. This is illustrated by the example of the EVOA that instructs the party responsible for a transport to return the waste. This is currently the ‘notifier’, but this means that the party actually responsible cannot be called on, especially since the term ‘notifier’ provides opportunities for the use of front men in international shipping.³

The research shows continuously that, according to the respondents, the implementation and enforcement are not given sufficient priority by the Commission. The Commission focuses, in particular, on the formulation of new policy, whereby the details regarding implementation and enforcement are left to the Member States. Generally, the enforcement of EC law is of some concern.⁴ The result of insufficient provisions relating to the implementation and enforcement at times result in the non-enforcement within the Member States. Different sides therefore argue for a system of ex-ante review of EC decision with regard to the implementation and enforcement aspects to prevent problems.⁵ This is a complex matter since it means that the implementation and enforcement situation in fifteen Member States must be taken into account. The Commission has already indicated several times that it intends to draw more attention to the implementation and enforcement in the preparation of EC provisions, but, to date, there is no real improvement. There are various reasons for this. Firstly, as indicated above, it is most difficult to appraise the implementation and enforcement situation in the Member States correctly. Secondly, in the preparation of EU regulations, it does not yield any direct policy or political ‘profit’ to draw extensive attention in advance to the implementation and enforcement aspects that a Directive might entail. It is furthermore most costly and time-consuming and it is also a matter for which the Member States are primarily responsible under the Treaty.

- b. It is difficult to *communicate* the problem regarding EC Directives that cannot be implemented or enforced with Brussels. The analyses of the subchapters show that where Directives, for example, introducing criteria or terms cannot be implemented or enforced or introducing systems which implementation institutions or enforcement authorities in the Member States cannot apply, that ‘silent losses’ are often incurred. The losses mean that a Member States transposes the literal Directive in a legally correct manner but that, in practice, no implementation or enforcement is carried out. Such problems occur in some of the cases examined in this research project without

² See Chp. 4.

³ See also the problems in this respect in Germany referred to in chapter 6.

⁴ See, *inter alia*, L.J. Brinkhorst, Summing-up of the Conference (report of the conference Improving the Quality of Legislation in Europe), in Alfred A. Kellerman, et al. (ed), *ibid* 1999, p. LV. And W.R.J. van den Hende in the same edition, p. 70-71.

⁵ Van den Hende, for example, argued for an ‘Impact Statement’ accompanying any intended EC regulation. Those impact statements might be created by completing a so-called ‘impact fiche’. See W.R.J. van den Hende, *ibid*.

any feedback to the Commission. The TSF/IMPEL network set up by individual initiatives collaboration between the Member States of implementation and enforcement authorities relating to the environment – is one of the alternatives filling this gap.

- c. An indirect problem related to the implementation and enforcement of Community provisions is that where the Community provision intends to create a uniform regime for all Member States, differences subsequently occur and result in strategic behaviour by citizens of the Member States by operating or searching for the Member States with the mildest regime. We encountered these problems, *inter alia*, in the examination of the Directives on information on the environment and the Directives on admission to the occupation of road haulage operator and road passenger transport operator.
- d. The implementation and enforcement institutions are not systematically involved in the preparation of the implementation of EC provisions in the Netherlands. Foreseeable enforcement problems are therefore not signaled (or too late) and not resolved at an early stage. Naturally, the latter problem, also occurring in the field of the implementation of regulations on waste, cannot be attributed to the defective quality of EC legislation, but it does play a significant role.

2.3 Effectiveness and efficiency

The research demonstrated problems relating to effectiveness and efficiency particularly in the form of ‘silent losses’ incurred as a result of the non-enforcement of parts of (implemented) Community provisions. During the research into these fields, we encountered cases of ‘paper implementation’, i.e. legally correct implementation carried out in such a manner that it will not lead to infraction proceedings although it is was clear at some point that the implemented provision could not be enforced. Examples were found in connection with Directives on admission to the occupation of road haulage operator and road passenger transport operator and – although more indirectly – the Directives on waste.

Contrary to other areas of policy, the Community policy on waste does have feedback mechanisms (IMPEL/TSF network and the mandatory notification on the environment) contributing to more supervision by the Commission, although with intervals. The problems of stagnation in the enforcement are thereby resolved, as the practical experiences with the implementation of the regulations are made clear.

A special problem occurring with respect to the provisions on waste in connection with the effectiveness and efficiency of EC legislation concerns the direction used in the Directives on waste with regard to the means (not) used by Member States to attain the objective. Based on the example of the environmental agreements concluded by the Dutch government for the implementation of Directives, it became clear that the European legislator at times seems to say two different things. On the one hand, the recommendations and calls by the European Parliament and the Council to promote self-regulation and agreement practices and, on the other hand, there is a fairly rigid prosecution practice by the Commission and the where it concerns the use of these flexible implementation instruments. Perhaps, the European legislator should not only regulate the implementation methods in recommendations, notifications and resolutions, but also make it clearer in the Directives themselves what is expected of the Member States.

⁶ The possibility of using agreements as an implementation instrument has meanwhile been further restricted by the Court in the Court of Justice judgment of 22 April 1999, C-340/99, *NTER* 2000, p. 148-150.

2.4 Subsidiarity and proportionality

As regards the subsidiarity and proportionality of EC regulations, only a few concluding comments may be made. The subsidiarity and proportionality of the EC decisions gave rise to few direct problems. Conflicting competences between Member States and the Union did not occur in any of the regulations examined. An indirect problem for the implementation and enforcement in the Netherlands was the occasionally defective connection of the European rules with national legislation. This is a problem that must be resolved by the Member States themselves in the transposal and implementation of rules, but the research did show that, in some cases, it has a most disruptive effect on the enforcement of rules in the Netherlands if, in particular, EC Directives already include provisions regarding the enforcement or sanctions of EC rules. Where this occurs, the enforcement systems are often fairly rigid and do – for example – not properly connect with the Dutch bargaining culture.

2.5 Mutual harmonization

The mutual harmonization between the EC Directives may be improved. The research showed at various points that the DG's in Brussels focus on their own legislation and as a result:

- a. the DGs lack mutual awareness of one another's legislative products;⁷
- b. EC Directives sometimes include conflicting requirements relating to the same subject;⁸
- c. there is little 'direction' with respect to the mutual harmonization of EC legislation.

The lack of direction in particular hampers a proper implementation and enforcement of Community provisions in the Member States in several respects. Firstly, it is usually left to the Member States to resolve any (alleged) conflict between the EC provisions. Feedback to the Commission is often difficult in this respect. Secondly, the overview of existing and EC provisions in force seems to be lacking, as also appears from the case examined with respect to the Directives on the accessibility to information on the environment. This case showed, *inter alia*, that the Commission is not capable of providing an overview of the EC provisions in force within the area of the accessibility to information on the environment.

2.6 Simplicity, clarity and accessibility

Simplicity, clarity and accessibility (hereinafter referred to under the heading 'accessibility') of EC provisions, and in particular EC Directives, constitute significant problems, although the impact on the implementation and enforcement is not always as considerable.

Many of the problems relating to the accessibility of EC provisions, in particular EC Directives, are caused by the fact that there are various different legislative cultures within the EC, each with their own tradition. In the Netherlands, for example, we are used to developing and using statutory regulations in a specific manner deviating from the methods used in the UK or in France. As regards the terminology, there is the added problem that EC provisions must seek to connect with the terms used in the individual Member States and the ancillary legal concepts and systems that differ considerably from country to country. Certain problems pertaining to the EC provisions are therefore actually inherent to the nature of the substance. For example, many of the problems related to the term 'waste' cannot or can hardly be precluded or resolved as it was the intention to provide a basis and a regulation for the manner in which 'waste' is handled in the EU via a relatively new term. Such a problem can hardly be precluded.

⁷ E.g. see the analyses conducted with respect to the Directives on the admission to the occupation of road haulage operator and road passenger transport operator in Chapter 4.

⁸ Example referred to in Chapter 4.

Many of the accessibility problems in EC Directives – such as unclear, confusing terminology, incomplete or inconsistent regulations or use of vague terms – are directly covered by the work to be carried out for the transposal of the provision by the national legislators. Any negative effects of a Directive failing with respect to the implementation and enforcement are therefore directly overcome. Naturally, there is no such safety net for EC provisions with direct effect, such as the Treaty provisions, EC Regulations or provisions of EC Directives that have acquired direct effect (insofar as they are eligible to this by virtue of their contents) due to the expiry of the implementation time limit.

Certainly, the technical aspects of EC legislation related to the accessibility, are not high on the list of priorities of the parties involved in the preparation of European provisions. The low priority also means that any comments regarding the technical aspects of legislation have little status during the preparations of Community provisions. Policy subjects and aspects dominate the preparations.

2.7 Other qualitative problems and their impact

A qualitative problem not covered as such by the review based on the (Dutch) qualitative criteria is the lack of feedback of experiences with the implementation of EC legislation. The spontaneous initiative of the enforcement authorities to establish the TSF/IMPEL network with a view to the EVOA indirectly demonstrates the fact that this is desired and has a positive effect on the quality of EC legislation. The systematic notification with respect to the implementation of environmental Directives in the Member States, including the Directives on waste, shows that this enables more intensive control by the Commission and, subsequently, that the Commission is better able to communicate with the Member States on the situation relating to the implementation and enforcement of Community provisions.

3. Research into the quality of EC decisions

The quality of Community legislation – in particular, during the past ten years – has often been discussed in the Netherlands and examined. On the one hand, this is result of ever-increasing insights in to the functions of legislation and insights into factors that may (not) contribute to attaining the objectives pursued by legislation. In addition, increasingly more attention is drawn to the quality of EC regulations in the context encountered by the Netherlands in the realization of EC law within the Netherlands, whether or not via transposal of EC Directives. It is not productive to examine those research projects and discussions conducted in literature on the quality of EC regulations once more. However, some attention must be drawn to the main lines, for example, to review whether or not the research conducted merely confirms the existing views or produces new insights.

Briefly summarized, the analyses in the research of the past years provides the following views, according to this research, with respect to the qualitative defects frequently occurring in EC legislation.⁹

1. Qualitative defects as a result of the *organization of the Community legislative process*. This problem manifests itself in various forms, e.g. in the lack of institutional legislative attention in the preparation of Community legislation, insufficient possibilities of contributing items that may be important from a legislative point of view during the preparations, no feedback possibilities from Member States to the Commission during and after the transposal and

⁹ Important sources for this compilation were the article by J.P.L. Marissing, Vier rapporten inzake de kwaliteit van EG-regelgeving (*Four Reports on the Quality of EC Legislation*), in *SEW* 4 (1996), p. 124-134 and the dissertation by N.E. Bracke, *Voorwaarden voor goede EG-wetgeving* (Requirements for proper EC legislation), diss. University of Amsterdam, 1996.

implementation in a broad sense, and insufficient harmonization between national and Community legislative processes as a result of which it is, for example, difficult for national parliaments to make a contribution in time.¹⁰

2. Qualitative defects in the use of *EC regulatory instruments in policy-making*. The problems in this respect mostly concern the excessive regulation (particularly signaled by the Molitor Working), the – inevitable – circumstance that EC regulations are not directly in line with the particular legal systems of the Member States, the problem of selecting the right regulatory instrument (proper hierarchy of standards) and the failing collection of regulations of the Community legislator (in Netherlands, for example, pointed out by the Koopmans Working), the shortage of possibilities and problems with respect to the involvement of local government in the implementation of EC regulations and insufficient possibilities of using flexible implementation methods.¹³
3. *Technical aspects of legislation* causing problems within EC regulations. It concerns problems such as lack of accessibility, vagueness, unclear formulations, inconsistencies, unnecessary complexity and insufficient structures.
4. Problems concerning the *management* of the EC regulatory file. In this context, it mostly concerns problems relating to the access to EC regulations, publication and codification and consolidation of EC regulations.¹⁴

Brief comparison of this research with previous research

A brief comparison shows that many of the known problems emerged once more in this research project. In particular, many of the problems signaled in the field of the implementation and enforcement, subsidiarity, mutual harmonization, simplicity, clarity and accessibility confirm the existing views with respect to the qualitative defects of EC regulations. However, according to us, the research shows the following new elements – ranked according to their importance:

- i. the ‘*silent losses*’ that may ensue from a lack of quality of EC regulations. This may be caused by different factors, but one of the most important is the combination of the lack of feedback between decision-makers in Brussels and the implementation and enforcement bodies in the Member States as a result of which there may be a legally correct ‘paper’ implementation of EC regulations while there is no practical implementation or enforcement of those regulations – due to various motives. This is not sanctioned by either Brussels or the Member State. The lack of systematic control and supervision is particularly apparent here.

¹⁰ See e.g. V.J.J.M. Bekkers, J.M. Bonnes, A.J.C. de Moor-van Vugt and W.J.M. Voermans, *ibid*, Zwolle 1993.

¹¹ Report group independent experts on simplification of statutory and administrative regulations, COM (95) 288, 21 June 1995.

¹² See the report *De Kwaliteit van EG-regelgeving*, The Hague 1995.

¹³ See J.W. van de Gronden, *ibid*, diss University of Utrecht, Deventer 1998.

¹⁴ See, *inter alia*, the *Rapport Public* by the French Conseil d’Etat of 1992, in particular p. 49-53.

- ii. The low priority given to editorial and enforcement issues in the decision-making and preparations of EC regulations by the Commission. The research shows that ‘on paper’ attention may be drawn to the editorial quality of EC regulations, issues of enforcement and the contribution of (national) legislative and legal contributions, but that due to the scale and dynamics of the decision-making within the EU, the ‘technical’ contribution rarely leads to any results as political and policy-oriented contributions are much more important and all attention is drawn to this.
- iii. The consequences of ‘distortions of implementation’, i.e. the differences occurring due to the fact that Member States implement EC Directives pursuing total harmonization in different ways thereby giving rise to different regimes per Member States. This often leads to strategic or calculating behaviour on the part of citizens, businesses or institutions within the Member States. The addressees seek the Member State with the mildest regime, thereby complicating the implementation and enforcement in other Member States.
- iv. Insufficient involvement of national enforcement and implementation bodies in the preparations of EC regulations, as a result of which predictable problems or bottlenecks in the implementation are not resolved at an early stage.
- v. The shortage of mutual harmonization between EC regulations – also caused by the inward-looking attitude of the DGs of the Commission – as a result of which conflicting requirements are sometimes laid down by EC regulations concerning the same subject. The lack of harmonization in the form of a shortage of consistency in terminology within one and the same resolution, but also in closely intertwined regulations within a certain policy area may also be noted in this respect.
- vi. Insufficient harmonization of Community law with respect to the provisions of treaties concerning the same subject as the Community legislation. In particular, in cases where the Union is a party to the treaty, in addition to the Member States, this may pose problems.
- vii. The relative seriousness of the problems in the field of the quality of the editing of the EC regulations (especially Directives) in relation to the difficulties that arise in the implementation and enforcement of EC regulations. Vague terms and other defects in the editorial quality of EC regulations are inevitable to some extent due to the method and dynamics of decision-making within the EU, and the necessity to treat the 15 legal systems equally. A compromise is therefore – also at the level of the editing – of vital importance. In most cases, the problem of the defective editorial quality of an EC Directive is not a major problem *as such*: those problems are usually resolved by the Dutch legislation in the transposal, although this may be difficult. The defective editorial quality usually leads to real bottlenecks in the

implementation and enforcement in combination with other problems, such as an unclear objective of a Directive,¹⁵ a very short implementation time-limit, insufficient capacity at implementation and enforcement bodies, lack of consistency between the terms, defective harmonization with national regulatory systems, or the use of EC Directives as a document to formulate a policy without having sufficiently substantiated the normative meaning of a Directive (see also under h.).

Directives are meant to be transposed (see Article 249 EC Treaty).

Vague or inconsistent terms in a Directive, problems of structure or other problems of an editorial nature are therefore usually only difficult for the parties responsible for the transposal. It becomes more difficult where a Directive, intentionally or unintentionally, starts to have direct effect within a Member State by the expiry of the time limit, at least where they include provisions that may have direct effect. The vagueness of the terms of a Directive and the lack of an explanation on this may then, in practice, give rise to uncertainty and lack of clarity with respect to the intention and the scope of a Directive. This problem may also occur in a national resolution, but it is easier to resolve within a limited 'interpretation community' than in a broad and multicultural interpretation community such as the European Union. Naturally, the same problem also applies to Regulations although – according to this research – these are usually of a better (editorial) quality. This is obviously related to the fact that a Regulation has direct effect in the Member States.

The results of this research partly confirm previous research results and mostly highlight new dimensions of the previously signaled problems. Partly in the light of this, the question is relevant whether the approach opted for to date and the priorities laid down are or have been effective to deal with the qualitative problems of EC regulations. In order to assess this, it is necessary to give an overview of the policy approach used to date, both within the European Union and the Netherlands.

4. Policy focusing on the improvement of the quality of EC regulations.

The problem of the approach to the defective quality of EC provisions has – as shown – a certain tradition. Different solutions have been applied to improve the quality of legislation.

Community solutions to promote the procedural quality: the interinstitutional agreement

Since a few years, the problems of the defective quality of European provisions have also been put on the agenda within the Community institutions. In 1993, the Council of Ministers adopted a resolution on the improvement of the editorial quality of Community regulations (O.J. C 1993, 166/01). The set-up of this resolution was most restricted and did not bind all European legislative partners. Further progress was made upon the conclusion of the Treaty of Amsterdam in 1997 by appending a declaration (no 39) to the final act of the Treaty regarding the editorial quality of Community legislation including a call for the European institutions to reach joint Directives regarding clear, simple and precise editing of Community legislation. This declaration was followed by the Interinstitutional Agreement concluded last year and

¹⁵ E.g. the problem of the term 'disposal' in the EC regulations on waste as discussed in Chp. 5.

¹⁶ Of course, it does concern an editorial problem, but we have classified defective consistency mostly as a problem of harmonization in this research project. See also under f.

concerning the joint guidelines for the editorial quality of Community legislations adopted on 22 December 1998 (*O.J. C* 1999, 73/1). This agreement binds all institutions involved in the development of Community legislation. The preparatory Commission's report emphasizes that, after all, the care for better lawmaking is a shared responsibility of the European institutions.¹⁷

The set-up of the Interinstitutional Agreement concerning the joint guidelines for the editorial quality of Community legislation (hereinafter: the Agreement) is restricted, especially compared to the Dutch Instructions for legislation. The Agreement includes, above all, technical stipulations on legislation – 22 stipulations – supplemented by eight implementation measures relating to the manner in which the technical stipulations on legislation must be implemented within the European institutions. Especially in view of the fact that, before the conclusion of the Agreement, a comparative analysis was carried out with respect to all legislative directions in the Member States, and that, furthermore, an in-depth study was conducted into the case law of the EC Court of Justice, the harvest of 22 mostly technical stipulations regarding legislation seems rather meagre. However, compared to the former – very broad – Council resolution of June 1993, it is a step forward, both as regards contents and as regards the binding character.

The 1998 Interinstitutional Agreement hardly includes any stipulations regarding issues relating to the implementation or enforcement of Community decisions; the Agreement focuses strictly on the technical aspects of lawmaking. It must be noted that the 1998 Agreement is not intended to be the final step but merely a step to draw more systematic attention to the quality of Community regulations. The implementation measures related to the Agreement also show that this is a continuous process. The measures provide, *inter alia*, for a further cooperation between Member States and institutions with a view to a better understanding of the aspects to be considered in the editing of texts, the composition of editorial teams within the institutions involved in legislation, and – interestingly – the drawing-up of a joint practical guide relating to the Agreement for the benefit of any party cooperating in the editing of legislative texts.¹⁸

Community solutions focused on an increase of the substantial quality of EC provisions

In 1994, the European Commission set up a working party to review the manner in which Community policy-making is regulated in different sectors. This Molitor working party – including independent experts from the Member States and persons from the corporate sector – issued a report with a critical examination of the regulatory ambition of the Community with respect to the fields examined and a call for a change of culture. Subsequently, the European Commission decided to subject some sectors of the internal market to a critical review with the assistance of the Member States, the corporate sector and consumers. The review focused on the European internal market mechanism. The so-called SLIM exercise (Simpler Legislation Internal Market) may be regarded as an element in the follow-up to the Molitor report. The European Commission proposed to have four sectors of the Internal Market examined by four so-called SLIM teams. A difference with the activities of the Molitor group is that the SLIM operation was carried out under the presidency of the Commission and directly involved the Member States and other parties (corporate sector and consumers). The SLIM teams, working slowly, have to date not resulted in any revolutionary

¹⁷ See EC Commission, *Better Lawmaking 1998: a shared responsibility*, COM (1998) 715 final, dated 1 December 1998.

¹⁸ The so-called *Guide Pratique Commun*, of which the first French draft and the English version (Joint Practical Guide) are circulating (June 2000) within the Commission and the EP.

deregulatory operations. As State Secretary Benschop remarked: the SLIM operation as such is useful, but, to date, it has produced insufficient actual results.¹⁹

Dutch solutions

The quality of EC provisions does not solely depend on the efforts at the Community lawmaking level. In fact, many lawmaking processes are not completed upon the conclusion of Community decisions that include legislation. In some respects, the Member States are co-legislator and therefore carry a shared responsibility for the quality of EC legislation. The Member States, for example, are responsible for the quality of EC provisions in case of transposing Directives. After all, the Member States are free to use any available means to attain the objective.²⁰ The Netherlands has complied with this in several ways. Firstly, the considerations and requirements with respect to the quality of national legislation naturally apply to the statutory regulations implementing the EC Directives or to provisions implementing any EC law with direct effect. In addition, the Netherlands focuses on the quality care with respect to the implementation of EC decisions. The Instructions for regulations include a separate chapter (8) on the preparation and implementation of EC legislation. The instructions in that chapter concern both substantial and procedural legislative issues and refer to the entire procedure from the preparation of an EC decision in Brussels up to and including the notification phase of the implementation regulation to the Commission. These instructions are, *inter alia*, the result of the research carried out at the beginning of the Nineties by the Legislative Projects Review Committee into the problems relating to the implementation of EC legislation.²¹

The current instructions must overcome some of the most frequent implementation problems, such as problems occurring mostly in or in connection with the implementation of EC legislation via generally binding regulations. The instructions refer, above all, to drawing attention to the legislative at an early stage in the preparation of EC provisions (e.g. by the contribution of legislation departments or lawyers), to informing and involving Parliament, implementation organizations and enforcement authorities at an early stage and to accelerating the transposal process itself (by submitting the implementation measures to the Council of Ministers at an early stage, by refraining from including any additional national policy, etc.). Furthermore, the Instructions also include several technical stipulations on legislation in connection with the structure of provisions with Community aspects.

The manual ‘101 Practical Questions regarding the Implementation of EC Decisions’ (*101 Praktijkvragen over de implementatie van EG-besluiten*)²³ deals with specific questions that may arise from the implementation of EC law. This manual seeks to contribute, in particular via the provision of specific information, to the quality of the implementation of EC decisions. In particular, the 101 practical questions discuss the requirements – many of which are the result of the EC Court of Justice’s case law – set by Community law with respect to the implementation of EC law.

The Netherlands therefore draws specific attention to the quality of EC legislation and the ancillary transposal or implementation measures. It is not easy to measure the effectiveness of

¹⁹ See Parliamentary Documents II 1998/1999, 21 501-01, no 123, p. 2.

²⁰ See Article 249 EC Treaty.

²¹ Legislative Projects Review Committee (Review Committee), *Implementatie van EG-regelgeving in de nationale rechtsorde* (‘Implementation of EC legislation in the national legal system’), The Hague (the Netherlands) 21 December 1990.

²² By involving government officials concerned with legislation in the preparation of the Dutch position. However, the sheer scale of the Community decision-making means that it is difficult – as shown by this research project – to actually ‘introduce’ this contribution in the preparation of the Dutch position or to the Council’s working parties.

²³ Published in the *Gereedschap voor de wetgevingspraktijk* (‘Tools for Legislation’) series, The Hague 1998.

those efforts, but it is certain that the Dutch policy on quality is, of course, not the decisive factor in the conclusion of EC decisions and EC regulations of 'poor' quality must therefore also be implemented and applied in the Netherlands. Naturally, the effectiveness of the Dutch qualitative measures and systems varies. Since a few years, for example, it is Dutch policy to involve government officials concerned with legislation at an early stage in the preparation of EC legislation. In principle, it is a good idea to contribute lawmaking expertise in the development of EC provisions from the start. However, the sheer scale of the Community lawmaking processes means that the Netherlands, like the other Member States, must make strategic decisions with respect to the points contributed to the development of EC provisions: in most cases, only one or two significant points can be made during meetings of the fifteen representatives of the Member States. Due to the nature of things, points (also) concerning the quality of the EC provisions as such are often not discussed in the preparations: the focus is on policy issues.

Dutch policy with respect to Europe

Part of the Dutch policy on quality is to stimulate the quality of European regulations within the Netherlands and also on the European stage. That refers to, *inter alia*, deregulation and simplification of European regulations. This is shown by the active role fulfilled by the Netherlands in the simplification operation of European regulations (SLIM operation), but also by the publication of non-papers on this subject, the discussions relating to the application of the principle of mutual recognition of national rules in the implementation of EU agreements between Member States and the 'score board' (keeping score of the Member States' progress made with the implementation of EC provisions).

However, according to the Dutch government, a strategy to improve European provisions must be further developed. The Commission has promised to develop a strategy focused on the improvement of the quality of legislation in the short time, i.e. in 2000. The Netherlands will actively contribute to ensure that a strategy providing guarantees for high-quality regulations will be completed for the European Council in spring 2001. According to the Netherlands, this means that the strategy must concern the following:

- a better preparation of regulations drawing attention to better consultations between the Member States and the Commission, alternatives for regulations (e.g. self-regulation) and regulatory impact assessment (= the regulatory impact on the implementation, for example, by the corporate sector and central government);
- a program providing sufficient tools for the analysis of current regulations;
- implementation techniques for new regulations;
- monitoring and assessment of the effectiveness and efficiency of the new working method regarding the implementation of regulations after some years;
- a broad application of the guidelines for the editorial quality.²⁴

Effectiveness of the policy pursued

An examination of the policy pursued so far in the approach of problems regarding the defective quality of EC provisions with respect to the implementation and enforcement shows that this approach – not surprisingly – in a Community context focuses mostly on promoting the technical (procedural) quality of EC legislation (readability, accessibility, structure etc.). According to the research, this is exactly the field where no urgent problems occur with respect to the implementation and enforcement. Moreover, the status of instruments to increase the procedural quality of EC provisions is fairly low and – as shown by this research – the Commission does not always comply with it. In addition, the Community policy on

²⁴ See The State of Europe, Parliamentary Documents II 2000/2001, 27 407, no 1, p. 147.

quality does not offer a solution for the problem of defective feedback and assessment of the realization of European policy within the Member States and the ancillary silent losses relating to enforcement and implementation of EC legislation.

In this context, a policy focusing more on the contents as opted for in the Netherlands seems to refer more to the root of the problem. By drawing attention to several aspects important to the quality of regulation (lawfulness, implementation and enforcement, effectiveness and efficiency, subsidiarity and proportionality, mutual harmonization, simplicity, clarity and accessibility) at an early stage, many potential qualitative problems may be precluded. In that sense, instruments such as the Instructions for legislation, the 101 Practical Questions and the preparatory platforms set up in the Netherlands for drawing systematic attention to the quality of legislation are potentially important remedies. The problem of the Dutch policy, however, is that it is not (or hardly) in line with the Community policy. This is shown clearly by the experiences with the Dutch contribution regarding quality to the development of EC legislation. In most cases, this is not really discussed because larger or more important policy or political interests overshadow it. The Dutch contribution is only productive in cases where a regulation is prepared in the bosom of the Commission. This also means that part of the Dutch policy on quality is fruitless due to the fact that there is no interface with Community policy. However, the proposals submitted by the government during the European Council in spring 2001 seem to be important steps towards establishing such an interface. In particular, the emphasis put on the interest of and better preparation with systematic attention on qualitative issues, monitoring and assessment, and analysis of EC provisions may well create successful initiatives to promote the substantial quality and resolve some of the problems shown by this research.

5. A summary of the most important results of this research

The research focused on examining EC regulations in view of any qualitative problems and at the same time assessing the impact of those problems – if present – on the implementation and enforcement of those regulations. In our opinion, the research conducted has led to two principal results. Firstly, the research resulted in a more detailed insight into the problems of implementation and enforcement occurring as a result of the defective quality of EC regulations (see paragraph 2 of this chapter). Secondly, the research provided a new insight into the nature of the problems signaled and the underlying causes. Paragraph 3 of this chapter highlighted the new dimension of the problems signaled in this research, in the sense that they – in part – shed new light on the previous research conducted in this field. Briefly summarized, it concerned the following insights:

1. A lack of quality of EC regulations may lead to ‘silent losses’ in the form of non-application or non-enforcement of EC regulations with qualitative defects. These stagnations are not counteracted at a national or Community level due to fact that there is no feedback of enforcement experiences or a systematic review of the experiences regarding the implementation of EC regulations.
2. Editorial and enforcement issues are given a (much too) low priority in the decision-making and preparation of EC regulations.
3. ‘Distortions of implementation’ occur, i.e. differences in the approach to and regulation of the implementation between Member States in cases where the implementation of EC Directives aiming at total harmonization within the Member States. As a result, different regimes may arise per Member States leading to strategic

or calculating behaviour on the part of citizens, business or institutions within the Member States.

4. Insufficient involvement of national enforcement and implementation bodies in the preparation of EC regulations, as a result of which predictable problems or bottlenecks in the implementation may not be resolved at an early stage.
5. A considerable lack of mutual harmonization between EC regulations – in part caused by the inward-looking attitude of the Commission's DGs.
6. There is insufficient harmonization of Community law and the provisions of treaties concerning the same subject as the Community legislation. In particular, in cases where the Union is a party to the treaty, in addition to the Member States, this may pose problems.
7. The problems with respect to the editorial quality of EC regulations in relation to the ensuing difficulties in the implementation and enforcement of EC regulations are relative and may usually be resolved in the transposal of EC Directives.

6. Epilogue and prospects

The intention of this study is to provide an initial indication of the possible links between the quality of EC decisions and problems relating to implementation and enforcement. A more extensive study than this quick-scan study is necessary to draw any real conclusions on these links. However, it is noticeable that the substance and the relationships examined and found in this research project are most diverse; each file seems to have individual and characteristic problems.

A conclusion that may be further be drawn – on the basis of the first survey in this research project – is that the problems caused mostly by substantive qualitative defects of EC legislation are more serious than might be suspected – on the basis of previous studies. In our opinion, this research shows clearly that both the nature and the intensity of the problems discovered raise the question as to whether such problems relating to the implementation and enforcement also occur in different areas of policy and in other Member States. A first insight into German case law at any rate indicates that similar problems seem to occur in the use of EC provisions raising questions with respect to the quality of the EC provisions concerned. The analysis conducted with respect to the remedies applied so far shows that measures at Community level focus in particular on the promotion of the procedural and editorial quality of EC legislation. This approach is ineffective for several reasons. Firstly, the European institutions do not (yet) or hardly apply the editorial guidelines. Secondly, this research shows that the editorial defects as such do not lead to major problems with respect to the implementation and enforcement of EC provisions within the Member States. In this context, the solution does not actually refer to the problem.

CHAPTER 8

Summary

1. Preface

Between September 2000 and November 2000, the Research Institute for Legislation of the Catholic University of Brabant carried out research into the relation between the quality of EC provisions and the impact of this on the implementation and enforcement of those regulations

within the Netherlands. The existence and the nature of the connection between European legislative quality and the implementation and enforcement were examined on the basis of examples within four regulation areas. A summary of this research is outlined below.

2. Reason for the research

Over the past years, the Netherlands has advocated the improvement of the quality of European regulation within the European Union – partly on the basis of its own experiences and policy views. This has resulted in, for example, the declaration (no 39) appended to the Treaty of Amsterdam concerning the editorial quality of Community legislation and the international conference ‘Quality of European and National Legislation’ organized between 24 and 27 April 1997 in Scheveningen (the Netherlands) by the ministries of Justice and Economic Affairs in collaboration with the European Commission and the T.M.C. Asser Institute. On 22 December 1999, the European Commission, the Council and the European Parliament concluded an interinstitutional agreement – partly initiated by the Netherlands – for the promotion of the quality of European regulation. To date, the respective guidelines refer, in particular, to the editorial quality. However, in the government’s opinion, the formulation of quality standards with respect to the contents is also necessary at a European level.²³ Partly in that context, the Dutch government has initiated research, based on a number of selected regulations, into any qualitative defects of EC provisions. Based on the research results, the Netherlands will – insofar as the research necessitates this – take specific steps at EC level to increase the quality with respect to the contents, according to the recently published policy document ‘Policy on the Quality of Legislation’ (*Wetgevingskwaliteitsbeleid*)²⁴.

3. Research objective

The analyses conducted in this research are primarily focused on gaining insight into the extent in which European regulations fall short of a proper quality and, as a result, lead to problems in the implementation, application and enforcement. This broad question has various dimensions that, since 1991, have been examined in several Dutch research projects (inter alia, conducted by the Tilburg Centre for Legislative Matters²⁵). To date, like the findings of the Koopmans Working Party, these research projects examined, in particular, the *general notions* of the link between the quality of European regulations and the manner of implementation, application and enforcement within the Netherlands. They focused mostly on the lack of (sufficient) harmonization of European and national policy-making but also on the problem of the sometimes defective quality of EC decisions. Procedure and content are closely related in the conclusion of European regulations and determine, for the major part, the quality of European rules.²⁶

²³ See Parliamentary Documents II 1999/2000, 24 475, nos 1-2.

²⁴ See policy document *‘Wetgevingskwaliteitsbeleid en wetgevingsvisitatie’* (‘Policy on Legislative Quality and Legislative Visitation’), p. 22.

²⁵ A few examples of those research projects: Review of Legislation Projects Committee (or CTW), *Implementatie van EG-regelgeving in de nationale rechtsorde* (‘Implementation of EC Regulations in the National Legal System’), The Hague, 21 December 1990, CTW 90/22 V.J.J.M. Bekkers, J.M. Bonnes, A.J.C. de Moor-van Vugt and W.J.M. Voermans, *Brussel en Nederland: tegenliggers, spookrijders of reisgenoten?* (Brussels and the Netherlands: Opposing Vehicles, Ghost Riders or Travel Companions?), Zwolle 1993, J.M. Bonnes, *Uitvoering van EG-verordeningen in Nederland* (‘Implementation of EC Resolutions in the Netherlands’), diss. KUB, Zwolle, 1994, Sacha Prechal, *Directives in European Community Law*, diss. UvA, Amsterdam 1995, N.E. Bracke, *Voorwaarden voor goede EG-wetgeving* (‘Requirements for proper EC legislation’), diss. UvA, Amsterdam 1996, and *Improving the Quality of Legislation in Europe*, conducted under the auspices of the T.M.C. Asser Institute, A.E. Kellerman et al (Eds.), The Hague/Boston/London 1998.

²⁶ Often heard complaints are that European regulation is frequently inaccessible, vague and formulated obscurely, or unnecessarily Directive, inconsistent, too complex and/or insufficiently structured (See, *inter alia*, N.E. Bracke, *Voorwaarden voor goede EG-wetgeving*, diss. UvA, The Hague, 1996; H. Hijmans, *Over de*

The research seeks to gain more insight into the connection or relation between defects in the quality of EC regulations, in particular EC Directives, and problems occurring in the implementation and enforcement of those regulations after they have been transposed into national regulations. The research seeks, in particular, to identify practical problems in the implementation and enforcement and to examine to what extent these problems are caused directly by defects in European regulation. The identification of these problems in the implementation and enforcement and to examine to what extent these problems are caused directly by defects in European regulation. The identification of these problems in the implementation and enforcement will mostly be based on case law and experiences with enforcement.

The two research objectives lead to two types of results, firstly, the information regarding the relation and the possible causal link between defective legislative quality and national implementation and enforcement problems, and, secondly, the information regarding the types of problems with which implementation and enforcement institutions and authorities are faced as a result of defective EC regulations.

2.1 The term legislative quality

In order to research the quality of EC Directives, it is important to clarify what exactly is meant by the 'quality' of EC provisions. It is, above all, a matter of perspective what the quality of legislation must be taken to mean. In the Netherlands, the term 'quality' is closely related to the broader concept of the rule-of-law and administrative quality of legislation as described, *inter alia*, in policy document 'Views of Legislation' ('*Zicht op wetgeving*').²⁷ In the Netherlands, the quality of legislation is based on the extent to which a regulation complies with the conditions of a. lawfulness, b. implementation and enforcement, c. effectiveness and efficiency, d. subsidiarity and proportionality, e. mutual harmonization and f. simplicity, clarity and accessibility. Naturally, the Dutch concept of quality cannot always be transposed into European regulations even though many aspects of the Dutch policy on legislation may be generalized. The quality standard for European regulation must primarily be found on the basis of the objectives pursued in a Community context with the existing regulatory instruments. At the Conference 'Quality of European and national regulations in the internal market' ('*Kwaliteit van Europese en nationale regelgeving in de interne markt*') held in Scheveningen in April 1997²⁸, both the Director-General of the Council Legal Service, J-C Piris, and the deputy Director-General of the European Commission Legal Service indicated what the term quality of European regulation must be taken to mean.²⁹ In

kwaliteit van Europese regelgeving (*On the quality of European regulation*), *RegelMaat* 1997, p. 192-198 and C.W.A. Timmermans, How can one improve the quality of Community legislation, *CMRL*, 1997, p. 1229). The reason for these qualitative defects, leading to problems in the interpretation and implementation of EC law, are, *inter alia*, the lack of institutionalized attention for legislation in the European Union. Until recently, specific experts developed the major part of legislation without any 'legislative eye' being involved. See also Wim Voermans, Europese Aanwijzingen voor de regelgeving in een interinstitutioneel akkoord (*Objets trouvés*) (*European Instructions for Regulation in an Interinstitutional Agreement (Objets trouvés)*) in *RegelMaat* 6, 1999, p. 230-232.

²⁷ Parliamentary Documents II 1990/91, 22 008, nos 1-2.

²⁸ For a summary of the contents of this meeting, please refer to H. Hijmans, Over de kwaliteit van Europese regelgeving, in *Regelmaat* 1997/5, p. 192-198.

²⁹ See J.-C. Piris, The Quality of Community Legislation: the Viewpoint of the Council Legal Service (p.25-38) and C.W.A. Timmermans, How to improve the Quality of Community Legislation: the Viewpoint of the European Commission (p.39-59), in: A.E. Kellerman et al (Eds), *Improving the Quality of Legislation in Europe*, The Hague/Boston/London 1998.

combination, their approach means that the following issues are decisive for the quality of EC regulations:³⁰

1. necessity of the regulation;
2. proportionality;
3. subsidiarity;³¹
4. selection of the right instrument;
5. (restriction of the) volume of regulations, the regulatory density and the regulatory expenses;
6. coherency with existing measures;
7. requirement of care, in the sense of prior consultation of interested parties;
8. implementation and enforcement;
9. editorial quality, in particular, compliance with Community requirements applying to the editing of EC decision;³²
10. the accessibility (*inter alia*, in the form of management, consolidation and codification of regulatory texts).

2.2 Procedural and substantive quality

Apart from many similarities, there are some noticeable differences between the Dutch concept of quality and the Community concept of quality, including, in particular, attention for issues such as subsidiarity, the selection of the right Community instrument, attention for deregulation and requirement of due care (in the form of consultation of interested parties). Naturally, this difference is related to the position of EC regulatory processes in relation to our national legislative processes, and the experiences gained with legislation in Europe. The discussion concerning the quality of legislation within the EU is relatively new: it has left its traces in the standards set for legislation. The new aspect has two consequences, firstly, the discussion of what quality of EC provisions actually means, and to what extent and in which context it fulfils a role, has only just commenced, and there are as yet few actual quality standards, and secondly, the division of responsibility with respect to the quality of legislation is not yet clear. In 1997, Piris made a distinction between two aspects that are of vital importance to the growing European awareness regarding the quality of EC legislation, i.e. the attention for the 'procedural' or technical quality (in particular, the attention for legislative aspects of a provision such as editing, terminology, accessibility, etc) and the substantive quality (*qualité substantiel* relating to matters such as the necessity of the provision, subsidiarity, selection of the right instruments, implementation and enforcement, proportionality and the expenses and effects of a provision).³³ The results of the policy on quality by the European institutions are mostly related to the procedural quality of provisions, where – due to the fact that they are no politically or policy sensitive issues – measures contributing to the editorial quality of EC provisions could be initiated rapidly.³⁴ The quality standards used there hardly deviate from the technical standards laid down for Dutch legislation. The development of a Community legislation policy intended to improve the substantive quality of EC provisions is much more complicated. Analyses in the field of the substantive quality of legislation and measures to improve this quality in the future touch the core of European political and administrative decision-making processes, as shown by the

³⁰ Points 1, 2, 4, 6 and 7 are also put forward as requirements for EC legislation in the 1993 Sutherland report. See the European Commission's notification of 16 December 1993 COM (93) 361 def.

³¹ In the sense of Article 5 EC Treaty.

³² In particular, the requirements laid down in the Interinstitutional Agreements on 22 December 1998 with respect to the joint guidelines for the editorial quality of the Community legislation (*O.J. C* 1999, 73/1).

³³ See J.-C. Prins, *ibid* 1998, p. 28.

³⁴ See the aforementioned Interinstitutional Agreement concerning joint guidelines for the editorial quality of Community legislation of December 1998.

discussion on the 1995 Molitor Committee report.³⁵ The committee's rather far-reaching proposals in the field of deregulation could not count on a wide level of support. One consequence of the Molitor group's recommendations was the SLIM project.³⁶ In this project, the European Commission proposed to have SLIM teams examine sectors (originally four) of the Internal Market.³⁷ One difference with the Molitor group's activities is that the SLIM operation takes place under the chairmanship of the European Commission while the Member States and other parties (corporate sector and consumers) are directly involved. These SLIM projects – initiated in 1996 – that, apart from deregulation, also review the administrative expenses and corporate effects of European provisions, have not yet led to any really tangible results.³⁸

The Netherlands has also sought to contribute to an actual policy on quality in the field of the substantive quality of EC provisions. In the run-up to the Dutch Presidency, as part of the Market Mechanism, Deregulation and Legislative Quality project, the working party on the quality of EC legislation (Koopmans Working Party) was set up. Following an analysis of the defects in legislation, the Quality of EC Legislation project submitted a number of proposals, including the following:

- to attain increased discipline at an EC level in the choice between the Directive and Regulation instrument;
- to further develop and expand the guidelines for the quality of EC legislation;
- to set up a Community body reviewing the quality of legislation.³⁹

The proposals were first brought to the attention of the other Member States and institutions of the European Union at the start of 1996. The subject has furthermore been included at various occasions in the Intergovernmental Conference (IGC). On 15 July 1996, a Protocol was submitted to the European Union Treaty (Treaty of Amsterdam), although it must be noted that this protocol only concerned the Koopmans working party's proposal to develop new guidelines in the field of the improvement of the editorial quality. The working party's proposals in the field of the substantive quality were not directly feasible.⁴⁰

For this research project, this means, *inter alia*, that while there may be a rather clear awareness of quality and a developing policy on quality with respect to the procedural quality

³⁵ In the summer of 1994, the European Commission set up the Molitor group (named after the chairman) instructing it to examine the entire field of legislation for possibilities of deregulation. The group is composed of independent experts, *inter alia*, from the corporate sector, the trade unions and the academic world. The Molitor group examined four areas of legislation, i.e. legislation on the environment; legislation on working conditions; food hygiene (legislation on condiments); and the machine Directive. In 1996, the European Commission presented the group's final report to the European Council in Cannes. The report contains a large number of more or less practical recommendations for deregulation, simplification and improvement of the quality of legislation in the aforementioned areas. In addition, the report argues for a 'change of culture' in the field of the use of legislation.

³⁶ An acronym of *Simpler Legislation in the Internal Market*, COM (96) 204 def.

³⁷ On the basis of the SLIM team's activities and recommendations, the Commission wishes to submit proposals to adjust the respective EC provisions. The following areas of EC legislation are examined: - 1st phase (1996): Intrastat, building products, mutual recognition of diplomas, ornamental plants; 2nd phase (1997): VAT, fertilizers, combined nomenclature for foreign trade, banking services; 3rd phase (1998): electromagnetic compatibility, insurances, social security rights. To date, the SLIM teams' recommendations have not led to extensive deregulation operations or major adjustments to EC provisions.

³⁸ See, *inter alia*, the report of State Secretary Benschop in last March to the Lower House *parliamentary documents II* 1999/2000, 221 501-01, no 137.

³⁹ See *De kwaliteit van EG-regelgeving* (The Quality of EC Legislation) report by the working party on the quality of EC legislation, The Hague 1995. See also the report of the activities by the working party on the quality of EC legislation in the context of the Market Mechanism, Deregulation and Legislative Quality project, *parliamentary documents II* 1996/97, 24 036, no 54.

⁴⁰ See also H. Hijmans, *ibid*, 1997, p. 198.

of EC provisions, there is much debate with respect to both the exact contents of what may apply as the substantive quality of EC legislation and to the question regarding the manner in which an improvement must be realized in this field. Partly for this reason, it is more useful to use the rather definite Dutch notions and standards of quality for the review of the quality of EC legislation. Moreover, with a view to the manner in which they are, for example, put into operation in the Directions for Legislation, the Dutch quality standards seem to encompass most of the European quality standards – including the substantive.

APPENDIX 1 MEMBERS OF THE SUPERVISORY COMMITTEE

Chairman:

Prof dr R.J.G.M. Widdershoven
University of Utrecht

Members:

Ms A.M. Sewandono
Ministry of Housing, Spatial Planning and the Environment

Mr P.J.J. Drost
Ministry of Housing, Spatial Planning and the Environment

Ministry of Economic Affairs
dr J.M. Bonnes

Mr L.J. Clement
Ministry of Transport, Public Works and Water Management

Mr D.P. van den Bosch
Ministry of Justice

Ms W.M. de Jongste
Ministry of Justice

APPENDIX 2 INTERVIEW QUESTIONS

Below, a summary is given of the questions asked during the research interviews with the key persons at the departments. Slightly amended questionnaires were used for the interviews with implementation and enforcement bodies with, for example, fewer questions on the transposal of Directives.

Introduction

This interview includes questions with respect to the problems and bottlenecks in the implementation, application and enforcement of EC regulations. The research objective is to examine which problems may be attributed to the regulations themselves and to what extent the of the EC regulations are the result of those bottlenecks. On the basis of a principal

¹ The concept of quality is related to the quality criteria laid down in policy document ‘Views of Legislation’ (*‘Zicht op wetgeving’*).⁴¹ In particular, it concerns the following criteria:

- a. lawfulness;
- b. implementation and enforcement;
- c. effectiveness and efficiency;

survey of the problems of implementation and enforcement that occur or have occurred in the implementation of EC regulations in the Dutch legal system, it is examined to what extent those problems are (also) caused by the quality of the regulations concerned.

The research focused on some clusters of EC regulations in various policy areas:

a. Transport, Public Works and Water Management

Directive 96/26 on admission to the occupation of road haulage operator and road passenger transport operator (*O.J.* 1996 L 124) as amended by Directive 98/76 (*O.J.* 1998 L 227);

b. Economic Affairs

Community framework regulations on State Aid for research and development (*O.J.* 1996 C 45) as amended (*O.J.* 1998 C 48);

c. Housing, Spatial Planning and the Environment 1

(Related) EC decisions on waste (75/442, 91/689, 259/93, 94/62, 94/67 and 1999/31);

d. Housing, Spatial Planning and the Environment 2

Directive 90/313 on the freedom of access to information on the environment (e.g. in relation to parts of Directives 67/548, 89/369, 90/220, 91/414, 96/82, 97/11, 98/8);

Below, some questions are asked with respect to your experiences with the implementation and enforcement of EC regulations. The questions are intended as a basis for a discussion on the problems and bottlenecks with respect to the implementation and enforcement of those EC regulations in your particular field.

With a view to the report, we kindly ask your permission to tape this conversation. The tape is solely intended to ensure the accuracy of the report. The report and the tape are destroyed after the research. The research information and interview results will be included anonymously in the report.

I. Preparations of EC regulations

1. To what extent are you, or is your department, involved in the preparation of the contents of the EC Directives at issue?
 - A. At what point were you involved (following the publication of the Commission's proposal or later)?
 - B. How were you involved?
2. Did your department or any other department, at any point during the preparations of the EC Directives, seek to:
 - a. amend the contents of the Directive (if so, what was the effect, if not, did that pose a problem at a later stage?) and/or
 - b. discuss the quality of the Directive (if so, how, if not, what were the consequences?) from the Netherlands.

-
- d. subsidiarity and proportionality;
 - e. mutual harmonization;
 - f. simplicity, clarity and accessibility.

3. Is a form completed and what has happened with respect to the problems signaled and the action plan referred to? Has the discussion regarding the form (via the Dutch parliament) led to the formulation of a Dutch position that has had any success in the Council committees?
4. Have any Dutch interest groups been able to make a contribution on the contents of the Directive during the preparations? If so, which and how?
5. Do you know if any advisory bodies from the EC itself were consulted during the preparation of the regulations? If not, is the lack of the contribution from the permanent Dutch advisory bodies (such as the Council of State) felt?
6. To what extent has Dutch parliament participated effectively in the preparation of the Dutch position with respect to the Commission's proposal?
7. During what point of the preparations were the Dutch implementing institutions or 'enforcement partner' (administrative bodies, Public Prosecutions Department, special investigation services, the police) informed of the possible tasks and powers that may arise from the prospective EC Directive?
 - What was the general reaction of those bodies to the prospective Directives/implementation of the Directive?
 - Could the reactions of the implementation institutions still be included in the Dutch position?
8. How and at what point was local government (municipalities, provinces, regulatory industrial organizations) involved in the preparations?
9. Is the quality of the EC regulations in any way discussed at any point during the preparations? For example, by emphatically involving legislative jurists in the preparation (of the Dutch position)?
10. Which Commission DG prepared the EC regulations and are the policy competence and the division of the policy areas of that DG, and/or as arising from the EC regulations, sufficiently compatible with the Dutch division? Did this have any effect on the quality of the EC regulations?
11. Did the editorial quality of the intended EC regulations pose a problem to which serious attention must be drawn during the preparations?
12. To what extent has the manner of implementation of the EC regulations had a positive or negative effect on the quality of the EC regulations?

II. Implementation of EC regulations in the Dutch legal system

1. What specific problems have you/your department encountered in the implementation/application of the EC regulations in the Dutch legal system after it had entered into force? Please, specify according to

- a. national legal problems (how to implement, which legal instrument to use, what Act to amend, binding nature of the instrument selected, etc?);
 - b. technical problems of legislation (unclear formulations, matters of interpretation, incorrect translations in the Dutch version); note: was this followed by a rectification procedure?;
 - c. specific policy competence problems (e.g. were the EC regulations in line with the Dutch division of competence);
 - d. problems in the choice for the enforcement system (criminal law, administrative law, private law) and the organization of the legal protection provisions);
 - e. problems in the designation, location or establishment of an enforcement organization/institution;
 - f. problems in selecting a supervisory system;
 - g. problems in the designation, location or establishment of investigative bodies?
2. Did the requirements set by the Court of Justice to the national implementation and enforcement cause any special problems (in particular, full implementation, principle of assimilation, principle of efficiency, a deterrent and proportionality)? Are the European-law requirements compatible? Did the selection of the implementation and enforcement system give rise to any complications?
 3. To what extent did the Community rules (on competition, free market, mutual recognition, etc.) cause any additional complication in the implementation of the EC regulations?
 4. As regards your particular EC regulations, were they in any way implemented directly by the EC institutions themselves? If so, what were the experiences, if not, was this lack felt?
 5. To what extent were the national implementation and enforcement institutions involved in the implementation of the EC regulations and in what manner? What were the experiences?
 6. In what manner was local government (municipalities, provinces, regulatory industrial organizations) involved in the implementation in situations where they did not fulfil a role as an implementation agency? What problems did arise from this?
 7. What possibilities were included in the EC regulations for (further) transitory regulations within the implemented regulations?
 8. Were the EC regulations in accordance with international law? If not, what tension or problems did arise from this?
 9. Did the EC regulations lead to any unforeseen policy or financial burden that only became clear during the implementation?
 10. Could the EC regulations be implemented in time and did the implementation time limits leave sufficient room for proper implementation?

11. Did the implementation and the implementation measures have to be notified in any way? If so, did this give rise to any special problems?
12. Did the Dutch implementation measures give rise to any reasoned advice, and/or infraction proceedings?
13. Has any feedback to the Commission been attempted with respect to the problems encountered in the Netherlands during the implementation in a narrow sense (the transposal)?
14. Do the EC regulations include sufficient suggestions/room for setting up:
 - an adequate system of implementation
 - adequate supervision
 - an adequate system of sanctioning
 - an adequate investigation system
15. Did the implementation of the EC regulations in a narrow sense lead to any other problems of implementation and enforcement not referred to in part II?

III. Implementation and enforcement of the (implemented) EC regulations

1. Were the implementation and enforcement bodies involved in the implementation of the EC regulations prepared for their task?
2. Did the EC regulations in which you were involved include any transfrontier dimensions and in what manner did the national implementation and enforcement bodies handle this?
3. Did the selected enforcement system separate the granting of permits (or any other beneficial decisions) and the enforcement? If not, did this cause any problems?
4. Did any unforeseen financial and/or other policy burden occur during the implementation and the enforcement of the (implemented) EC regulations obstructing the implementation and investigation?
5. In what manner did the European institutions check the manner in which the implementation and enforcement of the (implemented) EC regulations and the bottlenecks occurring with respect to this (supervision and monitoring)
6. Did the implemented EC regulations leave many (discretionary) regulatory and/or administrative powers to implementation bodies and did the implementation of those powers give rise to any problems?
7. In what manner is the implementation and enforcement of the (implemented) EC regulations 'monitored' in the Netherlands and what is done with this policy information?
8. Have the (implemented) EC regulations caused many legal conflicts brought before the Dutch court? If so, have those cases often led to substantial compensation?

9. Have any preliminary questions been submitted to the Court of Justice by the Dutch court as a result of the (implemented) EC regulations? To what extent are the preliminary questions related to the quality of the EC regulations?
10. What other problems (not referred to) occur/have occurred in the field of the implementation and enforcement of the (implemented) EC regulations?

IV. After-care

1. Do frequent amendments to EC Directives, and/or in general, the maintenance of new EC regulations cause problems in a specific field? If so, in what way and to what parties?
2. Are the EC regulations and/or the implementation measures reviewed in any way?
3. Do the (implemented) EC regulations as such, and the manner in which they are implemented and enforced, face much social opposition? If so, how is this handled?