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Summary

The implementation of European subsidy schemes in the Netherlands. Legal problems and challenges.

INTRODUCTION

If only because of the notices to be found everywhere in Europe saying ‘This project is being partially funded by …’, followed by the European fund in question, every EU citizen knows about the subsidies financed with European money. These subsidies are not only provided to achieve the EU policy goals, but also to make the EU more visible to the EU citizen. The European subsidies are not undisputed. The European Court of Auditors for instance refuses year after year to provide an unqualified audit opinion as regards the legitimacy of the subsidies spent by the Member States. Mistakes are discovered in such large numbers that the European Court of Auditors does not dare to warrant the legitimacy of these subsidies financed from the EU budget. Also in the Netherlands problems occur in the implementation of the European subsidy schemes. More than once the European Commission has refused to pay the subsidies promised from European funds, or has recovered money already paid to the Netherlands. Projects that originally were to be paid for with European subsidies eventually had to be financed from the national treasury insofar as it turned out to be unfeasible to recover the European subsidies from the national recipients. These Dutch problems were the reason for the research which is the subject of the present book. It has been investigated which legal problems exist when Dutch implementing bodies implement European subsidy schemes and to what extent the European and/or national (subsidy) law should be adjusted to resolve these problems. The legal research question formulated in Chapter 1 reads:

Which legal problems do exist when Dutch implementing bodies implement European subsidy schemes and to what extent should the European and/or national (subsidy) law be adjusted to resolve these problems?
THE EUROPEAN SUBSIDY SCHEMES IMPLEMENTED BY DUTCH IMPLEMENTING BODIES

In Chapter 2 a European subsidy has been defined as: a financial contribution directly or indirectly financed by the EU budget, by way of donation to finance an action intended to help achieve an objective forming part of an EU policy. National implementing bodies can be involved in various ways in the implementation of European subsidy schemes. In the first place it is possible that national implementing bodies are charged with granting European subsidies. It concerns the European subsidies that are provided in shared management with the Member States and by national agencies. In those cases there exist two subsidy relationships, namely between the European Commission and the Member State/national agency on the one hand and between the national implementing body and the final recipient of the European subsidy on the other hand. The latter subsidy relationship is usually governed by both European and national law. In the second place, if national implementing bodies grant European subsidies, they are also charged with other tasks, such as auditing and recovering the subsidies in case of irregularities. When the European subsidies are granted by the services of the European Commission or by European implementing agencies, national implementing bodies can also be involved in the implementation of the European subsidy scheme in question.

Dutch implementing bodies grant European subsidies from the ESF and EFRD structural funds, the EAGF and EAFRD agricultural funds, the European Fisheries Fund, the migration funds, the European Globalisation Fund, and on the basis of the programmes of the European Year for Combating Poverty (2010), Lifelong Learning and Youth in Action. Since the Member States are closely involved in the implementation of these European subsidy schemes one also speaks within this framework of shared or mixed administration. Shared administration refers to the joint implementation of the EU law by the European Commission and the national implementing bodies in the Member States. Since the cooperation within the framework of the European subsidies between the EU and the Member States is so close, one also speaks of mixed administration. The consequence of this shared/mixed administration is that the European and the national legal order are getting interwoven to such an extent that problems easily occur when these legal orders are not in line with each other. The interplay between the European Commission and national implementing bodies within the framework of the implementation of the European subsidy legislation is not an isolated phenomenon. Insofar as rules must be established at the national level in order that national implementing bodies can comply with the European obligations ensuing from the European subsidy legislation, there is also mixed legislation and regulation. After all, in that case both at European and national levels laws and regulations are adopted. A further consequence of the circumstance that there is mixed management between national implementing bodies and the European Com-
mission is that there is mixed administration of justice. Both the national courts and the Court of Justice (including the Court of First Instance) are confronted with disputes in respect of the implementation of the European subsidy legislation in the Member States.

One of the most important features of the European subsidy schemes for which national implementing bodies provide the European subsidies is the existence of the obligation of national co-financing. The rationale of this is that the EU does not wish to spend European subsidies on projects for which the national implementing bodies have no national subsidy available. The principle of partnership also plays an important role. Although the case law on this principle is not yet clear, the conclusion is that the principle of partnership may lead to more far-reaching obligations for national implementing bodies than foreseen in the European subsidy legislation. In the third place, most European subsidies are granted on the basis of operational programmes (OP) set up by the Member States. They specify in which way the European subsidy scheme will be implemented by the Member States or other bodies. An OP usually relates to a period of seven years: the programme period.

Other relevant principles for the implementation of European subsidy schemes are the principles of coherence, complementarity, coordination, conformity, subsidiarity, proportionality and concentration. Another important principle is the principle of decommitment. This principle, the so-called n+2 rule, implies that if national implementing bodies have not provided the European subsidies allocated to the Member State within a certain period to final recipients, the non-spent subsidies are to be returned to the EU. It is further important to observe that committee formation within the framework of the implementation of the European subsidy legislation is of great interest. They do not only exist at the national level for each (sub)programme (the so-called Monitoring Committees), but also at the European level (comitology). The latter committees are closely involved in the approval of the operational programmes submitted by the Member States, the distribution of the European funds among the Member States and the adoption of soft law by the European Commission.

Where European subsidies are provided, irregularities and fraud unfortunately also often occur. In the past years the emphasis has therefore shifted more and more to protection of the financial interests of the EU. This not only makes itself felt in the European subsidy legislation itself, but also in horizontal instruments – see the recent proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law – and in the case law of the Court of Justice. In this way attempts are made to combat fraud with EU funds.
THE REQUIREMENTS AND PRECONDITIONS SET BY EUROPEAN (SUBSIDY) LAW TO THE IMPLEMENTATION OF EUROPEAN SUBSIDY SCHEMES IN THE MEMBER STATES

Relevant general doctrines and principles of Union law

Chapter 3 contains a discussion of a number of general doctrines and principles of Union law that have significance for the shared or mixed management by the European institutions and national implementing bodies. Hence, these doctrines and principles are also relevant for the implementation of the European subsidy legislation by national implementing bodies. The common denominator of the discussed general doctrines and principles of Union law is that they are the determining factor for the full application of EU law in the national legal order, or that they standardise this application. The doctrines and principles have been discussed as much as possible in the context of the implementation of the European subsidy legislation by national implementing bodies. It concerns respectively the principle of priority, the doctrine of the application of EU law in the national legal order, the principle of loyal cooperation, the doctrine of effectiveness, the subsidiarity principle, the institutional autonomy, the procedural autonomy and the general legal principles of Union law. Most doctrines and principles have been developed in the case law of the Court of Justice; the principle of loyal cooperation and the subsidiarity principle have long been included in the European treaties.

The obligation or possibility to apply national law when implementing the European subsidy legislation

The European subsidy legislation which must be implemented by national implementing bodies mainly consists of European regulations and European decisions. In Chapter 4 it has been examined to what extent within the framework of the implementation of European regulations and decisions there exists in a general sense the obligation or possibility to adopt national law. After all, national implementing bodies and the legislator will have to assess to what extent the instruments laid down in the European subsidy legislation are sufficient to fulfil all obligations laid down in it.

The conclusion is that for the implementation of the European subsidy schemes the European subsidy legislation – consisting of European regulations and decisions – is not sufficient. National law is needed to see to it that all obligations laid down in the European legislation can be complied with within the framework of the national subsidy relationships. However, for the national legislator and national implementing bodies it is by no means simple to determine to what extent national law is necessary for the implementation of European subsidy regulations and decisions. It is recommended to be aware of this when drafting European subsidy regulations and decisions. The question which provisions are directly applicable and for which provisions further
national law is needed is currently too much a problem the Member State must deal with. If the national law is not satisfactory to perfect the European subsidy legislation, complex issues arise about which there is great lack of clarity. On the one hand, it is important for the Member States to be able to let the national law be as much as possible in line with the European subsidy legislation. On the other hand, the impossible can neither be expected from them, if the European subsidy legislation fails to make clear whether implementation in the national law is needed.

In Chapter 4 it has further been established that within the framework of the implementation of the European subsidy legislation the European Commission adopts much European soft law. It concerns in this respect rules of conduct laid down in instruments which as such have not been declared to be legally binding, but which in practice can nevertheless have certain (indirect) legal effects. In the implementing practice European soft law is of great significance. However, in European case law it has not yet been made perfectly clear what the impact of European soft law is in the national legal order within the framework of the implementation of European subsidy schemes. From the case law of the Court of Justice it can be derived that such soft law is binding, if it follows from the European subsidy legislation itself, or from a special cooperation obligation in combination with the agreement of the Member State with the soft law in question. In view of the interest of the principle of partnership it is plausible that also within the framework of the implementation of the European subsidy legislation there exists a special cooperation obligation. It is conceivable that from the circumstance that national implementing bodies agree in the so-called committees with the soft law proposed by the European Commission the conclusion is drawn that they are bound to it.

Although the Court of Justice has not yet confirmed this, the implementation practice shows that the European Commission itself assumes the ‘comply, or explain’ principle. If a deviation from the European soft law cannot be explained, there is a risk that European subsidies must be paid back to Brussels. Partly in view of this, national implementing bodies are strongly inclined to comply as much as possible with European soft law when exercising discretionary powers and when interpreting the European subsidy legislation. The consequence of this is that also the final recipient of the European subsidy is confronted with European soft law. This poses a problem if the soft law has neither been published, nor implemented. After all, the final recipient of the European subsidy could never anticipate this. It is doubtful whether the national courts can always offer sufficient legal protection. After all, by virtue of the Grimaldi ruling they seem to be obliged to take account as much as possible of European soft law, although it is unclear to what extent this ruling also has significance for soft law that has not been published.

Insofar as national implementing bodies are bound to European soft law, it is preferable that this soft law is translated into the national subsidy relation-
ship. In that way the final recipient of the European subsidy can anticipate it and it will be easier for national implementing bodies to invoke the interpretation laid down in European soft law against the final recipient of the European subsidy. However it is incompatible with the nature of soft law that it is implemented in the national laws and regulations. The conclusion is therefore that it is preferable that if a national administrative body wants to take European soft law into consideration, in view of obligations vis-à-vis the European Commission, the soft law is converted into a national policy rule. This does the most justice to the nature of soft law. A national implementing body should however assume a critical attitude towards European soft law and not automatically proceed to implementation. In particular they must ensure that in European soft law no new obligations will be laid down which eventually can have consequences for the final recipient of the European subsidy. After all, this will be at odds with the principles of legality and legal certainty. In that case they must urge the Commission to lay down these obligations in a European subsidy regulation. It would however be preferable if European soft law were adopted less often. This might in the first place be achieved by adopting clearer European subsidy legislation, so that its interpretation is less unclear. The EU institutions have every chance to do this when they adopt the package of legislation for the programme period 2014-2020. A second possibility is that when adopting the European subsidy legislation the Council and the European Parliament would publish explanatory notes, which will create more clarity about the interpretation and objectives of this legislation. Unfortunately there are no indications that such explanatory notes will be published shortly. Questions about the impact of European soft law into the national legal order and the associated tension between flexibility on the one hand and legal certainty and legality on the other hand will therefore remain topical.

Specific requirements of European law in respect of the implementation of the European subsidy legislation in the Member States

European law determines to a large extent how the national subsidy relationship between the national implementing body and the final recipient of the European subsidy is shaped. The specific requirements that are set to the implementation of the European subsidy legislation cannot only be found in that legislation itself. Other Union law is also relevant for the implementation of European subsidy schemes, such as the rules that apply to the protection of the financial interests of the EU, state aid, procurement and the environment. The European subsidy legislation sometimes refers to this European legislation. In many cases it follows from the European legislation itself that it is also of interest to the granting of European subsidies. Furthermore, European soft law is of great significance for the implementation of the European subsidy legislation. If national implementing bodies are in fact not bound to this, in
practice they are strongly inclined to comply with the soft law. Finally, the Court of Justice has also developed specific requirements in case law that are relevant to the implementation of the European subsidy legislation.

In Chapter 5 the specific requirements of European law have been divided into seven categories. This choice has been made on the basis of the relevant European legislation studied, the European case law and the interviews held with representatives of the European institutions and national implementing bodies.

1. Requirements for the appointment and creation of competent national implementing bodies

Although it is up to the Member States to decide which national implementing bodies are charged with the implementation of the European subsidy schemes, it usually has been accurately determined in the European subsidy legislation which requirements the national implementing bodies to be designated must meet, which tasks they must be able to perform and which powers to exercise and in some cases even which regulations they must prepare. The consequence of this is that under certain circumstances the Member State cannot but form a new national authority. The concrete result of the European interference is a mass of national implementing bodies involved in the implementation of European subsidy schemes: managing authorities, audit authorities, certifying authorities, national agencies, local groups, Monitoring Committees, etc. The above does not alter the fact that the Member State remains the contact point for the EU. The Member State can therefore not hide behind national implementing bodies that make mistakes in the implementation of the European subsidy legislation; the Member State is and remains liable vis-à-vis the EU in respect of irregularities.

2. Requirements in respect of establishing and modelling the national subsidy relationship

The application for a European subsidy is usually assessed by national implementing bodies. It differs for each European subsidy scheme to what extent the procedure for granting a subsidy, including the formal and material conditions to be fulfilled in order to be eligible for a European subsidy, has been regulated at the European level. For the implementation of the European agricultural subsidies and the Lifelong Learning and Youth in Action programmes detailed and in many cases also exhaustive European rules apply.

For the European subsidy schemes Youth in Action, Lifelong Learning and the migration funds it applies that national implementing bodies are obliged, after a positive selection decision, to enter into agreements with the person whose application has been honoured. For Lifelong Learning and Youth in Action the European Commission has prescribed standard agreements. They contain the power for the national implementing bodies to impose fines, to dissolve the agreement and to reduce and recover the European subsidy. The
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3. Requirements for the division of scarce European subsidies
For most European subsidy schemes a limited amount of money is available. When the European subsidies applied for exceed the available budget, the European subsidies become scarce. In the European subsidy legislation it has usually not explicitly been provided by which system the scarce European subsidies must be divided. However there are indications that the European Commission prefers a tender procedure, now that this system safeguards best that the qualitatively best project is chosen. For Youth in Action and Lifelong Learning it has actually been explicitly set out that the available European subsidies will be divided by means of a tender procedure. The requirements for this procedure can be traced back to the principles of equality, impartiality and transparency taken from public procurement law, which also apply to the division of the European subsidies for the Lifelong Learning and Youth in Action programmes. Although these principles are not explicitly mentioned in the other European subsidy legislation, a number of arguments has been put forward which make it possible to conclude that these principles and the requirements ensuing from them also apply to the division of European subsidies from the structural funds, the migration funds, the European Fisheries Fund and the EAFRD. With the entry into force of the new Financial Regulation there is no longer any doubt about this. If the principles of equality, impartiality and transparency indeed want to offer protection to applicants of European subsidy, specific rules will have to be laid down in the European subsidy legislation in respect of the legal protection that is open in respect of award decisions and – still more important – against rejection decisions that are in conflict with these principles.

4. Requirements as regards the possibilities to refuse a European subsidy
In Chapter 5 the most common grounds in the European subsidy legislation for refusing a European subsidy have further been discussed. A European subsidy should for instance be refused if the administrative sanction of exclusion has been imposed on the applicant in question. An applicant can also be on a so-called black list, for which reason he will not be eligible for European subsidies. Furthermore, an application must not be honoured if another European subsidy has already been received for the same project. Finally, it has been concluded that the European state aid rules may also have the consequence that a European subsidy must be refused. Although in case of European subsidies it concerns European money, this does not mean that these subsidies cannot qualify as state aid.
5. **Requirements in respect of European subsidy obligations for the national applicant/recipient of the European subsidy**

The European subsidy legislation also lays down to a considerable extent which subsidy obligations must be imposed on the final recipients of European subsidies. The most important European subsidy obligations a final recipient of a European subsidy must comply with are keeping proper records of the project, complying with the European procurement rules and maintaining the project subsidised with the European money during a certain period. It has been discussed that subsidy obligations may undergo changes during the project, by the development of interpretative European soft law and by case law of the Court of Justice, which is at odds with the legal certainty for the final recipient of the European subsidy.

If a final recipient fails to comply with the obligations attached to the European subsidy, it implies that there are irregularities within the meaning of Regulation No 2988/95. In that case national implementing bodies should withdraw and recover the European subsidy and in some cases also impose administrative sanctions. When a recipient acts contrary to a European subsidy obligation he cannot have been aware of, it does not yet mean that withdrawal and recovery can be refrained from. From European case law it follows that this is only possible, if the final recipient of the European subsidy acted in good faith.

6. **Requirements for enforcing the European subsidy legislation by national implementing bodies**

The protection of the financial interests of the EU is deemed of such importance that this has by now led to an enforcement system which is rightly called a shared enforcement cathedral. At audits of projects that have (partly) been paid for with European subsidies in total as many as seven European and national authorities are involved. Both the European subsidy legislation and the case law of the Court of Justice make ever more demands on audits to be carried out by national implementing bodies. Insofar as irregularities are observed, administrative sanctions and measures should be imposed. It is important that the non-fulfilment of supplementary national obligations also counts as irregularities.

For the European agricultural subsidies it applies that there usually is a common system of administrative measures and sanctions that are suitable for direct application by national implementing bodies. It is striking that the Court of Justice does not consider the safeguards of Article 6 ECHR applicable, since the administrative sanctions – such as exclusion – allegedly have no punitive character. In order to arrive at that conclusion, the Engel criteria developed by the European Court of Human Rights, on which basis it must be determined if there is a question of a ‘criminal charge’, are in my view stretched too much. It applies however that administrative sanctions cannot be imposed without a separate legal basis for them in a European subsidy
regulation or in national law. For the withdrawal and recovery of European subsidies, no separate legal basis in a European regulation is required.

In the European subsidy legislation concerning the structural funds, the migration funds and the European Fisheries Fund no common system of measures and sanctions has been laid down. An obligation for the Member States to apply financial corrections when irregularities occur has been deemed sufficient. It is not always clear if in case of irregularities the national co-financing associated with the European subsidy must also be withdrawn and recovered. Insofar as the European subsidy legislation does not provide for the possibility to impose administrative sanctions, the Member States are obliged to impose national sanctions by virtue of the principle of loyal cooperation as is apparent from the European case law.

It often occurs that as a supplement to the European subsidy legislation national implementing bodies adopt national rules; these are (stricter) national rules which the final recipient of the European subsidy must comply with. Under Union law national implementing bodies are obliged to enforce these national rules vis-à-vis the final recipients, even if they are stricter than the European subsidy legislation. They are not allowed to give permission to deviate from these rules. If the (stricter) national rules are not complied with, the European Commission has the power to apply financial corrections.

The European agricultural subsidy regulations exactly prescribe in which cases national implementing bodies can refrain from imposing administrative measures and sanctions. It concerns cases of force majeure, obvious errors and mistakes recognised as such by national implementing bodies and of which the final recipient of the European subsidy could in reason not be aware. Insofar as no codified principle of legitimate expectations has been laid down in the European agricultural subsidy regulations, there is room for omitting administrative measures and sanctions by virtue of the unwritten principle of legitimate expectations. Now that the administrative measures and sanctions within the framework of the European agricultural subsidies have been completely Europeanised (direct application), the unwritten principle of legitimate expectations should be interpreted in a European way. This means that honouring the principle of legitimate expectations must not lead to a situation in which a European subsidy is kept contrary to the European subsidy legislation (no contra legem). Much importance is furthermore attached to the expertise of the final recipient of the European subsidy; hence, little success is to be expected from invoking that a European obligation cannot be known.

Insofar as administrative measures and sanctions have not been Europeanised (indirect application) there is room for national implementing bodies to refrain from withdrawal and recovery of a European subsidy on the basis of a national interpretation of the principles of legal certainty and of legitimate expectations. The case law of the Court of Justice has developed such that this room is becoming increasingly smaller. For the time being the ESF ruling seems to be the high point, or rather the low point, in that respect. Although the
Court of Justice still assumes a national interpretation of the principles of legal certainty and legitimate expectations, ever more European demands are made before reliance on these principles may actually be honoured. The interest of the protection of the financial interests of the EU is more important that the protection of the individual final recipient of the European subsidy. In view of this it would be preferable if the administrative measures and sanctions in all European subsidy schemes were Europeanised. In that case there will be a shift from indirect to direct application of European law. The advantage of this is that it will then be clear that the national law is of no significance as regards awarding a lower amount in European subsidies and withdrawing them, and hence there will neither be any room for the national interpretation of the principles of legal certainty and legitimate expectations on which such measures are based. In order not to leave the financial risks of irregularities entirely with the final recipients and to make an end to the current ‘all-or-nothing’ situations, sliding sanction scales should moreover also be provided for and rules should be made in which cases national implementing bodies may refrain from withdrawal and recovery. Such provisions can already now be found in the European agricultural subsidy legislation.

The Court of Justice does not easily assume that the imposed administrative sanctions and measures are in conflict with the proportionality principle. Other fundamental rights also offer little protection, certainly when it has been established that the final recipient has acted in violation of the obligations attached to the European subsidy. But, the European rules on limitation can lead to the situation that a European subsidy can no longer be withdrawn and recovered. Although Regulation No 2988/95 considers a limitation period of four years sufficient, it is permitted to the Member States to apply longer limitation periods. The Court of Justice has however determined that this period must comply with the principles of legal certainty and proportionality. It is further important that the commencement of the limitation period and the rules about the interruption of this period have been Europeanised. The consequence of this is that any existing national rules have no significance.

On the basis of European case law it can as yet not clearly be established to what extent national implementing bodies may award compensation to final recipients of a European subsidy, if it is found that these bodes have acted in violation of the national principle of legitimate expectations. Since this can usually not result in the decision to withdraw and recover the European subsidy to be held illegal, it would have to concern compensation for loss resulting from an administrative act.

There is a connection between imposing administrative sanctions and measures by the Member States and the financial corrections by the European Commission vis-à-vis the Member States. Financial corrections by the European Commission will inform the national implementing body in some cases of irregularities that have occurred. Moreover, national implementing bodies will try to recover from the final recipients of the European subsidy the money
that has to be paid back to Europe. This does not alter the fact that national implementing bodies have an independent obligation to make financial corrections if irregularities have occurred, even if the European Commission has not applied any financial corrections vis-à-vis the Member State.

If the European subsidy and the national co-financing have been granted in breach of European state aid rules, the European Commission will usually refuse to pay this European subsidy from the European funds. However, in order to be able to effectively enforce the European state aid rules, more is needed. To actually restore the competition it should be ensured that the European subsidy and the co-financing that must be regarded as illegal state aid will be recovered from the final recipients. To that end the European Commission can adopt a recovery decision pursuant to Regulation No 659/1999 under which the Member State is obliged to recover the state aid, including any interest received on it. Within that framework final recipients can hardly expect any success from relying on the principles of legal certainty and legitimate expectations.

When in respect of a European subsidy there has been a breach of the European subsidy legislation, this subsidy should almost always be withdrawn and recovered from the final recipient, even if these decisions have become irreversible at law. By virtue of the Kühne & Heitz ruling such an obligation does not apply if, although a decision was contrary to the European subsidy legislation, the result was that the final recipient was awarded too little European subsidy. The conclusion is that in view of the interest of the effective implementation of EU law this distinction should be put right.

7. Requirements in respect of legal protection at national level
Finally, in Chapter 5 it has been concluded that final recipients of the European subsidies, but also the local governments that grant European subsidies, have in principle no cause for action against decisions of the European Commission in which the latter refuses to compensate for certain European subsidies or recovers paid European subsidies from the Member State. Only the Member State has access to legal protection at European level. Hence, final recipients and local governments can only lodge an appeal to the national courts against the decisions to withdraw and recover European subsidies, respectively recovery decisions of the central government. But the European subsidy legislation sets requirements for the legal protection by the national courts. These requirements are implied in the general European legal principles. The fact is that the legal protection at national level should comply with the principles of defence and effective legal protection. In view of the complete system of remedies it must be possible for final recipients and local governments to put forward in the national court that European acts, including recovery decisions of the European Commission, are invalid. It is problematic that, when in national proceedings questions arise about the interpretation and validity of the European subsidy legislation or the significance of European
soft law, final recipients of European subsidies are dependent on the will of the national court to ask for a preliminary ruling about this. They cannot force the national court to do so. There is some friction here now that the Court of Justice should have the last word as regards the interpretation and validity of European law, so also of the European subsidy legislation. The conclusion is that if the national court fails to ask for a preliminary ruling contrary to the so-called *Cilfit* criteria, the effective legal protection of the final recipient of the European subsidy is adversely affected.

**(LEGAL) PROBLEMS OBSERVED IN THE IMPLEMENTATION OF EUROPEAN SUBSIDY SCHEMES IN THE NETHERLANDS**

In Chapter 6 the (possible) legal problems have been discussed which arise within the framework of the implementation of European subsidy schemes in the Netherlands. These legal problems are inherent to the ‘mixed management’ which exists within the framework of the implementation of the European subsidy legislation. After all, its consequence is that in many cases the European subsidy legislation cannot be implemented without the national law. In practice the two legal orders turn out to be insufficiently in line with one another. In many cases the starting point that the European subsidy legislation has supremacy over the national law used for the implementation of the European subsidy legislation does not resolve the observed legal problems. After all, excluding application of national law that is in conflict with EU law does not yet mean that the European subsidy legislation can be directly applied by national implementing bodies. Furthermore, interpretation of national law in conformity with EU law does not always offer a solution.

It has appeared that the observed bottlenecks are not only contained in the Dutch (subsidy) law, but result also from the complicated and on some points unclear European subsidy legislation. For the Dutch legislator and Dutch administrative bodies it is not always easy to establish to what extent the European subsidy legislation extends to the Dutch subsidy relationship, or to what extent it is required to establish and/or to apply Dutch (subsidy) law. The consequence of this is, for instance, that Dutch (subsidy) law wrongly fails to provide for the power of Dutch administrative bodies to impose administrative sanctions laid down in the European agricultural subsidy regulations. In other cases European subsidies are withdrawn and recovered on the basis of the sanction provisions of the Dutch General Administrative Law Act, while the European subsidy regulation contains a common system of sanctions and measures.

The bottlenecks are also due to the fact that the underlying basic principles of European and Dutch subsidy law are different. The Union law assumes that there exists an equal relationship between national implementing bodies on the one hand and final recipients of European subsidies on the other hand.
The idea – which is also expressed in the case law of the Court of Justice – is that final recipients of European subsidies themselves choose to participate in a European subsidy scheme. This ‘free choice’ justifies that the final recipient of the European subsidy vis-à-vis the subsidy granting (European) authority does not have to be accorded more legal protection than a contract partner in normal commercial transactions. By contrast the basis of the subsidy section of the Dutch General Administrative Law Act is that the subsidy relation between the administrative body and the subsidy recipient implies a legal relationship governed by public law. Legal regulations about granting subsidies were partly considered so important in order to protect subsidy recipients against a whimsical government. The idea that a subsidy recipient must be glad to receive any financial contribution from the government and is therefore entitled to little or no legal protection was sidelined with the entry into force of the subsidy section of the General Administrative Law Act. These diametrically opposed basic principles find expression in a number of issues.

In the first place, as regards the European subsidies that are granted by the European Commission, European implementing agencies and national agencies, European subsidy law assumes that the subsidy relationship is shaped by means of a decision-replacing agreement. Under Dutch law a decision-replacing agreement implies an unacceptable interference with the subsidy section of the General Administrative Law Act. Under Dutch law it is therefore problematic that from such agreements the power is derived to impose penalties on the final recipient, without there being a legal basis for this.

In the second place the Dutch subsidy-granting system assumes that with the decision determining the subsidy amount the matter has been finalised. Therefore, in the light of the national principles of legal certainty and legitimate expectations, such a decision cannot be reconsidered without good reason. In contrast, according to European subsidy law it is virtually always possible except when the limitation period has expired to withdraw and recover a European subsidy, if irregularities have occurred. The fact that the irregularities may partly be the fault of the subsidy-granting authority is of no concern. The consequence of the equality between the subsidy-granting authority and the final recipient of the European subsidy is that the final recipient is not justified in relying on the legitimacy of the decisions of that authority. It is the own responsibility of the final recipient of the European subsidy to investigate to what extent the decisions of the subsidy-granting authority agree with EU law.

In the third place, the fact that the administrative sanctions which under European subsidy regulations must be imposed in case of irregularities are not considered punitive sanctions by the Court of Justice is partly caused by the circumstance that final recipients of European subsidies have voluntarily chosen to participate in the European subsidy scheme. The idea is that this
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voluntary choice also implies that the sanctions to be imposed by virtue of the European subsidy legislation are accepted.

Finally, European subsidy law attaches much more importance to a transparent division of scarce European subsidies. This can also be explained from the idea that the final recipient of a European subsidy is seen as an equal contract partner. After all, the transparency principle has its origin in procurement law, which concerns the award of public contracts. Although in the Dutch subsidy practice many legal actions are brought about the division of scarce subsidies, that has so far resulted in few codified rules.

In some cases complications with the implementation of European subsidy legislation are connected purely with the subsidy section of the General Administrative Law Act or the special national subsidy regulations adopted for the implementation of the European subsidy legislation. In the first place Article 4:23 of the General Administrative Law Act requires a legal basis for granting a subsidy. This requirement also applies to European subsidies which must be considered as subsidies under the General Administrative Law Act. The requirement of the legal basis and in particular the exceptions to it lead for instance to the question to what extent a legal basis can be found in the European subsidy legislation.

Secondly, many problems arise with the subsidy ceiling provided for in the subsidy section of the General Administrative Law Act. When granting European subsidies it has usually also been required in the Dutch subsidy legislation that such a ceiling must be determined. For many projects it applies that after a project has been carried out the European subsidy is fixed at a lower amount than the maximally granted subsidy amount (under-realisation). For the question whether the subsidy ceiling has been reached, the totally granted maximum subsidy amounts are nevertheless taken as starting point. The consequence of this is that applications for the award of a European subsidy for in principle suitable projects must be rejected by virtue of Article 4:25 (2) General Administrative Law Act. Insofar as one does not succeed in using the reserved, but eventually not paid European subsidies in new projects these funds flow back to the EU by virtue of the decommitment principle.

In the third place, subsidy-granting administrative bodies are inclined to impose stricter subsidy obligations when granting European subsidies than is necessary under the European subsidy legislation. Under the European subsidy legislation these stricter national rules must be enforced in the same way as the European rules. Dutch subsidy-granting administrative bodies can therefore not refrain from withdrawing and recovering the European subsidy, because the final recipient of the European subsidy has ‘only’ acted contrary to a Dutch subsidy obligation. Hence, laying down stricter national rules, how well intentioned that may be, means in practice a greater risk of irregularities, which must result in the withdrawal and recovery of a European subsidy.

The conclusion is that many of the above-mentioned bottlenecks can be overcome by adopting in the Netherlands the European Subsidy Act supple-
mentary to the subsidy section of the General Administrative Law Act. In this Act of Parliament the subsidy section of the General Administrative Law Act can, where useful, be deviated from. That is sometimes necessary in order to avoid that the provisions of the subsidy section of the General Administrative Law Act must be stretched in order to be able to fulfil the European obligations. The European Subsidy Act will in addition offer the possibility to provide a basis for the powers of Dutch administrative organs charged with the implementation of the European subsidy legislation.

THE PRESENT RESEARCH INTO THE PERSPECTIVE OF MIXED MANAGEMENT

In the concluding observations it has been discussed that the mixed management between the European Commission and the Member States in the implementation of the European subsidy schemes implies that there exists an equal partnership. Since the EU – rightly or wrongly – does not really entrust the implementation of the European subsidy legislation to the Member States, a European straitjacket has been created in particular in Commission rules and soft law in order to force the Member States not to deviate from the European line. Eventually it applies: the EU pays, so it decides. So, the mixed management between the European Commission and the Member States is mainly characterised by hierarchy. In practice the institutional and procedural autonomy is of much less significance than would be expected on the basis of the European subsidy schemes. In view of this the term ‘mixed management’ in the context of the implementation of the European subsidy legislation is an unfortunate choice. It implies that there is equality between the European Commission and the Member States. There is however no question of equality. The term ‘layered management’ does more justice to the characteristics of the ‘partnership’ between the European Commission and the Member States in the implementation of European subsidy schemes. The rules and their interpretation are determined at European level and the Member States, when implementing the European subsidy schemes, should strictly conform to them.

The layered management has a number of consequences. In the first place, it gives rise to complicated layered laws and regulations. Secondly, an important consequence of the layered management is that the Member States are financially liable when irregularities occur in the implementation of the European subsidy legislation. The consequence of this is that the Member States try to limit as much as possible the financial risks. This results in stricter national implementing rules than is necessary in accordance with the European subsidy legislation. Furthermore, Dutch implementing bodies are strongly inclined to follow the European Commission’s interpretation of the European subsidy legislation – laid down in soft law or in advice obtained over the telephone –, even if it is doubtful whether this interpretation is actually correct. Dutch implementing bodies also try to limit the financial risks by withdrawing
and recovering as much as possible European subsidies that have not been spent in accordance with the European subsidy legislation, even if the irregularities are (partly) due to these bodies themselves. If a dispute about this is brought before the court, the Dutch administrative court turns out to be susceptible to the argument that the European subsidy is in breach of the European subsidy legislation and so because of “Brussels” must be withdrawn and recovered – in spite of the fact that the mistakes are partly the fault of the national implementing body.

Thirdly, the layered management has resulted in a veritable enforcement cathedral both on European and national level. The enforcement cathedral results in a situation where a final recipient can expect up to seven control officers, which leads to sky-high implementation costs. It has however the inherent risk that there is so much emphasis on the protection of the financial interests of the EU that the content of the projects financed with European subsidies is no longer taken into consideration.

Fourthly, in the Netherlands the consequence of the layered management is that as regards the withdrawal and recovery of European subsidies a Europeanised subsidy law has developed. Although the subsidy section of the General Administrative Law Act applies in theory to the withdrawal and recovery of European subsidies by Dutch implementing bodies, in practice interpretation is, where needed, in conformity with Union law in order to be able to fulfil the European obligations. Hence, in the Netherlands a subsidy law has emerged which is completely tailored to providing European subsidies. But the consequence of this is that, although the same Dutch legislation applies both to recipients of European subsidies and to recipients of national subsidies, the former have less protection from this Dutch legislation because of its interpretation in conformity with Union law.

Fifthly, the layered management has the result that, although final recipients of the European subsidies have access to legal protection by the Dutch courts, it is not guaranteed that the Court of Justice gets the chance to interpret the European subsidy legislation. The Dutch courts are inclined to refrain from asking for a preliminary ruling, in view of the time this takes and furthermore since clear answers of the Court of Justice are not ensured. This does not always imply the best outcome for the final recipient of the European subsidy. The latter has however no possibility to enforce that a preliminary ruling is asked for.

The aforementioned consequences of the layered management do not make the European subsidies more attractive. Potential final recipients are deterred by detailed rules and obligations in combination with the risk that the European subsidy – in many cases many years later – must be paid back. The consequence of the layered management is that the financial risk almost always lies with the final recipient. The national legislator and national implementing bodies are faced with complicated European subsidy legislation and high implementation costs. Moreover, in many cases – as both reports of the Euro-
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The effectiveness and the results of the subsidised projects cannot be demonstrated. The national courts prefer not to deal with the disputes about European subsidies between national implementing bodies and national final recipients. The complicated European and national subsidy legislation and the circumstance that the two do not always fit in well with one another lead to many worries for all those concerned.

So it is understandable that in the Netherlands the usefulness and necessity of European subsidies for the Netherlands are questioned. Would it not be better – and far easier – to subsidise cycle paths and employment projects with national instead of European money and in exchange to pay less money to the EU? However, politically it does not seem to be very realistic to suppose that the European subsidies for the Netherlands will be abolished so long as other rich EU countries continue to profit from them. Moreover in these days of economic crisis flows of national money are drying up, so that the European funds are seen as a welcome extra source of income. Another possibility would be that the implementation of the European subsidy schemes is no longer outsourced to the Member States, but will come entirely in the hands of the European Commission and European agencies. After all, that will solve the problems between legal orders that do not fit in with one another. This possibility too is politically not very realistic. In the first place, there would at this moment be insufficient manpower for this at the European level. Secondly, the Member States would lose much influence in respect of the question which projects should be eligible for European subsidies.

The above does mean that also in the future European subsidy schemes will have to be implemented in the Netherlands. In this book improvements in the implementation have been proposed, so that the European subsidy may again become a little more attractive. However it doesn’t look as if the aforementioned desired national and European developments will be on their way in the short term. The legal protection of the final recipient of the European subsidy is as yet in the hands of in particular national implementing bodies and national courts. They are faced with European obligations and are – rightly – hesitant not to comply with these obligations. Although the European obligations – also in view of the protection of the financial interests of the EU – deserve all attention, the danger in that respect is that the legal protection of the final recipient of the European subsidy is lost sight of. The low point in that connection is the disappointing ruling of the Dutch Administrative Law Division of the Council of State in which it is held lawful that the European subsidy is withdrawn and recovered from a final recipient since the obligations to keep records have not been complied with, while it had been established that the national implementing body itself had taken care of the

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1 See the Dutch report about implementation of the Cohesion policy: “The Future of Cohesion policy, Joint position paper of the Dutch central, regional and local government.”
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Project administration. This Kafkaesque outcome is completely motivated by the European obligation to go over to recovery. Although this obligation most certainly exists, it applies in the relationship between the European Commission and the Member State and has not been written for the national subsidy relationship. If in that case value is only attached to the European obligation to go over to recovery, no justice is done to the circumstances of the case, to the reasonableness and to legal certainty.

To do justice to the national courts it must be acknowledged that the case law of the Court of Justice – in particular the ESF ruling – makes it very difficult to make exceptions to the European obligation to go over to recovery. They would then first have to ask for a preliminary ruling whereby there is no guarantee that this will result in other, more balanced answers. That is (also) why the national implementing body should take the lead in this. After all, in practice it has appeared possible to start negotiations with the European Commission and to accomplish that in case of irregularities, of which it has been shown that they are (partly) the fault of the national implementing body, the European subsidies must actually be paid back to the EU, but do not have to be withdrawn and recovered from the final recipients. National implementing bodies should more often enter into this kind of negotiations, so that mistakes in the implementation of the European subsidy legislation are no longer fully for the risk of the final recipients of the European subsidies. The implementation of the European subsidy legislation is a complex situation, in which legislators, implementing bodies and courts must assume their responsibility in the realisation of the European objectives, without prejudicing the principles of legality and legal certainty.