



**Le juge administratif
et
le droit communautaire
de l'environnement**

**National administrative courts
And
Community
Environmental law**

CONTRIBUTION

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**La réglementation des déchets et des installations polluantes
Regulations governing waste and polluting facilities**

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I am tempted to say a lot of things to you, but from previous experience *inter alia* at the European Court of Justice, I know that one becomes most popular in these circumstances by being very brief. So I will try to do that.

I was very honoured to have been asked by the organisation to speak here today. I assume it's because we have submitted the best report and also you've heard before from the representative of the European Commission that we have a flawless system in implementing these directives and the judges all behave very well. I propose I won't say anything on our report besides the comment I've just made and of course I will be happy to answer questions.

I would like to talk about two points. The second is partly on request, to deal with this organisation we have to advise the judges. The first entails some general comments on the application of EC-law by national courts.

First of all, I would like to adhere to what has been said before: that EC-law works through national law, so it must fit in the national law system. It's very important, I think, that the European legislator keeps an eye on that. This is also why we favour as the Dutch Council of State the method of consistent interpretation. We choose to interpret the national law as much as possible in consistency with EC-law rather than applying the instrument of direct effect, which means putting aside national law.

I think the experience of the Council of State with EC-directives shows that, in those periods where we have lots of cases on for instance the Bird's Directive or the Habitat Directive or even the IPPC-Directive, the cause of the case load was not so much, I think, problems inherent to these instruments, but rather a lack of implementation. And you can actually see that once these instruments have been implemented, sometimes years too late I have to admit, they do work and it doesn't create insurmountable problems anymore.

I would also like to say that I share the concerns of the previous speaker on the growing use of guidance documents. I think we see a tendency in the legislation to have framework directives. Another example, apart from IPPC, would be the Water Framework Directive, in which very general ecological goals are set, leaving all the details to be worked out by technicians who sit down together to draft Guidance Documents. There is no real democratic process here, and there are no lawyers involved. These documents will nonetheless have very high status, because after all, when we have to apply the law as judges it is mostly all guidance we have. So I do share some concerns here although I realise as lawyers we could never write this down. Some sort of influence of the legislator in these documents would be nice however.

Last general comment on this point: I see some interesting questions coming up, in the Netherlands at least, on the consequences of infringing European (quality) standards for individual decisions. I'm talking here on nation wide standards such as in the Air Quality directives or again the Water Frame directive or the National Emission Ceiling (NEC) directive.

We are confronted sometimes with the argument by parties saying (let me take the example of the NEC- directive, according to which certain ceilings must be reached in 2010): Well, we are way over these ceilings at present, there's no way we are going to be able to limit emissions or reduce them so as to reach the required level in 2010, and this means that every individual decision, e.g. a license, for a plant which generates some additional emissions, will have to be quashed. So far we have been able to block these arguments by saying, this is only in 2010 and nothing is sure yet, but I hope you see the difficulty of this argument. To what extent should infringement of national (quality) standards have consequences for individual decisions? I'm sure one time in the future we will not be able to escape this argument and will have to decide on it in substance.

Then as a second issue I would like to elaborate a little bit on this institute that we have. It is an institute which was founded in 1993, in our present Environment Act there is a legal basis for this institute. It is a permanent institute with about 30 to 40 advisors. These people are technicians, natural scientists, biologists, etc. It is a permanent organization and it's independent. It's founded and paid by the state, the Council of State doesn't pay these people, neither do the parties. We ask them in about 50% of the cases to produce a report, mostly in cases where licenses are challenged because the authority, when granting the license, will take into account the facts submitted by the operator who wants the license and then a third party challenges the permit by saying "you shouldn't have given this permit because..." and it submits it's own evidence. And then of course if we have to settle this dispute, (perhaps I should have started by stressing that we are the first and only instance in environmental cases so we decide in full, also on the facts and every aspect of substance) we ask for advice. This is not about legal questions, although these people are very well aware of the legal framework - as was stressed before, the facts and the legal framework are almost inseparable- but what they do is enlighten us on technical questions like : how urgent is this clean-up? What is the actual level of noise, because the neighbours say it is too noisy and the operator says it's not too noisy? Who is right? What is the distance to the neighbours and are there trees in between, perhaps to diminish the sound? Is it BAT or not? How about the traffic in the surroundings? We had a case last week for example, where this organization advised us on the prevailing winds. This was a case about smell. They said because we've researched the wind on the spot, we can tell that these people can never suffer from smell because the wind is always from the west (or something to that effect). The advisors always visit the area where the plant or farm is located. We find the advises very helpful indeed. I would say how to survive as an environment judge without such an institute and of course you can all tell me how you do that. I read in the report that Finland has judges who have these remarkable characteristics, but I was wondering, do you also go to investigate on the spot with all the judges? Yes you do actually, if it's necessary. Anyway, we are very satisfied with our own system, I can strongly recommend it and again I would be happy to answer any further questions on this.