

EU environmental directives in the Netherlands

1. Introduction

In June 2006, the Social and Economic Council of the Netherlands (SER) issued an advisory report containing recommendations to improve the coordination between EU and Dutch regulations and policymaking on nature and environmental issues. With reference to three EU environmental directives, the report examines why problems have arisen in the Netherlands and how these problems can be avoided in future.

2. Background to the advisory report – the issues

The environmental directives examined in the SER's report are the Habitats Directive (1992),¹ the Air Quality Framework Directive (1996)² and the Water Framework Directive (2000).³ These directives aim to protect public health and natural biodiversity.

Habitats Directive

The main aim of the Habitats Directive (1992) is to promote the maintenance of biological diversity. It was necessary to take action at Community level because the habitats, fauna and flora under threat are part of the Community's natural heritage, and the threats to their survival are often of a transboundary nature. During negotiations about this Directive, the Netherlands focused its efforts on the creation of conservation areas (Natura 2000) as the European extension of the National Ecological Network developed in the Netherlands in the early 1990s.

An important part of the Directive is the habitat assessment framework. Pursuant to this framework, for any project that may have 'significant effects' on a conservation area, an 'appropriate assessment' must be made of those effects. A project found to have a negative impact on the natural characteristics of the area may nevertheless be carried out if there are no alternative solutions, there are imperative reasons of overriding public interest, and compensatory measures are taken.

Air Quality Framework Directive

The Air Quality Framework Directive (1996) aims to prevent or reduce the harmful effects of air pollution on human health and the environment. The Directive stipulates that limit values and alert thresholds be set for thirteen pollutants. The specific limit values and alert thresholds are laid down in four daughter directives, based on the findings of international scientific groups, such as the World Health Organization (WHO). The first and best-known of these daughter directives provides standards for particulate matter. At negotiations about this daughter directive in Brussels, the Netherlands made a number of critical comments about the feasibility and height of these standards.

Water Framework Directive

The Water Framework Directive (2000) was drawn up in response to the pressure of ever-growing demand for a sufficient supply of high-quality water. The Directive provides that a

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

² Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management

³ Directive 2000/60/EC of 23 October 2000 establishing a framework for the Community action in the field of water policy

'good status' for water must be achieved by 2015. Similarly to the Air Quality Framework Directive, specific standards are to be set in daughter directives in due course.

In the Netherlands, the Habitats Directive and the Air Quality Framework Directive have led to comparable problems that can be summarised by the following question: 'Is the Netherlands in a deadlock?' The application of these directives meant that building plans for infrastructure, housing, companies and industrial estates were not always been able to proceed or needed to be adapted. This occurred on the basis of court rulings by the Council of State, the highest authority to which citizens and environmental authorities can appeal against the decisions of administrative bodies (i.e., municipalities and provinces) on spatial planning issues. On several occasions, the Council of State ruled that, in implementing the environmental directives, these administrative bodies had not done their homework well, or that plans could not proceed because they would fail to meet environmental quality standards (in particular, for particulate matter).

In addressing this issue, the SER applies the following framework:

1. Are problems inevitable because of different and conflicting values and interests? If so, have the relevant values and interests been broadly weighed up (e.g., by means of a social cost-benefit analysis) at both national and European level?
2. If the problems are not (primarily) caused by a conflict of interests, are they caused by the directive itself? If so, how can a better directive be developed – e.g., one that gives member states greater scope for customisation?
3. If the problems are not caused by the directive itself, are they caused by the way in which the directive is implemented nationally? If so, implementation needs to be improved in the Netherlands, and no decision-making at European level is required.

Characteristics of the Netherlands and the importance of a European environmental policy

In further analysing these issues, it is important to take into account the Netherlands' specific combination of geographical and economic characteristics. Based on this combination, the three environmental directives are believed to concern the Netherlands more than other EU member states. The Netherlands is one of the most densely populated countries in Europe, with a strong concentration of economic activities linked to metropolitan areas in the economic core area of Northwest Europe. The Netherlands' geographical position in a delta of rivers makes the country more vulnerable to cross-border environmental problems, as well as a natural logistics hub, with all accompanying transport movements. In addition, the strong growth of intensive cattle farming has led to specific environmental problems. Finally, the Netherlands has specialised in relatively energy-intensive sectors of industry, such as the chemical industry.

Some of these characteristics must be viewed as facts about which little or nothing can be done. This particularly applies to the Netherlands' geographical position. To a certain

degree – and certainly in the long term – other characteristics can be influenced by policy.

Although this specific combination of characteristics is unique to the Netherlands, there are important similarities with surrounding countries. For instance, the average population density in Germany is much lower than in the Netherlands, but metropolitan areas such as the Ruhr area face similar air quality problems to the Dutch Randstad conurbation.

Clearly, the close concentration of population and economic activities in the Netherlands makes it difficult for the country to meet specific environmental quality targets. Cross-border and shared environmental problems can now be addressed effectively at EU level. The intensive use of space and high pressure on the environment in the Netherlands mean that this country, in particular, has a clear interest in cost-effective instruments to address environmental challenges.

3. Analysis

3.1 Introduction

In this section, the SER sets out the theoretical framework for the analysis of the three environmental directives. As far as possible, this theory is supplemented by practical experiences with the three directives. To start with, the SER explains the principles on which it has based its advice.

3.2 SER principles

In the SER's opinion, the key issue is whether the three environmental directives promote social affluence. As in all its advisory reports, the SER defines affluence in the broadest sense, in terms of material progress (*profit*), social progress (*people*) and the quality of the living environment (*planet*). In the SER's view, promoting social affluence and striving for sustainable development therefore ultimately have the same aim.

Consequently, with regard to the environmental directives, the question is whether the social benefits of policy harmonisation at EU level are greater than the social costs involved, and whether the cost-benefit ratio is optimal, or whether another form of policy harmonisation within the EU could lead to better results for the Netherlands.

Previous SER advisory reports on EU environmental and other policy

The SER has previously issued several advisory reports on the main lines of European integration and the issue of how the Netherlands can make optimal use of European frameworks. Recent examples include reports on the evaluation of the Lisbon Strategy (2004), the Services Directive (2005), Eco-efficiency as Opportunity (2005) and the co-financing of the EU Common Agricultural Policy (2006). The SER's advice is given from a socio-economic perspective and is based on the understanding that national policy and European policy are strongly intertwined.

At the end of 2005, for the Upper House, the SER carried out an initial analysis of the European Commission's legislative and work programme for 2006, with a focus on the principle of subsidiarity. In the follow-up to this analysis, the SER later recommended to the Cabinet that it more systematically consider whether timely consultation of the SER could be useful with regard to the Netherlands' coordination of EU policy.

In answering these questions, the principles of subsidiarity and proportionality play an important role. The principle of subsidiarity reflects an express preference for decision-making at the lowest level that is appropriate for a specific issue. The principle of proportionality concerns (amongst other things) the means used, involving issues such as the appropriate level of detail in directives and the extent to which account is taken of local circumstances.

In order to develop a European environmental policy that will reflect the desires and possibilities of the various member states to the fullest extent possible, a number of problematic issues must be addressed. With reference to the framework given in Section 2, three such issues can be outlined: (1) conflicting values and interests; (2) the content of the directives; and (3) implementation in the Netherlands.

3.3 Conflicting values and interests

Theory

Striving for sustainable development is a social process that involves searching, learning, considering and committing oneself. It is not about a clear-cut goal, but instead about a continuous balancing process that is necessary to keep economic and financial (i.e., *profit*), socio-cultural (i.e., *people*) and ecological (i.e., *planet*) resources in good equilibrium with each other. This balancing process is never-ending, because of the various dimensions of sustainability (each of which has its own methodology) and because what is or isn't considered to be sustainable depends on social judgment. In addition, conflicting values and interests must be clearly identified and subsequently weighed up against each other.

Practice

Analysis shows that the above-mentioned balancing process has not sufficiently taken place in the Netherlands with regard to the three environmental directives. The predominantly political decisions taken were not made sufficiently clear. Moreover, barely any social cost-benefit analysis of the environmental directives – an important aid in weighing up competing values and interests – was carried out. Finally, the problems that manifest themselves so strongly at local level in the Netherlands in applying the Air Quality Framework Directive and Habitats Directive can certainly also be attributed to insufficiently consistent national political decisions during the decision-making and implementation processes for these directives.

3.4 Content of the directives

Theory

Tensions between different values and interests manifest themselves in the choice of premises and principles for policy and regulation. For instance, the principle ‘the polluter pays’, a cornerstone of environmental policy, may conflict with the objective of a level playing field for companies. Equally, this latter objective may conflict with the principle of equal standards (or equal minimum standards) for environmental quality directives. The EU is not only an internal market: it is also a legal community to which Community law is uniformly applied.

However, this uniform application of the law does not mean that there is no scope for diversity. Due to considerable differences between the member states – differences which have greatly increased following the recent enlargement of the EU – there is a need for customisation. At the same time, in its interactions with individual member states, the EU is facing the challenge of finding a balance between, on the one hand, common standards and principles and, on the other hand, scope for a certain degree of differentiation to be able to effectively address local and regional problems and opportunities. Pursuant to Article 174 (3) of the EC Treaty, in preparing its policy on the environment, the EU must take account of environmental conditions in the various regions of the Community, as well as the balanced development of those regions.

In addition, to be acceptable to all member states, European legislation necessarily features a high degree of compromise that leaves scope for national interpretation. Finally, as a legal instrument and by its very nature, a directive allows scope for the member states to determine how and with which resources they will achieve the prescribed objectives.

Practice

When European regulations, such as the three environmental directives, lead to problems, the principle of subsidiarity is often raised: should the European Commission in fact concern itself with these problems? It is clear that these environmental directives have a strong basis in the EC Treaty, specifically in Articles 174 and 175 on environmental protection. Moreover, these directives aim to protect human health and vulnerable ecosystems, which is a good reason for establishing a protection level (or minimum protection level) for the EU as a whole.

With regard to the content of directives, the principle of proportionality is particularly relevant. One important issue is whether, in view of regional differences within the EU, the three environmental directives offer scope for national customisation. For the Air Quality Framework Directive, this scope barely exists: the first two daughter directives contain environmental quality standards in the form of ‘hard’ limit values that are the same for the whole of the EU.⁴ The third and fourth daughter directives contain ‘softer’

⁴ Despite this, these daughter directives do provide scope for various interpretations by the member states, e.g., with regard to the issue of where the limit values apply. In Germany and Austria, they apply only in areas often

target values. In contrast, the Habitats Directive and the Water Framework Directive explicitly leave scope for interests to be weighed up, for instance in order to avoid disproportionately high costs.

Another question is whether the implementation deadlines for the directives provide the member states with sufficient scope for a cost-effective approach. The three directives each have different implementation deadlines, and within a single directive various deadlines apply, depending on the requirement in question. The time limits for implementation range from over 1.5 years up to a maximum of 15 years (e.g., for achieving the ‘good status’ of water). In 2005, the European Court of Justice found the Netherlands guilty of failing to implement all legal and administrative provisions necessary to ensure compliance with the Habitats Directive within the prescribed time limit.

3.5 Implementation in the Netherlands

Theory

European directives generally have implications for national regulations. This may be because the directive (or parts thereof) sets objectives that go beyond those in national regulations or because it requires a different regulatory and administrative methodology. Often, national regulations make more stringent requirements than the directive itself. Systematically lowering these requirements would be at odds with the emphasis on providing sufficient scope for national policy, and the principles of subsidiarity and proportionality. It is better to examine how useful and necessary these more stringent requirements are on a case-by-case basis: the most logical time at which to do so is during the decision-making process for a new directive.

European directives can also have implications for policymaking and relations between administrative bodies within a member state. This particularly applies to local government authorities that are responsible for actually implementing directives on environmental quality. Potential problems caused by implementing the directive too late or incorrectly mostly manifest themselves at province and municipality level.

Furthermore, in order to achieve one of the main objectives of the three environmental directives – i.e., the harmonisation of environmental impact and environmental quality – it is important that this objective be adequately supported by an appropriate harmonisation of measures in the field of environmental pressure (e.g., emissions ceilings) and emission reduction and energy-saving policies. This harmonisation will provide the best opportunities to promote eco-efficient innovations (Eco-efficiency as Opportunity). For the Netherlands in particular, with its high traffic density, achieving a good balance between the set environmental quality standards and Community measures such as emissions standards is critical.

frequented by people for longer periods of time, as opposed to the Netherlands and most other EU countries, where they apply to the entire territory.

A good mix of measures is also important to counteract any negative effects that environmental quality standards may have on economic growth. By promoting eco-efficient innovations, the EU can make a valuable contribution to a cost-effective approach to environmental issues. It is also necessary to achieve the right balance between the various measures to prevent member states from becoming trapped in an impasse in which they must comply with the set standards, but lack sufficient possibilities to take appropriate measures to meet those standards within the framework of European law.

Practice

In comparison with the requirements of the Habitats Directive and the Air Quality Framework Directive, Dutch regulations impose more stringent requirements and so offer more protection. With regard to habitat protection, this has been deliberate, and the Cabinet wishes to maintain this state of affairs. With regard to air quality, national regulation has been adapted in recent years in order, together with other measures, to be able to meet European standards.

It is striking that, during preparations for EU decision-making on these environmental directives, no direct link was made to implementation in the Netherlands and to the local government authorities that play a major role in applying the directives. The municipalities, in particular, were insufficiently prepared, which made their decisions extremely vulnerable to founded complaints from interested parties and to corrective action by the administrative courts and the Council of State.

Why have there been so many legal proceedings in the Netherlands?

In the Netherlands, compared to other member states, the application of the Habitats Directive and the Air Quality Framework Directive has led to a relatively large number of legal proceedings. This can largely be explained by several concurrent factors:

- * Environmental and nature organisations in the Netherlands have greater access to the courts than in other member states. They can lodge complaints or appeals, whereas in other countries, such as Germany, they can only do so if they can demonstrate subjective public-law rights (e.g., land ownership);
 - * Poor preparation by municipalities;
 - * In some respects, implementation of the environmental directives in the Netherlands was very rigid, with individual project legally linked to spatial planning;
 - * Processes of spatial planning are very complicated in such a densely populated country as the Netherlands and there is insufficient coordination with environmental policy.
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The analysis of the three environmental directives on which this advisory report is based shows that there has been a lack of adequate European policy and supporting national policy in this area in past years. Since the Netherlands originally called for European emission reduction and energy-saving policies measures to be able to meet standards for particulate matter, little has been heard from either Brussels or The Hague. It was only upon the European Commission's proposed amendment of the Air Quality Framework Directive and its daughter directives in autumn 2005 that the Dutch Cabinet repeated this call for measures.

4. SER recommendations

The SER's recommendations in this advisory report are divided into two types: recommendations that apply more generally and recommendations that specifically concern environmental policy. These recommendations are not only relevant to the Netherlands; they could also benefit other EU member states.

4.1 General recommendations

Act proactively and strategically before making decisions

The Netherlands must take a much more proactive and strategic approach to European integration, rather than a reactive and defensive approach. Government and Parliament must apply the subsidiarity principle to the phase before the European Commission publishes its proposal, rather than to the phase thereafter. This will only be possible if national politicians take a clear position on important proposals in good time, based on careful and extensive consideration of the various values and interests at stake. To make this possible, EU coordination in The Hague must be organised in such a way that time and energy are not invested in resolving differences of opinion between departments, but instead in the creative search for new opportunities in the European playing field.

Broader coordination with the EU

The SER does not believe it is wise for national coordination with the EU to be solely the responsibility of various central government units. For key issues, it is logical to call on insights and expertise from society by consulting civil society organisations (employers' and employees' organisations, and nature and environmental organisations). Stakeholders involved in the implementation and enforcement of a directive, such as local government authorities and companies, must also be involved in coordination. This will lay strong foundations for the implementation process.

Good implementation plan required

For directives that cannot easily be incorporated in existing national rules and structures, an implementation plan must be prepared in parallel to the development of the directive. Such a plan must combine official procedures and substantive measures to achieve the objectives and standards of the directive in a cost-effective way. The plan's development must reflect the development of the decision-making process in that the plan must incorporate any changes along the way, and the implementation bodies and business community must be involved in this development. By working out various scenarios in good time, some direction can be given to this relatively fluid process.

4.2 Specific recommendations for environmental policy

Representing national interests in Europe

The SER understands that many Dutch environmental issues can only be resolved at European level. However, this does not alter the fact that, in view of the special circumstances described above, the Netherlands requires a certain degree of scope for customisation in dealing with conflicting values and interests.

Because environmental quality standards can impede economic development, a good mix of various measures is desirable at European level. In the area of air quality, in particular, the SER considers it necessary to further tighten policy at European level, which will also promote eco-efficient innovations (Eco-efficiency as Opportunity).

Achieving a good European mix of measures is something that concerns all member states. In view of the Netherlands' economic and geographical position, it is clearly in the country's interest to strongly impress the need for this mix upon the EU.

Link to spatial planning

As indicated above, the problems in implementing the Habitats Directive and the Air Quality Framework Directive have mainly manifested themselves in relation to spatial projects (infrastructure, housing, companies and industrial estates). Now that the Government is comprehensively integrating laws in the field of spatial planning and the environment, the issue is how to involve the EU directives in this integration in the right way. In addition, local government authorities (in particular, smaller municipalities) will need to invest in the expertise of their officials and the streamlining of procedures.

Against this background, the SER recommends that a full inventory be made of problems in the relationship between EU environmental directives and the Dutch legislative system and administrative practice in the field of spatial planning and the environment, and that these problems be systematically resolved.

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