



VROM Council recommendations for the development and implementation of European law and policy on housing, spatial planning and the environment in the Netherlands

SUMMARY

The application of environment directives such as the Nitrates Directive, the Habitat Directive and the various directives on air quality is a contentious issue in the Netherlands. EU legislation has thrown up more barriers to economic activity in this country than in others. For example, in no other member state have infrastructure projects been significantly hindered as a result of the application of the limit values for air quality, even though the air quality in several other countries and regions is no better than here.

The VROM Council (VROM-raad), the Netherlands' Council of Housing, Spatial Planning and the Environment, investigated whether there are features or characteristics specific to the Netherlands at the root of these differences. It turns out that a combination of specifically Dutch characteristics and choices – including high environmental pressure, high population density and the country's delta topography, plus the nature and scope of the administrative law review processes – determine the practical effects of European law and policy in the areas of environment, spatial planning and housing. As a result, the problems associated with the implementation of European environment law and policy are magnified in the Netherlands. Owing to certain characteristics of the Dutch system of administrative law, European environmental law has rapid and far-reaching effects here. These characteristics – in particular, the link between environmental law and spatial planning law, the pace of administrative proceedings and the ease of access to the courts for private citizens – ensure that the difficult choices involved in implementing and applying European environment law and policy in the Dutch economic and geographical context become apparent very quickly. This is why the combination of these characteristics and choices sometimes have a much greater influence on the effects of EU law and policy than the host of details that are debated when measures are first conceived.

The VROM Council recommends that, when European law and policy is formulated, the potential consequences arising from national characteristics and choices be examined more deliberately. Since the impact of European law and policy are determined in large part by the characteristics of national administrative law, geography, economy and culture, it is important to estimate the effects of EU policy proposals in the earliest phases of preparation at EU level. Impact assessments conducted by the European Commission chart the EU-wide effects. National impact assessments which take account of the specific situation



in an individual member state would identify the effects that can be expected at national level. The VROM Council therefore advocates using the 'embryonic' phase of EU policy to plot out the effects that are likely to occur due to country-specific characteristics.

In addition, the latitude that member states have in transposing and applying EU law should be actively explored when the transposition or application of a particular dossier is likely to be problematic or when a dossier could have far-reaching effects due to characteristics specific to a particular member state. The best approach is often to examine how other countries interpret certain obligations and how they transpose and apply the provisions concerned. Comparisons can reveal any scope for manoeuvring or alternative forms of implementation, and thus enable member states to make a more conscious choice between various options when transposing and applying EU directives. It was not the European environmental standards themselves, but rather national choices (deliberate or not) that were responsible in the past for the exceptional effects that some European provisions have had in the Netherlands.

6

Recent experiences with the application of environmental directives seem to have triggered a shock reaction. In the past, the Netherlands often advocated imposing as many far-reaching, stringent obligations as possible in EU environment directives in order to create enforceable provisions and thereby enable all of Europe to benefit from a high-quality environment. But now it frequently favours keeping obligations to the minimum and making those that are imposed as nebulous as possible. In the VROM Council's opinion, it would be unwise to continue down this path: there should be no concessions on clarity when quality requirements are at stake. Nevertheless, there must be scope for taking account of the specific circumstances of the individual member states. In view of its geographical position, the Netherlands has a permanent interest in ambitious European environmental standards, due to the implications for health as well as the natural environment. In order to meet the high demands set by Europe, the Netherlands also has a considerable interest in subjecting pollution sources to sufficiently rigorous standards at EU level. Wherever the ability to meet stringent quality standards depends on rigorous European standards for pollution sources, the Netherlands should continue to make a case for linking the two.

The Netherlands' high population density, its location at the mouth of several European rivers, its important distribution function for much of the continent and its intensive agriculture cause major ecological stress. This makes some of the environmental quality standards agreed at European level difficult for the

Netherlands to meet. In particular cases, it might therefore be advisable for the Netherlands to advocate more flexible environmental quality standards.

Be that as it may, the aforementioned characteristics and choices may necessitate additional, further-reaching environmental measures in the Netherlands than elsewhere in order to guarantee the level of environmental quality that Europe and the international community consider necessary. By choosing to engage in certain intensive economic activities that distinguish it from other member states and regions, the Netherlands may have to implement more environmental measures than other member states. As a result, it will not always be possible to pursue a level playing field for parties forced to take these divergent environmental measures.

The way in which administrative law functions in the Netherlands is, in the VROM Council's view, a specific national characteristic that directly influences the effect of European law and policy. It is relatively easy to gain access to the courts. In contrast to the situation in other countries, the legal protections under administrative law pertaining to housing, spatial planning and the environment are frequently invoked, which means that the consequences of EU environmental law and other legislation are sometimes revealed more quickly in the Netherlands than elsewhere. As a result, the Dutch courts often set aside decisions, usually because a party has failed to demonstrate sufficiently how obligations ensuing from European law have been met. The right to bring environmental and spatial planning cases before the courts was limited to interested parties several years ago. The VROM Council is against further limitations. The Council does, however, advocate discussing at European level the differences in national legal protections and their consequences for applying and meeting standards imposed by European law. It is unacceptable that certain requirements under European law seem to be ignored entirely in some member states because no one is able to point out these failures in objection and judicial review proceedings.

The Dutch administrative courts operate quickly and efficiently. This is a public good that must be maintained. However, attempts should be made to increase the judicial system's capacity to resolve disputes, and the VROM Council recommends more comparative research in this area. Reducing the number of decisions overturned purely on procedural grounds and offering the option of rectifying administrative decisions or orders pending court proceedings ('administrative loop') could shorten delays caused by review proceedings. If recent proposals to amend the General Administrative Law Act (*Algemene wet bestuursrecht*) in order to expand the scope of the administrative loop cannot be



implemented quickly enough, it would be advisable to consider taking steps to this effect in environmental and spatial planning law.

With this analysis and guidelines, the VROM Council is expressing a different view of the problems associated with the implementation of some EU legislation, e.g. the Air Quality Framework Directive, in the Netherlands. Although there is a strong tendency to blame building freezes on 'Brussels' and consequently advocate weaker EU environmental quality standards, the VROM Council recommends spotlighting other matters. The Netherlands could improve the effectiveness of efforts to implement European law and policy by taking advantage of the scope provided by EU legislation for modifying the transposition and application process.

Conclusions and recommendations

Both the application of environment directives (e.g. the Nitrates Directive, the Habitat Directive and the various directives on air quality) and the debate on housing associations are contentious issues in the Netherlands. EU legislation has thrown up more barriers to economic activity in this country than in others, even though the quality of the environment is no better in many other countries or regions than here.

With this analysis and guidelines, the VROM Council is expressing a different view of the problems associated with the implementation of some EU legislation, e.g. the Air Quality Directive, in the Netherlands. Although building freezes are blamed on 'Brussels' and there is a strong tendency to advocate weaker EU environmental quality standards, the VROM Council recommends spotlighting other concerns. The Netherlands could improve the effectiveness of efforts to implement European law and policy by taking advantage of the scope provided by EU legislation for shaping the transposition and application process.

11

1. The Netherlands' distinctive characteristics and choices determine effects of European law and policy

In this advisory report the VROM Council concludes that the problems associated with the implementation of European environment law and policy are more severe in the Netherlands. Owing to certain characteristics of the Dutch administrative law system, European environmental law has rapid and far-reaching effects here. These characteristics – in particular, the link between environmental law and spatial planning law, the pace of administrative law procedure and the ease of access to the courts for private citizens – ensure that the difficult choices involved in implementing and applying European environment law and policy in the Dutch economic and geographical context become apparent very quickly. These attributes of the administrative law system, combined with factors such as environmental pressure, high population density and the Netherlands' delta topography, have a much greater influence on the effects of EU law and policy than the host of details that are debated when measures are first conceived.

Recommendation

The VROM Council therefore recommends that throughout the process of European law- and policymaking the Netherlands pay more attention to the



consequences that are likely to ensue because of its distinctive national characteristics and choices, and make better use of the opportunities the EU offers.

Supplementing European impact assessments with national ones

Impact assessments organised by the European Commission chart the effects of proposed measures EU-wide. They do not, however, factor in the considerable effects of transposition and application in divergent national contexts. There is an urgent need for knowledge about how directives and other European instruments can impact a member state due to its specific national circumstances. This is why the VROM Council advocates conducting national impact assessments (in addition to the European Commission's assessments), which would take the Netherlands' specific characteristics into account, thus providing a more accurate estimate of the local effects of European measures. National impact assessments would also ensure that the opportunities available to the Netherlands in European law and policy are revealed more quickly and used more effectively.

Another instrument that deserves our close attention is the territorial impact assessment, not least because the spatial effects of European environment policy are often quite dramatic in the Netherlands. A host of measures originating from the Commission's Environment DG not only impact the policy areas for which the Ministry of Housing, Spatial Planning and the Environment is responsible, but can also affect dry and wet infrastructure, agriculture and tourism. So, impact assessments should also chart the effects for adjacent policy areas, a remit that would necessitate the participation of experts in these fields.

Inter-administrative dossier teams – bringing in implementation expertise

A positive development is the establishment of inter-administrative dossier teams which guide the process of European law- and policymaking and prepare Dutch position papers. This allows previous implementation experience to be used in the development of new European law and policy. It is important to step up efforts to ensure that legal knowledge is used at an early stage of the process.

The specific effects of EU measures require attention from the embryonic phase of decision-making to the adoption of a measure and beyond.

It is important to take account of the anticipated effects of EU law and policy proposals, and the specific characteristics of member states in the earliest phases of preparation. These national characteristics and choices, and the way they determine the effects of European policy and law, should be factored in throughout the decision-making process. The VROM Council would add that this is also of growing importance in the phase following the adoption of a directive or regula-

tion. With the increasing use of framework directives and other measures that allow considerable latitude for interpretation and elaboration, the phase involving committees and guidance working groups is more important than before.

Significance of national characteristics regarding policy position in developing European measures

During this preliminary phase, awareness of country-specific characteristics can facilitate the formation of coalitions with member states and regions that share similar characteristics.

Only in highly exceptional cases would national particularities warrant conferring a special status on the Netherlands, or a small group of member states. However the VROM Council would urge the Netherlands to press – at the earliest possible stage – for language which, given the specific national situation, will help prevent transposition and application problems. For example, it might be necessary to factor in the presence of numerous bodies of surface water (alternative distance standards for pesticide use) or the high degree of urbanisation in the Netherlands (definition of ‘rural area’ for the purpose of subsidies in rural development policy). If this approach fails to produce a satisfactory result, the necessity of the proposed measure and the regulations it provides for should be critically examined by all the member states.

13

2. Strict or vague European/national standards?

Due to the problems with the application of European directives in years past, there are frequent calls to draft unambitious measures in legally vague language in order to avert potential problems in the Netherlands. The VROM Council believes this is short-sighted. There are many circumstances in which ambitious European environmental quality standards are in the Netherlands’ interests, particularly in view of its geographical situation and features. Health, the economy and the environment all depend on the existence of sufficiently far-reaching agreements on EU environmental quality standards.

Recommendation

The VROM Council recommends continuing to advocate stringent European standards for environmental quality. When setting quality standards, no concessions should be made with regard to clarity, but there must be scope for taking specific national circumstances into account.



Level playing field?

Calls are regularly heard for a level playing field in environment policy. The VROM Council would note, however, that any arguments pertaining to a level playing field should distinguish between ensuring a certain minimum level of environmental quality and the measures required to achieve it. Although EU environmental quality norms are only minimum standards, as a rule the Netherlands should not be subject to stricter environmental quality standards than other EU member states. However, to guarantee the same minimum level of quality EU-wide, there may be cases in which it is necessary to forego the aim of a level playing field with regard to environmental measures. Due to physical characteristics or national choices favouring intensive economic activities, it may be necessary to implement measures in the Netherlands that are stricter or broader than those in other member states and regions.

Linking European environmental quality standards to European source control measures

The ability to guarantee a certain level of environmental quality often depends, in part, on European standards for pollution sources, particularly for mobile sources and emissions that disperse over long distances and across borders. This means that there are limits to what a member state can do on its own to meet the European environmental quality standards. In such cases, the Netherlands' interests would be served if European source standards were coupled to environmental quality obligations in the member states. The VROM Council therefore urges the Dutch government to continue to press for such a move, wherever compliance with strict quality standards is dependent on the existence of strict European standards for pollution sources. The VROM Council also recommends introducing the topic of linkage earlier in the standard-setting process in order to improve the odds of achieving it.

14

3. A broad outlook on the transposition and application of EU law

Exploring transposition options by studying approaches of other member states
The Netherlands, like other member states, transposes and applies EU law within a given national context. As a result, sometimes certain approaches are chosen automatically, without first considering the full range of options available under EU law. This explains, in large part, the problems that have ensued from the Habitat Directive and the air quality directives. Problems of this nature could be circumvented, at least in part, by studying how other member states approach EU legislation in the areas of housing, spatial planning and the environment if the

transposition or application of new law is proving or likely to be problematic in practice.

Recommendation

The VROM Council advises actively exploring the options available for transposition and application provided for under EU law, in part by comparing the approaches taken by other member states. This is of particular importance in relation to dossiers that are likely to cause transposition or application problems and dossiers that have potentially far-reaching consequences due to the specific national characteristics that play a role.

The options can be explored by performing comparative studies, utilising European networks or setting up regular consultations with countries that develop solutions which are of interest to the Netherlands. The main objective of any exploratory process would be to determine how other countries interpret, transpose and apply certain obligations. Comparisons reveal the scope and alternatives for implementation, enabling the Netherlands to make a deliberate choice from a range of options.

By examining how other member states apply obligations imposed by EU law in select dossiers the characteristics and choices that distinguish the Dutch approach can be more clearly identified and scrutinised. Only then will it be possible for the Netherlands to make a well-considered choice if circumstances warrant a special approach.

Following on from the Advisory Council on Government Policy's report urging greater government involvement in European issues, we would also like to see the Dutch national government steer towards a more deliberate approach to making choices and considering alternatives in the process of transposing and applying European policy and law. First, though, the scope for action must be known.

Starting transposition at the appropriate time

It is essential to determine at an early stage whether it is possible and necessary to make national adjustments, and how to go about it, in order to comply with the environmental quality standards. This may mean that due to unique national characteristics, such as high population density or economically strong distribution, chemical and agriculture sectors, measures will need to be more intensive than in other countries and be taken earlier in order to secure the desired level of environmental quality. The Netherlands often has to make tremendous efforts to



achieve timely compliance with environmental standards. The VROM Council would emphasise how important it is for the Netherlands to launch implementation measures immediately so that no time is lost during the introductory phase.

4. Reshaping legal protections?

The way in which legal protections function under Dutch administrative law is, in the VROM Council's view, a specific characteristic that exerts a powerful influence on European law and policy in the Netherlands. There appear to be significant differences between the legal protections available in the administrative law systems of the member states. In some countries, because access to the courts is limited, particular substantive norms in EU environmental directives are neither applied nor enforced.

Recommendation

In the opinion of the VROM Council, it is unacceptable that certain requirements of European law are not being met in some member states because there is no objection and judicial review procedure which would draw attention to the state's non-compliance. The VROM Council therefore urges the EU member states to discuss differences in national legal protections and the consequences for the application of and compliance with European standards.

In the Netherlands, access to the courts was restricted to interested parties several years ago. In view of that change and the recommendation above, the VROM Council would advise against limiting access any further.

Since the administrative courts have minimal authority to settle disputes in environmental and spatial planning cases, it may be worth experimenting with different instruments in these areas in order to accelerate the dispute resolution process. If recent proposals to amend the General Administrative Law Act cannot be implemented quickly enough, it would be advisable to consider taking steps to this effect in environmental and spatial planning law. The government recently announced its intention to amend the Spatial Planning Act (*Wet op de ruimtelijke ordening*) and the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*) accordingly. The government may wish to consider expanding its scope of action in this respect to include the Environmental Licensing (General Provisions) Bill (*Wet algemene bepalingen omgevingsrecht*) and other environmental legislation.

The VROM Council recommends investigating the following options:

- using instruments such as the 'administrative loop' on a wider scale in order to facilitate quicker and more effective dispute resolution;
- increasing the problem-solving capacity of the legal system by expanding the scope for upholding decisions despite its procedural shortcomings.

5. Concluding remarks

In its analysis and recommendations the VROM Council has shone a new light on the problems the Netherlands has experienced in applying a number of EU directives, including those on air quality. Although there is a strong tendency to blame building freezes on 'Brussels' and, as a result, advocate weaker EU environmental quality standards, the VROM Council recommends spotlighting other concerns. The Netherlands could improve the effectiveness of efforts to implement European law and policy by taking advantage of the latitude that EU legislation allows.

About the VROM-raad

The VROM-raad (VROM-council), the Netherlands Council of Housing, Spatial Planning and the Environment is charged with advising government and parliament on the main aspects of policy with regard to the sustainability of the environment and on other main elements of policy relating to housing, spatial planning and environmental management. The VROM Council is also charged with providing advice on the environmental policy activities of the government on the international level.

The VROM Council advises the government and Parliament on strategic choices for the medium and long-term. Its advices consider policy issues related to realising a sustainable quality of the living environment. The Council meets every three weeks.

The explanatory memorandum accompanying the VROM-raad Act anticipated that requests for advice would largely be confined to four areas:

- The physical environment: the surroundings in which societal activities unfold. The issues here are those of quantity, quality, planning as well as identifying the variable such as energy, biodiversity and space, which are crucial to achieving a society that manages its resources in a sustainable way.
- The changing socio-cultural processes (such as sustainable consumption, demography, lifestyles, perceived quality of the living environment) and international developments (European integration, globalisation and North-South relations) which influence VROM-policy.
- The interrelationship between economy and ecology.
- Instruments and policy concepts (such as management techniques, optimisation, coherence, societal support, voluntary agreements and direct regulation and direct regulation, concepts for planning and the planning of large projects).

The Council was established in 1997 and resulted from a merger of the Council for the Environment, the Council for Housing and the Council for Spatial Planning. The work programme laid down each year by the Minister in consultation with the Council ensures that the advice requirements of both government and parliament can be met.

As of 1 January 2005 the third term of the VROM-council started. The composition of the Council for the third term is as follows:

- **Henry Meijdam** (mr. H.M.), chairman.
- **Chris Backes** (until 1-1-2008)



- **Peter Boelhouwer** (prof. dr. P.J.) Scientific director of the Research institute OTB, Director of the TU-Delft Research Centre for Sustainable Urban Areas. Professor of the housing systems at the faculty of Architecture of TU-Delft.
- **Karin van Dreven** (ms. drs. C.F.) Director of Corporation 'Woonplus Schiedam'.
- **Maarten Hajer** (prof. dr. M.A.) Professor of Political Science at the University of Amsterdam.
- **Marjan Hofkes** (prof. dr. M.W.) Acting Director of the Institute for Environmental Studies, Vrije Universiteit, Amsterdam. Associate Professor and Programme Manager Modeling and Economic Analysis, Vrije Universiteit, Amsterdam.
- **Niels Koeman** (prof.dr. N.S.J.) Professor of Environmental Law at the University of Amsterdam and solicitor and partner at Stibbe, Amsterdam. (since 1-1-2008)
- **Hans Mommaas** (prof. dr. ir. J.T.) Professor of Leisure Studies and Director of Telos: Brabant Institute for Sustainable Development at Tilburg University .
- **Arnold Reijndorp** (prof. ir. A.) Independent researcher and consultant at the cutting edge of urbanism, social developments and cultural trends in the urban field and Professor of Socio-Economic and Spatial Developments in Urban Areas at the University of Amsterdam.
- **Annemiek Rijckenberg** (ms. drs. A.) Independent advisor of urban development, project leader for Habiforum (Experimental field practical programme Renewed Space Use). Advisor of Deltametropool association.
- **Huub Smeets** (mr. H.C.F.) Chairman Director of Vesteda Groep.
- **Marja van der Tas** (ms. M.A.J.) Former councilor of Apeldoorn.
- **Sylvo Thijsen** (ir. S.) Chairman of the Board of Grontmij N.V (CEO).
- **Pieter Tordoir** (prof.dr. P.) Independent advisor and Professor of Economic Geography and Planning at the University of Amsterdam.
- **Nellie Verbugt** (ms. drs. P.J.L.) Independent advisor of spatial planning, urban management and public affairs. Chairman of the advisory group for the Netherlands Institute for Spatial Research.
- **Bastiaan Zoeteman** (prof. dr. ir. B.C.J.) Professor sustainability policy at Tilburg University. Chairman of Commission Genetic Modification (COGEM). Chairman of the institute for Globalization and Sustainable Development.

General secretary of the Council for Housing, Spatial Planning and the Environment

Bram van de Klundert (drs. A.F.).

Staff members

The staff of the VROM-raad numbers about twenty persons.

Contact and address

VROM-raad

Oranjevuitensingel 6

Postbus 30949, IPC 105

2500 GX Den Haag

the Netherlands

Telephone +31 70 339 1505

Telefax +31 70 339 1970

vromraad@minvrom.nl

www.vromraad.nl

EEAC

The VROM-raad is a member of the EEAC, the network of European Environment and Sustainable Development Advisory Councils.

www.eeac-net.org