



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

**National administrative courts
And
Community
Environmental law**

Pays-Bas-The Netherlands

**Réponse au
questionnaire
Answer to
The questionnaire**

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ANSWERS TO QUESTIONNAIRE
SEMINAR FOR COUNCILS OF STATE AND SUPREME
ADMINISTRATIVE JURISDICTIONS
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1. Information and public participation in environmental issues

A - Application of regulations

Has the respective application scope of these texts, and the Community directives in particular, led to disputes? How has national case law clarified the concepts contained in these texts considering, in particular, the case law of the Court of Justice of the European Communities?

Introduction

Directive 2003/4/EC (repealing Directive 90/313/EEC), Directive 85/337/EEC and the Aarhus Convention, which provide *inter alia* for a duty to inform the public and facilitate public participation in decision-making, have been implemented in Dutch law through the General Administrative Law Act (“General Administrative Law Act”), the Government Information (Public Access) Act (as amended by the Aarhus Convention Implementation Act), the Environmental Management Act, the Spatial Planning Act and the Environmental Impact Assessment Decree 1994. As a result, the directives and the Convention (“the texts”) normally have effect on private individuals via the implementing measures.

Disputes about the scope of the texts as such therefore only arise where the matter at issue is whether they have been correctly and fully implemented.

As a rule, case law relates purely to the application of the concepts contained in national legislation implementing the texts with regard to informing the public and facilitating public participation in decision-making. Since these implementing measures, in pursuing the aims of the texts, often have their own conceptual frameworks and do not incorporate literally the conceptual framework of the texts, this case law does not contribute greatly to clarifying the concepts contained in the texts.

The following very general observations can be made with regard to the scope of application of national legislation on informing the public and facilitating public participation in decision-making.

Under the Government Information (Public Access) Act, anyone may apply to an administrative authority for information contained in documents concerning an administrative matter. In the Act, the grounds on which disclosure of environmental information may be refused are narrower than those that apply to information in general.

According to the procedure followed by public authorities in deciding whether to grant an environmental licence, first a draft decision is made, on which the public may give its opinion, before a final decision is made. Notification of the draft decision is given by publication in newspapers or deposition of relevant documents for inspection or in some other suitable way. The same notification procedure is followed, for example, in case of an application for a decision requiring the preparation of an environmental impact statement (an “assessment of effects on the environment” as referred to in Directive 85/337/EEC) and for an environmental

impact statement that has been drawn up. The number of persons who must be reached by means of publication may depend on the expected adverse environmental consequences of the establishment. Final decisions are also sent to those who gave their opinions on a draft decision during the public consultations.

Anyone may give his opinion on a draft decision concerning an environmental licence. Since 1 July 2005, appeals against final decisions may be lodged by interested parties only, whereas previously this could be done by any member of the public. With regard to environmental licences, interested parties include (apart from the applicant) the owners and residents of the land on which the licensed establishment may have an environmental impact. However, an interested party may not appeal if it can reasonably be held against him that he did not express his views during the public consultations. Furthermore, an interested party may not appeal against parts of a decision in respect of which he did not express his views during the public consultations, unless failure to do so cannot reasonably be held against him.

A summary is given below of the principal judgments in which Directive 2003/4/EC (and Directive 90/313/EEC), Directive 85/337/EEC, the Aarhus Convention and article 8 of the ECHR, in so far as it relates to environmental matters, were specifically at issue.

Directive 2003/4/EC (and Directive 90/313/EEC)

In its judgment of 13 April 1999 in case no. H01.98.1533, the Administrative Jurisdiction Division of the Council of State (“the Division”), referring to the judgment of the ECJ in the Mecklenburg case of 17 June 1998, C-321/96, held that the freedom of access to information on the environment was the basic principle of Directive 90/313/EEC. Nevertheless, if one of the grounds for refusal provided by the Directive applied, the court need only decide whether the public authority,

weighing the interests at stake, could reasonably have reached its decision to refuse to disclose the information.

In its judgment of 15 December 2004 in case no. 200403316/1, the Division held that, with regard to documents containing commercial and manufacturing information, an administrative authority should, in making a new decision after a judgment, examine whether the information was information relating to the environment within the meaning of Directive 90/313/EEC and, if so, observe the assessment framework laid down in the Directive.

In its judgment of 23 November 2005 in case no. 200500902/1, the Division held that the basic principle of Directive 90/313/EEC, as evidenced by article 3 (1), was that public authorities are required to make information relating to the environment available to a person at his request. The Division found that article 3, paragraph 2 of Directive 90/313/EEC enumerated a number of interests on the basis of which a request could be refused, but that this did not allow member states to prescribe that a request for information must automatically be refused in these cases. The Division ruled that these provisions should be considered to have direct effect. Where information relating to the environment is involved, the minister has to weigh the interest served by disclosure against the interest served by protecting commercial and manufacturing information submitted in confidence, and provide specific reasons for his refusal to disclose the document.

In its judgment of 8 February 2006 in case no. 200505098/1, the Division held that, since the time limit for implementation of Directive 2003/4/EC was 14 February 2005, an administrative authority, in making a new decision after a judgment, had to take account of the assessment framework laid down in the Directive, as implemented as of that date in the Government Information (Public Access) Act.

Directive 85/337/EEC, with regard to provisions on disclosure and public participation in decision-making

In its judgment of 6 June 1995 in case no. E10.95.0002, the Division ruled that article 2 (3), second sentence, at (b), of Directive 85/337/EEC had been complied with. Under this provision, member states must make available to the public concerned the information relating to an exemption. The Division held that, in principle, any person could consult the background documents relating to the Major Rivers (Delta Plan) Act, in which an exemption had been granted.

The judgment of 10 October 2007 in case no. 200606568/1 concerned the requirement set pursuant to section 6:13 of the General Administrative Law Act that in principle an interested party has to have lodged an objection to a decision with the administrative authority before he can request a judicial review of the decision on the objection. According to the Division, this requirement does not preclude the conclusion that an effective remedy is available against the alleged violation of the right, as referred to in article 10a [sic] of Directive 85/337/EEC. This article in fact provides that the member states determine the stage at which decisions may be contested and does not preclude an initial review procedure by an administrative authority. Nor, according to the Division, is the requirement incompatible with these provisions that administrative review procedures must be exhausted before an application for review can be made to the courts .

The Aarhus Convention

In its judgment of 23 November 2005 in case no. 200500902/1, the Division held that the minister, when taking a new decision after a judgment, would have to examine whether a document contained information relating to the environment and, if so, would have to decide on whether to disclose that document, applying the provisions (as then in force) of the Government Information (Public Access) Act, which have since been amended by the implementation of the Aarhus Convention Implementation Act (Bulletin of Acts and Decrees 2004, 519).

Article 8 of the ECHR, in so far as it relates to environmental matters

In its judgment of 27 March 2002 in case no. 200003011/2, the Division held that, in so far as a decision to grant an environmental licence constitutes interference with the rights enshrined in article 8 (1) of the European Convention on Human Right (ECHR), it has a basis in the Environmental Management Act and hence is in accordance with the law. This interference is necessary in the interests of public safety and for the protection of health and the rights and freedoms of others, the interests of the individual having been fairly weighed against the interests of the community as a whole. In so far as the administrative authority had a positive obligation to take reasonable and suitable measures to protect the rights enshrined in article 8 (1) ECHR, it had not failed to fulfil it. Decisions given in accordance with the Environmental Management Act only contravene article 8 ECHR if they give rise to such a degree of environmental nuisance that they should be viewed as an unjustified or disproportionate infringement of the rights protected by article 8.

B - Judge control techniques

How much control does the administrative judge exercise over the administration's compliance with its obligations to inform citizens and facilitate public participation? In other words, how much discretion does it allow the administration in this regard? And what sanctions are issued when the judge observes that one of the obligations has not been met?

The question distinguishes between obligations to inform the public and obligations to facilitate public participation.

As far as informing the public is concerned, a distinction needs to be drawn between the legislation on public access to government information and the legislation on the notification of decisions, draft decisions, environmental impact statements and so on.

As far as the Government Information (Public Access) Act is concerned, the general or public interest served by disclosure of the requested information and the interests protected by the grounds for refusal are to be weighed, but not the applicant's specific interests. The question as to whether interests to be protected other than the public interest are at stake must be fully assessed by the court. The court's review of the administrative authority's decision on whether the interest served by disclosure outweighs the other interests mentioned in the Government Information (Public Access) Act is a limited test of reasonableness. In conducting this review, the court should give great weight to the underlying principle of that Act, namely that public access is the rule.

The court's review in the light of the legislation on the notification of decisions, draft decisions, environmental impact statements etc. is in principle a full one, but is more limited in areas where the administrative authority enjoys greater discretion, as for example in deciding on a suitable way to give notification of a decision or draft decision.

The court's review in the light of the legislation on facilitating public participation is also full in principle.

Incorrect application of the legislation on public access to government information results in the quashing of the decision on the application for disclosure.

Breaches of the law on the notification of draft decisions and on public participation can have various consequences depending on the arguments advanced by the

appellant. Firstly, the appellant may use such a breach as an excuse for the fact that he has failed to meet certain requirements for the admissibility of his appeal. An example is the requirement that he needs to have given his opinion during the public consultation phase in order to be able to appeal against the final decision. In that context, a breach of the law may result in the court deciding that an appeal against the final decision is, after all, admissible. If the appellant presents the breach as a ground for appeal in relation to the merits of the case, the court may quash the final decision. Procedural errors of this kind on the part of the public authority can hardly ever be disregarded, since it is virtually impossible to show that no interested party has been disadvantaged by them.

Breaches of the law relating to the notification of final decisions cannot result in their being quashed, but only in excusing a failure to satisfy certain admissibility requirements, such as the time limit for appeals.

When a decision has been quashed, the competent authority may in principle fall back on the procedure on which the decision was based. This does not apply, however, in so far as the nature of the error requires that the procedure be repeated (correctly this time) or supplemented. Moreover, if new compelling insights emerge that oblige the competent authority to come to a different conclusion, the requirements of careful decision-making can in particular cases demand that the competent authority give parties the opportunity to respond to that conclusion before a new final decision is given.

An administrative authority may not take a decision in preparation for which an environmental impact statement is required until the statutorily prescribed procedure has been followed. Exceptions only arise in cases involving procedural errors which can be shown not to have disadvantaged any interested party.

C - Open question

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

This question is identical to question 2.C and is probably in the wrong place. Presumably the question should read as follows:

In addition to the two previous questions, has your court issued other decisions on *information and public participation in environmental issues* that should be noted? If yes, please summarise these decisions in a few lines.

The judgment of the Division of 18 April 2007 in case no. 200606227/1 concerned the requirement arising from section 6:13 of the General Administrative Law Act that a person seeking to institute legal proceedings must have expressed his opinion on a part of a decision during the public consultation phase in order to be able to appeal against that part of the decision. The Division ruled that this requirement is not incompatible with article 6 of the ECHR.

The Division took the view that this requirement does not limit the right of access to the courts to such an extent that that right can no longer be effectively exercised. A person concerned is not being hindered in principle during the public consultation phase from expressing an opinion on parts of the draft decision to which he objects, *inter alia* in view of the fact that notification of a draft decision has to be given in a suitable manner. During the public consultation phase, any person can express his opinion on any part of a draft decision to which he objects, it being sufficient for him to indicate in brief the reason for his objection. Furthermore, under certain circumstances the law excuses a failure to express an opinion during the public consultation phase.

The Division also ruled that the requirement serves legitimate ends with regard to both administrative decision-making and dispute settlement. Its purpose was that persons with objections to parts of decisions raise them with the administrative authority at an early stage, thereby fostering careful decision-making. It also aims to ensure that the court is presented with a clearly defined dispute and that other parties are not confronted with grounds relating to other parts of a decision than those raised during the consultation phase.

The Division considered that the requirement is also not disproportional in view of the fact that notification of a draft decision has to be given in a suitable manner, that any person may express his opinion in brief on parts of a draft decision to which he objected during the public consultation phase, and that under certain circumstances the law excuses a failure to express an opinion during the public consultation phase.

2. Pollution law (example of polluting installations)

A - Application of regulations

How are responsibilities distributed under your national legislation in connection with the restoration of polluted sites? Does the selection of the party responsible (operators of sites or holders of waste) raise problems? Moreover, is it possible, in certain cases, to question the responsibilities of the public authorities in charge of applying the regulation in the event that they have not sufficiently exercised their powers to monitor and control industrial manufacturers?

Instances of soil pollution that arose before 1 January 1987 (the date on which the Soil Protection Act entered into force) are subject to the soil remediation rules laid

down by the Soil Protection Act. Under these rules, the owner or leaseholder of business premises that have been seriously polluted must remediate the soil if it has been established that there is an urgent need for remediation. If the pollution took place at an establishment covered by an environmental licence, remediation may also be required under the conditions of that licence, in which case the obligation rests on the licence holder. The Act does not state who is responsible for soil remediation if pollution which took place before 1 January 1987 did not occur on business premises (i.e. a plot of land on which an enterprise carries on business activities).

In the case of pollution occurring after 1 January 1987, section 13 of the Soil Protection Act provides that any person who performs activities as referred to in the Act on or in the soil and who knows or could reasonably have suspected that the soil could be polluted or impaired by these activities, is obliged to take all measures that can reasonably be required of him in order to prevent such pollution or impairment, or if such pollution or impairment occurs, to limit and as far as possible reverse it and its immediate effects.

If pollution occurs within a licensed establishment, remediation may be required of the licence holder depending on the conditions of the licence. If an exceptional incident occurs in an establishment the licence holder may also be required under the Environmental Management Act to reverse its consequences.

Pursuant to section 8.12b, opening words and at h, of the Environmental Management Act, a licence for an establishment must at the very least lay down conditions concerning what measures must be taken when the establishment permanently ceases its business activities in order to reverse or limit in so far as is necessary to do so the adverse consequences that the establishment has had on the site on which it was established and to make it suitable for its subsequent function. Pursuant to section 8.16, opening words and at c, of the Environmental Management

Act, a licence may lay down that the conditions designated therein will remain in force for a period stipulated therein after the licence expires. Hence, corresponding licence conditions place obligations on the licence holder even before the permanent cessation of business activities and on the person who may be deemed to be the licence holder after the permanent cessation of business activities. This could be the person who is the owner of the site at that time, but there is not yet any case law on conditions laid down pursuant to section 8.12, opening words and at h, of the Environmental Management Act.

If the persons concerned fail to meet the obligations described above, the administrative authority competent to take enforcement action must as a rule exercise this competence in view of the general interest that is served by enforcement. Only under special circumstances may the administrative authority refuse to do so, for instance, if there is a real prospect that the situation will become legally permissible, or if enforcement measures would be so disproportionate to the interests to be served by them that enforcement would be inappropriate in the specific situation at hand. It does not follow from the fact that an administrative authority has not taken action despite having been aware of an illegal situation for a considerable time that enforcement measures can no longer be taken. This applies equally to instances where administrative measures that could have prevented or limited an offence were not taken.

B - Judge control techniques

What is the scope of the powers of a judge ruling on a dispute concerning the application of one or other of these regulations? Are there procedural regulations or rules of evidence before the judge or procedures for establishing specific facts connected with these matters, given, in particular, their specific technical nature?

“Prior authorisation” in accordance with Directive 96/61/EC is granted in the Netherlands by means of the procedure governed by the Environmental Management Act in conjunction with the General Administrative Law Act. An appeal against a decision to grant an environmental licence may be lodged with the Division. The general powers of courts ruling on administrative disputes apply in the context of appeals of this kind. Under sections 8:72, 8:73, 8:74 and 8:75 of the General Administrative Law Act, the court may *inter alia*:

- quash all or part of the disputed decision;
- decide that all or part of the legal consequences of the quashed decision or a part thereof remain effective;
- direct the administrative authority to give a new decision or to perform another act in accordance with its judgment;
- hold that its judgment takes the place of the quashed decision;
- set the administrative authority a time limit for giving a new decision or performing another act, and may if necessary hand down a provisional remedy;
- determine that if the administrative authority does not comply with a judgment, the legal person designated by the court shall owe a penalty prescribed in the judgment to a party designated by it;
- at the request of a party, direct the legal person designated by it to pay compensation for the damage suffered by that party;
- order a party to pay the costs which another party has reasonably incurred;
- order that the court fee paid by the person who lodged the notice of appeal will be refunded to him.

The General Administrative Law Act does not lay down any rules of evidence; the courts administrative follow the doctrine that the means and burden to provide evidence are not formalized. Nevertheless, under section 8:47 of the General Administrative Law Act, the court may appoint an expert to conduct an investigation. Under section 20.14 (1) of the Environmental Management Act, the

Minister of Housing, Spatial Planning and the Environment is authorised, on behalf of the State, to set up a non-profit organisation to provide the administrative court, on request, with an expert report regarding appeals against decisions based on the Act. Under section 20.14 (3) of the Act, the organisation's constitution guarantees that the organisation carries out its activities impartially and independently. An organisation of this kind has accordingly been set up. In around half of the appeals concerning environmental licences, the Division asks that organisation to provide a report on technical points and the facts of the case. Unless it is apparent to the Division, on the basis of counter expertise or in some other way, that the organisation's report is incorrect, the Division will base its judgment, *inter alia*, on its report.

C - Open question

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

In its judgment of 20 June 2001 in case no. E03.96.0894/1, and in various other judgments, the Division applied the term "waste" as it was interpreted in the ECJ's judgment of 15 June 2000 in the joined cases C-418/97 and C-419/97. The Division held that in deciding whether something could be considered to be 'waste' within the meaning of Directive 75/442/EEC as amended by Directive 91/156/EEC it was necessary to take into account all circumstances, having regard to the Directive's objective and ensuring that its effectiveness was not prejudiced.