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Implementation of European Environmental Directives

The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?

Barbara A. Beijen*

Summary

European Directives must be implemented in national legislation. Given the large amount of infringement procedures before the European Court of Justice, many mistakes are being made in this implementation process. Problems concerning the quality of Directives, such as a lack of coherence between Directives, unclear terms and definitions, questions concerning the scope of Directives et cetera, are not felt at the European level, but place the Member States in a difficult position when implementing the Directives. This article shows how these factors contribute to the occurrence of implementation problems in the field of environmental law. These problems cannot be solved by the Member States, but should be taken into account in the legislative process at the European level.

I. Introduction

A large part of national environmental legislation is influenced by European law. It depends on the method of counting, but estimations are that 60-80 per cent of for example Dutch environmental legislation is influenced by European law. It is to be expected that similar percentages apply to other Member States. This means that national legal systems are highly dependent on European legislation.

The EU Treaty obliges Member States to faithfully execute European law and to transpose Directives into national legislation. If the transposition is incorrect, incomplete or late, the European Commission can start an infringement procedure. If the European Court of Justice (ECJ) concludes that the transposition is indeed insufficient, then the Member State will be condemned for a failure to fulfil its obligations under European law. Thus, each problem in implementation is regarded as the responsibility of the Member State in which it occurs.

However, given the large amount of European Directives and the fact that they do not constitute a coherent system, part of the problems in transposing

these Directives may be caused by problems in the Directives themselves, instead of by the Member States. Many authors have researched individual Directives and problems concerning their quality. However, these findings have never been combined in a coherent answer to the question of whether the characteristics and quality of European environmental Directives hinder proper implementation by the Member States. It is necessary to identify the source of implementation problems to be able to solve them. Problems at the Member State level call for other solutions than problems relating to the poor quality of the Directives.

This article is limited to environmental Directives (which is a rather extensive field in itself), but many of the problems identified seem to be applicable in other fields of law as well. However, more research is necessary.

First, I will describe the methodology.¹ Then a description of the different categories of problems on the European level follows. I will also pay attention to other factors which contribute to implementation problems.

II. Research methods

In order to come to a thoroughly analyzed answer to the research question first an overview of European environmental law was made and the Directives were classified in different categories, such as water, air, waste, nature, chemicals, noise and a rest category with horizontal Directives (such as the IPPC Directive and the EIA Directive) and Directives that do not fall within any of the other categories. Ten Directives were selected from the different categories and from different periods for an in-depth investigation.

A major source of information is the judgments of the ECJ. Infringement procedures show which problems have been found by the European Commission and preliminary rulings are the most important source to see what problems national judges have to deal with. The analysis of the case law of the ECJ reveals that especially unclear obligations give rise to preliminary questions. Furthermore, in the Directives different instruments are used, such as area protection provisions, environmental quality standards, emission standards, licensing obligations and procedural requirements. All of these instruments give rise to different implementation problems.

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¹ This article is largely based on B.A. Beijen, *De kwaliteit van milieुरichtlijnen*, diss. Utrecht University, The Hague: BJu 2010.

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Sector	Directive	Title	Legal basis
Horizontal	85/337 and 97/11 96/61 (new: 2008/1)	EIA Directive IPPC Directive	Articles 100/235 EEC and 130S EEC Article 130S EEC
Water	76/464 (new: 2006/11) 91/676	Dangerous Substances Directive Nitrates Directive	Article 100/235 EEC (Article 175 EC) Article 130S EEC
Air	96/62 (new: 2008/50) 1999/30	Air Quality Framework Directive First Daughter Directive Air Quality	Article 130S EEC Article 130S EEC
Waste	75/442 and 91/156 (new: 2006/12)	Waste Framework Directive	Articles 100/235 and 130S EEC (Article 175 EC)
Nature	79/409 92/43	Wild Birds Directive Habitats Directive	Article 235 EEC Article 130S EEC
Dangerous substances	91/414	Pesticides Directive	Article 43 EEC

After this analysis of the Directives, the instruments used and the judgments of the ECJ, it was possible to make an overview of the problems that arise from the implementation of environmental Directives. Recurring problems which seemed to be related to the legal quality of the Directives were tested in the Netherlands, Germany and Denmark, with literature studies and interviews with experts, mainly academics and judges.² The main question to be researched in the empirical research part was to explore whether in the literature the problems found had been discussed and to what extent the interviewees recognised the results of my research, whether there were other important factors on the European level, and in how far the Member States are to blame for implementation problems.

Of course, there is not one single cause of implementation problems, and it cannot be said that the Member States are flawless and only Europe is to blame. But the Member States do depend on the quality of the Directives for implementation, and if the Directives are unclear, ambivalent or incoherent, this hinders a correct implementation by the Member States.

It follows from this research project that there are several recurring problems with the quality of environmental Directives. Some of these problems concern specific instruments, such as area protection or environmental quality standards, and others are of a more general nature, such as unclear definitions, unclear obligations and poor coherence within the Directive or with other Directives. In the following sections, each of these categories will be discussed in more detail.

III. Coherence between Directives

There are over 400 European environmental Directives. Some of them have a formal relation with each

other, such as mother and daughter Directives (e.g. in air quality) or amendments to older Directives, but many of them are independent. The Member States have to transpose and apply them in their national environmental law systems. They are free to decide whether they want to transpose them in an integrated system or as separate acts. Problems relating to the coherence between Directives will appear both when transposing in an integrated system, as well as with the application of separate acts.

Problems with coherence include, for example:

- Directive 92/43 (hereafter: the Habitats Directive)³ uses the term ‘plan or project’, but does not define this. Directive 85/337 (hereafter: the EIA Directive)⁴ does contain a definition of ‘project’. Can this definition be used to interpret the Habitats Directive? The ECJ says yes, but this was not clear beforehand, because the Directive does not refer to the EIA Directive.⁵ The ruling of the ECJ dates from 12 years after the Directive, and all this time the meaning of this important notion was not clear.
- The EIA Directive uses the term ‘waste disposal’, just as Directive 75/442 (hereafter: the Waste

² Prof. Dr. P. Pagh, Prof. Dr. E.M. Basse, Prof. Dr. H.T. Anker and H. Soja LL.M from Denmark, Prof. Dr. G. Lübke-Wolff, Prof. Dr. E. Rehinder, Prof. Dr. E. Bohne M.A., Prof. Dr. G. Winter and Prof. Dr. H.D. Jarass LL.M from Germany and Prof. Dr. J.H. Jans, Prof. Dr. H.G. Sevenster, Th.G. Drupsteen LL.M and J. Teekens LL.M from the Netherlands.

³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, *OJ* 1992, L 206/7.

⁴ Council Directive 85/337/EEC of 27 June 1985 on the assessments of the effects of certain public and private projects on the environment, *OJ* 1985, L 175/40.

⁵ Case C-127/02, *Landelijke vereniging tot behoud van de Waddenzee*, [2004] ECR I-07405, par. 26.

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Framework Directive)⁶ does. Only the latter Directive contains a definition. Can this definition be used to interpret the EIA Directive? In this case, the ECJ stated that this was not allowed.⁷ Although the ECJ does have a reason for this different approach compared to the first case, the case shows that the rulings of the ECJ are not predictable and it is very difficult for Member States to decide in which cases they can rely on the definition in another Directive and in which cases this is not allowed.

- Some subjects are covered by multiple Directives. Which rules are applicable in such cases? Does waste water have to be treated in line with the Waste Framework Directive, Directive 91/271 (hereafter: the Urban Waste Water Directive)⁸ or maybe in accordance with other water Directives, such as Directive 2000/60 (hereafter: the Water Framework Directive or WFD)⁹ or Directive 2006/11 (hereafter: the Dangerous Substances Directive)^{10,11} Leaking waste water must be regarded as waste. The Waste Framework Directive contains a provision that waste waters are excluded from the Directive where they are covered by other legislation. The question was whether the Urban Wastewater Directive constituted such ‘other legislation’. The ECJ concluded that this was not the case, because that Directive does not ensure a level of protection equivalent to the Waste Framework Directive. This is not an unreasonable ruling, but the outcome of such a procedure is not very predictable.
- Many Directives contain provisions such as “Member States shall, without prejudice to Directive ..., ensure that ...”. The meaning of such provisions is often not entirely clear and may give rise to preliminary questions. An example is Article 14 of Directive 91/414 (hereafter: the Pesticides Directive).¹² In this case, the ECJ ruled that when deciding upon a request for environmental information concerning plant protection products, not only the conditions of the Pesticides Directive must be taken into account, but the conditions of Directive 2003/4 on Access to Environmental Information as well.^{13,14} It follows from Directive 2003/4 that the public interest served by the disclosure of the information must be weighed against the interest served by the refusal of the request.

These examples show that the ECJ rules on a case-by-case basis. It is very difficult for the Member States to predict whether or not they can rely on information from another Directive for the exact meaning and interpretation of unclear provisions.

IV. Terms and definitions

Most Directives contain a list of definitions in one of their first Articles. Still, terms and definitions can cause several problems.

In the first place, definitions are often not as clear as one might hope. The definition of ‘waste’ gave rise to much case law and literature.¹⁵ Another example is the very long definition of ‘best available techniques’ from Directive 1996/61 (hereafter: the IPPC Directive),^{16,17} or the unclear definition of ‘discharge’ in the Dangerous Substances Directive.¹⁸ Even though this last Directive dates from 1976, the meaning of the key term was only clarified by the ECJ in 1999.

Unclear definitions may cause implementation problems when a Member State tries to translate the definition in a way that best suits its national legislation. A way to prevent problems with transposition would

⁶ Council Directive 75/442/EEC of 15 July 1975 on waste, *OJ* 1975, L 194/39.

⁷ Case C-486/04, *Commission v Italy*, [2006] *ECR* I-11025.

⁸ Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, *OJ* 1991, L 135/40.

⁹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, *OJ* 2000, L 327/1.

¹⁰ Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, *OJ* 2006, L 64/52.

¹¹ Case C-252/05, *Thames Water Utilities*, [2007] *ECR* I-03883.

¹² Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market, *OJ* 1991, L 230/1.

¹³ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ* 2003, L 41/26.

¹⁴ Case C-266/09, *Stichting Natuur & Milieu*, [2010] *ECR* 00000.

¹⁵ For example, Cases C-304/94 and others, *Tombesi*, [1997] *ECR* I-03561, Case C-9/00, *Palin Granit*, [2002] *ECR* I-03533, Case C-444/00, *Mayer Parry Recycling*, [2003] *ECR* I-06163, and L.A. Versteijl, “Der Abfallbegriff im Europäischen Recht. Eine unendliche Geschichte?”, in: *Euro-päische Zeitschrift für Wirtschaftsrecht* 2000, p. 585-591 and J.R.C. Tieman, “The broad concept of waste and the case of ARCO-Chemie and Hees/EPON”, in: *EELR* 2000, p. 327-335.

¹⁶ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, *OJ* 1996, L 257/26.

¹⁷ M.P. Jongma, *De milieuvergunning*, Deventer: Kluwer 2002, p. 56-61.

¹⁸ H.F.M.W. van Rijswijk, “EC Water Law in Transition”, in: H. Somsen (ed.), *The Yearbook of European Environmental Law*, Oxford: Oxford University Press 2003, p. 290-298.

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be to copy the definition from the Directive verbatim into national legislation. But then problems may arise in the application, so implementation problems in a wider sense cannot be prevented as long as the definition gives rise to different interpretations.

In the second place, many Directives contain terms that are not defined, but are important for the meaning and scope of the Directive. Examples are the terms 'deliberate' and 'significant' in Directive 79/409 (hereafter: Wild Birds Directive).¹⁹

In the third place, terms may appear in multiple Directives. This can lead to the use of different definitions for the same terms. This is especially problematic if a Member State wishes to implement these Directives in a single act. The term 'installation' is a key term in the IPPC Directive, but it occurs in several other Directives as well. Examples are Directive 2000/76 on the Incineration of Waste,²⁰ Directive 2003/87 on Greenhouse Gas Emission Allowance Trading²¹ and Directive 1999/13 on Volatile Organic Compounds.²² Another example can be found in the Pesticides Directive and Directive 98/8 (hereafter: the Biocides Directive),²³ in which the same terms are used, but with slightly different definitions. This creates confusion concerning the question of whether or not a difference in meaning is intended.

Another problem arises when the term has a definition in one Directive and is not defined at all in another. As set out in Section III, it is not clear whether or not one can rely on a definition from another Directive.

V. Scope of Directives

The scope of Directives is important for their implementation. However, Directives are not always clear about this.

The EIA Directive illustrates this. On the one hand, Article 2(1) obliges Member States to ensure that (all) projects likely to have a significant effect on the environment are made subject to an assessment of their effects. On the other hand, Article 4 elaborates which projects are meant in Article 2. Annex I contains a list of projects which shall be made subject to an assessment. Annex II contains a list of projects for which the necessity of an EIA must be determined. Member States can do this by either a case-by-case examination or the use of thresholds or other criteria. In practice, a case-by-case examination is rather time-consuming and the setting of criteria can be complicated. That is why most Member States chose to use thresholds. Looking at the wording of the Directive, this seemed to be allowed. The ECJ ruled, however, that the simple use of thresholds, as allowed by Article 4(2 sub. b), is in conflict with Article 2, as this cannot ensure that *all* projects with a possible significant effect on the environment will be assessed.²⁴ Thresholds do not take special circumstances into account,

such as the sensitivity of the surroundings or the cumulation of projects. The reasoning of the ECJ makes sense in the light of environmental protection. However, the text of the Directive seems to allow the choice many Member States made to use only thresholds.

There is a tendency in the Member States to try and avoid the application of obligations like the EIA, because of the administrative burden. It takes time and money to carry out an EIA, to take measures against air pollution, or to protect a natural area et cetera, so Member States try to find ways to avoid the application of a Directive. Something similar occurred in relation to the Wild Birds Directive: Member States were reluctant to designate areas, because this designation would limit the possibility of using these areas for economic developments, for example. However, the ECJ decided that only ornithological criteria were decisive for the designation and that economic, social or cultural factors were not relevant.²⁵

Member States seem to prefer a limited interpretation of the scope of a Directive, whereas the European Commission and the ECJ usually employ a much broader interpretation, as they interpret Directives in the light of their objective, which is environmental protection. In most cases, the European Commission wins infringement procedures, because the ECJ sticks to the same broad interpretation.

The text of a Directive is not always clear in this regard. Often, it seems that there is a margin of appreciation for the Member States, but this freedom is limited by the ECJ. However, the initial interpretation by the Member States is often very defensible and therefore such implementation problems cannot solely be blamed on the Member States themselves.

¹⁹ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, *OJ* 1979, L 103/1.

²⁰ Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, *OJ* 2000, L 332/91.

²¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, *OJ* 2003, L 275/32.

²² Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, *OJ* 1999, L 85/1.

²³ Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, *OJ* 1998, L 123/1.

²⁴ For example, Case C-72/95, *Kraaijeveld*, [1996] *ECR* I-05403, Case C-392/96, *Commission v Ireland*, [1999] *ECR* I-05901 and Case C-255/08, *Commission v Netherlands*, [2009] *ECR* I-00167.

²⁵ For example, Case C-3/96, *Commission v Netherlands*, [1998] *ECR* I-03031.

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VI. Instruments

Environmental Directives contain different kinds of instruments by which to attain the objectives. This is necessary, because reaching the environmental goals calls for different measures and instruments. Each instrument has its own positive and negative effects. The range of instruments creates flexibility. Examples of the instruments used are environmental quality standards, emission standards, the designation and protection of areas, procedural requirements, the use of plans and programmes, product standards, normatively described goals and standards, monitoring, prohibitions and obligations, enforcement, interim measures and annexes.

The choice of instruments depends on the actual goal of a Directive and sometimes a combination of instruments is necessary to attain that goal.

When the objective is clean air, the best way is to use both quality standards and emission standards, often even in combination with product standards and programmes. Emission standards are an important means to make sure that operators use environmentally friendly methods and do not emit too many hazardous substances. But if there is a concentration of industry in a certain area, the sum of all these emissions might result in poor air quality, even though each installation respects the emission standards. Quality standards are necessary to ensure air quality in such areas. On the other hand, quality standards alone do not suffice. In relatively clean areas, emission standards are needed to prevent excessive or increasing emissions and to keep the air in that specific area clean. This shows how a combination of instruments can be necessary to achieve the desired environmental result. It is not necessary to combine all these instruments in one Directive, but the coherence between Directives and instruments should be kept in mind.

Each of the instruments has its own characteristics and its own potential problems. When designing a Directive, one should be aware of this and prevent these problems as far as possible.

Environmental quality standards

Environmental quality standards are limit values for polluting substances in, for example, air or water. The use of environmental quality standards seems to be rather easy. The Directive describes the required environmental quality and leaves it to the Member States how to achieve this. This is perfectly in line with the character of the Directive: it only prescribes the result to be achieved and leaves the choice of form and methods to the Member States (Article 288 TFEU). Still, the instrument does cause difficulties for the Member States.

In the first place, Member States have a great deal of freedom in reaching the environmental quality prescribed. Even though this can be an advantage, it can also be quite difficult. Especially Member States

with not much of a tradition in the field of environmental protection can find it difficult to decide which measures to take or how to divide the available 'space to pollute'. Also the planning of the necessary measures to reach the goals in time can be difficult. It could be helpful if the Directive or an adjacent document at least contains some guidelines or best practices concerning how to achieve the desired environmental quality.

A second problem concerning the use of environmental quality standards is that the Directives do not contain clear information on the consequences of exceeding the quality standards. Is a Member State obliged to stop granting permits for polluting activities or does it even have to withdraw permits which have already been granted? Are these legal instruments enough or should even more practical measures be carried out? Is it enough to make an action plan to rectify the excess? This information is important for the transposition and application of these Directives, because it might be necessary to take additional measures in the national legislation. The Air Quality Directives do not contain a clear answer to these questions. Dutch legislation on air quality was rather strict, which led to administrative judges annulling permits. However, this seemed to go beyond what the Directives require.²⁶ In relation to Directives 76/160 and 2006/7 (hereafter: the Bathing Water Directive),²⁷ the ECJ was quite clear that this contains an obligation of result, and that Member States are obliged to take any measure to achieve the required quality.²⁸ In my opinion, the consequences of an excess of environmental quality standards should follow from the Directive itself, because this is important for implementation in the Member States.

A third problem is that Member States do not have the power to use all measures that might be necessary to reach the prescribed environmental quality. National measures may not form an obstruction to the free movement of goods, which can render the prescription of particulate filters for diesel engines²⁹ or

²⁶ Ch.W. Backes, "Umsetzung, Anwendung und Vollzug europäischer Umweltqualitätsnormen", in: M. Führ, R. Wahl & P. von Wilmsowsky (ed.), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Rehlinger*, Berlin: Erich Schmidt Verlag 2007, p. 669-691.

²⁷ Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, *OJ* 1976, L 31/1 and Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC, *OJ* 2006, L 64/37.

²⁸ Case C-92/96, *Commission v Spain*, [1998] *ECR* I-00505; Case C-307/98, *Commission v Belgium*, [2000] *ECR* I-03933; case C-226/01, *Commission v Denmark*, [2003] *ECR* I-01219

²⁹ Case T-182/06, *Netherlands v Commission*, [2007] *ECR* II-01983 and Case C-405/07 P, *Netherlands v Commission*, [2008] *ECR* I-08301.

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extra rules for the acceptance of (veterinary) medication impossible.³⁰

A final problem is the influence of pollution coming from abroad, for example the pollution of air or water, or pollution from natural sources, such as sea salt or sand.³¹ These factors cannot be influenced by a Member State, but they may render it more difficult to live up to the required quality standards.

A special form of quality standards is the use of emission ceilings. These ceilings limit the total amount of emissions allowed in a Member State. This concerns not only emissions from industry, but also from traffic, households etc. But this leads to similar questions as in the case of quality standards: how should pollution be divided, how to control this and what does one do when the ceiling is reached or exceeded? Should a Member State stop traffic, shut down a factory? Directive 2001/81 (hereafter: the NEC Directive)³² does not provide an answer to these questions, so judgments from the ECJ must be awaited. A case is pending before the ECJ.³³ Advocate General Kokott came to the conclusion that when deciding on the application for a permit as required in the IPPC Directive, the national emission ceiling must be respected, because these installations contribute strongly to the emission of atmospheric pollutants.³⁴ It is to be expected that the emission ceilings will be regarded as obligations of result as well, in which case Member States must take all measures possible to fulfil their obligations. This may include extreme measures.

Emission standards

Emission standards are limit values for the emission of polluting substances by, for example, installations or cars, independent from the actual environmental quality at a certain spot. Emission standards are relatively easy to use. There is not much doubt as to how to transpose them and the norms are clear. It is an important instrument, but by emission standards alone it is impossible to control total emissions. In a heavily industrialised area with many installations close to one another, the environment will be heavily polluted, even if all installations abide by their respective emission standards. In addition, environmental quality standards are necessary, as explained above. Another good supplement is the use of national emission ceilings.

Designation and protection of areas

The designation and protection of areas is a good instrument to protect the environment. Especially vulnerable areas may need a stricter protection regime than other areas. This instrument is used in several Directives, such as the Wild Birds Directive, the Habitats Directive, Directive 91/676 (hereafter: the Nitrates Directive)³⁵ and the Bathing Water Directive.³⁶ In all of these Directives, the identification and designation of areas which have to be protected is problematic.³⁷ The criteria for designation are often

not very clear and seem to leave quite a bit of freedom to the Member States.

The Wild Birds Directive, for example, obliges Member States to 'classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species'. But the Directive does not contain criteria to determine which territories are the most suitable. It was only after the case law of the ECJ from 1993 onwards that it became clear that solely ornithological criteria were to be used for the selection of areas, whereas the Directive dates from 1979.³⁸ An important role was given to the list of Important Bird Areas in Europe (IBA), which was seen as presumptive evidence of the importance of areas. This list was made by the International Council for Bird Preservation, an NGO, at the request of the European Commission. Only on the basis of other scientific documents, proving that a specific area is not necessary for the conservation of wild birds, did may Member States desist from designating such an area. However, the ECJ has never accepted such arguments. The very authoritative nature of this IBA list is somewhat astonishing, given the fact that there is no legal basis for this list and this NGO does seem to have its own interest in bird protection.

³⁰ A. Keessen, A. Freriks & M. van Rijswijk, "The Clash of the Titans: The Relation Between the European Water and Medicines Legislation", in: *CMLR* 2010, p. 1429-1454.

³¹ A.M. Keessen, J.J.H. van Kempen & H.M.F.W. van Rijswijk, "Transboundary river basin management in Europe. Legal instruments to comply with European water management obligations in case of transboundary water pollution and floods", in: *Utrecht Law Review* 2008, Issue 3, p. 35-56.

³² Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, *OJ* 2001, L 309/22.

³³ Joint cases C-165/09, C-166/09 and C-167/09, *Stichting Natuur en Milieu*, *OJ* 2009, C 193/2.

³⁴ Joint cases C-165/09, C-166/09 and C-167/09, *Stichting Natuur en Milieu*, *OJ* 2009, C 193/2, opinion of AG Kokott, point 74-77.

³⁵ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, *OJ* 1991, L 375/1.

³⁶ Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, *OJ* 1976, L 31/1 and Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC, *OJ* 2006, L 64/37.

³⁷ B.A. Beijen, "The implementation of area protection provisions from European environmental Directives in the Member States", in: *Utrecht Law Review* 2009, Issue 1, p. 101-116.

³⁸ Case C-355/90, *Commission v Spain*, [1993] ECR I-04221 and Case C-3/96, *Commission v Netherlands*, [1998] ECR I-03031.

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The Habitats Directive does contain criteria for designation in Annex III, but these criteria are rather general. Article 4 of this Directive contains the system for the designation of areas: Member States propose a list of sites to be protected, the Commission establishes a draft site of lists of Community importance and the member States designate the sites on that list as special areas of conservation. The cooperation between the Member States and the European Commission better guarantees that relevant areas are designated, but even with this Directive, there has been discussion concerning the necessity to designate certain areas.³⁹ There is no equivalent of the IBA list for the Habitats Directive, which leaves more space for discussion concerning the ecological value of areas.

The Bathing Water Directive does not prescribe the designation of areas, but must be applied to all waters which qualify as bathing waters. This prevents problems concerning the designation of areas, but still does not guarantee that the Directive is applied in all relevant areas. Article 3 concerning monitoring does contain an obligation to 'identify' all bathing waters. The difference with an obligation to officially designate areas is thus quite formal. A discussion as to which waters should be seen as bathing water can still exist. The problem under this Directive is thus not the formal designation of areas, but rather the question of to which waters the rules of the Directive should be applied. This is independent from the question whether the waters have to be designated or only identified.

Case law concerning the Bathing Water Directive shows that the application of the Directive is not dependent of the actual designation of bathing waters and that Member States are not free to exclude bathing waters if they do not have the required quality.⁴⁰ This case concerned bathing waters which had been monitored for several years, but were no longer to be regarded as bathing waters because of their shallowness and a lack of bathers. The ECJ does not accept this and points out that shallow water can be very attractive for certain types of bathers and that the waters were used in advertising leaflets for camp sites. This means that the waters must be regarded as bathing waters and thus should conform to the limit values contained in the Directive.

The European Commission and the ECJ are quite strict in their control of designated areas or areas in which a Directive must be applied. But Member States seem to have a tendency to be reluctant in designating areas. Usually, the designation of an area means a regime of stricter protection, so it limits the possibilities for other uses or new developments in the area. This could be an explanation for this reluctance, but it is certainly not the only one. Directives often do not contain clear criteria for the designation of areas, in which case it is understandable that Member States are reluctant to apply the Directive.

Procedural requirements

Procedural requirements can take different forms. The EIA Directive contains a procedure which has to be followed before granting a permit. Other Directives contain procedures concerning the obligation to report, to inform the public, to collect information et cetera. Procedural requirements do not make the environment any cleaner.⁴¹ They can, however, indirectly contribute to environmental protection. Examples are the EIA Directive and the Directives on access to environmental information. Therefore, the necessity of these measures must be examined. This kind of requirement is usually not very difficult to transpose and apply, but it may require major adaptations if it does not fit within the existing legal system in a Member State. Member States are often not very keen on this and tension may arise with the principle of the procedural autonomy of the Member States. Implementation problems in this situation are often not a direct result of the Directive, but of a reserve in the Member States.⁴² They might not wish to adapt their own national system or might not see the value of the European rules. In that case, however, they should raise this in the negotiations concerning the Directive. Once the Directive has been adopted, they should faithfully execute it.

Plans and programmes

Plans and programmes are used in environmental Directives as a means to attain an objective. A plan or programme helps to set up a good time schedule, to control progress and the results of the measures taken. An interim evaluation and monitoring of measures and progress may give valuable information to help reach the prescribed result in time. In Directives concerning air quality, there is an obligation to set up an action plan if it becomes clear that it will be difficult to reach the required air quality in time. The plan itself is not the ultimate goal of the Directive, but an aid to reach that goal. Plans and programmes can lead to problems because Member States do not always make them or stick to them. A problem is that Directives are not always clear on the obligatory content of plans or programmes. In relation to the Dangerous Substances Directive and the Nitrates Directive, infringement procedures concerning these plans were started by the Com-

³⁹ For example case C-371/98, *First Corporate Shipping*, [2000] ECR I-09235.

⁴⁰ Case C-307/98, *Commission/Belgium*, [2000] ECR I-03933.

⁴¹ Interview with Prof. Rehinder in November 2007.

⁴² Interviews, B.A. Beijen, *De kwaliteit van milieuriichtlijnen*, diss. Utrecht University, The Hague: BJU 2010, p. 231 and 243.

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mission.⁴³ The extent of the obligations resulting from Article 7 of the Dangerous Substances Directive and Article 5 of the Nitrates Directive is not very clear. Some measures are obligatory; others seem to be facultative, but in specific circumstances the ECJ is of the opinion that those measures are compulsory as well.⁴⁴ Ireland has been condemned by the ECJ for taking separate measures instead of a coherent action programme. The question when a programme is sufficiently coherent remains unanswered, however.

These are similar problems as may occur with procedural requirements. For both instruments, it is important that the Member States feel the need to take certain actions. When using these instruments, it should be clear how they contribute to a better environmental quality. A plan or programme alone will not help the environment; at the end of the day, it is the execution of a plan that matters. Nevertheless, it may be an important intermediate stage which encourages Member States to take action. If there is only an environmental quality standard which enters into force in, for example, 2020, Member States will not feel an urgent need to take action in 2011. A plan or programme might be an incentive to take earlier action.

In relation to air quality, the ECJ ordered that persons directly concerned must be in a position to require the competent national authorities to draw up an action plan in case there is a risk that limit values or alarm thresholds may be exceeded.⁴⁵ However, this does not grant a guarantee to individuals that the limit values will never be exceeded. Member States are only obliged to take measures ensuring a *gradual return* to a level below those values of thresholds.

The problems relating to plans and programmes mostly do not concern the actual transposition in national legislation, but the execution of the obligations. This problem should be solved at the national level, but more clarity concerning the contents of programmes would be helpful.

Product standards

Product standards are technical norms which must be followed before a product can be allowed on the market. These product standards are relatively easy to use and do not give rise to many implementation problems. They can easily be copied into national legislation. Another factor that makes implementation relatively easy is that the addressees of such norms are clear; they only apply to producers. Producers will also keep an eye on each other, so as to prevent their competitors from circumventing the rules and incurring fewer costs. This is thus a very practicable instrument, but of course it can only be used to regulate products. Regulating products can also contribute to a better environment as a whole. For example, setting up product standards for the maximum emission from cars will help to improve air quality. This instrument should be used in a creative way to improve the environment, as it is both helpful

and easy to use. It forces producers to make their product more environmentally sound and by prohibiting products that do not comply with the norms, consumers are forced to buy cleaner products.

Normatively described goals and standards

Normatively described goals and standards can be used as an alternative way to set standards, instead of the use of environmental quality standards or product standards. Examples are the concept of 'best available techniques' in Article 9(4) of the IPPC Directive or the 'good status' of waters in the Water Framework Directive.⁴⁶

The notion of 'best available techniques' has been defined in the IPPC Directive, in which a complete definition has been given, accompanied by separate explanations of the words 'best', 'available' and 'techniques'. However, this still does not provide certainty for Member States as to which norms to prescribe when granting a permit. That is why BREF documents are used to fill in the contents of 'best available techniques' in different sectors.

The Water Framework Directive has the aim of achieving a 'good status' for both surface water and groundwater (Article 4 WFD). Article 2 of the Directive contains definitions of these statuses, but a definition such as "'Good groundwater status' means the status achieved by a groundwater body when both its quantitative status and its chemical status are at least 'good'" must be further elaborated before the Member States can implement this. Annex V provides for more detailed descriptions of high, good and moderate status, but this Annex does not contain any numerical standards. For the assessment of the ecological water status, intercalibration has been carried out, led by a Working Group. For the chemical water status, standards are laid down in a daughter Directive, Directive 2008/105 on Priority Substances.⁴⁷

⁴³ Case C-285/96, *Commission v Italy*, [1998] ECR I-05935; Case C-384/97, *Commission v Greece*, [2000] ECR I-03823; Case C-152/98, *Commission v Netherlands*, [2001] ECR I-03463 (all relating to the Dangerous Substances Directive); Case C-274/98, *Commission v Spain*, [2000] ECR I-02823; Case C-69/99, *Commission v United Kingdom*, [2000] ECR I-10979; Case C-127/99, *Commission v Italy*, [2001] ECR I-08305 (all relating to the Nitrates Directive).

⁴⁴ Case C-266/00, *Commission v Luxembourg*, [2001] ECR I-02073; Case C-221/03, *Commission v Belgium*, [2005] ECR I-08307.

⁴⁵ Case C-237/07, *Janecek*, [2008] ECR I-06221.

⁴⁶ H.F.M.W. van Rijswijk, *Moving Water and the Law*, Groningen: Europa Law Publishing 2008, p. 23-24.

⁴⁷ Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, OJ 2008, L 348/84.

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Technical specifications for the chemical analysis and the monitoring of water status are given in Commission Directive 2009/90.⁴⁸

The content of normatively described goals and standards as described above thus does not follow directly from the Directive, but is elaborated in other documents. Interpretation by the ECJ may further develop these concepts. This means that these norms may not be as static as environmental quality standards and it is not necessary to amend the Directive in order to adapt to technological developments. However, this does not mean that the norms leave more freedom to the Member States, because the elaboration of the norms usually still results in detailed norms with which the Member States have to comply. Without this elaboration, the meaning of such standards is often unclear and Member States can hardly determine the exact obligation that follows therefrom. This makes the norms difficult to use as far as the Member States are concerned, because they cannot simply copy the norm in their national legislation. They will need support in doing this, to prevent differences in interpretation between the Member States. The most important aspect is thus that it should be clear how the normatively described goals and standards must be filled in. Usually the Directive contains a mechanism with which the norms are elaborated at the European level, either in a daughter Directive or in soft law documents. Without such a mechanism, the Commission would have to accept differences between the Member States in the interpretation of the norm or standard, and that would be contrary to the purpose of harmonisation.

The examples of the IPPC Directive and the WFD show that normatively described goals and standards require supplementary documents before they can be used by the Member States. This may result in more flexibility in the final norms. A negative side to this is that the exact extent of the obligations of such a Directive is unclear, as this depends on secondary documents. This means that the Member States do not fully know what they are committing themselves to when agreeing to a Directive containing such vague criteria.

Prohibitions and obligations

Many Directives contain prohibitions and obligations meant for individuals or companies in one form or another. Examples are a prohibition on the discharge of polluting substances into water without permission or the obligation to report exceptional circumstances. These provisions can be either procedural or substantive and may coincide with one of the above categories. Due to the different ways in which they can appear, it is difficult to make general remarks concerning implementation problems. One important factor is at least the clarity of the obligation.

An example of a prohibition which gives rise to implementation problems is Article 5 of the Wild Birds

Directive. This Article prohibits the deliberate disturbance of birds, *particularly* during the period of breeding and rearing. This creates uncertainty as to the extent of this prohibition in other periods. The Habitats Directive contains an obligation which is not really unclear, but very difficult to work with in practice. Article 12 contains a prohibition of several forms of deliberate disturbance of species. However, the deterioration or destruction of breeding sites and resting places must simply be prohibited, without the condition of 'deliberate'. In case of migratory species, it is quite likely that, for example, a farmer works on his land and unintentionally destroys a nest of which he was not aware. This would be in breach of the Habitats Directive. One might wonder whether this really is the intention of the Directive.

The obligation to have a permit system can give rise to questions concerning the exact scope of this obligation. An example is Article 6(2) of the Dangerous Substances Directive, which requires a prior authorisation for all discharges of dangerous substances as listed in the Directive.⁴⁹ France transposed this obligation with a declaratory scheme containing emission limits and a possibility for the authorities to set stricter standards in specific cases. The ECJ ruled that this is contrary to the Directive, as there is no system of prior authorisation in all individual cases.⁵⁰ This ruling by the ECJ cannot come as a surprise in my opinion, as there is a fundamental difference between prior authorisation in individual cases, for example with a permit system, or the application of general rules from which in specific circumstances a deviation is possible. Several other environmental Directives prescribe the use of a permit system, such as the IPPC Directive, the Waste Framework Directive, Directive 2001/80 on Large Combustion Plants,⁵¹ the Pesticides Directive, and the Urban Waste Water Directive. The scope of this obligation is quite clear, so it does not necessarily lead to implementation problems. However, problems may occur in Member States with a preference for general rules such as the Netherlands, as they will have to make exceptions for cases meant in those Directives. This requires an

⁴⁸ Commission Directive 2009/90/EC of 31 July 2009 laying down, pursuant to Directive 2000/60/EC of the European Parliament and of the Council, technical specifications for chemical analysis and monitoring of water status, *OJ* 2009, L 201/36.

⁴⁹ H.F.M.W. van Rijswijk, "EC Water Law in Transition", in: H. Somsen (ed.), *The Yearbook of European Environmental Law*, Oxford: Oxford University Press 2003, p. 251-258.

⁵⁰ Case C-381/07, *Association nationale pour la protection des eaux et rivières – TOS*, [2008] ECR I-08281.

⁵¹ Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, *OJ* 2001, L 309/1.

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adaptation of existing national systems and it limits the freedom of Member States to choose the form and method of implementation.

If it is not clear what a prohibition or obligation requires exactly, the chances are that a Member State will not transpose it correctly and that the obligation is not respected.

Enforcement

Enforcement is necessary for correct implementation and application. The TFEU contains an infringement procedure as a way of enforcing the implementation of Directives. National legislation should also contain ways to enforce the Directive itself. The enforcement is often left to the Member States and is only addressed in the Directive in a very general way. The Habitats Directive prescribes, for example, that the Member States “shall undertake surveillance of the conservation status” (Article 11) and “shall take the requisite measures to establish a system of strict protection of animal species and plant species” (Articles 12 and 13). Similar obligations can be found in Article 14 IPPC Directive concerning compliance with permit requirements. Directive 1999/30 (hereafter: the First Daughter Directive on Air Quality)⁵² contains an Article on penalties: “Member States shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive. Those penalties shall be effective, proportionate and dissuasive.” This still leaves a large amount of discretion to the Member States.

A Directive can also contain more specific requirements concerning the assessment or monitoring of the Directive. Examples are Article 7 of the First Daughter Directive on Air Quality on the assessment of concentrations of polluting substances and Article 6 of the Nitrates Directive on the monitoring of nitrates concentration.

A level playing field in enforcement and monitoring is important, especially when economic interests are concerned. If one Member State were less stringent in, for instance, permit requirements and the use of best available techniques, companies in that Member State would have a competitive advantage because they do not have to take expensive measures to prevent or limit air pollution etc. The same might happen when environmental quality standards are exceeded, but this is not assessed properly.

Provisions concerning enforcement and monitoring do not often create problems in the implementation of Directives, but can play a role in the actual execution thereof.

Transitional provisions

A Directive must be implemented from the moment stated in the Directive. The national legislation may enter into force before this deadline if the Member State so chooses. Questions can arise as to how to handle cases which arise just before the deadline for

implementation, but are not yet completed. This occurs especially in longer lasting processes, such as the application for a permit. Some Directives contain a provision concerning interim measures, but these provisions may give rise to questions. This was especially the case with the original EIA Directive. It was not entirely clear whether the Directive should be applied to so-called ‘pipeline cases’, i.e. cases in which the official procedure for a permit was started but not completed before the deadline of the Directive. The ECJ made this clear: the Directive does not have to be applied to cases commenced before the deadline. Only new applications have to be submitted to an EIA.⁵³ After these rulings, the need for more explicit provisions concerning transitional periods became clear. Similar provisions in, for example, Directive 97/11⁵⁴ and in Directive 2001/42⁵⁵ have been drafted in accordance with the ruling of the ECJ. It thus seems that this problem was tackled by the rulings of the ECJ and it no longer occurs.

The transitional provisions from the Pesticides Directive gave rise to many preliminary rulings. Article 8 provides for the provisional placing on the market of plant protection products for which the assessment has not yet taken place. Questions were raised on the exact meaning of this provision and its relation to the Biocides Directive, which contains a similar provision, but in a slightly different wording.⁵⁶ The ECJ ruled that these two provisions have the same meaning.⁵⁷ Another question related to the character of this provision. The ECJ stated that it does not constitute a ‘standstill’ obligation, but Member States should refrain from adopting measures during the

⁵² Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, *OJ* 1999, L 163/41.

⁵³ Case C-396/92, *Bund Naturschutz in Bayern*, [1994] *ECR* I-03717, par. 19; Case C-431/92, *Commission v Germany (Großkrotzenburg)*, [1995] *ECR* I-02189, par. 23-33; Case C-301/95, *Commission v Germany*, [1998] *ECR* I-06135, par. 11-17 and 25-29; Case C-150/97, *Commission v Portugal*, [1999] *ECR* I-00259, par. 13, 18, 19, 21 and 23.

⁵⁴ Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, *OJ* 1997, L 73/5.

⁵⁵ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, *OJ* 2001, L 197/30.

⁵⁶ E.M. Vogelesang-Stoute, “European Community Legislation on the Marketing and Use of Pesticides”, in: *Review of European Community & International Environmental Law* 1999, p. 144-151.

⁵⁷ Case C-316/04, *Stichting Zuid-Hollandse Milieufederatie*, [2005] *ECR* I-09759.

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transitional period which are liable to seriously compromise the result prescribed by the Directive.⁵⁸

Annexes

Many Directives contain annexes. These can have different contents. Often annexes are quite technical and may contain, for example, lists of projects for which an EIA is necessary (EIA Directive), environmental quality values (First Daughter Directive on Air Quality) or norms which can be used to determine such standards (Water Framework Directive), lists with dangerous substances (Dangerous Substances Directive) or protected species (Habitats Directive) etc. Usually, these annexes are adjusted more often than the provisions of the Directive itself. It depends on the Directive which procedure must be followed. As an annex is part of the Directive, the normal legislative procedure must be followed, unless stated otherwise. This is quite an extensive and time-consuming procedure which involves the European Commission, the Council and the European Parliament. That is why many Directives contain a provision in which adjustments to the annexes are delegated to the European Commission, often assisted by a special committee (the comitology procedure). See, for example, Articles 19, 20 and 21 of the Pesticides Directive, Article 16 of the WFD or Article 12 of Directive 96/62 (hereafter: the Air Quality Framework Directive).⁵⁹ All of these Directives provide for the adaptation of annexes by the Commission, supported by a (regulatory) committee. The final decision is not taken by the Committee, however, but by the Commission, or, if the Commission deviates from the opinion of the Committee, by the Council.

It is remarkable that the annexes to the Wild Birds Directive may be amended by the Commission, after an opinion of the Committee (Article 17), whereas the amendment of the annexes to the closely related and more recent Habitats Directive has not been delegated to the Commission and may only be adopted by the Council on a proposal from the Commission (Article 19).

The large-scale delegation to the Commission makes sense, because it enables the European Union to act more quickly. On the other hand, there is less democratic control over this process and the Member States can lose their grip on the procedure, even though they are usually represented by civil servants in the Committees.⁶⁰ At the same time, the technical norms are very determinative for the scope of the Directive and are thus rather essential. An example is Annex I-IV of the First Daughter Directive on Air Quality, containing limit values and alarm thresholds for different pollutants or the list of active substances in Annex I of the Pesticides Directive.

The most important point relating to the use of annexes is that it should be clear when drafting the Directive what the role of the annex is, what the impact on the scope of the Directive will be and how,

by whom and when it can be amended. Directives usually contain sufficient information concerning these elements. A potential problem with the use of annexes relates to the scope and clarity of Directives. Often, these annexes contain thresholds for the applicability of a Directive. Member States are inclined to adopt a limited interpretation, whereas the European Commission and the ECJ tend to use a broader interpretation (see above, Section V). Member States might want to split up a project to avoid the applicability of a Directive or have a different opinion where it concerns the applicability of multiple categories. It is clear that the ECJ will not accept this, as can be concluded from a case on the EIA Directive concerning a transboundary power line.⁶¹ Power lines only have to be subjected to an EIA if they are longer than 15 km. In this case, the Austrian part of the power line was less than 15 km in length. According to the ECJ, the total length of the power line is decisive for the necessity of an EIA, irrespective of the border. In another case the ECJ confirmed that the splitting of projects may not lead to a circumvention of the Directive and that the cumulative effect of the projects must be taken into account.⁶² In the IPPC Directive, it was not clear from the annex how to deal with operators which carry out several activities, but all of them below the threshold. Should the total capacity be determined by adding up the different activities, or is the Directive not applicable as long as none of the activities exceeds the thresholds? The provision concerning the adding up of activities (Annex I, sub. 2) is unclear and has been clarified in the 'Guidance on Interpretation and Determination of Capacity under the IPPC Directive'.⁶³ Capacities of activities under the same subheading of the Annex must be added together, but different animal types do not fall under the same subheading and cannot be aggregated. However, if the meaning of terms like 'subheading' is unclear, such provisions are difficult to apply.

As annexes are important for the scope of the Directives, their meaning and the way in which they should be dealt with should be clear for the Member States so as to avoid differences in application.

⁵⁸ Case C-138/05, *Stichting Zuid-Hollandse Milieufederatie*, [2006] ECR I-08339.

⁵⁹ Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, *OJ* 1996, L 296/55.

⁶⁰ See further G.J. Brandsma, *Backstage Europe: comitology, accountability and democracy in the European Union*, diss. Utrecht University, Arnhem: 2010.

⁶¹ Case C-205/08, *Umweltanwalt von Kärnten*, [2009] ECR I-11525.

⁶² Case C-142/07, *Ecologistas*, [2008] ECR I-06097.

⁶³ <http://ec.europa.eu/environment/air/pollutants/stationary/ippc/pdf/capacity_guidance.pdf>

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Detailed requirements

Requirements stipulating the means with which a certain objective must be achieved are an example of detailed requirements which are not particularly appropriate as an instrument in a Directive. The Nitrates Directive is probably the clearest example in the field of environmental law. Both Germany and the Netherlands implemented this Directive with a method for determining the deposit of nitrates which deviated from the Directive. This was not accepted by the ECJ.⁶⁴ In both cases however, the results of the Directive were also not achieved, so there was more amiss than just the choice of the system.

Especially in Member States with a well-functioning national system of environmental law, these 'means requirements' lead to adaptations in the national system which are not necessary to achieve the envisaged result. If a Member State achieves the result with other means and the objective of the Directive is still attained, it is not reasonable to state that the Member State fails to carry out its obligations under European law. In such a situation, a Member State does not feel the urge to adjust the existing system. For Member States with a weaker tradition in environmental law, however, detailed requirements can be very helpful. But one could argue whether it is necessary to lay down these requirements in a binding instrument such as a Directive. An alternative could be the description of best practices, which would be more flexible.

The use of 'means requirements' does not seem to be in line with the purpose of a Directive, which is binding as to the result to be achieved, but leaves the choice as to the form and methods of implementation to the national authorities (Article 288 TFEU).

VII. Soft law

Soft law can take different forms. Sometimes the European Commission provides explanatory memoranda or guidance documents on its website to clarify a Directive. Other Directives provide for technical documents, in which norms from the Directive are laid down more precisely. An example is the IPPC Directive with BREF documents containing Best Available Techniques, or the Water Framework Directive with guidances concerning important notions from the Directive. Sometimes there is a legal basis for such documents in the Directive (for example, in the IPPC Directive), and sometimes not (for example, in the Habitats Directive and in the Water Framework Directive). In the latter case, they do not have any legal status and are nothing more than an aid for the Member States. Formally, they are not legally binding and the Member States are free to deviate from such documents. In practice, however, both the ECJ and national courts and authorities do attach a great deal of weight to these documents.

There is a good reason to make interpretative documents and other kinds of guidance documents, even without a legal basis in the Directive. Most of the problems described in sections III, IV and V above boil down to the lack of clarity in the Directives. A (partial) solution to these problems might be to provide more clarity concerning the meaning and scope of a Directive, definitions, obligations and the relation to other Directives. However, one might wonder whether soft law is the best way to clarify these points. Usually, soft law is used in reaction to a lack of clarity (for example, the guidance documents with the Habitats Directive they date from years after the Directive itself). It would be better to prevent this lack of clarity in the first place, or at least to fill in the gaps in Directives at the moment of adopting a Directive. An explanatory memorandum accompanying the Directive could help the Member States to implement correctly in the first place, whereas a guidance document after the deadline for implementation does not prevent implementation problems, but can only help to repair them. Of course, due to the lack of a legal status for most soft law documents, in theory Member States are free to ignore them and to follow their own interpretation. In practice, however, it is easier to follow the view of the Commission.

The use of soft law and other non-binding, extralegal interpretative documents seems to be continually increasing. These documents lack a formal legal status, but in practice appear to be rather important. Sometimes even the ECJ refers to such documents.⁶⁵ However, there is no democratic control by the European Parliament over the drafting of such documents.⁶⁶ Their objectivity is not guaranteed, as they usually reflect the ideas of the European Commission and do not always pay enough attention to changes in the relevant Directive made by the Council or European Parliament. The exact procedure for adopting a soft law document depends on the Directive in question. It is not always the Commission alone which adopts such a document. Often experts from the Member States, the Member States themselves or other stakeholders are involved in the preparation of such documents. There can also be some tension between the guidance document and the Directive itself, or between different guidances concerning the same Directive. An example is the Habitats Directive. According to Article 16(1) Habitats Directive, a favourable conservation status is a precondition

⁶⁴ Case C-161/00, *Commission v Germany*, [2002] ECR I-02753 and Case C-322/00, *Commission v Netherlands*, [2003] ECR I-11267.

⁶⁵ Case C-342/05, *Commission v Finland*, [2007] ECR I-04713.

⁶⁶ L.A.J. Senden, "Soft law and its implications for institutional balance in the EC", in: *Utrecht Law Review* 2005, Issue 2, p. 77-99.

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for a derogation from the species protection provisions. However, following the Guidance Document on the strict protection of animal species of Community interest,⁶⁷ derogations may also be granted when the conservation status is unfavourable, but it is established that the situation will not worsen as a result of the derogation. This is in contradiction with the text of the Directive, but the ECJ follows this line of reasoning by the Commission.

In general, the Member States have a tendency to follow guidance documents, because it is easier and they do not have to make their own decisions. In addition, it probably helps to prevent infringement procedures if a Member State does as the Commission wishes. Although these documents can function as an important support for the Member States, the way they are created is often non-transparent, which makes them less reliable.

The use of soft law documents can help to fill in uncertainties, but there is also a major disadvantage: control over these documents is limited and they are not legally binding, although in practice they are very authoritative.

VIII. Other factors

Languages and translations

The language regime is a source of potential problems. The notions used in a Directive can have a different meaning than the same word in a national context. In German, there is a difference between a regular permit ('Genehmigung') and a 'Planfeststellung'. The use of the term 'permit' in a Directive would not be interpreted as allowing the use of a 'Planfeststellung' in the national legislation. Different German Acts prescribe a 'Planfeststellung' for projects such as the construction of roads, railways etc. If a Directive prescribes the use of a permit or authorisation, it is unclear for German lawyers whether or not this requirement can be integrated in the 'Planfeststellung' or whether a separate permit procedure must be established.

Another example is the term 'absichtlich' in the German version of Article 12 of the Habitats Directive. In the German legal system, this does not include conditional intent. If the term from the Directive is transposed into national legislation, this will at least give the suggestion of a different meaning than the Directive entails, and thus bears the risk of the norm being applied incorrectly.

Furthermore, negotiations are usually held in English and/or French. Civil servants from other Member States are not always sufficiently proficient in these languages to foresee the consequences of the choice for a certain wording, which weakens their position. Often, documents are not available in other languages, or only become available at a later date. By giving Member States the opportunity to react to the

translation this problem could be reduced, but the possibility to deviate from the approved text in English or French is limited.

Legislative process

The process of lawmaking at the European level is very complex, with the European Commission, the Council and the European Parliament being involved. During this process, negotiations and compromises are inevitable. However, this may result in unclear texts, as it is more difficult to reach an agreement on a clearer text. Problems only become apparent in the process of transposing and executing the Directives and when differences of opinion between the Commission and the Member States arise in infringement procedures.

On the other hand, national legislation is not always clear either and needs to be clarified by the courts, so this is partly inherent in lawmaking. But unclear obligations are in practice very problematic. They will not solve environmental or legislative problems and simply move the burden of dealing with such non-clarities to the authorities in the Member States. This may create different protection regimes throughout Europe and even within the Member States, where the goal should be the harmonization of protection regimes and a level playing field.

Attitude of the Member States

Another factor in the flawed transposition and realization of the goals of environmental Directives is the attitude of the Member States. This can especially be seen in the designation of areas, but it also explains part of the problems with procedural requirements and means requirements. See the relevant sections for more information.

National factors

Other factors are also relevant, depending on the Member State in question. This can be the organization of the state (federal or unitary), the structure of national environmental law (sectoral or integral), etc. In a federal state such as Germany, the chances are that transposition is flawed in one or more *Länder*, or constitutional arrangements concerning the autonomy of regions might stand in the way of complete implementation. In Denmark's sectoral system, transposition could be incomplete, because sectoral Acts do not always cover the total field of environmental law. Furthermore, the risk of late implementation increases where various different Acts have to be adopted or

⁶⁷ Guidance Document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007), http://circa.europa.eu/Public/irc/env/species_protection/library?l=/commission_guidance/english/final-completepdf/_EN_1.0_&a=d.

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amended. On the other hand, in an integrated system, the lack of coherence between Directives may cause problems in implementation, because conflicts between Directives are especially felt in the case of transposition in one single Act.

IX. Conclusion

According to the system of European law, the Member States are to blame for every problem in the transposition of Directives. This article shows that not every flaw in transposition is caused by the Member States, but that Directives are often imperfect and therefore difficult to transpose. These problems cannot be resolved by starting infringement procedures against the Member States, but should be solved by improving the Directives. Instead of starting infringement procedures against those Member States, the proper reaction would be to review and rectify the Directives.

The main problems are a lack of coherence between Directives in the use of definitions and in the applicability of multiple Directives to the same situation, a lack of clarity concerning definitions and the scope of Directives. Different instruments such as area protection, emission standards, environmental quality standards, procedural requirements and the obligation to set up plans or programmes each have their own problems to which attention should be paid when prescribing such instruments. Soft law can be helpful for Member States, especially when filling in technical standards or vague norms, but interpretative documents should be handled with care. They usually reflect the opinion of the European Commission, there is no democratic control over the procedure and they are not legally binding. Member States should bear this in mind and critically assess these documents before deciding to follow them.

National judges have the possibility to turn to the ECJ with preliminary questions when there is a lack of clarity, but this is not an absolute solution. In the first place, if the Directive appears clear to the national authorities, because there is room for the chosen interpretation, there seems to be no need to pose preliminary questions. In the second place, such questions can only be raised by national judges. This

is of no help to the national administration struggling with the obligations contained in a Directive. In the third place, once the national procedure has reached the judicial stage and the national judge decides to refer to the ECJ, it takes a long time before an answer can be expected. In the meantime, the national procedure has to be put on hold. Other cases concerning the same problems should be put on hold as well.

Recommendations

Member States are obliged to loyally execute European law, even if this requires amendments to perfectly functioning national legislation or the designation of vulnerable but economically important areas. This should however start with negotiations in which all parties concerned loyally aim to make a Directive of good quality. Better impact assessments with a focus on the legal and environmental effects of new legislation, both on the European and the national level, would be helpful in this matter. If the effects of a Directive are known beforehand, Member States will be able to consider whether they wish to commit themselves to these obligations. An explanatory memorandum which is available at the same time as the Directive would also be of great assistance to the Member States in their implementation process.

The Commission is working on thematic strategies in different areas of European environmental law. These strategies are meant to map the different Directives within these areas and sometimes lead to the integration or consolidation of existing legislation. In my opinion, this is a very welcome strategy. In some areas, such as air quality and water law, there is already a tendency towards framework Directives and daughter Directives. By using a legislative framework, the coherence in an area of law is better safeguarded. The framework Directives should contain definitions which apply to all daughter Directives.

This development should be applauded. However, this does not mean that there are no legal questions left. Also in framework Directives, definitions, scope and the instruments used should be clear to avoid problems as set out in this article. In addition, conflicts may arise with the coherence between different framework Directives.