

2. The governance approach in European Union environmental directives and its consequences for flexibility, effectiveness and legitimacy¹

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INTRODUCTION

The complex nature of environmental problems, the uncertainty with regard to developments such as climate change, the call for regional differentiation and policy discretion for the Member States has led to new developments in the area of European environmental law. The European Commission has recognised the need for flexibility to increase the quality and efficiency of its environmental policy. Detailed legislation in areas like environmental law no longer suffices. In its 2001 white paper on governance the Commission already advocated the use of different policy tools such as Framework Directives.² Next to that, several authors have argued that the classical top-down government approach, which can be characterised by the setting of rather specific and substantive rules at EU level that have to be implemented and administered by the national Member States, is lacking legitimacy because with this approach current

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² European Commission, *European Governance* (White Paper, COM 428, 2001) 5.

environmental problems cannot be solved.³ A new approach has been embraced: the governance approach. The Commission's white paper on adaptation to climate change and the Commission staff working document, *Climate change and water, coasts and marine issues* – both from 2009 – are mainly based on this governance approach.⁴ The aim of the governance approach is, according to Howarth, to increase the input-legitimacy and to achieve more legitimate policymaking (political legitimacy) by the involvement of stakeholders in standard setting and decision making, and to increase flexibility by standard setting at various levels so that regional circumstances can be taken into account. The output-legitimacy would also be improved because of the increased input-legitimacy: stakeholders would be willing to act in conformity with the norms and standards they have set themselves. Also enforcement would, in the governance approach, best be done by the stakeholders. Finally, the approach aims at increasing the effectiveness of environmental legislation, mainly as a result of the increased input and output legitimacy. The effectiveness is seen both on procedural provisions as well as on a substantive improvement of the environment.⁵ Although much has been written on the advantages of the governance approach,⁶ there are hardly any empirical studies that support the assumption that these aims are or will be achieved.

We will offer some legal perspectives on the governance approach as defined by Howarth. One of the main instruments – although certainly not the only one (see above) – used in the governance approach are Framework Directives. One of the characteristics of a Framework Directive is that it limits legislation to the essentials, leaving it up to Member States to fill in the details when implementing it and thereby allowing the Member States to take local conditions into consideration, such as

³ Marks, Hooghe and Blank (1996), 49–86.

⁴ European Commission, *Adapting to Climate Change* (White Paper, COM 147, 2009); European Commission, *Climate Change and Water, Coasts and Marine Issues* (Commission staff working document accompanying the White Paper *Adapting to Climate Change: Towards a European framework for action*, SEC 386, 2009).

⁵ Howarth (2009), 391–417.

⁶ Lee (2009); Howarth (2009), 391–417; Kjaer (2007); Slaughter (2005); Van Rijswijk (2008); Krämer (2002), 155–182; Krämer (2007), 70–74; Van Rijswijk, Gilissen and Van Kempen (2010), 129–157.

geographical, physical and ecological circumstances, the regional impacts of, for example, climate change and the existing nature, air and water quality.⁷

It is recognised that, especially, the effects of climate change and the necessary measures to adapt to it are best regulated and performed at the national or even regional or local level.⁸ However, when filling in the details the Member States are often bound by procedural requirements with regard to consultation, reporting and transparency.⁹ This development is known as proceduralisation¹⁰ and has become an important element of EU environmental legislation. The use of Framework Directives, which is now applied for the regulation of several environmental problems, marks a departure from the classical Community approach which is known for its detailed legislative and executive acts. An important advantage that goes with the governance approach is that it offers more flexibility and policy discretion to tackle complex and wicked environmental problems. On the other hand it is also argued that environmental protection will differ seriously between several Member States¹¹ because the obligations that follow from directives are often unclear¹² or the ambition level even decreases because of more policy discretion and flexibility in environmental directives,¹³ amongst other reasons because it will be more difficult to rely on provisions that offer a minimum level of protection in the courts. In this chapter we will compare two policy tools: first the type of directive that includes the governance approach; such directives aim to offer more flexibility by increased policy discretion and they often contain more procedural provisions; in particular, Framework Directives represent this type of 'Governance Mode Directive'.¹⁴ Secondly, the type of directive that

⁷ Josefsson and Baaner (2011), 463–486; European Commission, *European Governance* (White Paper, COM 428, 2001), 10.

⁸ Termeer et al. (2011), 1–21.

⁹ Scott and Trubek (2002).

¹⁰ Scott (2000).

¹¹ Keessen et al. (2011), 162–85; Keessen et al. (2010), 197–222.

¹² Van Kempen (2012a), 477–497.

¹³ Krämer (2002), 155–182.

¹⁴ In Chapter 3 of this volume, Mireille Bogaert analyses what can be understood by a Framework Directive. In this chapter, we use the term Framework Directive in a more general sense for those directives that aim to offer more flexibility by increased policy discretion and that often contain more procedural provisions. For us, the flexibility given by directives is hence the core focus that we want to examine.

contains a classical, detailed regulatory approach, often called the 'Classical Directive'. While there is a need to provide more policy discretion to enlarge the legitimacy and effectiveness of European environmental law, a thorough research of the way directives offer policy discretion is necessary and not yet available in literature. Effectiveness of European environmental law, however, is not only achieved by increasing legitimacy, as described by Howarth (2006), but also by increasing effective legal protection. In this chapter we will compare several governance mode directives with a classical top-down directives and judge whether the governance approach delivers what it promises. We will focus on effective legal protection (direct effect), flexibility with regard to standard setting and legitimacy (legal legitimacy as well as political legitimacy).

First, we will introduce and elaborate on some concepts we have mentioned in the introduction (Section 1). We will have a closer look at the requirements for effective legal protection (1.1). The ability to rely on legal provisions before the courts is closely related to the amount and kind of policy discretion (1.2). Furthermore, we will have a closer look at the way of standard setting (1.3) to enable us to find research results on a shift in legitimacy; we will then have a closer look at concepts of legitimacy (1.4).

The Habitats Directive¹⁵ will be discussed as an example of the classical directive giving detailed norms (Section 2). As examples of governance mode directives the Air Quality Directive¹⁶ and the Water Framework Directive¹⁷ will be discussed (Section 3). The focus will be on the level of discretion the Member States are given by these Directives with regard to (1) the main provisions, (2) derogations, and (3) instruments and measures. Next the level of discretion given by both policy tools will be discussed in relation to the enforcement by the courts related to the doctrine of direct effect, effectiveness and legitimacy (Section 4).

¹⁵ Council Directive (EEC) 92/43 on the conservation of natural habitats and wild flora and fauna [1992] OJ L206/7.

¹⁶ Directive (EC) 2008/50 of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L152/1.

¹⁷ Directive (EC) 2000/60 of the European Parliament and of the Council establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

1. EXPLANATION OF SOME CONCEPTS

1.1 Effective Legal Protection

If a directive is not transposed (correctly) within the period set by the directive it is possible to rely on the directive directly in a national court. To be able to do so, provisions need to be unconditional and sufficiently precise (the doctrine of direct effect).¹⁸ According to the Court of Justice of the European Union (CJEU) a provision is unconditional if the implementation of the provision is not subject, in its implementation or effects, to the taking of a measure of the institutions of the Community or the Member State. A provision is sufficiently precise if the obligation which it imposes is set out in unequivocal terms.¹⁹

Provisions which do not leave the Member State any discretion generally meet these criteria. When a provision only contains such restricted power it has to be ‘mechanically applied’ by the Member State. Article 13 of the Air Quality Directive is a good example of such a provision. This article prescribes precise limit values for sulphur dioxide, PM10, lead and carbon monoxide in ambient air, which are laid down in Annex XI. These limit values *must* be met, therefore this provision is unconditional as well as sufficiently precise. If a Member State does not transpose this article of the Air Quality Directive within the period given for transposing it and the limit values are exceeded, it is possible for individuals to rely on this provision directly in a national court.²⁰

In general the provisions of a directive will contain some level of discretion. Provisions which give a high level of discretion are often not ‘unconditional and sufficiently precise’, because these provisions are often subject, in their implementation or effects, to the taking of a measure either by the institutions of the Community or the Member State. In that case individuals can only rely directly on the limits of the

¹⁸ Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337; Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 00053; Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 01839.

¹⁹ Case C-236/92 *Comitato di coordinamento per la Difesa della Cava and others v Regione Lombardia and others* [1994] ECR I-00483, paras 8–9.

²⁰ Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001; Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337; Case C-8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 00053.

discretion of the Member State, as set by the provision, in national court. These limits, however, have to be sufficiently precise.²¹

1.2 Levels of Policy Discretion

Three levels of discretion can be identified.

Discretion regarding policy

The provision leaves the Member State a high level of discretion. It is left to the Member State to decide whether or not to *apply* the provision.²² This type of discretionary power can be recognised by the use of terms such as ‘may’ or ‘can’. For example, according to Article 16(1) of the Habitats Directive, Member States *may* derogate from the norms set by the Directive. The provision is not ‘unconditional and sufficiently precise’, therefore individuals cannot rely on Article 16(1) in a national court when they wish the Member State to apply the derogation.

However, when a Member State decides to apply Article 16(1) it has to meet the conditions set by this provision. The derogation can only be applied provided there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. Furthermore, the derogation must be granted for one of the reasons mentioned in Article 16(1)(a)–(d). When the Member State decides to apply the derogation *without* meeting these conditions, it is possible for individuals to rely on these limits of the discretion of the Member State in a national court, because these limits are sufficiently precise. For example, if it is obvious that satisfactory alternatives exist, it is possible for the national courts to decide that the Member State has exceeded its discretion by relying on the derogation anyway. When a Member State has discretionary power but this discretion is subsequently limited by conditions which have to be met when it decides to apply the provision, it will be referred to as restricted policy discretion.

²¹ Case C-51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 00113; Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV and others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403; Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405.

²² Konijnenbelt, Van Male and Van Wijk (2008), 147–157.

Discretion regarding assessment

This means that the provision intentionally leaves the Member State the discretion to fill in part of the conditions set by the provision when it applies the provision. A good example of this type of discretion is Article 10(1) of the Habitats Directive. According to this provision Member States shall endeavour, *where they consider it necessary*, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora. This provision is not ‘unconditional and sufficiently precise’, therefore, individuals cannot rely on this provision in a national court. The provision leaves it to the discretion of the Member State to decide whether it is necessary to encourage the management of features of the landscape which are of major importance for wild fauna and flora.

Often the Member State’s discretion regarding assessment is limited in one way or another. In that case it might be possible for individuals to rely on these limits in a national court, provided the limits are sufficiently precise. Article 16(1) of the Air Quality Directive, for example, requires that Member States shall *take all necessary measures not entailing disproportionate costs* to ensure that concentrations of PM_{2,5} in ambient air do not exceed the target value laid down in Section D of Annex XIV as from the date specified therein. The Member State does not have to do everything within its power to achieve the target value. If the measures entail disproportionate costs the Member State does not have to take these measures. However, its discretion is limited, as at the core of Article 16(1) it is required that the Member State take all necessary measures. For example, if a Member State does not take any measures to ensure that concentrations of PM_{2,5} do not exceed the target value, the national court can decide that the Member State has exceeded its discretion. When the Member State’s discretion is limited when filling in the conditions set by the provision it will be referred to as restricted assessment discretion.

Degree of discretion regarding interpretation

The provision leaves room for interpretation.²³ This type of discretion is very common because it is not possible to define every term used by a directive. Almost every provision leaves a certain degree of discretion at some level. Article 12(1)(a) of the Habitats Directive is a good example.

²³ Michiels (2003), 106–107.

According to this article Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting all forms of deliberate capture or killing of specimens of these species in the wild. The term 'deliberate' leaves room for interpretation. For example, if a trap is used to hunt foxes and accidentally an otter is caught, does this constitute a deliberate act?²⁴ When a provision leaves room for interpretation the provision will be unconditional and sufficiently precise in general. Therefore, individuals can rely on the provision in a national court when a Member State fails to transpose it.

It is presumed that given the need for flexibility, directives that follow the governance approach such as Framework Directives leave Member States a high level of discretion. Therefore, it is assumed that it is less likely that an individual can rely on a Framework Directive in a national court.

1.3 Standard Setting

It is assumed that a Governance Mode Directive will increase the effectiveness of the norms. Such directives allow Member States to set realistic standards which take local conditions into account. If only one set of standards were established covering the entire territory of the EU, these European standards taking local conditions into account, would become very complex. Therefore, the classical directive often does not suffice in areas such as environmental law, where local conditions should be taken into consideration when establishing norms and standards.

Governance Mode Directives create flexibility through the standards which can be set at national level. However, by allowing Member States a broad discretion when establishing the standards, much is left to the willingness and the ambition of the Member State to achieve the overarching goals set by the Directive.²⁵ Standard and norm setting at national level is introduced in, for example, the Water Framework

²⁴ The Court of Justice of the European Union answered this question in Case C-221/04 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-04515, paras 71–74. The Court decided that because there was no intention to capture or kill otters, the capture of the otter did not constitute a deliberate act. Furthermore, the Spanish authorities were not aware of the presence of otters in the area. Therefore, neither the possibility of such capture nor killing was accepted.

²⁵ Van Kempen (2012b).

Directive, the Floods Directive and the Framework Directive on Marine Strategy.²⁶ Research has shown that Member States take very different approaches when implementing the Water Framework Directive, thus leading to differences in the level of ambition.²⁷ Therefore, it might be more effective to set minimum standards, while allowing the Member States to adopt plans and programmes to achieve these standards and ensuring flexibility through derogations.²⁸ For example, a directive could set minimum standards, which have to be met, as well as additional standards which the Member State should try to achieve. This approach ensures a minimum level of protection as well as the possibility to take local considerations into account. The Air Quality Directive is a good example of this approach. It combines the use of limit values, which have to be met within a set period, with target values. Furthermore, by requiring reviews on the implementation of the directives, Member States can be compelled to take the implementation of the directive seriously. But even with regard to the implementation of Air Quality Directives there are major differences between the Member States.²⁹ However, these differences are not caused by the way the standards are implemented – they are all implemented as target values and are the same all over the EU – but by the way the monitoring is organised. Therefore it can be concluded that directives should also prescribe the way monitoring obligations should be implemented and organised. At the moment, this differs quite a lot throughout the EU and with respect to more environmental directives.³⁰

1.4 Legitimacy

Increasing the legitimacy of European environmental policies is one of the main goals of the governance approach. However, legitimacy can be defined in several ways.³¹ In a legal context legitimacy is used to refer to the basic principle that the power of the government should be limited; this requires that government intervention should have a legal basis (the rule of law). A legal basis is especially necessary when government

²⁶ Green et al. (2012).

²⁷ Keessen et al. (2010), 197–222; Uitenboogaart et al. (eds) (2009).

²⁸ Van Rijswick (2008).

²⁹ Backes, et al. (2005), 157–164.

³⁰ See for a comparative research on the implementation on monitoring obligations following from the Nitrates Directive in England, Denmark, Flanders and the Netherlands Fraters: Beijen et al. (2012).

³¹ Van Buuren et al. (2013).

behaviour restricts the rights and civil liberties of members of the public.³² Legitimacy also has an important democratic element. By requiring a legal basis for all government behaviour, the government cannot prohibit, order or allow certain behaviour without democratic control through Parliament.³³

Legitimacy implies legal certainty; the members of the public are able to predict which behaviour is required. This is especially important if certain behaviour will be sanctioned by the authorities. In addition, legitimacy enables equality, for example to have the same minimum of environmental protection level as other EU citizens. By laying down the rules equal treatment can be better ensured.³⁴ Crucial to legitimacy is the possibility of having access to the court to enforce equal treatment. In this context the doctrine of direct effect is important to ensure effective legal protection, which is necessary for legitimate policies. Access to the court is fundamental to enforce the principle of legitimacy.³⁵

It can be argued that legal legitimacy could be reduced when Governance Mode Directives that offer large policy discretion are used. Such directives leave it to the Member States to fill in the details. If the requirements and standards of a directive are not clear, it will become more difficult for members of the public to predict which behaviour is required, thereby decreasing legal certainty. In addition if a directive leaves a high level of discretion, it will be difficult to rely on the general and normative provisions in a directive in national courts, in case a directive has not been transposed (correctly) within the period set for transposing by the directive. Finally, democratic control will shift from the EU level to the national level when the standards are filled in through delegated acts, within the EU, or within the Member State.

Legitimacy, however, has a political aspect as well.³⁶ Legitimacy in a political context can be referred to as public backing. In this context it is important whether members of the public *experience* Government behaviour as legitimate (described as output-legitimacy by Howarth). By requiring a legal basis for Government behaviour members of the public are more likely to support and accept the subsequent behaviour of the Government.³⁷ Involvement of the members of the public can also

³² Voermans, Borgers and Sieburgh (2011), 7–10, 24.

³³ Voermans, Borgers and Sieburgh (2011), 7–10.

³⁴ Voermans, Borgers and Sieburgh (2011), 11.

³⁵ Ebbesson (2009), 416.

³⁶ Rosanvallon (2011).

³⁷ Voermans, Borgers and Sieburgh (2011), 12.

significantly increase the public backing of Government behaviour (described as input-legitimacy by Howarth). This has been broadly recognised in the field of environmental law.³⁸ Participation has been a basic principle in environmental law since the adoption of the Aarhus Convention, but also previously in many Member States. The Aarhus Convention lays down some basic principles in relation to access to information, public participation in decision making and access to courts in environmental matters. It is sometimes stated that by using a governance approach, members of the public will increase the social backing of European environmental law. As the Commission mentioned in its white paper on governance, many people feel that the Union is too remote. A stronger interaction with regional and local governments is necessary. By explicitly involving the Member States through the use of, for example, Framework Directives, with standard setting at national or regional level, it is assumed that the political legitimacy of the law will be increased. Furthermore, modern Governance Mode Directives often explicitly require a high level of participation, thereby further increasing social backing of the law as well.

In the following sections of this chapter these perspectives on the governance approach are further explored. Three examples will be discussed showing the consequences of using Governance Mode Directives in practice (see Section 4). Selected directives are the Habitats Directive, the Air Quality Directive (2010)³⁹ and the Water Framework Directive. The main reasons for this selection are that the directives differ in age and approach. The Habitats Directive can be characterised as a Classical Directive, the Air Quality Directive is one of the first Governance Mode Directives, with binding standards, and the Water Framework Directive is a very clear example of the new governance approach in EU environmental legislation.⁴⁰ Furthermore, they deal with several topics within EU environmental legislation.

³⁸ European Community, *Guidance on public participation in relation to the water Framework Directive*, (Office for official publications of the European Communities 2002); Arnstein (1969), 215–224; Alexander (2002), 226; Walker et al. (2002), 14.

³⁹ The first Air Quality Directive dates from 1996. This directive was replaced by the current Air Quality Directive in 2010.

⁴⁰ Lee (2009).

2. THE HABITATS DIRECTIVE

As mentioned in the introduction two policy tools will be compared: the Classical Directive and the Governance Mode Directive. In this section, the Habitats Directive will be discussed as an example of a Classical Directive. The main provisions, derogations and measures of the Habitats Directive will be described in the following sections.

2.1 Main Provisions

The Habitats Directive is – together with the Birds Directive – the backbone of Europe’s nature conservation law. It offers a strong protection regime for species and habitats.⁴¹ The main provisions of the Habitats Directive are formulated in a strict way and leave Member States without any real discretion.⁴² For example, Article 12 of the directive dictates that Member States should take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting (amongst other things): ‘all forms of deliberate capture or killing of specimens of Annex IVa species in the wild’. Member States should adopt a comprehensive legal framework implementing this prohibition.

With regard to the interpretation of the prohibitions laid down in Article 12, Member States only have discretion with regard to interpretation. The CJEU has interpreted the term ‘deliberate’ widely, leaving Member States even less room for interpretation when deciding whether an act is deliberate or not. If the possibility is accepted that a protected animal is captured or killed the capture or killing is deliberate.⁴³ However, Member States should not only adopt a comprehensive legal framework implementing the prohibitions laid down in Article 12, they should also take preventive measures. In *Commission v Hellenic Republic*, the Court ruled with regard to Article 12(1)(b) that if all requisite specific measures to prevent disturbances of Annex IVa species have not been taken, a system of strict protection has not been provided.⁴⁴ In a more recent case this line of reasoning has been reaffirmed. In this case,

⁴¹ Verschuuren (2004), 39–67.

⁴² The norms of the Habitats Directive are laid down in Articles 12, 13 and 15.

⁴³ Case C-221/04 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-04515, para. 71.

⁴⁴ Case C-103/00 *Commission of the European Communities v Hellenic Republic* [2002] ECR I-01147, paras 35–39.

which was also brought to the Court by the Commission, the Court ruled that France breached Article 12(1)(d) by failing to take the requisite measures to prevent deterioration or destruction of breeding sites or resting places of the European hamster. In the light of the dramatically decreasing number of burrows, France should have taken more measures to prevent urbanisation of and harmful agriculture activities on the land favourable to the species.⁴⁵ With regard to the content of the preventive measures prescribed by Article 12, Member States have restricted assessment discretion.

2.2 Derogations

Although the main provisions of the Habitats Directive are strict with regard to the implementation of the prohibitions, Member States are not completely deprived of discretion. The Directive contains several derogations allowing Member States to deviate from the norms. It is left to the Member States to decide whether they want to use these derogations. However, the Member States can only rely on these derogations under specific circumstances (restricted policy discretion). For example, Article 16(1) of the directive allows derogations from, amongst others, Article 12 if: ‘there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range’. These criteria allow the Member States some restricted assessment discretion. The Commission emphasises though that another solution cannot be rejected just because it would cause greater inconvenience.⁴⁶

Article 16(1) subsequently lists five reasons which can justify a derogation from Article 12. One of the reasons for granting a derogation is: ‘to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property’. In its guidance document the European Commission stresses that mere nuisance and normal business risks do not justify the use of this derogation.⁴⁷ A derogation can also be justified if it is in ‘the interests of public health and public

⁴⁵ Case C-383/09 *European Commission v French Republic* [2011], paras 24–40.

⁴⁶ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats directive 92/43/EEC* (2007) 58–9; see also Krämer (2009), 59–85.

⁴⁷ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats directive 92/43/EEC* (2007) 54.

safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment'. The European Commission mentions that a reason qualifies as an 'imperative reason of overriding public interest' when the interests are of a certain weight. Short-term interests cannot qualify as overriding public interests.⁴⁸ Still, the reasons listed in Article 16 are largely open-ended and leave Member States some discretion, although it must be noted that according to the Court the derogations should be interpreted and implemented restrictively to avoid undermining the main provisions of the Directive.⁴⁹

2.3 Conservation Measures

The Habitats Directive also contains several conservation measures for special conservation areas appointed according to the criteria laid down in Article 4(1) and Annex III of the directive. According to Article 4(1), the Member States propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. Member States have a certain degree of discretion regarding interpretation when selecting the most representative territories. Next, the European Commission will draft a list of sites of Community importance. With regard to these sites the Member State has to take the conservation measures laid down in Article 6(2)–(4) of the Directive. Subsequently, the Member State has to designate the sites of Community importance as conservation areas. At this stage the Member State's power is restricted; it has to appoint the territory as a conservation area. With regard to these areas the Member State has to take all of the conservation measures laid down in Article 6(1)–(4).

The measures laid down in Article 6(1)–(2) give restricted assessment discretion to Member States. For example, Article 6(1) of the Directive obliges Member States to: '... establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'. According to this article Member States are obliged to take active conservation

⁴⁸ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats directive 92/43/EEC* (2007), 55.

⁴⁹ *Ibid.*

measures. However, with regard to the content of the measures the Member States exercise assessment discretion. This discretion is limited by the fact that the measures have to correspond to the ecological requirements of the natural habitat types (Annex I) and the species (Annex II) present on the sites. In its guidance document on Article 6 the European Commission elaborates on the criteria which should be taken into consideration when establishing the ‘necessary conservation measures’.⁵⁰

Article 6(3) seems to leave the Member States less discretion than Article 6(1)–(2). Article 6(3) states that: ‘Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives.’ Only after ascertaining that the plan or project will not have any adverse effects on the integrity of the site, can the Member State allow the plan or project.⁵¹ This provision has been extensively discussed by the Court in *Kokkelvisser*.⁵² The Court has given a broad interpretation to the concepts ‘plan or project’. It decided that where an activity has been carried on for many years, but for which a licence is granted annually for a limited period, each licence should be assessed as a ‘plan’ or ‘project’ within the meaning of Article 6(3) of the Habitats Directive.⁵³ Furthermore, the Court has decided that if it is likely that a plan or project will undermine the conservation objectives of the site concerned it is likely that the plan or project will have a significant effect.⁵⁴

In addition, the Court mentioned in *Commission v Italy* that an appropriate assessment consists of a thorough investigation, not just highlighting the impacts on flora and fauna in the area. The assessment

⁵⁰ Managing Natura 2000 sites, the provisions of Article 6 of the Habitats Directive (EEC) 92/43 on the conservation of natural habitats and of wild fauna and flora [2000] OJ L206/17–19.

⁵¹ Case C-304/05 *Commission of the European Communities v Italian Republic* [2007] ECR I-07495.

⁵² Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405.

⁵³ Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405, paras 28–29.

⁵⁴ Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405, paras 46–49.

should not be selective and should take all environmental repercussions into consideration. A plan or project can subsequently only be authorised if the national administration has made certain that it will not adversely affect the integrity of the site.⁵⁵ By discussing the notions ‘plan’, ‘project’, ‘significant effect’ and ‘appropriate assessment’ extensively, the Court leaves the Member States little discretion regarding interpretation where it concerns the implementation of this provision.

Article 6(4), however, allows derogations from Article 6(3) of the Directive. As with regard to the derogations laid down in Article 16, Article 6(4) gives Member States real discretion. It is left to the Member States to decide whether they want to use this derogation; however, the usage of the derogation is bound to specific circumstances (restricted policy discretion). In the absence of alternative solutions, a plan or project can be carried out for imperative reasons of overriding public interest as long as the Member State will take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. The notions ‘alternative solution’ and ‘compensatory measures’ have been extensively discussed in the Guidance paper of the Commission on Article 6.⁵⁶ The case law in relation to the condition ‘imperative reasons of overriding public interests’ as laid down in Article 16 is also applicable to Article 6(4) of the Directive. Article 6(4) should be interpreted strictly, because it provides an exemption of the system of strict protection laid down by Article 6(3).⁵⁷

As expected from a Classical Directive, the main provisions of the Habitats Directive give the Member States little discretion regarding interpretation with regard to the implementation of the prohibitions. That is the reason that the Habitats Directive is regarded as offering an effective protection regime.⁵⁸ The derogations, however, leave the Member States more discretion. It is up to the Member State to decide whether it wants to rely on the set derogations. But if it decides to use the provided derogations, the Member State is bound to specific circumstances which can justify the use of a derogation (restricted policy discretion). The measures of the Habitats Directive also leave a broad

⁵⁵ Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405, para. 59.

⁵⁶ Guidance document on Article 6(4) of the ‘Habitats Directive’ 92/43/EEC (2007).

⁵⁷ Case C-239/04 *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10183.

⁵⁸ Verschuuren (2004), 39–67.

discretion to the Member States. In particular, Article 6(1), (2) and (4) leave the Member States room for interpretation. With regard to Article 6(1) and (2) the Member States have restricted assessment discretion. With regard to Article 6(4) the Member States have restricted policy discretion.

3. THE WATER FRAMEWORK DIRECTIVE AND THE AIR QUALITY DIRECTIVE

In the field of European environmental law two important Governance Mode Directives have been introduced: the Water Framework Directive (2000) and the Air Quality Directive (2010).⁵⁹ These Directives were meant to give the Member States the opportunity to implement EU legislation with consideration of local circumstances – like low ground-water levels and extensive dry spells. As mentioned before, Governance Mode Directives leave Member States more discretion especially with regard to the main provisions compared to Classical Directives, such as the Habitats Directive. While the main provisions of the Habitats Directive are strict with regard to the implementation of the prohibitions and hardly leave Member States any discretion regarding interpretation, the main provisions of the Water Framework Directive and Air Quality Directive consist of a combination of strict standards set at both European and national level and procedural requirements, leaving Member States more discretion. The main provisions, derogations and instruments and measures of both Directives will be described in the following sections.

3.1 Main Provisions

The Air Quality Directive aims at improving and protecting air quality in the EU, *inter alia* by setting air quality standards. The Directive mentions three types of air quality standards: limit values, target values and long-term objectives. The limit values adopted for sulphur dioxide, nitrogen dioxide, PM10, PM2,5, lead, benzene and carbon monoxide, do not leave the Member States any discretion; the values must not be exceeded (restricted power).⁶⁰ The limit values for nitrogen dioxide and

⁵⁹ The first Air Quality Directive dates from 1996. This directive was replaced by the current Air Quality Directive in 2010.

⁶⁰ The limit values for sulphur dioxide, PM10, lead, carbon monoxide, nitrogen dioxide and benzene are laid down in Article 13(1) *jo*. Annex XI of the Air Quality Directive. The limit value for PM2,5 is laid down in Article 16(2) *jo*. Annex XIV section E.

benzene did not have to be reached until 1 January 2010; the other limit values had to be reached by 1 January 2005. The limit value for PM_{2,5} does not have to be reached until 2015 with regard to the stage 1 limit value and 2020 with regard to the stage 2 limit value.

The target values adopted for PM_{2,5}, ozone, arsenic, cadmium, nickel and polycyclic aromatic hydrocarbons,⁶¹ however, are of a different character. Member States should take all necessary measures not entailing disproportionate costs to ensure that the target values are not exceeded. By adding the phrase ‘not entailing disproportionate costs’ Member States are given the opportunity to assess whether the measures necessary to achieve the target value should be taken. They are allowed restricted assessment discretion. The target values did not have to be reached until 31 December 2012 with regard to arsenic, cadmium, nickel and polycyclic aromatic hydrocarbons. The target value for ozone and PM_{2,5} did not have to be reached until 1 January 2010.

With regard to the long-term objective for ozone Member States have the same amount of discretion as with regard to the target values; the Member State should take all measures necessary not entailing disproportionate costs to achieve the long-term objectives, the main difference being that the Directive does not define a date by which the long term objective for ozone should be met.⁶²

The Water Framework Directive begins a new approach in European water management and can be characterised by integrated protection of river basins throughout Europe.⁶³ The Water Framework Directive sets goals with regard to surface water, ground water and protected areas.⁶⁴ These main provisions have been subject to discussion, because at first sight Member States seem to exercise a lot of discretion. This may be one of the reasons for the large differences in implementation throughout the EU.⁶⁵ However, this is only partly true.

The Framework Directive requires Member States to implement the necessary measures to prevent deterioration of the status of all bodies of

⁶¹ The target values for arsenic, cadmium, nickel and polycyclic aromatic hydrocarbons are laid down in Directive 2004/107/EC and have not yet been incorporated in the Air Quality Directive. The target values for PM_{2,5} are laid down in Article 15(1) and Article 16(1) of the Air Quality Directive. The target value for ozone is laid down in Article 17(1) and Annex VII of the Air Quality Directive.

⁶² The long-term objective for ozone is laid down in Article 17(1) jo. Annex VII.

⁶³ Van Rijswick and Havekes (2012), 101–108.

⁶⁴ Van Kempen (2012a), 477–497.

⁶⁵ Keessen et al. (2010), 197–222.

surface water (stand-still principle).⁶⁶ Furthermore, Member States should ensure a good status of surface water.⁶⁷

The no deterioration principle of the Water Framework Directive does not leave any discretion (restricted power). In a recent judgment of the court of Maastricht, followed by a decision of the Dutch Council of State,⁶⁸ the courts decided that the permit to build a hydro power plant in the Maas River did not sufficiently guarantee that the norms of the Water Framework Directive would not be violated. Although the building plans of the plant did contain a fish guiding system (*visgeleidingsstelsel*) to protect the fish migrating downstream, this system did not exclude a further deterioration of the population of migrating fish. The court destroyed the decision to allow the building of the hydro power plant, thereby forcing the authorities to reconsider the conditions for allowing the build.

To achieve a *good status of surface water* both the ecological and chemical status of the surface water must qualify as good.⁶⁹ The ecological status consists of biological, hydrological and chemical and physico-chemical elements. The biological and hydrological elements leave Member States some discretion.⁷⁰ In Annex V of the Water Framework Directive normative qualitative definitions with regard to these elements have been laid down (degree of discretion regarding interpretation). These definitions must be translated into standards by Member States. Their discretion is limited by the requirements listed in Annex V. With regard to the chemical and physico-chemical elements of the good ecological status Member States have more discretion. Member States have to establish environmental quality standards next to the standards laid down by the Commission applicable to the concentrations of the priority substances in surface water, sediment and biota. When setting these standards Member States have to follow the procedures laid down in Annex V table 1.2.6 (restricted assessment discretion) (Figure 2.1). This shows the greater role of procedural provisions.

⁶⁶ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4(1)(a)(i).

⁶⁷ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4(1)(a)(ii).

⁶⁸ District Court Maastricht 13 July 2011 and Administrative Division of the Council of State 8 February 2012, LJN BV3249 (*Visstandverbetering Maas et al. v Minister van Infrastructuur en Milieu*).

⁶⁹ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 2(18).

⁷⁰ Dieperink et al. (2012), 160–73.

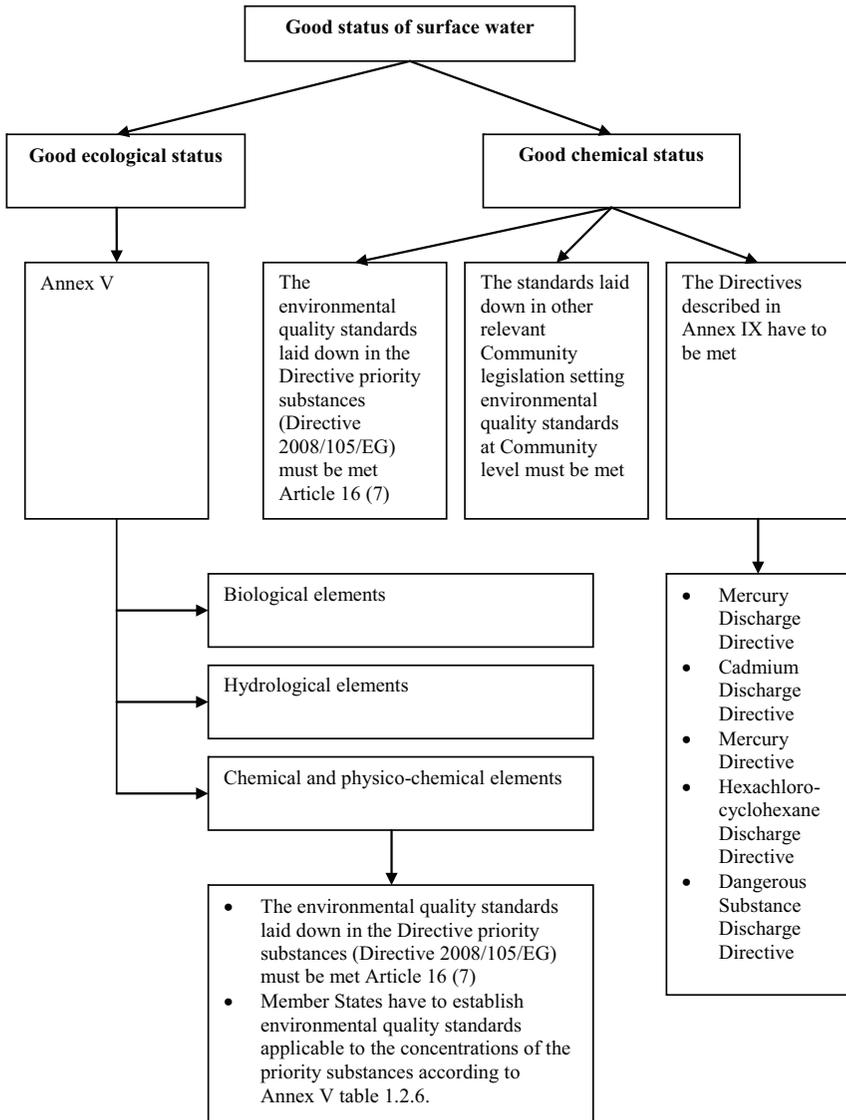


Figure 2.1 The setting of surface water standards by Member States

The standards with regard to the chemical status of surface water do not leave the Member States any discretion (restricted power). To achieve a good chemical status the standards laid down in the Mercury Discharges Directive (82/176/EEC), the Cadmium Discharges Directive (83/513/

EEC), the Mercury Directive (84/156/EEC), the Hexachlorocyclohexane Discharges Directive (84/491/EEC) and the Dangerous Substances Discharges Directive (86/280/EEC) must be met. Furthermore, the standards laid down in other relevant Community legislation setting environmental quality standards at Community level as well as the standards laid down by the Commission applicable to the concentrations of the priority substances in surface water, sediment and biota must be met (Figure 2.1).

The standards that must be reached to achieve a *good ground water status* do not leave Member States much discretion either.⁷¹ A good ground water status is achieved by reaching a good quantitative and chemical status.⁷² With regard to the quantitative status the Water Framework Directive lists the results which must be achieved. With regard to these results the Member States have some degree of discretion regarding interpretation. With regard to the good chemical status the standards adopted by the Groundwater Directive⁷³ must be met. This Directive lays down groundwater quality standards for nitrates, pesticides and plant protection products which must be reached (Annex I). Member States do have some discretion; they have to consider adopting thresholds for the substances mentioned in Annex II part B. When establishing these thresholds, Member States have to follow the procedure laid down in Annex II A (restricted assessment discretion)⁷⁴ (Figure 2.2).

Compared to the Habitats Directive the norms of the Air Quality Directive and the Water Framework Directive are less strict and partly set at the national level. With regard to the Air Quality Directive Member States primarily exercise discretion with regard to the target values and long-term objectives. The Water Framework Directive allows Member States no discretion when it comes to standards set at the European level, which have been laid down in a Groundwater Directive and a Directive with quality standards for priority substances.⁷⁵ The Water Framework

⁷¹ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4(1)(b)(ii).

⁷² Directive (EC) 2000/60 of the European Parliament and of the Council establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 2(20).

⁷³ Directive (EC) 2006/118 of the European Parliament and of the Council on the protection of groundwater against pollution and deterioration [2006] OJ L327/19.

⁷⁴ The norms of the Water Framework Directive are laid down in Article 4(1) and (2).

⁷⁵ Directive (EC) 2008/105 of the European Parliament and of the Council on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/

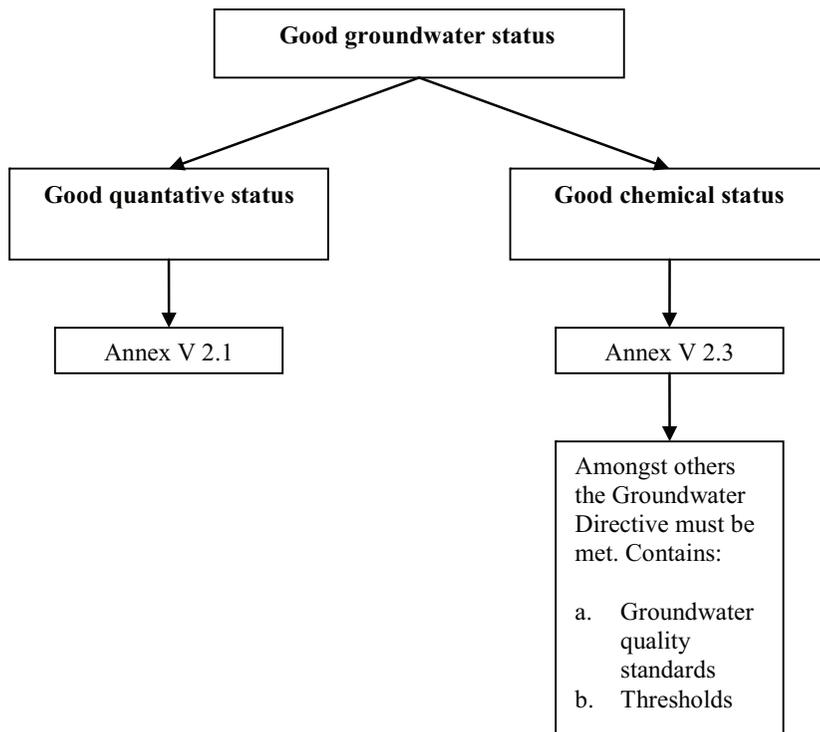


Figure 2.2 Setting of groundwater standards

Directive primarily allows Member States to exercise discretion when setting environmental quality standards to achieve a good ecological status with regard to the chemical and physico-chemical elements of surface water and when setting thresholds to achieve a good chemical status of ground water. Member States also exercise some discretion with regard to the translation of the normative definitions laid down in Annex V to achieve a good ecological status in relation to the biological and hydrological elements of surface water and with regard to achieving a good quantitative status of ground water. All the other standards laid down in the Directives do not allow Member States to exercise any

EEC and 86/280/EEC and amending Directive 2000/60/EC [2008] OJ L348/84 and Directive 2006/118/EC of the European Parliament and of the Council on the protection of groundwater against pollution and deterioration [2006] OJ L372/19.

discretion. In conclusion the discussed Directives still contain a substantial number of strict norms.⁷⁶ And when Member States are allowed to exercise discretion, their discretion is often severely limited by procedural requirements.

3.2 Derogations

Both Directives contain several derogations. The derogations with regard to the values and objectives laid down in the Air Quality Directive, however, are limited. It contains a general exemption to exceed the limit values if exceeding these values is attributable to natural sources. The Directive, furthermore, contains two specific derogations. The limit values for PM10 may be exceeded if the exceedance is the consequence of winter-sanding or salting of roads. The deadlines for reaching the limit values for PM10, nitrogen dioxide and benzene may be extended for five years for a particular zone or agglomeration. These derogations can only be used if the exceedances have been reported to the European Commission.⁷⁷

The derogations laid down in the Water Framework Directive are far more extensive.⁷⁸ The deadlines to achieve a good surface water and ground water status (2015) may be extended.⁷⁹ Furthermore, Member States may aim to achieve less stringent environmental standards for specific bodies of water if these bodies are affected by human activity or if their natural condition is such that the achievement of these objectives would be impossible or disproportionately expensive.⁸⁰ Temporary deterioration in the status of bodies of water is allowed if the deterioration has a natural cause or if the deterioration is the consequence of a *force majeure* such as extreme floods.⁸¹ Finally, derogations from failure to achieve the goals set by Article 4(1) are possible.⁸² The Water

⁷⁶ See in the same way: Van Rijswijk, Gilissen and Van Kempen (2010), 129–157.

⁷⁷ Directive (EC) 2008/50 of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L152/1, Article 22.

⁷⁸ Ginzky (2006), 117–131; Bogaart (2009), 195.

⁷⁹ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4 (4).

⁸⁰ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4(5).

⁸¹ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4(6).

⁸² Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 4(7).

Framework Directive lists an extensive amount of procedural criteria which have to be met before these derogations can be used.⁸³

Compared to the Habitats Directive the derogations laid down in both Governance Mode Directives are highly procedural. The Habitats Directive only mentions under which circumstances derogations can be justified; the other two Directives, however, require adaptation of the relevant air quality plans and river basin management plans when derogations are necessary. The obligation to inform the Commission if the derogations laid down in the Air Quality Directive are used by Member States is extraordinary. The Water Framework Directive does not contain a similar obligation. Even though the derogations of the two Directives are highly procedural, they allow the Member States to exercise discretion (restricted policy discretion) just like the derogations laid down in the Habitats Directive.

3.3 Instruments and Measures

The Air Quality Directive contains several instruments among which is the adoption of an air quality plan.⁸⁴ An air quality plan must be established for zones or agglomerations where the levels of pollutants in ambient air are exceeding any limit value or target value to achieve the related limit value or target value. With regard to establishing an air quality plan the Member States do not have any discretion. However, with regard to the content of the plan they do. Member States can adopt any measures to reach the limit and target values (restricted assessment discretion). If the deadline for limit values is already expired, the air quality plans shall set out appropriate measures to keep the exceedance period as short as possible. The Directive contains a list of information which has to be included in the air quality plan.⁸⁵

Furthermore, a short term action plan should be established when there is a risk that the levels of pollutants will exceed one or more alert thresholds.⁸⁶ This plan should indicate the measures that should be taken

⁸³ Conclusions on exemptions and disproportionate costs, Water directors' meeting under Slovenian Presidency, Brno, 16–17 June 2008.

⁸⁴ Directive (EC) 2008/50 of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L152/1, Article 23(1).

⁸⁵ Directive (EC) 2008/50 of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L152/1, Article 23 (1) and Annex XV(A).

⁸⁶ Directive (EC) 2008/50 of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L152/1, Article 24(1)

in the short term in order to reduce the risk or duration of such exceedance. With regard to establishing a short term action plan the Member States do not have any discretion either. However, with regard to the content of the plan they do. This has been confirmed in the case *Janecek*. In this case the CJEU looked at the short term action plan of the old Air Quality Directive. The Court ruled that when establishing the plan the Member States are allowed to take into account the factual circumstances and all interests. Furthermore, the Member States are not obliged to take measures to ensure that the alert thresholds are never exceeded. However, the Member States should take measures capable of reducing to a minimum the risk of alert thresholds being exceeded and the duration of such an occurrence.⁸⁷

The Water Framework Directive contains a programme of measures containing basic and supplementary measures for reaching the objectives set by the Directive.⁸⁸ The Member States have to adopt the basic measures, such as measures promoting an efficient and sustainable water use in order to avoid compromising the achievement of the objectives set by the Directive (restricted power). The supplementary measures should be adopted in addition to the basic measures if the basic measures fail to achieve the objectives of the Directive.

Member States should also adopt river basin management plans for each river basin lying entirely in their territory to achieve the objectives of the Directive.⁸⁹ The plans have to contain the information required by Annex VII of the Directive. The Directive requires information on the status of surface water and groundwater and detailed information of protected areas. With regard to the content of the plans the Member States have little discretion regarding interpretation. Any discretion left is related to the level of detail of the provided information and the addition of supplementary programmes and plans. The river basin management plans have to be regularly reviewed and updated.

The level of discretion given to the Member States with regard to the air quality plan is similar to the level of discretion they are given in

and Annex XII. With regard to ozone the Member States only have to draw up a short-term action plan if in their opinion there is a significant potential to reduce the risk, duration or severity of the exceedance.

⁸⁷ Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221, paras 43–47.

⁸⁸ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 11.

⁸⁹ Directive (EC) 2000/60 establishing a framework for community action in the field of water policy [2000] OJ L327/1, Article 13.

relation to the necessary conservation measures which must be established according to the Habitats Directive to protect the natural habitats and species on the site.⁹⁰ The air quality plan has to be established but the Member States can adopt any measures to reach the limit and target values. The basic measures set by the Water Framework Directive have to be adopted in the 'programme of measures'. With regard to the exact content of the basic measures the Member States have some discretion. The river basin management plans have to contain the information required by the Directive. The Member States are therefore left with very little discretion.

4. AN ASSESSMENT OF THE FLEXIBILITY AND PROCEDURAL ELEMENTS IN THE THREE DIRECTIVES AND CONCLUDING REMARKS

In Section 1 we discussed several legal perspectives on the governance approach. Now we will discuss whether the aims of the approach as described in Section 1 are achieved. In this section we will assess the three directives with regard to effective legal protection (direct effect), flexibility with regard to standard setting and legitimacy (legal legitimacy as well as political legitimacy) to provide an answer to our main research question as set out in the introduction.

4.1 Effective Legal Protection

As described in Section 1.1 individuals can rely directly on the provisions of directives which are not transposed (correctly) into national law within the period set by the Directive if the provisions are unconditional and sufficiently precise. The Habitats Directive contains many obligations which qualify as unconditional and sufficiently precise and which are directly effective. As discussed in Section 2.1 the main prohibitions do not leave Member States any real discretion. The obligations are clear and in its decisions the CJEU has severely limited any room left for interpretation (Member States only have discretion regarding interpretation).⁹¹

⁹⁰ Directive (EEC) 92/43 on the conservation of natural habitats and of wild fauna and flora [2000] OJ L206/7, Article 6(1).

⁹¹ Case C-103/00 *Commission of the European Communities v Hellenic Republic* [2002] ECR I-01147; Case C-221/04 *Commission of the European*

The main provisions of the Governance Mode Directives are less strict and leave Member States more discretion, as has been discussed in Section 2.1. Therefore, part of the standards of the Air Quality and Water Framework Directive are not ‘unconditional and sufficiently precise’.⁹² Consequently, these obligations are difficult to enforce in national courts.⁹³

However, if a provision is not unconditional and sufficiently precise individuals can rely directly on the unconditional limits of the discretion set by that provision in national court.⁹⁴ But, when these limits are just procedural, the discretion of a national authority does not lead to the effective enforcement of the Directive. For example, if the levels of pollutants in ambient air are exceeding a limit value in an agglomeration, an air quality plan must be established in order to reach the related limit value according to the Air Quality Directive. However, with regard to the content of this plan the Member States have been given a broad discretion. Individuals cannot force the Member State to adopt specific measures; they can only force the Member State to adopt a plan. Therefore, it is difficult for individuals to address the quality of the air quality plan, or the content of the proposed measures.

The derogations laid down in the Habitats Directive, the Air Quality Directive and the Water Quality Framework Directive are not ‘unconditional and sufficiently precise’ (Section 2.2 and Section 3.2). The use of derogations is left to the discretion of the Member States (restricted policy discretion). Even if the conditions set by the derogations are met, the national authority cannot be forced to use the derogation. However, it is possible for individuals to question the use of derogations by national authorities. For example, if a national authority relies on a derogation without meeting the conditions which have to be met before a derogation can be used, individuals can question the use of the derogation in national courts. The conditions limit the discretion of the Member State.

Communities v Kingdom of Spain [2006] ECR I-04515; *Case C-75/01 Commission of the European Communities v Grand Duchy of Luxembourg* [2003] ECR I-01585.

⁹² See on the complexity of the obligations following from the Water Framework Directive Van Kempen (2012a), 477–497.

⁹³ Although the standards with regard to the chemical status of surface water and the standards that must be reached to achieve a *good chemical status of ground water* do not leave Member States a lot of discretion. These standards are directly effective. With regard to the Air Quality Directive the limit values do not leave Member States any discretion either.

⁹⁴ *Case C-51/76 Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 00113.

The plans laid down in the Habitats Directive, the Air Quality Directive and the Water Framework Directive tend to give the Member States restricted assessment discretion as well. This discretion is not as broad as the discretion they have with regard to derogations laid down in the Directives (Section 2.3 and Section 3.3). The Member States have to adopt the necessary measures. Member States should adopt an air quality plan to reach the limit and target values and, when there is a risk that the alert thresholds will be exceeded, a short-term action plan has to be established. However, the content of the plan is left to the discretion of the Member State (restricted assessment discretion). The same is true for the conservation measures which have to be established according to the Habitats Directive. Exemptions do occur. With regard to the programme of measures based on the Water Framework Directive, the Member States have to adopt the basic measures. The river basin management plan does not leave much of a degree of discretion regarding interpretation either. The Water Framework Directive has listed which information has to be laid down in the plan.

The assumption that Governance Mode Directives reduce the possibility of relying on the provisions in a directive in a national court is true with regard to the main provisions of these Directives; the Member States have more discretion. However, the discretion is not as broad as one might have thought. The Member States have to reach the limit values set by the Air Quality Directive. Furthermore, the Member States should take all necessary measures not entailing disproportionate costs to ensure that the target values are not exceeded. The discretion given to the Member States is therefore limited. With regard to the standards set by the Water Framework Directive, the Member States only have a high level of discretion when establishing the standards for chemical and physico-chemical elements to achieve a good ecological status of surface water elements. However, when establishing these standards the Member States are bound by procedural requirements. In conclusion, it is true that the standards of the Governance Mode Directives leave the Member States a larger discretion than the standards set by the Classical Habitats Directive. However, the discretion is limited; both Directives also contain norms which do not leave the Member States any discretion at all (restricted power).

The derogations and the instruments and measures of the Governance Mode Directives and the Classical Directive hardly differ. All Directives leave the Member States a broad discretion with regard to the derogations. All Directives tend to leave the Member States discretion with regard to the content of the plans which have to be adopted. It is clear that conservation measures, air quality plans and river basin management

plans and a programme of measures have to be established. However, the content of the measures and plans leave the Member States discretion (restricted assessment discretion). There are two exemptions; the programme of measures of the Water Framework Directive does not leave the Member States a broad discretion when it comes to the basic measures. The basic measures described in the Water Framework Directive have to be adopted. Therefore the programme of measures does not leave as much discretion as the air quality plans. The same is true for the river basin management plan. This plan leaves little room for interpretation, although the implementation differs seriously in practice.⁹⁵

4.2 Standard Setting

As described in Section 1.3 it is argued that because Governance Mode Directives leave it up to Member States to fill in (some of) the details when implementing the Directives, the effectiveness of European environmental law will increase. As described in Section 3.1 the Water Framework Directive leaves Member States a limited amount of discretion with regard to the main provisions of the Directive.

The biological and hydrological elements of the ecological status of surface water leave Member States some discretion. The Water Framework Directive contains normative definitions with regard to these elements.⁹⁶ These definitions must be translated into standards by Member States. Their discretion is limited by the requirements listed in Annex V. With regard to the chemical and physico-chemical elements Member States have more discretion. Member States have to establish environmental quality standards next to the standards laid down by the Commission applicable to the concentrations of the priority substances in surface water, sediment and biota. When setting these standards Member States have to follow the procedures laid down in the Directive. The standards with regard to the chemical status of surface water do not leave any discretion to Member States.

The standards that must be reached to achieve a *good ground water status* do not leave Member States a lot of discretion either. With regard to the quantitative status the Water Framework Directive lists the results which must be achieved. With regard to the good chemical status the standards adopted by the Groundwater Directive must be met.

⁹⁵ Baaner (2011), 31–52.

⁹⁶ Howarth (2006), 3–35.

The Air Quality Directive does not leave the Member State any discretion with regard to the content of the main provisions. The limit values, target values and the long-term objectives have all been set by the Directive. These values and objectives constitute a sliding scale of norms which have to be met. The Member States have to conform to the limit values set by the Directive. However, the target values only have to be met by the Member State if the Member State can achieve the values without making disproportionate costs. The long-term objectives leave a similar level of discretion, the main difference being the period set for reaching the objective.

It is true that compared to the Habitats Directive the standards of the Air Quality Directive and the Water Framework Directive are less strict while the Habitats Directive is regarded as an effective directive.⁹⁷ However, the amount of discretion given by the Water Framework Directive and Air Quality Directive is not as extensive as one might have thought. When Member States are allowed to exercise discretion, their discretion is often severely limited by procedural requirements. Both Governance Mode Directives contain sliding scale norms, leaving Member States more time to reach the set standards or allow deviations from the standards. This does allow a more flexible approach. However, the proof is in eating the pudding. Practice will have to show whether the approach set by the Governance Mode Directives will increase the effectiveness of European environmental Law.⁹⁸ The first results do not look very promising.⁹⁹ In this regard the importance of monitoring obligations cannot be overestimated.¹⁰⁰

4.3 Shifts in Legitimacy

Because Governance Mode Directives leave Member States room to fill in (some of) the details when implementing the Directives, there is a risk that legal legitimacy will be reduced. However, as discussed previously

⁹⁷ Verschuuren (2004), 39–67.

⁹⁸ Moss (2008), 32–41; Howarth (2009), 391–417; Ebbesson (2009), 419.

⁹⁹ Communication from the Commission to the European Parliament and the Council, *Towards sustainable water management in the European Union, First stage in the implementation of the Water Framework Directive 2000/60/EC* (COM 128 final, 2007).

¹⁰⁰ The study of Dutch National Environmental Agency (2012) contains a comparative research on monitoring networks for nitrates in four Member States and concludes that they differ seriously, with unknown effects on the achievement of the goals.

only part of the standards of the Water Framework Directive are set by the Member States. The Member States only set (part) of the standards for chemical and physico-chemical elements to achieve a good ecological status of surface water elements. Furthermore, when establishing these standards the Member States are bound by procedural requirements. The Water Framework Directive contains normative definitions for the biological and hydrological elements of the ecological status of surface waters; these definitions must be translated into standards by Member States.

With regard to the derogations and the instruments and measures there are hardly any differences between the Governance Mode Directives and the Classical Directive. All Directives leave the Member States broad discretion with regard to the derogations (restricted policy discretion); although compared to the Habitats Directive the derogations laid down in both Governance Mode Directives are highly procedural, which shows the shift to the governance approach. The Air Quality Directive for example, requires the Member State to inform the Commission if the derogations laid down in the Directive are relied upon.¹⁰¹

All Directives tend to leave the Member States discretion with regard to the plans which have to be adopted. It is clear that conservation measures, air quality plans and a programme of measures have to be established. However, with regard to the content of the measures and plans, the Member States exercise discretion (restricted assessment discretion). Therefore, the impact of Governance Mode Directives on legal certainty is not as big as presumed. Of course much will depend on future decisions of the ECJ and the national courts when they have to judge the way the Member States have used their policy discretion.

In addition, as discussed in Section 4.1, the Governance Mode Directives can still be relied upon in national courts, even if the Directive leaves a high level of discretion. The Member States are required to remain within the limits of discretion as set by the Directive.¹⁰² Furthermore, the fact that Member States fill in part of the standards of the Water Framework Directive does not automatically mean democratic control (and subsequently legal legitimacy) is reduced, but it shifts from European to national democratic control, which may on the one hand be more effective, but may on the other hand lead to a decreasing protection level. It all depends on the question whether and under what conditions

¹⁰¹ Directive (EC) 2008/50 of the European Parliament and of the Council on ambient air quality and cleaner air for Europe [2008] OJ L152/1, Article 20(1), (2) and Article 21(2).

¹⁰² Ebbesson (2009), 416.

the adoption of the standards is delegated. Delegation could also increase the support and acceptance of the members of the public of the subsequent behaviour of the Government (also known as output-legitimacy). People may feel that the national government is less remote than the EU. Delegation of legislative acts is quite common, not only with regard to European environmental law, but also with regard to, for example, Dutch national legislation.¹⁰³ This development is not directly related to the introduction of a governance approach and proceduralisation, but can also take place in classical command and control settings. See, for example, the obligations based on Directive 76/464/EEC (now 2006/11/EC) for Member States to define and implement environmental quality standards for List II substances.

Legitimacy in a political context can be increased by a governance approach and participation of stakeholders in standard setting and decision making or by Governance Mode Directives, in case they require extensive public participation when adopting the necessary measures (also known as input-legitimacy). Involvement of the members of the public can significantly increase the public backing of European environmental law. However, public participation cannot only be contributed to the governance. Participation is a basic principle in environmental law since the adoption of the Aarhus Convention and is one of the principles of good governance. Therefore, the consequences of the use of a governance approach on legal legitimacy and political legitimacy may not be as big as presumed.

4.4 Concluding Remarks

In this chapter we have offered some legal perspective on the governance approach. We have compared two new environmental Governance Mode Directives with a classical top-down directive in relation to: effective legal protection (direct effect) and flexibility with regard to standard setting and legitimacy (legal legitimacy and political legitimacy). We have researched what role these elements play in three kinds of directives: a Classical Directive, an in-between Directive and a Directive which fully represents the new governance approach in EU environmental legislation. We chose these three directives because they represent policy fields that are characterised by uncertainties and therefore could profit from flexibility and policy discretion for the Member States – being the Habitats Directive, the Air Quality Directive and the Water

¹⁰³ Voermans, Borgers and Sieburgh (2011), 43–4.

Framework Directive. These directives give an overview of three important aspects of European environmental legislation; nature conservation, air quality and water management. After looking at the main provisions, exemptions and instruments and measures prescribed by the three environmental directives, we conclude that Governance Mode Directives do offer more flexibility due to the policy discretion allowed to Member States, but that in the end the differences between Classical Directives and new Governance Mode Directives are not as big as one might think. The main advantage of flexibility is the ability to take regional circumstances into account when it comes to standard setting, the use of exemptions and the taking of measures. This does not depend, however, on the difference between Classical Directives and Governance Mode Directives except for the standard setting. It is also argued that there is a risk – depending on the ambitions of the Member States and the attitude of the courts towards the reliance on provisions that offer more policy discretion to the Member States – of decreasing the effectiveness and the legal legitimacy of EU environmental legislation. We did find more procedural provisions in the Governance Mode Directives and only case law will provide us with the answers as to what can really be achieved by procedural provisions when it comes to the realisation of an appropriate protection level of the European environment. However, political legitimacy may increase, but in our view there should be no difference between the possibilities for public participation with regard to Classical or Governance Mode Directives. A decreasing effectiveness of legal protection will be the deathblow of the governance approach, because it will become fully implausible to argue that the effectiveness of environmental legislation will improve, in case the obligations following from environmental law will be less easy to enforce. Increasing political legitimacy will merely depend on the way the results of public participation are taken into account at the national level.

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