

Recent Developments; Dutch Report

Preliminary questions to the ECJ

The Dutch Council of State is seeking for a preliminary ruling on the possible direct effect of the National Emission Ceiling Directive 2001/81 (the NEC Directive) in Case C-165/09 *Stichting Natuur en Milieu, Stichting Greenpeace Nederland v. College van Gedeputeerde Staten van Groningen*

In essence, the Council of State wants to know what the consequences are for an individual environmental permit for an installation (which will become operational in the year 2011 at the earliest) which contributes to the national emission ceiling for SO₂ in the NEC Directive being exceeded or the risk of it being exceeded.

In particular the Council of State wants to know, in the absence of guarantees that the installation for which an environmental permit was sought would not contribute to the national emission ceiling for SO₂ in the NEC Directive being exceeded or the risk of it being exceeded, whether the Member State must refuse the application for the environmental permit or attach further conditions or restrictions to it.

And finally it wants to know if the NEC Directive had direct effect and whether a private individual can bring the issue of compliance with the NEC Directive before a national court?

Anti-crisis measures

The government has tabled a proposal for a so called 'Crisis and Recovery Act'. Its main purpose is to speed up decision-making procedures of some 70 major infrastructural works. Some of the elements:

1. limiting the possibilities for provincial and local authorities to ask for judicial review;
2. introducing the possibility that, in the case a decision taken under this Act is in violation of any written or unwritten rule of law, a court is allowed not to annul that decision, in the event that the interests of interested parties are not affected.
3. the introduction of the so called 'relativity-principle' or *Schutznorm*-requirement. Access to the administrative courts in the Netherlands is regulated in such a way that once a person has been deemed an interested party under the GALA, that person then has access to the courts and in judicial proceedings against a decision can and may put forward any argument that will lead to the decision being quashed, regardless of whether there is any relationship between the claimant's interest and the argument put forward or the reason for quashing the decision. Thus an action instituted by an environmental organisation may result in a decision being quashed even if the rule infringed is one that is not designed to protect the interest the environmental organisation is seeking to protect. Given this situation, which some regard as absurd, and the basic premise in the Netherlands that administrative law focuses primarily on protecting individual rights (*recours subjectif*), it has been advocated that a *Schutznorm* should be introduced, a requirement limiting standing to those whose interest is protected by the legal rule in question. Such a requirement would mean that an administrative court could only quash a decision if the administrative authority had infringed a rule that aimed to protect the claimant's interest.
4. According to Dutch EIA law there is duty to look into 'reasonable alternatives'. This provision will be scrapped.

5. The duty to consult with the Dutch Commission for EIA on the EIA performed will be scrapped.
6. Projects of 'national interests' will no longer be subject to a licensing requirement on the bases of the Dutch Nature Conservation Act. According to the Council of State this will lead to conflicts with the Habitats Directive.
7. Introducing a *Lex Silencio Positivo* across the board. So if a decision is not taken within the timelimits applicable, the license/permit will be regarded as being granted.

Westerschelde(Scheldt Estuary)

The Dutch Council of State has ruled against work to deepen and widen the river Scheldt estuary to give larger cargo ships easier access to Antwerp in neighbouring Belgium. Both the Netherlands and Belgium wanted to start the work last year when the first permits were issued for dredging work. But in a provisional ruling the Dutch Council of State said Dutch agriculture and fisheries minister Gerda Verburg was unable to conclude with "sufficient certainty" that the area would not be adversely impacted by the work. Relevant background information is that the Netherlands and Belgium (in the 2005 The Scheldt Treaties) had agreed, in a treaty, that Belgium should to pay the Netherlands €300m in compensation for environmental damage caused by deepening the Westerschelde estuary (as a result of the compensation requirement in the Habitats Directive). It was also agreed that the Netherlands had to flood an area of land known as the *Hedwige polder* to compensate for the loss of wildlife habitat caused by the dredging. However, by intervention of the Dutch prime-minister, it was decided by the Dutch government that the Netherlands will not flood the area, but will seek alternative compensatory measures in stead.

Environmental groups *De Zeeuwse Milieufederatie* and the *Netherlands Society for the Protection of Birds* had objected to work in the Westerschelde, an estuary for the Scheldt river that runs through Belgium and out into the sea in Dutch territory. The groups argued the area was an internationally unique region where mud and sandbanks attract a large number of migratory birds. The Dutch Council of State will hand down its final ruling later this year.