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**The Quality of Environmental Directives Revisited**

**Introduction**

My PhD thesis was published in 2010 and concerned the question what role European environmental directives themselves had in the occurrence of implementation problems in the Member States.¹ Now, a good nine years later, it is time to look back on the conclusions of my research and to see what has changed since then. In the next section, I will first give a short description of my thesis and of the main conclusions. Thereafter, I will pay attention to some of the developments in the field of “Better Regulation” and see if and how they fit with my recommendations.

**The quality of environmental directives in 2010**

The infringement procedure of Article 258 of the Treaty on the Functioning of the European Union (TFEU) suggests that Member States are to blame for any flaw in the implementation of a directive into national law. The only relevant question for the European Court of Justice (ECJ) to answer in an infringement procedure is if there was a failure to implement a (provision of a) directive. There is no need to prove if there is any blame on the Member State. Neither can a Member State prevent a condemnation by proving that the implementation gap is not the fault of the Member State, but the consequence of for example a gap in the directive. However, the quality of the directive can certainly influence the occurrence of implementation

problems. If a directive is unclear, or for example in conflict with obligations from another directive, this is not problematic for the directive as such, but the problems will be felt at the national level when trying to implement it into the national framework of legislation.

In my thesis, I focused on the implementation of environmental directives. I did case law research, literature studies, used scoreboards of the European Commission and conducted interviews. I looked more specifically at the implementation of 10 different environmental directives, in different sectors (nature protection, water, waste etc.) to see if there were any common patterns to be found. In addition, I researched the implementation of environmental directives in three Member States, i.e. the Netherlands, Germany and Denmark. The rationale behind this choice was that these three countries seemed to be taking environmental law quite seriously, hence really putting an effort in the proper implementation of European law. As a consequence, failures in the implementation of environmental directives in these Member States are more likely to point in the direction of a flaw in the directive as a cause of the implementation problem. In less ‘green’ Member States, an implementation problem may also just be the result of a lack of interest in proper implementation. As a side-note: in the last decade this seems to have shifted a bit. These Member States are not as ambitious as they used to be.²

In my thesis, I identified a number of recurring aspects in the directives themselves which triggered implementation problems in the Member States. Among these aspects were a lack of coherence between directives, problems with definitions, a lack of clarity about the scope of directives, some specific problems related to the instruments used in the directives and a lack of clarity about the meaning and status of soft law. I will elaborate on these problems a bit further.

Coherence between directives

There is a large number of environmental directives. At the time of my research there were over 400.\(^3\) Today the number could be a bit lower, because some directives have been repealed or merged, but still it remains a vast amount. Some of these directives have formal links with each other, such as framework directives and daughter directives. This was for example the case in the field of air quality.\(^4\) In the case of formally linked directives, they usually use the same definitions or refer to each other for this. However, most directives are more or less stand-alone instruments. They are adopted one at a time and at the European level there is no real need to fit them into a system or to align them with existing directives. Yet, the Member States are supposed to implement them in their national legal system. Of course these systems vary from country to country, which is the very reason for the use of directives. A lack of coherence will be felt mostly in countries with a (more or less) comprehensive act on the environment, as is the case in the Netherlands. If a certain term is used with different definitions, it will be difficult to use a single definition in the first article of the act, but different definitions have to be used for different chapters of the acts. In for example Denmark, there are many separate sectoral acts on the environment, allowing each act to use its own definition.

Definitions

For clarity with regard to the meaning of directives, it is important that they contain definitions of the most important terms. Although most directives do contain definitions in one of the first articles, this does not mean that there are no problems. The definition of for example “waste” has given rise to a lot of case law and reflections in literature. The meaning of ‘discharge’ also remained unclear for a long time, although it was a key term in the Dangerous Substances Directive.

\(^3\) Beijen, op. cit., p. 32.
The same term may appear in different directives, but with different definitions. This is especially challenging for a Member State wishing to implement the directives in a single act. An example was the term “installation” in the IPPC Directive, but also used in several other directives on heavy industry. The introduction of the Industrial Emissions Directive solved this problem (see below).

An unclear definition as such is not a problem for implementation *stricto sensu*, as the unclear definitions can be literally copied into national law. But then of course, in the application of the national law, the question will still arise how the term should be applied. A final problem relating to the meaning of terms is that not all terms are defined, but that their meaning can be decisive for the application of a directive. An example is the term “significant effect” from the Wild Birds Directive and the Habitats Directive.

**Scope of directives**

Clarity of the scope of a directive is necessary for the proper implementation into national law. However, this can prove a problem. An example is the EIA Directive, for which several rulings of the ECJ were necessary before the actual scope became clear. Take also the Habitats Directive, dating from 1992, where still new rulings appear clarifying its scope. A recent case concerning the question whether a programmatic approach for granting permits is in line with the Habitats Directive shows that even after more than 25 years, Member States are still struggling with the scope of the obligations.

**Specific instruments**

Environmental directives are meant to protect the environment, but this can be done in several ways and by prescribing several instruments. Such instruments are amongst others environmental quality standards, emission standards, product standards, designation of areas, plans and programs,

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5 Beijen, op. cit., p. 153.
6 Judgment of 7 November 2018 in Joint Cases C-293/17 and 294/17, Coöperatie Mobilisation for the Environment UA and others.
procedural requirements, normatively described goals and standards, prohibitions and obligations, rules about enforcement, transitional provisions and annexes. A lack of space prevents me from describing the problems with each category of instruments more thoroughly, but I will point out at least some of them.

Environmental quality standards are useful to prescribe the result that must be achieved by the Member States and leaves it to the Member States how to get there. This is perfectly in line with the instrument of a directive and the principle of subsidiarity. However, the freedom Member States have in achieving the result can also be problematic. Member States are not free to take every measure they want in order to achieve the prescribed result, as those measures will have to comply with the free movement of goods. This blocked for example the prescription of particulate filters for diesel engines.7 It is also often unclear what the consequences are of exceeding the quality standards. It does not mean that no new permits can be granted or that even existing permits must be withdrawn.8 For reasons of enforcement, these consequences should be spelled out in the directives themselves.

Soft law

Soft law can take many different forms. An explanatory memorandum from the European Commission is a form of soft law, as are technical documents elaborating norms from a directive, Commission recommendations, and many other kinds of documents. Soft law is, as the name suggests, by nature not binding, but it does often have binding effects in practice. Seen from a positive light, it is safer and easier for the Member States to follow soft law as compared to hard law. It is easier, because they can just follow the interpretation from the document and not have to figure out the exact meaning themselves. It is safer, because sticking to an interpretation given by the European Commission is a way to prevent infringement procedures. However, these documents usually do not have a legal basis, there is (often)

8 Judgments of 26 May 2011 in Joint Cases C-165/09-167/09, Stichting Natuur en Milieu and others.
no real democratic control and they may give rise to a shift of power towards the Commission. Especially in the light of the tendency of Member States to follow the documents, there is only a small chance that these documents are challenged before the European Court of Justice. The express reference to soft law by the ECJ is limited. In a case against Finland, the ECJ does mention a guidance document, but is not explicit about the value of it.\textsuperscript{9} It seems to be just one of the arguments for the Court’s reasoning. Advocates General use the guidance documents slightly more often,\textsuperscript{10} but of course they are in a different position than Judges. In cases where these documents do play a role (more often preliminary rulings than infringement cases), the ECJ emphasizes that it has the final say in the interpretation of European legislation, but it does use the documents and attaches at least some value to them.\textsuperscript{11}

\textbf{Recommendations}

Based on the findings of my earlier research, I formulated some recommendations in order to improve the quality of environmental directives and to prevent implementation problems following from this. These recommendations will be described here in short.

First and most far-reaching, I suggested to introduce an overarching framework directive for the environment, containing the most important definitions, general rules on monitoring, reporting and other kinds of obligations from directives, and consequences of non-compliance with directives. Of course, this was more or less a shot for the moon. It does not fit in the European legal system, where all directives in principle have the same status. It would also be a gigantic operation not only to create this

\textsuperscript{9} Judgment of 14 June 2007 in Case C-342/05, \textit{Commission v Finland}, par. 29.
\textsuperscript{10} For example, Opinion of AG Sharpston of 27 February 2014 in Case C-521/12, \textit{Briels}, par. 8-10 and Opinion of AG Léger of 20 January 2011 in Case C-383/09, \textit{Commission v. France}, par. 28.
\textsuperscript{11} See: http://www.solar-network.eu for a thorough study on the meaning and use of European soft law in the Member States.
directive, but also to amend all existing directives so that they become aligned with it.

Another and more feasible recommendation was to reduce the number of environmental directives. By combining different directives into a single one (or through the use of a framework directive with daughter directives), consistency would at least better guaranteed than with the use of multiple directives with may be applicable at the same time.

A directive is meant to give the Member States freedom in form and methods\textsuperscript{12}. When a need is felt to lay down very detailed rules in a directive, the usage of a regulation instead of a directive should be considered. Although a high level of detail may ensure that the directive is clear, it may still give rise to implementation problems, as it may be difficult to fit the directive into the existing legal system. As a regulation does not have to be transposed, this could be the better solution.

In the Dutch legal system, the explanatory memoranda and the parliamentary documents concerning the adoption of an act are an important source of information for the interpretation of the act. In the European order, these documents are harder to find, and at least in the jurisprudence of the ECJ they hardly play a role. Strengthening the position of these documents and enhancing their accessibility might give the Member States guidance in the implementation process.

As described above, there is a lot of soft law in many forms and appearances, but its status is unclear. More clarity on its status could also be of great help to the Member States: are they supposed to follow soft law documents, or are they expected to be very critical about this and not rely on it to easily? This recommendation is in line with the previous one. Explanatory memoranda could even be considered as a sort of soft law and being a help for the Member States.

Specifically for environmental law, in case directives prescribe environmental quality standards, Member States could be supported by not only prescribing these but also creating a supportive policy at the European

\textsuperscript{12} See Article 288 TFEU.
level, creating legal instruments helping the Member States to achieve the quality standards. For example, in the field of air quality, more stringent rules on the emission of cars/trucks/factories etc. would help the Member States to realize the prescribed quality standards. The consequences of a new proposal are not always clear in advance. It could be helpful to let a small number of Member States make an impact assessment on the basis of a draft directive and use the results in the legislative procedure. This helps to identify problems beforehand, at a moment when it is still possible to make changes to the proposal.

Looking back on these recommendations anno 2019, I still believe they can contribute to enhancing the quality of environmental directive. However, I do not foresee the proposed overarching framework directive anywhere in the near future. As mentioned, it does not fit well in the system of European law, and there are simpler solutions for the same problem. Aligning definitions can also be done by using the same definitions in different directives; and general rules on monitoring, reporting and so on can also be created by drafting a general set of provisions and copying them in different directives.

**Developments in environmental legislation**

Since 2010, the quality of legislation has received a lot of attention at the European level, amongst other things in the “Better Regulation” program. The fact that it was the main focus of the First Vice-President in the Juncker Commission (2014-2019) illustrates the importance of this theme. I will now analyze some aspects of the “Better Regulation” program that are aimed at improving the quality of legislation in the environmental field.

**Recasting**

Recasting is a way to make legislation more streamlined, by combining an act and the amendments to the act, or by combining to adjacent directives into a single instrument. This has been done in the field of environmental

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The Quality of Environmental Directives Revisited

law over the last decade, with the Industrial Emissions Directive 2010/75/EU (IED) as the most prominent example. This recast repealed seven different environmental directives, and the directives amending them. Recasting thus fits in very well with my recommendation to reduce the number of directives.

**Fitness checks**

Another means to improve the quality of legislation is by performing “fitness checks”. The EU define this as follows:

“[C]omprehensive policy evaluations assessing whether the regulatory framework for a policy sector is fit for purpose. Their aim is to identify excessive regulatory burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and to help to identify the cumulative impact of legislation. Their findings will serve as a basis for drawing policy conclusions on the future of the relevant regulatory framework.”

Identifying overlaps, gaps and inconsistencies is very important, as my analysis of EU environmental law revealed that this is at least quite regularly a problem. The fitness check of the Water Framework Directive 2000/60/EC (WFD) is being carried out at the time of writing, with a consultation that took place between September 2018 and March 2019.

**Focus on implementation**

With the Environmental Implementation Review, the Commission created a tool to better monitor the implementation of European environmental law in the Member States. It was introduced in 2016, so experience with it is still limited, but it provides two-yearly country reports on implementation. Especially after some time, these reports could reveal trends and problems in implementation. Such reports can thus contain valuable information, yet for the improvement of the quality of legislation it is more important what is done with this information. Hopefully implementation problems will not

only be blamed on the Member States, but will also be used in the evaluation of legislation.

**Impact assessments**

Impact assessments are a way to analyze the expected effects of legislative proposals. This is a very important instrument to identify possible problems beforehand, at a moment that it is relatively easy to adapt the pending proposals. My original recommendation was to let impact assessments be conducted by a number of Member States and not only at the European level; however, a thorough impact assessment at the European level can still provide valuable information to prevent implementation problems.

**Make it Work**

“Make it Work” is not an initiative of the European Commission, but of a number of Member States. The project aims to improve European environmental law, particularly by establishing a more coherent and consistent framework of law through developing drafting principles on the use of cross-cutting instruments and procedures in EU environmental directives and regulations. The Make it Work team created drafting principles for environmental reporting and principles on drafting provisions on compliance insurance.

The fact that this network was initiated by the Member States shows that the need was felt to create more uniform rules on certain cross-cutting subjects, which is perfectly in line with my original conclusion that specific problems are caused by instruments such as reporting and inspection. My recommendation was to introduce general rules on these subjects in an

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overarching framework directive. Yet, drafting principles like these are a very good alternative, as they also encourage the European legislator to use standard provisions on such subjects. It is still possible to deviate from the standard, but at least that would require thorough consideration. However, the drafting provisions are only adopted by the Make it Work team. It would be good if the Commission adopted them as well, and for example integrated them in manuals on legislative drafting, possibly in a specific version for environmental legislation.

**Conclusion**

This contribution has made clear that the quality of environmental directives is a vivid subject, which has gained a lot of attention over the last decade. In the light of the recommendations of my earlier study, the developments since then, described above, should all be welcomed, as they can contribute to a higher quality of environmental directives and a decrease of implementation problems. However, the quality of legislation is a subject which demands constant attention. Although some of the problems described above are definitely smaller today than they were in 2010 (e.g. due to the recasting of directives), none of them have been solved completely. This means that the recommendations formulated earlier are still relevant points of attention when drafting new directives, or when evaluating and adapting existing ones.