

**DUTCH REPORT TO THE XV<sup>th</sup> COLLOQUY OF CONSEILS D'ÉTAT**

**AND**

**SUPREME ADMINISTRATIVE JURISDICTIONS OF  
THE EUROPEAN UNION**

**BRUSSELS, 22 - 24 APRIL 1996**

Rapporteurs:

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## Implementation of Directives

### **Part 1: General matters**

#### I. The Administrative Law Division and its predecessors

To ensure a proper understanding of the replies to the questions raised by the general rapporteur, it is necessary to provide a brief account of the changes that have taken place in the Dutch Council of State.

The Council of State as a whole advises on bills presented to Parliament and on drafts of orders in council (i.e. government decisions introducing generally binding regulations).

In addition, the Council had an Administrative Disputes Division for a long time. This division was responsible for advising on disputes between individuals and government bodies and disputes between government bodies in cases where the Crown was designated by law as an administrative authority to which application could be made for reconsideration of the decision of another administrative authority.

A Judicial Division too was established in 1976 to hear appeals lodged in administrative law disputes where no appeal lay to other administrative courts or to the Crown.

On 23 October 1985 the European Court of Human Rights ruled in the case of *Bentham v. the Netherlands* that the Crown could not be regarded as an independent administrative court. This opened the way for citizens to apply to the civil courts for a ruling on the legality of decisions taken by the Crown in its capacity of administrative authority hearing applications from the decision of another administrative authority in cases involving the civil rights of citizens.

As this situation was considered undesirable, the Temporary Crown Disputes Act was introduced and came into force on 1 January 1988. This Act gave the Administrative Disputes Division the power to hear disputes concerning government decisions against which an application to the Crown lay and which could not be regarded as orders having general effect. It was to hear such disputes as an independent administrative court. As regards disputes concerning orders having general effect (e.g. local plans), the Division continued to advise the Crown, which decided on appeal.

On the basis of the judgment of the European Court of Human Rights in the *Jacobson v. Sweden* case, however, it was considered that the objections of the European Court of Human Rights to the Crown as the administrative appeal authority of last instance must also be considered to extend to disputes concerning orders of a general nature.

Appeal to the Crown has therefore been abolished since 1 January 1994, when the Administrative Disputes Division and the Judicial Division were merged to form a single Administrative Law Division. This Division acts both as court of first and sole instance (mainly in the context of planning and environmental protection legislation) and as an appeal court in relation to the judgments of district courts in administrative disputes. The Administrative Disputes Division will be referred to below by its full name. The Judicial Division and the Administrative Law Division will be referred to as "the Division", which will mean the former before 1 January 1994 and the latter from that date onwards.

## **II. The implementation procedure**

### **(a) Competent authorities**

The basic rule is that directives are implemented by the organs of central government, i.e. the legislator (government and parliament together), the Crown and government ministers. Local authorities and other lower-tier public bodies do not play a significant role in this connection.

Implementation by act of parliament is necessary if the existing legislation must be amended or if the Crown or the minister concerned does not have the requisite authorisation to implement the directive by order in council or by ministerial regulation or order. Even if such an authorisation does exist, it may not be exercised and the implementation must nonetheless be by means of an act of parliament if criminal provisions have to be incorporated in the implementing instrument. Only if the statutory authorisation itself expressly provides for the introduction of criminal provisions may such provisions be incorporated in secondary legislation.<sup>1</sup>

Notwithstanding the basic rule, what are termed alternative implementation techniques<sup>2</sup> have also been developed in recent years, namely:

- Covenants: an example is the implementation of Directive 91/296 (transit of natural gas through grids) by means of a covenant between the State and Nederlandse Gasunie which is binding on and can be enforced by both parties.<sup>3</sup> Sometimes this form of implementation is actually provided for in the relevant directive. See for example article 4 (1) of Directive 85/339 concerning the packaging of drinks (containers for liquids for human consumption). Under this provision, the directive may also be implemented by means of "voluntary agreements".<sup>4</sup>
- Self-regulation: see for example Directive 89/552 concerning the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.<sup>5</sup>

- Collective agreements: see for example Directives 91/533 (information on terms and conditions of employment) and 92/56 (collective redundancy).<sup>6</sup>

The directives on the recognition of diplomas mentioned in the questionnaire are implemented in accordance with the basic rule. A complete list of the relevant implementing measures is given in Annex I. This shows that all instruments at the disposal of central government are used in the implementation of these directives, but that the sectoral directives have been mainly implemented by ministerial orders and the general directives by act of parliament.

Bills and draft orders in council implementing directives are referred to the Council of State for advice. Under section 15 (1) of the Council of State Act (Bulletin of Acts and Decrees 1962, 88), as last amended by the Act of 20 December 1995 (Bulletin of Acts and Decrees 1995, 704), the Council is consulted on all bills and all draft orders in council. Save in the exceptional cases where the Division is asked by the Council to submit a preliminary report to the Council, the Division is not involved in the provision of advice on legislation.

(b) Judicial implementation

Question 1(b) of the questionnaire deals with the question of whether the case law of the Division plays a role in the implementation process. We would describe this as "judicial implementation". The possibility of such implementation was indeed recognised by the Court of Justice in the Katsikas judgment.<sup>7</sup> In this judgment the Court of Justice held that "the scope of national legal provisions must be assessed in the light of the interpretation given to them by the courts" ("*la portée des dispositions législatives ... doit s'apprécier compte tenu de l'interprétation qu'en donnent les juridictions nationales*").<sup>8</sup> In our view, this method of implementation requires clear existing case law. However, we are not aware of any cases in which decisions of the Administrative Law Division have fulfilled this role.

For the record, we would observe in this connection that a clear distinction should be made between judicial interpretation as described above and consistent interpretation in the case of correct or incorrect implementation. An example of correct implementation will be discussed in section III (b) below. In the case of incorrect implementation, there is a conflict between the national legislation and a directive. Here the courts must act to resolve the conflict. Examples of this will be dealt with in section III (c).

(c) Method of implementation.

The basic principle laid down in article 56 of the Instructions for Legislation is that the provisions of a directive - or in any event the terminology - should be literally incorporated in the national legislation. These Instructions were laid down by order of the Prime Minister of 18 November 1992, after recommendations had been made by the Council of State.' They contain criteria governing the quality of government legislation and are intended to ensure good, well-drafted legislation and to enhance the efficiency of the legislative process. They therefore relate to all Dutch legislation, including legislation that implements directives, but they do have a separate section dealing with the implementation of EC legislation.

According to Instruction 56 (1), the national implementing legislation should use the terminology of the directive. Doubt is cast on this principle in the literature. It is argued that although this rule could possibly be applied in areas where there is no national legislation (assuming that such areas still exist), it would be impracticable elsewhere since the provisions of the directive must be incorporated into existing national legislation, which has its own terminology.<sup>10</sup> Instruction 56 (2) permits a departure from the basic rule where (a) the terminology of the Community legislation is not sufficiently precise, (b) it is therefore better to use the terminology employed elsewhere in national legislation or (c) this would result in better Dutch.

A special method of implementation is that of referral to the directive. This is generally considered acceptable in the Netherlands, provided that the requirements of clarity and legal certainty are fulfilled. In practice, a distinction is made between the following two referral techniques:

- static referral, i.e. to the text of the directive as it reads on the date of implementation, and
- dynamic referral, i.e. to the existing text and any amendments or additions.<sup>11</sup> An example of this is the Framework Act on EEC Procurement Rules (Bulletin of Acts and Decrees 1993, 212) implementing the directives on public supply and public work contracts.

### **III. The legal effects of a directive**<sup>12</sup>

(a) During the implementation period

The question whether national judicial authorities are obliged to interpret national legislation in a manner consistent with the directive even during the implementation period has given rise to much debate.<sup>13</sup> In this report, we have subscribed to the view of S. Prechal that the court is not obliged but is entitled to do so, the only exception being where the directive has been implemented even before the expiry of the implementation period. "In

such a case of 'premature implementation', the national court not only has the faculty to proceed to consistent interpretation ... but on the basis of Article 5 of the Treaty it is also under the obligation to do so as a manner of Community law".<sup>14</sup>

Although the rapporteurs have adopted a definite legal position in this respect, we have not been able to find any judgment in which the national legislation has been interpreted in a manner consistent with a directive during the implementation period. However, we did find a judgment in which interpretation consistent with a directive was not applied or was in any event not raised as a matter for consideration. This was the first case in which the so-called EIA directive was considered by the Administrative Disputes Division of the Council of State.<sup>15</sup> It concerned the granting of an exemption by the Ministers of Housing, Spatial Planning and Environment (VROM) and Agriculture, Nature Management and Fisheries (LNV) from the need to prepare an environmental impact statement for the issue of a licence under the Waste Substances Act for a landfill site in Nieuwegein. As the exemption had been granted on 18 November 1987, i.e. before the expiry of the implementation procedure provided for in article 12 of the EIA Directive, the Division held that the State was not bound to implement the Directive." The question whether the Division was not already bound to interpret national law in a manner consistent with the Directive and the ground for exemption contained in it (article 2 (3)) was not answered in this case.

(b) Correct implementation

The Court of Justice held in the Becker judgment "that wherever a directive is correctly implemented, its effects extend to individuals through the medium of the implementing measures adopted by the Member State concerned".<sup>17</sup> In keeping with this judgment, the Division can review a provision of national law to ensure that a directive has been properly implemented. This occurred for example in the case of Strijthagen. This was a case that involved the construction of a holiday village as referred to in Annex II, point 11 (a), of the EIA directive. No environmental impact statement had been prepared. The plaintiffs submitted that the disputed decision (i.e. the approval of the local plan allowing for the construction) was therefore in breach of the Directive.

In accordance with the advice of the Administrative Disputes Division, the Crown held that the project in question was a so-called Annex II project and that the Member States have a duty to establish criteria and/or threshold values under article 4 (2) of the Directive which are necessary to determine what projects of the categories referred to in annex n must be subjected to an EIA procedure. Such criteria were included in the implementation order - the EIA Decree of 20 May 1987 (Bulletin of Acts and Decrees 1987, 278, now replaced by the EIA Decree of 4 July 1994, Bulletin of Acts and Decrees 1994, 540), and constituted, in the view of

the Crown, a correct implementation of the Directive. The Crown therefore considered that it was sufficient to review the disputed decision by reference to the EIA Decree and concluded that it was consistent with the Decree. As the Directive had been correctly implemented, direct application of the Directive was no longer relevant.<sup>18</sup> This judgment was recently upheld in the Sleen case.<sup>19</sup>

Even in a case of correct implementation, however, it may be advisable to interpret a provision of national law in a manner consistent with a directive.<sup>20</sup> This occurred, for example, in the judgment of the Division of 16 June 1995 in respect of the Major Rivers Delta Act (Bulletin of Acts and Decrees 1995, 210). Section 3 (2) of this Act exempts the projects to reinforce the dykes of the major rivers from the provisions of the EIA Directive. According to the section in question, the exemption was based on article 2 (3) of the Directive. The Division concluded that the exemption was justified, since it interpreted the list of the relevant sections of dyke in annex 1 of the Act (consistently with the Directive) as "specific projects" within the meaning of article 2 (3) of the Directive. However, it reserved the right to examine whether each individual "project" constituted an "exceptional case" as referred to in the said provision of the Directive.<sup>21</sup>

The general rapporteur has also inquired whether, in a case where there is a conflict between an implementing measure and a directive, the Division checks whether this measure is compatible with the directive or with the relevant implementing act. We have taken this question to mean that the rapporteur envisages a situation in which there is a directive, an implementing act and a measure implementing or applying the act. In view of the finding of the Court of Justice mentioned above, we suspect that the Division would in such a case review the measure by reference to the act. If the act correctly implements the directive and the measure is in breach of the directive, it will also, logically, be in breach of the act. If there has been incorrect implementation, however, an implementing measure may sometimes be reviewed directly by reference to the directive. This is known as specific review (see section (c)(i) below).

(c) Incorrect implementation

(i) Direct effect

The doctrine of the direct effect of directives is accepted absolutely by the Division. By way of example, we would mention the judgment of the Division of 11 November 1991 in the case of Rosmalen. This too involved the lawfulness of an exemption from the EIA Directive. The exemption had been granted for the conversion of a provincial highway near Rosmalen into a motorway. The Division held, in general terms, that article 2 (1) in conjunction with article 4 (1) of the EIA Directive accurately defined the cases in which there was an obligation to conduct an EIA procedure. According to the Division, these provisions therefore had direct effect. As

the case concerned exemption from an EIA obligation, the Division then went on to consider whether it might constitute an "exceptional case" as referred to in article 2 (3) of the Directive. It held that the possibility of exemption provided for in the national legislation exceeded the limits of article 2 (3). It accordingly set aside the statutory provision as being in conflict with the Directive and quashed the disputed decision.<sup>22</sup>

Statutory provisions have also been set aside in other cases on the ground that they conflicted with provisions of a directive that had direct effect. For example, the Division held in a judgment of 6 March 1986 that section 53 of the Hunting and Shooting Act was in conflict with article 7 (3) of Council Directive 79/409/EEC on the conservation of wild birds.<sup>23</sup> Under article 7 (3) of the Directive, the species of birds listed in the annex may be shot only in the Member States referred to in connection with these species. Grounds for an exemption from this provision were given in article 9 (1) and (2). The Division took the view that the possibility of exemption under section 53 of the Hunting and Shooting Act was much wider than that described in the Directive and that section 53 should therefore be set aside for this reason. The licence granted by the Minister of Agriculture (LNV) was therefore rescinded.

Furthermore, the Administrative Disputes Division set aside section 16b (1) of the Chemical Waste Act as being in conflict with Directive 84/631/EEC (hazardous substances) in a judgment of 6 September 1990.<sup>24</sup> This section made it possible for an objection to be lodged against the export of hazardous substances on grounds other than those mentioned in article 4(6) of the Directive. A later attempt by the Minister of Housing, Spatial Planning and Environment to salvage something of this section by interpreting it in a manner consistent with the Directive failed. The Administrative Disputes Division saw no reason to reconsider its judgment of 6 September 1990.<sup>25</sup> In a judgment of 20 January 1994, the Division confirmed its ruling that section 16b (1) of the Chemical Waste Act was not binding.<sup>26</sup>

In all these cases the Division carried out an abstract review, in other words it ascertained whether the national legislation on the basis of which the disputed decision was taken satisfied the requirements of the directive. If not, there was no basis for the decision taken or, accordingly, for the power to take a valid decision in other cases.

However, there have also been cases in which the Division has carried out a concrete review, i.e. in which it has quashed a disputed decision as being in conflict with a provision of a directive having direct effect, but has left intact the applicability of the underlying statutory provision. An example of this can be found in the judgment of the Administrative Disputes Division in the Alara case.<sup>27</sup> This case involved the Nuclear Energy Act and articles 6(a) and (b) of the Council Directive of 15 July 1980 altering the Directives laying down the basic safety standards for the health

protection of the general public and workers against the dangers of ionising radiation.<sup>21</sup> Under this provision the limitation of individual and collective doses that are the result of controllable exposure must be based on the following two principles:

- (a) that they are useful (the "justification principle"), and
- (b) that every exposure must be minimised as far as reasonably possible (the "Alara principle").

These principles were not at the time incorporated in Dutch legislation. A licence granted under the Nuclear Energy Act for the possession and application of certain radioactive sources was therefore cancelled because it had not been shown that the application had been reviewed by reference to both the above principles. In this judgment, a licence was therefore directly reviewed by reference to article 6 of the Directive. The judgment was upheld by rulings of the Administrative Disputes Division of 27 March 1991 and 21 July 1991.<sup>29</sup>

These principles have now been included in the Radiation Protection Decree (BSK). However, they have not been incorporated in the Nuclear Installations, Fuels and Ores Decree (BKSE), which does not refer to the former Decree. The Division therefore held as follows in a judgment on an appeal against a licence granted under the BKSE. First of all, it ruled that article 6, opening words and (a) and (b), of the Directive had direct effect. It then went on to hold that a licence that was based on the BKSE and did not make provision for a review by reference to the two principles should be cancelled on the ground that the reasons were insufficient. It added that it considered this ruling to be in keeping with the object and scope of the Directive.<sup>30</sup>

The literature has indeed defended this approach by arguing that a concrete review as applied in the cases mentioned above is appropriate where the object of the directive is not to prohibit certain activities in principle but merely to limit them. Where a decision is in conflict with a directive, the underlying legislation (i.e. the Nuclear Energy Act or the BKSE in the above cases) should not be set aside. It is sufficient for the licence that has actually been granted and conflicts with the directive to be cancelled.<sup>31</sup>

#### "Vertical" and "horizontal" direct effect

All the cases referred to above concern disputes between an individual and the State; in such cases the direct effect of the directive is said to be "vertical". "Horizontal" direct effect, i.e. where an individual claims the benefit of the directive in a dispute with another individual, does not occur in cases coming before the Division since it is an administrative law body. In accordance with the case law of the Court of Justice,<sup>32</sup> the civil courts too have in fact repudiated the horizontal direct effect of directives.<sup>33</sup> Another possibility is that a directive might be invoked in a dispute between two administrative bodies.

(ii) Interpretation consistent with directive

We have already mentioned above judgments in which section 53 of the Hunting and Shooting Act was set aside as being in conflict with provisions of the Wild Birds Directive that have direct effect.<sup>34</sup> However, there have also been judgments in which section 53 of the Hunting and Shooting Act was interpreted in a manner consistent with the Directive. For example, the Division held in a judgment of 10 September 1992 that section 53 of the Hunting and Shooting Act had to be interpreted in the light of article 9 of the Directive. Under section 53, a licence may be granted to hunt and shoot certain species of game in order to limit and prevent "damage". Article 9 of the Directive refers in this connection to "serious damage". According to the Division, it is this concept which must therefore be applied when interpreting section 53. As "serious damage" did not apply in this case, the appeal against the refusal to grant a licence was dismissed. Although section 53 of the Hunting and Shooting Act was set aside in the judgment of 6 March 1986, the provision was interpreted in the present judgment in a manner consistent with the directive.

The Division also interpreted the concept of damage in the Act in a manner consistent with article 9 of the Directive in a judgment of 14 January 1994."

A fairly similar combination of direct effect and interpretation consistent with a directive occurred in the case of the export of waste substances. In this case, however, it was a manner not of a single statutory provision but of a succession of provisions. First of all, the Administrative Disputes Division held in its judgment of 6 September 1990 (already referred to above) that section 16(b) of the Chemical Waste Act should be set aside as being in conflict with Directive 84/631/EEC.<sup>36</sup> In a judgment of 15 December 1994, however, the successor to this provision - section 10.36a of the Environmental Management Act - was interpreted in a manner consistent with the text and scope of the Directive. The Division also gave an explanation for the difference in method. It referred expressly to the "nature and scope" of the lack of implementation:

"The Division is of the opinion that having regard to its nature and extent, this particular defect of section 10.36a (1)(a) of the Environmental Management Act may be resolved if this part of the section is interpreted in a manner consistent with the text and scope of the applicable Directives."<sup>37</sup>

In his note on this judgment, Backes observes that minor and insubstantial "defects" can evidently be solved if the provision is interpreted in a manner consistent with the directive, whereas the method of direct effect must be applied in cases where there is a clear and substantial conflict with provisions of EC law.<sup>38</sup> He considers this undesirable because the criterion ("nature and scope") is vague and almost impossible to apply. If necessary,

an application must be made to the Court of Justice for a preliminary ruling on the question of which method should be applied, i.e. direct effect or interpretation consistent with the directive.<sup>39</sup>

Whatever the case may be, it appears that the Division also resolutely applies the method of interpretation consistent with the directive. It is therefore true that there are cases in which an existing rule is given a "new" interpretation as a result of a directive. We would refer in this connection to the judgments on section S3 of the Hunting and Shooting Act and section 10.36a of the Environmental Management Act as discussed above.

We should also make the following observation here. In the Eldim case, the Administrative Disputes Division held that the minister could not interpret a statutory provision in a manner consistent with a directive if it (the Division) had previously set it aside as being in conflict with a provision that has direct effect.<sup>40</sup> The case in question involved (once again) section 16b (1) of the Chemical Waste Act, which was held to be in conflict with article 4 (6) of Directive 84/631/EEC in a judgment of 6 September 1990.<sup>41</sup> In fact, the judgments concerning the Hunting and Shooting Act referred to above are inconsistent with the Eldim case. In the judgments on the Hunting and Shooting Act, a provision that was initially set aside as being in conflict with a directive was later interpreted in a manner consistent with the directive.<sup>42</sup> It follows that in the Eldim case the minister was barred by the Administrative Disputes Division from taking the very action which the Administrative Law Division itself had taken in its judgments! In the Kolpinghuis judgment (case 80/86, Jur. 1987, p. 3969 ff) too, it was held that the State may not invoke a directive against an individual.

The question also arises of whether a statutory provision which has been interpreted in a manner consistent with a directive where there has been incorrect implementation can later - in its "new" interpretation - provide a sufficient basis in law for application or implementation orders. An example of this is section 10.36a of the Environmental Management Act. This provision has never been set aside as being in conflict with a directive. However, the Division has interpreted it in a manner consistent with a directive in the ATM case.<sup>43</sup> Although the provision has admittedly remained intact, this does not alter the fact that as long as it has not been amended the implementation of the directive is defective. Interpretation consistent with the directive does not, after all, remedy the lack of implementation.

It is therefore argued in the literature that the authorities may no longer apply the incorrect provision, even if this has been interpreted by the courts in a manner consistent with the directive. However, the writer concerned was thinking in particular of the provisions of directives in which powers are granted to the State and in which the rights of individuals are not at

stake.<sup>44</sup> Whether this also applies to a provision such as section 10.36a of the Environmental Management Act, which has been interpreted in accordance with a directly effective provision (article 4 (6) of Directive 84/631/EEC), is therefore still open to doubt.

(iii) Compensation

The principle that the State is liable for damage which private individuals suffer as a result of incorrect implementation of directives<sup>45</sup> is entirely in keeping with Dutch law on liability. According to the case law of the Supreme Court, fault is not a requirement for the establishment of liability for unlawful government acts.<sup>46</sup> The three requirements which the Court of Justice laid down for the liability of the State in the Francovich judgment (unlawfulness, damage and a causal link) can also therefore be applied by the Dutch courts without reservation.<sup>47</sup> Since 1 January 1994 (when the General Administrative Law Act came into force) the administrative courts have also had a general power to award damages if the appeal is held to be well-founded. They can also therefore decide on an independent order for compensation. To the best of our knowledge, no such claims for incorrect implementation of directives have yet been instituted.

**IV. Recognition of diplomas**

The general Council directives on the recognition of diplomas and certificates (89/48/EEC and 92/51/EEC) were the subject of the following two judgments of the Division. In a judgment of 3 March 1994, the Division dismissed an appeal against the rejection of an application to be recognised as a physiotherapist on account of training received in the German Democratic Republic. The Division held that Directive 89/48 was not applicable because the course for physiotherapists was expressly mentioned in Annex C to Directive 92/51, where the appellant's diploma did not qualify as a "higher-education diploma" for the purposes of the former Directive. Nor was Directive 92/51 applicable because it was not yet in force at the time of the disputed decision (28 June 1990). The Division then reviewed the rejection in the light of article 52 of the EEC Treaty as interpreted by the Court of Justice in case C-340/89 (Vlassopoulou). It examined in particular whether the respondent had adequately examined the equivalence of the foreign and Dutch training courses. Since this was found to be the case and since it had also been found that the courses were not equivalent, the appeal was dismissed.<sup>48</sup>

The second judgment concerned a Greek seaman. He appealed against the refusal of his application for recognition of his Greek marine navigation diploma (Captain class C) and the issue of an equivalent Dutch diploma. Here too, the Division held that Directive 89/48 was not applicable, first of all because the seaman had not followed a 3-year higher vocational course and also because comparable courses in the maritime sector were

listed in Annex C to Directive 92/51 and the two Directives were mutually exclusive. Nor was Directive 92/51 applicable because at the time the disputed decision was taken (17 June 1991), it had not yet been adopted.

The Division then reviewed the refusal in the light of article 48 of the EC Treaty as interpreted by the Court of Justice in case no. 222/86 (Heylens). Here too, the issue was the equivalence of a course and a diploma. Unlike the previous case, the Division now held that the examination of the equivalence had not fulfilled the criteria laid down by the Court of Justice. It therefore quashed the disputed decision as being in breach of article 48 of the EC Treaty.<sup>49</sup>

## V. Preliminary ruling procedure

### (a) Interim injunctions

In an article entitled "*Het Kort Geding voor het Hof van Justitie van de Europese Gemeenschappen*" (Interim injunction proceedings before the Court of Justice of the European Communities), J.P. Mertens de Wilmars, a former president of the Court of Justice, advocated the introduction of an interim injunction procedure in the context of applications for preliminary rulings.<sup>50</sup> He had in mind cases in which the Court of Justice is asked to give a preliminary ruling on the validity of a Community act. In his view, it should be possible in such cases to request the Court of Justice to issue an interim injunction suspending the Community act in question. By analogy, we therefore raise the question of whether it should not be possible to apply to the Court of Justice in an interim injunction procedure for a provisional judgment on the interpretation of the relevant provision of Community law. This could then be used by the national courts to give judgment in provisional proceedings.

The need for such a procedure has long been felt. See for example the report by H.G. Schermers and J.S. Watson of the Asser Institute Colloquium on European Law, Session XV (1985).<sup>51</sup>

### (b) Exception to the duty of reference

Until such time as the interim injunction procedure described above has materialised, another question is whether an exception to the duty of reference may be made for "urgent" cases. Such an exception occurs for example in article 6 of the Treaty concerning the establishment and statute of a Benelux Court of Justice.<sup>33</sup> This article provides for a preliminary procedure in respect of Benelux law. Under article 6 (4) the national court of final jurisdiction need not refer "if the case admits of no delay owing to its urgent nature".

(c) The conditions of CILFIT

In the CILFIT judgment, the Court of Justice recognised that a national court of final jurisdiction need not refer if "the correct application of Community law (is) so evident that there cannot be any reasonable doubt about the way in which the question raised should be resolved".<sup>33</sup> However, the Court of Justice has attached a substantial number of conditions to this exception, for example that the chosen solution should be "equally evident" to the judicial authorities of the other Member States and the Court of Justice. Moreover, the national courts must take account of the existence of different authentic versions of the text (i.e. in the different languages). This could be taken to mean that the court must examine the relevant Community rule in all official languages of the EU, i.e. in twelve languages in the case of a provision of the Treaty. This rule may need to be relaxed slightly.

## Implementation of Directives

### **Part 2: Implementation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.**

#### 1. Dutch law

##### (a) General statutory framework

The protection of private life is regulated in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in article 10 of the Dutch constitution and in a general privacy act, namely the Data Protection Act of 28 December 1988 (Bulletin of Acts and Decrees 1988, 566). In addition, specific sectoral legislation has been introduced in a large number of fields, and general legislation touching on the right to protection of privacy applies to a small number of fields. Examples include the Data Protection (Police Files) Act, the Municipal Database (Personal Data) Act, the Social Security and Tax Number Act and the Medical Treatment Contracts Act (part of the Civil Code).

The literature<sup>54</sup> shows that the coexistence of these different acts has caused a large number of problems. For example, both the Data Protection Act and the Data Protection (Police Files) Act are applicable to the pounce and there is a grey area where it is not always easy to know which is applicable. Particular problems are posed by the distinction between the terms "police file" and "personal data filing system" within the meaning of the Data Protection Act and situations in which more than one set of privacy protection rules applies to one and the same filing system."

##### (b) Principles of the Data Protection Act

The introduction of the Data Protection Act was based on seven general principles.<sup>56</sup>

First of all, the introduction of the Act implemented article 10 (2) and (3) of the Constitution. Paragraph 2 provides that rules to protect privacy must be laid down by act of parliament in connection with the recording and dissemination of personal data. Under paragraph 3, rules on the rights of persons to be informed of data recorded concerning them and of the use that is made thereof and to have such data corrected must be laid down by act of parliament.

Second, the Data Protection Act does not distinguish between automated and non-automated personal data filing systems. Consequently, the legal protection of data subjects extends in principle to non-automated filing systems too. Third, the Data Protection Act has been drafted in such a way

as to include above all substantive criteria.

Fourth, the Act provides for a system of controllable self-regulation. Self-regulation has been given a central role in the Act and must be interpreted as an elaboration for certain sectors or other groups of the general criteria contained in the Act. These criteria are implemented in practice in sets of privacy rules governing the records of government and quasi-government bodies and in a code of conduct for organisations covered by private law.

Fifth, the Act allows for differentiation on the basis of the particular field for which records have been established. It distinguishes in this connection between the public, education, health care and social services sectors on the one hand and the private sector, the professions and other fields on the other.

Sixth, the Act limits the registration of records to what is strictly necessary for the proper operation of the Act. The Registration Office has been given particular responsibility for promoting observance of the Act, advising the government, handling complaints and mediating in disputes between data subjects and the controllers of personal data filing systems.

Finally, the Data Protection Act has enabled the Netherlands to ratify the Treaty of Strasbourg which contains some basic principles for the protection of personal data that must be implemented in the national legislation of each party to the Treaty.

(c) Outline of the Data Protection Act with particular reference to the Directive

Personal data is defined in the Data Protection Act (section 1) as information by which an individual person can be identified. The Act relates only to personal data included in a personal data filing system, i.e. a coherent collection of personal data relating to different persons which is kept by automated means or has been systematically developed in order to facilitate effective consultation of such data.

The term "processing" in the Directive is crucial. It relates to every processing of personal data, for example:

- collection, recording and storage;
- organisation, adaptation and retrieval;
- elaboration, use and disclosure by transmission and combination.

This definition is wider than that in the Data Protection Act in two ways. First of all, the automated processing of personal data not in filing systems is also covered by the Directive. And, second, the scope of the expression "processing of personal data" includes for example the collection of personal data, unlike in the Data Protection Act. The provisions of the Act apply in principle only from the moment that data are included in a filing

system.<sup>57</sup>

A number of records, for example personal data filing systems established in the course of police work, are excluded from the application of the Data Protection Act. The processing of data in such records also falls outside the scope of the Directive. However, the personal data records kept under the Municipal Database (Personal Data) Act are a quite important exception to this.

It is a characteristic of the Data Protection Act that the criteria are mainly concerned with the recording of personal data. The first substantive rule in the Act is contained in section 4. The keeping of a personal data filing system is permitted only for a particular purpose. According to the explanatory notes, this obliges the controller to specify the purpose. It is also necessary that the interests of the controller should provide a reasonable justification for this purpose. The purpose of the system may not be illegal or contrary to public policy or morals. As far as the contents of the filing system are concerned, it may contain only data that have been lawfully obtained and are in keeping with the purpose for which the system has been established (section 5 (1)). The controller of the records is subject to a duty to take whatever measures are needed to ensure that the personal data in the system are correct and complete (section 5 (2)) and to take measures of a technical and organisational nature to protect a record against loss or corruption of the data and against unauthorised access, alteration or disclosure. The data included in the system should be used only for purposes that are compatible with the purpose of the system (section 6 (1)).

Section 7 provides the basis for the important Sensitive Data Decree (1993, Bulletin of Acts and Decrees 158). Under this Decree, data concerning a person's religion or beliefs, sex life, race or political affiliation may not be included in a personal data filing system unless this has been provided for by law or permitted in this Decree.

Section 11 of the Data Protection Act lays down rules governing the disclosure of data to a third party. This is permitted in so far as it results from the purpose of the filing system, is required by law or is done with the consent of the data subject (subsection 1). Data may not be disclosed where secrecy is required by virtue of the office or profession of the party in possession of it or by virtue of a statutory provision (subsection 3). Although the Directive seems to indicate more precisely when disclosure is possible, based on its wide definition of the term processing, it may in practice differ little from the Data Protection Act.

Sections 17-22 deal with personal data filing systems kept by government and quasi-government bodies, and sections 23-27 are concerned with the systems kept by the private sector and members of the professions. This distinction has been made in order to create a stricter set of rules for the former category than for the latter. According to the explanatory

memorandum to the Act, the distinction is based on the fact that the information kept about people by government bodies and other organisations and institutions coming within this category is generally more comprehensive and far-reaching than, for example, in the case of the private sector. This distinction is not made in the Directive.

The Data Protection Act does not distinguish between the collection of data from the data subject and through other channels. In both cases, the controller must inform the data subject in writing of the purpose of the records and the identity of the controller when the data are first entered in the system. Under the Act, the duty of information does not apply if the person concerned knows or could reasonably be expected to know that his personal data have been included in the system. There are also various other exceptions (state security, criminal investigations, etc.), including the "serious interests" of persons other than the data subject (e.g. the controller).

The Directive makes a distinction between the collection of data from the data subject and from third parties (articles 10 and 11). If the data are collected from the data subject, the information duty applies from the moment that the data are collected since the collection too comes within the scope of the directive. The information duty does not apply where the parties concerned are already aware of the data.

Under the Data Protection Act, the Registration Office has the function of supervising the operation of personal data filing systems. It has special powers to enable it to carry out its duties effectively. For example, the controller is obliged on request to provide all information and cooperation needed to allow the Office to carry out its duties. Non-compliance with this obligation is a criminal offence. The Registration Office may institute an investigation, either at the request of a data subject or of its own volition, into how the Act has been implemented in relation to a particular personal data filing system. As a result of the Directive, the position of the Office will have to be strengthened. For example, it will have to be able to institute proceedings before the courts independently.

The questionnaire is answered below (the questions being numbered consecutively").

## **II. The implementation procedure**

1. The activities connected with implementation of the Directive are in full swing in the Netherlands. On 27 October 1993 the Minister of Justice held oral consultations with the standing committee for justice of the Lower House of Parliament about what was at that time still the draft European directive on privacy. The consultations have been resumed on a number of occasions since then.<sup>58</sup> The great interest shown by the Lower House in this draft directive was unique.<sup>59</sup> Two bulky research reports<sup>60</sup> prepared for the Ministry of Justice have now been published: the first is a preliminary legal study for the legislative project "Personal Data Protection Act" connected with the anticipated entry into effect of the Directive, and the second is a socio-scientific evaluation of the Data Protection Act. The evaluation study describes past experiences and identifies problems which may be of relevance when the new Act is introduced. Although it was stated on behalf of the Minister of Justice at a meeting on 14 June 1995 connected with the socio-scientific evaluation study that the concepts and ideas of the Data Protection Act largely corresponded to those of the Directive, it may still be necessary to introduce a new act. This seems to us to be inevitable since the personal data filing system is the central feature of the Data Protection Act. The Minister of Justice has left this question open, but the Dutch name of the Act will in any event have to be altered.<sup>61</sup>
2. Under article 73 (1) of the Constitution, the Council of State has to be consulted on draft legislation. Section 15 (1) of the Council of State Act provides that the Council must be consulted about government bills before they are presented to the Lower House of Parliament. In the case of the forthcoming bill, the Council of State will not only check it for observance of general drafting principles, consistency, clarity and so forth but also examine whether the directive is being correctly implemented. It is not inconceivable that when preparing its advice the Council will examine whether the bill and the explanatory memorandum take sufficient account of the conclusions contained in the above-mentioned reports.

## **III. Nature of the measures to be taken**

- (a) General provisions
3. Part 9 of the Data Protection Act is entitled "International aspects". It is noteworthy that - as far as we have been able to check - the

explanatory notes on this part do not deal with possible aspects of EC law. This is strange since the transfer of data may be governed by the provisions on the movement of goods (articles 30-37 of the EEC Treaty) or the movement of services (articles 59-66), depending on the nature of the means of transport. For example, the transfer of data may be counted as goods transport if the earner of the data is of a tangible nature (e.g. tapes, floppy disks, letters and cassettes).

As regards article 1 (2) of the Directive, the following point should be made. Section 49 (2) of the Data Protection Act provides that it is prohibited to disclose data to or obtain data from a personal filing system located elsewhere to which this Act does not apply, in so far as it has been declared by order in council that such disclosure or obtainment may seriously prejudice the personal privacy of the data subjects. It is expected that this provision will have to be amended if the Directive is implemented in the countries of the Union. Limitations on the free transfer of personal data may in principle be imposed only in relation to third countries (articles 25 and 26 of the Directive).

4. The following observation should be made about article 2 of the Directive. Although it is evident from the explanatory memorandum to the Data Protection Act that the term "personal data" is widely defined (since it is based on article 2 of the Treaty of Strasbourg), it must be assumed that implementation of article 2 of the Directive will necessitate a further broadening of this term. Every theoretical possibility that a person may be identified from information brings such information within the ambit of the rules governing personal data. It has been pointed out in the literature, for example, that an estate agent who operates an Internet service showing pictures of houses for sale will be covered by the Directive. The criticism is that by treating "virtual" personal data as "real" personal data, the Directive will hamper the development of the electronic highway by excessive bureaucratisation.<sup>62</sup>

The Directive also relates to all automated (or partially automated) processing of personal data. No distinction is made here in principle between data in files and other data. The scope of the Directive is therefore broader than that of the Data Protection Act. The way in which processing is defined in the Directive will not only result in the modification of terms in the existing legislation but also necessitate an entirely different structure.

5. As indicated above, the Data Protection Act relates only to personal data included in a personal data filing system (file). In certain circumstances, non-automated records may also come within the ambit of the Data Protection Act.

As regards the scope of the Directive, article 3 (1) provides that the Directive applies to data which form part of a filing system or are intended to form part of a filing system. The latter provision is wider than the definition in the Dutch legislation. Moreover, the Directive applies, as mentioned previously, to all processing of personal data, whether by automatic or non-automatic means.

Article 3 (2), first indent, of the Directive provides that the Directive does not apply to processing operations concerning public security, defence, State security and the activities of the State in areas of criminal law. For the time being, it must be assumed that the Intelligence and Security Services Act (Bulletin of Acts and Decrees 1987, 635) is not covered by the Directive. The same applies to the Data Protection (Police Files) Act, which is in fact in keeping with the Data Protection Act, and also largely to the Judicial Records and Certificates of Good Behaviour Act. The word "largely" is used advisedly, because the certificates of good behaviour - which are often requested by future employers wishing to find out whether job candidates have a criminal record - will have to be reviewed by reference to the criteria of the Directive. It would not seem that the exceptions mentioned in the Directive are applicable here.

(b) The processing of personal data

6. A large number of the principles governing the quality of the data as mentioned in article 6 (1) of the Directive are also contained in the Data Protection Act. A quite important exception is the rule that the Member States should - in brief - provide in their legislation that information from which an individual may be identified should not be kept for longer than is necessary for the purposes for which the data were collected or for which they are further processed. There is no provision in the Data Protection Act for a duty to render data anonymous after a given period or to destroy them. Under section 31 of the Act, data may be removed from the filing system at the request of the data subject if certain statutory conditions have been fulfilled.

The Dutch legislation should be amended in this respect. A rule as referred to in article 6 (1) of the Directive - or in any event a rule of this tenor - can be found in articles 454 and 455 of the Civil Code; these articles impose limits on the period within which patients' particulars may be included in a medical file.

7. As regards the question of whether the national processing of data - in particular, disclosure to third parties - may take place in cases other than those referred to in article 7 of the Directive, reference should be made to section 11 (2) of the Data Protection Act. This

permits disclosure to third parties for scientific or statistical purposes. However, it is a condition that the request for disclosure must have emanated from the third-party/recipient. The "legitimate interest" of the third party (article 7 (f) of the Directive) would appear to provide little basis for disclosure for the above-mentioned purpose. Nonetheless, the Directive does provide that disclosure is possible for this purpose, partly in view of article 6 (1)(b) ("further processing of data for [...] statistical or scientific purposes").

8. The Data Protection Act already makes provision for a category of sensitive data (in the Sensitive Data Decree), as referred to in article 8 of the Directive. The storage of police and criminal records and medical particulars have already been regulated in the manner provided for in the Directive. The Sensitive Data Decree lists specific exceptions to the general ban on the processing of sensitive data. Generally speaking, these exceptions are similar to those of the Directive. The difference consists in the fact that the Decree permits exceptions on the basis of the "weighty interests of the controller", whereas the Directive does so on account of a "substantial public interest" and only where this has been laid down either by national law or by decisions of the supervisory authority (i.e. the Registration Office) (article 8 (4) of the Directive).
9. We would make the following observations about article 8 (7) of the Directive. The Netherlands does not have a scheme for national identification numbers in the sense that each resident is known to the authorities under a single number. However, there is a number for tax and social security purposes (known for short as the SoFi number). This is a registration number employed by bodies such as the tax authorities, the industrial insurance associations (for social security purposes), the municipal social services (for national assistance) and the Database Office of the Ministry of Education (student financing). The use of this number has been regulated by law, for example in section 6a of the Data Protection Act (which has in fact not yet come into force). There is a distinct possibility that the SoFi number may in due course become a national identification number.
10. The Data Protection Act is not applicable to personal data filing systems which are used exclusively for the public provision of information by the press, radio or television. Nor is the Act applicable to books and other written publications (section 2).<sup>63</sup> Article 9 of the Directive allows the national legislatures the scope to reconcile the right to privacy with the rules governing freedom of expression. As far as the implementation of this article is concerned, mention should be made of the applicable criminal legislation (defamation) and civil legislation (tort).

- 11-13. The obligation under the Data Protection Act to inform the data subject applies whether or not the data have been obtained from him or from a third party. In the Netherlands, the obligation applies from the moment that the data is entered in the filing system. Under the Directive the relevant moment is the time when the data are obtained from the data subject or, where they are obtained from someone else, the moment when disclosure to a third party is considered, but in any event no later than the time of disclosure (articles 10 and 11 of the Directive). If necessary in order to guarantee the "fair processing" of the data (article 10 (c) of the Directive) the data subject must be given extra information (not provided for in the Data Protection Act), for example about the recipients or categories of recipients of the data.

In the Netherlands, the data subject often has no right to information, inspection and correction if the data are used exclusively for statistical or scientific purposes and individual persons cannot be identified from the results (section 33 of the Data Protection Act). The Directive (article 11 (2)) simply stipulates that information must be provided unless, for example, the provision to the data subjects proves impossible.

- 14-15. In the Data Protection Act, the right of access provided for in the Directive (article 12) is incorporated in the rights of data subjects to inspect and improve data (part 7). A new provision is the right of the data subject to be informed of the logic involved in the automatic processing of any data concerning him. In practice, the alterations that need to be made to Dutch law are relatively minor. For example, the ground on which a Member State or the Union can prevent access to the controller and its data processing will have to be modified; instead of simply an economic or financial interest, the Member State or the Union will in future need to have a substantial economic or financial interest.
16. The right to object provided for in the Directive (article 14) is rather wider than in the Data Protection Act. The data subject may object free of charge to the processing of his personal data for direct marketing purposes. Here the right to object is absolute: the request for protection must be granted even if no reasons for the objection are given. If direct marketing is being considered, the data subject whose data are to be disclosed to third parties or to be used at the expense of third parties must be explicitly informed of this right (article 15 (b) of the Directive)

17. National law has no express scheme of protection against individual decisions which are based solely on automated data processing (article 15 of the Directive) and are intended to evaluate certain personal aspects relating to the data subject. It is possible that the procedures concerning psychological tests may have to be modified.
18. The Data Protection Act includes provisions (express and otherwise) regulating the confidentiality and security of processing (section 6 (2) and section 8). These sections need to be made more specific, since they are more limited than article 16 of the Directive. For example, the relationship between the controller and the processor must be recorded in an agreement. Substantively, little would be changed; under the Data Protection Act the processor has the same responsibility as the controller.
19. Under the Data Protection Act, personal data filing systems that do not come within the public sector category of part 5 have to be notified to the Registration Office. "Public sector filing systems" are not notified to the Registration Office; however, the deposit of their systems for inspection and the nature of the systems should be notified (section 19 (3) and sections 24-25). The Standard Exemptions Decree designates a number of categories of personal data filing system which are in principle exempt from these obligations. It also sets out the criteria that the designated filing systems have to fulfil if the exemption is to apply in practice. This arrangement is in keeping with article 18 of the Directive. It is, however, expected that the period of permitted data storage will have to be defined more precisely.
20. Dutch law does not provide for a prior check, for example by the Registration Office, in the case of processing operations likely to present specific risks (article 20 of the Directive). However, the Office is regularly asked for advice about processing operations where it is unclear whether privacy is adequately safeguarded.<sup>64</sup>
21. The national legislation will have to be supplemented to provide for the establishment by the Registration Office of a public register of notified processing operations and the provision of information about the identity of the controller, the purposes of the processing, the categories of data subject and the categories of data.

(c) Judicial remedies, liability and sanctions

- 22-24. The following points should be made about articles 22-24 of the Directive. Under the national legislation (sections 9 and 10 of the Data Protection Act), the data subject has the right to apply to the civil courts. Two courses of action are

possible where there has been an unlawful act; prohibit the proscribed behaviour and order measures to rectify the consequences of the behaviour. There is also a right to claim fair compensation.

The Data Protection Act allows the Registration Office the opportunity to institute an investigation into how the legislation is being applied. This may result in a recommendation to the controller of the personal data filing system. Neither the individual concerned nor the controller of the registration are able to apply to an administrative court following the ruling of the Registration Office.

(d) Codes of conduct

25. Provision is made in Dutch legislation for codes of conduct (section 15 of the Data Protection Act). Organisations that are representative of their sector or industry may submit such codes to the Registration Office, which may then declare that the code is in its view in keeping with the Act and satisfies the requirements that may reasonably be imposed for the protection of privacy. The declaration does not bind the courts. As far as we know, nine declarations have now been issued.<sup>65</sup>

(e) Supervisory authority and working party on the protection of individuals with regard to the processing of personal data

26. The Registration Office (*Registratiekamer*) is the designated public authority responsible for supervision in the Netherlands. It has advisory duties with regard to the implementation of the Act. It also has the power to institute investigations into how the legislation is applied in relation to a particular personal data filing system. The Office is entitled to gather information from the controllers and to gain access to all premises in which personal data are kept. For the sake of brevity, reference should be made to the above notes for its other powers.

A new provision will be that the Registration Office is given the power to engage in legal proceedings. Once it has the power to initiate court proceedings, the Office will be better able to enforce observance of the Act.

\* \* \*

1. J.A. Winter, *Doordringend recht. De invloed van het gemeenschapsrecht op de nationale rechtsorde* (Penetrating law: the effect of Community law on the national legal order), Zwolle 1988, pp. 28-29.
2. On this, see T. Heukels, *Alternative implementatietechnieken en art. 189, lid 3, EEG: grondslagen en ontwikkelingen* (Alternative implementation techniques and article 189 (3) of the EEC Treaty: principles and developments), *Ned. Tijdschrift voor Bestuursrecht* 1993/1, pp. 59-74.
3. OJ, 1991, L 147. See the announcement in the Netherlands Government Gazette no. 67, dated 3 April 1992, p. 25.
4. OJ, 1985, L 176/18.
5. OJ, 1989, L 298/23. See also sections 5/42, 61(a) and 169 of the Media Act (Bulletin of Acts and Decrees 1995, 320).
6. OJ, 1991, L 288/32 and 1992, L 245/3 respectively.
7. Joined Cases C-132, 138 and 139/91 (*Katsikas v. Konstantinidis*), (1992) ECR I-6577.
8. *Ibid*, para. 39.
9. Government Gazette 1992, 230; took effect on 1 January 1993.
10. P.J. van Vlier and J.S. van den Oosterkamp, *Voortvarende implementatie van EG-richtlijnen, mede in het licht van de Algemene wet bestuursrecht en de Aanwijzingen voor de regelgeving* (Effective implementation of EC directives, viewed partly in the light of the General Administrative Law Act and the Instructions for Legislation, SEW 1994/11, p. 735).
11. On this subject, see the publication of the Ministry of Justice entitled 707 *Praktijkvragen over the implementatie van EG-besluiten* (101 practical questions about implementation of EC legislation), loose-leaf.
12. In preparing this report, we made frequent use of the reports of G.H. Addink *et al.* on European environmental legislation, 104 national decisions on aspects of European environmental law. Publications of the Vereniging voor Milieurecht 1996-1, Zwolle 1996.
13. See S. Prêchai, *Directives in European Community Law. A study of directives and their enforcement in national courts*, Oxford 1995, pp. 23-24 and 206-207.

14. Prechal, *ibid*, p. 207.
15. The environmental impact assessment (HA) directive is Council Directive 85/337/EEC of 3 July 1985, concerning the effect of certain public and private projects on the environment, OJ, 1985, L 175/40.
16. Administrative Disputes Division, 26 August 1991, *Milieu en Recht* 1992, no. 37, with note by Jans.
17. Case 8/81 (U. Becker v. Finanzamt Munster-Innenstadt), preliminary ruling of 19 January 1982, (1982) ECR 69.
18. Royal Decree of 31 October 1995, no. 95.007715, in case no. G01.93.0258 (Strijthagen).
19. Administrative Law Division, case no. E01.94.0114, 22 December 1995 (Sleen).
20. Cf. Prechal, *op. cit*, *nt.* 12, *supra*, pp. 210-213.
21. Administrative Law Division, case no. E1O.95,0002, 16 June 1995 (De Wit v. the Provincial Executive of Gelderland), AB 1995, 384, with note by Van Hall.
22. Administrative Disputes Division, 6 September 1990, AB 1991, 12, with note by Drupsteen (GMU).
23. Judicial Division, 6 March 1986, *Milieu en Recht* 1987, p. 16, with note by Jans ("Rotganzen"). See also the president of the Judicial Division, 19 March 1993, no. R01.91.1870/P01, tB/S 1993, no. 26, with note by Widdershoven. For the Directive see OJ, 1979, L 103/1.
24. Administrative Disputes Division, 6 September 1990, AB 1991, 12, with note by Drupsteen (GMU).
25. Administrative Disputes Division, 17 February 1993, G05.92.1279, AB 1993, 424, with note by Drupsteen (Eldim).
26. Administrative Disputes Division, 20 January 1994, G05.92.2045, *Milieu en Recht* 1994/6, no. 60, with note by Jans (Edelchemie).
27. Administrative Disputes Division, 17 March 1989, *Milieu en Recht* 1989, pp. 520-522, with note by Jans (Alara).
28. OJ, 1980, L 246/1.
29. Nos. G05.87.0403 and G05.90.0010.

30. Administrative Law Division, 15 January 1996, E03.94.0091 (Urenco).
31. See J.H. Jans, in: W. Brussaard *et al.*, *Milieurecht* (Environmental Law), 3rd edition (Zwolle, 1993), p. 612.
32. See cases 152/84 (Marshall I), Jur. 1986, pp. 723 ff, and C-91/92 (Faccini Don), Jur. 1994, p. 1-3325 ff.
33. See Addink, *Europese milieurechtspraak en (milieubelangen: conflict of verzoening?* (European environmental case law and environmental interests: conflict or reconciliation?) in: G.H. Addink *et al.*, *Europese milieurechtspraak, 104 nationale uitspraken met Europees milieurechtelijke aspecten* (European environmental case law: 104 national judgments touching on aspects of European environmental law), Publikaties van de Vereniging voor Milieurecht 1996-1, pp. 32-34. See also N. Aland, *Europese soortgerichte natuurbeschermingswetgeving* (European species-related nature conservation legislation), *ibid* pp. 146-7.
34. See note 23, *supra*.
35. Administrative Law Division, 14 January 1994, no. SO1.93.0396, AB kort 1994/272.
36. See note 24, *supra*.
37. Administrative Law Division, 15 December 1994, no. G05.93.2307, AB 1996, 29, with note by Backes (ATM). The Division had in mind in this connection not only Directive 84/631/EEC but also Directives 76/403/EEC and 78/319/EEC.
38. *Loc.cit.*, with reference to Jans' note on this judgment, *Milieu en Recht* 1995, no. 57.
39. *Ibid.*
40. See note 25, *supra*.
41. See note 24, *supra*.
42. See notes 34 and 35, *supra*.
43. See note 37, *supra*.
44. J.H. Jans, *Rechterlijke uitleg als implementatie-instrument van EG-richtlijnen: spanning tussen instrument en rechtszekerheid* (Judicial interpretation as an implementation instrument of EC directives: tension between instrument and legal certainty), in: T.

- Hoogenboom/L.J.A. Damen (ed.), *In de sfeer van administratief recht* (Utrecht, 1994), p. 255.
45. See Joined Cases C-6 and 9/90 (Francovich and Bonifaci), *Jur.* 1991, p. I-5357 ff.
  46. Supreme Court, 31 May 1991, *RvdW* 1991, 143 (Van Gog/Nederweert).
  47. See G. Betlem/E. Rood, *Francovich liability*, *N.J.B.* 1992/8, pp. 254-255.
  48. Administrative Law Division, *X v. State Secretary for Welfare, Health and Cultural Affairs*, 3 March 1994, *AB* 1994, 548.
  49. Administrative Law Division, *A. Koronis v. Minister of Transport, Public Works and Water Management*, 12 August 1994, no. R01.92.2384.
  50. *S.E.W.* 1986, pp. 32-54, on p. 40.
  51. H.G. Schermers and J.S. Watson, *Report of the Conference*, in: Schermers et al. (eds.), *Article 177 EEC: Experiences and Problems* (Amsterdam, 1987), pp. 38-39.
  52. Dutch Treaty Series 1965, 71; 1966, 243 and 1973, 173.
  53. Case 283/81, *Jur.* 1982, pp. 3415 ff.
  54. J.E.J. Prins *et al*, *In het licht van de Wet persoonsregistraties: zon, maan of ster?* (In the light of the Data Protection Act: sun, moon or star?), *Alphen aan den Rijn/Diegem* 1995, p. 107.
  55. *Ibid*, p. 108.
  56. *Parliamentary Papers II*, 1984-1985, 19095, pp. 15-17.
  57. *Costs to the State of the European privacy directive*, Institute for Research of Government Expenditure, *Onderzoeksreeks* no. 64, p. 23.
  58. Cf. *Parliamentary Papers n*, 1992-1993, 22800 VI, no. 43.  
*Parliamentary Papers II*, 1993-1994, 23400 VI, no. 9  
*Parliamentary Papers II*, 1994-1995, 23900 VI, nos. 11 and 13.  
*Parliamentary Papers II*, 1994-1995, 22112, no. 45.
  59. J.M.A. Berkvens, G. Overkleeft-Verburg, *Computer Law* 1995/3, p. 102, note 1.

60. See note 54 and the heading Document, Common position on Privacy Directive, the Data Protection Act criterion, application and evaluation, Zwolle 1995.
61. Parliamentary Papers II, 1994/95, 23900 VI, no. 11.
62. See note 60.
63. See also Costs to the State of the European privacy directive, *ibid*, p. 34.
64. See note 57, p. 34.
65. The Data Protection Act, *ibid*, p. 123 ff.