

# Environmental Law

## General principles and EIA

Nienke Saanen  
15 March 2013

# Topics

1. History
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# Development of European environmental law (1)

- 1958: EEC-Treaty → no environmental law
- 1972: Club of Rome → “limits to growth” → protection of the environment became an element in the decision making, but no legal basis
- 1987: Single European Act → Title on the environment in the Treaty
- 1988: ECJ acknowledges the environment as an imperative requirement

# Development of European environmental law (2)

- 1992: Treaty of Maastricht → one of the goals of the EC was a high level of protection of the environment and improvement of the quality thereof
- 1995: Treaty of Amsterdam → integration of environmental protection in other policy areas and codecision
- 2009: Treaty of Lisbon → climate change added to the Title on environment

# Relevant provisions

- Art. 3 (3) TEU:  
The Union shall establish an internal market. It shall work for the sustainable development of Europe based on [...] a high level of protection and improvement of the quality of the environment
- Art. 11 TFEU:  
Environmental requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development

# Title XX on environment (1)

*Article 191*  
(ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:
  - preserving, protecting and improving the quality of the environment,
  - protecting human health,
  - prudent and rational utilisation of natural resources,
  - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

# Title XX on environment (2)

- Principles: Art. 191 (2) TFEU

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

1. Precautionary principle
2. Principle of preventive action
3. Rectify at the source
4. Polluter pays

# Principles

- Not mutually exclusive!
- Precautionary principle: also intervention when damage is not 100% sure, but is very likely to occur
- Preventive action: environmental damage is certain, so to prevent (in the earliest stage possible) is better than to 'cure'



# Legal basis and procedure

- Basic rule: art. 192 (1) TFEU → normal procedure and qualified majority
- But: art. 192 (2) → consultation of EP and unanimity for
  - ❖ Fiscal provisions
  - ❖ Town and country planning
  - ❖ Water management
  - ❖ Land use
  - ❖ Measures significantly affecting a MS general structure of energy supply

# Minimum harmonisation

- Art. 193 TFEU:

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

➔ Obligation to notify (but that is it)

# Legal basis: art. 192 TFEU

DIRECTIVE 2008/50/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 21 May 2008  
on ambient air quality and cleaner air for Europe

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the functioning of the EU and in particular Article 192 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(3)</sup>,

Whereas:

- (2) In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes.
- (3) Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management <sup>(5)</sup>, Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air <sup>(6)</sup>, Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air <sup>(7)</sup>, Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air <sup>(8)</sup> and Council Decision 97/101/EC of 27 January

# Legal basis: art. 114 TFEU

DIRECTIVE 2001/100/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 7 December 2001

amending Council Directive 70/220/EEC on the approximation of the laws of the Member States on  
measures to be taken against air pollution by emissions from motor vehicles

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE  
EUROPEAN UNION,

Having regard to the Treaty on the functioning of the EU  
and in particular Article 114 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the Economic and Social  
Committee <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article  
251 of the Treaty <sup>(3)</sup>,

Whereas:

pants and vehicles of category M<sub>1</sub> with positive-ignition  
engines whose maximum mass exceeds 2 500 kg,  
which were previously excluded.

(4) Because of their emission characteristics, it is appropriate to exempt vehicles with positive-ignition engines that run only on gas fuel (LPG or NG) from the low temperature test. Vehicles where the petrol system is fitted for emergency purposes or starting only and where the petrol tank cannot contain more than 15 litres of petrol, should be regarded as vehicles that can run only on a gaseous fuel.

(5) It is appropriate to align the test for low temperature emissions with the test for emissions at a normal ambient temperature. The test at low temperature is therefore restricted to vehicles of category M and N with

# Legal basis for provisions on the internal market

- **Art. 114 TFEU:**

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

# Art. 114 (5&6) TFEU

- Criteria:
  - ❖ New scientific evidence
  - ❖ Relating to the protection of the environment
  - ❖ Problem specific to a MS
  - ❖ Arising after adoption of harmonisation measure
- Steps:
  - ❖ Notify Commission of measure and grounds
  - ❖ Verification and standstill
  - ❖ Approval or rejection

# Case *Roetfilters* (1)



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## Case *Roetfilters* (2)

- Dir. 98/69 regulates the emissions from motor vehicles
- Type approval cannot be refused on grounds of environmental protection when the motor vehicle complies with the Euro-4 norm
- Because NL exceeded the limit values for air pollution by particulate matter, it wanted to oblige owners of in NL registered diesel cars to have a filter installed
- Legal basis of Dir. 98/69 was art. 114 TFEU → NL notified the Commission



# Case *Roetfilters* (3)

- Decision Commission: no specific problem (rejection, May 2006)
  - CFI: also in other MS serious problems with air quality (T-182/06)
  - ECJ: annuls CFI-judgment because Commission had not taken into account a TNO-report (scientific evidence) → failure to state grounds (C-405/07 P)
  - Proceedings took almost 3 years and Commission had stated that the TNO-report would not make changes
- What if the legal basis would have been art. 192 (1) TFEU?



# Environmental impact assessment



**P E R C E P T I O N**

<http://english.hidden-science.net>

# What is it?

- Awareness instrument!
- Introduced in the mid 80s to force decision makers to be aware of the impact of their decision on the environment
- The fact that a decision had an impact on the environment did not necessarily lead to a negative result → that was up to the decision makers!
- EIA-Directive entails the prevention principle: prevent damage to the environment
- Now, certain effects on the environment do lead to a negative result (e.g. air quality and habitat)

# Types of EIA

1. Project related EIA (Dir. 85/337/EEC as amended)
2. Plan / programme related EIA (Strategic Environmental Assessment; Dir. 2001/42/EC)

# Project related EIA

- Scope

*Article 1*

1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive:

‘project’ means:

- the execution of construction works or of other installations or schemes,
- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

# Core provision

## *Article 2*

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

- Projects likely to have significant effects
- By virtue of their nature, size or location
- Made subject to development consent
- Before consent is given an assessment is conducted
- These projects are defined in the Annexes

# What projects?

- Listed on Annex I → EIA compulsory
- Listed on Annex II →
  - ❖ MS decides on a case-by-case basis, or
  - ❖ MS sets thresholds or criteria
- Annex III holds selection criteria for Annex II-projects like size, location, waste production, probability of the impact

# Exception

- Projects serving national defense purposes
- Exceptional circumstances
- MS has to decide on a case-by-case basis



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# Contents of EIA

## *Article 3*

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora; → **Habitat assessment**
- soil, water, air, climate and the landscape; → **Air quality assessment**
- material assets and the cultural heritage;
- the interaction between the factors mentioned in the first, second and third indents.

# Case C-255/08

- Dutch law prescribed that the competent authority decided on a case-by-case basis whether an Annex II-project was made subject to an EIA
  - But only for projects above certain thresholds (regarding size)
  - By conducting the EIA, all the criteria of Annex III had to be taken into account
- Commission was of the opinion that this was an incorrect transposition of the Directive → infringement proceedings

# ECJ judgment in case C-255/08

- Aim of the Directive is to subject all projects that can have significant effects on the environment to an EIA
  - Even a project of a small size can have significant effects, e.g. due to its nature or location
  - Also those projects have, according to art. 2, to be made subject to an EIA
  - A first selection solely on the basis of the size of projects constitutes a violation of the Directive obligations
- ➔ Dutch law has to be amended

# EIA process

1. **Project preparation & notification to the competent authorities**
2. **Screening**: is an EIA required for a particular project?
3. **Scoping**: on what potential effects is environmental information required?
4. **Environmental studies & submission** (Environmental Impact Statement)
5. **Review of adequacy of the information**
6. **Consultation of interested parties and the public**
7. **Decision**

# Plan / programme related EIA (Strategic Environmental Assessment – SEA)

- MS have to make sure that plans or programmes that are likely to have significant effects on the environment are made subject to an EIA
- Mandatory for e.g. water management plans and spatial planning
- For other plans: either on a case-by-case basis or by specifying the plans and programmes → criteria in Annex II
- Process is basically the same as for the project related EIA
- Extra obligation: monitor!