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# **Colloquium Article: Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards**

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## **I. INTRODUCTION**

This paper will explore the possibility of using tort law based instruments for the enforcement of environmental standards. Not by using these instruments vis-à-vis those who are violating environmental standards (which could be regarded as a rather innovative approach to the subject), but vis-à-vis public authorities not taking sufficient enforcement action with respect to persons and undertakings who are primarily responsible for the environmental harm. Our main question therefore is, whether a non- or unsatisfactory enforcement of environmental law by public authorities can result in liability to pay damages based on general civil law. The approach that will be introduced is one of the "hottest" and most discussed subjects in legal practice and academia alike, in the Netherlands today.

In the past, the Netherlands was not known for its enforcement of environmental law. Some years ago there was a rather high rate of non-enforcement. However, the occurrence of several accidents in the Netherlands and Europe has changed ideas on the importance of environmental law enforcement. This change of mind was triggered by a fireworks explosion, a café fire, a sinking ship on the river Rhine, an explosion of a Turkish slum, and a German bank that went bankrupt. In all of these accidents the injured parties raised the issue of whether the public enforcement authorities were liable to pay damages. The question raised by the injured parties will be the focal point of this paper.

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Illustrative of the public authorities' failure to adequately enforce Dutch environmental law is the S.E. Fireworks accident that occurred in the Netherlands. The incident involved explosions that occurred on the premises S.E. Fireworks, a company which stored and assembled fireworks in the City of Enschede in the eastern part of the Netherlands. On Saturday, May 13, 2000, a series of explosions occurred at the S.E. Fireworks facility causing the death of twenty-two persons and injuring almost one thousand more. The incident inflicted extensive damage on a large area immediately surrounding the factory, including a residential area. Questions were raised as to whether the operator was abiding by the terms of his license and whether enforcement procedures were being fully implemented. It was argued that the stored fireworks were heavier than permitted and that were stored in an unsafe manner: the containers were both too heavy and not fire-resistant enough. It was also argued that the State and the City of Enschede did not fulfill their compliance and enforcement responsibilities with respect to the S.E. Fireworks facility and its operator. This raises the question of whether this omission on the part of the State or City public authorities, or both, should cause them to be liable for damages.

At least in the Netherlands, the S.E. Fireworks accident was the starting point for a renewed interest in the liability of public authorities for non-enforcement. This paper will introduce the reader to the debate. The following questions are vital to the subject: (1) Is there a legal duty for public authorities to enforce environmental law?; (2) Are public authorities liable to pay damages if they fail to enforce environmental law?; and (3) What, if any, is the influence of European law on this subject? The first question will be answered in section two of this paper, and the second question will be answered in section three. Sections two and three will discuss the influence of European law. Section four will have some concluding remarks.

## **II. AN ADMINISTRATIVE LAW OBLIGATION TO ENFORCE?**

### **A. Dutch Administrative Law**

As in most legal systems, in the Netherlands, the protection of the environment is in the hands of state authorities. Public bodies in the Netherlands are entitled to grant licenses to companies such as S.E. Fireworks. The terms of these licenses are designed

to protect the environment by prescribing, among other things, the best available control techniques. In most cases, the public authorities are also entitled to supervise and enforce the environmental standards as defined by the terms of the licenses. The executives of public authorities supervise companies' adherence to the terms of the licenses by checking, for instance, the safety of public buildings and the installations of industrial plants. The principal instruments employed for enforcement of environmental standards are *bestuursdwang* (a compulsory order allowing public authorities to repair damage at the infringer's expense) and *last onder dwangsom* (an enforcement order subject to a penalty for non-compliance). Both sanctions are designed to end any non-compliance and bring the targeted facility into compliance with legal requirements. Only parties that have a direct interest in the matter may request enforcement by the public authority. Thus, the main question that must be answered is whether national administrative or European law requires the public authority to enforce environmental law if it is made aware of instances of non-compliance.

In general, Dutch statutory law does not acknowledge an enforcement obligation. Dutch statutory law merely states that public authorities are entitled to enforce on a discretionary basis. Thus, there is no express general statutory rule mandating that a public authority must enforce the law in general, and environmental law in particular. This lack of express statutory mandate could lead to the conclusion that Dutch law imposes no duty upon public authorities to enforce environmental law. However, there is more.

Environmental law and, more specifically, Article 18.2 of the Environment Management Act (*Wet Milieubeheer*) provides that the administrative authority entitled to grant permits has a duty of care to enforce the legal rules with respect to the buildings and the activities conducted within it.<sup>1</sup> A close reading of this provision clarifies that although it codifies a duty to enforce, it is not an absolute duty.<sup>2</sup> The case law of the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), the highest administrative court in the Netherlands for environmental disputes, consistently states the

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1. See *Wet Milieubeheer* [Environmental Management Act] § 18.2 (2004) (Neth.), available at <http://www.eel.nl/documents/EnvironmentalManagementActMay2004.pdf>.

2. See *id.*

following: "In cases of non-compliance, authorities are *in principle* required to enforce the environmental standards. Only in extraordinary circumstances it can refrain from taking the appropriate measures."<sup>3</sup>

Although great emphasis lies in enforcing environmental law, it seems that enforcement is not a strict legal obligation because circumstances exist in which it is possible to refrain from taking enforcement measures. For instance, a public authority, confronted with non-compliance of environmental standards, must only enforce those standards absent extraordinary circumstances. Non-enforcement is acceptable to the Administrative Jurisdiction Division when the possibility exist to legalize the infringement (by granting a license) or when the discretionary power to enforce is exercised so unreasonably that no reasonable public authority could ever have come to it. Those familiar with English law will have no difficulty seeing the resemblance of *Wednesbury* (unreasonableness).<sup>4</sup> In this way the court does not decide what the reasonable authority would do, but only what no reasonable authority could do.<sup>5</sup>

A somewhat different situation arises when no infringement of environmental law has been found yet. The decision of a public authority to supervise the safety of establishments and companies has an important political dimension that involves prioritizing and costs. Public authorities do not have unlimited amounts of money to spend on supervision. Therefore, one can argue that this is a policy decision with large discretion available to the public authority concerned.

## B. European Influences

### 1. European Community Law

An important question is whether European Community Law forces Member States to enforce environmental standards. Most of the national water and air quality standards, emission-stand-

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3. See, e.g., Administrative Jurisdiction Division of the Council of State (Afdeling bestuursrechtspraak van de Raad van State) 11 August 2004, LJN: AQ6637. Cf. A.B. Blomberg & F.C.M.A. Michiels, *Between Enforcement and Toleration of Breaches of Environmental Law - Dutch Policy Explained*, in: 4 THE YEARBOOK OF EUROPEAN ENVIRONMENTAL LAW 181-208 (T.F.M. Etty & H. Somsen, eds., Oxford University Press 2005).

4. See *Assoc. Provincial Picture Houses v. Wednesbury Corp.*, (1948) 1 K.B. 223, 229 ("[T]here may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.").

5. See *id.* at 234.

dards for discharges in water and air, waste legislation, and regulation of nuclear energy, nature conservation, pesticides and biocides all have, at least in part, a European directive or regulation as their origin. European law is of great importance for Dutch environmental law because European directives require transposition into Dutch law.

The mere transposition of environmental directives into national law is, of course, not enough. The obligations they contain first have to be applied and then enforced. This is primarily a responsibility of the Member States. Article 175(4) of the European Community Treaty ("EC Treaty") states, in so many words, that the Member States shall implement the environmental policy.<sup>6</sup> The Court has held, in connection with Article 10 of the EC Treaty, that to the extent that environmental directives and regulations do not provide for specific enforcement obligations, national enforcement measures must be effective, proportionate, and dissuasive.<sup>7</sup> Furthermore, national rules dealing with infringements of Community environmental standards should not be less favorable than those governing infringements of national environmental law. The European Commission supervises the manner in which Community environmental law is enforced. Although the European Commission does not have any formal competence to ensure compliance with European environmental legislation in the territory of the Member States, inadequate enforcement may be a reason for the Commission to initiate proceedings for infringement of the Treaty.

Environmental directives sometimes contain provisions which require a certain type of enforcement by the Member States. Article 5(4) of Directive 76/464<sup>8</sup> provides an example of such enforcement. This directive compels national authorities to establish emission standards in permits to prevent water pollution. The provision states:

Should the emission standards not be complied with, the competent authority in the Member States concerned shall take all

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6. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, 1997 O.J. (C 340).

7. See Case C-186/98, *Ministerio Publico v. Nunes*, 1999 E.C.R. I-4883, ¶ 6.

8. Council Directive 76/464, ON POLLUTION CAUSED BY CERTAIN DANGEROUS SUBSTANCES DISCHARGED INTO THE AQUATIC ENVIRONMENT OF THE COMMUNITY, art. 5(4), 1976 O.J. (L 129) 23 (EC).

appropriate steps to ensure that the conditions of authorisation are fulfilled and, if necessary, that the discharge is prohibited.<sup>9</sup>

This provision implies, in our view, that it is not permitted to tolerate discharges which violate the Community emission standards of Directive 76/464.

Other environmental directives similarly contain enforcement provisions. A more recent example is the Seveso II Directive (96/82).<sup>10</sup> The Seveso disaster was an industrial accident that occurred in 1976 in a small chemical manufacturing plant in Italy. It resulted in the highest known exposure of 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) in residential populations which gave rise to the European Union industrial safety regulations, known as the Seveso directives. The second Seveso Directive was proposed because of severe accidents, amongst which was the aforementioned accident in Enschede. One of the objectives of the Seveso II Directive is to ensure increased consistency in enforcement at the European level through greater prescriptive detail of the obligations of the competent authorities. The most important new element of the directive is Article 18(2). It states that the competent authorities are required to organize an inspection system which can either consist of a systematic appraisal of each establishment or of at least one on-site inspection per year.<sup>11</sup> This European obligation has had its effect on Dutch legislation. Although the scope of the Seveso II Directive is limited to certain and not all industrial installations, it implies a legal obligation for public authorities to supervise a "Seveso-installation" at least once a year.

In most directives however, the requirement to enforce European law is stated in fairly general terms in the sense that Member States must take all appropriate legal or administrative action in case of infringement of the provisions of the directive or regulation. In the absence of concrete and specific provisions, Member States must first determine how the factual situation has to be brought in line with the legally desired situation.

According to case law from the European Court of Justice, directives have to be implemented not only in fact, but also in law. Thus, even where a directive is adequately transposed into national law, but the national provisions are not effectively enforced,

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9. *Id.*

10. See Council Directive 96/82, ON THE CONTROL OF MAJOR-ACCIDENT HAZARDS INVOLVING DANGEROUS SUBSTANCES, ART. 18, 1996 O.J. (L 10) 13, (EU).

11. *Id.* art. 18.2.

this will not suffice. The first time this was confirmed for environmental directives was in case C-42/89, in which the Court held that Belgium had failed to fulfill its obligations under the Treaty because the supply of drinking water to the city of Verviers did not in fact meet the required standards.<sup>12</sup>

A second example of a Court of Justice decision in which a Member State was held to have failed to implement a directive in fact is the *Blackpool* case.<sup>13</sup> In this case, the United Kingdom ("UK") was held to have failed to take all the necessary measures to ensure that the quality of bathing water in the bathing areas in Blackpool and adjacent to Formby and Southport conformed to the value limits set in accordance with Directive 76/160 on bathing water.<sup>14</sup> The main argument of the UK Government was that it had taken "all practicable steps" to meet the value limits.<sup>15</sup> The Court rejected this argument, observing that it was clear from Article 4(1) of the directive that the Member States are to take all necessary measures to ensure that, within ten years following the notification of the directive, bathing water conforms to the value limits set in accordance with Article 3 of the directive.<sup>16</sup> It added that this period is longer than that laid down for the implementation of the directive, namely two years from the date of notification (Article 12(1)), in order to enable the Member States to comply with this requirement.<sup>17</sup> The only derogations from the obligation contained in Article 4(1) are those provided for in Articles 4(3), 5(2) and 8.<sup>18</sup> The Court reached the following conclusion:

It follows that the directive requires the Member States to take steps to ensure that certain results are attained, and, apart from those derogations, they cannot rely on particular circumstances to justify a failure to fulfil that obligation.

Consequently, the United Kingdom's argument that it took all practicable steps cannot afford a further ground, in addition to the derogations expressly permitted, justifying the failure to fulfil the

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12. Case C-42/89, *Comm'n v. Kingdom of Belgium*, 1990 E.C.R. I-2821.

13. Case C-5/90, *Comm'n v. United Kingdom of Great Britain and Northern Ireland*, 1993 E.C.R. I-4109.

14. *Id.*

15. *Id.* at ¶ 20.

16. *Id.* at ¶ 28.

17. *Id.* at ¶ 42.

18. *Id.* at ¶ 43.



obligation to bring the waters at issue into conformity at least with the annex to the directive.<sup>19</sup>

The operative part of the judgment makes quite clear that there is nothing for it to do but to ensure that the bathing water conforms to the value limits set in the directive.<sup>20</sup> The Court declared that:

by failing to take all the necessary measures to ensure that the quality of the bathing water in Blackpool and of those adjacent to Southport conforms to the limit values set in accordance with Article 3 of Council Directive 76/160/EEC . . . the United Kingdom has failed to fulfill its obligations under the EEC Treaty.<sup>21</sup>

Another important case in this respect, again involving the UK, is case C-340/96. This case concerned the system of acceptance by the Secretary of State for the Environment of so called "undertakings" under Sections 18 through 24 of the Water Industry Act 1991.<sup>22</sup> Section 18 of the Act provides that, where a water company supplies water that does not comply with the purity requirements, the Secretary of State must in principle make an enforcement order.<sup>23</sup> Under Section 19(1) of the Act, the Secretary of State is not required to make an enforcement order in relation to any company if he is, *inter alia*, satisfied that the company in question has given an undertaking to take all such steps as it appears to him for the time being to be appropriate for the company to take for the purpose of securing or facilitating compliance with the relevant rules.<sup>24</sup> The Court ruled that Member States must, in order to secure the full implementation of directives in law and not only in fact, establish a specific legal framework in the area in question.<sup>25</sup> In the case of the mechanism of undertakings which was at issue in these proceedings, the Court held that this had not been achieved.<sup>26</sup>

[The Act] authorises the Secretary of State to accept an undertaking on the sole condition that it contains such measures as it appears to him for the time being to be appropriate for the company to take in order to secure or facilitate compliance with the

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19. *Id.* at ¶ 43-44.

20. *Id.* at ¶ 47.

21. *Id.* at Operative part, ¶ 1.

22. Case C-340/96, *Comm'n v. United Kingdom of Great Britain and Northern Ireland*, 1999 E.C.R. I-2023.

23. *Id.* at ¶ 3.

24. *Id.*

25. *Id.* at ¶ 7.

26. *Id.*

standards in question. The Act thus does not specify the matters to be covered by the undertakings, in particular the parameters to be observed in respect of derogations, the programme of work to be carried out and the time within which it must be completed, and, where appropriate, the information to be given to the population groups concerned.<sup>27</sup>

This judgment makes it clear that a statutory system which allows the government to tolerate the infringements of a directive is incompatible with Community law and it underlines the fact that failure to properly transpose a directive into national law as well as a factual infringement of Community standards may cause the Court to hold that a Member State has failed to fulfill its obligations.<sup>28</sup>

Finally, according to the judgment of the European Court of Justice in case C-494/01 (*Commission v. Ireland*) on twelve specific factual infringements of the Framework Waste Directive the Court ruled that:

[I]n principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate.<sup>29</sup>

In other words, the Commission is entitled to deduce from a series of *individual* infringements that there is a "general practice" of non-compliance and non-enforcement. This implies that the Commission is not only entitled to demand that these individual infringements of the Directive are remedied, but also that the public authorities in question change, more fundamentally and structurally, their enforcement policies.<sup>30</sup>

## 2. The European Convention on Human Rights

Besides the influence of the law of the European Community on the legal obligation to enforce environmental law, the decision

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27. *Id.* at 28.

28. *Id.*

29. Case C-494/01, *Comm'n v. Ireland*, 2005 E.C.R. I-33331.

30. Cf. P. Wenneras, *EC Environmental Law in National and Community Courts* (2006) (Unpublished Ph.D. dissertation, University of Amsterdam, the Netherlands) (Peter Wenneras) at 205-212.

in the *Öneryildiz* case by the European Court of Human Rights has had considerable influence on the debate in the Netherlands.<sup>31</sup>

Öneryildiz, a Turkish national, and the twelve members of his family, were living in the shantytown of Hekimbasi Ümraniye near Istanbul.<sup>32</sup> This town was nothing more than a collection of slums built on land surrounding a rubbish tip which had been used jointly by four district councils since the 1970s and was under the authority and responsibility of the main City Council of Istanbul.<sup>33</sup> An expert report prepared on May 7, 1991, at the request of the Üsküdar District Court, drew the authorities' attention to the fact that no measure had been taken to prevent a possible explosion of the methane gas being emitting from the decomposing refuse.<sup>34</sup> On April 28, 1993 a methane-gas explosion occurred at the waste-collection site and the refuse erupting from the pile of waste buried eleven houses situated below it, including the one belonging to Öneryildiz.<sup>35</sup> Öneryildiz lost nine members of his family in the explosion.<sup>36</sup>

Following criminal and administrative investigations of the explosion, the mayors of Ümraniye and Istanbul were brought before the courts.<sup>37</sup> On April 4, 1996 the mayors were both convicted of "negligence in the exercise of their duties" and sentenced to a fine of 160,000 Turkish liras ("TRL") and the minimum three-month prison sentence provided for in Article 230 of the Criminal Code, which was, moreover, commuted to a fine.<sup>38</sup> The court ordered a stay of execution of those fines.<sup>39</sup>

Subsequently, on his own behalf and on the behalf of his three surviving children, Öneryildiz filed an action for damages in the Istanbul Administrative Court against the authorities which he deemed liable for the death of his relatives and the destruction of his property.<sup>40</sup> He complained under Article 2 (right to life) of the ECHR that the accident had occurred as a result of negligence on

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31. *Öneryildiz v. Turkey*, 39 Eur. H.R. Rep. 12 (2004).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

the part of the relevant authorities.<sup>41</sup> He also complained of the deficiencies in the administrative and criminal proceedings instituted under Article 6, section 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy).<sup>42</sup> In a judgment dated November 30, 1995, the authorities were ordered to pay the Öneriyildiz and his children TRL 100,000,000 in non-pecuniary damages and TRL 10,000,000 in pecuniary damages (at the time, the equivalent of approximately 2,077 and 208 euros respectively), the latter amount being limited to the destruction of household goods.<sup>43</sup>

Regarding the implementation of preventive measures for the rubbish tip, the Court noted that relevant protective regulations did exist.<sup>44</sup> The expert report showed that the rubbish tip did not comply with certain technical standards and the local and ministerial authorities had failed to take the measures required by the relevant regulations to ensure those standards were met.<sup>45</sup> Although some decontamination work had been commenced in 1989, the Court noted that it had been stopped by court order, i.e., a State organ whose decision had prolonged the deplorable situation with regard to the rubbish tip.<sup>46</sup> The Court considered that the expert report of 1991 had merely highlighted a situation of which the municipal authorities were supposed to have knowledge and be in control, especially as there were specific regulations that had not been complied with.<sup>47</sup> The Court found that although the national authorities had not encouraged the applicant to set up home near the rubbish tip, they had not dissuaded him from doing so either.<sup>48</sup> The Court noted the extent of the authorities' negligence and found that Öneriyildiz established a causal link between their negligence and the accident.<sup>49</sup> Accordingly, the Court held that the administrative authorities had known or should have known that the inhabitants of certain slum areas had been faced with a real threat, the authorities had failed to remedy the situation, and they had not done all that could reasonably have been

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

expected of them to avoid the risks in question.<sup>50</sup> Moreover, the authorities had failed in their duty to inform the inhabitants of the area of those risks.<sup>51</sup>

The Court found that there had been a violation of Article 2 because of unsatisfactory enforcement measures, unless the applicant's complaints could be deemed to have been remedied in the domestic proceedings by the effective implementation of the appropriate judicial machinery.<sup>52</sup> The Court found that the criminal proceedings, as conducted (the subject of the trial had been limited to "negligence;" the negligible amount of the fines), could not be considered to have been an adequate and effective remedy.<sup>53</sup> The same was true of the administrative proceedings: Öneriyildiz's right to compensation had not been acknowledged until four years, eleven months and ten days after his first claims for compensation had been dismissed and the EUR 2,077 compensation – a questionable amount itself – awarded to him had not yet been paid.<sup>54</sup>

### III. PRIVATE LIABILITY FOR NON-ENFORCEMENT?

#### A. Dutch Liability Law

The main tool to assess the conduct of public authorities is the general tort law provision in Dutch law, Article 162 of Book 6 of the Civil Code (*Burgerlijk Wetboek*). According to this provision, only the infringement of a right, a breach of a statutory duty, or a breach of a duty that follows from unwritten law can result in liability. These three grounds are equally applicable for public and private bodies and for every person. The last two grounds are of special interest to answer the central question in this paper.

The question as to whether a statutory duty exists is one we tried to answer in the foregoing paragraph about the administrative law requirement to enforce environmental law. If such a duty for a public authority existed, non-enforcement could amount to a wrongful act and could therefore cause liability. In specific cases, a statutory duty to supervise and enforce environmental law exists in the Netherlands. Although the transposition of the aforementioned Seveso II Directive, in fact, will imply in some cases a

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at n. 9.

statutory duty to supervise (and perhaps to enforce) and the influence of European Community law is pointing in the same direction, until now these arguments have never led to the liability of a public authority for breach of a statutory duty to enforce.

The "absence" of a statutory duty to enforce puts even more emphasis on the possibility that a duty that follows from unwritten law, a duty to take "due care," could lead to private law liability. In the case where public authorities know about the non-compliance and the risk involved, the question about the liability is reasonably easy. In those circumstances, one could easily conclude that there was a failure to take due care. Did not the legislature state that the local authority was entitled to enforce the safety rules? Could not the inhabitants in the vicinity of S.E. Fireworks in Enschede assume that the public authority would have taken the necessary measures vis-à-vis the owner of the company to comply? The answer to these questions could easily be affirmative. A more difficult situation is the one in which the public authority does not know about the non-compliance, but could have had an unwritten duty to find out about it and is, by not doing so, negligent. In these cases the Dutch judiciary applies the criteria that were set forth by the Supreme Court of the Netherlands (*Hoge Raad*) in the famous *Basement Hatch* case about an opened basement hatch and the duty to warn about the dangers. These general criteria state that: (1) the greater the severity and the scale of the possible damages (mainly bodily injury); (2) the greater the chance that the damage could occur; and (3) the graver the danger, the greater the duty to take care. Finally, the Court states that the less difficult (time, costs, and trouble) it is to take precautionary measures (isolated as well as in relation to the possible damage), the more one is required to take such measures. These criteria have not been developed in cases of liability for non-enforcement but should be regarded as the Dutch guidelines for answering the question of liability in cases where the non-enforcement was caused by omission and lack of knowledge of the non-compliance.

In applying these guidelines, one should always take into account that the legislature has assigned the duty to enforce to the competent public authority and that in doing so it influenced the duty to take care. The same can be said for the administrative case law according to which the competent public authority in principle has the obligation to enforce environmental law. In Dutch literature the main argument in favor of liability is the

trust that the general public is entitled to have.<sup>55</sup> The public at large must be able to trust that public authorities do supervise and enforce the law. On the other hand, it has been argued that the root of the problem does not lie with the public authority, but with the company that did not comply with environmental standards. That the government operates solely in the interest of the public, and not in the interest of individuals, thus the possibility of liability will lead to a flood of claims. One has to consider that these arguments may have a role in determining whether there was a failure of the duty to take due care.

In most cases a statutory duty will be absent and it will difficult to prove the failure of a duty to take due care. Still, there seems to be the possibility of holding public authorities liable for non-enforcement of environmental law. Dutch law recognizes a set of requirements to do so. Besides the question of attribution of the wrongful act or wrongful omission to the public authority, which will not be a major problem in cases of non-enforcement, there are two well discussed requirements.

### 1. Causation?

A much discussed subject in tort law is causation. For a public authority to be held liable, it must be shown that the particular acts or omissions were the *cause* of the loss or the damage sustained. This element of causation, with respect to this paper, must be addressed because the primary cause for the loss or damage of non-compliance is not the conduct of the public authority, but the violation of environmental law by a third party. The courts in the Netherlands, however, have not given any reason to believe that this would be a sound argument to refuse a claim against a non-enforcing public authority. In fact, most lawyers accept the possibility of multiple causes, especially in cases of non-enforcement. Both third parties and the public authority can be held liable. Dutch law does state, however, that if a wrongful act or omission gives rise to a risk and the risk has subsequently been realized, it is not up to the plaintiff to prove the causal relation between the conduct of the public authority and the loss or dam-

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55. C.C. van Dam, *Aansprakelijkheid van de overheid wegens onvoldoende toezicht en handhaving*, in: A.J. Akkermans & E.H.P. Brans (red.), *Aansprakelijkheid en schadeverhaal bij rampen*, Nijmegen: Ars Aequi Libri 2002, p. 112-113; Cf. also: A.A. van Rossum, *Civielrechtelijke aansprakelijkheid voor overheidstoezicht* (oration Utrecht), Deventer: Kluwer 2005 and I. Giesen, *Toezicht en aansprakelijkheid*, Deventer: Kluwer 2005.

age as would normally be the case. Rather, the defendant must prove that the loss or damage would have also occurred without his conduct.

The question of whether the required causal relation is in fact a considerable obstacle for any claim against a public authority for non-enforcement has to be answered in the negative.

## **2. Is the Plaintiff's Interest Protected by the Law?**

An important limitation on the liability of public authorities for non-enforcement is the condition that the plaintiff's interest must be protected by the law per Article 163 of Book 6 of the Dutch Civil Code. More specifically, a court must determine whether the conduct of the public authority violated a rule that protects the plaintiff's interest. This condition plays an important role in Dutch tort law and is bipartite. The legislature explained that the objective of Article 163 of Book 6 of the Dutch Civil Code is to decline liability if: (a) the norm breached (written or unwritten) does not protect the interest of the plaintiff, and if (b) the type of damage (personal injury or financial damages) must fall within the scope of protection the norm offers. Recent Dutch case law of the Supreme Court of the Netherlands has demonstrated that this limitation seems to effectively block any claim against public authorities for non-enforcement of environmental law.

The case most discussed in the Netherlands regarding non-compliance is the *Vessel Linda* case. In the case, no person was injured, but the damage was substantial. The second-hand, old, and rusty vessel "Linda" was subject to supervision according to a Dutch law that governs the river-worthiness of vessels on the river Rhine. After inspection by the competent public authority, the vessel was granted a certificate to make use of the river Rhine for another seven years. Under normal circumstances the public authority would have granted this certificate for another five years, but in this case, the public authority apparently was convinced that it was alright to grant the certificate for the seven years rather than five. Several months later, in April 1992, the vessel was being loaded with sand. During the night of April 22, 1992, the "Linda" sunk due to it being poorly maintained and corroded. "Linda" was alongside a floating dredge-combination called the "Annette," which sunk with her. It was clear that the "Linda" caused the accident and the damage to the "Annette." Dutch courts ruled that the public authority which inspected the "Linda" had not done so in a careful manner. Nonetheless, the main ques-



tion that still needed to be answered was whether the damage sustained by the plaintiff, the owner of the "Annette," was indeed protected by law. In other words, did the law protect the plaintiff's interest against the particular hazard encountered? The Supreme Court in the Netherlands ruled that this was not the case. It said that the law was written for the general interest and was concerned with the safety of vessels on the Rhine, but was not written to protect the plaintiff from the financial damages sustained. Although one could interpret this ruling as dismissing all claims of liability for non-enforcement, the exact scope of this verdict is still rather unclear. An important question, for instance, is whether the Supreme Court would have ruled otherwise if there would have been personal injury involved.

This case demonstrates that if liability for non-enforcement is possible at all, non-enforcement of environmental law is not the most likely candidate, for it is primarily written in the general interest.

## B. European Influences

Major parts of environmental law in Europe have a European Union ("EU") dimension. In other words, a failure to enforce national law will also imply a failure to enforce European law. This triggers the question of whether a failure of public authorities to enforce environmental legislation with an EU dimension can result in liability to pay damages *as a matter of European law*.

Early Dutch case law concerning a nuclear power station at Borssele showed the possible use of EC law to substantiate a claim for damages vis-à-vis state authorities. In this case The Hague district court observed that the State would be acting unlawfully if it allowed the radiation standards in the Euratom Directive to be exceeded. Environmental organizations had argued that the State was acting unlawfully by exceeding the maximum admissible doses of radiation laid down in the Euratom directives. The court ruled that the directives conferred direct rights on individuals which they could rely on in proceedings against the state. However, the claim was dismissed because there was no evidence that the standards had been exceeded.

In the early 1980s, the European Court of Justice ("EJC") ruled in the notorious *Francovich* case<sup>56</sup> (not dealing with environmental issues at all) "that it is a principle of Community law

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56. Case C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.”<sup>57</sup> In subsequent cases,<sup>58</sup> the Court ruled that individuals who had suffered damage had a right to reparation where three conditions were met: (1) the rule of law infringed must have been intended to confer rights on individuals; (2) the breach must be sufficiently serious; and (3) there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.<sup>59</sup> In particular, it is the first condition that will cause serious problems in environmental cases.

Let us assume that there is a legal duty *as a matter of European law* for state authorities to take adequate enforcement measures and, that by not doing so, a public authority breaches European law. If so, does rule or regulation that has been violated – in this case, failing to take adequate enforcement measures – aim at protecting individuals? The case law of the ECJ shows that the most difficult cases that decided this issue were those where the regulation: (a) aimed to protect the rights of individuals; and (b) did not directly affect the rights of individuals, but only indirectly, or in other words, through an obligation of the state.

The problems referred to under (a) above can be illustrated with reference to the Court’s judgment in the *Peter Paul* case.<sup>60</sup> Peter Paul and others were customers of the BVH Bank.<sup>61</sup> In 1987 the bank received authorization from the *Bundesaufsichtsamt* (German supervisory authority) to engage in banking transactions.<sup>62</sup> In the 1990s the bank suffered from financial difficulties, prompting the *Bundesaufsichtsamt* to examine its affairs.<sup>63</sup> In November 1997 the bank filed a bankruptcy petition and the *Bundesaufsichtsamt* subsequently revoked the bank’s authorization.<sup>64</sup> Paul and others brought proceedings against the Republic of Germany, seeking compensation for the loss of their

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57. *Id.* at ¶ 37.

58. Case C-46/93 & C-48/93, *Brasserie du Pêcheur v. Germany & The Queen v. Sec’y of State for Transp. ex parte Factortame, Ltd.*, 1996 E.C.R. I-1029; Case C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94, *Dillenkofer et. al. v. Germany* 1996 E.C.R. I-04845.

59. *See Brasserie du Pêcheur* at ¶ 51; *see also Dillenkofer* at ¶ 21.

60. Case C-222/02, *Peter Paul and others v. Germany*, 2004 E.C.R. I-9425.

61. *Id.* at III ¶ 17.

62. *Id.*

63. *Id.* at III ¶ 19.

64. *Id.* at III ¶ 20.

deposits.<sup>65</sup> The Court concluded that the applicable European Banking directives could not be regarded as conferring on individuals specific rights capable of giving rise to State liability on the basis of Community law.<sup>66</sup> The Court looked for individual rights in the directives but did not find them.<sup>67</sup> That one of the objectives of the directives was to protect depositors was insufficient to create "rights for individuals."<sup>68</sup> Evidently, the Court required that the particular Community rule that was violated *must specifically* aim to protect the rights of individuals.

In many cases it is quite clear whether the directive in question aims to create specific rights and obligations for individuals. However, the situation is more complicated in regards to most of the directives that are relevant in the field of environmental law. Consider, for example, the obligations under the Environmental Impact Assessment Directive.<sup>69</sup> Under this directive, an environmental impact assessment must be carried out before consent is given for certain projects likely to have significant effects on the environment.<sup>70</sup> From case law of the European Court of Justice, it is clear that interested third parties may rely on these provisions when before national courts. However, the directives do not give third parties a right to have an environmental impact assessment carried out as they are only affected indirectly by the obligations of the State. Nevertheless, in *Wells*, the Court of Justice stated, albeit in an *obiter*, that a Member State may be liable for a breach of an obligation not to grant a consent before an environmental impact assessment has been carried out.<sup>71</sup> Apparently the Court of Justice found that this provision intended to confer rights on individuals.

Other national courts have also applied a similar, comparatively strict *Schutznorm* requirement. One example is the Dutch Rechtbank Den Haag in the *Shapiro* case.<sup>72</sup> Shapiro, a clinical physicist, argued that the Netherlands should compensate him for damage arising as a consequence of its unlawful action, princi-

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65. *Id.* at III ¶ 22.

66. *Id.* at V ¶ 101.

67. *Id.* at V ¶ 94-100.

68. *Id.*

69. Council Directive 2003/35/EC, 2003 O.J. (L 156) 17-25.

70. *Id.*

71. Case C-201/02, *Wells v. Sec'y of State for Transp. Local Gov't and the Regions*, 2004 E.C.R. I-723, ¶ 66.

72. *Shapiro*, Rechtbank Den Haag [Hague District Court], Den Haag, 12 februrari 1996, RAwb 90 (ann. R. de L.) (Neth.).

pally for loss of wages, because the Netherlands had for years been in default in implementing Euratom directive. As a result, demand for clinical physicists had been minimal and he had been unable to find work in the Netherlands. His claim was dismissed, the court holding that it was not the purpose of this directive to create employment for physicists. The court held that the Netherlands had not acted unlawfully towards Shapiro.

In another case examining state liability to individuals, the Dutch Gerechtshof Den Haag (The Hague appeals court), recently issued a judgment concerning Article 5 in combination with Annex III of the Nitrate Directive (91/676).<sup>73</sup> Under this provision, Member States must establish and implement action programmes to reduce and prevent pollution caused by nitrates. The action programmes must include measures which ensure that the amount of livestock manure applied to the land each year does not exceed 170 kg per hectare. In the view of the Gerechtshof, these provisions were not intended to confer rights on individuals on the basis of which individuals could hold the state liable for the cost of purifying ground and surface water, or the cost of alternative drinking water. It held that the directive did not lay down an obligation by the state to guarantee a particular quality of water, upon which individuals could then base quality entitlements as against the state.

This latter judgment seems to be at odds with a decision of the French Tribunal administratif (administrative court) at Rennes.<sup>74</sup> In 1995, the Tribunal d'instance (district court) at Guincamp had ordered the Société Suez Lyonnaise des Eaux to pay compensation to 176 subscribers to its drinking water distribution network on account of the excessive nitrate content of the water it distributed. The Société accordingly brought proceedings before the Tribunal administratif to obtain compensation for the state's late transposition of Article 5 of Directive 91/676. The Tribunal accepted this argument and concluded that the state was liable.

An English decision concerning several environmental directives also sheds light on this issue. In *Bowden v. South West Water and Another*, a mussel fisherman claimed that he had been

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73. The Netherlands/Waterpakt, Gerechtshof Den Haag [Hof] [Dutch Court of Appeal], Den Haag, 27 oktober 2005, M&R 2006/1, nr. 4 (ann. J.J.) (Neth.).

74. *Annual Report on Monitoring the Application of Community Law*, COM 2002 324 (June 28, 2002) (French Tribunal administratif Rennes, judgment given on 2.5.2001, Société Suez Lyonnaise des Eaux, req. No 97182).

driven out of business because of water pollution in the fishing waters which had been classified under a directive.<sup>75</sup> The fisherman pleaded the breach of the Bathing Waters Directive (76/160), the Shellfish Waters Directive (79/923) and the Urban Waste Water Directive (91/271).<sup>76</sup> The Court of Appeal applied the following test: "The question is whether the provision was adopted in order to protect the interests of the person who claims to be entitled to a right under the directive . . . ."<sup>77</sup> The High Court judge who heard the case, whose conclusion was followed by the Court of Appeal, noted that the plaintiff's claim was as a fisherman and observed that neither the Bathing Waters Directive nor the Urban Waste Water Directive was intended to confer rights on mussel fisherman:

There is nothing in either which could possibly be said to entail the grant of rights to shell-fisherman, or which would enable the content of any such a right to be identified. They are concerned with different subject matter. Of course, improvements in water quality for bathers, and in treatment standards of waste water, may assist other interest groups, but that is not enough to give them a right of action.<sup>78</sup>

As regards the Shellfish Directives, the Court of Appeal agreed with the High Court judge that they were at least related to the plaintiff's activities, and that it could be said that if there was a failure by the United Kingdom to implement or to comply with the requirements of those directives it could have contributed to the loss of the plaintiff's fishing grounds.<sup>79</sup> However, if there was a breach, it would be a breach of an obligation owed to the public in general and there was nothing to tie such a breach to specific rights of individuals or which would enable the content of such a right to be ascertained.<sup>80</sup> Accordingly, the court held that there was no basis for a claim for damages.<sup>81</sup>

This judgment is particularly interesting because the court adopted the position that where the rule applied as the basis of the claim aims to protect "the public in general" it could not give rise to an individual's successful claim for damages. If this posi-

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75. *Bowden v. South W. Water Services Ltd.*, 3 C.M.L.R. 330 (Q.B.D. 1998), *aff'd* 3 C.M.L.R. 180, 180 (C.A. 1999).

76. *Bowden*, 3 C.M.L.R. 180 at 180.

77. *Bowden*, 3 C.M.L.R. 180 at 184.

78. *Bowden*, 3 C.M.L.R. 330 at 345.

79. *Bowden*, 3 C.M.L.R. 180 at 185.

80. *Id.*

81. *Id.*

tion were correct, it would mean that infringements by the state of, for example, environmental (air and water) quality standards could not give rise to liability to individuals. Even though the standards are intended to protect the individual, individuals would not be able to base a right to enforce them on the directives. In our view, it is impossible to base such a strict interpretation on the decisions of the Court of Justice with any certainty. We shall therefore have to await further developments on this point.

#### IV. CONCLUDING REMARKS

In general, no one will dispute that environmental legislation is intended to be enforced. In the Netherlands this intention is recognized in the case law of the Administrative Jurisdiction Division. Although no statute obligates public authorities to enforce environmental law, the case law states that, if a public authority is confronted with a situation of non-compliance and an absence of extraordinary circumstances, the public authority should take measures to force compliance. In this way, administrative law acknowledges the duty to enforce. Some European directives more or less state the obligation for Member States to enforce environmental law. In absence of such explicit provisions, the intention of enforcement is reinforced by the case law of the European Court of Justice. The case law states that directives must be implemented not only in fact, but also in law. In many cases the European Court demands that Member States take all necessary measures to ensure compliance with environmental standards. As a matter of principle we can assume that public authorities are under a legal duty to enforce environmental legislation. The main question in this paper is whether public authorities are, by not enforcing, liable to pay damages. The duty to enforce environmental law is considered to be in the general interest and not aimed at protecting the rights of individuals. This consideration seems to effectively block any claim against public authorities for non-enforcement.

A similar approach to the liability of public authorities can be found in the English common law system.<sup>82</sup> As is the case in the Netherlands, the English courts exercise considerable restraint in awarding judicial review remedies in respect of governmental policy decisions. One of the requirements for liability is that the defendant ought to have foreseen that the plaintiff might suffer

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82. Cf. PETER CANE, *AN INTRODUCTION TO ADMINISTRATIVE LAW* 242 (3rd ed. 1996).

injury or damage if the defendant acted negligently and that there was a sufficient relationship of *proximity* between the plaintiff and the defendant. The concept of proximity has been used as the basis for refusing to impose a duty of care in several cases where it was alleged that by negligence in exercising its functions, a law-enforcement authority had failed to prevent the plaintiff from suffering loss or damage as a result of conduct of a third party. The authority's function, as was decided in Dutch case law, was to protect the public as a whole, not as specific individuals. In addition, English tort law recognizes the need for compatibility with the statutory scheme, which requires the courts to decide whether the imposition of a duty of care would be consistent with the general scheme and particular provisions of the relevant statute.<sup>83</sup> In English law, the concept of proximity and the requirement compatibility with the statutory scheme do block effectively, as does the idea in European and Dutch law that the duty to enforce environmental law is not aimed at protecting the rights of individuals, any liability of public authorities for non- or unsatisfactory enforcement of environmental law.

It is generally conceded that these concepts are simply a cover for giving effect to value-judgments about the desirable scope of liability. Because we feel there is no sound argument against constructing liability of public authorities for non- or unsatisfactory enforcement of environmental law, there is an opportunity, and perhaps a need, to reinterpret and redefine the scope of the duty to enforce in a way that protects the rights and interests of individuals.

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83. See *Yuen Kun Yeu v. AttorneyGeneral of Hong Kong*, [1988] A.C. 175, 178-81 (P.C. 1987); *Hill v Chief Constable of West Yorkshire*, [1989] A.C. 53, 55-62 (H.L. 1988); *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.*, [1985] A.C. 210, 212-13 (H.L. 1984); *Murphy v Brentwood D.C.*, [1991] I A.C. 398, 403-10 (H.L. 1990).