elni
REVIEW

1+2/2013

ISSN 1618-2502

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L´ENVIRONNEMENT

INTERNATIONALES
NETZWERK
UMWELTRECHT

elni REVIEW

Editorial

The aim of the Environmental Impact Assessment (EIA) process is to ensure that projects which are likely to have a significant effect on the environment are assessed in advance so that people are aware of what those effects are likely to be. The review process conducted by the Commission of the 25 year-old "EIA-Directive" identified its potential strengths and weaknesses. Set against this background, the current edition of the *elni review* is dedicated to legal challenges in the implementation of Environmental Impact Assessment.

Firstly, an overview of challenges and perspectives of the EU Environmental Impact Assessment Directive is given by *Sergiusz Urban and Jerzy Jendrośka* in their review of the elni conference held on May this year in Wroclaw which examined the proposed changes of the EIA Directive in the light of practical experience gathered up to now (Member States experience, jurisprudence of EU courts and international bodies) and views expressed in literature.

Subsequently, the Appropriate Impact Assessment and Authorisation Requirements of Plans and Projects likely to have significant impacts on Natura 2000 sites are examined by *Nicolas de Sadeleer*. The aim of his article is to shed light on the procedural requirements of the Habitats Directive, which are a key provision for implementing the EU's system of protecting and preserving biological diversity in the Member States.

The third article is written by *Eckard Rehbinder* and argues for (suitable) criteria for the assessment of the likely environmental impacts of projects which are subject to the EIA, focusing on the assessments carried out by the competent authority and the assessment elements of the environmental report and the consultation of interested authorities.

The final article which concentrates on EIA is by *Gijs Hoevenaars* and analyses the quality review of EIAs and Strategic Environmental Impact Assessments (SEA). With regard to the current discussions in Europe on this subject, this article provides an insight into Dutch experiences with the quality review of EIA and SEA.

Further articles are dealing with current EU legal issues.

The article of *Ludwig Krämer* analyses the practice of access to documents within the EU on the basis of several examples of legislation, and its use and interpretation by the EU Courts of Justice in the area of access to environmental information.

In a further article *Lorenzo Squintani* discusses the practice of national bodies exceeding the terms of European Union directives when implementing them into national law. He analyses certain provisions of the Directive 2008/98/EC on waste in order to understand the functioning of the Dutch policy on so-called "gold-plating".

Finally, *Peter Kremer* examines whether mercury depositions which are emitted by Coal-Fired Power Stations are in line with the Industry Emission Directive and the Water Framework directive. Furthermore, he analyses what instruments are available under prevailing law to prohibit the construction of new coal-fired power stations and to make their approval subject to judicial review.

We hope you enjoy reading the journal.

Contributions for the next issue of the *elni Review* are very welcome. Please send contributions to the editors by mid-February 2014.

Claudia Fricke/Martin Führ

December 2013

Pre-announcement

elni forum 2014

February 2014
in Brussels, Belgium

The elni forum will take place in February 2014, at EU Liaison Office of the German Research Organisations (KoWi), 8th Floor, Rue du Trône 98, 1050 Brussels.

The elni forum 2014 will offer the opportunity to discuss environmental footprint issues in environmental law from different point of views:

"Environmental Footprints–
Key issues and practical experiences"

With an introduction by

Arjen Hoekstra, *Professor for Water Management and co-founder and scientific director of the Water Footprint Network, University Twente, Netherlands.*

Imola Bedo*, Production Coordinator DG Environment, European Commission, Brussels.*

Arjen Hoekstra presents key issues on the concept and developments on the water footprint. Imola Bedo will provide the point of view of the EU green products policy (PEF, OEF, PCRs, product passport). Furthermore there we will be the possibility to discuss the topic from an NGO and business perspective.

Further information to follow soon on www.elni.org

The Dutch policy on gold-plating and the transposition of Directive 2008/98/EC on waste

Lorenzo Squintani

1 Introduction

Directive 2008/98/EC,[1] recasting inter alia Directive 2006/12/EC,[2] sets minimum requirements in the field of waste management.[3] This means that the Member States have the competence to take measures, which achieve a higher level of environmental protection than that required by the Union legislator, so-called gold-plating.[4]

Since some years, European citizens are assisting to a pan-European discussion on gold-plating. In the context of the Better Regulation agenda, [5] EU institutions consider gold-plating a constraint to good regulation.[6] The United Kingdom, the Netherlands, Belgium, Germany and Austria increasingly refrain from gold-plating.[7] In the United Kingdom and in the Netherlands, gold-plating is regulated by centralised official policies aiming at fostering economic growth.[8]

Despite the relevance that these policies might have for the implementation of Union environmental law and, even more importantly, for the functioning of the system for the protection of the environment as shaped in the Treaties,[9] there is still a lack of empirical data on the manner in which these policies apply in practice. This article represents a first attempt to fill-in this lacuna, by focusing on the transposition of Directive 2008/98/EC in the Netherlands.

In the Netherlands, Directive 2008/98/EC was transposed in 2011 after the Dutch Association of Waste Management Installations had insistently requested the Dutch government to block gold-plating.[10] This suggests that gold-plating was present in the past. Moreover, it has been recently underlined that environmental protection in the field of waste management does not seem to affect economic growth, [11] and that the Netherlands can become a raw-material centre for Europe.[12] These statements show that the Netherlands is paying particular attention to the relationship between environmental protection and economic interests in the field of waste management. In this contribution, I will analyse certain provisions of Directive 2008/98/EC in order to establish whether alleged cases of gold-plating were eliminated and whether new cases of gold-plating were introduced (Section 3). This analysis will provide useful information for understanding the functioning of the Dutch policy on gold-plating. First, however, it is necessary to explain what gold-plating means and what the Dutch policy on gold-plating entails (Section 2).

2 Gold-plating and the Dutch policy constraining it

2.1 Gold-plating: a definition

In the Netherlands, gold-plating is called national topping (*nationale kop*). The Dutch government commissioned two studies, so-called *ECORYS* and *Europa Institute en Asser Institute* reports, to establish in how many cases Dutch law put obligations upon individuals that were not required under Union law.[13] The *Europa Institute en Asser Institute* report defines gold-plating as cases in which the Netherlands, by the correct implementation of Union directives and in some case regulations, goes further than that which is strictly necessary as specified in the relevant Union

1 OJ 2008 L 312/3.

2 OJ 2006 L 114/9. This Directive codified Directive 75/442/EEC (OJ 1975 L 194/39), as amended by Directive 91/156/EEC (OJ 1991 L 78/32).

3 Article 193 TFEU and, inter alia, Case, C-203/96, Dusseldorp [1998] ECR I-7045; Case, C-318/98, Fornasar [2000] ECR I-4785; Case, C-324/99, DaimlerChrysler [2001] ECR I-9897; Case, C-194/01, Commission v. Austria [2004] ECR I-4579; and Case, C-6/03, Deponiezweckverband Eiterköpfe [2005] ECR I-2753.

4 This concept is further explained in section 2 below.

5 This agenda was launched with the the Lisbon Strategy in 2000, recently followed by Europe 2020 Strategy for smart, sustainable and inclusive growth, COM(2010) 2020. The latest initiative in this field has been the Communication on EU Regulatory Fitness COM(2012) 746 final.

6 See Commission Working Document - Second progress report on the strategy for simplifying the regulatory environment, COM(2008) 33 final, 30 January 2008, p. 10. See also European Parliament resolution of 4 September 2007 on Better Regulation in the European Union (2007/2095(INI)); European Parliament resolution on the implementation, consequences and impact of the internal market legislation in force (2004/2224(INI)); and European Parliament resolution of 21 October 2008 on 'Better law making 2006' pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (2008/2045(INI)).

7 Cf. L. Krämer, *EC Environmental Law*, Sweet & Maxwell, 7th Edition (London 2011), p. 440. See J.H. Jans & L. Squintani with A. Aragão, R. Macrory and B.W. Wegener, *'Gold Plating' of European environmental measures?*, in *Journal of European environmental and Planning Law*, 2009, vol. 6, issue 4, pp. 417-435.

8 See J.H. Jans & L. Squintani et al, quoted at 7, pp. 417-435.

9 See, P. Pagh, *The Battle of European Policy Competences*, in R. Macroy (ed.), *Reflections on 30 Years of EU Environmental Law*, Europa Law Publishing, 2006, pp. 3-16, at pp. 5-15, J.H. Jans & L. Squintani et al, quoted at 7, p. 435, and L. Krämer, quoted at 7, p. 440.

10 See for example Vereniging Afvalbedrijven, *Annual Review 2010*, p. 3.

11 VROM, *Landelijk Afvalbeheerplan* 2009-2021, pp. 24 and 25. In September 2011, the Netherlands started disposing of 248,000 tons of waste from Naples, for EUR 12 million.

12 Vereniging Afvalbedrijven, *Annual Review 2010*, p. 1.

13 ECORYS, OpdenKamp Adviesgroep en Europa Instituut, *Koppen op EG-regelgeving. Eindrapportage definitief*, Rotterdam 2006, and Europa Institute en Asser Institute, National Koppen op EG-regelgeving. *Tweede ronde van meldingen van het bedrijfsleven over 'koppen' in de Nederlandse wet- en regelgeving, juridisch bekeken,* Leiden 2007.

directives.[14] The *Europa Institute en Asser Institute* report provides a further categorisation of the various kinds of measures falling within this general definition.[15] The government has adopted this definition,[16] which however, has been partially criticised in legal journals.[17] Broadly speaking, gold-plating in the Netherlands covers cases in which Dutch law establishes stricter standards than required by EU law, it does not take advantage of exceptions, it enlarges the field of application of a EU legal regime (so-called spill overs), or, more recently, regulates a subject matter which has not been regulated by Union law, but which is strictly related to a topic regulated by the Union legislator. For example, the protection of national parks which do not fall within the scope of application of the Habitats Directive has been considered a case of gold-plating, despite the fact that these sites are protected by a different legal regime than that applied to national parks covered by this Directive.[18] We could call this kind of measure a 'related measure'.

Gold-plating and more stringent protective measures

Gold-plating is a term derived from the political world. The Treaties use a different concept: that of 'more stringent protective measures' (Article 193 TFEU). The exact meaning of this concept is still discussed in the literature.[19] However, it is clear that Article 193 TFEU does not cover cases where a Member State does not take advantage of exceptions. Moreover, Article 193 TFEU does not cover measures which fall outside the scope of the application of Union law. Gold-plating seems to be an overarching concept covering: a) measures that do not take advantage of exceptions, b) more stringent protective measures, and c) spill overs and related measures.

2.2 The Dutch policy on gold-plating

In 1995, with the program "Market-functioning, Deregulation and Law-Making Quality" (*Marktwerking, Deregulering en Wetgevingskwaliteit*) the Dutch legislator started taking concrete action to lower the administrative burden on business. In the beginning of 2000s, this discussion started to focus on gold plating. Following the government coalition agreement reached in 2003,[20] an official policy on gold-plating was introduced in the Netherlands. Originally, it only covered environmental law and aimed at avoiding the introduction of *new* cases of gold-plating.[21] Later, it was expanded to any field of law and to existing cases of gold-plating.[22] Under this policy, gold-plating had to be avoided, unless a specific Dutch interest required otherwise. The clause 'unless a specific Dutch interest requires otherwise' was no longer present under the government coalition agreement of 2010.[23] Under the 2010 agreement, all cases of gold-plating had to be 'tracked down and eliminated'.[24] In 2011 the government even changed the Dutch Lawmaking Guidelines.[25] Guideline 331 states that transposition should be limited to what is strictly necessary. Until 2011, this guideline was only concerned with avoiding delays. Today, this provision also serves to avoid constraining the competitive position of Dutch industry. With the 2012 Dutch general elections a new government coalition was formed. Remarkably, the 2012 coalition agreement does not mention gold-plating at all.[26] The policy has not been cancelled, but it is unclear to what extent gold-plating can be justified.

3 Waste Management in the Netherlands: The Transposition of Directive 2008/98/EC

Until the 1970s, dumping practices were a reality.[27] To bring these practices to an end the Waste Act (WA) was passed in 1977.[28] The WA focused on an environmentally sound disposal of waste and on waste recovery.[29] Over time, the legal framework on waste management has been strengthened. Most notably, in the 1990s, when waste management was integrated with other sector-specific acts into the Environmental Management Act (EMA),[30] the functioning of the instruments introduced with the WA was reinforced, and priority was given to waste prevention.[31] Directive 2008/98/EC was transposed in 2011 by means of an amendment to the EMA.[32] From the point of view of gold-plating, this Act is

14 *Europa Institute en Asser Institute* report, p. 8.
15 *Ibid,* pp. 7-14, and Annex I.
16 *Kamerstukken II* 2006/07, 29 515 en 29 826, no. 222, p. 2 en 3.
17 J. Stoop, *Nationale Koppen op EU-regelgeving; een relevante discussie?*, in *Nederlands tijdschrift voor Europees recht*, July 2012, no. 6, p. 229-237 and L. Squintani & J. Zijlmans, '*Nationale koppen' en de doorwerking van natuurbeschermingsverdragen*, in *Milieu en Recht*, 2013, issue 3, pp. 158-171.
18 Brief Henk Bleker, Staatssecretaris EL&I aan de Tweede Kamer, 'Aanpak Natura 2000', d.d. 14 september 2011, no. 230499, p. 10. L. Squintani & J. Zijlmans, quoted at 17, p. 161.
19 L. Squintani, J.M. Holwerda & K.J. de Graaf, *Regulating greenhouse emissions from EU ETS installations*, in M. Peeters, M. Stallworthy and J. de CEndra de Larragán, *Climate Law in EU Member States*, Edwin Elgar, 2012, pp. 67-88, at pp. 72-79, with further references.
20 See Hoofdlijkenakkord voor het kabinet CDA, VVD, D66, 16 May 2003.
21 See the Government Coalition Agreement of 2003, *Hoofdlijkenakkord voor het kabinet CDA, VVD, D66*, 16 May 2003, p. 12.
22 See letter from the Cabinet to Parliament d.d. 2 November 2007, reference number OI/O/7130085.
23 See Government Coalition Agreement of 30 September 2010, Freedom and Responsibility (*Vrijheid en verantwoordelijkheid*).
24 Idem, pp. 13 and 14.
25 Prime Minister Circulair of 18 November 1992, last amended by Prime Minister's Order, Minister of the Interior, 1 April 2011, nr. 310225, *houdende vaststelling van de negende wijziging van de Aanwijzingen voor de regelgeving*, Stcrt. 2001, no. 6602.
26 See Government Coalition Agreement of 29 October 2012 (*Bruggen slaan*).
27 TK 1974/75, 13 364, no. 3, p. 34.
28 *Afvalstoffenwet*, Stb. 1977, 455.
29 TK 1976/77, 13 364, no. 5, p. 11 on the two pillars of the WA.
30 Environmental Management Act (*Wet milieubeheer*), Stb. 1979, 442, as amended.
31 TK 1988/89, 21 246, no. 3, p. 8.
32 Stb. 2011, 103 and Stb. 2011, 104.

particularly interesting because it was prepared in accordance with Guideline 331 of the Dutch Lawmaking Guidelines. Accordingly, a legislative proposal should not contain any rules beyond those necessary for the transposition of the Directive, other than for technical reasons.[33] Furthermore, the Dutch government stated that although more stringent protective measures are allowed under the Directive, measures which could affect the level playing field among Member States should be avoided.[34] In my opinion, this statement can be linked to the Dutch policy on gold-plating presented above. However, the government also indicated that the transposition of this Directive had to take into consideration the existing status quo, which, as further discussed below, went further than required by Union law.[35] As can be seen, the Dutch government seemed ready to maintain gold-plating, albeit implicitly. In the following I will analyse the transposition of certain articles from Directive 2008/98/EC by focusing on measures that do not take advantage of exceptions (Section 3.1), more stringent protective measures (Section 3.2), spill overs and related measures (Section 3.3).[36]

3.1 Measures that do not keep burdens to a minimum

Article 9 Waste Framework Directive[37] applied the permit requirement to establishments or undertakings disposing of their own waste at the place of production. In addition, Article 10 covered installations or undertakings that recover waste. In both cases an exception could be granted under certain conditions (Article 11). Today, Directive 2008/98/EC maintains this approach (Articles 23-26). Member States which do not exempt operators from the permit requirement do not keep burdens to a minimum. Dutch law does not keep burdens to a minimum.

In the 1990s, permit requirements were regulated in Chapter 8 of the EMA, which applied to industrial establishments in general. The general rule was that any establishment had to be subjected to a permit to be established, changed and exploited, unless an order stated otherwise (Article 8.1). Establishments for the recovery of waste were explicitly mentioned as establishments for which a permit was required.[38] Waste producers discarding their own waste at the place of production were also not exempted from the permit requirement.[39] In 2009, two years before the transposition of Directive 2008/98/EC, the General Act on Environmental Permits (GAEP) replaced the provisions of Chapter 8 EMA. Under this Act, only establishments with an IPPC installation or establishments listed in a specific order are subject to a permit requirement.[40] With regard to management facilities, waste, Annex I sub C of the Environmental Permits Order (EPO) states that establishments for the disposal or recovery of waste must have a permit, unless they fall under one of the thirty-three categories explicitly mentioned therein (Section 2.1(2) and Category 28.10 in Annex I, sub C).[41] The 2011tranposition act did not touch upon this system.[42]

As can be seen, the Netherlands partly enforced the opt-out clause available under Directive 2008/98/EC in 2009. The use of this clause was part of a more general reform of the Dutch permitting system which aimed at lowering administrative burdens.[43] This was done in accordance with the Dutch policy on gold-plating. However, it should be noted that only certain activities are exempted under the GAEP and EPO system. In particular, the reform covered installations for the recovery of homogenous flows of 'material unpackaged goods' (*vaste bulkgoederen*).[44] For example, activities for the recovery of ink cartridges for printers are covered by this reform. Activities were selected using generally applicable criteria, such as the homogeneity of the activities covered, and three specific waste-related criteria: a) activities must focus on the recovery of waste, in particular the recovery of raw materials; b) activities can be easily controlled without the need for complex analyses or studies;[45] and c) activities facilitates extended-producer-responsibility systems.[46]

The transposition of Article 24 Directive 2008/98/EC represents a perfect example of the 'no gold-plating, unless' regime which characterised the Dutch policy on gold-plating until the 2010 coalition agreement. Certain kinds of human activities concerning waste can, due to their very nature, be regulated by means of an *ex post* control mechanism, *i.e.* inspections. Others require

33 TK 2009/10, 32 392, no. 3, p. 2.
34 TK 2009/10, 32 392, no. 7, p. 4.
35 TK 2009/10, 32 392, no. 3, p. 14.
36 I will only focus on the provisions of Directive 2008/98/EC which have replaced the provisions of the Directive 2006/12/EC. Due to the general nature of these provisions, there is a greater chance that a discussion on the application of Dutch policy on gold-plating took place within the parliament.
37 With 'Waste Framework Directive' I am referring to Directive 75/442/EEC as amended by Directive 91/156/EEC.
38 Category 28 under Annex I of Stb. 1993, 50.
39 The content of the permit could be influenced by whether an establishment discarded waste coming from inside the establishment concerned or from outside.
40 Stb. 2008, 496, *Wet algemene bepalingen omgevingsrecht*.
41 Stb. 2010, 143, *Besluit omgevingsrecht* as amended by, in particular, Article II, letter J, point 11 Stb. 2010, 781. Activities involving non-separate collection were not exempted, nor were activities with mixed waste. New categories were exempted with Article II, letter G, point 13 Stb. 2012, 558 amending Category 28.10 in Annex I, sub C of the BOR.
42 TK 2009/10, 32 392, no. 3, p. 13.
43 Stb. 2010, 781, explanatory memorandum, p. 30.
44 *Ibid*, p. 36.
45 *Ibid*.
46 *Ibid*, p. 37.

complex assessments. Accordingly, they should be subjected to an *ex ante* control mechanism as well, *i.e.* the permit. More generally, environmental concerns seem to have driven the decision to use the opt-out clause in Article 24 Directive 2008/98/EC only partially. They justify gold-plating.

3.2 More stringent protective measures

Directive 2008/98/EC establishes several grounds for more stringent protective measures. In the following I will focus on the options concerning the so-called 'extend producer responsibility', the targets for waste recovery, the keeping of information on waste, the temporal limitation of permits and the allocation of the costs of disposal.

3.2.1 Targets for waste discovery

Article 11 Directive 2008/98/EC establishes explicit *minimum* targets for the preparing for reuse and the recycling of at least paper, metal, plastic and glass from households (increase of an overall 50% by weight by 2020) and of non-hazardous construction and demolition waste (increase of an overall 70% by weight by 2020). The clause 'to a minimum of' used in these provisions specifies that Member States can establish stricter targets. The Netherlands uses this option. As recognized by the Dutch government, the National Waste Management Plan 2009-2021 sets stricter binding standards than the Directive requires.[47] The amount of waste being recycled in the Netherlands has increased steadily,[48] and by 2015, the preparation for reuse and recycling of waste materials including at least household paper, metal, plastic and glass, or comparable waste, should be increased to an overall 60% by weight. In addition, by 2021, the preparation for reuse and recovery of other materials shall be increased to 95% in weight. As can be seen, by setting binding targets which are more stringent than those required by Directive 2008/98/EC the Netherlands has adopted more stringent measures. Curiously, the government gave no attention to this fact during the transposition of Directive 2008/98/EC.[49] The Dutch policy on gold-plating did not apply.

3.2.2 Keeping information on waste

Article 35(2) Directive 2008/98/EC requires establishments or undertakings covered by a permit or registration regime to keep a chronological record of, *inter alia*, the quantity, nature and origin of the waste, and they have to make that information available, on request, to competent authorities. For hazardous waste, the records must be preserved for at least three years. Member States can require the producers of non-hazardous waste to comply with paragraphs 1 and 2. The Netherlands uses this option, at least to some extent. With respect to the possibility of applying a registration duty upon waste producers, Article 10.38 EMA requires any person discarding industrial waste or hazardous waste, including the producer of the waste, to keep a record of certain information concerning the waste for at least five years. As can be seen, the Netherlands uses the option indicated in the Directive. Several members of Parliament pointed this out to the government and asked to know the motivation for this.[50] The government simply replied that the requirement may go further than what is required by the Directive, but it is in line with similar duties in other fields of Dutch environmental law.[51] It seems that the clause 'unless a specific Dutch interest so requires', in the pre-2010 formulation of the Dutch policy on gold-plating, was interpreted as including the desire to ensure legal coherence in the national legal order.

3.2.3 Time limitation of permits

In continuation with the Waste Framework Directive, Article 23(2) Directive 2008/98/EC states that a permit may be granted for a determinate period. Such a duty surely imposes extra burdens. Dutch law did this until 2010.

Under Section 8.17 EMA, permits for establishments disposing of waste from outside the establishment, or disposing of dangerous waste or land-filling waste had a maximum validity of ten years. This rule aimed at keeping permits current with the developments that have occurred in waste management.[52] In 2010, the GAEP revised this case of gold-plating. To reduce administrative burdens, the GEAP establishes that permits for establishments disposing of waste have an indefinite duration.[53] Interestingly, the GAEP only exempted new permits from the time limitation. Only by means of an amendment to the act which regulated the entering into force of the GAEP, this reform was extended to existing permits in order to save about 450,000 euro in administrative costs.[54] This advice was followed without any discussion. According to the government, environmental

47 VROM, *Landelijk Afvalbeheerplan* 2009-2021 (LAP2), p. 91 and 92.

48 *CBS, PBL, Wageningen UR (2010), Afvalproductie en wijze van verwerking, 1985–2008 (indicator 0204, version 09, 22 September 2010).* www.compendiumvoordeleefomgeving.nl. CBS, The Hague; Planbureau voor de Leefomgeving, The Hague/Bilthoven and Wageningen UR, Wageningen. See also Vereniging Afvalbedrijven, Annual Review 2010, *p. 6.*

49 In particular, TK 2009/10, 32 392, no. 3, pp. 6 and 7 and TK 2009/10, 32 392, no. 7.

50 TK 2009/10, 32 392, no. 6, p. 5.

51 TK 2009/10. 32 392, no. 7, p. 2, with reference to provisions such as Article 5:8 EPO.

52 TK, 1988/89, 21 087, no. 3, p. 80.

53 Section 2.23 GAEP and Section 5.4 BOR. For the reasoning see Stb. 2010, 143, explanatory memorandum, p. 72 and VROM, *Landelijk Afvalbeheerplan* 2009–2021 (LAP2), p. 110.

54 Section 1.2(5) of Stb. 2010, 142 and TK 2008/09, 31 953, no. 12 (herdruk).

protection is guaranteed by the duty to update permits if new techniques become available.[55]

The above shows that the introduction of the Dutch policy on gold-plating, and more generally, the desire to reduce administrative burdens, led to a review of the Dutch system for environmental permits. Over the years, it became clear that even in the field of waste law the goal of keeping the permit updated could have been achieved by a less burdensome rule than that of having to apply for a new permit after a maximum of ten years. In the light of cost/benefit analyses, gold-plating did not seem justifiable anymore and it was eliminated accordingly.

3.2.4 Allocation of costs of disposal

In line with the principle that the polluter should pay, Article 14 Directive 2008/98/EC states the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders. In addition, the Member States *may* decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such products may share these costs. As can be seen, Article 14 provides an option with respect to the liability for the costs of waste management of the producers of the product from which the waste came. Member States using this option may be establishing more stringent measures. The Netherlands uses this option.

From 1993 Dutch law has two instruments which follow the principle of extended producer responsibility. Section 15.32 EMA introduced the possibility of establishing a return deposit and a return premium. In addition, Title 15.10 EMA allows the introduction of a system of so-called 'Waste Management Contributions', if an industrial association so requires. Waste Management Contributions are based on private funds which cover the cost for establishing the infrastructure required to recover products. Title 15.10 EMA allows such contributions to be made compulsory for all producers or importers of the goods concerned on the Dutch market.[56] According to the Dutch government, the system described above increases waste prevention and recycling.[57] Therefore, this case of gold-plating seems to be linked to environmental concerns. The government also stated that Union law leaves space for such rules.[58] This suggests that the Dutch legislator was aware of exceeding the minimum requirements imposed by the Directive.

In 2011 the government indicated the intention to redress this case of gold-plating, albeit partially. In the legislative proposal for the transposition of Directive 2008/98/EC, a provision allowed the recovery of only *a part* of the costs from the producers of the products from which the waste came.[59] This change was in line with the minimum requirements established by the Directive. However, several members of Parliament questioned the meaning and the effects of the change. Some of them feared that the polluter pays principle and the principle of extended producer responsibility would have been negatively affected along with legal certainty.[60] Others wanted the government to go even further. The People's Party for Freedom en Democracy called for the abolition of all provisions following extend producer responsibility.[61] The government replied that legal certainty should be guaranteed and therefore that it would have refrained from downgrading the status quo.[62] Unfortunately, due to an error of correlation with a parallel legislative proposal,[63] today Section 9.5.2(3), letter b, EMA allows the recovery of only a part of the costs from the producers of the products from which the waste came.[64] However, the parliamentary history of Section 10.17 EMA casts doubts on the validity of Section 9.5.2(3), letter b, EMA. The Dutch legislator did not want to downgrade the status quo. The transposition of Article 14 Directive 2008/98/EC shows that legal certainty is considered a sufficient reason to justify gold-plating. Interestingly, the claim of legal certainty made by certain exponents of Parliament did not rely on studies or empirical data. It was formulated on an abstract level. The decision to maintain gold-plating was not supported by a substantiated cost/benefit analysis. Only due to a mistake was this case of gold-plating partially redressed.

3.3 Spill-overs and 'related measures'

Like its predecessors, Directive 2008/98/EC excludes several categories of waste from its field of application. In particular it does not apply to: a) gaseous effluents emitted into the atmosphere, b) land (in situ) including unexcavated contaminated soil and buildings permanently connected with land, c) radioactive waste; d) decommissioned explosives, and, under certain conditions, e) faecal matter straw and other natural non-hazardous agricultural or forestry material and f) uncontaminated soil and other naturally occurring material. Waste excluded from the field of application of a Union harmonizing measure can be

55 TK 2008/09, 31 953, no. 24, p. 39 and VROM, *Landelijk Afvalbeheerplan* 2009–2021 (LAP2), p. 110.
56 Such a measure serve to ensure the functioning of the infrastructures, which are developed by industry itself, TK 1992/93, 23 256, no. 3.
57 TK 1993/94, 23 256, no. 5, pp. 2 and 3.
58 TK 1992/93, 23 256, no. 3, p. 7.
59 TK 2009/10, 32 392, no. 2.
60 TK 2009/10, 32 392, no. 6, pp. 5-8.
61 Ibid, p. 4.
62 TK 2009/10, 32 392, no. 7, p. 10.
63 TK 2007/08, 31 501, no. 2 adopted with Stb. 2011, 269.
64 Section V, letter B1, Stb. 2011, 103 and Section I, letter D, Stb. 2011, 269.

regulated by national law. It appears that the Netherlands regulated such waste until 2011.

While Union law linked the exceptions to the nature of the waste, Dutch law linked the exceptions to the nature of the activity performed in an installation.[65] Theoretically, an activity and the waste generated by it could have been covered by Title 10 EMA and by the acts listed in Section 22.1 EMA.[66] The Dutch government recognized that the EMA often applied in addition to the regimes established in the legislative acts enumerated therein.[67] In conclusion, it appears that Dutch law regulated waste excluded from the field of application of the Directive. Since, to a certain extent, the provisions on waste management did not apply only if environmental values were already protected by the other acts listed in Section 22.1 EMA,[68] it can be argued that this potential case of gold-plating is linked to environmental concerns.

In 2011 this possible case of gold-plating was revised. Section 22.1 EMA was maintained, but Dutch law copied out Article 2(1) Directive 2008/98/EC in Article 10.1a EMA. The insertion of this article was justified in terms of legal certainty, in that it avoided the duplication of regulatory frameworks.[69] As can be seen, the abolition of this case of gold-plating seems to be related to the desire to increase legal certainty.

4 Assessment and conclusions

The main finding that we can be drawn from the above is that the Dutch policy on gold-plating was mostly applied. It is therefore important to understand how it functions. Generally speaking, gold-plating had to be avoided or redressed, unless specific interests required otherwise. This shows that the strict formulation of the Dutch policy on gold-plating introduced in 2010 was not applied during the transposition of Directive 2008/98/EC. This is positive because with the 2012 government agreement the Dutch policy on gold-plating seems to have come back to a more balanced formulation, albeit silently.

As regards the manner in which the pre-2010 formulation of the Dutch policy on gold-plating was applied, this case study shows that environmental concerns played an important role. The regulation of more undertakings and establishments for the management of waste by means of a permit required by Union law, the application of extended producer responsibility in theory and in practice as regards tyres, the establishment of more ambitious targets for the recovery of waste and the possibility to allocate the costs of disposal on the producer of the product from which the waste came aim at protecting the environment. Environmental consideration weighed more than economic interests. Also in the context of the abolition of the temporal limitation of permits, the Dutch government stressed that the level of environmental protection was not affected. It seems that the pre-2010 Dutch policy on gold-plating did not obfuscate environmental protection.

The avoidance or removal of gold-plating mostly followed cost/benefit analyses, at least to a certain extent. The non-application of the extended producer responsibility rules to other categories of undertaking or establishments than those already covered by these rules is a clear example of how economic interests can prevail on environmental concerns. However, the elimination of the permit requirement for certain undertakings or establishment and the abolition of time limitation to permits highlights that, in certain cases, gold-plating can have little or no environmental benefit. It could be argued that the elimination of the permit requirement stimulates the recovery of waste. It is now easier to establish an undertaking for the pursuit of certain recovery activity. It seems that a *conscious* application of the Dutch policy on gold-plating can lead to win-win situations: less administrative burdens and more environmental protection.

More generally, the Dutch policy on gold-plating seems to have increased the awareness of the Dutch government and Parliament about gold-plating. Before the introduction of the Dutch policy on gold-plating, the transposition of Union environmental measures focused on maintaining the status quo. The example of the elimination of the permit requirement for certain undertakings and establishments shows that it took many years for the Dutch legislator to implement an option that has been available for a long time. It could be argued that thanks to the Dutch policy on gold-plating, maintaining the status quo is no longer a mantra. As a consequence, the transposition of Union environmental measures is a moment of (re-)evaluation of the adequacy of the level of protection of the environment.

Another finding is that legal certainty seems to play a relevant role in the manner in which the Dutch policy on gold-plating is applied. Interestingly, the provisions on the keeping of information on waste go further than required in order to ensure a

65 This occurred with Sections 32 and 97 WA, later replaced by Section 22.1 EMA.

66 E.N. Neuerburg & P. Verfaille, quoted at 61, p. 343.

67 TK 2009/10, 32 392, no. 7, p. 3, with reference to the application of Chapter 10 to natural non-dangerous materials directly coming from the agriculture or silviculture to be used for the production of energy.

68 E.N. Neuerburg & P. Verfaille, quoted at 61, p. 343, with reference to AGRvS of 9 November 1990, n. G 05.88.0358 establishing that the WA applied next to the Chemical Waste Act (*Wet chemische afvalstofen,* Stb. 1976, 214) when the latter did not intend to protect the environment.

69 TK 2009/10, 32 392, no. 7, p. 3.

coherent legal system. Gold-plating was *justified* by the increase of legal certainty. Therefore, the statement that gold-plating affects the quality of regulation is probably not fully justified.

Also the statement that gold-plating affects economic growth is probably not fully justified. The amount of waste being recycled in the Netherlands increases steadily *without* affecting economic growth. Actually, the decrees in the amount of waste being landfilled, which can be partially linked to the increased amount of waste being recycled, could explain why the Netherlands can become a raw-material centre for Europe. It could be argued that gold-plating in the field of waste recovery has actually stimulated economic growth. Finally, it is too soon to draw general conclusions. However, it seems that a dichotomous view of gold-plating, *i.e.* good or bad does not reflect the complexity of the reality in which environmental protection takes place today. More studies on gold-plating are needed to understand the effects of gold-plating on both economic growth and environmental protection

Imprint

Editors: Regine Barth, Nicola Below, Claudia Fricke, Martin Führ, Gerhard Roller, Julian Schenten, Silvia Schütte

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The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the *elni Review*.

We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, govern-ment administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of € 20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

The *elni Review* is published with financial and organisational support from Öko-Institut e.V., and the Universities of Applied Sciences in Darmstadt and Bingen.

The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.

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