Dutch response to the report on access to justice in the Netherlands and the summary report – August 2009

This is a response to the report 'Measures on access to justice in environmental matters (Article 9(3)) – Country report for the Netherlands' and the 'Summary report on the inventory of EU Member States' measures on access to justice in environmental matters'. First, the Netherlands would like to express its appreciation for the European Commission's decision to have a study conducted into access to justice in environmental matters in the member states. The Netherlands believes it is important to have effective rules in this area and apply them properly. Having an overview of these rules is useful to government, business, civil society and individuals alike. We therefore thank the European Commission for the work that has been done in this wide-ranging investigation. There are a number of points on which we would like to comment, and in doing so refine the depiction of the Dutch situation.

Summary report

In the table on page 18 (Comparative table on access to justice in environmental matters in EU25), the Netherlands is given an overall assessment of '+', which stands for 'could be better'. The Netherlands falls somewhere in the middle of the EU25. This position is based on criteria such as the absence of *actio popularis*, the existence of the 'negative list', i.e. a list of decisions against which no appeal is available, and the absence of legal aid schemes for interest groups. However, using other criteria produces a different conclusion, as in the 'Recommendations for the development and implementation of European law and policy on housing, spatial planning and the environment in the Netherlands' (*Brussels lof. Handreikingen voor ontwikkeling en implementatie van Europees recht en beleid*)[1] issued by the VROM Council (*VROM-raad*) in 2008.[2] The VROM Council's report refers to the ease of access to administrative courts in the Netherlands. This ease of access can be concluded in part from the large number of applications for judicial review (relative to population numbers and surface area) and the time it takes – per case – to complete all stages of proceedings under administrative law.

Country report

Page 5 states: '[...] many administrative judgments result in a duty for the Public Authority involved to review the case and to produce a new decision, which decision obviously, again, is open to judicial review through administrative appeal'. This is true. We are delighted to be

[1] The report can be downloaded at http://www.vromraad.nl/Download/a066_Brussels.Lof.pdf.
[2] The VROM Council advises the government and Parliament on policy for a sustainable living environment and, in particular, on housing, spatial planning and the environment. Its members are independent experts from various backgrounds.

able to report that the Senate is currently considering a bill that would add a provision to the General Administrative Law Act (*Algemene wet bestuursrecht*) allowing administrative courts to issue interlocutory judgments to give administrative authorities the chance to rectify flawed decisions before final judgment is given; this procedure is known as the 'administrative loop' (*bestuurlijke lus*). Until now the only option has been for the court to quash such decisions and the authority to start over with a new decision-making process after which the interested party has to initiate the administrative-law procedure all over again. The administrative loop will serve to shorten proceedings.

On page 8 and 9, the report says of the 'negative list' (section 8:5, General Administrative Law Act): 'Categories of Decisions listed in this "negative list" are not open to appeal (...) Possibilities to challenge environmental violations in this area will be limited to civil law proceedings'. We would like to add that the civil-law proceedings referred to constitute full-fledged legal proceedings.

As for the comments on page 24 calling into question the impartiality of the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), we would refer to the position adopted by the Dutch government in its response to *Procola v. Luxembourg*: the Dutch Council of State satisfies the requirements of European Court of Human Rights case law on the structure and function of organisations that are engaged in both advising on legislation and dispensing justice.[3] We refer in particular to *Sacilor-Lormines v. France* (ECtHR 9 November 2006), *Kleyn et al v. Netherlands* (ECtHR 6 May 2003) and *Procola v. Luxembourg* (ECtHR 28 September 1995).

In response to the claim that the Administrative Jurisdiction Division '[...] tends to identify more easily with public authorities than with plaintiffs searching for protection against unfair and unjust decision-making by those public authorities' (page 24), we would like to point out that different opinions can be found in the literature. See, for example, A.T. Marseille.[4]

The report also states on page 24: 'Presumably, one of the reasons for this is that the members of the Council of State are predominantly recruited from among former politicians rather than from the judiciary or from academic circles'. With respect to the membership of the Administrative Jurisdiction Division of the Council of State we refer to the website of the Council of State (www.raadvanstate.nl): only five of its 57 members ever held public office.

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[3] 12 February 1998, Parliamentary Papers, House of Representatives 1997/98, 25 425, no. 3.

This represents such a small percentage of the total that there is no objection to their membership. Like the other members, of course, these five have outstanding legal and academic qualifications.

Notwithstanding the comments above, we are grateful to the European Commission for commissioning this study.

[4] NJB, *De dagelijkse praktijk van het hoger beroep bij de Afdeling bestuursrechtspraak*, 23 May 2003, issue. 21, p. 1068, provides a more balanced assessment.