Stockholm Meeting Avosetta Group
Dutch Report

Preliminary Remarks
As I have explained already to some of you, I do have serious conceptual problems with the questionnaire. And to an extent that I do not feel comfortable to give an answer to most of the detailed IPPC and EIA questions. Let me explain.
The central question to be discussed at our Stockholm meeting is whether European Community law forces Member States to enforce the environmental standards set in European Directives. Indeed, the mere transposition of environmental directives into national law is, of course, not enough. The obligations they contain have first to be applied and then enforced. This is primarily a responsibility of the Member States. Article 175(4) of the EC Treaty states in so many words that the Member States shall implement the environmental policy. 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.[1] Except for Article 10 EC Treaty many of the environmental measures taken by the Community merely contain a general obligation in this respect.

> See for instance Article 8 of Directive 2005/35 on ship-source pollution[2] and on the introduction of penalties for infringements states: '1. Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties'

Therefore, enforcement of European environmental law can be characterised as a shared resonsibility. Of course, European obligations have to be met, but how is a matter reserved for the Member States.[3] In absence of a specific enformcement obligation in a directives Member States are free to decide *how* to end the infringment. And this freedom is subject only to the Rewe/Comet rule that their efforts on dealing with infringements of Community environmental standards are 'effective'and are not less favorable than their efforts pertaining to deal with infringements of strictly national environmental law.

The IPPC and EIA Directive are, as such, (almost) completely silent on enforcement. In other words, this is being left to the Member States. In those Member States where the directive has been transposed in national law correctly, in general a violation of provisions of the directive, will also imply that has been acted in contravention of the transposing national law. So, in my view, the most pertinent question is, what kind of remedies are available to the public to require Member States public authorities and/or operators to act in compliance of the law. Therefore I will not try to answer the questions in the questionnaire, but in stead, will focus on how the public can force public

1. Cf. for instance ECR July 8 1999 (*Nunes en de Matos*), C-186/98, ECR 1999, I-4883.
2. OJ 2005/ L 255/11.
3. Unless there is a specific enforcement obligation. See for instance Article 5(4) of Directive 2006/11. This directive requires national authorities to establish emission standards in authorizations to prevent water pollution. The provision states: 'Should the emission standards not be complied with, the competent authority in the Member State concerned shall take all appropriate steps to ensure that the conditions of authorisation are fulfilled and, if necessary, that the discharge is prohibited.'

authorities to take enforcement action.[4]

Public Law Enforcement vis a vis public authorities

As in most legal systems, the protection of the environment is in the hands of state authorities. Public bodies in the Netherlands are entitled to grant licenses to companies. The terms of these licenses are designed to protect the environment by prescribing a.o. the best available techniques. In most cases these public authorities are also entitled to supervise and enforce the environmental standards (the terms of the licenses). Supervision is carried out by executives of public authorities by checking – for instance – the safety of public buildings and the installations of industrial plants. The principle 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 further infringements and to restore the lawful situation. Only the parties that have a direct interest in the matter have the possibility to request enforcement by the public authority. The main question that needs answering is whether the public authority is required by national administrative law to enforce if it knows environmental law is not complied with.

In general, Dutch statutory law doesn't acknowledge an *obligation* to enforce. Dutch statutory law merely states that public authorities are *entitled* to enforce, which constitutes a discretionary power. Conclusion must be that there is no *general* statutory rule that provides in a written and specific obligation to enforce public law in general or environmental law in particular. Taking this in consideration, one might conclude that a duty to enforce is difficult to construct. But there's more.

Environmental law, more specific the Environment Management Act (*Wet Milieubeheer*), provides in Article 18.2 that the administrative authority that is entitled to grant permits, has a duty of care to enforce the legal rules with respect to the building and to the activity that is conducted within it. Close reading of this provision clarifies that although it codifies a duty to enforce, it is not an absolute one. However, 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 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.' [italics added by the authors]

Although great emphasis lies on enforcing environmental law, it seems that it cannot be seen as a strict legal obligation for there are circumstances in which it is possible to refrain from taking enforcement measures. The conclusion is, that a public authority, confronted with a situation of non-compliance with environmental standards, is required to enforce unless there are extraordinary circumstances. Non-enforcement will be acceptable to the Administrative Jurisdiction Division when the possibility exists 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 to see the

4. This paper is based upon J.H. Jans & K.J. de Graaf, 'Liability of Public Authorities in Cases of Non-enforcement of Environmental Standards'. In: Pace Environmental Law Review 2007 (Vol. 24, Issue 2), p. 377-398.

resemblance of *Wednesbury* unreasonableness.[5] In this way the court does not decide what the reasonable authority *would* do, but only what *no* reasonable authority *could* do.

Access to court
Interested parties have access to court and can challenge any decision of a public authority not taking enforcement action under public law.[6]

Private Law Enforcement vis a vis public authorities
The main tool to asses the conduct of public authorities via private law (liability law) is the general tort law-provision in Dutch law, which is 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, in general *quod non*, is one we tried to answer in the forgoing paragraph about the administrative law requirement to enforce environmental law. 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 public authorities know about the non-compliance and the risk involved, the question about the liability seems reasonably easy. In those circumstances, one could conclude that there was a failure to take due care. A more difficult situation is the one in which the public authority doesn't know about the non-compliance, but could have had an unwritten duty to find out 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 in a bar and the duty to warn about the dangers.[7] 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 occurs and 3) the graver the danger, the greater the duty to take care. Finally it states that 4) the less difficult (time, costs and trouble) it is to take precautionary measures, the more one is required to take the 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 legislator 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 has in principle the obligation to enforce environmental law. Also relevant is the main argument in Dutch

5. Lord Greene in *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223, at p. 229: 'is the decision so absurd that no sensible person could ever dream it lay within the powers of the decision-maker'.
6. See on this 'The Rise and Fall of Access to Justice in The Netherlands' by Hanna Tolsma, Kars de Graaf and Jan Jans, *Journal of Environmental Law* 21:2 (2009), 309-321.
7. Dutch Supreme Court (*Hoge Raad*) November 5 1965 (*Basement Hatch*), *NJ* 1966, 136 with case note by Scholten.

literature in favor of liability: the trust that the general public is entitled to have.[8] 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 problems does not lie with the public authority, but with the company that didn't comply with environmental standards. And that the government operates solely in the public interest and not in the interest of individuals. The possibility of liability could however lead to a flood of claims. One has to consider that these – and other – arguments may have a role in the question whether there was a failure of the duty to take due care.

In most cases a statutory duty will be absent and it will be difficult to prove the failure of a duty to take due care. Still, there seems to be the possibility to hold 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 won't be a major problem in cases of non-enforcement, there are two well discussed requirements.

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 subject is, in respect to the subject of this paper, much discussed. This is caused by the fact that the primary cause for the loss or damage is not the conduct of the public authority, but the violation of – environmental – law by a third party. However, the courts in the Netherlands 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 authors accept the possibility of multiple causes, especially in cases of non-enforcement. Both third party and public authority can be held liable. Dutch law does however state that if a wrongful act or omission gives rise to a risk and this 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 damage as would normally be the case. The defendant should prove that the loss or damage would also have occurred without his conduct.

The question 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.

Is the plaintiff's interest protected by the law?

An important limitation on liability of public authorities for non-enforcement is the condition that the plaintiff's interest must be protected by the law (Article 163 of Book 6 of the Dutch Civil Code). More specific it is the question whether the conduct of the public authority did violate a rule which protects the plaintiff's interest. This condition plays an important role in Dutch tort law and is bipartite. The legislator explained that the objective of Article 163 of Book 6 of the Dutch Civil is to decline liability if a) the norm

8. 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* (oriation Utrecht), Deventer: Kluwer 2005 and I. Giesen, *Toezicht en aansprakelijkheid*, Deventer: Kluwer 2005.

breached (written or unwritten) doesn't protect the interest of the plaintiff, and if b) the type of damage (personal injury or financial damages) must fall within the scope of the protection the norm offers. Recent Dutch case-law of the Supreme Court of the Netherlands has demonstrated that it is this limitation seems to effectively block claims against public authorities for non-enforcement of 'environmental' law. The case that was most discussed in the Netherlands is the *Vessel Linda* case.[9]

In the case of the vessel 'Linda' no person was injured, although the damage was substantial. The second-hand, old and rusty vessel 'Linda' was subject to supervision according to a Dutch law that is concerned with the river-worthiness of vessels on the river Rhine. After the check 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 it apparently was convinced that it was alright to grant the certificate for seven years more. Several months later, in April 1992, it was being loaded with sand. It was alongside a floating dredge-combination called the 'Annette'. During the night of April 22nd the 'Linda' sunk for it was poorly maintained and corroded, taking the 'Annette' with here. It was obvious that the 'Linda' caused the accident and the damage to the 'Annette'. Dutch courts ruled that the public authority that checked the 'Linda' hadn't done so in a careful manner. The main question that still needed answering was whether the sustained damage 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. The law was written in the general interest concerned with the safety of vessels on the Rhine, but wasn't written to protect the plaintiff from the financial damages sustained by the plaintiff. Although one could interpret this ruling as one to dismiss 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.

The case demonstrates that if liability for non-enforcement is possible at all, non-enforcement of environmental law isn't the most likely candidate, for it is mostly considered to be primarily written in the general interest.

9. Dutch Supreme Court (*Hoge Raad*) May 7 2004, *RvdW* 2004, 67.