Questionnaire on the Principle of Integration

I. How to understand the integration principle of Art. 6 EC (to be introduced by invited speaker; however all of the participants should prepare and submit their own views)

See pages 16-23 of the third edition of *European Environmental Law* (attached).

Overlap with the concept of sustainable development? There is no explicit reference to the concept of 'sustainable devolpment' in our legislation either. The closest we have is a reference to 'future generations' in Art. 4.3(2) of the Dutch Environmental Management Act. This provision concerns the national environmental policy plan to be drawn up every 4 years: "The plan shall contain the main elements of the government's environmental policy, which is principally concerned with development which will meet the requirements of the present generation, *without endangering the opportunities of future generations* to meet their own needs, and with attaining the greatest possible level of environmental protection." According to Art. 4.6(3) this NEP "shall in any event be taken into account" by local and regional administrative authorities when taking decisions designated under this Act."

II. To what extent has the integration principle become part of the constitution or general principles and practises of law-making in your MS?

Constitution: No
Framework environmental act: No
Other act of general application: No

As from 1 January 2009 a new act will be in force: the Environmental Licensing (General Provisions) Bill (henceforth referred to by its Dutch acronym *Wabo*) is to establish a single, straightforward procedure and a single competent authority for persons or businesses seeking permission for activities which affect the physical environment.
The *Wabo* means that someone wishing to carry out a project, can get the necessary permissions through an integrated procedure: just one licence from one procedure, one set of rules to follow, one system of remedies and one enforcement agency. The new licensing system will replace much of the existing legislation regulating activities which affect our physical environment. Some 25 existing systems for issuing permits, licences, exemptions, and so on are being replaced by a single environmental licence. This new licence will apply to the demolition, construction, establishment or use of a physical facility. Activities affected will typically be location-specific projects which have an impact on our physical environment, i.e. air, water and soil, wildlife and biodiversity, landscape and cultural-historical elements.
However, it is remarkable that no reference to the principle of integration or Article 6 EC can be found in the explanatory document of the *Wabo* (neither in the *Wabo* itself).

A major obstacle to a full application of the integration principle is the so called 'speciality principle'; which is a general and fundamental principle of Dutch administrative law. Dutch administrative law is based on the principle that public authorities do not have general powers to promote the public interest, but only *specific* – objective-related – powers. This is expressed most clearly in the prohibition of détournement de pouvoir (abuse of power) in section 3:3 of the *Algemene wet bestuursrecht* (General Administrative Law Act, Awb), which states: 'An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.' This means that when exercising a power an administrative authority will have to consider the purpose for which that power was conferred, which often emerges from the legislation conferring the power. In short, when

exercising public law powers administrative authorities may not further public interests other than those with a view to which the power was conferred. It is not very difficult to see that this principle can cause severe problems in taking environmental objectives into account in environmentally remote legislation and/or administrative action. It even causes problems within the domain of environmental legislation. I have attached a forthcoming article on this problem.

2. Are there any references to making integration a legal principle on the level of federal/national/regional, etc. environmental policy papers (e.g. National Environmental Action Plan) or sectoral environmental policies (climate change, waste, etc.) and if the answer is positive, how is it formulated ?

Not in so many words. However, the recent policy paper 'New Energy for Climate Policy' (co-production of the ministeries of the Environment, Agriculture, Economic Affairs, Housing, Finance) is in fact a clear example on how the Kyoto-targets are being implemented in the Netherlands.
http://international.vrom.nl/docs/internationaal/New%20Energy%20for%20Climate%20Policy.pdf
This programme describes how the Netherlands is aiming to have one of the most efficient and cleanest energy systems in Europe by the year 2020.

3. The principle of integration or some part of it has it ever been interpreted by the judiciary? If the answer is positive, please provide a short summary!

No. Not that I know of.

4. Are there governmental institutions playing an environmental watchdog-role in the legislatory process?

The Council of State. It advises the Government and Parliament on legislation. Although it will not comment on environmental goals per se, its opinions do contain a quality of policy analysis:
1. Is the problem that is being addressed one which can and should be solved by legislation?
2. Will the proposed legislation be effective, and the proposed solution efficient and balanced as regards costs and benefits?
3. Will it be possible to apply and enforce the law and to monitor its effects?

5. Are there general requirements as to inviting environmental agencies to comment on or cooperate in the rule-making and individual administrative action by environmentally remote agencies?

Recently has been introduced the so called 'Environmental Test'. The environmental test is an environmental assessment system for new legislation. It is an initiative by the Ministry of Housing, Spatial Planning and the Environment (VROM) and the Ministries of Economic Affairs and Justice. It is carried out by the Support Centre for Proposed Legislation.

6. Are there general official advisory boards or scientific groups which reflect, discuss and recommend policies, measures or actions on environmentally remote legislatory or administrative action?

The Social and Economic Council of the Netherlands (SER); As an advisory and consultative body of entrepreneurs, employers and independent experts, the Social and Economic Council of the Netherlands (SER) aims to help create social consensus on national and international socio-economic issues. The current work programme involves:

Bio-based economy
Bio-based economy is a relatively new concept in the farming sector. It involves the production of chemicals, fibres and fuels on the basis of vegetable products. The development of a bio-based economy may have considerable consequences for global agricultural markets. In early 2007, the Cabinet will ask the Council to what extent the pursuance of a bio-based economy may contribute to the socio-economic development of the Netherlands. It will also ask the Council to investigate the international and European context. The Council's investigations should focus in particular on the possibilities of increasing opportunities for developing countries as suppliers of agricultural raw materials and contributing to achieving European sustainability objectives in the field of energy.

Agricultural values
The Dutch farming sector produces a number of 'goods' from which various social values can be derived. In addition to the direct benefits offered to society by the farming sector via agricultural production and additional employment, the benefits include healthy food, superior knowledge and a green living environment. In 2007, the Cabinet will ask the Council to indicate the current size and dimensions of the social value of agriculture, and to investigate its future in the light of, for instance, a further liberalisation of trade, the increasing pressure on space in the Netherlands and the growing demand for recreation.

Sustainability of mobility
The Cabinet will ask the Council for advice about how the objectives relating to traffic and transport – cleaner, more accessible and safer – can be achieved. In particular, it will ask to what extent the current policy and the economic recovery are contributing to the sustainability of mobility in the Netherlands and to the transition to cleaner fuels and technologies. It will also ask what social partners can do to point out the urgency of the sustainability of mobility in relation to the congestion problem, such as a pro-active stance with regard to the EU.

III. How has the SEA Directive 2001/42/EC been implemented in your country?

The SEA Directive comes closest to an instrument of alerting sectoral policies to environmental implications. We will not look at all details of understanding and implementation but will focus on the question whether experiences made with this instrument allow to conclude that it should be extended to further policy areas and even further forms of governmental action including legislation and rule-making. Questions of interest are the following:

1. Was the SEA directive properly been transposed into national law? (see e.g. C-108-06)

In any case transposed too late – See to that extent ECJ, Case C-108/06

2. In Art. 2 (a) there is a broad definition for 'plans and programmes'. How has this definition been adopted ? Copied and pasted, or with some more words attached to them and even extending the scope?

In general, in the Netherlands the SEA Directive has been implemented at its minimum level.

3. What is the general understanding of the concept of the 'authority'? What kind of organisations are included ? (See on public services, eg. C-188/89 *Foster and others v British Gas*)

'Traditional'central, regional or local authorities are only involved in SEA.

4. In Art. 3 (2) there is a special list of issues, which provide the automatic application of SEA. Is there any debate related to the content of this list ? Is it understood as a limitation of

the definition of Art. 2 (see the different wording in Art. 3 (2): “and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC”) ?

Section 7.2
1. The following activities shall be designated by order in council:
a. activities that can have serious adverse effects on the environment;
b. activities in respect of which the competent authority must decide whether they could have serious adverse effects on the environment due to the special circumstances in which they will be undertaken.

5. In what way does the outcome of the SEA procedure affect the final decision-making? (see Art. 4 (2))

Section 7.26d
1. The plan shall give at least the following information:
a. how account has been taken of the environmental effects of the activity to which the plan pertains, as described in the environmental impact statement;
b. what consideration has been given to the alternatives described in the environmental impact statement;
c. what consideration has been given to the views on the environmental impact statement stated in relation to the draft plan;
d. what consideration has been given to any recommendations made by the Committee pursuant to section 7.26b.

6. If you have had personal experience with SEAs or if there are reports on how SEA was used in practise: what are the conclusions, and do they encourage to extend the instrument to further sectors and even to law-making and sublegal rule-making in general ?

7. Were there/or are there any similar requirements in force in your county before/since the entering into force of the Directive ? In case of a positive answer, please provide a short introduction, mainly in connection with the relationship of the two types of requirements !

The Netherlands had already experience with strategic environmental impact assessment prior to the SEA Directive.

8. Do you have any information on any ongoing cases or judicial decisions in connection with the implementation of SEA requirements ? Please, provide a summary, if there is any example!

The available case law is not really interesting.

IV. Where do you see deficiencies of environmentally remote legislation and implementation with regard to environmental concerns, and what legal rules and institutions could improve the situation?

Main problem, as discussed earlier, has to do with the ‘speciality principle’ in Dutch administrative law.

Relying on European law to avoid the 'speciality principle' in Dutch administrative law?

1. Introduction

Government should serve the public interest, but within bounds set and exercising rights and powers conferred by the legislature. This clearly demonstrates the direct connection between the principle of legality and democracy. Nevertheless, the principle of legality would have little effect if the legislature were to confer unlimited or virtually unlimited rights and powers on the administration to further the public interest. This is why these rights and powers are specifically defined and are conferred to attain specific objectives. Dutch administrative law, for example, is based on the principle that public authorities do not have *general* powers to promote the public interest, but only *specific* – objective-related – powers. This is expressed most clearly in the prohibition of *détournement de pouvoir* (abuse of power) in section 3:3 of the *Algemene wet bestuursrecht* (General Administrative Law Act, *Awb*), which states: 'An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred.'[1] This means that when exercising a power an administrative authority will have to consider the purpose for which that power was conferred, which often emerges from the legislation conferring the power.[2]

In short, when exercising public law powers administrative authorities may not further public interests other than those with a view to which the power was conferred.[3] In Dutch administrative law this is known as the 'speciality principle'. The decision of the *Afdeling bestuursrechtspraak Raad van State* (Administrative Jurisdiction Division of the Council of State) in the *Maasdriel* case will serve as an example.[4]

> The mayor of Maasdriel had refused to grant a local hunting society a permit to shoot clay pigeons, required under a municipal bylaw. He refused the permit because he felt that granting it would mean acting contrary to both the *Flora- en Faunawet* (Flora and Fauna Act) and the *Wet wapens en munitie* (Weapons and Munitions Act). The purpose of the municipal permit system is to protect public order. The *Raad van State* held that the interests served by the two acts were not so closely linked with the interests on which the grounds named in the bylaw for refusing a permit were based that 'the mere circumstance that the intended use of the permit is incompatible with the *Flora- en Faunawet* or the *Wet wapens en munitie* should be a reason to refuse this permit.' In other words, the mayor's powers could only be used in the context of protecting public order and not to serve

1. Other 'traces' of this can be found in e.g. art. 3:4.2 *Awb*: 'When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised.' Cf. at European level Article 5 EC: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.' In the literature this is referred to as the 'principle of conferral'.
2. Cf. e.g. art. 8.10 *Wet milieubeheer* (Environmental Management Act): 'A licence may be refused only in the interests of environmental protection.'
3. L.J.A. Damen et al., *Bestuursrecht 1* (Den Haag 2005), p. 60.
4. *Raad van State* 29 April 2003, LJN AF8028. The Administrative Jurisdiction Division of the Council of State is the country's highest administrative court with general jurisdiction.

conservation interests (*Flora- en Faunawet*) or to regulate the use of firearms (*Wet wapens en munitie*).

Nevertheless, one wonders how the *Raad van State* would decide if the permit were contrary to the directly effective rule in Article 6(3) of the EC Habitats Directive[5] or were otherwise contrary to European law. Does European law require that the speciality principle be disapplied in such a situation?

This question is largely ignored in the Dutch literature on administrative law. In the most important book on the speciality principle, *Schlössels* points out that primary and secondary EC law can of course influence the objectives of national legislation conferring powers.[6] It goes without saying, he says, 'that a national objective-related administrative power should where appropriate be exercised in conformity with the rules on the application of Community law. For example, under certain circumstances the national legislation conferring the powers may have to be interpreted so as to conform with a directive.' Disappointingly, he observes in the following sentence that he will not be discussing this further.

This article considers to what extent European law invites – or requires – disapplication of the speciality principle in Dutch administrative law. I shall be concentrating on the question to what extent an administrative authority considering whether or not to grant a permit is permitted, or required, to take public interests into account other than those of the permit system in question, and specifically those based on European law. More particularly I will be discussing whether an administrative authority is permitted, or even required, to *refuse* a permit or other decision on the ground that it is contrary to European law obligations, even when the objectives of the applicable European law are broader than the assessment framework laid down by the national legislation on which the decision is based. I will also be referring to the opposite situation: Is an administrative authority permitted, or perhaps required, to *grant* a permit or other decision, despite the constraints of the assessment framework of national law, in order to avoid taking a decision that contravenes European law?

2. No disapplication where there is a specific statutory system

Let us return to the case outlined in the introduction. What if granting the permit to shoot clay pigeons were contrary to Article 6(3) of the Habitats Directive? Would the mayor have been right to refuse it then? Bear in mind that the Habitats Directive was transposed into Dutch legislation in the *Natuurbeschermingswet* (Nature Conservation Act) and the *Flora- en Faunawet*. It seems to me indisputable that to the extent the protection of habitats in the Netherlands required by European law is extended within the framework of the *Natuurbeschermingswet* and/or the *Flora- en Faunawet* – and this legislation is a full and precise implementation of the Habitats Directive – there is no need to involve Article 6(3) in the assessment framework of the local bylaw. Of course, the problem is solved if a permit to shoot clay pigeons is required under the *Natuurbeschermingswet* because of the possible effects on a special protection area. In that case there would be no

5. Directive 92/43; cf. on the direct effect of Article 6(3), Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405.
6. R.J.N. Schlössels, *Het specialiteitsbeginsel* (Den Haag 1998), pp. 8-9.

conceivable reason to take directly effective European law into account when applying local legislation. Proper application of the *Natuurbeschermingswet* and/or the *Flora- en Faunawet* would ensure that nothing was done that would contravene European law. Problems only arise if a permit is *not* required under either of these laws. In that case, other means will have to be found, based on some other statutory system, which will make it possible to take a different decision and so ensure that European law is not contravened.

European law does not require that an administrative authority takes *all* directly effective European law into consideration for *every* decision it makes. Certainly, Article 6(3) of the Habitats Directive must be observed, but from a European law point of view it is wholly irrelevant whether this is done by means of local or regional legislation or through national legislation such as the *Natuurbeschermingswet* or the *Flora- en Faunawet*. In other words, as long as the fulfilment of European law obligations can be guaranteed by or pursuant to provisions of a legislative system, that is – from a European law point of view – sufficient.

The case law of the Dutch *Raad van State* seems to reflect the same view.[7] Consider, for example, a decision concerning the appeal of an environmental organisation against a permit granted under the *Natuurbeschermingswet* to plant and then harvest mussels and oysters from Ireland and the United Kingdom in the Eastern Schelde, or Oosterschelde, a national conservation area. According to the decision, the administrative authority primarily took the view that to refuse the permit would be contrary to the free movement of goods (Art 28 EC Treaty). The question that was at issue was therefore whether the assessment framework of the *Natuurbeschermingswet*, designed to protect nature, should be extended on European law grounds in order to permit the economic and market interests of Article 28 to play a part in the decision whether or not to grant a permit under the *Natuurbeschermingswet*. The *Raad van State* ruled that this was not necessary, because a permit to plant mussel seed was also required under the *Visserijwet* (Fisheries Act) and Article 28 could be considered in the context of that procedure.[8] It observed that the case *exclusively* concerned aspects relating to the *Natuurbeschermingswet* and the scope of Article 6(3) of the Habitats Directive and that there was no place for review in the light of Article 28 EC. In other words, the assessment framework of the *Natuurbeschermingswet*, focusing explicitly on nature conservation, was not rendered inapplicable by Article 28 EC. In this case there was no European law need for this, as the interests Article 28 EC was intended to protect were safeguarded by the *Visserijwet*.

Even clearer is the case law of the *Raad van State* on the question to which statutory system the assessment framework of the Habitats Directive should be reckoned. The Netherlands was long in default regarding implementation of the Habitats Directive. Ultimately this resulted in the inclusion of a special section in the *Natuurbeschermingswet*, under which activities with possible significant effects on a special protection area would have to be subjected to a 'special' Habitats Directive test. Under art. 19d of the *Natuurbeschermingswet* it is prohibited, given the aim of preventing the deterioration of natural habitats and the habitats of species and the disturbance of the species for which the areas have been designated, to carry out projects or other plans

7. *Raad van State* 22 March 2006, LJN: AV6289.
8. Cf. *Raad van State* 26 February 2003 [2003] *M&R*, nr. 92.

which could have such an effect on those habitats or species without a provincial permit or without observing any regulations or restrictions imposed by such a permit. According to the *Raad van State* it was the intention of the legislature when it passed this provision to create an exclusive assessment framework and there is therefore no discretion to involve the assessment framework of the Habitats Directive in other statutory permit systems such as those under the *Wet milieubeheer* (Environmental Management Act), the *Woningwet* (Housing Act), or the *Wet op de Ruimtelijke Ordening* (Spatial Planning Act).[9]

3. Disapplication as a consequence of the requirement of consistent interpretation?

As we know, administrative courts and administrative authorities are obliged to interpret national law as far as possible in conformity with European law.[10] It is hardly surprising that this requirement of consistent interpretation can result in a change in the administrative assessment framework.

For example, it emerged from a decision of the *Raad van State* that Directive 2001/18 on the deliberate release into the environment of genetically modified organisms had not been transposed into Dutch law, specifically the *Wet milieugevaarlijke stoffen* (Environmentally Dangerous Substances Act, *Wms*).[11] Under the *Wms*, authorisation had been granted for small-scale trials with flowering genetically modified rape. Pursuant to the second paragraph of art. 26 *Wms*, the authorisation could only be refused 'in the interest of the protection of man and the environment'. According to the court this statutory framework provided sufficient basis for the court to interpret in the light of the directive. The obligations set out in the directive, including the precautionary principle and the duty to carry out a specific environmental risk assessment in accordance with the criteria of Annex II of the directive, were 'read into' the national law. Clearly, this means that applicants are confronted with obligations arising out of a directive that has not been transposed.

However, the possibilities of consistent interpretation are limited. It is a method that is above all appropriate when the European assessment framework is in effect an extension of the assessment framework of the national statutory system. However, it is not advisable to take consistent interpretation too far. In any event, it will *not* produce an extension of the assessment framework where the assessment framework provided for by the national statutory system is *exclusive*.

Illustrative in this context is a decision of the *Raad van State* on possible consistent interpretation of the Dutch environmental legislation in the light of Article 9(4) of the IPPC Directive, at least in relation to agricultural installations.[12] The case concerned an environmental permit granted for the keeping of several thousand chickens and several hundred pigs. A local resident contested the permit, relying among other things on Article 9(4) of the IPPC Directive. The ammonia deposits made possible by the permit were allegedly incompatible with the directive's requirement that 'best available

9. *Raad van State* 21 February 2007, LJN: AZ9028.
10. Cf. J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), in particular Chapter IV.
11. *Raad van State* 28 June 2004, *M&R* 2004/10, nr. 104 (with note by Jans).
12. *Raad van State* 13 November 2002 [2003] *M&R*, nr. 39.

techniques' should be applied. The court, having established that the IPPC Directive did apply in the case, first examined whether the Dutch environmental legislation could be interpreted in conformity with the directive, in other words whether the assessment framework of the IPPC Directive could be 'read into' the existing Dutch environmental legislation. However, in this case the legislation allowed the authorities no discretion whatever to refuse the permit or to apply the more stringent BAT requirements of the directive. Under the national legislation a permit to keep livestock could not be refused for reasons connected with ammonia deposits if the deposits that might be caused on the nearest area sensitive to acidity did not exceed the value set by law. In this case, the ammonia deposits remained below the statutory limit and so the permit had to be granted. As regards the possibility of interpreting the law in conformity with the directive, the *Raad van State* observed that the national legislation in question constituted the 'exclusive assessment framework' for assessing the ammonia deposits of livestock farms, so that there was no room to apply insights of environmental hygiene connected with ammonia deposits other than those contained in the legislation. The conclusion was therefore inevitable: the national legislation allowed 'no room to prescribe emission limit values based on best available techniques'.[13]

Another example of a statutory system for which the assessment framework cannot be extended by means of consistent interpretation concerns the granting of building permits. Art. 44(1) *Woningwet* provides: 'A normal building permit may only be refused if: [...], and in these circumstances must be refused.' There follows an exhaustive statement of a number of grounds for refusing a permit. In my view the exhaustive, mandatory system of the *Woningwet* precludes extension by the assessment framework of, for instance, the IPPC Directive or the air quality directives. Consistent interpretation cannot change an *exhaustive* system into one that is *non-exhaustive*. In fact, this would amount to a *contra legem* interpretation of art. 44, as 'may only be refused' would then have to be interpreted as 'may, inter alia, be refused'. Such an interpretation would be unacceptable in the light of the principle of legal certainty and would almost certainly not be allowed.[14]

A final example of the limited possibilities of consistent interpretation is the following. From a case of the *Raad van State* it may be implied that the assessment framework that provincial authorities have to apply when approving municipal zoning plans cannot be interpreted so as to conform with Article 6(2) of the Habitats Directive. The case concerned an appeal against approval by the provincial authorities of North Holland for the zoning plan on the island of Texel. Part of the area was designated a national conservation area and part was not. The *Raad van State* ruled that for the part designated a national conservation area the protection required by the Habitats Directive was assured by consistent interpretation of the *Natuurbeschermingswet*. However, for the part that did not fall under the protection of the *Natuurbeschermingswet* the *Raad van State* ruled that it saw no possibility of consistent interpretation, as there were no generally binding rules intended to implement the obligations arising under Article 6(2)

13. Nor is consistent interpretation an option, according to the Netherlands Supreme Court (*Hoge Raad*), even if the national statutory framework would in itself allow it, if the legislature has during the legislative process, for example in explanatory memorandums, unambiguously expressed the deliberate intention of having the national regulations depart from what the directive requires or leaves free. *Hoge Raad* 10 August 2007, LJN: AZ3758.
14. Cf. on *contra legem* and consistent interpretation ECJ Case C-105/03 *Pupino* [2005] I-5285.

of the directive. The lack of national legislation which could be interpreted in conformity with the directive made it impossible to take this route.

All that remains as a possible means of circumventing the speciality principle in such a situation, where it is impossible to apply consistent interpretation, is the direct effect of European law.[15]

4. Disapplication by means of directly effective provisions?

Reliance on European law by interested third parties?

That 'third parties' (including interest groups such as environmental groups) can rely on directly effective provisions of European law before administrative courts, in addition to the applicant, is generally recognised in Dutch administrative law.[16] Successful reliance results in annulment of the contested decision. I am aware of no example of case law in which a third party was denied reliance on directly effective European law because this was precluded by the statutory assessment framework. However, there are several – though not many – examples which justify the cautious conclusion that the speciality principle can indeed be rendered inapplicable as a result of third party reliance on directly effective European law. This emerges, albeit implicitly, from a decision of the *Raad van State* concerning the statutory system of permits required under the *Wet op de Ruimtelijke Ordening*.[17]

The case concerned a permit granted by a local authority to lay three artificial grass fields to replace three natural grass fields. Interested third parties objected, relying, among other things, on the Habitats Directive. It should be added that the case arose before the inclusion of the special and exclusive Habitats Directive test in the *Natuurbeschermingswet* (see section 2 above). Allegedly, the permit could have adversely affected the nearby conservation areas, which were listed among the habitat areas the Dutch Government had sent the Commission. However, at the time of the proceedings the Commission had not yet designated the areas as areas of Community interest. This meant that the European law protection of these areas could not be based directly on Articles 6(2) to (4) of the Habitats Directive, but had to be based on the general 'good faith' requirement not to take any measures that would jeopardise attainment of the objectives of the Habitats Directive.[18] Like the *Woningwet*, discussed above, which provides for an exhaustive, mandatory list of grounds for refusing to grant a building permit, the *Wet op de Ruimtelijke Ordening* provides an exhaustive, mandatory list of grounds for refusing to grant a planning permit. It will be clear that this system also allows no room to refuse a permit on grounds of possible conflict with the European law good faith requirement. Nevertheless the *Raad van State* explicitly considered whether the laying of artificial grass fields was an activity by which attainment of the objectives

15. Here the Council of State applied an order of preference: first examine whether consistent interpretation is possible and only when this proves not to be the case consider direct effect; cf. *Raad van State* 13 November 2002 [2003] M& R, nr. 39 and most recently *Raad van State* 5 september 2007, 200606758/1. Cf. also ECJ Case C-208/05 *ITC* [2007] ECR I-181, para. 70
16. Cf. J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007), in particular Chapter III.
17. *Raad van State* 16 March 2005, LJN: AT0540.
18. ECJ Case C-117/03 *Societa Italiana Dragaggi* [2005] ECR I-167. This involves application of the *'Inter-Environnement'* doctrine; ECJ Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* [1997] ECR I-7411.

of the conservation of natural habitats and wild flora and fauna might be jeopardised. It thereby implicitly acknowledged that it may annul a permit that contravenes European law, even if the objectives of the European law in question are outside the scope of the national assessment framework.

Indeed, it has been pointed out that European law may also result in the exhaustive, mandatory system of the *Woningwet* being disapplied and a building permit being refused, despite the fact that all the criteria mentioned in art. 44 as necessary for a permit to be granted are fulfilled.[19] In this case not by means of consistent interpretation, but by direct effect. The authors give the fictitious example of the construction of a car park. If a permit were refused because a European law environmental quality requirement was exceeded, it could be said that the exhaustive, mandatory system was rendered inapplicable as a result of European law.

A good illustration from the case law is a decision of the district court in Leeuwarden concerning the granting of a building permit for a pancake house near an area falling under the protection of the Birds Directive.[20] The court annulled the permit on the ground that the administrative authority had failed to observe due care and had failed to give adequate reasons for its decision, as it had paid insufficient attention to the relevant European law.[21] It seems that the court is thus neatly able to circumvent the exhaustive, mandatory system of the *Woningwet*. However, the question arises what the court would have decided if the administrative authority had taken European law into account. Would it have annulled the building permit then? My answer would be: Yes, it would. This was also the view of the district court in Zutphen,[22] where the issue was whether the granting of a building permit for 144 recreational bungalows was contrary to Article 6(3) of the Habitats Directive, given the effects on the Veluwe nature area, designated a special protection zone under both the Birds Directive and the Habitats Directive. The court observed that Article 6(3) of the Habitats Directive 'had direct effect and could consequently thwart the exhaustive system of grounds for refusal of art. 44 of the *Woningwet*.' As there was no question in this case of adverse effects within the meaning of Article 6(3) of the Habitats Directive, the appeal was held unfounded.

However, a decision of the *Raad van State* in interim injunction proceedings seems to suggest that the *Raad van State* may well think differently about the possible disapplication of the exhaustive, mandatory system.[23] In its provisional opinion, it held that there was insufficient ground for the view that the *Besluit luchtkwaliteit* (Air Quality Order) could prevent the granting of building permits where the requirements of section 43 of the *Woningwet* were fulfilled.

Application of European law by administrative authorities?

Above it was observed that the *Raad van State* will annul a permit where an interested third party invokes European law, even where the permit was properly granted under the national assessment framework. From the case law of the European Court of Justice

19. P.J.J. van Buuren, Ch.W. Backes, A.A.J. de Gier & A.G.A. Nijmeijer, *Hoofdlijnen ruimtelijk bestuursrecht* (Deventer 2006), p. 198.
20. *Rechtbank Leeuwarden* 25 October 2000, M&R 2001/3, nr. 28, with note by Bastmeijer.
21. See more extensively on this form of review: J.H Jans, 'The Consequential Effect of European Law in Respect of the Requirement of Due Care' [2007] *Review of European Administrative Law*, pp. 63-72.
22. *Rechtbank Zutphen* 4 January 2006, LJN: AV0543. This judgment also predates the special Habitats Directive test in the Nature Conservation Act; see section 2 above.
23. *Raad van State* 28 October 2005, LJN: AU 5387.

(ECJ), in particular *Costanzo*, it emerges that there is another side to the possibility of invoking directly effective European law before a national court.[24] Namely, the fact that administrative authorities are then also required to apply that same directly effective European law. In the words of the ECJ:

> It is important to note that the reason for which an individual may […] rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.
>
> It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.[25]

Given this observation, it is reasonable to assume that the *Raad van State* would require administrative authorities to apply directly effective European law even if this meant disapplication of the assessment framework of the permit system in question. Unfortunately, however, things are not that simple. Let us therefore examine a number of decisions of the *Raad van State* in more detail.

Take, for example, a decision of 7 December 2005.[26] The case concerned the refusal by the municipal executive of Boxtel to grant an environmental permit for a pig and cattle farm. The refusal was based on the increase of ammonia deposits in a Habitats Directive area. In other words, the local authorities felt obliged to refuse a permit to ensure that the Habitats Directive would not be infringed if it was granted. However, the legislation provided that, as regards decisions concerning an environmental permit for the establishment or change of a livestock farm, the competent authority should only determine the consequences of ammonia emissions from the animals' quarters on the farm in the manner provided for by law. In this case it was clear that the system of the law allowed no room to refuse the permit. As regards the question whether the refusal could not then be based on the Habitats Directive the *Raad van State* observed: 'Given the wording of the law it was also not possible to interpret the law in the light of the wording and purpose of Article 6(3) of the Habitats Directive and base the contended decision on this interpretation. Nor could the respondent directly rely on Article 6(3) of the Directive vis-à-vis the appellant as a ground for refusing the permit, as no private individual has requested that in this case. It is established case law of the Court of the Justice of the European Communities that a directive cannot of itself impose obligations on individuals and that the provision of a directive cannot as such be relied upon vis-à-vis

24. ECJ Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, para. 31, later confirmed in Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055.
25. Cf. also para. 33 of *Fratelli Costanzo*: 'that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them'.
26. *Raad van State* 7 December 2005 [2006] M&R nr. 19. Cf. also *Raad van State* 1 February 2006, LJN: AV0959.

an individual (Judgments of 26 February 1986 *Marshall*, C-152/84 [1986] ECR 723; 14 July 1994 *Faccini Dori*, C-91/92 ECR I-3325 and 7 January 2004 *Wells*, C-201/02 […]) This is precluded by the principle of legal certainty.'

Administrative authorities may not *themselves* refuse a permit as being contrary to the Habitats Directive unless a third party opposes the granting of the permit. The administrative authority must make its judgment based on the assessment framework set out in the national legislation. Adopting the Habitat Directive as a ground for refusal would, in the opinion of the *Raad van State*, amount to imposing obligations under the directive on an individual. In other words, the assessment framework of the national law remains effective and can only be disapplied where a third party relies on directly effective European law.

The case law of the *Raad van State*, as just discussed, amounts to the following: if an administrative authority grants a permit in accordance with the national assessment framework but contrary to a directly effective provision of a directive and a third party appeals against this, the *Raad van State* will annul the permit.[27] In other words, the speciality principle will not immunise the permit against annulment as being contrary to European law, even if the European rules contain a different assessment framework from the one in the permit system.

However, if the administrative authority applies the directly effective provision *itself* by refusing a permit and the permit holder appeals against this, the decision will be annulled because, according to the *Raad van State*, this would amount to a form of improper horizontal effect – at any rate, if no basis can be found in national law for such a refusal. Administrative authorities are thus faced with a difficult choice. If they apply national law and observe the speciality principle, the *Raad van State* will annul the decision as being contrary to the directive; if they apply European law, the *Raad van State* will annul the decision because they have ignored the national legal basis even though a directive cannot of itself be relied upon against individuals. The *Raad van State*'s approach here has been severely criticised in the literature.[28]

Like these critics, I cannot agree with the line taken by the *Raad van State* either. The core of its position is that refusing a permit where the assessment framework of the national legislation will not allow its refusal on grounds of being contrary to a European directive would imply that the directive was being directly relied upon against an individual. And this would be contrary to the rule against horizontal effect of directives; at least this is how I understand the *Raad van State*'s reasoning. In my view this position cannot be implied from 'rock-hard case law' of the ECJ.[29] In *Wells*, the case cited by the *Raad van State*, there are on the contrary indications that the reverse may be true: negative consequences for the permit holder of failure to apply a too limited assessment framework cannot be regarded as a prohibited form of 'inverse direct effect'.[30] In my opinion it can be implied from *Wells* and the other case law of the ECJ that the ECJ only has a problem with the horizontal effects of provisions of directives when they have not

27. Cf. also *Raad van State* 15 March 2006, LJN: AV5036.
28. Cf. J.M. Verschuuren, 'Afdeling bestuursrechtspraak worstelt met rechtstreekse werking EG-richtlijnen', [2003] *NTER*, pp. 75-77 and H.F.M.W. van Rijswick & R.J.G.M. Widdershoven, 'Een gemiste kans: de tijdelijke vergunning voor de lozing van zwarte-lijststoffen', [2002] *TvO*, pp. 232-233.
29. The term *keiharde jurisprudentie* (rock-hard case law) is used by H.G. Sevenster, see J.M. Bazelmans & M.N. Boeve (red.), *Milieueffectrapportage naar huidig en toekomstig recht* (Groningen 2006), p. 61.
30. The term is from ECJ Case C-201/02 *Wells* [2004] ECR I-723, para. 55.

been properly implemented, and with possible negative effects for individuals when the provisions in question are ones that are intended to create obligations for *individuals*, not when they are intended to create obligations for the *state*.[31]

Nor do I understand – assuming the *Raad van State* is right – why an administrative authority should be able to refuse a permit where a third party invokes a directly effective provision of a directive, but not otherwise. Why should there be no horizontal effect where a third party does not rely on such a provision, and why should legal certainty not be an issue? The implication is that the enforcement of European law is effectively placed in the hands of interested third parties, and administrative authorities are more or less compelled to take a decision (after all, they cannot refuse to do so) which is in effect an unlawful decision conflicting with a European directive.[32] This surely cannot be the intention of the rule against horizontal effect? Or does the *Raad van State* mean that where a third party relies on European law before a *court* the court will have to reward such reliance? But if this is what the *Raad van State* means, I wonder how this squares with the ECJ's view in *Fratelli Costanzo* and *Consorzio Industrie Fiammiferi* that administrative authorities are basically under the same obligation to apply provisions of directives as courts. Admittedly, there is no explicit ECJ case law from which it can be implied that administrative authorities are required under European law to apply directly effective European law *ex officio* (in other words without the intermediary of an interested party).[33] However, the view of the *Raad van State* that refusing a permit where the national assessment framework will not allow its refusal on the ground that it is contrary to a European directive would imply that the directive was being directly relied upon vis-à-vis an individual, cannot in my view be deduced from *Wells* or any other ECJ case law. In fact it would have made more sense to refer a question to the ECJ for a preliminary ruling on this key issue of the effect of European directives on national law.

5. Disapplication for breach of primary Community law

The *Raad van State*'s main argument for not allowing application of directly effective European law to the detriment of a person directly affected is the rule against horizontal effect of directives. This argument is in any event not relevant where the administrative authority is required to apply directly effective *primary* Community law.

Consider the following example. A foreign company applies to the regional authority (*Gedeputeerde Staten*) for the province of Limburg for a permit under the *Ontgrondingswet* (Soil Removal Act) to extract river clay from the River Maas. If the permit were not granted, this might well be regarded as an obstruction of the free movement of goods (Article 29 EC) or services (Article 49 EC). It is quite clear from the case law of the ECJ that an administrative authority must take the functioning of the internal market into consideration when taking a decision.[34] It is possible that this could

31. I refer here briefly to ECJ Case C-443/98 *Unilever Italia* [2000] ECR I-7535 and Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835. Cf. on *Pfeiffer* also the note by S. Prechal in [2005] *CMLRev.*, pp. 1445-1463. The judgment in Case C-144/04 *Mangold* [2005] ECR 9981, also corresponds precisely with this view.
32. Which, it may be assumed, would itself be a ground for a successful action for damages, based *inter alia* on European law (*Francovich* liability).
33. See, by contrast, on *ex officio* application by judicial authorities the judgment in ECJ Case C-222/05 *Van de Weerd* [2007] ECR I-4233.
34. See ECJ Case C-320/03 *Commission v Austria* [2005] ECR I-9871.

provide an argument for not refusing the permit in this case, on grounds of European law. Public interests other than those protected by the *Ontgrondingswet* would therefore have to form part of the assessment framework taken into consideration by the administrative authority.

This is further supported by the decisions of the *Raad van State* discussed above on the planting of Irish and UK mussel seed in the Eastern Schelde. Our conclusion there was that the assessment framework of the *Natuurbeschermingswet*, focusing exclusively on conservation, is not disapplied by Article 28 EC Treaty though there was no need for this in those cases as the protection of the interests underlying Article 28 was provided by the *Visserijwet*. The question does however arise how the *Raad van State* would act – or would have to act – if for a certain activity only a permit under the *Natuurbeschermingswet* were necessary and to refuse it would be contrary to Article 28. In my view the administrative authority would then have to ignore the exclusive assessment framework of the *Natuurbeschermingswet* and avoid a conflict with Article 28 by granting the permit. Nor would this involve *détournement de pouvoir* (abuse of power), the other side of the speciality principle.

According to the classical view of the speciality principle public interests other than those provided for by the statutory permit system itself cannot play a part in decision-making, except when those public interests coincide with the interests of the applicant. However, European law requires that it (European law) and objectives related to it are taken into consideration in decision-making, in order to avoid administrative authorities taking decisions that conflict with primary Community law. This applies even if the administrative authority would thereby have to venture outside the national assessment framework.

6. Conclusion

The basic principle is that European law does not affect the speciality principle as it exists in Dutch administrative law. European law does not require that an administrative authority takes *all* directly effective European law into consideration when taking a decision. It does however require that situations are avoided where administrative authorities act in contravention of European law. In many cases it is possible to 'stretch' a too limited assessment framework by means of consistent interpretation, so that it is possible to take European law into account. However, where particular powers and other exclusive assessment frameworks are limited by legislation the doctrine of consistent interpretation has little to offer, because in that case the result would be a *contra legem* interpretation of the national assessment framework. And that is not what European law requires either. In this kind of situation all that remains is to apply the doctrine of direct effect.

On the basis of the case law of the *Raad van State* it is possible to draw the tentative conclusion that a *court* may disapply the speciality principle if a third party relies on directly effective European law. However, the same *Raad van State* does not regard it as admissible for an *administrative authority* to disapply the principle of its own accord, basing its decision on an assessment framework in a directive that departs from the national law framework. The reasoning on which the *Raad van State* bases this view,

derived from European law, is not convincing and cannot in my view be implied from the case law of the ECJ. The *Raad van State*'s view virtually compels administrative authorities to take decisions that conflict with European directives. This cannot in my view be the intention.

In other words, it is not true to say that it makes no difference whether the speciality principle is disapplied by consistent interpretation or direct effect, at least not where provisions of directives are concerned. Where consistent interpretation is used, it is national law that is applied in the end, and any problems regarding the horizontal effect of provisions of directives can be avoided. As discussed above, the *Raad van State* regards it as problematic where administrative authorities apply directly effective provisions of directives *ex officio* where this is to the detriment of a person directly affected. Where consistent interpretation is used, the basis for the administrative authority's decision is found in national law and so no directive is applied (horizontally or otherwise).

The rationale of the speciality principle is that administrative authorities should not, for reasons of legality and conformity to the rule of law, exercise public law powers which the legislature has not declared them competent to exercise. The view of the *Raad van State* that, where European law does not provide a basis for competence, administrative authorities may only base their powers on national law is one I share.[35] But this does not mean, as the *Raad van State* apparently believes, that administrative authorities are obliged to grant permits contrary to European law if national law does not supply grounds for refusal. This does not serve the legality of the administration. Consequently, where a rule of European law requires that certain interests are taken into consideration, the speciality principle should be disapplied.

35. Cf. also *Raad van State* 11 January 2006 [2006] *NJB*, nr. 265.

work Directive,[69] Directive 91/156 on waste[70] and Directive 96/62 on ambient air quality assessment and management.[71]

The case law of the Court shows that the Court is in principle willing to review European legislation in the light of the proportionality principle. In the *Standley* case, the Court considered the Nitrates Directive.[72] It was argued that this directive gave rise to disproportionate obligations on the part of farmers, so that it offended against the principle of proportionality. The Court was not impressed. After a careful study of the Nitrates Directive, it came to the conclusion:

> 'that the Directive contains flexible provisions enabling the Member States to observe the principle of proportionality in the application of the measures which they adopt. It is for the national courts to ensure that that principle is observed.' In general the Court, in its assessment of the proportionality of an EC measure, will apply the so called 'manifestly inappropriate' test: 'the legality of a measure adopted [...] can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[73]

The conclusion in *Standley* that the flexible provisions of the directive enables the Member States to observe the principle of proportionality will be applicable to most, if not all, European environmental legislation.

The integration principle

One of the most important principles of EC law of relevance for environmental protection is the integration principle stated in Article 6 EC:[74] 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

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[69] Directive 2000/60 establishing a framework for the Community action in the field of water policy ; OJ 2000 L 327.

[70] OJ 1991 L 78/32.

[71] OJ 1996 L 296/55.

[72] Case C-293/97 *Standley* [1999] ECR I-2603. Cf. also Case C-102/97 *Commission* v. *Germany* [1999] ECR I-5051, para. 42. The same approach can also be found in the Court's judgment in Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651, on the precautionary principle; See below section 3.2 of this chapter.

[73] Case 331/88 *Fedesa* [1990] ECR I-4023. Cf. also more recently Case C-189/01 *Jippes* [2001] ECR I-5689, para. 83 and Case C-27/00 *Omega Air a.o.* [2002] ECR I-2569, para. 72. In the latter case, concerning threshold levels for noise produced by airplanes, the Court did not find that the Council committed a manifest error of assessment even if alternative measures could have been taken which would have been economically less damaging. Cf. also, with respect to the Waste Oils Directive, Case C-15/03 *Commission* v. *Austria* [2005] ECR I-837, para. 38 in particular and Case C-92/03 *Commission* v. *Portugal* [2005] ECR I-867.

[74] Cf. Article 11 FEU after the entry into force of the Reform Treaty.

The importance of the integration principle is reaffirmed in the Sixth Environment Action Programme, which stipulates that 'integration of environmental concerns into other policies must be deepened' in order to move towards sustainable development.[75] This refers to what is known as external integration, in other words, the integration of environmental objectives in other policy sectors. The principle was introduced into the Treaty by the Single European Act. There it was provided that 'Environmental protection requirements shall be a component of the Community's other policies.' It is notable that the current version of the Treaty is worded more forcefully and refers explicitly to implementation of the Community policies. Moreover, the general formulation makes it clear that the operation of the integration principle extends to the entire EC Treaty. New is the introduction of the clause 'in particular with a view to promoting sustainable development.' This has given the concept of 'sustainable development' some legal 'weight' and therefore cannot be seen as merely stating a policy objective to be achieved.[76]

The first question which presents itself is what precisely has to be integrated. The Treaty refers to 'environmental protection requirements'. What should this be taken to mean? Certainly, it would seem to include the environment policy objectives of Article 174(1) EC. It also seems likely that it includes the principles referred to in Article 174(2) EC, such as the precautionary principle and the principle that preventive action should be taken. And finally integration of the environment policy aspects referred to in Article 174(3) EC should not *a priori* be excluded, though it is true that the Treaty does not state that these aspects have to be integrated, but only that they should be taken into account. This wide interpretation of the integration principle in effect leads to a general obligation on the European institutions to reach an integrated and balanced assessment of all the relevant environmental aspects when adopting other policy.

The next problem concerns the question of whether the integration principle implies that the EU's environment policy has been given some measure of priority over other European policy areas. Probably, it has not, at least if by priority it is meant that, in the event of a conflict with other policy areas, environment policy has a certain added value from a legal point of view.[77] The text of the Treaty does not support such a conclusion. The integration principle is designed to ensure that protection of the environment is at least taken into consideration, even when commercial policy is involved or when other decisions are being taken and have to be worked out in detail, for example in the fields of agricul-

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[75] Decision 1600/2002 laying down the Sixth Community Environment Action Programme, OJ 2002 L 242. Cf. also Communication from the Commission 'A partnership for integration: a strategy for integrating the environment into EU policies', COM (1998) 333 and Commission working document 'Integrating environmental considerations into other policy areas – a stocktaking of the Cardiff process' COM (2004) 394.

[76] Cf. Bär & Kraemer (1998) at 316-318.

[77] See for a discussion of this issue Bär & Kraemer (1998) at 318-319.

ture, transport,[78] energy,[79] development aid,[80] trade and external relations,[81] internal market[82] and competition policy, regional policy, etc.[83] However, the manner in which potential conflicts between protection of the environment and, for example, the functioning of the internal market should be resolved cannot be inferred from the integration principle as such. Such conflicts should be resolved against the background of the body of case law established by the Court of Justice in respect of the principle of proportionality. If European legislation for the protection of the environment, which the Court has already designated as one of the essential EC objectives in the *ADBHU* case, results in restrictions of trade, this is regarded as permissible as long as the measures are not discriminatory and do not entail restrictions that go beyond what is strictly necessary for the protection of the environment.[84] The principle of proportionality may also prove a useful guide in relation to other areas of policy in which conflicts flowing from the integration principle are involved.

At the same time, it should be noted that when interpreting Article 33 EC, in the context of the common agricultural policy, the Court also has to weigh various objectives against each other. The institutions of the EC have wide discretionary powers when harmonising policy in relation to the various objectives contained in Article 33 EC (increasing productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, assuring the stability of supplies and ensuring supplies reach consumers at reasonable prices). One or more of these objectives may (temporarily) be given priority, as long as the policy does not become so focused on a single objective that the attainment of other objectives is made impossible. This approach could also be employed in respect of the environment. It would then be arguable that, if a given objective could adequately be achieved in a variety of ways, the integration principle would entail a choice for the least environmentally harmful.

Now that the question of the priority has been addressed, the problem of the legal enforceability of the integration principle looms large. The following comments are called for. The Court's judgments clearly show that the contention that the integration principle is of no value whatsoever is not correct. For example, the principle fulfils an important function in the choice of the proper legal basis of environmental measures and has been used by the Court to justify 'environmental' legislation under legal bases other than Article 175 EC.

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78 Mahmoudi (2005).

79 Dhondt (2005).

80 Williams (2005).

81 See Marín Durán & Morgera (2006).

82 Cf. for instance with respect to the freedom to provide services the Services Directive, Directive 2006/123 on services in the internal market (OJ 2006 L 376/36), which states in its preamble at point 7: 'This Directive also takes into account other general interest objectives, including the protection of the environment'.

83 Cf. Dhondt (2003) and Vedder (2003).

84 Case 240/83 *ADBHU* [1985] ECR 531.

In the *Chernobyl I* case, the issue was whether Regulation 3955/87 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl power station was rightly based on Article 113 (now Article 133) rather than Article 130s (now Article 175).[85] The Court held that the 'the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.' In the *TiO2* case,[86] the Court confirmed this.

A second legal consequence of the integration principle, closely connected with the above, is the following. The principle broadens the objectives of the other powers laid down in the Treaty and thus limits the role of the specific powers doctrine in environmental policy.

The *Chernobyl I* case and the *TiO2* case demonstrate that environmental objectives can be pursued in the context of the common commercial policy and its internal market policy. The principle has been used also in the interpretation of Directive 90/50 on public service contracts, leading to the conclusion that this does not exclude the possibility of using environmental criteria in identifying the economically most advantageous tender.[87] Without the integration principle, it is debatable to what extent environmental objectives, for example in connection with the approximation of laws for the attainment of the internal market, could be taken into account by the Council.

It was not without reason that most European environmental measures in the period prior to the Single European Act were based on a combination of the old Articles 100 and 235 EEC Treaty. The powers of approximation are limited in Article 3(h) 'to the extent required for the proper functioning of the common market'. And because the requirements of a properly functioning common market were not always and automatically synonymous with the requirements of environmental protection, it was necessary to invoke the additional legal basis supplied by Article 235 EEC. The integration principle makes such artificial devices unnecessary. Not only does it extend the objectives of the internal market policy and the common commercial policy, but environmental objectives can also be taken into account in other policy areas without the attributed powers doctrine interfering.

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[85] Case C-62/88 *EP* v. *Council* [1990] ECR I-1527. In the *TiO2* case (Case C-300/89 *Commission* v. *Council* [1991] ECR I-2867), the Court confirmed this, stating: 'That principle implies that a Community measure cannot be covered by Article 130s [now Article 175 EC, authors] merely because it also pursues objectives of environmental protection.'

[86] Case C-300/89 *Commission* v. *Council* [1991] ECR I-2867.

[87] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, para. 57.

> Thus in *Pinaud Wieger,* the Court held that the achievement of freedom to provide services in the transport sector can only be attained in an orderly fashion in the context of a common transport policy 'which takes into consideration the economic, social and ecological problems'.[88] And with respect to competition law, we argue that the impact on the environment must be taken into account in assessing whether agreements between undertakings violate Article 81 EC and is relevant to the Commission's when deciding whether or not to approve state aid under Article 87(3) EC.[89] Here, too, the environmental consequences can now be taken into account.[90]

Another aspect which is important when evaluating the legal status of the integration principle is whether the legitimacy of actions of the Council and Commission can be reviewed by the Court in the light of the principle. Can the validity of a directive or regulation, for example in the field of transport or agriculture, be questioned on the grounds that the decision has infringed the environmental objectives of the Treaty? In other words, the question as to the legal enforceability of the integration principle is in fact a question as to the legal significance of the objectives, principles and other aspects referred to in Article 174(1), (2) and (3) EC. It has already been noted that the present version of the principle has been formulated more forcefully than under the Single European Act. In principle, the review of European measures in the light of the environmental objectives should therefore be regarded as possible.

> Indeed, in its judgment in the *Chernobyl I* case, the Court speaks in just such strong terms ('must satisfy the requirements of environmental protection'). In the *Betatti* case, in which the lawfulness of Ozone Regulation 3093/94 was disputed, the Court was also prepared to examine the compatibility of a measure with the environmental objectives and principles of the Treaty.[91] It observed that Article 174 EC 'sets a series of objectives, principles and criteria which the Community legislature must respect in implementing [Community environmental] policy.' However, it should be borne in mind that the institutions have wide discretionary powers as to how they shape the Community's environment policy, and will have to balance the relative importance of the environmental objectives and other Community objectives as they proceed. The Court expressed this in the following terms: 'However, in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a

88 Case C-17/90 *Pinaud Wieger* [1991] ECR I-5253. See also Case C-195/90 *Commission* v. *Germany* [1992] ECR I-3141.

89 Cf. Community Guidelines on State aid for environmental protection, OJ 2001 C 37/3 containing a clear reference to the integration principle. See also Chapter 7 extensively.

90 Cf. Chapter 7, section 7.3.3.

91 Case C-341/95 *Gianni Bettati* [1998] ECR I-4355.

manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty.'

The conclusion that can be drawn from these judgments seems to be that only in very exceptional cases will a measure be susceptible to annulment (or being declared invalid) because certain environmental objectives seem not to have been taken sufficiently into account.[92] Another factor which will probably also have to be taken into account is that the degree to which measures are open to judicial review may differ depending on whether the objectives of Article 174(1) EC, the principles of Article 174(2) EC or the policy aspects of Article 174(3) EC are involved. As far as the latter are concerned, the Treaty states that the Community shall 'take account of' these aspects, which is not the same as observing them. Besides this, Article 174(2) EC states that the Community shall 'aim' at a high level of protection. The conclusion must surely be that the application of the integration principle is amenable to judicial review, but that the extent of that review is limited and may differ from one case to the next.

Perhaps more important than the possibility of relying on the principle before the Court of Justice is the following legal consequence. In our opinion, secondary European legislation can – and indeed must – be interpreted in the light of the environmental objectives of the Treaty, even outside the environmental field.

For example it has emerged as an important factor in justifying the application of the precautionary principle outside of the environmental sphere.[93]

Another example can be found in *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* where the Court assessed if the precautionary principle was taken into account in Directive 99/220 on the deliberate release into the environment of genetically modified organisms.[94] Another example can be found in the *ARCO Chemie Nederland* case.[95] In that case, the Court of Justice ruled that the concept of 'waste', in view of the prevention and precautionary principle, cannot be interpreted restrictive. This is, as it were, a special form of the generally accepted method of interpreting European law so as to be compatible with the Treaty.[96] Furthermore, one could argue that the Treaty itself, for instance the provisions on the free movement of goods, has to be interpreted in the light of the

[92] See also the *Standley* case discussed above in the context of the proportionality principle; Case C-293/97 *Standley* [1999] ECR I-2603.

[93] In particular in relation to the protection of public health. See Joined Cases T-74, 76, 83, 85, 132, 137, 141/00 *Artegodan GmbH a.o.* v. *Commission* [2002] ECR II-4945, para. 183.

[94] Case C-6/99 *Association Greenpeace France* v. *Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651. The legal basis of the directive is Article 100a EEC.

[95] Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland* [2000] ECR I-4475. See also Case C-270/03 *Commission* v. *Italy* [2005] ECR I-5233, para. 12.

[96] Case 172/82 *Inter-Huiles* [1983] ECR 555.

environmental objectives and principles mentioned in Article 175 EC.[97] In Chapter 6, we will see that the principle has been key in justifying recourse to the mandatory requirement relating to environmental protection to justify a directly discriminatory barrier to trade.[98]

Finally, we would like to refer to the Court's case law on the Waste Directive. It is settled case law that the concept of 'waste' cannot be interpreted restrictively in view of the environmental principles of Article 174 EC.[99]

A final question that should be discussed in connection with this principle is that of the possible consequences for Member States. In principle, in view of the fact that the text of the Treaty expressly refers to 'Community policies and activities', the integration principle should have no direct legal consequences for the Member States. Of course, there will be indirect effects, in the sense that the Council and the Commission will observe the principle in their legal acts, which are often addressed to the Member States. As these are often integrated regulations and directives, the Member States will also be required to observe a certain degree of integration. Also one could argue that where Member State exercise some discretion under a EU policy (e.g. the choice of trans European networks) the integration duty might apply directly to them.

On the other hand, it seems unlikely that the Member States will be bound by the environmental objectives and principles of the Treaty in areas that have not been harmonised, other than by the general obligation contained in Article 10 EC. They are not directly applicable.[100]

In the *Peralta* case, the lawfulness of Italian environmental legislation was disputed, *inter alia* because of alleged incompatibility with Article 130r (now Article 174) EC.[101] The Court rejected this claim and observed that this provision is confined to defining the general objectives of the European legislature in the matter of the environment. Responsibility for deciding what action is to be taken is conferred on the Council by Article 175. Moreover, Article 176 states that the protective measures adopted pursuant to Article 175 are not to prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty. Article 174 does not therefore preclude legislation of the kind in question in the main proceedings.

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97 See for instance Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, para. 48.

98 Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

99 Cf. for instance Case C-1/03 *Van de Walle a.o.* [2004] ECR I-7613, para. 45.

100 Cf. Krämer (2007) at 6. This lack of direct applicability prompted the Avosetta group of European environmental lawyers to suggest adding the following provision in the EC Treaty: 'Subject to imperative reasons of overriding public interests significantly impairing the environment or human health shall be prohibited.' See for more details: www.avosetta.org.

101 Case C-379/92 *Peralta* [1994] ECR I-3453.

In the same vein, we may point at the *Deponiezweckverband Eiterköpfe* case.[102] In that case, the Court decided that national measures that exceed the minimum level of protection of the Directive on the landfill of waste need not be reviewed in light of the principle of proportionality.

The scarce national case law on the subject also points in the same direction. In *Duddridge*, the English High Court held that the precautionary principle did not as such impose obligations on Member States.[103]

The integration principle is also reflected in the Charter of Fundamental Rights of the European Union.[104] Article 37 of the Charter contains a text similar, but not identical, to Article 6 EC: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' A difference is, for instance, that Article 37 Charter only refers to EU 'policies' and not to EU 'activities'. Furthermore, Article 6 EC refers more broadly to 'environmental protection requirements', whilst the Charter requires only 'a high level of environmental protection and the improvement of the quality of the environment' to be integrated.

Fundamental rights and the environment

According to Article 6 EU, the EU shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as general principles of Community law.[105] It is well known that this provision is a codification of the case law of the Court of Justice.[106]

Although this is not the place to give a treatment of the case law of the European Court of Human Rights relevant to the protection of the environment, environmental issues nowadays do play a more important role than ever before.

The following *Öneryildiz* case is just to illustrate the importance of this case law.[107] Öneryıldız is a Turkish national who, along with twelve members of his family, was living in a shantytown of Hekimbaşı Ümraniye near Istanbul. This town was

[102] Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753. See also Chapter 3, section 5.

[103] High Court, Queen's Bench Division (Smith L.J. & Farquharson L.J.) 3 October 1994, *R.* v. *Secretary of State for Trade & Industry,* ex parte *Duddridge & others* [1995] 3 C.M.L.R. 231. See also the judgment of the Dutch Den Haag District Court in the *Waterpakt* case, 24 November 1999 *Waterpakt* [2000] *MR* 1, which ruled in the same manner.

[104] OJ 2000 C 346/1. This charter was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000. After the entry into force of the Reform Treaty, according to the 'new' Article 6(1) EU, the provisions of the Charter 'shall have the same legal value as the Treaties'.

[105] Cf. Article 6(3) EU after amendment by the Reform Treaty.

[106] Case 29/69 *Stauder* [1969] ECR 419.

[107] ECHR 18 June 2002 *Öneryildiz* v. *Turkey* – 48939/99 [2002] ECHR 496.