

III – Independence of Regulatory Agencies, Supervisory and Enforcement Authorities

The Different Levels of Protection of National Supervisors' Independence in the European Landscape

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1. Restricting the Principle of Autonomy

EU law is based on the principle of material norms being anchored in European law and on their transposition being based on the national legal order. The effect of European law on the national legal order is felt via national rules of law. This applies both with respect to national institutional structures and national procedural rules and is referred to in European law as the principle of *institutional and procedural autonomy* of the Member States.¹ Looking, however, at various European rules adopted in recent years, it seems there are now a number of exceptions to this principle. Although the European Court of Justice (ECJ) consistently emphasises that the respect EU law has for the institutional structure of the Member States, secondary European legislation (in the form of regulations and directives) contains more and more stipulations that undermine this autonomy and significantly curtail the freedom available to the member states at a national level.²

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1 J.H. Jans *et al.*, *Europeanisation of Public law*, Europa Law Publishing, Groningen, 2007, p. 40-42.

2 For a discussion of the European influence on the principle of legality via ECJ case law and various European Directives, *see* S. Lavrijssen & A.T. Ottow, *The Legality of Independent Regulatory Authorities*, in L.F.M. Besselink, F. Pennings & S. Prechal (eds.), *The Eclipse of the Legality Principle in the European Union*, Kluwer International, The Hague, 2010, pp. 73-96.

2. National Supervisors' Independence: the Rationale

The move towards curtailing national autonomy is particularly evident where various sectors – including telecommunications,³ energy, the media and, more recently, the railways – are regulated.⁴ These fields are interesting from the perspective of independence as it is specifically in these sectors that European law has had a substantial influence on the requirements set in respect of national supervisors' independence. This is because national and local governments have traditionally played an important role, as shareholders in enterprises operating in these sectors. In many cases, state-owned entities, often operating as monopolies, were felt to be the most appropriate means of providing services of general interest to the public. Over time, however, technological developments and ideas on competition led to many of these traditional monopolies being dismantled and privatised. An important issue then was to prevent unfair competition from the state and to ensure that the state's involvement in the sector was placed at arm's length. This resulted in various supervisors being established to oversee the liberalisation process and these bodies required the ability to operate independently of the state.

The European legislator included various requirements for independence in the liberalisation directives adopted for the infrastructure sectors. These requirements have become increasingly stringent; whereas they originally focused only on the need for supervisors to be independent of *market parties*,⁵ they have since been extended to include independence from the *political arena*.⁶

Independence from market parties

It was deemed necessary for the supervisors to be independent of market parties in order to ensure that all the interests at stake in the various markets and in potential conflict situations would be given proper consideration and without

3 A.T. Ottow, *Telecommunicatietoezicht. De invloed van het Europese en Nederlandse bestuurs(proces) recht* ('Supervising telecommunications – The influence of European and Dutch administrative (procedural) law'), Sdu Uitgevers, The Hague, 2006.

4 See A.T. Ottow, Europeanization of the Supervision of Competitive Markets, *European Public Law*, Vol. 18, 2012, No. 1, p. 191-221.

5 In *France v. Commission*, ECJ 19 March 1991, case C-202/88, ECR 1991, I-1223, the ECJ derived the principle of independence from the EC (now EU) Treaty. See also ECJ 27 October 1993, *Decoster*, case C-69/91, ECR 1993, I-5335. The principle of independence was subsequently developed in more detail in various European Directives. See A.T. Ottow, Onafhankelijkheid van toezicht-houders. Hof van Justitie EU 9 maart 2010, Commissie/Duitsland, zaak C-515/07, *Tijdschrift voor Toezicht*, 2010, No. 3, pp. 78-86, A.T. Ottow & S.A.C.M. Lavrijssen, Het Europese recht als hoeder van de onafhankelijkheid van nationale toezichthouders, *Tijdschrift voor Toezicht*, 2011, No. 3, p. 34-50 and S. Lavrijssen & A.T. Ottow, Independent supervisory authorities: a fragile concept, *Legal issues of Economic integration* Vol. 39, 2012, No. 4, p. 419-446.

6 For these two aspects of independence see Ottow 2010 *supra*; Lavrijssen & Ottow 2012 *supra*, p. 427-430; T. Tridimas, Community Agencies, Competition Law and ESCB Initiatives on Securities Clearing and Settlement, in P. Eeckhout & T. Tridimas, *Yearbook of European Law 2009*, Vol. 28, 2009, Oxford University Press, Oxford, 2009, p. 216-307 and T. Prosser, *The regulatory enterprise. Government, regulation and legitimacy*, Oxford University Press, Oxford, 2010, p. 226-235.

interference by states, many of which still held stakes in market parties in these sectors. No conflicts of interest were permitted. Not only were supervisors required to be legally separate from and functionally independent of market parties, but there also had to be a genuine structural separation between the regulatory (and supervisory) tasks and a Member State's shareholding in a market party.⁷ These provisions did not, however, extend to stipulating how supervisors should be incorporated into the constitutional order of a Member State. It remained unclear, therefore, as to whether a supervisor could be a body falling under ministerial responsibility in a Member State or even be part of a ministry.⁸

Independence from the political arena

Over time, the European Commission indicated that political interference, too, should be excluded as this represented an obstacle to an objective assessment by supervisors. Politics driven by short-term interests can create regulatory uncertainty and is often driven by political or other specific interests, rather than being based on a balanced analysis by experts. The requirement for independence from the political arena is, however, more controversial in that it results in direct interference in the institutional, democratic systems of the Member States.

Despite the sensitivity of this issue, the European legislator has since further tightened the requirements for independence, as well as imposing far-reaching obligations on Member States in the new telecommunications and energy directives so as to ensure supervisory independence from the political world. Staff at the supervisory authority are not permitted to “seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks”.⁹ In order to safeguard supervisors' independence, Member States must ensure that the authority “can take autonomous decisions, independently from any political body, (...) with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties”.¹⁰ These changes mean the new directives go significantly further in terms of the degree of independence required as they now also include independence at a political and institutional level.

7 Article 3(2), Framework Directive (Directive 2002/21/EC, *OJEC*, L108/33).

8 For a more recent case, see ECJ 6 March 2008, *Comisión del Mercado de las Telecomunicaciones v. Administración del Estado*, case C-82/07, at <www.curia.europa.eu>. The ECJ found in this case that the Framework Directive did not require the assignment of the national numbering resources and the management of the national numbering plans to be allocated to separate regulatory authorities.

9 See Article 35(4)(b)(ii) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (*OJEC* 2009, L 211/55). See also Article 3(3)(a) of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (*OJEC* 2009, L 337/37).

10 Article 35(5)(a) Directive 2009/72/EC.

Complete independence

The ECJ seemingly followed the same line of increasing independence in the significant judgment reached in March 2010, in which it ruled that the authorities responsible for monitoring the processing of personal data (pursuant to Article 28(i) Directive 95/46/EC)¹¹ were expected to perform their tasks ‘with complete independence’.¹² The ECJ concluded from this that the supervisory authority should be able to fulfil its obligations objectively and impartially; in other words, without being exposed to any *direct* or *indirect* influence. The Court rejected Germany’s claim that this broad interpretation represented an infringement of the principle of democracy in Europe. The Court found that a broad interpretation of the term ‘complete independence’ did not violate the principle of democracy as the legislator is permitted to define the powers available to the supervisor and can also require it to report on its activities to parliament. Similarly, parliament or the government may appoint the board members of the supervisory authority. This judgement is recently confirmed in the case of October 16th, 2012 *Commission vs Austria*.¹³

These judgments clearly constitute interference in the institutional autonomy of a Member State, as the ECJ concludes that any form of influence – whether direct or indirect – is prohibited. This case should, however, be viewed in the context of the relevant directive and the need to protect personal data. The question remains as to whether these far-reaching requirements will also apply in other situations, such as in the regulation of network sectors and the media sector.¹⁴ The more recent directives in these sectors have not yet imposed such far-reaching restrictions. It was expected that the same high level of protection seen in the data protection regulation, would be implemented in the media regulation. This would have been relatively straightforward from the perspective of protecting media pluralism and the freedom of expression and free speech. Also these fundamental rights (such as in the case of privacy protection) should be safeguarded against direct or indirect influence of the state by sufficient independence requirements. However, for the media sector, there has been no such high level of protection of independence explicitly laid down in the media directives.¹⁵

11 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJEC 1995, L 281/31).

12 ECJ 9 March 2010, *Commission v. Federal Republic of Germany*, case C-518/07, annotated in *Tijdschrift voor Toezicht*; Ottow 2010 *supra*.

13 ECJ October 16, 2012, *Commission v. Austria*, case C-614/10, not yet published.

14 See the annotation with regard to the judgment in A.T. Ottow & M. Aelen, *Commission v. Federal Republic of Germany*, *European Human Rights Cases*, Vol. 11, 2010, No. 6, pp. 679-688.

15 See the report for the media sector: Hans Bredow Institute for Media Research/Interdisciplinary Centre for Law & ICT (ICRI), KU Leuven/Center for Media and Communication Studies (CMCS), Central European University/Cullen International/Perspective Associates (eds.), *INDIREG. Indicators for independence and efficient functioning of audio-visual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive* (Study conducted on behalf of the European Commission), February 2011.

3. Central Question

What effect do these requirements actually have on national market authorities in practice? This is the central question in this paper. Five published cases are used here to illustrate the impact of these provisions on national practices.¹⁶ All these examples relate to the regulated sectors; in other words, to the areas where the influence of the state has traditionally been felt.¹⁷ The liberalisation of these markets that has resulted from European rules and regulations makes these fields particularly interesting from a perspective of supervisory independence. As these examples show, national governments in various Member States have sought to establish the extent of their boundaries and to use their influence to exert pressure on the independent supervisors. These cases serve to emphasise how important the various European requirements are with respect to independence. These cases concern the independence of *national* authorities only.¹⁸ The independence of European agencies are not dealt with here. Another caveat must be made. This article deals with the *de jure* independence (*legal* requirements). The *de facto* independence is not considered in this article.¹⁹

4. Case 1: Dutch Gas Case

This particular case involved a policy rule issued by the Dutch Minister of Economic Affairs instructing the Board of the Netherlands Competition Authority (NMa) on how to deal with the rates charged by the state-owned company GTS (Gas Transport Services BV). The Office of Energy Regulation, which is the body responsible for enforcing sector-specific regulation, is part of the Netherlands Competition Authority. The Dutch Gas Act of 2000²⁰ gives the Competition Authority statutory powers to set gas transport rates. The party bringing the action, EnergieNed (the Dutch Association of Energy Producers), claimed that this policy rule should not be regarded as a general policy rule, but instead as an individual instruction to the Board with respect to the transport rates charged by GTS, given that the policy rule set such specific parameters that the Board had virtually no scope to include considerations of its own.

16 Other cases can be found in the implementation overviews of the Commission, although not many details can be derived from the published information. See e.g. Commission staff working paper. Situation in the different sectors accompanying the Report from the Commission: 28th annual report on monitoring the application of EU law (2010), COM(2011) 588 final, SEC(2011) 1094 final and Electronic Communications – Revised Regulatory Framework Infringement procedures opened for non-communication of transposition measures.

17 See for more sectors: Hanretty *et al.*, *Independence, Accountability and perceived Quality of Regulators* (Report Study 15), Centre on Regulation in Europe (CERRE), 2012.

18 For the independence of European authorities see Lavrijssen & Ottow 2012 *supra*.

19 Gilardi & Magetti use the term *de facto* independence for their effective autonomy in the day-to-day practice: F. Gilardi & M. Magetti, The independence of regulatory authorities, in D. Levi-Faur (ed.), *Handbook of Regulation*, Edward Elgar, Cheltenham, 2012, p. 204.

20 Article 12f Gaswet. (Dutch Gas Act).

Dutch requirements

EnergieNed claimed that the minister had contravened Article 5 of the Dutch Competition Act by essentially issuing instructions to the Board of the Competition Authority in an individual case, rather than limiting herself to general policy rules. As a result, EnergieNed claimed, the minister had exceeded her authority by wholly taking over the Board's powers to set rates, whereas Article 5d of the Dutch Competition Act only authorised the minister to issue *general* policy rules. Indeed, in 2001, when the Competition Authority was transformed into an autonomous administrative authority, it was stated that independence is required to ensure specific expertise. The minister cannot give instructions in individual cases. The legislator had deemed it important for there to be no scope for political interference in individual decisions taken by the Board of the Competition Authority. The state believed in this case, however, that there was no question of an *individual* policy rule and that the instructions were purely of a *general* nature.

The Dutch Trade and Industry Appeals Tribunal (CBb) disagreed with the state's view and ruled the decision taken by the Board in respect of this 'general' policy rule to be invalid. The Trade and Industry Appeals Tribunal believed, therefore, that the instructions constituted individual instructions, and that would be incompatible with the Dutch Competition Act.

European requirements

Article 25(1) of the European Gas Directive applying at the time (Directive 2003/55/EC) stated the following with respect to national regulatory authorities' independence:

1. Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent of the interests of the gas industry.²¹

The Board of the Netherlands Competition Authority is a designated regulatory authority and therefore needs to be able to operate independently. EnergieNed claimed that the minister, as the shareholder of GTS, was not authorised to adopt the specific policy rule as it resulted in the Board – in other words, the regulatory authority – no longer being able to set the rates charged by GTS on the basis of cost. By issuing an individual instruction (in the form of a policy rule) the minister violated the Board's independence and denied it the opportunity to adopt an independent position. Being able to issue individual instructions in this way would also have contravened Article 25(1) of the Gas Directive in that it allowed the state's role as a shareholder to become blurred with the tasks of the supervisor (in other words, the regulatory authority).

²¹ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJEU* 2003, L 176/57.

The examination conducted by the Dutch Trade and Industry Appeals Tribunal was based directly on the Dutch Competition Act and no account was taken of the Gas Directive. Nevertheless, the message conveyed was clear: there was a conflict of interests, with the minister having issued an individual instruction in respect of the rates charged by GTS, an entity with the Dutch state as its sole shareholder. Even if Article 5d of the Competition Act had not contained such a prohibition, the Tribunal would nevertheless have had to declare the policy rule invalid on the grounds that it contravened the Gas Directive. The Board of the Netherlands Competition Authority, as the regulatory authority designated responsible for implementing the provisions of the Gas Directive, has to be able to perform these tasks independently of any interest in a market party. And the policy rule issued constituted an obstacle in this respect.

The parliamentary history of the review of the Dutch Competition Act shows that, as well as the requirement for independence from *market parties*, there is also a prohibition on *political* interference. The Competition Act goes further in this respect than the old Gas Directive. The requirement for independence from political influence has since also been incorporated into the recast Gas Directive,²² which contains more stringent requirements, in Article 39(4) and (5), with respect to national regulatory authorities' independence. These requirements cover aspects such as the performance of regulatory tasks 'independently from any political body', the funding of the regulatory authority and the appointment and periods in office of board members.

These requirements for independence had to be transposed into national legislation by 3rd March 2011. According to the minister, the provisions of the European directive would not result in any substantial changes in the case of the Netherlands,²³ although it will need to be stated in the Electricity Act (*Elektriciteitswet*) and the Gas Act (*Gaswet*) that 'Our minister will refrain from issuing instructions relating to an individual case'.²⁴

The minister believes that Article 21 of the Dutch Framework Act on Autonomous Administrative Authorities (*Kaderwet zelfstandige bestuursorganen*) continues to allow the minister the right to determine the range of interests to be taken into

22 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJEU* 2009, L 211/94. See also Article 35(4) and (5) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJEU* 2009, L 211/55.

23 Amendment of the Electricity Act 1998 and the Gas Act, *Parliamentary Papers II* 2010-2011, 32 814, No. 3, p. 5 ff. Since the Framework Act on Autonomous Administrative Authorities (*Kaderwet zelfstandige bestuursorganen*) came into force, the minister's power to adopt policy rules relating to the exercising of powers assigned to the Netherlands Competition Authority has been included in this Framework Act rather than in the Competition Act.

24 See Articles I C and II B of the Amendment to the Electricity Act 1998 and the Gas Act, *Parliamentary Papers* 2010/11, 32 814, No. 2 (Bill).

account by the Netherlands Competition Authority when performing its tasks. It would appear that the minister is authorised to issue general policy rules, provided certain limits are respected. The text of the new energy directives can be read in such a way that policy rules are not allowed to extend to the regulatory tasks of the national supervisor. The minister does not wish, however, to impose such a restriction *ex ante* on the right to issue policy rules. Policy rules may in any event relate to the parameters of government policy in the energy market within which the national regulatory authority ('NRA') has to operate.²⁵

This is also confirmed in a European Commission staff working paper:²⁶

The Electricity and Gas Directives do not deprive the government of the possibility of establishing and issuing its national energy policy. This means that, depending on the national constitution, it could be the government's competency to determine the policy framework within which the NRA must operate, e.g. concerning security of supply, renewables or energy efficiency targets. *However, general energy policy guidelines issued by the government must not encroach on the NRA's independence and autonomy.*²⁷

Although general policy rules are, therefore, permitted within certain limits, the question of whether the Competition Authority's discretionary powers are being too severely restricted, thus leaving it too little freedom to take decisions in individual cases, needs to be decided on a case-by-case basis. The above working paper also states that the requirements should apply to the *entire* staff and management and not only to board members:

'The new legislation also prohibits the NRA's staff and the persons responsible for its management from seeking or taking direct instructions from any government or other public or private entity. This provision aims to tackle the situation where someone working for the NRA is seeking or taking direct instructions. According to the Commission's services, this provision also implies that it is forbidden for anyone to give such instructions. An instruction in this context is any action calling for compliance and/or trying to improperly influence an NRA decision and thus includes the use of pressure of any kind on NRA's staff or on the persons responsible for its management. In the view of the Commission's services this requires Member States to provide for dissuasive civil, administrative and/or criminal sanctions in case of violation of the provisions on independence as well as for any attempts by public and private entities to give an instruction or to improperly influence an NRA decision.'²⁸

25 See also the opinion of the Dutch Council of State in this respect, *Parliamentary Papers II* 2010/11, 32 814, No. 4, pp. 7-8.

26 Commission staff working paper, Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas, The Regulatory Authorities, Brussels, 22 January 2010.

27 Commission staff working paper, p. 7 (emphasis added).

28 Commission staff working paper, p. 7.

It follows from these new provisions of the recast Gas Directive (and the corresponding provisions in the Electricity Directive) that it is not only the Board of the Netherlands Competition Authority that has to comply with the requirements for independence but also the other staff at the Office of Energy Regulation. This is a sensitive issue in the Dutch context since only the Board of the Competition Authority constitutes an independent administrative authority (a so called 'small' independent authority) and not the entire Competition Authority. The bill implementing the energy directives consequently states that "The Board of the Competition Authority and the staff available to the Board will not demand or receive instructions relating to an individual case."²⁹ The Competition Authority's staff regulations will therefore have to take account of these new requirements as all staff involved with implementing the Gas or Electricity Directives will have to be able to act independently.

This Dutch case illustrates the importance of independence requirements for autonomous decisions by a national regulatory authority – in this case, the Office of Energy Regulation (and the Board) of the Netherlands Competition Authority. The new energy directives set stringent standards for this independence and the way in which it is implemented in day-to-day practice. The Dutch Trade and Industry Appeals Tribunal rightly found the general policy rule in the GTS case to constitute an individual instruction and subjected it to stringent review. The Dutch legal framework itself provided sufficient scope for this. If, however, this had not been the case, the Tribunal would have had to declare the policy rule and/or the decision by the Competition Authority to be invalid on the grounds that it contravened the then applicable Gas Directive.

5. Case 2: German Telecommunications Case

Rather than a 'general' policy rule this case involved statutory provisions with which the German legislator issued an instruction to the German telecommunications supervisor on how to deal with specific rules and regulations. In these new legislative provisions the German legislator specified how the term 'new markets' should be defined, how the principle of non-regulation in these new markets should apply, and imposed more restrictive conditions on the German telecommunications supervisor than provided for in the European Telecommunications Directives. In addition, it imposed a specific objective of regulation on the German supervisor instead of the various objectives set in the European Directives. These statutory provisions significantly curtailed the discretionary powers the telecom supervisor normally enjoys. According to the German government, this legislation simply provided more precise clarification of the European rules. Germany claimed that the Telecommunications Directives allowed sufficient freedom to

29 See Articles I C and II B of the Amendment to the Electricity Act 1998 and the Gas Act, *Parliamentary Papers* 2010/11, 32 814, No. 2 (Bill).

national legislators to define abstract concepts. The European Commission, however, disagreed and submitted the case to the ECJ for consideration.

In the recent judgment *Commission v. Federal Republic of Germany* the ECJ gave a number of important findings in support of national supervisors' independence. The Court imposed limits on the extent to which national legislators could seek to influence these supervisors and stated that European law had assigned responsibility for supervising the telecom sector to an independent supervisor, which should have broad discretionary powers. The national legislator was not permitted, therefore, to exclude certain markets from regulation in advance or to specify *ex ante* that only certain objectives should be taken into account. The Court's findings included the following:

54 Pursuant to Article 3(2) and (3) of the Framework Directive and recital 11 in its preamble, *in accordance with the principle of the separation of regulatory and operational functions*, Member States must guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality and transparency of their decisions. (...)

61 In carrying out those regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis³⁰ (...)

74 It should be added that, in any event, (...) the Framework Directive *confers on the NRA, and not on the national legislature, the task of determining the need for regulation of the markets.*

78 Therefore, by laying down a legal provision, according to which, as a general rule, the regulation of new markets by the NRA is excluded, Paragraph 9a of the TKG [German Telecommunications Act] encroaches on the wide powers conferred on the NRA under the Community regulatory framework, preventing it from adopting regulatory measures appropriate to each particular case. (...) the German legislature cannot alter a decision of the Community legislature and cannot, as a general rule, exempt new markets from regulation.

79 It follows that Paragraph 9a(1) of the TKG, by establishing a principle of non-regulation of new markets, is not compatible with Article 16 of the Framework Directive. (...)

83 However, it must be held that the limitation of the German NRA's discretion as a result of Paragraph 9a(1) of the TKG necessarily affects the NRA's ability to define the market' (emphasis by author).³¹

In this case the German legislator had sought to circumvent the supervision provided by its own independent national regulatory authority by including certain instructions already in the applicable telecommunications legislation. This

30 The ECJ in this respect referred to the judgment of 24 April 2008 in *Arcor*, C-55/06, *ECR I-2931*, paras. 153 - 156.

31 ECJ 3 December 2009, *Commission v. Federal Republic of Germany*, case C-424/07 (emphasis added).

significantly reduced the discretion available to the telecommunications supervisor. The ECJ saw through this attempt and declared it to be in contravention of the applicable European Telecommunications Directives. As the Court stated, the European legislator has conferred on the independent national regulatory authorities, and not on the national legislature, the task of determining the need for regulation of the markets. If, by laying down a legal provision in national legislation, the German legislator was to be able to prevent the national regulatory authority from adopting the regulatory measures that the authority considered appropriate, the national regulatory authority would be subjected to *political* influence that would restrict its powers and also constitute a threat to its independence.

The judgment in this case represents a significant curtailment of national autonomy as it means that national legislators are not free to disregard the system of independent supervision provided for in the European directives and to assign these powers to themselves. It can be concluded from this case that the ECJ regards the importance of independent supervision as a basic principle and will therefore closely examine any intervention by national legislators.

6. Case 3: Dutch Television Case

The above German case is of importance for a case – the Dutch television case – currently attracting attention in the Netherlands.

Influence of the Dutch House of Representatives

The central issue in this case concerns the extent to which cable companies should be required to allow their competitors to access their networks. The issue of cable networks has been politically very sensitive in the Netherlands for many years. Although OPTA, the Dutch Independent Post and Telecommunications Authority, had earlier decided to require access to the cable networks to be granted,³² its decisions were subsequently overturned by the Trade and Industry Appeals Tribunal³³ and in 2011 OPTA was forced to review its decision. Shortly before OPTA was due to announce its new decision, the Dutch House of Representatives adopted two amendments³⁴ in which the obligation to grant access was laid down in law (in the Dutch Media Act (*Mediawet*) and the Dutch Telecommunications

32 OPTA's decisions of 17 March 2006, 21 December 2007 and 5 March 2009, <www.opta.nl>. The first and third of these decisions were overturned by the Dutch Trade and Industry Appeals Tribunal. The new decision that OPTA was consequently forced to take in 2011 resulted in a draft opinion on regulation of the television market being published on 23 June 2011, submitted for consultation and finally adopted at December 20th, 2011, see: Trade and Industry Appeals Tribunal 5 November 2012 *Tele 2 et al. v. OPTA*, LjN: BY2135, para. 2.2.

33 Trade and Industry Appeals Tribunal 24 July 2007, *Casema et al. v. OPTA*, LjN: BB0186; Trade and Industry Appeals Tribunal 17 December 2008, *UPC et al. v. OPTA*, LjN: BG7099, and Trade and Industry Appeals Tribunal 18 August 2010, *Delta et al. v. OPTA*, LjN: BN4243.

34 *Parliamentary Papers II* 2010/11, 32 549, No. 28 and 2010/11, 32 549, No. 18.

Act (*Telecommunicatiewet*)).³⁵ These amendments require large cable companies to cooperate in the resale of their standard packages. In this way the Netherlands has circumvented the discretionary powers available to OPTA under the European framework that allow it first to delineate the market and then to decide which measures are necessary and proportional. This Dutch case is very similar, therefore, to the German telecommunications case discussed above.

OPTA and the minister's views

OPTA's draft opinion on the market, in which it stated that the television market was by now sufficiently competitive and not in need of more regulation, was published in the very same week as the amendment.³⁶ As the opinion stated, it was not appropriate – in OPTA's view – to impose an obligation to allow access to the television network. In a letter of 23rd June 2011 sent to the Dutch House of Representatives concerning the amendments that had been adopted the Minister of Economic Affairs, Agriculture and Innovation stated that:

This amendment deviates, however, from a principle that I consider very important and that is also established in European law, being *the requirement for an independent regulatory authority to decide on whether and how competition in markets should be regulated, with all the safeguards that this entails*. In my view this basic principle is of great importance in giving market parties the assurance that regulation will be applied professionally and consistently. This is also the reason why we have designated OPTA as the authority responsible for regulating the cable market. OPTA bases its opinions on in-depth market analyses and its decisions are subject to judicial review. My predecessors and I have emphasised this point, with reference to the legal risks involved. I will arrange for this issue to be discussed with the administrations of the European Commission, specifically with regard to the legal viability of this aspect of the Bill.³⁷

As the legislative amendment allows the Dutch legislator and not, as required by the European telecommunications framework, the national independent regulatory authority (in this case, OPTA) to decide whether to impose a specific obligation (in this case the obligation to allow access to the network), the Commission initiated an infringement procedure against the Netherlands.³⁸ The Commission alleges that the new legislation consequently contravenes the provisions of the European Telecommunications Directives.³⁹

35 This was achieved via an amendment to the Media Act in the form of the addition of Article 6.14 and an amendment to the Telecommunications Act in the form of the addition of Article 6a.21.a.

36 OPTA's draft opinion on its analysis of the television market of 23 June 2011, <www.opta.nl>. This draft decision is confirmed in the final decision of OPTA of December 20, 2011, <www.opta.nl>. This decision of OPTA is upheld by the CBB in its judgement of 5 November 2012, *Tele 2 et al. v. OPTA*, LJN: BY2135, <www.rechtspraak.nl>.

37 Emphasis added.

38 Case number 2012/4144, Brussels 24.10.2012, C(2012) 7394 final.

39 Specifically Articles 7(a) and 16 of Directive 2009/140/EC.

7. Case 4: French Government Commissioner of Autonomous Administrative Authorities

The issue of the appointment of government commissioners at various autonomous administrative authorities in France (*Autorités Administratives Indépendantes*, 'AAI') has recently garnered considerable attention. This attention was directly triggered by an amendment to the French telecommunications legislation that affected the telecom regulator ARCEP (*Autorité de Régulation des Communications Électroniques et des Postes*). The amendment, which was approved by the *Assemblée Nationale*,⁴⁰ allowed the government to appoint an official at ARCEP. Many people saw this as compromising the telecom regulator's independence. Under the amendment, the government official would be responsible for announcing details of the government's analyses of the postal and electronic communications markets to ARCEP. In addition, the official would be authorised to include any question relating to this field on the agenda, while a request for investigation of such a question could not be refused. The government official was not permitted, however, to attend consultations of the telecoms regulator. The brief explanatory notes to the amendment stated that it was based on a recent parliamentary report on the French AAI, in which the appointment of a government official at each AAI was recommended.⁴¹

This amendment is certainly questionable from a European perspective. Indeed a European Commission telecommunications spokesperson indicated that the Commission would examine the amendment to see whether it was compatible with European legislation:

La Commission Européenne va examiner "de très près" un projet français visant à nommer un commissaire du gouvernement au sein de l'Autorité de régulation des communications électroniques et des postes (Arcep), car elle veut s'assurer de l'indépendance de cet organisme, a indiqué jeudi un porte-parole.⁴²

Catherine Trautmann, a member of the European Parliament, described herself as *absolument ahurie et scandalisée* (absolutely stunned and shocked) by the amendment.⁴³ Éric Besson, the initiator of the amendment, defended the move by stating that he was seeking to reinforce the dialogue between the regulatory authority and the government and to increase the effectiveness of the work. He also stated that

40 The amendment was approved during the night of 13 January by six votes to five: Les députés valident la création du commissaire du gouvernement à l'Arcep, *Le Monde* 14 January 2011, <www.lemonde.fr>.

41 Assemblée Nationale, *Rapport d'information fait au nom du comité d'évaluation et de contrôle des politiques publiques sur les autorités administratives indépendantes*, Vol. I – Report, No. 2925, filed on 28 October 2010, pp. 101-102.

42 Bruxelles veillera à 'l'indépendance et l'impartialité' de l'Arcep, *Le Monde* 13 January 2011, <www.lemonde.fr>.

43 Gueric Poncet, Amendement – Le gouvernement va limiter l'indépendance du gendarme des télécoms, *Le Point* 13 January 2011, <www.lepoint.fr>.

the appointment of a government official at a regulatory authority was nothing new as such an official had already been appointed at other important regulatory authorities such as the French Authority for the Financial Markets (*Autorité des marchés financiers*), the Competition Authority (*Autorité de la concurrence*) and the Energy Regulation Committee (*Commission de Régulation de l’Energie*).⁴⁴

The appointment of a government official to such a position was clearly very much at odds with the requirement for independence stipulated in the telecom and energy directives. Although this official would not have had any formal powers and would not have been permitted to attend board meetings, his presence would obviously have put indirect (and maybe even direct) pressure on the activities of the independent regulatory authority. Appointing such an official in order to increase effectiveness was also unnecessary as there are other means of achieving this, and these other means respect the need for independence. Following a warning by European Commissioner Kroes that she would initiate infringement proceedings if this amendment was adopted, the French Senate voted against the amendment and the idea of appointing this new government commissioner (at least in the case of ARCEP) has now been abandoned.⁴⁵ In view of the strict requirements imposed, as discussed above, in the European energy directives, the government commissioner at the French energy regulator should also be removed from office.

8. Case 5: Hungarian Media Case

In December 2010 the Hungarian parliament passed a law, which came into force on January 1st 2011, which severely tightens indirect government control of the media.⁴⁶ This legislation also changes the supervisory regime of the country’s media. It creates a new Media Council, elected by Parliament, and whose chairman is directly appointed by the Prime Minister for a nine year mandate. Since the current (right-wing) party is in power and has a vast majority in Parliament, no representative of the opposition will sit on the Media Council for at least nine years. This new organisation is supposed to emerge as the modernised head of media supervision in the country, including both analogue and electronic media. The scope of the new legislation is large, as it is including every kind of media (press, television, internet media as well as online media).

44 See footnote 35.

45 <www.senat.fr/amendements/commissions/2010-2011/225/jeu_complet.html>.

46 Act CLXXXV of 2010 on media services and mass media, *Magyar Közlöny* (Official Journal) 31 December 2010, Act LXXXII of 2010 on the amendment of certain acts on media and telecommunications, *Magyar Közlöny* (Official Journal) 10 August 2010 and Act CIV of 2010 on the freedom of the press and the fundamental rules on media content, *Magyar Közlöny* (Official Journal) 9 November 2010.

Commissioner Kroes called⁴⁷ the new legislation ‘unsatisfactory’ and urged Hungary to bring the new act in conformity with European legislation, more specifically with the Audiovisual Media Services Directive.⁴⁸ It was announced by the Hungarian State that proposals were made to change the new legislation and bring it in conformity with EU law.⁴⁹ However, there was no mention of the original compliant by the Commission about the composition of the new members of the Media Council.⁵⁰

What does EU law require with respect to the independence of media regulators? The only requirements for independence and efficient functioning of national regulatory bodies in the audiovisual media sector are found in Article 30 of chapter XI (Cooperation between regulatory bodies of the Member States) of the Media Service Directive. This article provides:

Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 3 and 4 hereof, in particular through their competent independent regulatory bodies.

The scope and impact of this provision is further explained in two specific recitals of the directive:

(94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.

(95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between their regula-

47 N. Kroes, State of play of Commission's examination of Hungarian Media Law, *Extraordinary meeting of the European Parliament's Civil Liberties, Justice and Home Affairs Committee Strasbourg*, 17 January 2011, SPEECH/11/22: “the Media Law does not appear at first sight to be satisfactory”.

48 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services, O.J. 2010, L 95/1, hereafter and the Media Service Directive.

49 Act XIX of 2011 on the modification of Act CIV of 2010 and Act CLXXXV of 2010 *Magyar Közlöny* (Official Journal) 22 March 2011. See also: <http://europa.eu/rapid/press-release_MEMO-11-89_en.htm>.

50 Financial Times February 16, 2011.

tory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licenses are granted. This cooperation should cover all fields coordinated by this Directive.

The current text of Art. 30 Media Services Directive reflects a difficult compromise between the different visions of the European Parliament, the Commission and the Council. Recital 94 and Article 30 do not impose a formal legal obligation on Member States to create an independent supervisor where these do not yet exist.⁵¹ However, if a new supervisory body is created, this authority should be independent. But what does that mean? The Media Services Directive does not provide – contrary to the communications and energy directives – specific legal requirements.

It is questionable whether the Media Services Directive provides sufficient safeguards to intervene in the Hungarian case with regard to the independence of the new Media Council. Nonetheless, the Commission has started an infringement procedure.⁵² As media pluralism and the freedom of expression must be considered fundamental rights, it is at the very least remarkable that the media directive does not provide stricter provisions and safeguards to ensure the ‘depolitisation’ of media regulation and independent supervision. Lessons have to be learned from other sectors, such as the communications sector, to amend the legal requirements of the Media Service Directive in that respect.

9. Conclusion: Three Levels of Protection

As the examples discussed in this paper demonstrate, the independence of national supervisors is fragile and can come under pressure, not only from market parties, but also from the legislator and the political sphere and administration. Experience in various Member States prompted the European Commission to issue proposals designed to reinforce the independence of the national supervisors in various sectors. These more stringent requirements have since been incorporated into various European directives and not only provide for independence vis-à-vis market parties, but also vis-à-vis the political arena. To date, the ECJ has recognised the importance of and actively sought to protect the indepen-

51 See the Preliminary report by Hans Bredow Institute *et al.*, Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing rules in the AVMS Directive, SMART 2009/001, January 2011, p. 323.

52 1 September 2011, IP/11/1002. See also IP/11/1173 and report *Hungarian media laws in Europe. An assessment of the consistency of Hungary's media laws with European practices and norms*, CMCS, center for Media and Communications Studies, Budapest, 2012, <<https://cmcs.ceu.hu/news/2012-01-05/new-study-hungarian-media-laws-in-europe-an-assessment-of-the-consistency-of-hungary>>.

dence of national supervisors in its case law. The approach adopted by the Court is expected to continue in the future. Overlooking the European landscape of the above-mentioned regulated areas, three levels of protection can be distinguished. First, there is the area of data protection, where the European legislator and court have recognised the importance of independence and have secured a *high* level of protection of independence. A middle category is the energy and communications area, with legal requirements, which qualify as a *medium* level of protection of independence. Finally, there are sectors, such as the media sector, where so far the level of protection is *low*.

What lessons can we learn from the discussed cases? There will certainly be a tendency for governments, particularly in areas in which they have interests at stake, to seek a degree of involvement. There are various ways in which this involvement manifests itself. From a European perspective, however, any involvement by a government in individual cases in markets in which the state is also a market party is forbidden. Although general instructions (policy rules) may be issued to independent supervisors, the question of whether these instructions go too far in addressing concrete situations, will always be assessed critically. Political influence, even if the state is not a market party, is not allowed in the telecommunications and gas sectors on which the European directives have imposed far-reaching requirements. The legislator is not permitted to curtail the activities of the supervisors in these sectors either via legislation or policy rules in individual cases, but the legislator and the minister may define a general policy framework supervisors have to take into account in matters of general interest, such as security of supply and sustainability. The independent supervisors need, however, to have sufficient discretion within this framework to be able to take autonomous decisions in individual cases, based on the provisions of European law. A balance will have to be found between policy considerations from the legislator and ministries on the one hand and sufficient discretion for the independent authority on the other hand. Absolute independence is not realistic and can conflict with the democratic principle of the Member States.

Regulatory Enforcement in the Netherlands: Struggling with Independence

*Heinrich Winter**

1. Introduction

In this chapter, the issue of independence of regulators will be addressed. Three questions are answered. First, what is the degree of independence of the politico-administrative system of inspections and authorities in the Netherlands? Second, the question of what degree of independence is needed is discussed. Third, an answer is given to the question of how this desired degree of independence can be accomplished.

The second paragraph starts by pointing out the motives for a discussion on this issue now. In the third paragraph the concept of independence is addressed. What is independence in relation to inspectorates and authorities? What are the constraints and incentives? In this paragraph the first question is answered. The second question is addressed in the fourth paragraph, where the official line of thought in the Netherlands will be described. Different scholars focus on the desirability of more independence of inspectorates and authorities. Paragraph 5 focusses on different ways to safeguard independence. Then, of course, ministerial responsibility is discussed as well as organising inspectorates and authorities at a certain distance of the departmental structure. Finally, some conclusions will be drawn and the discussion will be put into perspective (paragraph 6).

2. The Debate on (In)dependency: Three Motives

There are at least three motives for the urgency of a discussion on independence of regulatory enforcement in the 21st century. The first one can be labeled as the public discussion on inspectorates and authorities. The second motive makes a reference to the political and administrative interferences with regulatory enforcement. The third motive focuses on the incentives from European law.

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2.1 *The Public Debate on Regulatory Enforcement*

Over the past few years a fierce public debate is been raging in the Netherlands concerning the merits of regulatory enforcement in general and about the use and nuisance of inspectorates and authorities in particular. Fuel for the discussions was provided by an important government document, the second memo on regulatory enforcement from October 2005 ('Kaderstellende visie op toezicht', *Parliamentary Papers II 2005/06*, 27 831, nr. 15). The title of this document is significant as it translates as 'Less burden, more effect'. In my opinion this title symbolises the current situation of regulatory enforcement in the Netherlands. Inspectorates and authorities have to deal with different constraints and incentives. *Less burden* indicates that regulatory enforcement is supposed to function on a more limited scale. The regulated should be bothered less. In this respect, we encountered the rather surprising concept of an 'inspection holiday' in the previous Dutch government's coalition agreement (Rutte I, 2010 – 2012). This meant that civilians, businesses and organisations that behave according to the law, will be trusted based on their previous performance and will be inspected in a lighter way than would usually be the case. In itself this of course is not a particularly controversial concept, but it leads to many potential misunderstanding and misinterpretations, which is understandable as it implies that inspectorates and authorities interfere too much with businesses and private citizens.

At the same time *more effect* should be brought about according to this vision memo. This means that if the inspector acts, it should be effective. Societal outcomes of inspections need to be clearly recognisable and substantiated.

Both starting points are useful, one could argue, but in practice the combination leads to paralysing effects. In short: the inspector can do no good. He is always to blame. If there is an incident, he did not anticipate the risks and failed to take measures. If there is no incident, then the inspector will be accused of creating a burden of supervision, he is evaluated as being too expensive and the conclusion could be that we can do without him. There are currently several inspectorates are involved in such ambivalent discussions. The Dutch Healthcare Inspectorate for instance, is an example of an inspectorate that attracts a great deal of public attention. It seems everyone disagrees with the organisation, from hospital management, patient organisations, consumer protection programmes on Dutch television, Dutch parliament and the National ombudsman. The debate focuses on the intensity of the activities of the Healthcare Inspectorate: some argue it is too reluctant to impose sanctions and fails to address the real problems, others argue that the inspectorate interferes far too much.

The public focus on inspectorates and authorities leads to insecurity surrounding purpose and function in regulatory organisations. It results in budget cuts and reorganisation and in the Dutch parliament passing a resolution aiming to build one nationwide inspection in a big and comprehensive merger. Indeed, there was such a resolution a few years ago, initiated by parliamentarian Aptrout,

unscrupulously aiming to form one inspectorate. We have seen deep budget cuts on inspectorates over the last few years and we also witness different inspectorates recently reorganising and merging. The argument for the independence of inspectorates and authorities find relevance in its function as a shield against these kinds of interventions.

2.2 *The Political and Administrative Domain*

The second incentive sparking public debate about regulatory enforcement and independence can be found in the way enforcement is executed within the politico-administrative domain. Research on inspections and authorities tells us that interventions from politicians and administrators often results in preventing inspectorates and authorities from acting as they want to. Research in the field of local environmental enforcement suggests that aldermen and deputies are frequently reluctant to impose sanctions that can put regional employment or other public interests at risk.¹ These concerns are raised by managers of firms complaining that the penalties civil servants threaten to impose and by counselors lobbying for (their own) agricultural interests. Businesses in this process threaten to leave the municipality or the province if the enforcement action is carried out. This lack of independence is one of the triggers that led to Biezeveld and Stoové coming up with their proposal of establishing an independent environmental authority.²

2.3 *European Regulation and Jurisprudence*

Third, the discussion on regulatory independence is relevant because of European regulation and jurisprudence by the European Court of Justice. An important milestone seems to be the EU Court's verdict of March, 9th, 2010, *Commission v Germany*, concerning the independence of the privacy authority in the German Länder, who are subjected to a certain degree of administrative control.³ The verdict addresses the interpretation of the term 'full independence' mentioned in the Privacy Directive. The EU Court of Justice is of the opinion that this term should be interpreted in a very strict sense which means that the privacy authority should be fully independent from state administration. Full independence thus can be compared with the independence of the judiciary. Other European Directives, for instance concerning energy or telecoms, are not as radical as the Privacy Directive but also in these fields independent enforcement seems not to be subjected to direct instruction from the government or by other public or private entities. This

1 N. Struiksmā, J. de Ridder & H.B. Winter, *De effectiviteit van bestuurlijke en strafrechtelijke milieu-handhaving* (WODC-reeks Onderzoek en beleid, nr. 253), Boom Juridische uitgevers Den Haag, 2007 en J. de Ridder, N. Struiksmā & M.J. Schol, *Grip op milieuzaken. Evaluatie van de strafrechtelijke milieuhandhaving*, Rijksuniversiteit Groningen, Groningen, 2009.

2 G.A. Biezeveld & M.C. Stoové, Naar een Nederlandse Omgevingsautoriteit. Een pleidooi voor onafhankelijk milieutoezicht, *Tijdschrift voor Toezicht* 2011, No. 3, p. 9-33.

3 ECJ 9 March 2010, C-518/07, *Commission v. Germany*. See also: A.T. Ottow, Onafhankelijkheid van toezichthouders, ECJ 9 maart 2010, *European Cie. v. Germany*, zaak C-515/07, *Tijdschrift voor Toezicht* 2010, No. 3, p. 78-86.

is illustrated by the Dutch case concerning a policy regulation by the Dutch Minister of Economic Affairs addressed to the board of the Dutch Competition Authority on how to determine the rates for gas transportation. The Dutch court argued that the Minister lacked authority to issue such a policy regulation, as it interfered with the independent judgment of the board of the Competition Authority.⁴

3. Independence and the State of the Art in the Netherlands

What are the constraints to and the incentives for independence and what does independence really mean? To start with this last question, regarding regulatory enforcement independence has a twofold meaning. First, there is (in)dependence in the relationship to the regulated field or sector. A sufficient degree of independence means that inspectorates are able to gather information on the behaviour of the regulated with little interference. Also, inspectorates should be free to come up with an analysis of this information and finally with the intervention they think is appropriate. When deciding upon interventions, independence usually is more endangered by more unobtrusive threats, like agency capture.

The other interpretation of independence of regulatory enforcement focuses on the relationship between the inspectorate on the one hand and politico-administrative leadership on the other. The most radical position would be that an inspectorate should be free to gather information it judged appropriate, and intervene when necessary, autonomous from the opinions of politicians and administrators.

3.1 *Independence and the Regulated*

First a few remarks on independence versus the regulated. In many evaluations of the financial crisis the world experienced following the bankruptcy of Lehman Brothers, we frequently saw reference made to the interdependence of the banking system and the supervisors. The relationship was tackled in terms of ‘regulatory capture’, did the financial inspectorates operate at a required distance from the regulated? There seems to be much evidence of close ties between the regulated and the regulators. We see a small world of bankers and inspectors, where job rotation between the sectors is predominant and where professionals meet in different kind of gatherings. The mixture of financial institutions and supervisors made it very difficult for the regulators to intervene or even to clearly distinguish what exactly was going on. This was true worldwide, and certainly in the Netherlands where the analysis of DSB’s bankruptcy in 2009 by the commission-Scheltema⁵ and the analysis of the crisis in the Dutch financial sector by parliamentary

4 CbB 29 juni 2010, LJN: BM9470 (Gaszaak).

5 Rapport van de commissie van Onderzoek DSB Bank, Den Haag, 23 juni 2010. <www.nuzakelijk.nl/algemeen/2280594/rapport-commissie-scheltema.html> (last consulted on 29 March 2013).

commission-De Wit⁶ came to similar conclusions. The financial supervisors maintained an old boys network with the financial institutions they were supposed to supervise. A remarkable story comes from the report by the commission-Scheltema on DSB where we witness a reverse case of capture. Auditors of the Dutch Central Bank had what they thought was a tough talk with bankers of DSB, pointing out that things had to change drastically within the bank. The DSB bank management interpreted this same encounter as a pleasant conversation about the state of affairs, resulting in the bank of course not reacting to the sharp criticism from the central bankers. The usual way of handling things, the close ties between central bankers and insurance companies and banks on which the central bankers relied, did not work at all in this case because DSB was a newcomer in the financial market, an outsider headed by a general manager who worked his way up from an insurance salesman to a banker with an official banking permission. DSB did not understand the usual way of handling things between supervisors and bankers, representatives of the central bank also did not understand that customs in the financial sector had changed rapidly, so they did not anticipate the radical change in relationship.

There seems to be more sensitivity for this aspect of the functioning of inspectorates and authorities than used to be the case. In the past for instance, one and the same inspector of the Dutch Inspectorate of Education could supervise schools in a certain district during his whole career, without ever changing his working area. Most inspectorates and authorities nowadays have the risk of 'capture', and there being too close a relationship between the regulator and the regulated, much more in mind.

Of course independence from the field is an absolute pre-condition for effective inspections. Inspectors inevitably must rely on cooperation by the regulated. Such cooperation is not self-evident. In this respect, in May 2012, a significant incident attracted attention. A newspaper article reported the secretary of Justice's withdrawal of a protocol composed several years ago by the ministry of Justice. The protocol was directed to civil servants working in institutions for juvenile delinquents.⁷ The intention of the protocol was to brief the staff not to be too honest or too negative to the visiting inspectors. The personnel ought to stress what was going well and which measures for improvement had already been taken. Apparently, cooperation is no automatism, as we all know.

6 Tijdelijke commissie onderzoek financieel stelsel, *Verloren krediet*, *Parliamentary Papers* II 2009/10, 31 980, No. 4 and *Verloren krediet II – de balans opgemaakt*, *Parliamentary Papers* II 2011/12, 31 980, No. 61.

7 <www.telegraaf.nl/binnenland/12208602/___Teeven_trekt_handleiding_in___html>, *Telegraaf* 25 mei 2012, Teeven trekt handleiding bezoek inspectie in (last consulted on 16 October 2012).

3.2 *Independence and the Minister*

The focus of this chapter is on the relationship between inspectorates and authorities and the minister. These relationships are shaped in different ways depending on the jurisdiction where inspectorates and authorities operate, from a large degree of independence and autonomy to close relationships where elaborate interference by the ministers is possible. Close relationships exist for instance in the areas of health care, education, food safety and work safety. We can illustrate this by taking the Healthcare Inspectorate as an example. This inspectorate can be seen as the extended arm of the minister, some people argue. The close links to the minister could endanger the independence of the inspectorate. This can be substantiated by taking a closer look at the position of the Inspector-General, the CEO of the Healthcare Inspectorate. His office is partly in the ministry, in the surroundings of the staff of the minister. Moreover, he is part of the management team of the ministry of Healthcare, Welfare and Sports. As a consequence he holds responsibility for management decisions affecting the health care sector in the Netherlands, the sector he has to supervise.

In general, there seems to be a strong tendency to pull the management of inspectorates towards the ministries, as Mertens earlier described.⁸ This is also the case with the ministry of Education and the ministry of Agriculture, Economics and Innovation, the Inspector-General of the Inspectorate of Education and the Inspector-General of the Food Authority as they are all part of the management team of the ministry. On the one hand, this is understandable. As an expert, the inspector can advise the minister on the policy to be issued, more specifically on questions of enforcement relevant for policy development. The question is whether it is sensible that inspectors are so closely linked to policymakers. Do they harm their independent position by doing so?

In contrast with inspectorates such as the Healthcare Inspectorate, the inspectorate of Education and the Food Authority, who seem to be closely linked to the departmental structure and to the minister, also through ministerial responsibility, the independence of several other authorities in the Netherlands is arranged for more formally. This for instance holds true for the Dutch Competition Authority, the Privacy Authority and for the two supervisors of the financial system. The choice for this independent position is made on the basis of several arguments. In the first place there is the European perspective. Several European directives and regulations require authorities to be structured as independent from interference from the minister. This is true for the Privacy Authority, for the Competition Authority and also for the Authority regulating the energy markets. In paragraph 4 we will take a closer look.

8 Ferdinand Mertens, *Inspecteren. Toezicht door inspecties*, Sdu, Den Haag, 2011, p. 119-139.

4. The Official Policy on Independence and the Degree of Independence Needed

What is the official line of thought on independence of inspectorates? Seen from the perspective of the previously mentioned *Kaderstellende visie* of October 2005, regulatory enforcement should be selective, determined, cooperative, transparent and professional. And it also should be independent. These are the six principles of good enforcement. Following this document, ‘independence’ means that inspectors function within the reach of ministerial responsibility. The minister has the authority to give general and particular instructions to the inspector and the inspectorate. This authority can be derived from article 44 of the Dutch Constitution, unless the authority is limited by the law. The formal position of an inspectorate is thus more or less independent, following the wishes of the legislator in specific cases of certain authorities and inspectorates. I will make a few remarks on this issue later on.

The material independence of inspections is expressed in the way in which they fill in their role within the borders of ministerial responsibility. According to the *Kaderstellende visie*, society must be able to trust the independent judgment of inspectors. Inspectors need to independently gather information, come to conclusions and formulate interventions. In other words, independence is part of the vision in this policy document, although not in the sense of a search for autonomy of inspectorates but more in a search for safeguards that can empower the inspector to gather information, come to conclusions and intervene.

At the same time, the *Kaderstellende visie* struggles with this issue. To cite: “The inspector plays his own role by determining the enforcement goals, the methods used and the capacity invested”. “The inspector formulates independent on the basis of his own professionalism his own independent judgment”. But at the same time it says: “The inspector plays his own role by determining the moment and the severity of a possible intervention; the minister is responsible”.

From a legal perspective, things are quite clear. Following article 44 of the Dutch Constitution, an inspectorate or authority functions under the umbrella of ministerial responsibility, which means the minister can give general and specific instructions to the organisation under his responsibility. This responsibility however, can be restricted, so it is not always the minister who is responsible. Following European legislation, for instance, it is sometimes required to set up and organise an inspectorate or authority at arm’s length from a minister. The independent administrative organisations (*zelfstandige bestuursorganen*) are organisations that play a role in the processes of national government but that themselves are not government departments or part of one, and that accordingly operate to a greater or lesser extent at arm’s length from ministers. Independent administrative organisations, in particular those for service delivery and policy execution used to be very popular organisations but recent years have seen their popularity in the Netherlands diminish. Recently, we have not seen many new

independent administrative organisations emerging. The discussion on fading government control and fragmentation of government, as this phenomenon is labeled, seems to lead to a repositioning of these types of (quasi-) independent government organisations.

Even if an inspectorate or an authority is organised in a semi-autonomous way still the question remains of whether this correctly conforms to European legislation and jurisprudence. Recent jurisprudence seems to show that there is reason to doubt this. For all of these autonomous government organisations in the past one legal framework has been developed. This framework act for independent government organisations (*Kaderwet zelfstandige bestuursorganen*) contains provisions that have possible consequences for the material independence of these organisations. For instance: Article 12 of this framework says that the minister appoints, suspends and discharges the members of the independent government organisation. Article 21, first paragraph, makes it possible for the minister to issue policy rules for these organisations' activities and Article 22, first paragraph, gives the minister the authority to annul their decisions. Discussing these authorities and with a reference to the decision by the European Court of Justice from March 9th 2010, mentioned above, Ottow asks herself if the relationship between the Dutch Privacy Authority and the minister fulfils the obligations of the Privacy Directive and answers to the requirement of full independence.⁹ Her conclusion is that the privacy law (*Wet bescherming persoonsgegevens*) institutionalising the Privacy Authority in the Netherlands, needs to be changed.

The authority to determine policy rules that follow from Article 21 of the framework for independent government organisations raises the question as to the character of these policy rules. Perhaps this authority fits the independence of these authorities if their character is a general one. When the policy rules tend to get rather specific, one doubts whether that still would be the case. In a dispute regarding a policy rule, issued by the minister of Economic Affairs, to the energy chamber of the Dutch Competition Authority the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) judged that a certain policy rule did not contain general rules, but specific rules and as such was unlawful.¹⁰

It is mostly European legislation that makes a radical choice for non-departmental organisations an inevitable one, for instance in the case of the Privacy Authority or with market authorities. Although perhaps that is not the only situation where formal independence is needed. I refer again to empirical data on environmental enforcement and interference from local government authorities who withhold inspectors to issue enforcement measures they deem necessary. The advisory committee-Mans named after its chairman, thought this was one of the reasons

9 A.T. Ottow & S.A.C.M. Lavrijssen, *Het Europese recht als hoeder van de onafhankelijkheid van nationale toezichthouders*, *Tijdschrift voor Toezicht*, 2001, No. 3, p. 34-50.

10 CBB 29 juni 2010, LJN: BM9470 (Gaszaak).

to plead for regional environmental enforcement agencies.¹¹ As already mentioned, Biezeveld and Stoové believe we should go beyond that and establish an independent Dutch Environmental Authority, an environmental agency, organised as an independent administrative organisation.

That more inspectorates will become formally independent is not very probable. On the contrary, the merging of several market authorities (NMa, OPTA en CA) into one larger new authority comes with a different organisational structure, which perhaps also diminishes the independence of the organisation, backs this up. In the context of the above – in short – described jurisprudence and the broader discussion on independence of inspectorates and authorities, the organisational change of these market authorities could become very interesting.

5. How to Safeguard Independence?

How to accomplish independence, is the third question to be answered in this contribution. The clearest way to safeguard independence is to set up and organise inspectorates and authorities as independent administrative organisations. Already above, it was concluded that at this time this is unlikely to be adopted. The task of establishing a certain degree of independence from the minister, when the inspectorate is not set up as a formally independent organisation, proves to be a challenging one. Which safeguards should apply in a situation of full ministerial responsibility where the inspectorate wishes to create material independence for its actions? Perhaps there are easier ways of realising independence. Since July 2002, the work of the Inspectorate for Education is based on a law.¹² This law states that the minister has no authority to give instructions to the inspectorate about the way the inspectorate judges educational quality.¹³ The parliamentary history of this article is interesting. Parliamentarians amended the law against the background of a discussion on independence of the education inspectorate. In the law a distinction is made between the gathering of information and the judgment. On this basis there is the exclusive domain of the inspectorate on the one hand and the intervention for which the minister should act on the other. In this sense, the ministerial responsibility for education inspections is made clear. Most other inspectorates lack such a legal basis for their activities, or, if they have such a basis it is much less precise. A few years ago several ministries were working on legislation concerning other inspectorates, but these proposals were never presented. The suggestion of working on a legislative framework for inspections that can offer minimal safeguards for material independence, while at the same time ministerial responsibility stays intact, could be very fruitful in this respect.¹⁴

11 Commissie-Mans, *De tijd is rijp*, Den Haag 2008.

12 Wet op het Onderwijstoezicht, *Staatsblad* 202, 387.

13 Article 8, third paragraph.

14 Ph. Eijlander, De ministeriële verantwoordelijkheid voor inspecties en inspectieoordelen. Naar een wettelijke basis voor onafhankelijk toezicht?, *RegelMaat*, 2003, No. 3, p. 94-99.

6. Conclusions: Independence in Perspective

Even with formal independence as is the case with several inspectorates and authorities in the Netherlands, independence must be put into perspective. Can we imagine an inspectorate being independent when the Inspector-General is a member of the management team of the ministry? Aside from this, it is true that independence is not an absolute value. Independence towards civilians, businesses and institutions is important, but at the same time there is dependency high and low. Inspectors need information from and the cooperation of the regulated. Independence from politicians is important too but at the same time independent market authorities need budgets and the means to organise themselves. On this issue, we should talk about a continuum, upon which variation is possible. Sometimes more independence is needed, sometimes we are satisfied with an optimum position.

Independence, thus, is not an absolute quantity. Depending on the characteristics of the task, the (European) legislation and the jurisprudence, either more or less independence is wanted. Autonomous government organisations could be an appropriate way for organising independence from the minister in certain fields of government activity. But even in these cases, as we have seen, it sometimes is questionable whether the status of autonomous government organisations fulfils all the requirements of European legislation. Some scholars of constitutional law in the Netherlands argue the re-installment of total political control. They seem to choose the wrong fight. From the other side: total independence as such does not exist either. It is always the material, factual situation that is decisive.

A Call for Independent Environmental Law Enforcement

Gustaaf Biezeveld*

1. Introduction

Thirty years ago Dutch society was shocked by the first serious environmental crime that came to light.¹ In 1982 police investigators discovered that over a ten year period a couple of companies belonging to Uniser Holding had emitted a great amount of dangerous substances into Dutch rivers. The companies involved had gone bankrupt leaving behind seriously polluted plants as well as tanks, cellars, and ships full of chemical waste. In reaction to the so-called Uniser Case the Dutch Cabinet of Ministers asked an independent commission to analyse the causes of these crimes and recommend what should be done to prevent such environmental crimes. This commission concluded that fragmented operating governmental bodies and services involved had strongly contributed to the failure of the competent authorities in this case. I cite: “Public servants’ thinking and acting proves to be characterised to a great extent by orientation on their own formal responsibility. There proves to be little inclination to call in the help of other public services and get jointly a concrete result”.² To change this situation, the commission recommended that from then on the social problem should be the starting point instead of fragmented public competences and services. Therefore the organisation of the government should match effective regulation of industrial activities.

The Uniser Commission’s report prompted the Dutch Minister of Environment to take action in order to encourage the competent authorities involved and their services to give more attention to environmental supervision and to promote co-operation among them.³ Since then environmental supervision has been an item on the political agenda. A great deal of effort has been made and much money

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1 Report of the Uniser Commission (1983), *Rapport van de onderzoekscommissie naar de bestuurlijke aspecten van de uitvoering van de milieu- en andere relevante wetgeving bij Drisolco BV, EMK, Uniser e.a.*, see: *Parliamentary Papers II 1982/83*, 17 600, chapter XI, No. 104.

2 Report Uniser Commission 1983 *supra*, p. 87.

3 Report of the Commission Mans (2008), *De tijd is rijp*, The Hague, 2008 (Annex to the letter from the Minister for Housing, Spatial Planning and the Environment on 10 July 2008, *Parliamentary Papers II 2007/08*, 22 343, No. 201).

has been spent building up law enforcement capacity and expertise, in both the administrative and the criminal sector. Looking back it can be concluded that the Uniser Case was a wake up call for environmental law enforcement in the Netherlands.

However, in 2008 another independent commission reported to the Dutch Ministers of Environment and Justice that there was still a lot to do to improve the effectiveness of environmental supervision and guarantee a level playing field for the companies involved. So even after three decades both the organisational and the practical side of environmental supervision still require political attention and effort. How could this have happened?

In the first part of my contribution I give you an overview of the institutional features of environmental supervision in the Netherlands as well as the shortcomings acknowledged by the Cabinet of Ministers, the Parliament and the competent authorities involved. When I refer to environmental supervision I use this term in a broad sense. It covers three subsequent actions:

(1) research by inspections or otherwise in order to determine if an action or situation or good meets the requirements, (2) to assess the results and (3) to intervene, if necessary.

In the second part my focus will be on a potential major cause of the shortcomings. I conclude with a short survey of the possibilities and implications of restructuring environmental supervision in accordance with the present standards of supervision on economic actors and activities. Although my contribution mainly deals with the Dutch situation I pay attention to the European context as well.

2. Features of Environmental Supervision in the Netherlands

In my view environmental regulation is mainly a specific kind of economic regulation. The main objects of environmental regulation cover a great variety of economic activities. The scale on which these activities take place varies from local to global. Therefore the scale on which environmental violations can be committed varies as well. This does require from the environmental supervision system that it covers the whole range of economic activities and matches with the various scales on which violations of environmental regulation may happen. However, it also requires from supervisory authorities that they can and will guarantee a level playing field for the companies involved.

Although environmental regulation of economic activities originates to a great extent from the European Union or its predecessor, the Member States are

autonomous as far as the organisation of supervision is concerned.⁴ This is in contrast with the situation in other domains of European economic regulation.⁵

In the Netherlands no distribution of the parts has been made between the administrative and the criminal environmental law enforcement sector. Both the administrative and the criminal law enforcement system apply to the whole range of environmental regulations. This implies that with almost every violation of environmental law both an administrative authority and the environmental prosecutor are competent to enforce. Both environmental law enforcement systems differ fundamentally on the institutional side. All environmental prosecutors are part of one organisation that is practically independent although it operates under the political responsibility of the Minister of Security and Justice. However, all supervisory authorities are political organs that are not exclusively focused on their responsibility for environmental supervision. In total there are roughly 450 competent administrative authorities, spread over three levels of government: local, regional, and national. Most of these authorities are assisted by inspectors belonging to their own organisation. The others are assisted by joint inspection services, working for a number of municipalities.

Although the supervisory authorities at the provincial and municipal level behave as autonomous organs that are only accountable to the representative body at its own level of government, in constitutional terms they are not fully autonomous. For their actions the Minister of Environment is accountable to the Parliament as well, based on the concept that environmental management is essentially a responsibility of the State and competences in this field that have been entrusted to governmental organs at a lower level of government should be exercised in accordance with the public interest.

From the beginning institutional fragmentation of environmental supervision has been a complicating factor for co-operation between the various supervisory authorities as well as their inspectors. Their natural tendency to behave autonomously has been strengthened by potential frictions between their supervisory task and other political tasks and responsibilities. So it is not surprising that there have been many environmental scandals over the past few decades, such as the TCR-affair,⁶ and the Probo Koala case,⁷ and many other complaints by non governmental organisations and companies expressing concern regarding the lack of effectiveness and a level playing field. The independent commission that reported

4 R.H. Lauwaars & C.W.A. Timmermans, *Europees recht in kort bestek*, W.E.J. Tjeenk Willink, Deventer, 1999.

5 See the contribution of Annetje T. Ottow in this volume.

6 R.J.J. Eshuis & E.A.I.M. van den Berg, *Dossier TCR. Tien jaar schone schijn*, WODC, The Hague, 1996.

7 Report of the Commission Hulshof (2006), *Rapport van bevindingen naar aanleiding van het onderzoek rond aankomst, verblijf en vertrek van de Probo Koala in juli 2006 te Amsterdam*, <www.amsterdam.nl>.

in 2008 to the Ministers of Environment and Justice came to the same conclusion.⁸ It recommended defragmentation by forming 25 regional supervision services on behalf of the supervisory authorities at the provincial and local level of government. This network should create better conditions for environmental supervision as well as a level playing field for companies. Therefore, it should have a proper legal base. In the view of this commission there was no need to reshuffle or reduce the number of supervisory authorities.

Both the former and present Cabinet of Ministers agreed with this recommendation but preferred voluntary development of regional services by means of a bottom up process over legislation. This preference was prompted by strong opposition from municipalities against new legal obligations.

It is expected that from the summer of 2013 in 28 regions at least a part of the environmental supervision tasks of provinces and municipalities will be executed by joint services. Yet it is still uncertain whether the regional services will result in better environmental supervision in co-operation with the Public Prosecutor's Office and the police. Apart from shrinking budgets for environmental supervision a significant lack of enthusiasm among the majority of supervisory authorities involved might become an obstacle for fully fledged and robust organisations with enough professional inspectors. At the very least it is disquieting there has been no discussion in most regions until now on questions such as:

- what conditions should be fulfilled for more effective environmental supervision and better guarantees for a level playing field for companies? and;
- what does the formation of joint services imply for the role and position of supervisory authorities?

Is this an indication that both the independent commission and the Cabinet of Ministers may have overlooked the political status of supervisory authorities as a major cause of the shortcomings of environmental supervision? In my view it is. To clarify this I must explain something about the Dutch and European standards for supervision of economic actors and activities.

3. Standards for Economic Supervision

In 2001 the Dutch Cabinet of Ministers published a white paper with standards for supervision on economic or social organisations by governmental bodies at the national level of government.⁹ Its key message was that it ought to be ensured to subjects of supervision as well as to citizens, responsible ministers and the

8 Report Commission Mans 2008 *supra*; cf. A.B. Blomberg, *Verplichte regionale omgevingsdiensten: een institutionele herziening van de uitvoering en handhaving van het omgevingsrecht*, *Tijdschrift Omgevingsrecht*, 2008, No. 4, p. 125-135.

9 *Parliamentary Papers II* 2000/01, 27 831, No. 1 (Framing vision on supervision 2001).

Parliament that supervision will be *independent, transparent, and professional* as much as possible. This implies that:

- a. the supervisor must be enabled to research the facts and make up his mind without being influenced by the subject of supervision involved or the responsible minister;
- b. the supervisor's objective judgement should be made public as much as possible, so that both the Parliament and the society can take note of it; and
- c. a professional process of judging by the supervisor is required.

Therefore the supervisor's organisation should be built in such a way that these standards for supervision can be guaranteed. At least this implies that within the government structure supervision is positioned as a recognisable entity, separate from policymaking and licensing.

The white paper gives no reason to assume that these standards do not apply to supervision exercised by provinces and municipalities under the responsibility of a minister. Therefore this Dutch government document provides strong arguments for the thesis that supervision of the observance of environmental law ought to be organised and exercised in a independent, transparent, and professional manner.

These Dutch standards for supervision coincide to a great extent with the European requirements on supervision of economic actors, as pointed out by prof. Ottow in her contribution to this book.

When we look at the public authorities that are competent concerning environmental supervision, it becomes clear that these standards have not been applied to supervision on the observance of European and Dutch environmental law. Neither in the European Union nor in the Netherlands has any legal action been taken to guarantee independence of environmental supervision of economic actors and activities. This is particularly remarkable because according both the EC-Treaty and the Treaty on the Functioning of the European Union, European environmental regulations and directives must be compatible with the objectives of the internal market. In my view there is no good reason why supervision regarding environmental regulations and directives is treated as different to supervision regarding other kinds of economic European law.

An explanation for the different approach taken by the European legislator might be that generally speaking negotiations regarding a new environmental regulation or directive are focussed more on the intended environmental protection levels and the accompanying costs for companies than on guarantees for a level playing field in the supervision phase.

The conclusion of this short survey is clear: there is no legal obligation for independent environmental supervision. At the same time we have not found good reasons why the standard of independence should not apply to environmental supervision. On the contrary. Therefore it seems worthwhile exploring whether

there might be a connection between the structural shortcomings of environmental supervision in the Netherlands and the political position of supervisory authorities.

4. Environmental Supervision in Practice

As I mentioned before, since the Uniser Case a number of other serious environmental cases have come to light.¹⁰ Most of these cases were analysed by an independent research team. Each of them concluded that the supervisory authorities involved had let other interests – mostly economic or financial interests – prevail over the interest of human health or environmental quality. This outcome is not surprising in a situation where the supervisory authority is a political organ with a great variety of tasks and responsibilities on behalf of the public interest. In such circumstances each supervisory authority has no choice: it is always trying to balance various and often conflicting interests, mostly by compromise. Given the political importance of economic interests and employment it proves almost inevitable that these interests outweigh the interests served by environmental supervision. So it is understandable that for most politicians the supervision portfolio is not an attractive one. Environmental offenses quite often place supervisory authorities in a difficult dilemma.

Their political position not only influences their performance as supervisor and their own decision making but it also influences the supervision culture within the government body involved as well as the attitude of inspectors towards economic actors that do not comply with environmental provisions. Most inspectors prefer a soft approach to companies above a strict one, even in contacts with evidently calculating economic actors. So in my view environmental supervision in the Netherlands can be characterised as highly politicised. Thanks to this the effectiveness of environmental supervision, as well as the willingness of economic actors to comply with environmental provisions, has been seriously affected. Under such circumstances the protection of human health and the environment as well as a level playing field can never be guaranteed.

In my opinion it is not fair to blame the supervisory authorities for this. It is the legislator who made the wrong choice by charging political organs with environmental supervision of economic actors and activities. This choice has been taken for granted over many, many years. This explains why until recently no one publicly linked the shortcomings of environmental supervision in the Netherlands with the political position of the supervisory authorities in this field. Although I worked for many years as an environmental prosecutor, my eyes were only quite recently opened when I was informed about the European legislation and jurisprudence on independent supervision on economic actors and activities. I then

10 G.A. Biezeveld & M.C. Stoové, Naar een Nederlandse Omgevingsautoriteit. Een pleidooi voor onafhankelijk milieutoezicht, *Tijdschrift voor Toezicht*, 2011, No. 3, p. 9-10.

realised that the lack of independent supervisory authorities had been overlooked as a major cause of the shortcomings of environmental supervision in the Netherlands. It explains why for over thirty years the efforts made by successive Cabinets of Ministers to improve environmental supervision has failed.¹¹ This insight has also helped me to understand the formation of regional supervision services as a process with great difficulty due to the fear that many supervisory authorities at the local level of government have of losing their control over inspectors and inspections. Although many authorities are not particularly happy with this task, as long as they bear the political responsibility for both economic development and environmental supervision most of them are inclined to defend their power to balance the various interests in individual cases. Therefore I foresee that many supervisory authorities will not be ready to voluntarily transfer their competence to impose sanctions on economic actors to the head of the regional service and make that a non-political supervisory authority. I fear that if I am right, the formation of regional services will not lead to effective environmental supervision and a level playing field.

I have done no research into the situation in other Member States of the EU without independent environmental supervision. Yet I assume that there are no significant differences from the Dutch situation. This implies that there are no guarantees for effective law enforcement of European environmental regulations and directives as well as a level playing field which is a prerequisite for the internal market. From this point of view the European level is the right level to agree on the necessity of independent environmental supervision by declaring the standards for supervision on economic actors and activities applicable for this field as well. However, in my view there are also good reasons for the Dutch legislator to review his choice for political supervisory authorities, in anticipation of future European legislation. Therefore, I conclude by presenting my ideas for a possible solution for the Dutch situation.

5. Towards Independent Environmental Supervision in the Netherlands

In a democratic constitutional state governing politicians must be accountable to the Parliament or a comparable representative body at a lower level of government for supervision of the compliance of legal provisions. This accountability regards at least the conditions and means for supervision as well as the effectiveness and efficiency of the supervision in practice. For failing supervision in general or in individual cases the responsible politicians can be held accountable as well. However, this does not imply that they should have the power to intervene in individual cases as this would be incompatible with the concept of independent supervision.

Therefore the first question to be answered is: who should be accountable for environmental supervision? In my view in the Dutch context the best option

11 Biezeveld & Stoové 2011 *supra*.

would be the Ministers of Environment and Nature management. This is in line with the present system based on the concept that environmental management is essentially a responsibility of the state. Moreover, given the various scales on which economic actors operate and economic activities take place, it is wise to organise responsibility and accountability for supervision at the highest level of government.

As mentioned before, the environmental supervision system should cover the whole range of economic activities and have the ability to respond to the various scales on which environmental violations may happen. In my view only a nationwide organisation can meet these requirements.¹² Therefore I would prefer an organisation comparable to the organisation of the Public Prosecutors Service that is headed by an, in principle, independent board and consists of a combination of national and regional units. Incidentally, the organisation for the police, which until 2013 consisted of 26 autonomous police forces, is being changed into a national police force and will also consist of a combination of national and regional units.

In my view the board of the ideal national environmental supervision organisation that should become the new competent authority for environmental supervision, should take over all the powers on environmental supervision that now belongs to approximately 450 political competent authorities. This will provide better conditions for both effective supervision as well as a level playing field.

The inspectors, lawyers and staff that now work partly at the national level, partly at the provincial and local level should become officials of the new organisation. This will provide better conditions for professionalism, co-operation, the gathering and exchange of information and similar responses in comparable situations.

What does this imply for the on going formation of regional supervision services? Should this process be considered out of date by new insights? Certainly not. In my opinion the implementation of the decision to build a network of regional supervision services can serve as a first, important step towards a national environmental supervision organisation. When these regional services operate, further steps can be made by harmonising procedures and IT-systems, by pooling expertise and by integrating management and information activities. In addition to this the legislator should make a provisional regulation on the transfer of the power to impose sanctions from the present supervisory authorities to the heads of the regional services. This would be a first step towards independent supervision.

12 Compare the reform of the Dutch police that came into force in January 2013. The previous organisation that consisted of 25 autonomous regional police forces and a national police force proved to be inadequate for the abatement of crime that exceeded the regional scale. Therefore the legislator decided to form a national police.

To be successful and efficient within a period of four to six years such a process of organic development should be furthered and directed by the national government.

Still one difficult question remains: will all supervisory authorities be ready to transfer their powers to the heads of the regional services? To be honest, I am not sure. So in my view European rules on independent environmental supervision are indispensable. The implementation of the Seventh Environment Action Programme of the European Union provides an excellent opportunity to present a view on this.¹³

6. Closing Remarks

In this contribution I have shown that independent environmental supervision is not primarily a political or public management concept. In the Netherlands we have experienced that independence is a prerequisite for both effective supervision and a level playing field. The economic and social costs of a lack of independent environmental supervision are enormous. Hopefully the Dutch and the European legislator will acknowledge this soon and take adequate action.

¹³ Proposal for a decision of the European parliament and of the Council on a General Union Environment Action Programme to 2020, *Living well, within the limits of our planet*, Brussels, 29 November 2012, COM(2012) 710 final, 2012/0337 (COD), priority objective 4: To maximise the benefits of EU environment legislation, p. 23-26.

