

European integration and the supervision of local and regional authorities Experiences in the Netherlands with requirements of European Community law

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1. Introduction

As a result of increasing European integration, local and regional² authorities are having to deal with European law more and more intensively. Because a Member State (read: central government) is responsible *vis-à-vis* the Community for the errors of local and regional authorities, the question arises within Member States whether the central government possesses sufficient supervisory instruments for complying with their obligations under Community law: they must ensure that the errors of local and regional authorities are rectified in time, and national law must provide for sufficient possibilities to do so.

Although Community law is neutral towards the internal relations between the various tiers of government in the Member States, this responsibility of the central government may, as a result of European integration, lead to a need for more powerful supervisory instruments in relation to local and regional authorities. In the past five years there has been debate on this subject within the Netherlands³ and after a long delay the Dutch cabinet decided in 2004 that the existing supervisory instruments in the decentralized unitary state that is the Netherlands should be expanded.⁴ The legislation intended to realize this expansion is in preparation. This discussion and its results would seem of interest to other Member States of the Community facing similar problems.

In turn, persons and institutions involved in the Dutch expansion process are also greatly interested in reactions from colleagues in other Member States, as remarkably it has so far proven impossible to obtain any relevant information concerning similar discussions in other Member States (see Section 2.4).

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2 We do not use the term 'decentralized authorities' in this contribution – although this term is frequently used to describe sub-national levels of government – because one cannot call the regions or states within a federal state 'decentralized'.

3 See for an overview of this discussion: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaardere ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, with contributions by D. Benschop, J.Th.J. van den Berg, J.W. van de Gronden, B. Hessel, F. Hilterman, R. Lefeber, M.Q.M. Oosschot, J. Peters and R.J.M. van den Tweel.

4 See Letter of 7 July 2004 from the Minister of the Interior and Kingdom Relations to the President of the Lower House, *Kamerstukken II* 2003-2004, 21 109, no. 138 (hereinafter: cabinet position).

1.1. The Dutch discussion seems relevant to other Member States

The fact that there do not seem to be similar discussions in other Member States, does not mean that they are not facing the problem of the central government's responsibility for errors made by local and regional authorities. The Court of Justice's extensive case law concerning Article 226 EC makes this abundantly clear. Some cases involving different Member States serve to illustrate this point.⁵

The Kingdom of the Netherlands was held responsible for the failure of the decentralized authorities to fulfil the obligation to bring into force the laws, regulations and administrative provisions needed to ensure compliance with Council Directive 75/440, concerning the quality requirements for surface water intended for the abstraction of drinking water in the Member States.⁶

The Netherlands government referred to the fact that in the Netherlands the supervision of the quality of the water is carried out in the framework of a decentralized system. The regional and local authorities are directly bound by the provisions of the directive and these bodies implement the provisions in actual water quality management, this process being supervised by the national authorities.

The Court of Justice decided: 'It is true that each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional and local authorities. That does not, however, release it from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature.'⁷

The Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty because the Länder Baden-Württemberg and Bavaria did not take the transposition measures necessary to comply with Council Directive 91/271 concerning urban waste water treatment.⁸

The Kingdom of Belgium was faced with infringement proceedings for the failure of the Walloon Region to guarantee the quality of the water in the town of Verviers as required on the basis of Council Directive 80/778, relating to the quality of water intended for human consumption.⁹

The Italian sub-national authorities did not meet a number of obligations relating to the management of waste, as laid down in Council Directive 75/442 and Directive 91/156. This resulted in environmental problems in the San Rocco Valley and to a successful action against the Italian Republic on the basis of Article 226EC.¹⁰

The French Republic failed to fulfil its obligations under the EC-Treaty, as certain bathing areas did not comply with the mandatory value limits set by Council Directive 76/160 concerning the quality of bathing water.¹¹

And finally the *Chania* case should be mentioned. When the Greek authorities on Crete did not meet their obligations on the basis of Council Directive 75/442 and Directive 78/319 with regard to the disposal of waste, the Hellenic Republic was found to have infringed EC law under Article 226 EC.¹² When after the judgment the Greek authorities still failed to take the necessary steps

5 Especially the precedents from other Member States played an important part in the Dutch discussion. See: J.W. van de Gronden, 'Wie is er verantwoordelijk', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaardere ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, pp.118-119. For other case law, especially with regard to directives, see: Sacha Prechal, *Directives in EC Law*, Oxford 2005, pp. 61-72.

6 Case 97/81, *Commission/Netherlands*, [1982] ECR 1819.

7 *Ibid.*, point 12.

8 Case C-297/95, *Commission/ Germany*, [1996] ECR I-6739.

9 Case C-52/89, *Commission/ Belgium*, [1990] ECR I-2821.

10 Case C-365/97, *Commission/Italy*, [1999] ECR, I-7773.

11 Case 147/00, *Commission/France*, [2001] ECR I-2387.

12 Case C-45/91, *Commission/ Greece*, [1992] ECR I-2509.

to meet the requirements laid down in Article 228 EC, the Commission again brought the case before the Court, which this time ordered the Hellenic Republic to pay to the Commission a penalty of EUR 20 000 for each day of delay in implementing the measures necessary to comply with the former judgment.¹³

These precedents should make clear that at central government level in the other Member States there must be both national legal instruments to ensure that mistakes of local and regional authorities are rectified in time, and national legal instruments to deal with the financial consequences of these errors (see Section 4). The question then arises whether the existing national supervisory instruments of a specific Member State are sufficient or whether they should be expanded.

From the examples given, however, it must not be presumed that the Community obligations of local and regional authorities are limited to obligations arising from Directives (see Section 3).

1.2. Topics to be dealt with

In this contribution, first of all an overview will be given of general European law aspects that all Member States are confronted with. In doing so the ambivalent position of local and regional authorities in Community law will be discussed (Section 2) and the errors involving Community law that can be made by local and regional authorities will be indicated (Section 3). Taking this into account, the next section will examine what is expected of the central government in order for it to comply with its European responsibilities (Section 4).

Secondly, attention will be paid to a number of issues which arose in the Dutch debate on the desired intensity and type of supervision and on the process of decision-making. After a brief overview of the traditional system of the decentralized unitary state and the instruments of supervision which they contain concerning, in particular, the provinces and municipalities, an indication will be given of the elements in relation to which the traditional system has appeared to fail (Section 5) and what reactions this has led to in the debate (Section 6). There appeared to be some tension – which was a politically sensitive matter – between those wishing to cling to the traditional national system and those who realized that European integration called for an adjustment of that national system. The Dutch cabinet in the end recognized the necessity of adjustment (Section 7). The contribution will conclude with some points of interest for other Member States that are confronted with the same problems (Section 8).

Within the context of this special issue on supervision, it should be explained that in this contribution the following broad definition of supervision is used:

‘collecting information regarding the question whether an action or matter complies with the applicable criteria and reaching a judgment based on this and, if necessary, intervening on the basis thereof.’¹⁴

¹³ Case C-387/97, *Commission/Greece*, [2000] ECR I-5047.

¹⁴ Cabinet position, *supra* note 4, p. 11, unofficial translation.

2. The ambivalent position of local and regional authorities

The position of local and regional authorities in Community law is ambivalent,¹⁵ and this has an influence on discussions regarding the relationship between the various tiers of government. The following elements can be derived from the case law of the Court of Justice.¹⁶

2.1. *Neutrality of Community law towards the internal division of powers*

Community law is neutral towards the internal division of powers between national tiers of government. This is a matter for national constitutional law.¹⁷ Thus, Community law leaves open the possibility of a centralized structure of Member States such as France, a federal structure of countries such as the Federal Republic of Germany, Spain and Belgium, and the system of the decentralized unitary state, as it exists in the Netherlands. Although the national constitutional structure of a Member State is thus not directly affected by Community law, it can, as will be shown, come under pressure as a result of increasing European integration.

2.2. *The responsibility of the Member State under Article 226 EC*

The neutrality of Community law has its price. Every Member State can decide on its own structure, but whatever is chosen may not be to the detriment of Community law. This means that the Member State (read: the central government) can be held responsible by the Commission under Article 226 EC for the wrongful conduct of local and regional authorities. This responsibility has a strong centralizing effect and leads to the question whether these central authorities possess sufficient supervisory instruments in order to force local and regional authorities to rectify their errors.

For the local and regional authorities, Article 226 EC thus constitutes a drawback of Community law: their relationship with the central authorities is mainly submissive and is dominated by the possibility of their infringing Community law.

2.3. *The responsibility of the local and regional authorities themselves under Article 10 EC*

The position of local and regional authorities in Community law is further determined by the principle of loyal cooperation under Article 10 EC. It is apparent from the Court's case law that this principle applies not only to the central government but also to local and regional authorities.¹⁸ This means that these authorities have a legal obligation of their own to comply with the prohibitions and obligations of Community law in a loyal manner. The consequences of Article 10 are far-reaching. Local and regional authorities can, for instance, on the basis of the principle of loyal cooperation, be obliged to disregard national legislation which incorrectly implements a directive, and even to apply a directly effective provision of a directive to the advantage of a citizen. This obligation arises when the period for transposition has expired, the

15 See B. Hessel and K.J.M. Mortelmans, *Het recht van de Europese Gemeenschappen en de decentrale overheden in Nederland*, Deventer 1997, pp. 103-104.

16 See for further elaboration: Bart Hessel, 'De voortschrijdende Europese integratie: zwaardere toezichtsinstrumenten dringen zich op', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaarder ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, pp. 10-12.

17 See for instance joined Cases 227-230/85, *Commission/Belgium*, [1988] ECR I; Case 240/87, *Atalanta*, [1988] ECR 3513.

18 See *inter alia* Case 103/88, *Fratelli Costanzo/Comune di Milano*, [1989] ECR 1839.

directive has not been transposed, or has been transposed incorrectly, and the directive is clear and unconditional.^{19 20}

It is apparent, thus, that Community law expects local and regional authorities to adopt an active role with regard to European rules, and to act independently of the central government. This aspect of their ambivalent position entails, amongst other things, that local and regional authorities are increasingly involved in the adoption of European legislation – which, after all, they are often called upon to implement – and that they are (more) involved in the transposition of European legislation; in addition, it means that more attention is paid to the obligations of the central government *vis-à-vis* the local and regional authorities, for instance, a right for them to claim compensation from the central government in the case of *Francovich* liability as a result of incorrectly implementing legislation.²¹ We could call this the ‘positive side’ of Community law for local and regional authorities.²² This contribution on supervisory instruments, however, is about the negative side, the drawbacks of European law. For a complete picture of the position of the local and regional authorities in Community law the advantages must not be forgotten. We will return to this later (Sections 7 and 8).

2.4. The Dutch experiences seem rather unique in the EU

Although it must be assumed that almost every Member State has to face the question whether European integration leads to the a need for more powerful supervisory instruments in relation to local and regional authorities, it is remarkable that during the debate in the Netherlands neither I, nor the several institutions involved, like the Ministry of the Interior and Kingdom Relations and the Interdepartmental Commission European Law, could find any relevant information about comparable discussions in other Member States. During this period at the end of 1999 we therefore got the impression that we were facing a new and unique question.

– An intermezzo: the reason for raising this question at all was not the result of a kind of super-consciousness of the Dutch government on the effects of the European integration process. The question came up in a debate over a constitutional problem concerning the ministerial responsibility *vis-à-vis* the Dutch parliament. What is the situation in regard of the ministerial responsibility for ministerial behaviour in European conflicts concerning infringements of Community law by local or regional authorities? –

While writing this article the situation seems to be unchanged. As far as I had access to English, German or French publications I could not find any indication that in the meantime other Member States are dealing with the same question. My contacts with the Dutch Ministry of the Interior, the Council of European Municipalities and Regions (CEMR) and the Committee of the Regions confirmed my impression concerning the topics of the current European discourse regarding the position of sub-national authorities. In comparison with the situation in 1999 much

19 See *inter alia* Case 103/88, *Fratelli Costanzo/Comune di Milano*, [1989] ECR 1839, and Case C-201/02, *Wells*, [2004] ECR I-723. For further elaboration on the question when a local or regional authority must apply a directly effective provision of a directive and when not, we refer to S. Belhaj and B. Hessel, ‘De rol van de decentrale overheden bij met EG-richtlijnen strijdige nationale wetgeving: enkele beschouwingen over driehoeksverhoudingen, rechtstreekse werking, richtlijnconforme interpretatie en het arrest Wells’, 2005 *RegelMaat* no.1, pp. 23-34.

20 Art. 10 EC also forms the basis for so-called ‘Francovich liability’ on the basis of which local and regional authorities can be held financially responsible via the national courts for damage resulting from their infringement of Community law.

21 B. Hessel, *De relatie tussen de Europese regelgever en de decentrale overheden vanuit decentraal perspectief*, Discussion paper for the Vereniging voor wetgeving en wetgevingsbeleid, Sdu, 2000, p. 41; Hessel, *supra* note 16, pp. 47-48.

22 For those local and regional authorities that do not yet have much knowledge of European law it will be difficult to see the advantage of this. Experience has shown, however, that the need to be involved in the adoption of European legislation becomes automatically apparent to them once they become aware of the content of the existing law.

more attention is paid to the influence of European law on regions and local governments.²³ And of course, thanks to the White Book of European Governance and the preparation of the European Constitution, the enlargement of the participation of regional and local governments in the European legislation process has become a hot topic. In other words: the focus is on what above I have called the ‘positive side’ of Community law and the negative side of the possible consequences of Article 226 EC seems to be largely neglected.²⁴

A more complete view on both sides of the position of sub-national authorities, especially municipalities, can be found in an interesting lecture that was given by my German colleague, Stephan Hobe, at the city hall of Cologne on 17 May 2004.²⁵ Discussing the position of municipalities in the European Union professor Hobe emphasized that the national autonomy of the municipalities in Germany can be affected by European law, in spite of the protection provided by the national constitution. He also explained to his audience that local officials cannot rely on the European Charter of local self-government of the Council of Europe with regard to the effects of EU integration.²⁶ The opponents of more powerful supervisory instruments several times introduced this Charter into the Dutch debate,

for which reason I am glad of some support from abroad. Given this negative side of Community law for local governments, Stephan Hobe proposed to strengthen the position of the German municipalities in the process of European integration and European legislation.

3. The Community obligations of local and regional authorities

When discussing the responsibility of the central government for infringements of Community law perpetrated by local and regional authorities, it is important to know what Community obligations are incumbent upon these authorities. In this context, there is often a tendency to think, in the first place, of obligations of local and regional authorities to implement European directives on the basis of national implementing legislation, for instance the issue of environmental licences or the application of European public procurement rules. The implementation of directives is, however, only one of the Community obligations which local and regional authorities have.²⁷

23 Compare, for instance, the reports of the Local Government Network (Logon) of the Council of European Municipalities and Regions (CEMR). The report from 2000 gives good but individual overviews of the effects of European integration on the local and regional authorities of the Member States involved in the Network. In the Final Guide of 2005 the participants pay much more attention to the European subjects they have in common, like the legal framework for European local government, services of general interest and public sector reform strategies. See the website of Logon: www.ceec-logon.net.

24 During my stint as a visiting professor at the University of Granada (Spain) in the second part of 2004 I noticed that the in sunny Andalusia my colleagues simply focused on the positive side for *their* region. See: posición FORO, *Andalucía y el futuro de Europa*, Junta de Andalucía, Consejería de la presidencia 2004.

25 Stephan Hobe, *Köln und Europa, Zur Stellung der Kommunen in der Europäischen Union*, Universität im Rathaus – Vorträge, 17. Mai 2004. See website Universität zu Köln: www.uni-koeln.de/uni/kultur_unirat_vort170504.html.

26 ‘Die Europäische Gemeinschaft selber ist diesem Vertrag jedoch nicht beigetreten, so dass sie durch diesen nicht unmittelbar gebunden wird. Nach Art. 15 Abs. 1 Satz 1 EKV ist ihr der Beitritt auch gar nicht möglich, denn laut dieses Artikels sind nur die Mitgliedstaaten des Europarats zur Unterzeichnung der Charta berechtigt. Auch lässt sich aus der Charta kein Schutz der kommunalen Selbstverwaltung auf europäischer Ebene in Form eines allgemeinen Rechtsgrundsatzes ableiten. Die Charta steht als völkerrechtlicher Vertrag außerhalb des Gemeinschaftsrechts und kann zwar einen im Wege einer Rechtsvergleichung gefundenen allgemeinen Rechtsgrundsatz bestätigen, reicht jedoch alleine nicht aus, um einen derartigen Grundsatz zu begründen.’ Hobe, *supra* note 25, p. 6.

27 In federal Member States the transposition of directives is often carried out by the federated states. In the Netherlands we have no experience with this.

3.1. Obligations under primary Community law

A very important category for local and regional authorities are the obligations under primary Community law, in particular the EC Treaty. These are, for instance, the Treaty provisions on the common market, such as the four freedoms, and competition, including state aid. Such obligations apply *directly* for these authorities, in the sense that no national implementing legislation is necessary. Furthermore, most of these Treaty provisions have direct effect, so they can be enforced in a national court.²⁸

3.1.1. The four freedoms

Local and regional authorities must abide by prohibitions on discrimination flowing from the free movement of goods, persons, services and capital. These are far-reaching obligations that have an effect on all manner of local and regional policy areas.²⁹ In the case of the free movement of goods, an example might be a prohibited clause in a tender for public works contracts to use only national sewer-pipes.³⁰ The free movement of persons is relevant for local and regional authorities in their capacity as employers, but also extends to their actions in various areas of policy such as civil registration matters, issuing of driving licences, social housing, town planning, etc.³¹ Local and regional authorities may, for instance, be confronted with the prohibition of discrimination in relation to the freedom to provide services in the area of rates for admission to museums,³² rules about engaging unemployed persons from the local area who are difficult to place,³³ or action against football hooligans coming from other Member States. The free movement of capital can also come up in the matter of authorization requirements or other requirements that are capable of hindering free movement, with regard to the acquisition, use or disposal of immovable property.³⁴

3.1.2. Competition law for undertakings and public authorities

European competition law for undertakings, as laid down in Articles 81, 82 and 86 EC, also leads to certain obligations for local and regional authorities. They can be confronted with this when 'going commercial' themselves and thus acting as an undertaking, but European competition law also involves rules for local and regional authorities when, acting as public authorities, they promote or force certain anti-competitive conduct of undertakings or grant them exclusive rights.³⁵

28 The prohibitions on discrimination flowing from the four freedoms have direct effect. Since the decentralization of European competition policy, as of May 2004, Art. 81 EC has direct effect in its entirety. Arts. 82 and 86 EC also have direct effect, but of the rules for state aid only the 'standstill' provision of Art. 88(3) EC has direct effect.

29 See for the significance of the four freedoms the now somewhat dated book by Hessel and Mortelmans, *supra* note 15, Chapters 7-9. Currently these chapters are being brought up to date as part 5 of the Kluwer series *Europees recht voor decentrale overheden*.

30 See Case 45/87, *Dundalk*, [1988] ECR 4929.

31 For an in-depth analysis I refer to the Ph.D. thesis by Hanneke Luijendijk, *Nederlandse gemeenten en het Europese personenverkeer, een onderzoek naar de consequenties van het personenverkeer voor de beleidsterreinen burgerzaken en ruimtelijke ordening en huisvesting*, Kluwer Europese Monografieën no. 79, Deventer 2005.

32 Case C-388/01, *Commission/Italy*, [2003] ECR I-721.

33 Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417.

34 Case C-302/97, *Konle*, [1999] ECR I-3099; joined Cases C-515/99, C-519/99, C-524/99 and C-526/99, *Reisch e.a.*, [2002] ECR I-2157; Case 452/01, *Ospelt*, [2003] ECR 2003 I-9743.

35 See for instance Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases and Materials*, Oxford 2002 Chapter 27, pp. 1123-1138. See also Anna Gerbrandy and Bart Hessel, *Mededingsrecht voor decentrale overheden*, in the series *Europees recht voor decentrale overheden*, part 4, Kluwer, 2004.

3.1.3. Community supervision of state aid

By now it is sufficiently known that, in granting aid, local and regional authorities are confronted with the Community supervision of state aid laid down in Articles 87-89 EC. The provisions lay down certain important obligations for these authorities, such as reporting plans to grant aid and the prohibition to grant state aid before the Commission has come to a – positive – decision on the matter.³⁶

3.2. Obligations arising from regulations

Regional and local authorities are also confronted with numerous obligations arising from EC regulations. Examples are Regulation 1612/68 on the free movement of workers³⁷ (although this Regulation ought to be familiar in local government circles, in fact it is largely unknown – in the Netherlands at least), the procedural Regulation 659/1999 in the area of state aid,³⁸ and, of course, the regulations concerning the Structural Funds.³⁹ These obligations also apply to local and regional authorities without any involvement of the national implementing legislator. The obligations contained in EC regulations do not need to be reproduced in national legislation – in fact, this is not even allowed. Furthermore, it follows from the nature of regulations that they are directly effective.

3.3. Obligations arising from directives

There are many European directives that entail obligations for local and regional authorities in specific policy areas. Examples could be the well-known public procurement directives, the many environmental directives such as Directive 91/271 concerning urban waste-water treatment,⁴⁰ Directive 85/337 on the assessment of the effects of certain public and private projects on the environment,⁴¹ Directive 75/440 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States,⁴² Directive 89/106 concerning rules on construction products⁴³ and Directive 75/117 on the principle of equal pay for men and women.⁴⁴ Directives must be implemented by national law, and in some Member States, such as the Netherlands, this implementation occurs on a national level, whilst in others – federal Member States such as Germany and Belgium – implementation can also occur at the level of the federated states. Here the legislature may enter the game either at a national or a federal level; local or regional authorities can then be confronted with the problem that this legislature has not correctly carried out its implementing task. Where a directive is not implemented correctly, municipalities can, for instance, be confronted with the obligation to interpret national law in accordance with the directive or may be obliged to disapply the incorrect implementing legislation on the basis of the principle of loyal cooperation, and even to apply a directly effective provision of a directive.

36 See for instance Craig and De Búrca, *supra* note 35, Chapter 27, pp. 1153-1169. See also Bart Hessel and Annelies Neven, *Staatssteun en EG-recht, praktische handleiding en checklijsten*, in the series *Europees recht voor decentrale overheden*, part 1, Kluwer, 2001; B. Hessel, 'Communautair toezicht op staatssteun en de Nederlandse decentrale overheden. Hoe werken de Europese regels in de decentrale praktijk?', discussion paper VAR, Vereniging voor bestuursrecht, in: *Staatssteun op het grensvlak van bestuursrecht, Europees recht en fiscaal recht*, The Hague 2005, pp. 7-74.

37 *OJ* 1968 L 257/13, subsequently amended. A proposal for amendment of this regulation has been under consideration for some time, COM(1998) 394 final.

38 *OJ* 1999 L 83/1.

39 See Hessel, *supra* note 16, p. 15.

40 *OJ* 1991 L 135/40.

41 *OJ* 1985 L 175/40, amended by Directive 97/11, *OJ* 1997 L 73/5.

42 *OJ* 1975 L 194/34.

43 *OJ* 1989 L 40/12, amended by Directive 93/68, *OJ* 1993 L 220/1.

44 *OJ* 1975 L 45/19.

3.4. General obligations arising from case law

Besides the obligations arising from the various European rules there are also obligations for local and regional authorities that have been developed in case law. Suffice it here to mention the principles that have been developed by the Court of Justice in the area of enforcement, and which may make an official policy of tolerance challengeable when European standards are concerned: the principle of effectiveness; the proportionality principle; the principle of equivalence (or assimilation) and the principle of deterrence.⁴⁵

4. What is expected from central government?

It follows from the above that the central government can be held responsible for a great number of possible infringements. Furthermore, in many Member States regional and local authorities' knowledge of European law is still insufficient, so that the chance that unwanted mistakes occur is large.

When an error becomes evident, the Member State is approached by the Commission. The Member State (that is: central government) is then obliged to end the infringement within a certain time-limit and to rectify the mistake. If it fails to do so the Commission can ask the Court of Justice to order the Member State to pay a periodic penalty payment.⁴⁶

In the case of sub-national infringements of Community law the central government thus has to deal with two different problems: the central government (1) must be able to ensure that the mistake is rectified in time and (2) should have a right of recovery from the local or regional authorities in respect of the penalty payment and other financial consequences.

4.1. Rectification of mistakes in time

It follows from the above that the central government must (be able to) ensure that mistakes are rectified in time in a number of situations.

For instance, when applying national implementing legislation, a local or regional authority can take *incorrect legal action*, such as awarding an environmental licence that is in conflict with a European directive. The violation of Community law can also appear as an improper *failure to act*, for instance, if a municipality tolerates certain illegal acts of citizens or undertakings in violation of European law, or a province infringes Community law by not inviting tenders in an open procedure. Furthermore, the infringement of Community law need not only regard legal acts but can also relate to *acts that are factual in nature*, for instance failing to build a sewage system in violation of the directive on urban waste-water treatment.⁴⁷

In addition, the central government must be able to react adequately to sub-national infringements of European rules where *no national implementing legislation* is involved; an example could be a municipality that, in violation of Article 39 EC, refuses to employ a citizen of another Member State or a regional authority that, in violation of Article 88(3) EC, grants aid to an undertaking without reporting it. In the case of violations of EC regulations there is no national implementing legislation either.

⁴⁵ See Hessel, *supra* note 16, p. 21. Also, certain general principles can be derived from the case law with regard to supplying information and cooperation and regarding the implementation of directives (Hessel, *supra* note 16, p. 20)

⁴⁶ See further Arts. 226-228 EC.

⁴⁷ See B. Velkamp, *Implementatie van EG-milieurichtlijnen in Nederland*, Kluwer Europese monografieën no. 53, Deventer 1998, pp. 99-100.

Supervisory instruments of the central government need to be capable of dealing with all these infringements.

4.2. Dealing with the financial consequences

The central government must also possess the national legal instruments for compensating for the financial consequences of errors of local and regional authorities. It must therefore have a right of recovery in respect of a possible penalty payment imposed on it by the Court of Justice and for other financial consequences.

5. The Dutch administrative system does not comply with the requirements of European law

When Member States examine whether their traditional national administrative system possesses the supervisory instruments central government needs, it is not improbable that the national system will turn out to need expanding. In the following section, an indication will first be given of the supervisory instruments which exist in the decentralized unitary state of the Netherlands. Subsequently, the areas in which these fall short will be indicated.

5.1. Supervisory instruments in the decentralized unitary state

Traditionally, there are three territorial tiers of government in the Netherlands: the central authorities, 12 provinces and about 450 municipalities. The decentralized aspect of this form of government is expressed in the fact that provinces and municipalities possess certain powers. A distinction is made in this context between, on the one hand, *autonomy* relating to their power to regulate and administer their own internal affairs as they deem desirable.⁴⁸ Examples are their own personnel management policy and the power to adopt autonomous rules on subsidies within their own territory. On the other hand, in addition to these autonomous tasks, there are tasks in so-called ‘co-administration’. This involves implementation of certain tasks or competences which they have been allocated or granted by or pursuant to a national law.⁴⁹ Examples are the grant of environmental licences under the national Environmental Management Act (*Wet milieubeheer*) or implementation of a subsidy policy that has been laid down in national subsidy legislation. It should be obvious that the distinction between autonomy and ‘co-administration’ is a sensitive issue within the three tiers of government, and that the provinces and municipalities find it very important that their autonomy is not gradually eroded as a result of the expansion of the competences of the central government. This is even more pressing since the ‘internal affairs’ of provinces and municipalities are not explicitly defined. The Netherlands does not have a ‘catalogue of competences’.

The unitary aspect of the decentralized unitary state can be found in a number of supervisory instruments that the central government possesses with regard to the provinces and municipalities, and also in the supervision that the province can exercise over the municipalities. Three formal, legal supervisory instruments can be distinguished:

⁴⁸ Art. 124, Para. 1, Constitution of the Netherlands.

⁴⁹ Art. 124, Para. 2, Constitution of the Netherlands.

1. Approval

This type of preventive control does occur in certain circumstances, but its use has been strongly reduced over time as it is considered too ‘nanny-ish’ towards the local and regional authorities, and it is too demanding for the supervising authority.⁵⁰

2. Suspension and annulment

This type of repressive (ex post) control is described in general terms. Decisions of the provinces and municipalities can be quashed by royal decree when they are in conflict with the law or the public interest.⁵¹

3. Rules on neglect of duty in the area of co-administration

There is a third supervisory instrument in the Netherlands decentralized unitary state, the so-called rules on neglect of duty. The idea behind this is that a higher administrative body – for the provinces this would be the Minister, and for the municipalities it is the province – can act in name of and for the account of the lower administrative body when the latter does not take the decisions required of it by or pursuant to a national law, or does not do so adequately. These rules on neglect of duty are laid down in the *Provinciewet* (Provinces Act) and the *Gemeentewet* (Municipalities Act), and only apply to the neglect of duties in co-administration.⁵²

Besides these formal, legal supervisory instruments there are several – partly informal, administrative – instruments that the central government can make use of. We mention here: informing or advising the local and regional authorities, peer pressure and a declaratory letter. Another possibility could be an obligation for local and regional authorities to provide information or to consult.

5.2. The traditional supervisory instruments are insufficient

If we compare the existing supervisory instruments with the supervision that is required of the central government under European law, then it becomes clear that these supervisory instruments fall short in a number of areas.

The instruments of suspension and annulment can only be used when the municipality or province takes incorrect legal action and not when it fails to act.

The rules on neglect of duty do offer the possibility to take action in case of failure to act, but only in the area of co-administration. When municipalities or provinces take decisions in the autonomous area of their own internal affairs that conflict with Community law or when they fail to act, the rules on neglect of duty do not offer a solution. These rules also do not apply to Community obligations that have not been transposed in national legislation, such as the application of Treaty provisions (for instance, the four freedoms) and obligations under regulations which have direct effect.

50 Art. 132, Para. 3, Constitution of the Netherlands. Under certain circumstances, for instance, the budget of a municipality or province can be subject to approval from the province or the Minister of the Interior, respectively (see Art. 203 *Gemeentewet* (Municipalities Act) and Art. 207 *Provinciewet* (Provinces Act)).

51 Art. 132, Para. 4, Constitution of the Netherlands.

52 See Arts. 120 and 121 *Provinciewet* (Provinces Act) and Arts. 123 and 124 *Gemeentewet* (Municipalities Act). The Constitution does furthermore provide in Art. 132, Para. 5, for a possibility to intervene if the administrative organs of the provinces or municipalities seriously neglect their autonomous duties, however, this must take place by way of a (separate) Act of Parliament.

Finally, there is a problem insofar as, under the existing system, the power to take a decision where a body of the municipality fails to do so belongs to the province and not the Minister.⁵³ Given this tension between the national system of administrative government and the demands that are made on the basis of European integration, there has been fierce debate, in which contradicting views arose that could also be informative for other Member States.

6. A heated debate in the Netherlands

The debate in the Netherlands involved various interested parties, such as two interdepartmental commissions, umbrella organizations of provinces and municipalities, scholars and lawyers. Although the initial presumption was that the traditional distribution of powers should be maintained, gradually it was recognized that European integration means that certain adjustments are needed.

6.1. Starting point: the maintaining of the traditional distribution of powers

The starting point for the discussions was a report by an interdepartmental committee, the ICCW,⁵⁴ in which the European law shortcomings of the existing instruments such as the rules on neglect of duty were acknowledged, but which clung to the existing distribution of power between the three national tiers of government. For this reason, this committee opted for the following supervisory instruments: peer pressure, declaratory letter, information and advice, general instructions from central government for the local and regional authorities, and an obligation to the local and regional authorities to provide information.⁵⁵

Furthermore, the ICCW called for the introduction of a right of recovery for the central government *vis-à-vis* the local and regional authorities for the financial consequences of their infringements. The introduction of such a right of recovery is considered necessary by all those involved in the debate because Dutch law does not offer sufficient possibilities for the central government to recover sums from local and regional authorities in relation to the financial consequences of violations of Community law. The Dutch cabinet has therefore also decided that such a right of recovery will be introduced (see Section 7).

The debate focused mainly on the question what supervisory instruments are necessary to rectify the infringements on European law in sufficient time. In its choice, this committee attached a great deal of importance to informal instruments of the central government in order to attempt to induce the local or regional authorities to rectify their mistakes in good time by way of administrative consultation.

The debate was continued when a second interdepartmental committee, the ICER,⁵⁶ was asked to advise the government specifically on the European dimension of supervision. This ICER committee asked me to write a preliminary study.⁵⁷

53 See Hessel and Mortelmans, *supra* note 15, p. 105-107. For those reasons, Mortelmans and I called for amended general legislative rules on neglect of duty already in 1997.

54 Interdepartementale Commissie voor Constitutionele aangelegenheden en Wetgevingsbeleid (Interdepartmental Commission for Constitutional matters and Legislative policy), *De Communautaire verplichtingen van decentrale overheden*, September 1999 (hereinafter ICCW report).

55 ICCW report, *supra* note 54, p. 55.

56 De Interdepartementale Commissie Europees Recht (the Interdepartmental Commission European Law).

57 Bart Hessel, Annelies Neven (ed.), Johan van de Gronden and Flora Goudappel, *Europeesrechtelijk toezicht op Nederland en de doorwerking naar decentrale overheden, Verkenningen ten behoeve van de ministeriële verantwoordelijkheid*, Europa Instituut, Utrecht University, May 2000 (hereinafter: preliminary study). This preliminary study has been included in the opinion of the ICER as Annex 3.

6.2. Suggestions for more intense supervision

Both in the preliminary study and in the exchange of views with the ICER, it was emphasized that the central government should, of course, always first attempt to urge the local or regional authority to change its conduct by way of administrative consultation. Possible more powerful supervisory instruments always have the character of *ultima remedia* that the central government can turn to as a last resort. The question here was whether the government should be given more powerful instruments in order ultimately to be able to rectify the mistake itself (see below under 6.2.1.) or to be better able to force the local and regional authorities to rectify it (see below under 6.2.2.).

6.2.1. Amended rules on neglect of duty

Following other European law experts,⁵⁸ I have suggested that the existing rules on neglect of duty should be amended to comply with the requirements of European law: extending them to include tasks within the sphere of autonomy, extending them to include factual acts and creating the possibility for the Minister to intervene in the case of neglect of duties by municipalities. In this context, it is emphasized that by amending the rules on neglect of duty, the government would send out the important signal that it places a premium on the fact that local and regional authorities comply with European law. Moreover, by complying with European law these authorities can themselves avoid the more intense instruments being applied to them.⁵⁹

Also, I argued not only for a right of recovery of financial consequences for the central government *vis-à-vis* the local and regional authorities, when the latter make mistakes, but equally *vice versa* for a right of compensation for the local and regional authorities *vis-à-vis* central government when it infringes European law (an element of the ‘positive side’; see Section 2.3).⁶⁰

6.2.2. Inter-administrative sanctions

Because the introduction of amended rules on neglect of duty turned out to be a very sensitive issue politically, an alternative came up in the debate which was a combination of three new instruments, which are termed ‘inter-administrative sanctions’.⁶¹ These would include an inter-administrative right of recovery, an inter-administrative periodic penalty payment, and an inter-administrative fine. These weighty instruments, which of course also have the nature of *ultimum remedium*, are more likely to maintain the administrative constitutional relationships. The Minister does not take over duties of the municipality or province in case of their failures, but these local authorities are themselves forced to act.

It can be questioned, however, whether the inter-administrative sanctions constitute a satisfactory alternative.

The inter-administrative right of recovery is not aimed at rectification of the infringement but merely at regulating the financial consequences.⁶² Thus it is not an alternative for rules on neglect of duty, but only a supplement to them (see Section 7).

58 Besides Mortelmans, I can point to the following: Commissie voor toetsing van wetgevingsprojecten (Committee for review of legislative proposals), *Implementatie van EG-regelgeving in de nationale rechtsorde*, 21 December 1990, CTW 90/22, p. 36; J.W. van de Gronden, *De implementatie van het EG-milieurecht door Nederlandse decentrale overheden*, Deventer 1998, p. 512, and B. Veltkamp, *supra* note 47, p. 99-100.

59 Preliminary study, *supra* note 57, p. 97.

60 *Ibid.*, p. 98.

61 See: R. Lefebber, *De Europese regelgever en decentrale overheden*, discussion paper for the Vereniging voor wetgeving en wetgevingsbeleid, The Hague 2000, pp. 68 *et. seq.*, in particular p. 86.

62 See for a comparison also R. Lefebber, *supra* note 61, p. 97.

The inter-administrative fine has the character of a punishment, and is thus a real sanction – something which the rules on neglect of duty lack. Thus, the inter-administrative fine cannot serve as an alternative to rules on neglect of duty either. Whether a local or regional authority should also be fined after a mandatory rectification of its mistakes is more a matter of internal administrative constitutional relationships and – apart from the deterrent effect it could have – is not relevant for the compliance with Community obligations.

The inter-administrative periodic penalty payment remains as a possible alternative. European law experts and practising lawyers have, however, pointed out that in case of emergency and under time pressure – and such are the situations we are talking about – it could still be more effective for the central government to act itself than for it to bombard the local and regional authorities with penalty payments.⁶³

6.3. Great resistance from the provinces and municipalities

It will not come as a surprise that both proposals for stricter supervision have met with great political resistance from the umbrella organizations of the Dutch provinces and municipalities.⁶⁴ Despite their *ultimum remedium* character, the umbrella organizations rejected the introduction of these more powerful instruments because they (1) turned out to be confident that in the event of a breach of Community law the Minister would be able to convince the province or municipality to amend its behaviour in peace and harmony, and (2) believed that the more powerful supervisory instruments formed an unacceptable violation of provincial and municipal autonomy.⁶⁵

6.3.1. Complete confidence in the administrative channels

Complete trust in the administrative channels may be politically desirable, but from a legal point of view this is a naïve belief.

In reaction to the views of the local and regional authorities it can be stated that *in abstracto* it is perfectly possible and also appealing to assume that the authorities involved will harmoniously come to a solution. This may be different, however, when a specific problem arises. If a municipality has awarded a local undertaking a contract where it should not have done, has improperly given aid to an undertaking, or has hired the brother of an alderman instead of a national of another Member State, both politically and legally a conflict situation arises when the Commission obliges the Member State to rectify this error. In such cases, it is not certain that the municipality is willing and able to resolve the conflict within the given time-limit to the satisfaction of the Commission and the central government. The advocates of heavier legal ammunition

63 Ronald J.M. van den Tweel, 'De Wet toezicht Europese subsidies: kort maar krachtig', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaarder ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, p. 88, where we read (unofficial translation): 'In exactly the one exceptional case, in which the instruction (for whatever reason) is not followed and a financial claim from Brussels threatens or is even already increasing each day, the central government may need to resort to substitutive decision making.' And Van de Gronden, *supra* note 5, p. 125, where, regarding inter-administrative sanctions, he states (unofficial translation): 'They, however, do not guarantee that a decentralized authority does what it must under EC law, since sanctions can be simply a price to pay. As an *ultimum remedium* the central government should therefore be able to intervene in the decentralized decision-making process by way of an EC regime on rules on neglect of duty, when the Netherlands threatens to breach its Community obligations because of failure to act by regional authorities.'

64 The *Interprovinciaal Overleg* (IPO) is the umbrella organization for the provinces. The Dutch municipalities are represented by the *Vereniging van Nederlandse Gemeenten* (VNG).

65 See Joop Th. J. van den Berg, 'Een reactie van VNG en IPO', Frank Hilberman, 'Artikel 226 EG en de decentrale overheden', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaarder ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, pp. 75 *et seq.* and pp. 129 *et seq.* Also from within the Ministry of the Interior and Kingdom Relations great importance is attached to local and regional autonomy, as can be concluded from the contribution by Jit Peters, 'Een reactie vanuit BZK', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaarder ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, pp. 69 *et seq.*

are thinking of such situations in which the Member State, with the Commission on its heels, can ultimately not avoid compelling the province or municipality to act in a certain way.

In such conflict situations, in which there are always political and/or legal losers, it does not even seem impossible that, in relation to these losing parties, a municipality or province may actually find it an advantage to be able to take refuge behind this compulsion from central government.

6.3.2. Violation of the autonomy of the local and regional authorities

In their reactions, the umbrella organizations retain the traditional distinction between autonomy and co-administration.

For the responsibility of the Member State under Article 226 EC for provincial or municipal errors, however, it does not make any difference whether this authority was acting within its own autonomy or in co-administration. A province that refuses to employ a national of another Member State will be confronted with the free movement of workers, a municipality that adopts an autonomous subsidy regulation for undertakings will be confronted with the Community supervision of state aid just as much as a municipality that implements a national subsidy regulation in co-administration.

The central government cannot rely on sub-national autonomy as an excuse to the Commission either, because those internal constitutional competence relationships are of no relevance in Community law. It is understandable that in the national context of the decentralized unitary state, the provinces and municipalities will be sensitive to their autonomy becoming subject to more stringent supervision, but they must realize that the autonomy of local and regional authorities has gradually been affected by the obligations under Community law for a long time already, and not just by any new supervisory mechanisms that may be involved. The Member States, including the Netherlands, have after all yielded a part of their sovereignty to the European Union, and it is not only the central government but also the local and regional authorities which bear the consequences of this.⁶⁶ The Dutch provinces and municipal authorities cannot blame the central government for being forced to introduce the related supervisory instruments, as a consequence of increasing European integration.

6.4. A cautious acknowledgement of the requirements of European law

After hearing the opinions of scholars and the reaction of the local and regional authorities, the ICER, in its advisory opinion, reached a cautious acknowledgement of the requirements of European law.⁶⁷

According to the ICER, the central government, once equipped with the instruments proposed by the ICCW, in general possesses sufficient possibilities to *promote* local and regional authorities' compliance with Community obligations. The ICER, however, acknowledges that these instruments do not offer a solution if the local or regional authority still fails to comply with certain Community obligations even after they have been used. In such exceptional cases the ICER considers a combination of a special instruction and a right of recovery necessary. The ICER, furthermore, does not rule out that even more powerful instruments will be necessary, but advises first gaining experience with the two instruments mentioned. If it turns out that these are

66 See J.W. van de Gronden, *De implementatie van het EG-milieurecht door Nederlandse decentrale overheden* (Ph.D. thesis Utrecht University, the Netherlands), Deventer 1998, p. 512, and Bart Hessel, 'Enkele afsluitende gedachten', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaardere ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer, 2003, pp. 149-151.

67 *De Europese dimensie van toezicht*, opinion of the ICER for the Minister of the Interior of 6 October 2000 (hereinafter: ICER opinion)

not sufficient, and only then, more powerful instruments such as the inter-administrative sanctions or amended rules on neglect of duty could be introduced.⁶⁸

6.4.1. First gain experience with less intrusive instruments

Naturally, the opinion of the interdepartmental ICER constitutes a political compromise. It is to be welcomed that this committee recognizes that the existing supervisory instruments may fall short in certain special circumstances, but whether it is wise to introduce the more powerful instruments only when it turns out that the lighter ones are insufficient seems doubtful. This point of view can be compared to a person who wants to take out fire insurance when the roof of his house is already smouldering. It is therefore fortunate that the Dutch cabinet does not follow the ICER's opinion on this issue.

7. The position of the Dutch cabinet

In light of the foregoing observations it should not be surprising that the Dutch cabinet took a long time to reach a position on this sensitive matter. It took four years and a number of cabinets before there was clarity on the issue. The following elements can be mentioned.

7.1. Attention for knowledge and implementation of EU law

It is worth noting – and it is politically wise – that the cabinet starts its official position on the disadvantages of EU law for local and regional authorities with a positive message to these authorities. The cabinet rightly assumes that violations of EU law have a great deal to do with the imperfect knowledge of this law on the part of local and regional authorities. Although it is primarily the responsibility of the regional and local authorities to gain such knowledge, the cabinet wishes to invest more in strengthening this knowledge. It also wishes more attention to be paid to the implementation of EU law, which must be realized for the most part by the local and regional authorities.

7.2. No general duty to provide information

The cabinet is not so keen on the introduction of a general duty to provide information for local and regional authorities, which the ICCW pleads for. If desired, a Minister can already ask the local and regional authorities for information and a general duty to provide information would create an enormous administrative burden.⁶⁹ For the local and regional authorities this is a good decision. A general duty to provide information would at first glance seem innocent enough – certainly when compared to rules on neglect of duty – but it has the great disadvantage that local and regional authorities cannot avoid the burden of this instrument by a high level of compliance with European law.

7.3. Preventive supervision

As for preventive measures, the cabinet considers peer pressure, information and advice by the Minister involved towards the local and regional authorities useful, but it rejects the instrument of the declaratory letter.⁷⁰ This instrument might – incorrectly – be regarded as a constituent

68 ICER opinion, *supra* note 67, pp. 36-37. See also Michiel Q. M. Oosschot, 'De Europese dimensie van toezicht', in: Bart Hessel (ed.), *In de Europese houdgreep? Over zwaarder ministerieel toezicht*, in the series *Europees recht voor decentrale overheden*, part 2, Kluwer: 2003, pp. 58-59.

69 Cabinet position, *supra* note 4, pp. 12-13.

70 *Ibid.*, p. 13-14.

element of the Community law obligation, and that would detract from the local and regional authorities' awareness of their direct responsibility.⁷¹

Neither is the cabinet in favour of the introduction of approval and negative clearance in order to guarantee proper compliance with EU obligations by local and regional authorities. These would moreover take up too much of the central government's capacity.⁷²

Furthermore, the cabinet does not want to make use of a periodic penalty payment via the civil courts. 'It is inappropriate, because it concerns the relationship between administrative bodies, and it is cumbersome'.⁷³

Finally, the cabinet is not in favour of a general power of instruction. This would violate the principle that, where there is room for discretion, the existing division of competences must be respected.⁷⁴

The cabinet does see possibilities for the instrument of the special instruction; however, the responsible Ministers should then determine, each for their own domain, whether that instrument is necessary as a preventive measure.

7.4. Repressive (ex post) supervision

In discussing ex post measures, the cabinet, naturally, shares the positions that were already expressed in the advisory phase (1) that the number of repressive instruments should be limited to the absolute minimum, (2) that the existing distribution of powers should be respected as much as possible and (3) that the responsibility of the local and regional authorities themselves should be left intact as much as possible.⁷⁵ Following this, it opts for the introduction of three new instruments: the individual instruction, the amended rules on neglect of duty and a right of recovery.

7.4.1. An individual instruction

Because the instruments of suspension and annulment are not sufficient when the local or regional authority fails to act, the cabinet opts for the individual instruction as a supplement to them.⁷⁶

The cabinet wishes to have this instrument as *ultimum remedium* in the case that the European or national court or the Commission has determined that there has been wrongful conduct by a local or regional authority.

7.4.2. Amended rules on neglect of duty

Against the background of the preceding debate it is remarkable that the cabinet also opts for – the direct introduction of – amended rules on neglect of duty. The cabinet recognizes that there is reason to doubt whether the existing rules on neglect of duty offer sufficient possibilities where a municipality or province fails to make a correct decision as required under European law, and then states: 'It is, however, not self-evident, with regard to the correct observance of Community obligations, that the possible use of this instrument should be ruled out. The cabinet will therefore

71 *Ibid.*, p. 14.

72 *Ibid.*, p. 15-16.

73 *Ibid.*, p. 16, unofficial translation.

74 *Ibid.*, p. 15.

75 *Ibid.*, p. 19.

76 *Ibid.*, p. 20.

do its best to ensure that the application of the existing rules on neglect of duty (...) will also extend to decisions required under European law.⁷⁷

7.4.3. *A right of recovery*

In order to deal with the financial consequences, the cabinet adopts the proposal of the ICCW and the ICER to introduce a right of recovery.⁷⁸

With its position, the Dutch cabinet – in spite of strong political resistance – has in the end opted for adapting the traditional, national administrative system to comply with the demands of European law.

8. Of what use are these experiences to other Member States?

To end this contribution, I come to a number of conclusions and recommendations for Member States that are confronted with the same question as faced by the Netherlands: does my traditional administrative system comply with the demands of European law?

1. Community law is neutral towards the internal division of powers between the national tiers of government. At face value this seems to mean that Community law considers the autonomy that is assigned to regional and local authorities within a Member State. This, however, is too much of a simplification. The effect of Community law on regions and municipalities limits their ‘internal’ autonomy. This means that sub-national authorities do not distinguish themselves from Member States, which have had to give up a part of their sovereignty. In addition to this there is the seriously centralizing effect of the fact that the national authority, on the basis of Article 226EC, will be held responsible for mistakes made by regional and local authorities. Member States must be aware of this consequence, for Community law does not offer a viable alternative. For after all, the alternative would be to hold regional and local authorities themselves responsible for their mistakes in the light of the Community and that, of course, would be both undesirable and untenable in a European Union of several hundred regions and thousands of municipalities.

Following a heated debate, the Dutch government accepted the consequences of the abovementioned policy and has decided to expand their instruments for supervision with (1) an individual instruction; (2) amended rules on neglect of duty and (3) a right of recovery. This is in line with my preliminary study and therefore, in my opinion, the right decision within the Dutch context. What the consequences of Article 226EC could be for other Member State I cannot as yet say. The relationship between national tiers of government differs from Member State to Member State and the same applies to the existing means of supervision. Furthermore, as the Dutch experiences have shown, the final decision is not primarily dictated by law but by politics.

2. In a discussion on the national administrative system and the requirements of European law, it is recommended that attention be paid to both sides of the ambivalent position of the local and regional authorities: the drawbacks, linked to the responsibility of the Member States under Article 226 EC, and the advantages linked to the responsibility of the local and regional authorities themselves on the basis of the principle of loyal cooperation (Article 10 EC). If adjustments

⁷⁷ *Ibid.*, p. 21, unofficial translation.

⁷⁸ *Ibid.*, p. 21.

are made to the national system, this responsibility of the authorities themselves should remain the guiding notion.

3. Current debate concerning the position of sub-national authorities in Europe generally emphasizes the ‘positive side’ of Community law: the reinforcement of the influence of regional and local authorities on the European legislation process. By paying attention to both sides of their inherently ambivalent position, it becomes clear that the willingness of the central government to grant more influence to the sub-national authorities within the European playing field is increased if as an *ultimum remedium* it disposes of the right instruments for the timely correction of sub-national mistakes. It also becomes obvious that the decision of the Dutch government to introduce more effective instruments for supervision serves as an indication that it attaches great importance to regional and local authorities correctly applying Community law. On the initiative of the Association of Dutch Municipalities and the Ministry of the Interior and Kingdom Relations I am currently involved in an extensive project to make the Dutch municipalities ‘Europe-proof’. Contrary to the Dutch provinces a majority of these municipalities have ignored the implications of Community law whereas sound knowledge of European law is certainly a prerequisite for being able to make a meaningful contribution to the European decision-making process.

4. In the context of the Community law obligations of local and regional authorities, it is not only the obligations of implementation under the directives that should be looked at. There are also obligations flowing from the EC Treaty and from EC regulations which these authorities must take account of, even without any intervention of the national or regional legislature.

5. With regard to the responsibility of central government for the wrongful conduct of local and regional authorities, the central government should not only possess instruments that are aimed at the rectification of the infringement within the time period set, but should also have the possibility to reclaim from the local and regional authorities the costs in terms of the financial consequences of such an infringement.

6. The responsibility of the Member State for the timely rectification of errors made by local and regional authorities means that the supervision of the central government must be able to extend to incorrect legal acts, factual conduct, and failure to act on the part of local and regional authorities. The central government cannot rely *vis-à-vis* the Community on an internal lack of competence which is a consequence of the traditional, national administrative system.

7. Although local and regional authorities should in the first place be persuaded to rectify their errors through informal, administrative channels, it would be realistic for a government to opt for adequate legal supervisory instruments as an *ultimum remedium* with regard to a local or regional authority that is not able, or does not wish, to comply with its Community obligations in a specific conflict situation.

8. In the supervision of local and regional authorities, the government – within the context of the national legal system – may be faced with the choice between adequate instruments allowing it to rectify the error of the local or regional authority itself, or adequate instruments to force the local or regional authority to rectify the error.

9. In case of strong political resistance or differences of opinion, a compromise might be to opt for expanding the traditional system in phases. However, it does not seem realistic to assume that the introduction of more powerful supervisory instruments will be any easier after specific experiences have demonstrated that they are necessary.

10. It is recommended to choose supervisory instruments that the local and regional authorities can avoid by complying with European law. This is not the case with a general obligation to provide information.