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ENVIRONMENT
Directorate E - Implementation & Support to Member States
ENV.E.2 - Environmental Implementation

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ENV.E2/ts/CHAP(2016)3291

Comité N65 OH

Email: secretariaat@n65.nl

Subject: your complaint filed on 17 October 2016

Dear Madam, Sir,

Your complaint filed on 17 October 2016 behalf of Comité N65 OH on air quality measures along busy road N 65 has been received and registered as CHAP (2016)3291. Please refer to this number in any further correspondence.

In essence you write that the Dutch authorities are criticizing you for assessing air quality along the N 65 road in Helvoirt in an incorrect way by measuring air quality within 10 meters of the kerbside of this road. According to you, the Dutch authorities claim that any air quality monitoring should be done at a minimum 10 metres away from the road's kerbside. You consider that this constitutes a breach of the criteria of Annex III to Directive 2008/50/EC on ambient air quality and cleaner air for Europe (hereafter: the Directive).

However, your complaint does not allow concluding that there are sufficient indications of a breach of EU environmental legislation, for the reasons set out hereafter.

1. No indications that the Dutch legislation transposes the Directive incorrectly

First of all, we cannot conclude that the Directive has been transposed incorrectly in the Netherlands.

In the Directive, Annex III on the assessment of ambient air quality and location of sampling points for the measurement of sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter (PM10 and PM2,5), lead, benzene and carbon monoxide in ambient air provides in its part A that:

"Ambient air quality shall be assessed in all zones and agglomerations in accordance with the following criteria:

1. Ambient air quality shall be assessed at all locations except those listed in paragraph 2, in accordance with the criteria established by Sections B and C for the location of sampling points for fixed measurement. The principles established by Sections B and C shall also apply in so far as they are relevant in identifying the specific locations in which concentration of the relevant pollutants are established where ambient air quality is assessed by indicative measurement or modelling.

Annex III Part B is about macro scale siting of sampling points whereas part C is about micro scale siting of sampling points.

The reference to the 10 meter from the kerbsite is found in the fifth indent of part C of Annex III to the Directive. It provides that:

" In so far as is practicable, the following shall apply for all pollutants [...]

- traffic-orientated sampling probes shall be at least 25 m from the edge of major junctions and no more than 10 m from the kerbside".

Article 5.19(2) Wm transposes Annex III, part A.2 almost literally whereas Article 22 RbL 2007 transposes part B and Article 25 RbL 2007 transposes part C of Annex III to the Directive.

Article 25 Rbl 2007 reads:

"Monsterneming bij de in artikel 22 bedoelde meetpunten voor de meting van concentraties van stikstofdioxide, zwevende deeltjes (PM_{2,5} en PM₁₀), lood, koolmonoxide en benzeen, op plaatsen die sterk door het verkeer worden beïnvloed, gebeurt, voor zover mogelijk, op zodanige wijze dat de inlaatbuizen zijn gesitueerd op:

a. ten minste 25 meter van de rand van grote kruispunten en

b. niet meer dan 10 meter van de wegrand."

The requirements of Annex III thus seem correctly transposed in the Dutch *Wet milieubeheer* (Wm) and the *Regeling beoordeling Luchtkwaliteit* (RbL 2007). Thus, according to Dutch as well as European legislation, traffic-oriented air quality monitoring stations are supposed to be situated within 10 metres of the kerbside and not at a minimum 10 metres away from it.

2. Flexibility is possible as regards location

The text of both the Annex III part C of the Directive and the Dutch transposing legislation take account of the possibility that the micro scale requirements cannot be met ("*In so far as is practicable /voor zover mogelijk*"). It cannot be concluded from the file with sufficient certainty whether you claim that this provision is being invoked by the authorities and if so, whether you consider that to be abusive. In the absence of such information we cannot conclude to the existence of sufficient indications of an infringement.

In this context, we would like to remark that it is not clear from your correspondence where the measuring station in question is actually located, since the official monitoring network does not seem to include a monitoring station along N65. It may be that the Netherlands operate more stations than strictly speaking required by the Directive. Such supplementary measuring stations need not as such comply with the requirements of Annex III to the Directive.

3. Calculation of air quality

From your correspondence, your controversy with the Dutch governments revolves around using the so-called "monitoring tool". In the Netherlands the calculation of NO₂ and PM₁₀ concentrations is regulated by paragraph 4.2 of the RbL 2007:

"Paragraaf 4.2. Het door middel van berekening vaststellen van concentraties van verontreinigende stoffen in de buitenlucht bij wegen

Artikel 69

Bij het door middel van berekening vaststellen van concentraties van verontreinigende stoffen in de buitenlucht bij wegen wordt, naast de gegevens, bedoeld in artikel 66, gebruik gemaakt van gegevens met betrekking tot de:

- a. verkeersintensiteit van de onderscheidenlijke categorieën van motorvoertuigen;*
- b. wijze waarop het verkeer zich afwikkelt;*
- c. kenmerken van de betreffende weg, en*
- d. kenmerken van de omgeving.*

Artikel 70

1. Bij het door middel van berekening vaststellen van concentraties van stikstofdioxide, zwevende deeltjes (PM10), lood, koolmonoxide en benzeen in de buitenlucht bij voor motorvoertuigen bestemde wegen worden concentraties bepaald:

a. op een zodanig punt dat gegevens worden verkregen waarvan aannemelijk is dat deze representatief zijn voor de luchtkwaliteit van een straatsegment met een lengte van minimaal 100 meter;

b. op niet meer dan 10 meter van de wegrand.

(...)

3. Indien toepassing van het eerste en tweede lid, aanhef en onder b, ertoe leidt dat concentraties worden bepaald op een zodanig punt dat de verkregen gegevens niet in overeenstemming zijn met het eerste en tweede lid, aanhef en onder a, worden de concentraties, in afwijking van het eerste en tweede lid, onder b, bepaald op een afstand groter dan tien meter van de wegrand, respectievelijk dichterbij of verder weg

dan de rooilijn, zodanig dat wél wordt voldaan aan het eerste en tweede lid, aanhef en onder a."

This Art 70(3) Rbl 2007 allows for *calculating* concentrations both within and beyond 10 meters of the kerbside as long as the calculation is representative for air quality of a street segment of at least 100 meters. This being about calculating air quality as opposed to actually measuring such quality, is not contrary to the Directive.

It seems to the Commission, based on the letter of 26 July 2013 sent by the authorities that air quality is being calculated at the N 65¹, and thus not measured directly ("*monsterneming*"). It must be underlined, that the Directive does not provide criteria for monitoring stations used for such calculations of air quality. Using monitoring stations that comply with the requirements of the Directive for the official monitoring network for air quality calculations is of course in line with the Directive.

In the absence of information allowing us to conclude that the Dutch authorities are measuring traffic-related air quality at the location in question at more than 10 meters away from the kerbside (as opposed to calculating such air quality at a place more than 10 meters away from the kerbside), we cannot conclude that there are sufficient indications that the Dutch authorities have infringed the Directive. The Dutch government can also not claim that your calculations are invalid because they either assess locations within 10m of the kerbside or rely on monitoring stations within 10 meters of the kerbside, because both are legal according to Dutch and European legislation.

4. National remedies seem available

In addition, we would like to emphasise that the national judge also acts as EU judge, meaning that the national judge can be called upon to enforce EU legislation. For that reason the Commission, which has only limited means at its disposal and cannot for instance conduct its own inspections, may decide not to pursue a complaint but instead to suggest that complainants seek redress at national level.

It is obvious from your complaint that you have addressed your concerns to the Dutch civil and administrative judges several times already. So far, however, these judges have handed down rulings declaring your actions inadmissible. We understand your complaint as that you didn't formulate a complaint on lack of access to justice in the Netherlands as such. We understand that you merely consider that national remedies are no longer available in your case. In this respect we want to make the following observations.

Reading in particular the recent ruling of 16 October 2016 of the The Hague District Court (civil chamber), it seems that national legal action is still possible but with the administrative

¹ As far as the Commission is aware the Dutch authorities apply two methods for calculation of the air quality ("*standard rekenmethode, SRM 1 and 2*").

judge². Consequently, we conclude that in your case national redress is still possible as regards the measuring or calculating of air quality.

Conclusion

For the reasons set out in this letter, we do not intend to pursue your complaint at this stage. Should you however have disposal of relevant information liable of changing this conclusion, we would like to invite you to send it to us within four weeks after receipt of this reply. Otherwise we will close your complaint file without any further follow-up.

Yours sincerely,



Ion Codescu

² Namely, against letters sent on behalf of the Minister of Infrastructure and the Environment on 25 July 2013 and 25 October 2015 .