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## Soft law and policy rules in the Netherlands

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### 1 Introduction

In the last week of May 2011 air traffic in Western Europe was disrupted again due to an erupting volcano in Iceland. Again, since it was only one year ago that due to another volcano in Iceland (the Eyjafjallajökull) almost all air traffic in Europe was grounded. This had a huge impact on the economies of the European countries. Especially airlines lost millions of their profit.<sup>1</sup> In 2011 the consequences seemed less devastating. Only in Denmark and a part of Germany the airspace was closed. In Germany this order applied for all flights in and out of Bremen, Hamburg and Berlin. Due to the experiences of the previous year the developments were closely watched by the media and critics, like the CEO of Ryanair, that were of the opinion that the government was overreacting.<sup>2</sup> From a legal point of view the grounding of the aircraft is done by a general order, prohibiting flights in certain areas of the airspace of Germany. This order is based on par 29 of the German Aviation Code (*Luftverkehrsgesetz*), that gives the authorities (*Luftfahrtbehörden* and the *Flugsicherungsorganisation*) the competence to issue any kind of order for the sake of the public safety and safety of air transport. It is important to notice that this statutory provision grants the authorities discretion: it is their judgment what is safe and what is unsafe and it is their decision what measures should be taken to ensure safety.

It was the *Bundesminister* Ramsauer who issued the order to partly prohibit flying in the German airspace. He based this order on a so called NOTAM (a notice) from German air traffic control (the *Deutsche Flugsicherung*) and an advice of the German Meteorological Service. In this decision-making procedure it is the task of the Meteorological Service to provide a prediction of the contamination values and to forward these details to the air traffic control. Air traffic control then has to compile its notice on the base of this information. The final decision of the *Bundesminister* is then almost inevitable: if the values exceed a certain maximum, he has to close the airspace.

And this is where soft law comes into play. The maximum values are derived from a recommendation of the European Aviation Safety Agency.<sup>3</sup> This maximum is the substantive norm that more or less forces all the actors in the

decision-making procedure (the meteorological service, air traffic control and the *Bundesminister*) to make the decision to close the airspace. One could say that the discretion in the statutory act is completely filled with this norm in soft law. Once the facts have been established (so: the predicted concentration of ashes), the decision is more or less inevitable. The attitude of the *Bundesminister* was therefore 'I have no alternative than to make this decision'. In itself a very convincing defence.

This example shows a specific function of soft law. Soft law provides a substantive norm from a professional organisation with some specific expertise in an administrative law procedure. In this article I will explore the many functions soft law has in the continental legal systems. The question that will be addressed in this article is: what are the consequences of soft law for administrative decision-making in the Netherlands and in other continental European systems?

It is important to notice that this article focuses specific on the Dutch legal system, with an excursion to other continental European legal systems. Though the Dutch legal system stands in the tradition of continental legal systems like the German administrative law, there are some differences. In this article I will reflect on the function of soft law from a continental European point of view and focus especially on the situation in the Netherlands.<sup>4</sup>

First I will provide an overview of the many functions of soft law from a continental European perspective (par 2). From these many functions I will then derive some general characteristics of soft law that are applicable in any legal system and that play a role in the codification of soft law in the Dutch legal system (par 3).

Since soft law almost by definition exists on the linkage between the law in the books and the law in action, I will then focus on the application of soft law and highlight some relevant characteristics of that aspect as well, again first from a more general continental point of view and then the way the Dutch system handles the application of soft law (par 4). The last section (par 5) contains concluding remarks with regard to the added value of soft law in administrative decision-making.

## 2 The many functions of soft law in administrative law

In continental European legal systems soft law has many functions. The functions depend on whether one opts for a strict legal point of view, or for a wider perspective of public administration.

### 2.1 Legal perspective

#### Rechtsstaat and principle of legality

The continental European legal systems, like the German and the Dutch legal system, are offspring of the *Rechtsstaat*. This *Rechtsstaat* is often translated with the 'rule of law'. That translation is not correct or at least not precise enough. The 'rule of law' is an Anglo-American concept, while *Rechtsstaat* is based on the principles of bureaucracy: a typical continental invention.<sup>5</sup>

*Rechtsstaat* literally means 'law-based state'. From the end of the eighteenth

century, in most Continental countries, not only in the German and Austrian empires - the two outstanding examples - but in most parts of the continent the bureaucratic law-based state became the core of public administration. The 'law-based state' constrained the arbitrary exercise of state authority and it purged particularistic ways of dealing with public affairs. In doing so, a body of administrative law was created that made governmental decisions more predictable and fair.

The legal principle that expresses this 'law-based state' is the principle of legality. This principle demands that administrative bodies that infringe individual rights and obligations need to have an authority, a legal base for their action, in legislation. Legislation both empowers or enables and restricts the scope of administrative actions of these bodies.

The principle of legality has a particular function in *negative* state interference that results in an infliction of individual freedom or property (in German: *Eingriffsverwaltung*). Most of the state interference is negative by nature: the requirement to have a permission to do certain things (to start your business for example), the obligation to pay taxes etcetera. Negative state interference coincides with the *ordering* function of administrative law: the state has to organize society, for example the use of the physical environment, and therefore has to prohibit building without a building permit and to ensure public interests like safety or aesthetics.

Not all state interference is negative. Sometimes the state provides certain goods and enlarges individual property. One could think of social security, health care, housing or education (students' grants). This distributive task of the state coincides with *positive* state action (in German: *Leistungsverwaltung*). For this *positive* action the principle of legality is less choosy. Since individual citizens are not really the victim of such decisions, the legality principle does not *demand* that the legislator agreed to this interference in a statutory act. Of course, a basis in legislations is preferable but from the perspective of the principle of legality it is conceivable that an administrative body makes a decision without such a basis in legislation.

## Demarcation between hard law and soft law

With the principle of legality in mind, it is easier to distinguish hard law from soft law. From a continental European point of view hard law would be any law that has a sound foundation in legislation. This can either be statutory laws (acts of parliament), or delegated regulation by a public body, based on a rule-making competence in an act of parliament. All other rules that are applied and that do play a role in individual decision-making are considered soft law.

It is important to notice that hard law is a more *formal* definition, whereas soft law has a more *substantive* definition. Legislation is legislation because the rule is decided upon by someone that has rule-making powers (either derived from the constitution or from an act), using a prescribed procedure and published in a public bulletin. Soft law is on the other hand substantive by nature: soft law is law because it is *applied* by the administrative body.

## Modern legislation: vague terms and discretion

In the Netherlands as well in other countries one could observe a development

in which legislation seems to become a less and less appealing legal concept. The principle of legality is regarded more and more as an obstacle for effective, efficient decision-making that serves the general interest. Some authors state that it is the current, fast changing society that impedes the standardizing power of legislation.<sup>6</sup> The way of reasoning is then: the society changes so fast that the legislative procedure is simply too slow to adapt rules and regulations to this new societal situation.

The result is legislation with vague indefinite terms, that leaves leeway for the public body that has to make the specific decision in individual cases (like the *Bundesminister*) and uncertainty for citizen (meant as an amalgam of all citizens from individual citizens to large companies) and the judiciary.<sup>7</sup>

### **Negative state interference: the need for justification of individual decisions**

Given this discretion in legislation, soft law has the function to standardize open definitions in the statutory acts and other binding regulations. The more leeway these forms of 'hard law' provide, the more need for soft law to understand the individual decisions of the public body. Soft law makes it understandable or predictable what an administrative body decides or will decide in certain situations. The example of the *Bundesminister* serves as an example: his decision is verifiable due to the substantive norm in the EASA-recommendation. In this situation the *Bundesminister* only has to establish facts (what is the contamination on a certain moment) and based on those facts the decision is almost inevitable: either close the airspace or not.

In this respect soft law is a necessity to supplement the standardization that enables public bodies to make individual decisions. After all: in the end a judiciary has to give his opinion: is this decision right or wrong? Is it lawful or not? If the answer to this question can not be found in the legislation as such, the judiciary as well as the public body itself, have to rely on rules that do not qualify as statutory acts or delegated binding regulations, but belong to the vague field of soft law.

In this context the function of soft law is to justify the use of the leeway or discretion granted by the legislator in this individual case. Any public body has to give reasons for its decision. The more discretion the public body has, the more need for a general rule that can justify the decision.

When it comes to the *quality* of the grounds of the individual decision, the need for soft law is also based on other principles such as due care, equality, consistency and legal certainty. The reference to the general rule underlines that the public body does not do something 'out of the blue' (principle of due care) and that it would use the administrative competence in a similar situation in a similar way (principle of equality, consistency). These principles are more specific and affect the substantive aspect of the individual decision. After all: the most convincing reason that can justify an individual decision is that the public body did make similar decisions in similar cases. Therefore the public body makes it easier for itself if it could apply some general rules within the discretionary power.

### **Positive state action: equality, legal certainty, consistency**

The need for soft law is even more urgent when it comes to *positive* state action. As stated before: when the state executes its *distributive* task the legality principle is not so strict with regard to the firm foundation in legislation. Especially when the decision-making is not based on legislation, soft law is inevitable. Soft law has to provide the criteria that are used when deciding on a claim for students grant, or for a reimbursement of a hospital bill. If the legislator itself did not state these criteria, the criteria have to be set by the administrative body that distributes these goods. The applied rules are still considered soft law, since the public body that is using those rules, does not have the competence to make a general binding regulation.

An example might illustrate this. In the Netherlands there is a specific act that provides Social Support for people in need. This act (the Social Support Act) states that municipalities have to provide support that compensates the need and requires that the municipal councils will lay down an ordinance with the exact form of this support. The municipal ordinances – still hard law, since based on a competence to lay down binding regulation – state that needed persons, based on a medical assessment that confirms this need, can receive domestic help (someone to clean the house, do the laundry, etc). The ordinance does not regulate the exact quantity of this domestic help. The actual question the municipal executive, that has to decide on claims for social support, is: how many hours of domestic help is this person entitled to?

The answer to this question lies in additional protocols that provide an estimation of the time needed to clean houses etcetera. When deciding upon a claim the municipal executive actually applies that protocol. This is a protocol developed by a national organisation and therefore refers to some specific knowledge.

### Soft law that refers to certain expertise

With the latter we encounter a last principle that forms the legal foundation for soft law. That is the principle of due care. This principle demands from the administrative body that it carefully establishes all relevant facts and interest, and makes a well-informed decision. Seen from the perspective of due care the administrative body has to know what it is doing; what the consequences of a certain decision are. The vague terms and discretion in legislation are sometimes unavoidable since the public body has specific expertise, or at least is supposed to have specific expertise of a substantive field of law. That is after all the reason why there is an administrative authorities like the national bank to regulate the financial sector, or unemployment agencies that have a specific knowledge of the labour market.

The administrative body does not always have the specific expertise needed for a proper decision-making. One could not expect from the *Bundesminister* for example that he would know or would be able to set a certain criterion for the contamination of volcanic ashes. He'd better rely on the standard laid down by experts, in this case the EASA.

The same goes for decision-making in the field of for example environmental law. A permit on whether or not to exploit a certain factory that has consequences for the environment is often based on norms and rules that are developed by expert organisations. Those organisations have the knowledge on the 'best available techniques'.<sup>8</sup>

## 2.2 Less legal arguments

### Intergovernmental relations

In addition to these normative, legal arguments there are also other, more practical reasons that can explain the need for soft law. A first argument is derived from the intergovernmental relations. All administrative bodies function within an institutional framework with other public bodies that also have certain competences or authorities. Quite often there is some kind of interdependency or even a hierarchy between those administrative bodies. This hierarchy results in recommendations or guidelines from one administrative body addressing another. Sometimes this has a legal base. In Germany, for example, the Chancellor is allowed to lay down guidelines for her Ministers. This is more or less logical as the Chancellor is the *'primus inter pares'* and derives this regulatory power directly from the German Constitution.<sup>9</sup>

In other situations these recommendations do not have an explicit legal base. One could expect similar guidelines laid down by a central authority for the local government authorities. After all: the central authorities often have some kind of supervisory power to correct the decision-making by the local government. In that sense one could regard the guidelines as the result of a well-thought use of that supervisory power.

### Responsive legislation: self-regulation

A second argument that enhances the need for soft law is the use of responsive legislation. With this reason the focus shifts from the institutional environment to the clients of the administrative decision-making: the persons that are addressed and that need to behave in a way that is contributing to the public interest. In this vision legislation is not the body of substantive norms, but provides a procedure, a direction that has to be filled with substantive norms by the addressees themselves. Several versions of this process are conceivable. Often members of the public are assigned a duty of care, or the granting of a permit is made dependent on possessing a certificate. This certificate is part of a number of standards agreed to without any government intervention, laid down for example by the profession concerned. A private certifying institution monitors compliance with these standards. This means that the role of the government has become very indirect.

When standards are laid down by members of the public, those involved in the norm-setting belong to fairly well-defined professional groups whose actions influence a public interest; an example is the health care sector. The name of anyone who gives medical treatment in the Netherlands must be entered into a central register.<sup>10</sup> A care provider must provide responsible care (Article 40, Individual Health Care Professions Act (*Wet BIG*)). What 'responsible care' entails is laid down in numerous protocols drawn up by the profession itself; moreover, these protocols are enforced primarily by disciplinary measures – that is, by the profession itself.<sup>11</sup> Public law may then intervene by striking off a name from the register in combination with prosecution under criminal law.<sup>12</sup> The standardization of doctors also has a public aspect. In Germany for example employees are entitled to continued payment of salary in case of illness if they have a medical notice. The medical notice has to be issued by a doctor. In this

notice the doctor has to state that the employee is too ill to work. Now in doing so he has to apply certain substantive criteria. After all: you don't want that the opinion on what is ill and what not divert too much. These substantive criteria on what determines whether or not someone is ill and therefore unable to work, are formulated by the *Gemeinsame Bundesausschuss*, a professional association of doctors and medical practitioners. The authority to formulate these guidelines is laid down in § 92 of book 5 of the social security act. The guidelines define incapacity for work as the situation in which the sickness makes it impossible for the employee to do the job, or when doing the job will worsen the sickness.<sup>13</sup> The rules state that the doctor has to ask about the details of the job, the demands of the job and has to assess whether or not there is a causal relationship between the sickness and performing the job activities.<sup>14</sup> Whether or not we are dealing with soft law here, is debatable. One could say that these guidelines are the result of delegated rule-making. That does not take away the fact that these substantive norms hide from the view of the legislator and are therefore based on a weak democratic legitimacy.

An example from another field: in the Netherlands there are many substantive norms relevant when building a house. These substantive norms address almost all aspects and are aimed at the safety and usefulness of the construction of the building itself, the safety of the process of building (safety on the construction site) and the environment-friendliness of the used materials. The norms vary from for example the number of stair steps and the height of the ceiling to for example the standards that have to be taken into account with power plugs etcetera. These norms are developed by a private organisation, the so called NEN. This NEN lays down what everyone thinks is 'normal' and 'feasible'; also with regard to building. NEN is comparable to other organisations like European Committee for standardisation (CEN) or the International Organisation for Standardization (ISO). Violation of these norms might result in an administrative procedure. The legislation states that anyone who builds is responsible to take sufficient measures for a safe building that does not harm health (so is environmental friendly and safe in case of fire). This is the public norm that can be enforced by the administrative body. When the administrative body enforces this obligation, it will use the NEN-norms, mentioned before. So it is regarded *unsafe* if the builder uses materials that are not in conformity with these norms.

## Disciplining the bureaucracy

It is not only the institutional environment or the addressed citizen that can enhance the need for soft law. The more empirical need for soft law can also be found within the administrative body. There are some factors that contribute to the need of soft law: the number of decisions that have to be made or clients that have to be addressed and the size of the administrative body both in number of public servants and in jurisdiction (number of departments, regions etc). Quite often these factors coincide: the more clients or the more decisions, the larger the organization required to execute the administrative task.

Especially in the welfare state, with its expanded public interests, we envisage an increasing number of large-scale executive public bodies needed to reallocate public means from the richer members of society to the poorer citizens that need protection or support. In the Netherlands the employee insurance agency is

responsible for incapacity benefits and unemployment benefits, the ministry for education for student grants, the ministry for housing for social housing and housing subsidies and of course the tax office for the tax assessment.

These public bodies became more and more important after WOII; the rise of the welfare state. It is interesting to observe that the shape and task of these bodies changed over years. From decentralized organizations with regional differences to national organizations that apply rules equally on a national level. With this development a standardisation of the organization is required. Already in the eighties we therefore see an increasing use of Information communication and technology (ICT). Window clerks are being replaced by databases and currently even by websites.<sup>15</sup>

This electronic standardization is to a certain extent also soft law. This ICT provides the translation of the hard law to individual decision-situations. It is interesting to notice that quite often the content, the substantive decisions within the ICT-systems are made somewhere else; not within the bureaucracy, but at the supplier, the private company that programs the systems.<sup>16</sup> During the parliamentary session on a proposal to change the Dutch legislation on students' grants the responsible minister had to confess that there was no room to adapt his proposal, since he already had hired a private company to develop the computer application to ensure a smooth implementation of the expected legislation.<sup>17</sup> Here we see that the legislative procedure and even the bureaucracy itself is sometimes – in some aspects – a slave of the computerized world.

## 2.3 Interim conclusion

It is no doubt that against the background of the principle of legality soft law and the increased ambiguity in legislation, soft law has a supplementary role in the continental European systems like Germany or the Netherlands. Soft law standardizes discretion in legislation, it provides a justification for individual decisions, makes these decisions verifiable, and is demanded from a perspective of principles like equality and legal certainty. It sometimes reflects specific expertise and then contributes to the principle of due care. The soft law rules also have a function from the perspective of intergovernmental relations, in the relation between government (administration) and citizen and within the bureaucracy.

But on the other hand soft law also creates a problem from the perspective of the principle of legality. The substantive criteria that predict whether or not you are granted a permit, license, subsidy or benefit, are not based on legislation, but on something else. Seen from the perspective of legality the legislator provided a certain authority to the administrative body, with the expectation that it would weigh *individual* interest. One could argue that that authority does not imply a regulatory power, as the legislator demanded that administrative bodies should weigh individual interests and should not hide behind a general rule that has no legal basis. It is even worse since this general rule is not even the result of a decision made by the legislator.

It is therefore important to identify some main variables that soft law has. The variation on those variables determines whether or not we have to worry about soft law or not.



## 3 Variations of soft law in administrative decision-making

### 3.1 General characteristics

The overview of the many functions soft law has, both from a legal point of view and from a more empirical perspective provides a variation of all kinds of soft law. This variation comes down to a variation on certain characteristics or variables. These variables determine the exact role and the binding effect – both in a normative and an empirical sense of the word.

#### Author of soft law

Soft law in administrative law varies from *public* to *private* origin. The examples of the first kind are the rules the administrative body itself develops when executing an administrative task or the guidelines a higher administrative body publishes to address another administrative body. Private soft law are the rules developed by private expertise organizations that give an idea of the 'best available techniques' in environmental law, or medical protocols in social security law or health care. Though these rules are officially nothing more than a recommendation, it is quite impossible for the administrative body to divert. After all: the rules are the expression of a certain expertise, and it is not likely the administrative body has the same knowledge on the specific field.

#### Decision on soft law: which soft law applies?

Regardless of the origin of the soft law, the administrative body still can make an explicit decision on whether or not to apply the soft law. The decision can be general, in the sense that the competent administrative body decides that a certain rule is the correct interpretation, or the correct way of establishing facts. A general decision that the rule of the expertise group is correct and will be applied, determines the discretion in future situations. After all: the administrative body more or less makes a general promise that has to be upheld. A specific problem might occur when the administrative body 'borrows' a rule from someone else and recognises that rule as the correct interpretation of the administrative competence. After all it is very likely that the rule changes after that formal recognition. The question then is what happens if the rule changes? Does the administrative body have to apply the new, latest version of the rule or the version that was recognised a while ago? And what if these new rules collide with rules of the administrative body itself? Which one prevails and is more binding?

#### Access to soft law

A third characteristic that might vary is the extent to which the rule has been made public. This determines the amount to which citizens have access to soft law, can self build their expectations on the decision the administrative body is likely to make. On the one side of the spectrum we see soft law rules that are published and that are accessible for the public. On the other side we see the less published or not public soft law. Not all soft law is published in official bulletins. Especially the expertise rules of private organisations suffer from this. These rules sometimes even have an economic value. In the Netherlands for example

you - as a citizen – have to pay to get your own copy of the NEN-standards.<sup>18</sup> The NEN-organisation is nothing less than a commercial organisation that provides an overview of what the sector states as ‘normal’. The fact that the NEN-standards are an overview of these norms creates an economic value that has to be compensated, for example by way of a subscription. Other rules are by definition not made public due to the way they are developed. One could think of the soft law that develops within the administrative organisation on the departments, out of sight of the manager and the political responsible officials. In practise the norms that develop in this street-level bureaucracy are very important and determine whether or not you will receive the permit or benefit. But they are bureaucratic rules, not officially defined or promulgated let alone published.

### Justification of soft law itself

A fourth characteristic has to do with the quality of the soft law itself. Soft law contains the substantive norms and criteria used in the decision-making. The justification of this decisions might vary from completely absent (think about the computer systems: it is not likely that one could find an argumentation that justifies these decisions) to present and extended. The latter are – presumably – the rules that have the form of a ‘recommendation’ (f.e. the recommendation of the EASA). It is only likely that someone is acting according to a recommendation if the recommendation itself contains a convincing argument why that recommendation is a correct interpretation of the administrative competence.

### 3.2 Codification of soft law in the Netherlands: policy rules

In the Netherlands the legislator codified soft law in administrative situations, based on these four characteristics. The main reason was to make an end to the rather chaotic administrative reality with its plethora of rules and to force administrative bodies to use their discretionary powers in a well-thought manner.

The result was the codification of the policy rule as a specific type of soft law in the General Administrative Law Act (*Awb*). This act defines policy rules as ‘a general rule, not being a generally binding regulation, established by decision, concerning the balancing of interests, establishment of facts or interpretation of legislation in the exercise of a power of an administrative authority’ (art. 1:3 (4) *Awb*). The definition of policy rules as a ‘decision’ in the *Awb* means that the adoption of a policy rule requires a so called ‘public law juridical act’. This can be derived from the definition of an order in art. 1:3 (1) *Awb*: ‘a decision means a written decision of an administrative authority constituting a public law juridical act’.

The most important requirement a policy rule has to meet is that it has to be adopted by the competent administrative body. The competent administrative body is the administrative body that is competent to make the individual decision. So the municipal executive who is competent for issuing building permits has also the competence to promulgate policy rules with regard to those permits.

Only if the legislator explicitly grants an administrative body to do so, another

public body, that does not have the administrative competence for the individual decision-making, can promulgate policy rules. In the Dutch legislation the legislator for example provides the Minister for Economic affairs the competence to promulgate policy rules that have to be applied by the National Competition Authority, an independent public body that can impose fines on companies that form cartels or abuse their market power. In these situations, where the legislator provides a specific authority to promulgate policy rules, a new problem arises. After all: now two public bodies are authorized to lay down policy rules with regard to the same administrative competence. In our example: both the National Competition Authority and the Minister for Economical Affairs could lay down policy rule on, for example, the level of the fines or the priorities on the companies that have to be subject to investigation. In those situations one could expect that the policy rule of the Minister takes precedence over the policy rule of the National Competence Authority. The reason is that the legislator did distribute the rule-making competence with a reason – at least: that is what one could expect.

Another characteristic of the Dutch policy rule is that it has to be promulgated officially in a *decision*. The decision marks the moment the new policy applies. This avoids problems with regard to transitory problems. The effect of the policy rule is therefore immediately clear. To have the legal effects of a policy rule, the rule has to be made public using the official bulletins. Furthermore, a policy rule has to be made public and has to contain a justification of the decisions. If not, the policy rule does not have the legal consequences of the policy rules as stated in the General Administrative Law Act. The most important consequence is that the justification of an individual decision requires more than only the reference to this policy document. If the policy rule would meet the requirements mentioned before, reference to a consistent course of action would constitute a sound reasoning for that individual decision (art. 4:82 *Awb*)

As a consequence of the rather strict definition of policy rules, soft law falls apart in two subcategories. On the one hand the soft law as meant in the General Administrative Law Act and on the other hand all the remaining general rules that still exist and that do not satisfy the requirements of the policy rules. The latter category consist of for example rules formulated by private expertise organizations (like NEN) to public bodies that have a hierarchical position but that lack an official authority to promulgate policy rules.<sup>19</sup> These rules still exist and are still relevant in administrative review procedures. They are called guidelines, or ‘course of conduct’. Their legal effect differs only slightly from that of policy rules (see below).

### 3.3 Interim conclusion

Soft law has many forms. The effect of soft law is related to certain characteristics. The author of soft law is relevant, as well as the official decision on which soft law is applicable. Furthermore the substantive quality of the policy rule, to be more precise: the quality of the justification of the decisions within that policy rule, determines the way the administrative body can use it for decision-making.

In Dutch administrative law the legislator opted to codify some specific rules as ‘policy rules’. Soft law is only a policy rule if the competent administrative body promulgates the rule as a policy rule. This codification did of course not end the

practice relevance of soft law, meaning that besides policy rules other types of soft law still exist. The relevance of the distinction lies nevertheless in the legal effects of soft law in general and policy rules in particular.

## 4 Application of soft law

### 4.1 Binding effect

The next step in the analysis of the consequences of soft law is the way soft law binds administrative bodies in their administrative decision-making. In general soft law used by administrative bodies leads to a collision of principles. On the one hand there are the basic principles of legal equality and legal certainty which require certain regularity in administrative behaviour. These principles applaud the development of policy rules and its application in administrative decision-making. This is especially the case if soft law shows a specific expertise – like the recommendation of the European Aviation Safety Agency in the introduction. On the other hand there is the principle of proportionate decision-making that requires a weighing of the individual interests. It is actually the job of administrative bodies to make individual decisions based on an assessment of the specificities of a case. In the separation of powers the legislator empowered the administrative body to make an individual decision; taking into account all relevant interest involved. With this power a responsibility arises: the administrative body *has to* take into account all relevant factors.<sup>20</sup> It would be contrary to this principle if the administrative body refrains from weighing interests and simply applies a general rule.<sup>21</sup> Why wouldn't the German *Bundesminister* be able to make a different decision contrary to the recommendation and not close the airspace? After all: it is his administrative competence and his responsibility and not that of the European Aviation Safety Agency.

Decisions that are not in conformity with soft law are fully acceptable from a normative point of view. Though, it is clear that a diversion calls for an extra explanation and therefore some more justification. The German *Bundesminister* who would not close the airspace has to have strong arguments to do so. From an empirical point of view diversion of soft law is not likely to happen. Not only in the decisions that have a high political impact (like the closure of the airspace) but also in the more routine decisions within a bureaucracy. The civil servant acts within a bureaucratic environment. One major characteristic of the bureaucracy is the division of tasks and strong command and control. It is not likely that a civil servant would try to deviate from the rule, knowing that an attempt to do so requires a strong justification. Not only to convince the citizen, but also to convince the superiors. The public servant that proposes to make another decision compared to what the general rule prescribes has to be certain, has to be able to explain his proposed decision to his superiors.

### 4.2 Applying soft law in the Netherlands

The codification of the policy rule in the *Awb* leaves considerably less leeway for departing from policy rules compared to other soft law. According to article 4:84 *Awb* the administrative authority shall act in accordance with the policy rule

unless, due to special circumstances, this would affect one or more interested parties disproportionately in relation to the objectives of the policy rule. Diverging from policy rules is restricted to the condition of 'special circumstances'. These special circumstances may constitute of interests, facts or consequences which were beyond consideration when the policy rule was adopted. Only when an administrative authority establishes 'special circumstances', it may reconsider the interests involved and to come to the conclusion that the rule should not be applied. If special circumstances are absent, the *Awb* requires the application of the policy rule, regardless of any possible unwanted consequences. Therefore the binding effect of policy rules can be considered stricter than the binding effect of other soft law.

It is interesting to notice that this codification resulted in an even stricter application of policy rules. To make the case that there are 'special circumstances' appears to be a burden for administrative bodies – more specific: for the public servants that have to prepare the decision. In stead of weighing individual interests and divert from the general rule in specific situations, public servants are more aimed at applying general rules, knowing that in a legal procedure it is not easy to explain why they diverted from the rule. Only in 'positive' state action, where the chance of a legal procedure is low, diversion can be expected, since the diversion does not cause harm to individual citizens.

## 5 Concluding remarks

Soft law is a necessary shield between the hard law in legislation and the individual decision-making by public bodies. This has always been the case, but in present times, where the society becomes more complex and decision-making relies even more on specific expertise, the influence of soft law seems to be even larger than before. At the end it is the soft-law that determines whether or not permits or subsidies will be granted and it is the soft-law that leads to the special restrictions attached to these decisions.

The plethora of rules that can be regarded as 'soft law' gives rise to new questions. What is exactly the status of this soft law? What determines the 'binding effect' of soft law? In this article I distinguished four variables that determine the quality and legal effect of soft law. First of all, the author: this might be a private entity or a public entity. If the author is a public entity it becomes relevant to assess the specific competences of this public entity. Does this administrative body have any specific administrative competences that more or less force the addressed administrative body to comply with its rules? A second variable is the question whether or not the soft law is officially adopted by the administrative body that applies the soft law. With such a decision one could say that the administrative body promises to apply these rules in its individual decision-making. A third variable refers to the publication or accessibility of soft law: if soft law is made public, and accessible, in general it might create legitimate expectations. At least: the administrative body has something to explain if it deviates from its own promise. The fourth variable has to do with the quality of soft law itself. The rules might have a sound reasoning that can form a sound reasoning for the individual decisions. On the other side of the spectrum are the soft law rules that are only general decisions with no adequate justification as such. These require more additional effort to ensure that the individual decision in which these rules are applied can stand the test of

criticism.

With these four variables one could assess the legal effect. In the Netherlands the legislator created a distinction between 'ordinary soft law' and policy rules based on these four characteristics. These policy rules are the 'soft law rules' that are decided upon by the competent administrative body. The General Administrative Law Act furthermore contains some specific requirements with regard to the preparation of policy rules, their justification and the way they are made public. On the strength or their specific characteristics one could argue that soft law in the legal form of a policy rule is preferable to other kinds of soft law. Especially because the legal effects of policy rules is more explicit than with regard to other forms of soft law.

The specific nature of policy rules, with its explicit binding effects, ends problems with regard to colliding soft law rules. After all: especially with regard to soft law one might expect many different kinds of soft law, from different sources and of different quality. Only if soft law meets the criteria of the policy rule, it is clear that these rules have to be applied individual decision-making. The fact that the policy rules might not be in conformity with other types of soft law, does not change that.

This has to do with the effects of soft law and therefore its application in specific decision-making situations. Though soft law is founded on principles like equality, legal certainty and consistent decision-making the administrative body is still supposed to make individual decisions and weigh individual circumstances. The latter requires at least a consideration that the rule should not be applied in all situations. There are situations in which the application of the rule does not meet the goals and interests the legislator had in mind when formulating the general administrative competence. Applying soft law thus requires an administrative body that is critical on the outcomes of the decision-making procedure and capable of responding in all the signals that seem to point at disproportionate decision-making.

The codification of the policy rule in the Netherlands makes this application of soft law in individual decision-making complex. Since the Dutch legislator defined policy rules, it also defined the legal consequences and therefore the duty for administrative bodies to act in conformity with the policy rule.

Deviation is only allowed in 'special circumstances'. These are circumstances that the administrative body did not have in mind when deciding upon the policy rule. In practice it is not easy to provide evidence on the true considerations of the policy rule. Especially in situations when the content of the policy rule is derived from external organizations (like expertise associations). One could therefore conclude that codification of soft law as policy rules in the Netherlands drives this type of rule more and more towards hard law. The codification of policy rules therefore blurs the distinction between hard and soft law.

## Noten

**1** 'Scottish, Irish and Northern Irish airports shut by ash', *BBC News* 5 May 2010; 'Ash cloud costing airlines £130m a day', *The Guardian* 16 April 2010.

**2** 'Volcanic Ash Cloud Controversy: Ryanair's CEO Calls For Opening Scottish Air Space', *CNN International* 24 May 2011.

**3** Safety Information Bulletin 2010-17R2.

**4** The knowledge of the German system of administrative law is based on comparative research in the field of social security law and added with general literature, such as H. Maurer, *Allgemeines Verwaltungsrecht*, München: Beck 2009. The knowledge of other legal systems is derived from R.J.G.H. Seerden (ed.), *Administrative law of the European Union, its Member States and the United States*, Antwerpen-Oxford: Intersentia 2007.

**5** A. Tollenaar & J. de Ridder, 'Administrative justice from a continental European perspective', in: M. Adler (ed.), *Administrative Justice in context*, Oxford: Hart 2010, p. 301-320.

**6** M. Scheltema, Het starre gelijkheidsbeginsel, *Staatscourant* 26 februari 2004

**7** This is why Scheltema, for example, questioned the principle of legality: M. Scheltema, 'Van rechtsbescherming naar een volwaardig bestuursrecht', *NJB* 1996, p. 1355-1361.

**8** Bruce Ackerman, *Reforming Environmental Law*, Faculty Scholarship Series, Paper 144, Yale Law School 1985; Roger Dijkmans, 'Methodology for selection of bestavailable techniques (BAT) at the sector level', *Journal of Cleaner Production*, 8(1) February 2000, p 11–21.

**9** § 65 Grundgesetz.

**10** Articles 3 and 4 of the Individual Health Care Professions Act.

**11** Medical disciplinary rules are governed to a considerable extent by public law because the organization and procedure of the disciplinary tribunal are regulated in some detail in the Health Care Professions Disciplinary Regulations Decree.

**12** Article 7 and 6, Individual Health Care Professions Act.

**13** H. Vogelsang, *Entgeltfortzahlung*, München: C.H. Beck 2003.

**14** See: §, 2 par. 5 Richtlinien über die Beurteilung der Arbeitsunfähigkeit und die Maßnahmen zur stufenweisen Wiedereingliederung, of the Gemeinsame Bundesausschuss 01.12.2003 BAnz. Nr. 61 (S. 6501) vom, 27.03.2004.

**15** Mark Bovens & Stavros Zouridis, 'From Street-Level to System-Level Bureaucracies: How Information and Communication Technology is Transforming Administrative Discretion and Constitutional Control', *Public Administration Review* 62 (2) March/April 2002, p 174–184.

**16** J.W. Oordt & A. Tollenaar, 'Effecten van informatisering op de kwaliteit van beschikkingverlening', *Bestuurswetenschappen* 2010, p. 28-46.

**17** S. Zouridis, *Digitale disciplineren, Over ICT, organisatie, wetgeving en het*

*automatiseren van beschikkingen*, Delft: Eburon 2000, p. 180 ff.

**18** It is possible to read this document free of charge during office hours in the headquarters of NEN in The Hague, though this is mainly a theoretical access for someone that is living on the in another part of the country.

**19** The competent administrative body is of course free to accept a rule written by another organization of another public body and promulgate it as its own policy rule, as long as the decision that this rule will be used in the decision-making is made by the competent administrative body.

**20** This principle is especially relevant in for example Germany, where this principle is called *Individualgerechtigkeit*: the requirement to adapt to specific interests.

**21** In German law this is called *Ermessensunterschreitung*.

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