

# **Implementing European Union Law in the Netherlands: the Current System, its Limitations and Possible Alternatives**

**Ton van den Brink\***

Although the Netherlands has had more than fifty years of experience as a member of the European integration process, the debate on the implementation of EU law is still vivid. In fact, the last years have shown a renewed interest in the matter, partly as a result of the attempts made by the Dutch government to speed up the implementation process. The question rises whether the Dutch implementation system – that is closely following the rules and principles of the general system of legislation – is in need of changes of a more fundamental nature.

## **1. Introduction**

More than fifty years have passed since the Netherlands became one of the founders of the European Coal and Steel Community, the first of the European Communities. The Dutch legislature has had an enormous amount of work to do over the years in order to implement the law coming from the Communities and later the European Union (EU), as the effectiveness of EU law depends to a large extent on national legislatures. The obligation to implement EU law needed to be embedded in the national legislative system and a practice on how to deal with the obligation of implementation had to be established. In the Netherlands, this has not given rise to a fundamental discussion on the position of EU implementation law in the national legal order. Instead, the approach has been – without much discussion – to apply the regular framework for setting rules.

As indicated above, this gives rise to a discussion on two more general themes: the framework for setting rules (section 2) and the position of European Union law in the Dutch legal order in general (section 3). Together, these two topics lead to

\* Erasmus University Rotterdam/Dutch Scientific Council for Government Policy

the core matter of this article: the way legislative powers are organised and used in the Netherlands for the implementation of European Union law (section 4). The question whether the current way of addressing this issue is adequate and just, will be analysed in the same section. This question is closely linked to the topic of section 5: the exceptions which have been adopted – mainly in more recent times – to the initial system, as it has apparently proved insufficient.

A more general reconsideration of the issue of implementing EU law could result in two major alternatives for the current system. The first would be a general provision on the basis of which all implementing measures can be adopted by the government or even by individual ministers. This is basically the system that is in force in the United Kingdom on the basis of the European Communities Act. The other alternative would be to apply a separate procedure for the adoption of Acts of Parliament that concern the implementation of EU law. This procedure would have to be more apt and suitable for the implementation of EU law by taking into account the special nature thereof. Both options are discussed in section 6.

## 2. Setting Legal Norms in the Netherlands

In the Netherlands there are three different types of instruments that are used to set legal norms at the central level.<sup>1</sup> The first is the Act of Parliament which is adopted by Parliament and the government jointly.<sup>2</sup> The administrative order is enacted by the government,<sup>3</sup> whereas ministerial regulations can be enacted by individual ministers. A hierarchical order exists between the three instruments of law.<sup>4</sup>

The next feature concerns fixing the level at which a certain matter must or can be regulated. The Dutch Constitution answers this question – albeit only to a very limited extent – as it prescribes regulation by Act of Parliament for specific matters.<sup>5</sup> In all other cases, unwritten law is decisive.

The constitutional principle of unwritten law that is the keystone for determining the appropriate level of legislation has become known under different names, of which the *principle of legality* has the longest reputation. Legal scholars have differing opinions on the precise scope and contents of this principle. What is clear, however, is that Acts of Parliament have primacy over other legislative instruments and the *Queen in Parliament* (*'formele wetgever'*) has primacy over other legislative

<sup>1</sup> The Constitution and the way that instrument is amended is not included.

<sup>2</sup> Art. 81 of the Constitution. As the Dutch ministers of the Crown may not at the same time be Members of Parliament, government has to be mentioned explicitly.

<sup>3</sup> Art. 89 of the Constitution.

<sup>4</sup> C.A.J.M. Kortmann and P.P.T. Bovend'Eert, *The Kingdom of the Netherlands. An Introduction to Dutch Constitutional Law*, Deventer: Kluwer 1993, p. 16.

<sup>5</sup> An example is the legal position of members of the judiciary that has to be regulated by Act of Parliament according to art. 117 of the Constitution.

authorities. The principle of legality requires that the most important elements of law must be laid down in Acts of Parliament, since this is the instrument with the highest democratic quality. Another, unchallenged, consequence of the principle is that a hierarchy of norms is created according to which Acts of Parliament have primacy over administrative orders<sup>6</sup> which have, in turn, primacy over ministerial regulations. Moreover, regulation at the level of government or individual ministers requires – in principle – an explicit legal basis in an Act of Parliament. Every legislative power of the government or individual minister has to be – again in principle – a delegated power. Yet, even in cases where such a legal basis does exist, the government and individual ministers must be cautious in using it. The consideration that the most important elements of law must be laid down in an Act of Parliament remains paramount in those circumstances.

Of particular interest are provisions in Acts of Parliament which allow the government to deviate from the Act concerned. An example is Article 111 from the Aliens Act 2000 which provides that by administrative order, provisions may be adopted that deviate from Chapters 1-7 of the Act in order to deal with ‘exceptional circumstances’.<sup>7</sup> Such provisions are at odds with the principle of legality. Whereas a clear hierarchy of norms flows from the principle of legality, the provisions in question disturb this hierarchy. Moreover, the use of such provisions makes the system of legislation less transparent for the citizen and – as a result – confusion might arise as to the precise legal position of citizens. It is possible that the principle of legal certainty is similarly impaired.

The principle of legality clearly limits the regulatory powers of the government and individual ministers of the Crown and, furthermore, such powers must be derived from in Acts of Parliament.<sup>8</sup> The contents and the scope of these legal bases need to be clearly specified, as the principle of legality does not allow ‘blank cheques’. In this sense, the principle also limits the powers of Parliament and government (*Queen in Parliament*) as the state’s highest legislator. This can be seen as an important difference with the principle of *sovereignty of Parliament* which governs the matter in the United Kingdom. The *sovereignty of Parliament* presupposes that the powers of the state’s highest legislator are unlimited. The principle of legality, however, not only limits the powers of the lower legislative authorities, but also the powers of the *Queen in Parliament* in the Netherlands.

<sup>6</sup> Which can be compared to the British Orders in Council. I am using the term used by T. Foster (*Dutch legal terminology in English*, Leiden: Academic Press, 2003, p. 57, also to express the fact that they may be comparable to Orders in Council but are yet not entirely equivalent.

<sup>7</sup> Art. 111 of the Aliens Act 2000 (replacing the Aliens Act), *Staatsblad* (Official Journal) 2000, 495.

<sup>8</sup> However, there are some – albeit very little – possibilities for independent regulatory powers of the government.

### 3. European Union Law in the Dutch Legal Order

The Dutch approach to EU membership has always been rather pragmatic.<sup>9</sup> Being a rather small country, which has in economic terms a long history of being dependent on trade with other countries, the advantages of the European integration process have always been very clear. Up until its involvement in the Second World War, the country managed to maintain itself as an independent state by adhering to a strict policy of neutrality. Despite this policy, the Netherlands was invaded by Nazi Germany and the country was defeated within five days. After the war, the Netherlands abandoned the policy of neutrality – the country also became a NATO-member – and accepted a more far reaching approach to ensure peace and posterity in the future. This led to the Netherlands becoming one of the founding fathers of the European Communities. This was facilitated by the fact that the concept of sovereignty had never played a significant role in the constitutional debate. The development of the integration process and the supranational characteristics of the Communities were – generally speaking – readily accepted as necessary features for achieving these intended aims. Also the acceptance of the basic principles of direct effect and supremacy was mostly unproblematic as those principles were in line with the existing constitutional practice that was also already reflected in the Dutch Constitution.<sup>10</sup>

Specialized constitutional courts, such as the German, French and the Italian, have competed with the ECJ over questions which ultimately come down to the issue of sovereignty.<sup>11</sup> The Netherlands does not have a specialized constitutional court and issues of a constitutional nature have to be dealt with by the regular courts. These courts have never really questioned the ECJ's court decisions on this point but have instead rather readily accepted the basic notions of Community law.<sup>12</sup>

Furthermore, the acceptance of EU-membership and its consequences by the Dutch legislator has, for the greater part, been uncomplicated. The Dutch are unfamiliar with the fundamental tension that is inherent between, for instance, the British principle of *sovereignty of Parliament* and EU membership. In the Netherlands, the notion of a sovereign legislator (government and Parliament combined) is considered to be a bit of an oddity as the *Queen in Parliament* is bound by the Constitution, provisions of international law, fundamental human rights and

<sup>9</sup> For the purposes of this article it suffices to be rather brief on this issue. Besselink and Swaak give a more comprehensive overview: L.F.M. Besselink and R.A. Swaak, 'The Netherlands Constitutional Law and European Integration', *European Public Law*, vol. 2 (1996), p. 34-39.

<sup>10</sup> Arts. 93 and 94 of the Constitution.

<sup>11</sup> The most famous of which is the 'Maastricht Urteil' of the German Constitutional Court, BverfGE, 89, 155 of 12 October 1993.

<sup>12</sup> J.W. de Zwaan, 'The Netherlands (judiciary and administrative authorities) and art. 10 of the EC Treaty', Report for F.I.D.E. 2000, XIX Congress, The Duties of Cooperation of National Authorities and Courts and the Community Institutions under art. 10 EC.

principles, and – indeed – European Union law. The principle of legality is such a fundamental principle which, *inter alia*, contains the powers of the *Queen in Parliament*. The powers of the legislature are therefore better described as general, rather than sovereign powers.

In this context too, the problems tend to be more of a practical rather than a fundamental nature. An example is the implementation of the Directive on the legal protection of biotechnological inventions.<sup>13</sup> Despite the binding nature of directives, Parliament at first simply refused to co-operate in bringing about the necessary implementing measures. It urged the government to initiate a procedure under Article 230 EC (review of the legality of Community measures) and adopted the necessary Act of Parliament only when the Court of Justice rejected the Dutch claim.<sup>14</sup> The time fixed for implementation laid down by the directive, had by then long expired.

The pragmatic approach to EU membership is also illustrated by the fact that the Dutch Constitution does not refer to the European Union at all. In general, lawyers have felt recently that the Constitution does not mirror the constitutional reality anymore on this point. In a recent report drawn up by legal scholars at the request of the Dutch government, the relationship between the Dutch Constitution and EU membership was explored.<sup>15</sup> Again, however, the discussion focused more on the practical arrangements than on the more fundamental questions. The issues that have been discussed are, for instance, related to the position of institutions of the state (Parliament, Council of State), decentralized authorities, the Netherlands Antilles and Aruba and the procedures for the appointment of Dutch nationals in European Union institutions. The question whether the legal status of EU law in the national legal order should be laid down in the Constitution does not play a significant role in this debate.<sup>16</sup> In any case, the desire to make EU membership subject to conditions in the way other Member States have done (for instance by making EU-membership dependent on compliance with fundamental rights and principles<sup>17</sup>) is apparently absent.

It is recommended that a possible reference in the Dutch Constitution to EU membership should also include a provision on the implementation of EU law. Such a provision would, however, not entail a completely new structure, but merely a

<sup>13</sup> Directive 98/44/EC, OJ 1998, L 213/13.

<sup>14</sup> Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079.

<sup>15</sup> L.F.M. Besselink, H.R.B.M. Kummeling, R. de Lange, P. Mendelts, S. Prechal, *De Nederlandse Grondwet en Europa*, Groningen: Europa Law Publishing.

<sup>16</sup> It has been suggested to insert a provision that the application, the direct effect and supremacy of EU law are governed by the Treaties and the law derived from the Treaties, *op. cit.*, p. 210.

<sup>17</sup> See e.g. art. 10(5) of the Swedish Instrument of Government (Regeringsformen).

solution for exceptional cases in which the regular framework does not suffice.<sup>18</sup> The existing framework for the implementation of EU law will therefore remain the starting point.

## **4. The Legal Framework for the Implementation of EU Law in the Netherlands**

### **4.1 The 'Equal Treatment' Principle**

In the beginning of the integration process, the number of policy fields of the EEC was still limited and the scope of the transfer of powers was not yet defined. There seemed little occasion for adopting special provisions for the implementation of European legislation at the time. Also the successive treaty ratification procedures have never lead to such provisions. According to the Dutch government, the implementation of EU legislation has, therefore, to be realized within the regular framework of legislation. This means that the rules and principles that apply to the adoption of regular, 'indigenous'<sup>19</sup> legislation, also apply to the implementation of EU law. The concrete implications of this principle are that neither a specific legislative procedure is in force for the implementation of European Union law, nor a general possibility to implement at the level of government or individual ministers (as in the UK European Communities Act). If indigenous legislation has to be adopted at the level of the *Queen in Parliament*, then European law must also be implemented at the same level of legislation.

However, in practice a number of exceptions to this rule of 'equal treatment' have been accepted in view of the time constraints and special nature of the obligation to implement EU law. Those exceptions have become ever more frequent and explicit over the years. Firstly, obligations to consult advisory bodies, social institutions and the like in the legislative process (an important feature in the Dutch system, characterised as it is by the *poldermodel*) have been abolished (with the exception of the opinions of the Council of State).<sup>20</sup> Such rounds of consultations are particularly time consuming and not very effective when the Member States are tied hand and foot to the instrument of EU law that needs to be implemented. Yet, if the government still considers it useful to consult external bodies, it will do so (in matters that are highly politically sensitive for example).

The second – more important – exception to the principle to treat indigenous legislation and implementing legislation equally, are specific delegation provisions.

<sup>18</sup> *Op. cit.*, p. 213/214.

<sup>19</sup> I will take the liberty in this article to use this term as opposite to legislation that is meant to implement EU law.

<sup>20</sup> Art. 1(7) of the Administrative Code (*Algemene Wet Bestuursrecht*).

On the basis of such provisions, legislative power is delegated to the government or individual ministers for the *specified* purpose of the implementation of European Union legislation. Such provisions always form part of an Act of Parliament (or an administrative order) in a specific policy area. Examples are the Telecommunications Act (*Telecommunicatiewet*) and the Environmental Act (*Wet Milieubeheer*). The application of such provisions is, therefore, always limited to a certain policy area or even a part thereof. The effect of such provisions is that instead of the contents, it is the source of legislation that determines the appropriate level of legislation.

#### **4.2 Does the Principle of Legality make Sense in the Context of the Implementation of EU Law?**

Before discussing the official government's position on 'speedier implementation' which was the result of the deliberations on the amendment of the above-mentioned Telecommunications Act, it is helpful to explore to what extent the principle of legality can play a useful role in the context of the implementation of EU law. The answer to this question depends on the aims and purpose of the principle. The purpose of the legality principle has been formulated as follows:

‘(...) that the highest democratically legitimized institution in the country sets optimal norms on the basis of a thorough deliberation for the implementation of policy and administration, which creates legal certainty for those confronted by those policies or administration.’<sup>21</sup>

The presumption is that the *Queen in Parliament* is free to decide on the contents of Acts of Parliament. Yet, when the *Queen in Parliament* has to implement EU law, it is bound by the contents of the European decision that has to be implemented. The question may then legitimately be posed as to what extent the Act of Parliament can, in such a context, be democratically legitimized by the fact that Parliament has adopted it. In my personal view, this can only be said of the normative choices the European legislator has left for the Member States to make.

This would, however, not necessarily mean that the principle of legality is irrelevant for the implementation of EU law. The hierarchy of norms, the transparency and consistency of legislation and legal certainty for the citizen remain also in the EU implementing context important elements which are served by the principle of legality. Moreover, adoption of implementing measures at the level of the *Queen in Parliament*, can from a democratic perspective, still be opportune for instance in cases of minimum harmonisation. The principle of legality is also important from the point of view of the separation of powers. A practice according to which a large amount of legislative power would be in the hands of the administration would be at odds with the *Trias Politica*.

<sup>21</sup> Free translation AvdB of Ph. Eilander, *De wet stellen. Beschouwingen over onderwerpen van wetgeving*, Zwolle: W.E.J. Tjeenk Willink 1993, p. 54.



In conclusion, an affirmative answer to the question posed in the title of this section is very well defensible. Nonetheless, it cannot be argued that the principle of legality plays the same role in the context of the implementation of EU law. The Dutch legislative practice is, however, not based upon a clear vision on the meaning and the contents of the principle in this particular context.

#### **4.3 The Principle of Legality in the Context of the Implementation of EU Law**

In para. 2 it was pointed out that the principle of legality determines at which level legislation has to be adopted. The fact that secondary legislation is more readily accepted when it concerns the implementation of EU law shows that the principle of legality has apparently a distinctive meaning in this context. Guideline 339 from the *Guidelines for the drafting of legislation*<sup>22</sup> explicitly provides for more possibilities to delegate regulatory powers to the government or individual ministers as:

- the European instrument leaves the national legislator fewer possibilities to make choices of policy;
- the instrument to be implemented is more detailed in nature;
- the time constraints for the implementation of the instrument are more pressing;
- the chances are higher that the instrument to be implemented will be changed more often in the future;
- such provisions occur more frequently in the current system of legislation in which the legal basis for delegation of legislative power will be laid down.

The explanatory memorandum that is attached to this guideline provides that the principle of legality, also in the context of the implementation of EU law, is the keystone for deciding at what level rules should be adopted. However, the memorandum also deals with the special nature of implementing EU law that gives rise – according to the government – to a ‘specific interpretation’ of the principle for this particular context. This ‘specific interpretation’ does not seem to mean much more than that the principle of legality does not need to be applied too strictly. At any rate, the contents of the guideline seem to have been inspired more by practical considerations than by any particular insights into the overall meaning of the principle for the particular context of the implementation of EU law.

Many provisions in Acts of Parliament mirror the government’s view expressed in Guideline 339. In a lot of different areas of law, provisions have, over the

<sup>22</sup> These guidelines ‘*Aanwijzingen voor de regelgeving*’, have been drawn up by the Prime Minister.



years, come into effect which provide for broader powers for the government and individual ministers to regulate for the purpose of implementing EU law. An example of such a provision is Article 120 of the Dutch Housing Act which reads as follows:

‘By means or by virtue of<sup>23</sup> administrative orders, provisions can be adopted for the purpose of complying with international obligations that are binding on the Netherlands which concern or are related to matters of this law or on the basis of this law.’<sup>24</sup>

This concerns a very broad delegation of legislative power from the point of view of the principle of legality. It is, however, not allowed to apply this provision to adopt rules that are contrary to other provisions of the Housing Act. If an international obligation would require such rules, the only way to comply would then be to change the Housing Act according to the regular procedure.

In different areas of law, even provisions with such a broad scope as Article 120 of the Housing Act were apparently considered insufficient. Delegation provisions, which also include the power to deviate from Acts of Parliament or even the power to replace provisions thereof, have also been introduced into Dutch legislation. Despite the fact that such provisions are at odds with the principle of legality, they do occur in different Acts of Parliament. The wording of these provisions differs from one Act to the other and sometimes it is even unclear what they mean in terms of constitutional consequences. An example taken from the Flora and Fauna Act is illustrative on this point:

‘The prohibitions laid down in the Articles 8-16 of this Act, can be changed by administrative order in order to comply with international obligations or decisions taken by organs of the European Union or other international organisations and new prohibitions may be adopted concerning the topics which are regulated in the Articles mentioned above.’<sup>25</sup>

In constitutional terms, it is unclear what the exact effect of this provision is. One could argue that this Article allows for a permanent deviation of the Flora and Fauna Act by administrative order (meaning that there is no obligation to adapt the Flora and Fauna Act at the level of the *Queen in Parliament* eventually). On the other hand, one might also argue that the Flora and Fauna Act will in fact be changed as soon as an administrative order is adopted on the basis of the afore mentioned article. That would mean that there is indeed no deviation from the Act and therefore no necessity for ‘reparation’ afterwards.

<sup>23</sup> This expression is used to allow explicitly for regulation by individual ministers.

<sup>24</sup> Translation: AvdB

<sup>25</sup> Art. 18 of the Flora and Fauna Act (*Flora en Faunawet*).

In other cases, Acts of Parliament may be clearer on this point, but nonetheless just as far-reaching in the light of the principle of legality. The differences in wording, in scope and in clarity of the above-mentioned provisions can, to some extent, be explained by the *ad hoc* way in which they were adopted. It was only in the late 1990s that the amendment of the old Telecommunications Act put the issue into a wider constitutional perspective without focusing on specific legislative needs for flexible implementation modalities in particular policy areas. Parliament considered the particular provision the government had proposed for inclusion in the Telecommunications Act to be particularly troublesome. It was all the more astonishing to discover that numerous similar provisions were already in existing legislation, which had obviously not been noticed by Parliament before, at least not as far as the constitutional implications of those provisions were concerned.

## 5. The Government's Position on 'Speedier Implementation'

As a result of the deliberations on the amendment of the Telecommunications Act, the government adopted a general position on speedier implementation in 1999.<sup>26</sup> The government proposed a mechanism that implied a further divergence from the original principle that the implementation of European Union law is to be treated equally to 'indigenous' legislation. The mechanism that was proposed, developed the possibility to delegate regulatory power, but took it yet a step further. In the government proposal, the provision according to which regulatory power is delegated is accompanied by the power to terminate the effect of 'higher' legislation and adopt rules to replace the relevant parts of such higher legislation.

Considering its drastic character, the mechanism was made subject to the fulfilment of strict conditions. First and foremost, the necessity of the mechanism should have to be proven both by the *Queen in Parliament*, for its incorporation into an Act of Parliament, and by the government, when it would apply the mechanism in practice. Another condition was that the provision should not lead to an *overall* mechanism, on the basis of which delegated legislation would suffice *in general* for the implementation of EU law. The provision should, on the contrary, only be included in policy-specific Acts where a clear necessity for the mechanism is apparent. According to a third condition, the use of the mechanism must be temporary. This means that when the government applies the mechanism to adopt EU-implementing measures, it should – in principle – at the same time introduce a bill to Parliament to amend the underlying Act of Parliament. Whilst deliberating on this bill, the administrative order would be in force until it could be withdrawn when the amendment of the Act of Parliament comes into force.

<sup>26</sup> *Kamerstukken II* (Official documents of Parliament) 1998/1999, 26 200 VI, No. 65.

The government's proposal is inconsistent with the principle of legality. This principle also restricts, as has been shown, the powers of the Dutch Parliament and, more specifically, the power to delegate legislative power which would allow the government to regulate whilst setting aside higher legislation. Also from the point of view of the transparency of legislation, legal certainty and the hierarchy of legal instruments, the government's proposal is highly questionable. Precisely because of these fundamental objections, the government has made the application dependent on the fulfilment of strict conditions. This, however, limits the practical use of the proposal and it would, therefore, not be a significant contribution to the efficient implementation of EU legislation.

In particular the Council of State<sup>27</sup>, as well as the First Chamber of Parliament<sup>28</sup>, has heavily criticised the government's proposal. The current government has, therefore, recently decided to reconsider it in order to come to meet the different points of critique.<sup>29</sup> In this new position, the government stresses the significance of the relevant national rules and principles, whilst at the same time acknowledging the importance of correct and timely EU implementation. This approach results in the first place in a focus on adequate regular possibilities for delegation of legislative powers instead of special provisions. The government considers the regular framework to be sufficient and argues that special arrangements (with or without the possibility to deviate from Acts of Parliament) for the implementation of EU law should therefore not be necessary.<sup>30</sup> By emphasising this point, the government seems to support the above-mentioned 'equal treatment' principle.

Yet, at the same time the new position of the government seems to give room for a different treatment of implementation legislation. The very nature of implementation legislation makes, according to the government, a 'somewhat' broader delegation of legislative power more easily acceptable.<sup>31</sup> It is therefore unclear what the new governmental position will mean for the legislative practice, especially for existing (and pending) legislation that contains examples of the initial proposal. In my opinion, the provisions concerned should at least be reconsidered in the light of the new insights in the matter.

The Council of State criticised the government's new position just as harshly as the first one.<sup>32</sup> The main point of criticism was that – according to the Council – the government saw the matter too much in terms of legislative techniques rather than as a matter of major constitutional importance, in which the relation between the government and Parliament was at stake. In its letter from July 2004,

<sup>27</sup> Opinion of the Council of State, published as attachment to the position of the government.

<sup>28</sup> *Kamerstukken I*, 1999-2000, 26 200 VI, No. 166.

<sup>29</sup> Letter of the Minister of Justice to the First Chamber of 27 July 2004, *Kamerstukken I*, 2004-2005, 29 200 VI, F.

<sup>30</sup> P. 2 of the letter.

<sup>31</sup> P. 3 of the letter.

<sup>32</sup> Opinion of the Council of State of 8 april 2004, No. W03.04 0024/I

the government made an effort to meet the Council of State's grievances.<sup>33</sup> It tried to bring the matter into a broader perspective by also paying attention to the role of Parliament and government in preparing of EU law. A more comprehensive role for Parliament in this stage may indeed serve to legitimize a less significant role in the implementation process. This plea, however, is not new and was also not made very concrete by the government.

A more coherent and overall approach to the issue of EU implementation has yet to be put forward. The debate on the report on the Dutch Constitution and EU membership provides a perfect opportunity to do so.

## 6. Alternative Ways of Implementing EU Law

### 6.1 A General Delegation of Regulatory Power

Two major alternatives are possible for the current method of implementing European Union legislation: a *simplified procedure* for the adoption of Acts of Parliament and a general provision for the *delegation* of the power to adopt implementing measures to the government (comparable with the UK European Communities Act). Although it has substantial drawbacks from the point of view of the principle of legality, the latter option plays the more dominant role in the discussion on the subject in the Netherlands. The introduction of this option would mean that the government, or even individual ministers, would become the most important sources of law in many policy areas. The legislative authority of Parliament would consequently diminish considerably. This would be at odds with the principle of legality.

The principle of legality also gives rise to some practical points of concern. Some subjects are considered to be of such importance that they may not be regulated at the level of government, not even when Parliament would explicitly provide for such a power. The scope and therefore the utility of the provision will for that reason in any case be limited. Another more practical point of concern that flows from the principle of legality is that a general provision to delegate legislative powers may give rise to problems when the European instrument to be implemented requires the amendment of Acts of Parliament. As stated above,<sup>34</sup> it would be at odds with the principle of legality to allow the government to amend or set aside higher legislation, even if the power to do so would be explicitly laid down in an Act of Parliament. If, however, the Dutch would opt for a version of the British 'European Communities Act' which would not contain such a power, this would then considerably reduce its practical use.

<sup>33</sup> *Op. cit.* footnote 31.

<sup>34</sup> In section 2.

Another point of a more practical kind concerns the specific nature of the instruments to be implemented. Some regulations and directives may be extremely detailed and specific. Others have a more general and a more vague character. The nature of the European instruments is a decisive element for the way in which they should be implemented. The more possibilities there are to determine the contents of legislation independently, the greater the need is for procedural guarantees to ensure an optimal end result. On the other hand, one might also question – in terms of effectiveness and appropriateness – the application of the regular framework for the adoption of legislation in those cases in which the implementation of a very specific EU instrument comes down to no more than a literal copying of the text. This might even give the wrong impression that Parliament and government can, independently and fully, determine the contents of legislation.

The aforementioned distinction has also significance for the assessment of the merits of a general provision for the delegation of the power to implement European Union legislation. It would be more acceptable to delegate legislative powers if the power does not involve the making of substantive normative choices. Yet, it is extremely difficult to limit the scope of a delegation provision to the implementation of European Union measures that leave no room for such normative choices. A directive may contain very vague provisions as well as provisions that can only be transposed into national law literally. Furthermore, the majority of EU instruments would have both characteristics. A general provision would, for that reason, in practice be open for the implementation of both types of European measures. That would mean that the provision could also be used as the legal basis to implement European measures for which regulation at a lower level is not considered desirable.

A last remark concerning the general provision for the delegation of regulatory power is more political than legal in nature, but of major importance nonetheless. The above-mentioned provision seems hardly politically feasible at the moment. The debate on both the initial and the subsequent position adopted by the government on speedier implementation has shown that the Dutch Parliament has a strong aversion to such provisions and the government does not cease to emphasize that it will, under no condition, strive to accomplish them.

## **6.2 A Simplified Legislative Procedure**

A more suitable alternative for the current Dutch way of implementing European Union law would be to simplify the procedure for the adoption of Acts of Parliament. A significant simplification could be realised by having the bill considered in Parliament only upon an explicit request by a certain number of Members of Parliament. Without such an explicit request, the Act of Parliament concerned would be enacted on the basis of the tacit approval of Parliament.

A similar procedure has governed the position of Parliament and government for years with respect to the approval of international treaties. This procedure has worked rather smoothly and the experiences in that field might benefit a parallel procedure for the implementation of EU law.

The most important advantage, from a democratic point of view, is that Parliament would – as opposed to the general delegation provision – retain its full legislative power. Parliament itself could – according to this option – decide on the role it wants to play in the legislative process. When it is called upon to implement, for example, an EC directive of minor importance or an EC directive that leaves the Member States a small margin of discretion, it can refrain from putting the government's bill on the parliamentary agenda.

The option of the simplified legislative procedure would, furthermore, not impair the principle of the legality. The joint power of Parliament and government to enact legislation is left intact and the end result of the procedure is 'regular' Acts of Parliament. All the complications that arise with respect to the general delegation provision (related to the hierarchy of norms, the necessity of arrangements when the government needs to derogate from Acts of Parliament) do not occur in this context. Yet, one danger needs to be avoided. The government's bill will need to be confined to the mere implementation of European Union legislation. It is undesirable that aspects of national policy will also be included. Otherwise, it cannot be expected that the Parliament will relinquish its right to consider the bill on the contents. The intended advantages in efficiency would then be jeopardised. It would require a separate Act of Parliament – subject to the regular legislative procedure – in which the rules based on national policy would have to be laid down. As the end product of the two different procedures are the same, the two could be brought together in a consolidated version. This would avoid the situation that provisions which govern the same matter are found in different legal documents and it would enhance, therefore, the transparency of legislation. This would constitute another advantage compared to the general delegation of implementing power.

The option of the simplified legislative procedure acknowledges the special nature of implementing European Union law compared to laying down autonomous legislation. That, in itself, presents a major improvement. However, the possibility of implementing EU legislation in time and the smooth 'absorption' of European Union law into the national legal order would also be enhanced by this option.

## **7. Conclusion**

Pragmatic concerns have determined the Dutch membership of the European Union rather than a coherent, fundamental approach to the issue. Consequently, the problems that have arisen have been mostly at a practical level, but they may also have a constitutional dimension. The same holds true in the particular context of the implementation of EU law. More implicitly than explicitly, the principle has been applied to treat the implementation of EU law in the same way as indigenous

legislation. Exceptions to this principle have been introduced on an *ad hoc* basis and without a clear, coherent view of its constitutional implications. This constitutional dimension has only been addressed on the occasion of the government's position on 'speedier implementation'. Up until now, however, the debate has essentially not gone beyond discussing the specific merits of the government's proposal. A well-defined perception of the role and position of the principle of legality (which is decisive in this matter) in the context of the implementation of EU law does not underly the legislative practice at the moment.

The Netherlands is due for a new approach to the phenomenon of the implementation of European Union instruments, particularly because a general, coherent and fundamental standpoint on the issue does not govern the matter right now. This new approach needs to be based on the acknowledgement that implementing EU measures differs fundamentally from adopting pure national legislation. This opens the way for reconsidering the national rules and principles, which currently govern the matter, in the light of the framework provided by the European Union. Elements to be taken into account in that respect cover the time constraints, which are an inherent feature of the implementation process, and also the 'implementation score-boards', which show that the current situation in the Netherlands leaves room for improvement (especially in relation to the achievements of other Member States).

It should be pointed out that other aspects deserve equal attention. An assessment needs to be made as to whether the aims which underly the framework for setting rules at the national level can and also need to be achieved when the implementation of EU law is concerned. The most important example, in this respect, is the principle of legality. It has been argued in this article that this principle is not redundant in the context of the implementation of EU law. On the other hand, it would also be rather unwise simply to apply this principle as if implementing EU law requires the same framework as the adoption of autonomous norms.

A new approach to implementing EU law could easily result in a simplified legislative procedure. Such a procedure would, in the first place, signify a clear, general and coherent way of addressing the issue. Furthermore, it would be an adequate and effective solution, fitting neatly into the national system for adopting legislation. It would also bring an end to the current situation with its multitude of specific provisions and arrangements. Finally, it would also provide a solution in keeping with the spirit of Article 10 EC Treaty and the duty of cooperation.