



# EU law in practice

2023



Netherlands  
Court of Audit

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1.

# Executive summary

As a member of the European Union, the Netherlands is involved in the negotiation of EU law and in decision-making on new legislation and regulations. The member states promote their own interests during the negotiations and decision-making. Under the EU Treaties, however, they must implement and enforce EU law in full once it is adopted. This will ensure legal certainty for citizens and businesses, and that the single market functions correctly. However, EU law is not always entirely compatible with national circumstances. Their implementation can raise many questions about the interpretation and application of EU law.

The European Commission, the EU's executive body, is tasked with the negotiation of EU law in certain areas on behalf of the Union and to enforce EU law and investigate *possible infringements* by member states. The Court of Justice of the European Union ('the Court') or another court decides whether there is an *actual infringement* of EU law. This audit is intended to provide the Dutch parliament with an insight into the Netherlands' compliance with EU law. It centres on compliance procedures initiated against the Netherlands by the Commission or other parties.

We examined the formal and informal procedures between the Commission and the Netherlands to enforce compliance in 2010-2020. We also investigated how ministries closely involved in EU policy used formal and informal procedures to resolve possible infringements and how the procedures were coordinated and aligned across government. The ministries concerned are the Ministry of Foreign Affairs, the Ministry of Economic Affairs and Climate Policy (EZK), the Ministry of Finance, the Ministry of

Infrastructure and Water Management (I&W), the Ministry of Justice and Security (J&V) and the Ministry of Agriculture, Nature and Food Quality (LNV).

To complement the government-wide audit, we carried out 9 case studies. Each case concerned compliance with EU law, in which we investigated the formal and informal procedures and analysed how the cases had been resolved. More information on the cases is presented in the appendix to this report (in Dutch).

Based on our audit, we came the following conclusions.

As the Netherlands is obliged to implement and apply EU law, we expect the Dutch government to have knowledge of, an insight in and an understanding of the formal and informal procedures in place to ensure compliance. Both the government and the House of Representatives need this insight and understanding not only to appreciate the status of compliance but, above all, to assess the short and long-term legal and administrative risks and their potential financial and social consequences.

This information can improve the ministers' longer-term decision-making and strengthen the House of Representatives' oversight of government. The importance of this was recently demonstrated in the case of buffer strips that farmers are required to plant by 1 March 2023 to prevent fertiliser run-off into water courses. Buffer strips are obligatory, as the Commission is gradually phasing out a derogation from the Nitrates Directive (not a case study in this audit). The Commission thinks the Netherlands is not doing enough to improve water quality. The Minister of LNV had advised the House of Representatives in December 2022 that farmers would not need to comply until 1 January 2024. Both the House and the farmers were wrong-footed. The minister later described his advice as an 'error of judgement'.

### **EU law: procedures and compliance**

The Commission uses informal procedures (such as EU Pilot) to discuss differences of interpretation with the Netherlands. They often resolve a dispute without the Commission needing to start a formal legal procedure. If an informal procedure fails to resolve a dispute between the Commission and a minister, the Commission can initiate a formal procedure (an infringement procedure). In most cases, the Netherlands will then amend its national laws, sometimes following a judgment by the Court. The Netherlands can also be party to a Court case outside an infringement proceeding if, for instance, it institutes proceedings itself or if it asks the Court for clarification. In such cases, the Court's judgments are usually in favour of the Netherlands.

### **Interministerial coordination**

*In theory*, existing government consultation structures offer many opportunities for substantive coordination and alignment of compliance with EU law. *In practice*, however, interministerial coordination and alignment occur only when long-running procedures fail to resolve a dispute and it is referred to the Court. Coordination and alignment, moreover, are concerned more with the procedure itself. There is no substantive coordination and alignment among ministries regarding compliance with EU law or the financial risks to society of non-compliance.

### **Learning from procedures**

Ministers rarely evaluate the origins of infringements of EU law or their resolution after intervention by the Commission or the ministries themselves. If there is any reflection on a closed procedure, it is done orally, on an ad hoc basis and by individual file holders. Ministers do not systematically learn the underlying lessons of recent procedures.

### **General picture from the case studies**

In 6 of our 9 case studies there are long procedures. The procedures regarding the Water Framework Directive, for instance, started more than 10 years ago. The procedures often involve a succession of informal EU Pilots, formal infringement procedures, some resulting in Court cases, and/or preliminary rulings by the Court. Proactive measures are sometimes taken to end possible infringements of EU law rather than wait for the Commission to initiate a procedure. This was the case, for instance, in response to the Court's judgment in the Sofina case.

Ministers sometimes test the limits of what is possible, or breach them. This is not coordinated or aligned at government level. The procedures' outcomes can have far-reaching social consequences for the Netherlands, as illustrated by the Integrated Approach to Nitrogen (PAS).

### **Final comment**

Every member state promotes its own interests when EU laws are drafted. Once they have been adopted and implemented in national legislation, the laws become part of the EU and member state legal system. The Netherlands is therefore obliged to comply with EU law. An internal scoreboard kept by the Commission suggests that the Netherlands holds a middle position regarding compliance with EU law.

An assessment with contrary expertise could help mitigate the risk of potentially serious societal and financial consequences. The Interministerial Committee on

European Law (ICER) could play a role here. Contrary expertise can expand inward looking mindsets, which can in turn prevent the Commission from initiating new formal procedures against the Netherlands. It can also prevent disputes lasting longer than necessary. Solutions to urgent problems such as poor water quality or nitrogen pollution then need not be unnecessarily delayed, which would only add to the societal costs.

## 2.

# Introduction

### 2.1 The problem at hand

#### 2.1.1 Background

The Netherlands has been a member of the European Union and its predecessors since 1951. The rights and duties laid down in the EU Treaties and associated EU-laws apply to all member states and their citizens. EU law has often direct application and takes precedence over the member states' national laws.<sup>1</sup> This is also laid down in the Dutch Constitution (articles 92-94). In its capacity as a member state, the Netherlands takes part in the Council of the EU and can negotiate and influence the outcome of the European Commission's legislative proposals. In the negotiations, the Netherlands promotes its own interests. New EU laws are ultimately adopted jointly by the Council and the European Parliament.

As a signatory to the EU Treaties, the Netherlands has committed itself to implementing and complying with EU law. This includes: (a) all treaties on the establishment and functioning of the EU, and (b) all binding legal acts of the EU, such as regulations, directives and decisions. The Netherlands may not take any measures that violate Treaty obligations.

It is sometimes difficult for the member states to comply with the obligations of the EU legal order. Every member state has its own unique culture, its own political system and its own demographic and geographical characteristics. EU-wide laws and rules cannot always be slotted seamlessly into a country's political and administrative framework. Nevertheless, every member state has agreed to implement and comply



in full with EU law. The Dutch government has agreed to do so.<sup>2</sup> It guarantees legal certainty for citizens and businesses. It is also a precondition for the proper functioning of the single market.

In practice, divergent and conflicting interests also influence the implementation of EU law. The correct implementation and enforcement of EU law may oblige the Netherlands to take measures that benefit some interests (e.g. nature conservation) at the expense of others (e.g. industry). This can lead to difficult political decisions, where Dutch political aspirations or implementation clashes with EU law.

The Commission plays a key role in the adoption of EU law and oversees its implementation in the member states. As the EU's executive body, it is tasked with:

1. conducting negotiations on behalf of the EU with international organisations (such as the World Trade Organization, G7 and G20) and with heads of state and government;
2. formulating new legislative proposals (right of initiative);
3. managing the EU budget;
4. issuing advice and recommendations;
5. enforcing EU law in the member states.

The Commission's enforcement of EU law is at the heart of this audit. Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Commission can investigate a member state's infringement of EU law. This task is technical in nature and attracts less media attention than the Commission's other tasks.

In 2018, the European Court of Auditors mapped out the formal and informal procedures the Commission could initiate if it suspected an infringement of EU law (European Court of Auditors, 2018). The procedures can have social and financial consequences for member states. For example, the Commission can oblige a member state to amend national policy in a particular area and the Court of Justice of the European Union ('the Court') can impose a fine or penalty payment or both.

### **2.1.2 Knowledge gap**

It is currently not known how often citizens, businesses and other stakeholders are faced with problems due to the Netherlands' incorrect implementation of EU law. It is also not known how often the Commission has initiated proceedings against the Netherlands for possible infringements of EU law in recent years, or what the consequences were. The European Court of Auditors' 2018 report does not include empirical evidence.

The Commission's single market scoreboard shows in general terms how member states implement and enforce EU law. In comparison with the other member states, the Netherlands holds a middle position regarding implementation of EU law and performance in infringement procedures.<sup>3</sup>

The procedures the Commission initiates against the Netherlands for possible infringements of EU law enjoy little political or administrative attention in the Netherlands. When the media spotlight falls on the most serious problems, this changes. A recent example is the Netherlands' Integrated Approach to Nitrogen (PAS), which infringes parts of the Habitat Directive.

The House of Representatives is informed of active formal infringement procedures every quarter, albeit in only broad lines. It receives no information on informal procedures. As the Commission and the Netherlands classify some informal procedures as confidential, it is not known to what extent the Commission suspects the Netherlands is implementing EU law incorrectly. Whether such problems are resolved at an early stage, and the resultant benefits to the Netherlands, are underexposed.

Academic studies of how the Netherlands implements EU law and the problems caused by incorrect or incomplete implementation are few. In recent years, they have tended to consider transposition: the incorporation of EU law into national law (Toshkov, 2010; Haverland & Romeijn, 2007). There are many studies of the *timeliness* of transposition (Thomson, 2009; Mastebroek, 2003; Zhelyazkova & Torenvlied, 2009). An audit of the national implementation of EU policy that we carried out in 2008 also focused on the timeliness of implementation.

This present audit investigates compliance with EU law in practice and the procedures initiated to resolve problems.

## 2.2 What have we audited?

### Starting points

The Netherlands has committed itself to implementing the EU Treaties. An important principle of the EU legal order is that member states, including the Netherlands, take appropriate measures to ensure the fulfilment of obligations arising out of the Treaties or resulting from acts of the EU institutions. The Netherlands refrains from any measure that could jeopardise attainment of the Union's objectives (Union loyalty).<sup>4</sup>

We accordingly expect the Netherlands to ensure its implementation of EU law is correct, take measures to prevent disputes and resolve any problems that arise. The Dutch government must therefore have sufficient experts in-house to keep information up to date and to exchange and share knowledge of EU law. We also expect the Netherlands to refrain from taking measures that violate Treaty obligations and to correctly resolve any infringements of EU law by means of existing procedures (in consultation with the Commission or otherwise). Following such procedures, finally, we expect Dutch ministries to investigate the causes of incorrect implementation of EU policy and, where possible, take measures to prevent reoccurrence.

### **Audit objective**

Our audit objective is to inform parliament of the Netherlands' compliance with EU law, the informal and formal steps taken with the Commission to resolve disputes and the resultant improvements. As this topic is still largely unknown, a secondary audit objective is to close the knowledge gap.

### **Audit method**

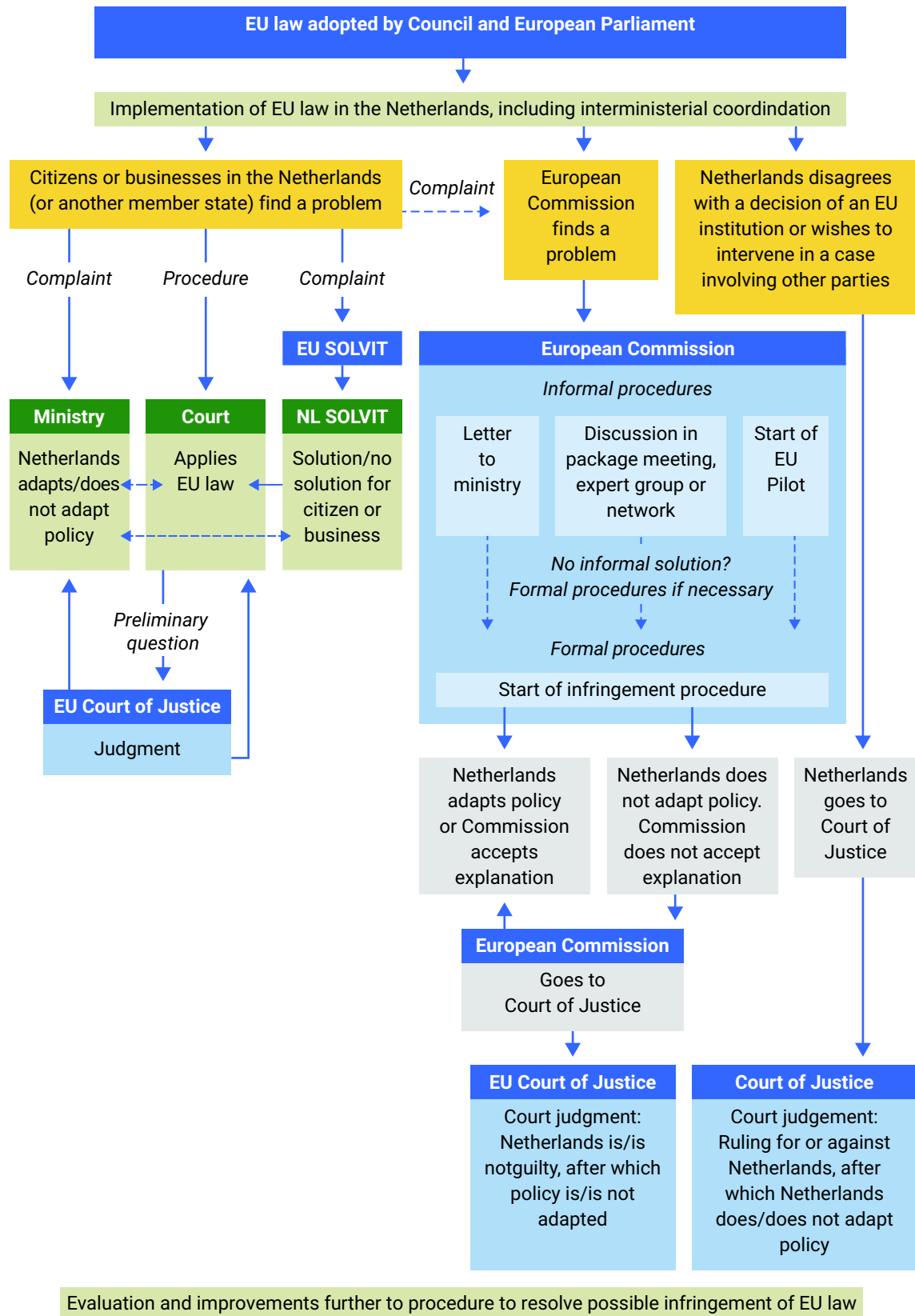
We obtained information from the 3 ministries that coordinate government-wide implementation of EU law: the Ministry of Foreign Affairs, the Ministry of Economic Affairs and Climate Policy (EZK) and the Ministry of Justice and Security (J&V). We requested information from them on government-wide coordination and alignment of compliance, and on government-wide statements of the Netherlands' possible infringement of EU law between 1 January 2010 and 31 December 2020 ('2010-2020').

We also examined: (a) how ministries responded to the Netherlands' possible infringement of EU law in 2010-2020, (b) how Dutch ministries handled complaints made by citizens, businesses and other stakeholders about possible infringement of EU law, (c) whether the ministries evaluated problems arising from infringements of EU law, and (d) what lessons they learned. For this part of the audit, we requested information not only from the 3 coordinating ministries but also from 3 ministries closely involved in EU policy: the Ministry of Finance, the Ministry of Infrastructure and Water Management (I&W) and the Ministry of Agriculture, Nature and Food Quality (LNV).

We analysed the informal and formal routes that the Netherlands could take to address possible infringements of EU law, as shown in figure 1.

**Figure 1** Routes to address potential non-compliance with EU law

Potential problems implementing EU law can be addressed by several parties through a variety of procedures



The procedural routes are explained in table 1.

**Table 1** *Informal and formal procedural routes for infringements of EU law*

Procedural route	Informal or formal	Description
National court: Direct application of EU law	Formal	Citizens, businesses and other stakeholders can try to resolve possible infringements of EU law by going to a national court.
National court + Court of Justice: preliminary question	Formal	A national court can (and in some cases has to) refer questions about the application or interpretation of a provision of EU law to the Court of Justice.
Ministry	Both	A ministry itself can handle certain complaints/notifications made by citizens, businesses and other stakeholders by means of objection and appeal procedures. A ministry can also resolve a problem ex officio if it identifies an infringement.
SOLVIT	Informal	EU citizens and businesses that identify a possible infringement of EU law in another member state can submit a complaint to SOLVIT. SOLVIT is an online mediation service set up by the Commission in 2002.
Letters from the Commission	Informal	The Commission can send letters to various tiers within ministries on possible infringements of EU law that are not subject to active procedures.
Expert groups and networks	Informal	The Commission can set up expert groups, among other things to advise on the implementation of EU law. To strengthen cooperation, it can also establish informal networks of representatives of the member states and other stakeholders tasked with implementing particular EU laws.
Package meeting	Informal	Where compliance with EU law is problematic, a package meeting can be held between the Commission and the ministry concerned to discuss all relevant issues informally.
EU Pilot	Informal	Where the Commission suspects an infringement of EU law, the complaint can be dealt with in an EU Pilot: an informal consultation mechanism between the Commission and the member state to prevent a formal infringement procedure.
Infringement procedure	Formal	The Commission can initiate a formal infringement procedure if it suspects a member state is violating EU law. The procedure can ultimately lead to the Court of Justice imposing a financial sanction on the member state.
Court of Justice: other direct cases	Formal	A member state can appeal against a decision by an EU institution directly to the Court of Justice. A member state can also intervene in a case brought by for example the European Commission against another member state. <sup>5</sup>

This report explains how often the Netherlands was involved in most of the above procedural routes in 2010-2020, and how they were resolved.

In addition, we carried out 9 case studies (see table 2) to determine how procedures were actually conducted and understand the problems that arose.

**Table 2** *The 9 cases studies*

Case	Procedure	Principal Ministry
1 Renewable energy	EU Pilot	EZK
2 Visa applications	SOLVIT	Foreign Affairs and J&V (IND)
3 Corona flight vouchers	Letter from European Commission	I&W
4 Third Driving Licence Directive	EU Pilot, infringement, (threat of) Court case	I&W
5 Water Framework Directive	EU Pilot, infringement	I&W
6 Residence permit fees, long-term third-country residents	Infringement, Court case	J&V
7 European arrest warrant	Preliminary question, infringement	J&V
8 Integrated Approach to Nitrogen (PAS)	Preliminary question, national court ruling	LNV
9 Sofina judgment on dividend taxation of non-resident taxpayers	Preliminary question, ministry's own solution	Finance

## 2.3 Audit scope

The audit examines possible infringements arising out of the incorrect or incomplete implementation and application of EU law. It does not consider untimely implementation.

To complement the government-wide audit, we studied 9 cases that were representative of a large but not exhaustive proportion of possible procedures.

The audit focuses on how *ministers* deal with procedures to resolve possible infringements of EU law. It does not consider the judiciary system. The audit looked at preliminary procedures at the Court only in so far as the Netherlands was involved. Court rulings are taken as a given. Issues arising from the European Convention on Human Rights (ECHR) and issues relating specifically to state aid are largely left out of consideration.

## 2.4 Organisation of this report

This report first explains national coordination of the Netherlands' implementation of EU law. It then discusses problems that arise in the implementation of EU law and the solutions that have been found in recent years. It also looks at the ministries' evaluation of the procedures and the improvements they make in response. The key findings on the 9 case studies illustrate how procedures to ensure compliance with EU law are carried out in practice. We close with our conclusions.

More information on the cases is presented in the appendix to this report (in Dutch).

# 3.

# Interministerial coordination of the implementation of EU law

## 3.1 Our findings in brief

This chapter considers the ministries' coordination and alignment of the implementation of EU law. We expect the ministries to coordinate and align their actions in order to prevent problems and resolve disputes, if they arise. To this end, the Dutch government must have appropriate in-house expertise in EU law.

We found that *in theory* there are enough interministerial organisational linkages to coordinate the implementation of EU law and resolve any problems that might arise, for instance through the working groups of the Interministerial Committee on European Law (ICER). *In practice*, government-wide alignment and coordination of EU law concentrates on the implementation of EU law and on cases referred to the Court of Justice of the European Union ('Court cases'). There is no interministerial alignment or coordination of formal and informal procedures or their prevention. Little consideration is given to formal and informal procedures brought against the Netherlands. What alignment there is is ad hoc in nature and relates to procedural rather than substantive matters.

For each of its government-wide coordination tasks, the Ministry of Foreign Affairs has an appropriate number of staff with specific knowledge of EU law. The ministries of J&V and EZK have only limited capacity for coordination. The other ministries are responsible for the organisation and coordination of implementation of EU law in their respective policy fields; the available personnel varies from one ministry to another.



We present these findings in more detail in § 3.3 and 3.4. In § 3.2, we first outline how EU law is prepared and who is involved in its implementation at EU level.

## 3.2 Preparation and implementation of EU law

### 3.2.1 Types of EU law

Acting on a proposal from the Commission, the European Parliament and Council can adopt regulations, directives and decisions. These are binding legal acts:<sup>6</sup>

- a *regulation* is of general application and is binding in its entirety and directly applicable in all member states;
- a *directive* is binding as to the result to be achieved upon each member state to which it is addressed but leaves to the national authorities the choice of form and methods;
- a *decision* is binding in its entirety; a decision that specifies those to whom it is addressed is binding only on them.

As an EU member state, the Netherlands is obliged to take all national legal measures necessary to apply EU law. This is known as implementation (KCBR, 2017). Implementation includes the incorporation ('transposition') of EU law into national law. Without correct and full implementation, EU law cannot be applied correctly. How many measures the Netherlands has to take to implement EU law depends on the type of legal act:

- *regulations* apply automatically and do not need to be incorporated into national law (and may not be incorporated into national law). However, national regulations may be necessary to implement them if, for instance, an implementing authority has to be designated;
- *directives* require timely, complete and correct transposition into national law;
- a *decision's* implementation is determined by its subject matter.

An important aspect of the implementation of EU law is the need to amend or repeal incompatible national law and regulations (KCBR, 2017).

### 3.2.2 Preparation of EU law

The EU legislative process begins with a proposal from the European Commission.<sup>7</sup> Most decisions on a proposal are taken by the Council of the EU (made up of ministers from the 27 member states) and the European Parliament.<sup>8</sup> In the Netherlands, the Ministry of Foreign Affairs is responsible for interministerial coordination of the preparation of EU law. It informs parliament about new Commission proposals by means of files prepared by the Working Group for the Assessment of New Commission Proposals (BNC).<sup>9</sup>

### 3.2.3 Implementation of EU law at EU level

For the purposes of this audit, the chief actors overseeing the correct and complete implementation of EU law are:

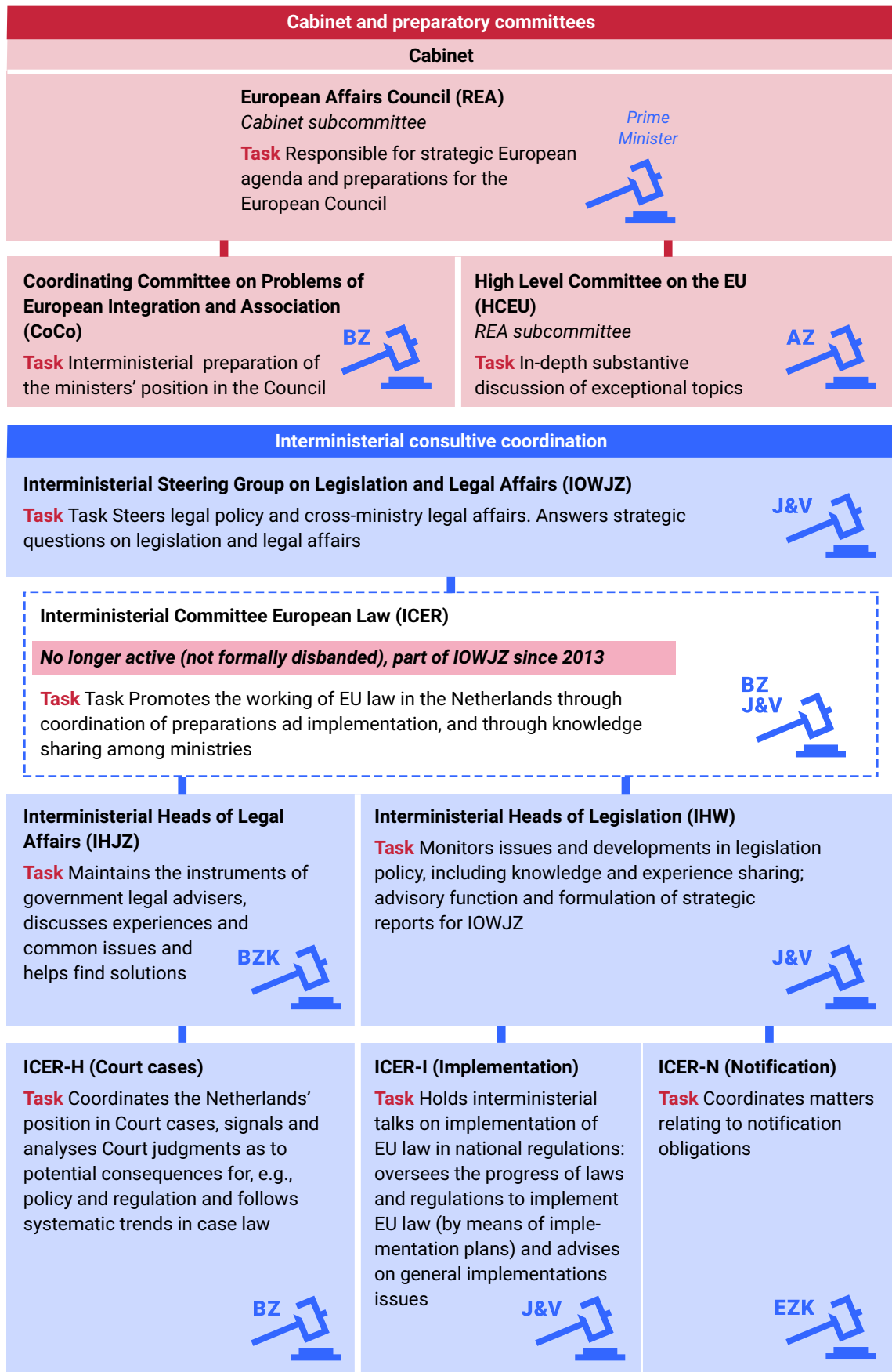
- *European Commission*. The Commission<sup>10</sup> oversees implementation of the EU Treaties and EU law. On its own initiative or in response to third-party complaints, it can investigate possible infringements of EU law. It has discretionary power to initiate an infringement procedure against a member state and to refer a case to the Court of Justice of the European Union. The Commission also monitors the member states' performance in formal and informal EU procedures;<sup>11</sup>
- *Court of Justice of the European Union*. The Court ensures that EU law is interpreted and applied uniformly throughout the Union. It reviews the legality of the EU institutions' legal acts, oversees the member states' fulfilment of Treaty obligations and clarifies EU law at the request of national courts.<sup>12</sup> The Court of Justice's General Court has jurisdiction to hear and pass judgment on certain classes of action or proceedings brought against EU institutions.

## 3.3 Many opportunities for alignment and coordination

### 3.3.1 Government-wide actors: tasks and personnel

Figure 2 summarises the main interministerial organisational linkages and actors that in theory can align and coordinate implementation of EU law in the Netherlands. They can also be used to discuss possible infringements of EU law and their resolution. We describe their tasks and their staffing in this section.

**Figure 2** Government-wide consultation structures for the implementation of EU law



The Interministerial Committee on European Law (ICER)<sup>13</sup> and its 3 working groups play a lead role in the coordination of EU law across ministries. Since 2013, it has been part of the Interministerial Steering Group on Legislation and Legal Affairs (IOWJZ),<sup>14</sup> in the form of an EU-related agenda item. Although the ICER working groups are well placed in theory to coordinate activities for the Commission’s formal and informal procedures, none of them is tasked with substantive coordination of EU Pilots or infringement procedures.

### Organisation of government-wide coordination

3 ministries are responsible for government-wide coordination of EU law: the Ministry of Foreign Affairs, the Ministry of EZK and the Ministry of J&V. Table 3 shows which ministry is responsible for which coordination tasks.

**Table 3** Main coordination tasks of the Ministries of Foreign Affairs, EZK and J&V

Coordination tasks	EU procedure for problems implementing EU law
<b>Foreign Affairs: Legal Affairs Department / European Law Division</b>	
<ul style="list-style-type: none"> <li>• Court cases (main focus). Activities of the EU Litigation Team relate to: (a) direct cases referred to the Court, such as infringement procedures and appeals by the Netherlands, and (b) preliminary cases involving the Netherlands.</li> <li>• ICER-H.</li> </ul>	Court cases: <ul style="list-style-type: none"> <li>• infringements</li> <li>• other direct cases</li> <li>• preliminary cases</li> </ul>
<ul style="list-style-type: none"> <li>• Registering communication with the Commission on EU Pilots (post box function).</li> </ul>	EU Pilots
<ul style="list-style-type: none"> <li>• Overseeing the Commission’s deadlines to answer letters.</li> <li>• Processing formal notices and reasoned opinions.</li> <li>• Issuing quarterly reports to cabinet and House of Representatives on formal notices.</li> <li>• Substantive involvement if infringement procedure goes to the Court.</li> </ul>	Infringement procedures
<b>Foreign Affairs: Permanent Representation of the Netherlands to the EU (PR EU)</b>	
<ul style="list-style-type: none"> <li>• Promotion of the Netherlands’ interests in Brussels. Providing both substantive and strategic advice.</li> </ul>	N.A.
<ul style="list-style-type: none"> <li>• Forwarding formal documents to the relevant ministry and its attaché to the PR EU (post box function).</li> <li>• Keeping up to date, especially with sensitive cases. Where necessary, initiating talks with the Commission and participating in talks between ministries and the Commission during a procedure.</li> </ul>	Infringement procedures

Coordination tasks	EU procedure for problems implementing EU law
<ul style="list-style-type: none"> <li>Forwarding letters (outside EU Pilots) to the ministry concerned</li> </ul>	Letters from the Commission
<b>J&amp;V</b>	
<ul style="list-style-type: none"> <li>ICER-I</li> </ul>	N.A.
<b>EZK</b>	
<ul style="list-style-type: none"> <li>Netherlands SOLVIT centre</li> </ul>	SOLVIT
<ul style="list-style-type: none"> <li>ICER-N (not covered by this audit)</li> </ul>	N.A.

### Staffing of government-wide coordination

We analysed the capacity available at the Ministries of Foreign Affairs, J&V and EZK to carry out their coordination tasks. At the Ministry of Foreign Affairs, about 22 people in the European Law Division at the Legal Affairs Department, including support staff, work in the field of EU law.<sup>15</sup> To perform government-wide coordination, 8 staff members (also known as ‘agents’) from the division’s EU Litigation Team are authorised to conduct Court cases on behalf of the Netherlands. At ICER-H, 4 people are responsible for coordination: a chair, a secretary, a clerk and an assistant. Databanks on infringement procedures and EU Pilots are maintained centrally by 1 support officer.

At the Ministry of J&V, 2 members of the Legislation and Legal Affairs Department (DWJZ) are involved in ICER-I coordination: ICER-I’s chair and secretary.

At the Ministry of EZK, 2 people are involved in ICER-N coordination: the chair and secretary. During the audit period, a further 1 or 2 people and 2 trainees staffed the Dutch SOLVIT centre.

### 3.3.2 Actors per ministry: tasks and personnel

Each ministry is responsible for compliance with EU law in its policy field. It is also responsible for informal dialogue with the Commission in EU Pilots and decides whether it will take part in preliminary cases. Ministries also have substantive responsibility for infringement procedures and for answering letters from the Commission. Furthermore, each ministry is represented in ICER-I, ICER-H and ICER-N.

We found that the number and organisation of staff with specific knowledge of EU law at the 6 ministries differ from one ministry to another. Some ministries, such as Foreign Affairs and I&W, have a central EU law unit. At all ministries, the policy departments most involved in EU law have at least some specific knowledge of EU law.

### 3.4 Little alignment and coordination in practice

Ministries can discuss EU legal issues in the interministerial ICER configurations. Some ICER working groups are more active than others. The ICER-H working group meets the most frequently. It is engaged in (the alignment of) Court cases. The minutes of the ICER working groups for 2010-2020 reveal that the groups generally fulfilled their tasks. Below, we present our findings from the minutes on the ICER working groups' involvement in the formal and informal EU procedures we investigated for this audit.

#### **ICER**

Until 2013, the 3 ICER working groups were part of an overarching ICER consultation structure. According to 4 reports compiled in 2010 and 2012, ICER discussed wider-ranging topics of a general nature rather than individual cases. It held detailed discussions on, for instance, the added value of EU Pilots, their coordination and whether the House of Representatives should be informed of EU Pilots.

#### **ICER-I**

In 2010-2020, ICER-I met on 63 occasions. We received the minutes of 45 meetings. We concluded that little thought was given to formal and informal EU procedures and their coordination. The meetings concentrated on procedural matters, such as the Commission's collection of a fine or penalty payment for untimely implementation of EU law.

#### **ICER-H**

The ICER-H working group met about 280 times in 2010-2020. We received the minutes of 241 meetings. Regarding informal and formal EU procedures, they reveal:

- active EU Pilots are a recurring talking point in the meetings. The procedures are usually summarised for information purposes. Comments on active procedures are restricted to procedural matters, such as the initiation of a new procedure or that the Commission is not satisfied with the conclusion of a case and that an official infringement procedure will follow. There are far fewer substantive comments. Substantive comments relate to, for instance, clarification of a case, reminders of a similar case in the past, a case's importance to certain ministries and warnings of an EU Pilot coinciding with an infringement procedure;
- active infringement procedures are a recurring talking point in the meetings ('quarterly report of infringements'). Procedural and substantive details are not discussed at length. It is often just noted that there are no comments or special circumstances. In general, comments are confined to procedural issues such as how many new procedures have been initiated and in what areas, which procedures

have been closed or that a case might be referred to the Court. Fewer substantive comments are made, and they usually relate to a brief description of a case's subject matter, the approach taken by the ministry, similar cases against other member states and options to intervene, or questions about other ministries' experiences.

# 4.

# Informal EU procedures

## 4.1 Our findings in brief

This chapter looks at the informal procedures between the Netherlands and the European Commission that the Commission can initiate when it suspects a possible infringement of EU law. We ask how often they are initiated, how the Netherlands deals with the procedures and what their outcomes are. We expect the Netherlands to resolve possible infringements via informal procedures wherever possible.

From the information available on informal procedures, we found:

- *informal procedures (EU Pilots and SOLVIT cases) are preventive instruments to discuss compliance*: they often dissuade the Commission from taking formal steps to resolve a dispute. Two-thirds of the EU Pilots initiated by the Commission were resolved during the audit period before formal procedures were started. Most SOLVIT cases directly affecting citizens were also resolved informally without a Court case. Partly due to SOLVIT's informal nature and its organisation in the Netherlands there are structural problems in some areas and it cannot be guaranteed that all cases receive the consideration they deserve;
- in the Commission's opinion, the Netherlands does not comply with all the requirements of informal procedures. SOLVIT cases, however, are completed within the required term;
- ministries have no oversight of and therefore *no systematic insight into other informal contacts* between the Commission and the Netherlands. Correspondence with the European Commission outside the procedures is largely unknown, including correspondence by senior civil servants and politicians. Ministries also have no



systematic insight into which civil servants take part in which of the Commission's expert groups, to what purpose and what substantive contribution they make.

We also found that there were no government-wide guidelines on how ministries should act in informal procedures. The guidelines on EU Pilots consider only protection of confidentiality. Parliament is not informed of informal procedures.

## 4.2 EU Pilot and SOLVIT: accessible compliance procedures

Citizens, businesses and other stakeholders in the EU can submit a complaint to the Commission if they think the Netherlands infringes EU law.<sup>16</sup> Information made public by the Commission indicates that it received a total of 1,025 complaints involving the Netherlands in 2010-2020 (European Commission, 2010-2020).<sup>17</sup> Most of the complaints related to employment, the environment and the single market. Electric pulse fishing was one of the topics on which the Commission received complaints about the Netherlands.<sup>18</sup> When asked, the Commission told us that it had found 164 of the 1,025 complaints were justified and had been followed up by either an informal or formal procedure: 92 were subject to an EU Pilot, 4 were referred to SOLVIT and 18 prompted the Commission to launch an infringement procedure.<sup>19</sup>

### 4.2.1 EU Pilots

The Commission describes the EU Pilot procedure as an informal but structured written dialogue with a member state. The procedure is an early-stage intervention: it begins when the Commission suspects a member state might be infringing EU law and an infringement procedure has not been initiated. Depending on the outcome, the Commission decides whether it should initiate a formal procedure.

#### Organisation

Each ministry has a contact person for EU Pilots. When an EU Pilot query is received from the Commission, the Ministry of Foreign Affairs registers it centrally and forwards it to the contact person at the ministry concerned. Foreign Affairs also records the ministry's response. Several rounds of queries and answers may be necessary before the Commission closes a case.

We found that there were no government-wide guidelines on the steps ministries should take in an EU Pilot. A manual on legislation and the EU prepared for the ministries (KCBR, 2017) touches upon EU Pilots but is more concerned with questions of confidentiality. Its general thrust is that EU Pilot correspondence may not be made

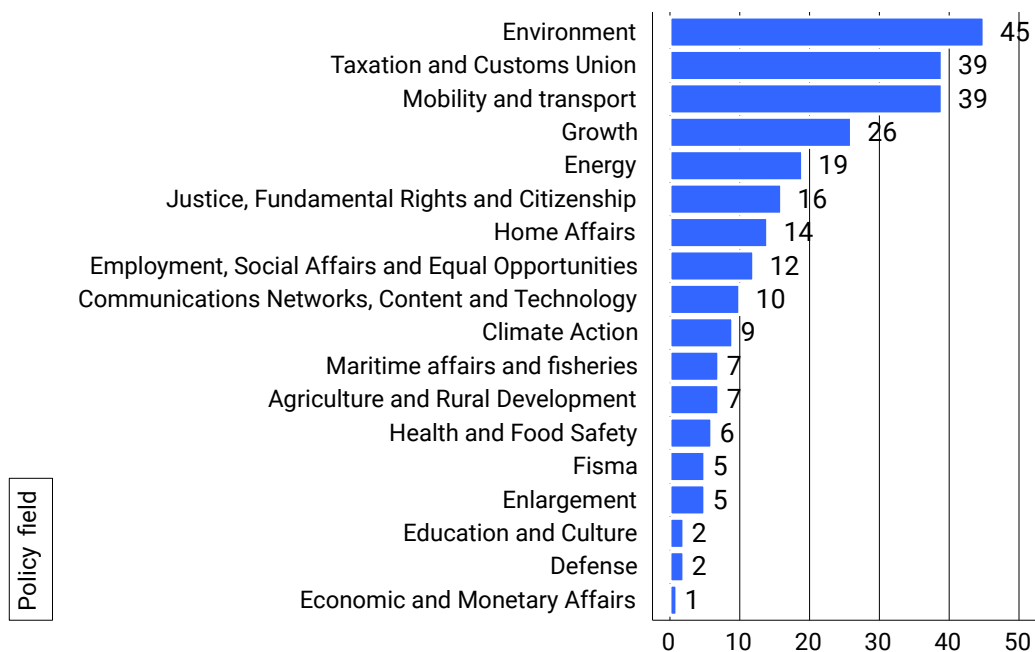
public. Of the ministries investigated for this audit, only the Ministry of I&W had an internal manual for EU Pilots. A manual at the Ministries of EZK and LNV was touches upon the coordination of EU Pilots, among other things.

### EU Pilots in practice

The Ministry of Foreign Affairs provided us with information kept by the Commission on EU Pilots since 2010. Between 2010 and 2020, 264 EU Pilots were brought against the Netherlands, covering nearly all policy fields. The number per policy field is shown in figure 3, based on the classification in the Commission’s database.

**Figure 3** *EU Pilots against the Netherlands 2010-2020 (N=264)*

#### Number of EU Pilots per policy field



Most of the EU Pilots initiated by the Commission (64% of 264 in total) related to 5 policy fields: environment (45), mobility and transport (39), taxation and customs union (39), single market, industry and SMEs (26), and energy (19). Most of these procedures started between 2010 and 2012.

Of the 264 EU Pilots in the audit period, 92 were prompted by complaints made by EU citizens and other stakeholders, chiefly in the policy fields of education, taxation, employment and social affairs. The other 172 cases were initiated by the Commission itself, chiefly in the fields of environment, energy, and mobility and transport.

On average, the procedures took 387 days. There are significant differences in the duration per year and per policy field. Some cases lasted 2 years or longer.

In 67% of the proceedings (177 of the 264 cases), the Commission accepted the Netherlands's response and closed the procedure. We found that informal EU Pilots resolved most cases. The Commission took no further formal steps. In our opinion, EU Pilots have a preventive effect. In 54 of the other 87 cases, however, the Commission thought further treatment was warranted and in 39 of these cases, it initiated an infringement procedure against the Netherlands.<sup>20</sup> Owing to lack of data, it is not known how some EU Pilots were closed. Some cases have not been closed yet. In most of these cases, the Commission has to make a move and the Netherlands cannot be blamed for a lack of cooperation.

**Case study: Renewable energy**

In the renewable energy case, the Commission launched an EU Pilot procedure when it suspected the Netherlands would not meet the national renewable energy targets. The Commission did not follow up with an infringement procedure.



EU Pilot involving the Commission and the Netherlands for failure to meet the target of the Renewable Energy Directive

### What is the problem?

#### The Netherlands will not achieve the renewable energy target



The 2009 directive to promote the use of renewable energy set a target for the member states as a whole to generate at least 20% of their total energy requirement from renewable sources. The binding national target for the Netherlands was 14%. When actual figures were below target, the Commission launched an EU Pilot in 2016 and asked the Netherlands to take additional measures to meet the target.

23-4-2009	Adoption of Renewable Energy Directive
6-2010	Renewable energy action plan sent to Commission
4-7-2016	Commission launches EU Pilot, asking the Netherlands to take additional measures to meet the target
As from 19-8-2019	Evident that Netherlands will not meet the target for 2020; preparation of statistical transfer
19-6-2020	Netherlands concludes statistical transfer agreement with Denmark
20-7-2020	Netherlands informs Commission by letter of agreement with Denmark
20-8-2020	Commission confirms receipt of letter; Commission accepts the solution
25-2-2021	Commission closes EU Pilot
15-12-2021	Netherlands sends final agreement with Denmark to Commission
19-1-2022	Commission confirms that statistical transfer will be included in the percentage of renewable energy for 2020

### How was the case resolved?

The Netherlands took an administrative measure known as statistical transfer. Its shortfall was offset, against payment, by surplus renewable energy generated by Denmark. The Commission probably closed the Pilot procedure in the light of this measure. The measure did not increase the percentage of renewable energy generated by the Netherlands.



When it became clear that the Netherlands would not meet its target, the minister opted for an administrative measure to resolve the problem. It is likely the Commission closed the Pilot on account of this measure. The measure did not increase the proportion of renewable energy generated by the Netherlands.

More information on this case is provided in chapter 2 of the appendix to this report (in Dutch).

### **Information on EU Pilots**

The Netherlands treats all information on the existence and progress of EU Pilots in confidence. Apart from the Commission's database, there are no internal records of the procedures at government level. Of the ministries audited, only I&W and Finance keep internal records of problems implementing EU law, including information on EU Pilots. Their records consistently state that the information is confidential.

The Commission publishes very little information on EU Pilots.<sup>21</sup> What it does publish is posted on the single market scoreboard. This online tool stopped publishing information on individual member states in 2021. In previous years, it had provided information only on the member states' compliance with the 70-day time limit for a first response to an EU Pilot query. According to the Commission, the Netherlands scored slightly under this limit in only 2017 and 2019 (European Commission single market scoreboard, 2013-2020).

### **4.2.2 SOLVIT**

SOLVIT is an informal mechanism the Commission introduced in 2002 to mediate when a citizen or business from one member state has problems in another if, for instance, a public authority is not implementing EU law correctly and a formal procedure has not been initiated.<sup>22</sup> In such cases, citizens and businesses can submit a complaint to SOLVIT. It is used chiefly where there are problems regarding the free movement of people, goods, services and capital.<sup>23</sup> SOLVIT is free of charge and is mainly an online service. Responsibilities for the service are not formally defined. Under the SOLVIT action plan (European Commission, 2017), the Commission coordinates the SOLVIT network in cooperation with the member states.

#### **Organisation**

Every SOLVIT case involves two centres: one in the complainant's member state (the home centre) and one in the member state that has to handle the complaint (the local or lead centre). The home centre forwards a complaint to the lead centre and the lead centre contacts the domestic authority concerned. The lead centre will try to find a solution within 10 weeks.

In the Netherlands, the Ministry of EZK was responsible for SOLVIT during the audit period.<sup>24</sup> 1 or 2 staff members and 2 trainees (master students in European law) staffed the SOLVIT lead centre. In practice, complaints were handled by the trainees under the supervision of a policy officer.

Guidance on how to handle SOLVIT complaints is provided in an internal guidance document and a Commission manual (European Commission, 2020a). The guidance document does not have a clear structure and provides little context or background information for case workers. It refers to several structural and recurrent problems, and notes that the Netherlands receives many SOLVIT complaints about the rejection of visa applications by the Immigration and Naturalisation Service (IND). The IND demands more documents on the purpose and circumstances of an applicant's stay than required under Directive 2004/38/EC. Both the IND and the Commission are aware of this problem. In this respect, the guidance document states that SOLVIT receives many complaints about the IND but the lead centre does not have enough influence to resolve the matter.

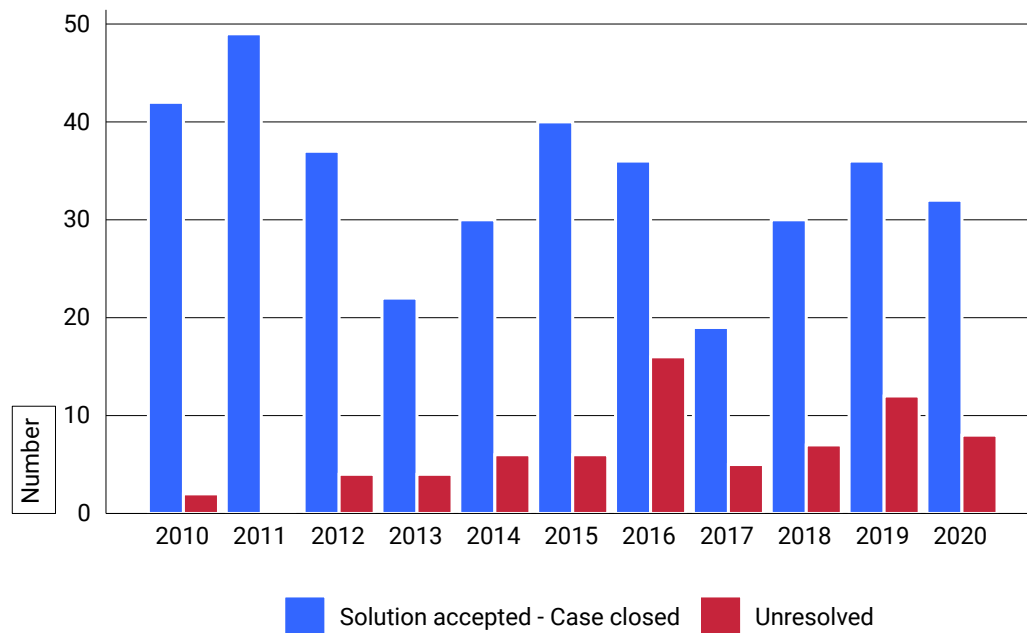
SOLVIT was transferred to the Netherlands Enterprise Agency (RVO), with the Ministry of EZK as the contracting authority, on 1 October 2021. Staff at the RVO was increased to 2.5 FTEs in 2022. Its website names the Netherlands as the SOLVIT home centre chiefly for businesses and cases involving mutual recognition of goods.<sup>25</sup> Such cases represent a small proportion of SOLVIT cases handled by the Netherlands as home centre.<sup>26</sup>

### **SOLVIT in practice**

Figure 4 shows the number of SOLVIT cases per annum between 2010 and 2020 in which the Netherlands was the lead centre and the number that were resolved (solution accepted) or went unresolved (solution not accepted).<sup>27</sup>

**Figure 4** Number of SOLVIT cases in which the Netherlands was the lead centre, 2010-2020 (N = 443)

**Number of cases per annum and status**



Of the 443 SOLVIT cases, 70 remained unresolved. With a resolution rate of 84.2%, the Netherlands does not quite meet the 90% target set by the Commission.<sup>28</sup> It nevertheless shows that the Netherlands benefits from this informal procedure and that it has a preventive effect: if SOLVIT resolves a case, it is not necessary to go to court.

A relatively high number of cases in which the Netherlands was the lead centre (i.e. where complaints were made against a public authority in the Netherlands) concerned social security (203 cases) and the free movement of people (102), followed by recognition of personal qualifications (48) and taxation and customs (30). Most social security cases related to unemployment benefits and the payment of medical expenses and pensions. Most of the SOLVIT cases relating to the free movement of people concerned visa applications.<sup>29</sup>

The Commission’s annual reports do not disclose how many SOLVIT cases in which the Netherlands was the lead centre were submitted by businesses and how many by citizens. Most of the SOLVIT cases received by the Netherlands during the audit period were submitted from the United Kingdom (69), Poland (52) and Germany (38). The complaints made from Poland related mainly to social security and those from the United Kingdom to visa applications.

## Visa application case: complaints submitted to SOLVIT

A relatively high number of SOLVIT complaints the Netherlands received in 2010-2020 concerned visa applications made to the Immigration and Naturalisation Service (IND). They are considered in the following case study.

### Case study

## Visa applications: SOLVIT complaints



SOLVIT cases concerning visa applications made to the IND

### What is the problem?

**The Dutch visa application procedure does not comply with Directive 2004/38/EG**



Citizens from other EU member states submit relatively many complaints via the informal SOLVIT mechanism about the Netherlands' interpretation of Directive 2004/38/EC with regard to short-stay visas. The Commission and the Ministry of EZK recognise that there are systematic problems regarding the IND's handling of visa applications, in part because the IND requests more information than required by the directive.

### How are complaints handled?

Between 2010 and 2020, 67 SOLVIT complaints were made against the Netherlands concerning visa applications. 35 cases have not been resolved. The IND does not have SOLVIT guidelines or work instructions. Cases that are fundamentally the same can be dealt with differently. The IND does not know how many of the 67 case were forwarded to it, does not prepare reports on SOLVIT cases and does not keep registers or archives. Without registers or analyses, the background to complaints cannot be ascertained. The IND does not know why SOLVIT cases remain unresolved.

The Commission maintains that visa applicants may not be asked to provide more information than required by the directive. The Ministry of Foreign Affairs and the IND nevertheless continue to do so. SOLVIT cannot deal with all visa cases if the Netherlands continues its current approach.

SOLVIT is a useful informal mechanism that can help prevent formal legal proceedings. However, its informal character means it can sometimes be ineffective. Decisions in visa cases may therefore wrongly disadvantage citizens of other EU member states.



**Informal EU mechanisms such as SOLVIT can help resolve citizens' problems. But SOLVIT's informal character means it is sometimes ineffective.**

More information on this case is available in chapter 3 of the appendix to this report (in Dutch).



As lead centre, the Netherlands handled SOLVIT cases in slightly less than 66 days on average in 2010-2020. It therefore met the Commission's target of 70 days.

### **Information about SOLVIT**

Information on SOLVIT cases handled by the Netherlands and their outcomes is not made public. The Ministry of EZK has prepared SOLVIT annual reports since 2018, but for internal use only. The Commission's single market scoreboard has included an annual SOLVIT report since 2004 and a country report on the Netherlands since 2012.<sup>30</sup> The scoreboard shows that the resolution rates and handling times for the many SOLVIT cases involving the Netherlands were on target in 2020. It also shows that staff capacity for SOLVIT cases is open to improvement. The scoreboard raises two specific points concerning the Netherlands as lead centre: (1) delays in issuing residence permits for non-EU family members, and (2) unfair conditions and refusal to issue short-stay visas for non-EU family members.

Until 2014, the Minister of EZK was informed internally about the Commission's country reports on SOLVIT cases in the Netherlands. Since 2015, this information has been dealt with by officials at the ministry. Internal reports issued to senior ministry officials invariably note that capacity to handle SOLVIT cases and staff continuity are matters of concern, as trainees perform most of the work. For several years, the reports have also referred to structural problems revealed by SOLVIT cases, especially regarding visa applications. The Commission's internal reports state that the many unresolved visa cases are indicative of a structural problem at the IND, which requests more documents than required under EU rules. Despite frequent contact with the IND on this matter, there is still no solution.

## **4.3 Little insight into other informal EU procedures**

### **4.3.1 Correspondence with the European Commission**

Besides informal EU Pilots, the Commission also uses informal letters to point out possible problems in the member states' implementation of EU law. Letters can be sent at every level, including the highest political level. In the event of a major problem, the Commission can send a 'political letter' to a minister. The letter is first sent to a member state's Permanent Representation to the EU (PR EU) with a request to forward it to the relevant minister.

#### **Case study: COVID-19 flight vouchers**

During the COVID-19 crisis, the Commission sent a political letter on flight vouchers to the Minister of I&W on 14 May 2020.<sup>31</sup> We consider it in the case study below.



European Commission sends recommendations and a political letter because Regulation 261/2004/EC must be implemented without change

### What is the problem?

**Without permission, airlines are issuing flight vouchers to passengers instead of refunding them**



Travel bans imposed on the outbreak of coronavirus in March 2020 seriously disrupted the aviation industry. Under Regulation 261/2004/EC air passengers are entitled to reimbursement, compensation and assistance if flights are cancelled. A ticket must be refunded within 7 days of cancellation. Demand for refunds increased. Without their passengers' agreement, airlines issued vouchers that, contrary to the regulation, would be reimbursed within a year.

### How did the minister respond?

- 18-3-2020 The minister urges the Commission to temporarily amend the regulation. The first amendment proposal follows a day later
- 25-3-2020 The minister instructs the Human Environment and Transport Inspectorate (ILT) not to enforce compliance with the regulation. Letter to the House of Representatives on 30 March
- 18-3 – 4-5-2020 The Netherlands seeks support from other member states for a temporary relaxation of the regulation. 16 member states support the proposal

### What is the final outcome?

- 13/14-5-2020 The Commission advises the member states that the regulation must be implemented without change and sends a political letter. It also decides to provide support to the aviation industry. On 14 May, the minister withdraws her instruction to the ILT not to enforce compliance with the regulation and informs the House that she has done so
- 20-5-2020 The minister sends the ILT a letter withdrawing the instruction not to enforce compliance. The Netherlands decides to seek restoration of compliance



**On the outbreak of the COVID-19 pandemic, the Netherlands decided not to comply with the regulation. The Commission made recommendations and sent a political letter to the Netherlands. This prompted the Netherlands to seek correct compliance with the regulation again.**

More information on this case is available in chapter 4 of the appendix to this report (in Dutch).

### Procedure to handle informal letters

The ministries do not have guidelines on how to handle informal letters from the Commission. The Ministry of J&V is alone in having a short internal procedure for informal contacts with the Commission.

### **Availability of informal letters**

Records are not kept at government level of informal communication with the Commission. This entails informal communication regarding every level of government including the highest political level. On request, the Ministry of Foreign Affairs provided us with one sheet of A4 listing 14 letters that the Commission had sent to Dutch ministries in 2018-2020. These 14 letters were available because the contact person for EU Pilots had received a copy of them. The Ministry of Foreign Affairs also confirmed that every level of the Commission communicated in writing with every level of the government and that no one, at either the Commission or the ministries, kept a record of the correspondence.

With the exception of the Ministry of J&V<sup>32</sup> none of the ministries' in this audit digital information systems could retrieve letters from the Commission on the implementation of EU law – apart from correspondence on EU Pilots and infringement procedures.

### **Information on informal letters**

No public or internal reports are prepared of letters from the Commission to the Netherlands.

## **4.3.2 Informal consultation with the European Commission**

To carry out its tasks, the European Commission collaborates informally with the member states through expert groups,<sup>33</sup> networks and package meetings (see also table 1 in § 2.2). The Commission uses these channels in order to: (a) have member states participate in the preparation of legislative proposals, policy initiatives and the implementation of EU policy, and (b) strengthen coordination and cooperation with member states. Member states can use the expert groups and networks to discuss problems with the Commission and other member states.

### **Organisation of informal consultations**

*Expert groups* are permanent or temporary consultative bodies established to advise the Commission. The stage of policy formulation determines the role of these groups.<sup>34</sup> *Networks* are informal groupings<sup>35</sup> of mainly public authorities sometimes complemented by private parties or NGOs. They are usually set up by the member states, the Commission or a combination of the two. *Package meetings* are informal discussions between the Commission and a member state, held when it is suspected that EU legislation is not being implemented correctly (European Commission, 2020b).

There are no government-wide or ministerial guidelines on whether and how records should be kept of contacts with expert groups and networks or on the outcome of package meetings.

## Participation in informal consultations

We asked the ministries which expert groups and networks their policy departments participated in and what policy fields were discussed in package meetings with the Commission. The information they provided is shown in table 4.

**Table 4** Ministries' participation in expert groups, networks and package meetings, 2010-2020

Ministry	Participation in		
	Expert groups <sup>36</sup>	Networks	Package meetings
Foreign Affairs	No information	No information	No information
EZK	No information	No information	No information
Finance	No records at the ministry as a whole. DGFZ has information on participation in expert groups.	No records	No records
I&W	No records, but reference to high level groups	No records, but reference to European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)	Information on 2 package meetings (in 2017 on EU infringement policy and in 2019 on ERRU regulation)
J&V	No records, but 9 expert groups identified	No records, but 3 networks identified	No information
LNV	No records, but 16 expert groups identified	No information	No information

The ministries could name only a few expert groups and networks. Only file holders know which members of staff take part in which expert groups.

On the whole, little information is available on most forms of informal consultation with the Commission and few records are kept of what is discussed and the outcomes.

We could partially reconstruct the Dutch ministries' participation in *expert groups* using the register kept by the Commission.<sup>37</sup> The information in the register is provided by the members of the expert groups themselves. On request, the Commission provided us with a list of active expert groups and their membership. Dutch ministries, implementing organisations and autonomous administrative authorities are currently represented in 589 expert groups. We could identify the ministries, implementing organisations

and autonomous administrative authorities that were involved in a small number of these expert groups.

With regard to the Commission's *networks*, we found that the EU Law Network discussed problems regarding the implementation of EU law and attempted to find potential solutions. This network can be used in conjunction with other member states to influence the Commission.

# 5.

# Formal EU procedures

## 5.1 Our findings in brief

This chapter looks at the formal procedures between the Netherlands and the European Commission. The infringement procedure is a formal procedure. It can result in a case being referred to the Court of Justice of the European Union (the Court). The Commission uses it when it suspects there has been a possible infringement of EU law that has not been resolved by an informal procedure. We expect the Netherlands to resolve a possible infringement of EU law subject to a formal procedure before it is referred to the Court.

We conclude from the formal procedures the Commission initiated against the Netherlands between 2010 and 2020 that:

- If an informal procedure does not resolve a dispute and the Commission initiates a *formal procedure* against the Netherlands regarding a violation of EU law, the Netherlands loses in most cases and amends its laws, with or without the Court passing judgment.
- In the Commission's opinion, the Netherlands does not meet EU targets for the correct and complete implementation of directives and timely compliance with the Court's decisions.
- The ministers concerned inform parliament only in broad lines about active and closed infringement procedures and cases that have been referred to the Court ('Court cases').
- If the Netherlands is involved in Court cases that are not infringement proceedings, the Court usually finds in its favour. Electric pulse fishing and the European arrest warrant are notable exceptions.

There are no government-wide guidelines on how ministries should respond when the Commission initiates a formal infringement procedure against the Netherlands. The available manuals consider only the confidentiality of the procedures. Government-wide guidelines are available on Court cases.

## 5.2 An infringement procedure usually results in the Netherlands amending its laws (with or without a Court case)

Under article 258 TFEU, the Commission can initiate a formal infringement procedure<sup>38</sup> if it considers that a member state is violating EU law. This could eventually lead the Commission to refer the case to the Court.<sup>39</sup> A full infringement procedure consists of 6 steps. Steps 1 to 4 are known as the *administrative phase* and steps 5 and 6 as the *judicial phase*.

### Steps in an infringement procedure

#### **Administrative phase**

*Step 1: Letter of formal notice from the European Commission.* The Commission sends a letter of formal notice explaining why it suspects a member state is failing to fulfil its obligations under EU law. The member state must respond within 2 months.

*Step 2: Member state's response to formal notice.* The member state responds in writing to the formal notice.

*Step 3: Reasoned opinion from the European Commission.* If a case is not resolved by the formal notice, the member state's response or any subsequent dialogue, the Commission can issue a reasoned opinion, explaining why it considers the country to be violating EU law. The member state must respond within 2 months.

*Step 4: Member state's response to the reasoned opinion.* The member state responds in writing to the reasoned opinion.

#### **Judicial phase (dispute phase)**

*Step 5: European Commission refers the case to the Court.* If steps 1 to 4 do not resolve a dispute to the Commission's satisfaction, the Commission can refer the case to the Court for a decision on whether the member state is fulfilling its obligations or not. If the Court decides it is not, the member state must take all measures necessary to comply with the Court judgment and end the infringement.

*Step 6: European Commission refers the case back to the Court.* If the member state still does not rectify the situation to the Commission's satisfaction, the Commission can refer the case back to the Court. Where a member state is referred back to the Court, the Commission can ask the Court to impose financial penalties in the form of a lump sum and/or a daily penalty payment.

## 5.2.1 Settlement in the administrative phase

### Organisation

If an infringement procedure is brought against the Netherlands, correspondence with the Commission is conducted via an EU system managed on the Dutch side by the Ministry of Foreign Affairs. This ministry also oversees compliance with the response terms set by the Commission. The file holder at the ministry concerned has primary responsibility for coordinating and responding to the Commission's letters (KCBR, 2017). Foreign Affairs is involved only if an expert from the ministry concerned is not involved in the case. The Permanent Representation to the EU monitors the procedure, especially in sensitive cases. Its legal advisers can also attend discussions with the Commission. Acting on instructions from the Dutch government, the Permanent Representation can proactively provide the Commission with information to prevent an infringement procedure or a referral to the Court.

The steps in the infringement procedure are set out in a manual on legislation and the EU (KCBR, 2017). There are no other government-wide guidelines on how ministries should handle infringement procedures. The Ministry of I&W has an internal manual on how to deal with infringement procedures. The Ministry of J&V has a short document with an informal, process-oriented description of the infringement procedure. The Ministries of EZK and LNV have a coordination manual that considers a range of issues, including infringement procedures. The Ministry of Finance has an infringement checklist dating from 2007. The Interministerial Committee on EU law has also issued a memorandum on the confidentiality of infringement procedures (ICER, 2019).

### Infringement procedures in practice

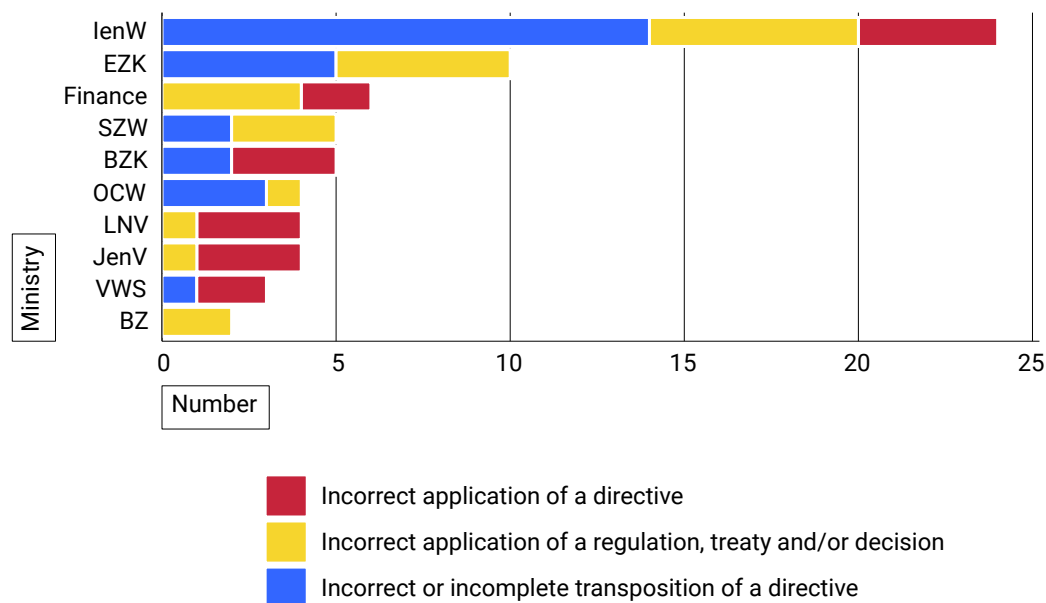
Between 2010 and 2020, the European Commission initiated 210 infringement procedures against the Netherlands.<sup>40</sup> 151 of them were for the account of 4 ministries: I&W (50), EZK (40), Finance (33) and J&V (28). These ministries are responsible for implementing a relatively high number of EU laws. Most infringement procedures were launched in 2010 and 2011. The number of new procedures initiated in each subsequent year was fairly constant, with an upward exception in 2016.



This audit looked at infringement procedures initiated when the Commission considered implementation and/or fulfilment of EU law obligations to be incorrect or incomplete. Figure 5 shows how many of these substantive procedures were active or closed during the audit period. We broke them down into the 3 categories of substantive problems used by the Commission itself.

**Figure 5** Number of infringement procedures started on substantive grounds, 2010-2020 (N=67)

**Most infringement procedures at IenW, mainly because of incorrect or incomplete transposition of a directive**



In total, 67 infringement procedures were brought against the Netherlands on substantive grounds during the audit period. The highest number of cases was initiated against the Ministry of I&W (24), followed by the Ministry of EZK (10). Of the 67 procedures, 18 were initiated by the Commission in response to complaints by citizens and businesses and 39 were started following an informal EU Pilot. From the information received, we could not establish why the other 10 procedures had been initiated.

How quickly did the Netherlands resolve the problems involved in the procedures? We determined the duration of the procedures for each of the 3 categories of substantive problems: incorrect or incomplete transposition of a directive, incorrect application of a directive, and incorrect application of a regulation, treaty and/or decision.<sup>41</sup>

At the end of 2020, 49 of the 67 infringement proceedings had been closed, with an average duration of 26 months. Infringement proceedings for the incorrect or incomplete transposition of a directive (involving mainly the Ministries of BZK, Finance, I&W, J&V, LNV and VWS) lasted longer than average. Some of the 18 proceedings that had not been closed at the end of 2020 had been active for 10 or more years.<sup>42</sup> Information we received from the Commission indicated that the Netherlands was not responsible for the protracted nature of these cases.

We reconstructed the outcome of 38 of the 49 procedures that were closed in 2020. In most of these cases (25 of the 38), the Netherlands complied with the obligation to provide more information (8 times), took additional measures or amended national law (11 times) or the case was referred to the Court before the procedure was closed (6 times).

To gain a better understanding of infringement procedures (origin, development and consequences), we analysed all the documents and information exchanged between the Commission and the Netherlands regarding 16 cases that were closed. Details on these infringement procedures are presented in table 5.

**Table 5** Details on 16 infringement procedures

Infringement number	Ministry involved	EU legislation involved	Substance
2010/2085	ELI / LNV	Articles 218, 288 TFEU	Netherlands voting behaviour during CITES Doha conference
2010/2118	FIN	Article 56 TFEU, article 36 EEA	Reduction of salaries tax and social insurance contributions of employees undertaking certain types of vocational training
2010/2184	I&W	Article 49 TFEU and article 4 (3) TEU in conjunction with article 101 TFEU	Bilateral air services agreement with Russian Federation
2011/2073	I&M	Directive 2009/149	Implementation of directive on calculation of costs of accidents
2012/4090	V&J	Directive 2009/48	Compliance with toy safety provisions
2012/4142	V&J	Article 21 TFEU, Directive 2004/38	Interpretation of national rules on family reunification
2012/4144	EZ	Directives 2002/21 and 2002/19	Amendment of the Media and Telecommunications Act

Infringement number	Ministry involved	EU legislation involved	Substance
2014/2274	I&M / V&J	Directive 2004/49	Transposition of railway safety directive
2016/4014	EZ / LNV	Directive 92/43	Information provided for Commission decision on status of Polder Stein in compliance with Habitat Directive
2016/4060	J&V /EZ	Directive 2006/123	Legislation on au pair agencies and the Services Directive
2017/2062	I&W	Directive 91/157	Compliance with waste reporting obligations
2017/2190	I&W	Directive 2000/30	Compliance with biennial obligation to submit information on commercial vehicles tested
2018/2022	I&W	Directive 2011/70, Euratom	Compliance with EU obligations to manage spent nuclear fuel and radioactive waste
2018/2265	EZK	Decision 2017/899	Compliance with obligations to admit 700 MHz frequency band on 30 June 2020
2018/2275	EZK	Directives 2014/23, 2014/24 and 2014/25	Compliance with provisions of EU public procurement directives
2019/2069	I&W	Implementation regulation 2016/480/EU	Compliance of national sanctions register for road transport offences (ERRU)

We conclude the following from our audit:

- Half of the infringement cases were preceded by an informal EU Pilot. At least 4 of these EU Pilots were in response to a complaint made by a citizen or business.
- In the Commission's opinion, nearly all cases related to non-compliance with obligations arising out of EU directives, regulations or decisions. In 1 case (2010/2085, concerning the Netherlands' voting behaviour at the CITES Doha conference on trade in bluefin tuna), the Commission claimed the Netherlands did not respect the principle of loyal cooperation laid down in the EU Treaty.
- In 10 of the 16 cases, the Netherlands satisfied the Commission's requirements, in 6 cases it did not. In 3 of those 6 cases, the Netherlands ultimately cooperated, even though it disagreed with the Commission's position. In the other 3 cases, the Netherlands disagreed with the Commission and saw no reason to amend national law.
- Of the 16 infringement proceedings investigated, 14 were formally closed. The other 2 had not been closed at the end of 2020. In 12 cases, the Netherlands satisfied the Commission's requirements. In 9 cases it amended relevant national

law. In 3 of these 9 cases the Commission first indicated that it was considering going to the Court (railway safety, 2014/2274; national programme to manage spent nuclear fuel and radioactive waste, 2018/2022; national ERU system, 2019/2069) before the Netherlands decided to satisfy the Commission's requirements.

- The files on 11 of the 16 cases were not complete; documents referred to in the files (e.g. documentation on EU Pilots, letters, emails) were missing.

#### **Case study: Third Driving Licence Directive**

Following the entry into force of the Third Driving Licence Directive, the Commission initiated infringement procedures against the Netherlands, 1 of which was preceded by an EU Pilot, and threatened to take the Netherlands to Court. This is considered in the following case study.

## Case study Third Driving Licence Directive



An EU Pilot concerning the Third Driving Licence Directive was followed by an infringement procedure and the threat of a Court case

### What is the problem?

**The Commission suspects the Netherlands has not complied with the Third Driving Licence Directive**



The Commission has drawn up guidelines for the standardisation of driving licences in the EU. The Third Driving Licence Directive further harmonised rules on driving licences, for instance by introducing a uniform physical driving licence document and harmonising the period of validity.

The Commission considered that the Netherlands did not comply with the directive's provisions for a long time. A total of 6 infringement procedures were brought against it. 1 of the procedures, concerning incorrect transposition (2015), was preceded by an EU Pilot. It involved a substantive difference of opinion between the Netherlands and the Commission on the correct transposition of the directive and there were many delays in amending the law. The Commission decided to go to the Court in February 2017.

17-3-2011 to 21-11-2012	Infringement procedure by the Commission against the Netherlands for non-timely transposition of the directive
16-9-2014	Commission starts EU Pilot for suspected incorrect transposition of the directive
22-10-2015	Commission starts 2nd infringement procedure following an EU Pilot for suspected incorrect transposition
15-2-2017	Commission announces it will bring a Court case against the Netherlands for shortcomings in transposing EU driving licence rules
10-7-2017	Netherlands amends its legislation (effective as from 12 July 2017)
24-1-2019	Commission closes 2nd infringement procedure
8-3-2018 t/m 2-12-2021	Still 4 infringement procedures brought by the Commission against the Netherlands, chiefly for non-timely transposition

### How was the case resolved?

The threat of a Court case spurred the Netherlands on to amend national law in July 2017. The Netherlands was slow to amend the laws and regulations. The amendments were not always communicated to the Commission.



**The Netherlands took a long time to amend national laws and regulations in conformity with the Third Driving Licence Directive. The European Commission therefore initiated several infringement procedures against the Netherlands. In the 2nd infringement procedure (2015), which had been preceded by an EU Pilot, the Netherlands eventually amended national law after the Commission threatened to refer the case to the Court.**

More information on this case study is provided in chapter 5 of the appendix to this report (in Dutch).

Our audit also found that the ministries did not have a complete understanding of the precise causes or background of infringement procedures.

#### **Ministries' understanding of infringement procedures**

Ministries often find that EU law is complicated and open to multiple interpretations, that national laws and regulations are also complicated and that they do not have the capacity to implement and enforce them correctly. Representatives of some ministries observed that over the years the Commission had interpreted national autonomy for the implementation of directives more narrowly.

In some cases, staff at the ministries said the Netherlands' attitude to possible infringements of EU law was 'obstinate'. The cases concerned procedures that were taken all the way to the Court and national policy was amended only when the Court found against the Netherlands. According to some members of staff at the ministries, the cases were shaped by political motives and calculated risks, with senior politicians not always being receptive to advice by officials on possible infringements of EU law. Ministers sometimes tested the limits of what was permissible to protect citizens and business from 'everything coming from Brussels', even though it was known that the Netherlands' actions were very probably incompatible with EU law.

#### **Case study: Water Framework Directive**

The Commissions initiated successive EU Pilots and infringement procedures against the Netherlands over many years following the introduction of the Water Framework Directive in 2000. The following case study shows that this file has not yet been closed.



Several infringement procedures and EU Pilots concerning the Water Framework Directive.

### What is the problem?

**The Commission suspected that the Netherlands did not comply with the Water Framework Directive (WFD) on multiple occasions**



The WFD includes uniform quality standards and obligations that member states must meet in order to improve water quality. The Commission was not always satisfied with the way in which the Netherlands fulfilled the WFD's obligations and initiated several EU Pilots and infringement procedures against it over several years.

2000	Introduction of the Water Framework Directive
2004-2005	1st infringement procedure
2009-2014	2nd infringement procedure
2012-2015	1st EU Pilot
2014-2016	2nd EU Pilot
2015	Court case against Germany with consequences for the Netherlands
2016-2017	3rd EU Pilot
2019-2020	3rd infringement procedure
2020	2 new EU Pilots against the Netherlands

### How was the case resolved?

In some cases, the EU Pilots and infringement procedures were closed with the Netherlands adapting its policy. Changes were made quickly when national interests were not involved. When national interests were at odds with the Commission's requirements, the Netherlands opted for a more elaborate process of European and national coordination. These solutions were often a compromise between European and national interpretations of the WFD.

There still are differences of interpretation between the Commission and the Netherlands. For example, until 2021 the Netherlands understood the WFD's objectives (quality standards for groundwater and surface water) to be result obligations but now considers them to be best effort obligations. According to the Netherlands, measures must be taken on a timely basis to achieve the WFD's objectives. The outcomes can come later. Parliament was informed in April 2022 that the objectives would probably not be achieved in 2027 and that possible exemptions would be obtained. The Commission's thoughts are still not known. In the past, it has repeatedly expressed concerns about the Netherlands' achievement of the objectives by 2027. 2 EU Pilots are currently still active.



**EU Pilots and infringement procedures concerning the WFD were often resolved through informal coordination. The Commission and the Netherlands, however, still have differences of interpretation, for instance regarding the obligations arising out of the WFD.**

More information on this case study is provided in chapter 6 of the appendix to this report (in Dutch).

### **Information on infringement procedures**

The Minister of Foreign Affairs writes to the House of Representatives every three months to inform it about the implementation of EU directives and active and new infringement proceedings brought against the Netherlands.<sup>43</sup> Appendices to the letters summarise the status of active cases, cases that have been dropped and the ministries concerned. They are based on a quarterly internal statement prepared by Foreign Affairs with detailed information on the cases' current status and the steps taken. The House receives only a brief summary of the main points. The Ministries of I&W, J&V and Finance (DG Financial Affairs) prepare their own internal reports on infringement procedures.

The European Commission's website presents information on active and closed infringement procedures,<sup>44</sup> and the single market scoreboard provides information on the member states' performance in infringement procedures to transpose EU directives into national law. The scoreboard shows that the Netherlands had a conformity deficit (the percentage of directives incorrectly transposed) of 1.4% in 2020 and 1.7% in 2021, whereas the Commission's target is 0.5%. The EU average is 1.4%. The Netherlands scores higher than the EU target and recently higher than the EU average. Furthermore, the number of directives the Netherlands has not transposed recently increased. Problematic policy fields in the Netherlands, according to the Commission, are transport, environment and energy (together 63% of active cases).

### **5.2.2 Judicial phase (dispute phase): Court cases**

If the administrative phase of an infringement procedure does not have a satisfactory outcome, the Commission can ask the Court to rule whether a member state has fulfilled its obligations.<sup>45</sup>

#### **Organisation**

If the Commission refers an infringement procedure to the Court, the European Law Division of the Ministry of Foreign Affairs represents the Netherlands in consultation with the ministry concerned. The Ministry of Foreign Affairs is responsible for monitoring the viability of the case from an EU law perspective, the consistency and coherence with the Netherlands' stance in other cases, and the editorial and substantive quality of the Dutch submission. The ministry concerned is expected to provide building blocks for the substantive submission and – in consultation with the Ministry of Foreign Affairs or otherwise – an initial draft of the substantive submission (Foreign Affairs, 2015a).



The Netherlands can be involved in Court cases in 3 ways: as defendant, applicant or intervener. We focus here on the Netherlands' role as defendant. It assumes this role when the Commission refers its suspicions that the Netherlands has not fulfilled its obligations in an active infringement procedure to the Court. The steps the Netherlands can or must take as defendant are set out in a manual issued by ICER-H (2015) and in a manual prepared by the Ministry of Foreign Affairs (2015a). ICER has also issued a manual on the fines and penalty payments that the Court can impose. This manual explains how fines and penalties are calculated and lists the minimum and maximum amounts.<sup>46</sup>

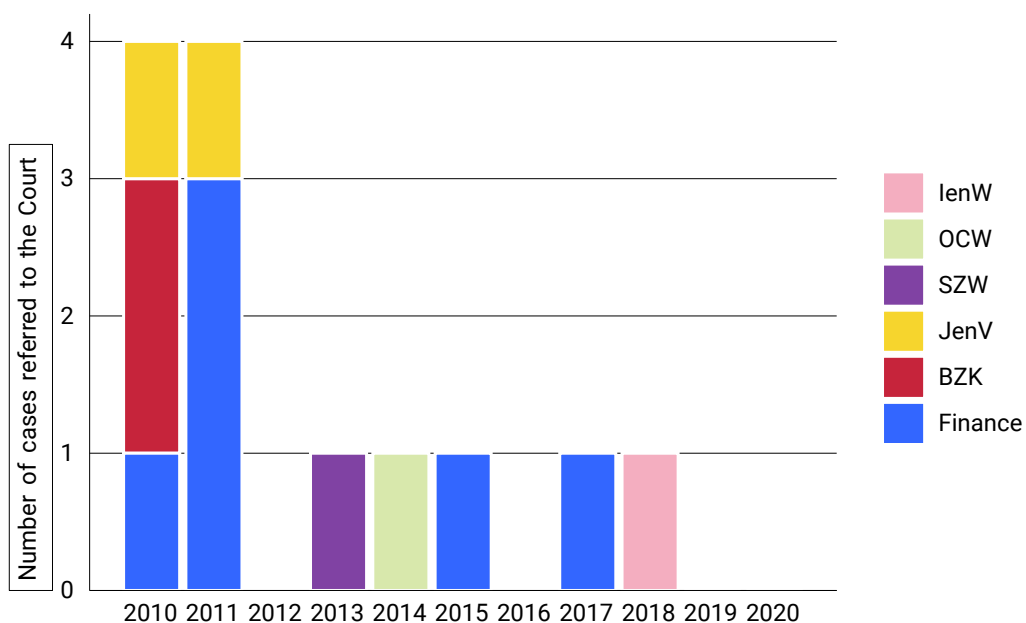
### Infringement Court cases in practice

The Ministry of Foreign Affairs keeps a database with information on Court cases involving the Netherlands. We learned from this information that the Commission decided to initiate 30 Court cases against the Netherlands as part of an infringement procedure between 2010 and 2020.<sup>47</sup> 12 of those 30 cases involved the Ministry of Finance, 5 the Ministry of EZK and a further 5 the Ministry of I&W.

The Court considers a case only if it is referred to it by the Commission. The figure below shows how often, and in respect of which ministries, the Commission initiated a case in 2010-2020.<sup>48</sup>

**Figure 6** Number of cases against the Netherlands referred to the Court (by Ministry, 2010-2020)

**In previous years, less cases against the Netherlands have been referred to the Court**



1 of the 13 cases referred to the Court during the audit period related to the failure to transpose an EU directive on time. A case against the Ministry of I&W was dropped after the ministry informally undertook to amend national law. In 2010-2020, 11 cases were therefore referred to the Court on substantive grounds.<sup>49</sup> The Ministry of Finance had primary responsibility for 5 of those cases.<sup>50</sup> Primary responsibility for the other cases lay with the Ministries of J&V, BZK, I&W, OCW and SZW.<sup>51</sup>

A case involving the Ministry of Finance was ultimately dismissed without the Court handing down a judgment.<sup>52</sup> The Court passed judgment on the Netherlands in 6 of the other 10 cases. This means that the Netherlands had to resolve the violation – non-compliance with EU law – and amend national law. The Netherlands also had to bear the cost of the procedures. 3 of the 6 cases involved the Ministry of Finance, 2 the Ministry of J&V and 1 the Ministry of BZK. Fines and penalty payments were not imposed on the Netherlands in any of these cases.

#### **Case study: residence permit fees for third-country nationals who are long-term residents**

In the case of residence permit fees charged by the Netherlands to third-country nationals who are long-term residents, the Court ruled in 2012 that the Netherlands was violating EU law. The fee system was not fully adapted until 2019. More information is provided below.

## Case study

# Residence permit fees for third-country nationals who are long-term residents



The Court ruled that residence permit fees charged by the Netherlands were too high

### What is the problem?

**The Commission suspected the Netherlands violated the EU directive on the status of third-country nationals who are long-term residents**



The Commission thought the residence permit fees charged by the Netherlands were too high. It therefore initiated an infringement procedure against the Netherlands.

October 2006	Inspraak Orgaan Turken, a Turkish interest group, submitted a complaint to the Commission about the level of residence permit fees the Netherlands charged third-country nationals who are long-term residents
27-6-2008	Infringement procedure initiated
25-10-2010	European Commission refers the case to the Court
26-4-2012	Court judgment on the level of Dutch fees
24-5-2012	State Advocate issues opinion on fees and notes that the Court's judgment has wider implications
1-1-2013	Fees for third-country residents who are long-term residents are lowered
January 2013	Netherlands answers the Commission's questions of end-2012 about measures taken in response to the Court's judgment
23-1-2014	Commission closes the infringement procedure
1-1-2019	The fee system was revised following a further 2 legal procedures

### How was the case resolved?

The infringement procedure culminated in a Court judgment on 26 April 2012. The Court ruled that the excessively high and disproportionate fees the Netherlands charged for residence permits could be an obstacle to the exercise of the rights provided by the directive. In response, the Netherlands lowered the fees charged to third-country nationals who are long-term residents. In most cases, the policy line did not require excessive fees to be refunded.

The Court ruled in 2010 that the fees the Netherlands charged Turkish nationals were too high. After the 2012 judgment on the fees charged to third-country nationals who are long-term residents, it took a further 7 years (and 2 procedures) before the fee system as a whole was brought into line with EU law, even though the State Advocate had warned as early as 2012 that the Court's judgment had wider implications.



**The Netherlands had been charging disproportionately high fees for residence permits for many years. Even after a Court case, it did not revise fees charged for other residence permits until legal proceedings forced it to.**

More information on this case is provided in chapter 7 of the appendix to this report (in Dutch).

### **Information on Court cases**

The Ministry of Foreign Affairs sends the annual reports on the Netherlands representation in Court cases to the House of Representatives.<sup>53</sup> All outcomes of all Court cases are also published on the Court's website.<sup>54</sup> The Commission's single market scoreboard<sup>55</sup> provides information on the compliance time, the time between the Court's judgment and the member state's compliance with it. The Commission has set a target of 18 months. On average, the Netherlands takes 25.9 months to comply and it therefore does not meet the target.

## **5.3 Other Court cases: judgments often agree with Dutch position**

### **5.3.1 Other direct Court cases**

There are also situations in which the Netherlands itself takes the initiative to refer a case to the Court. The Netherlands can go to the Court directly either as applicant or as intervener. In the first case, it appeals against a decision taken by an EU institution, usually the Commission. In the second, it wishes to present its position in an active case involving other parties, such as between another member state and the Commission. The Netherlands can then support 1 of the 2 parties.

### **Other Court cases in practice**

Public sources reveal that the Netherlands was an applicant in 14 cases and intervened in 84 cases between 2010 and 2020. In a clear majority of these cases, the Court agreed with the Netherlands position. (Foreign Affairs, 2010-2020). It can be concluded from an internal database compiled by the Ministry of Foreign Affairs in the period 2015-2020 that most of the 48 applications and interventions in that period related to the EZK, I&W and Finance policy fields.

In 5 of the 6 cases in which the Netherlands was the applicant in this period, it lodged an appeal with the General Court, one of the Court's judicial bodies. The General Court found in its favour in each of these 5 cases. This means that those parts of a regulation that the Netherlands appealed against were declared null and void, that a financial correction already imposed did not have to be made and that aid was not reduced as proposed. In the 6th case, the Netherlands appealed against a decision to ban electric pulse fishing, in which France had supported the Council of Ministers and the European Parliament. The Netherlands lost this case. Electric pulse fishing, in which Dutch fishers had made substantial investments over many years, was subsequently banned; see box below.

### Electric pulse fishing

By way of experiment, the Ministry of LNV provided a grant to equip five Dutch trawlers with electric pulse trawls in 2008. The results were encouraging: less bycatch, less damage to the seabed and far lower fuel consumption. The fishing industry concluded from the experiment that pulse fishing was a good alternative to fishing with a beam trawl.

The ministry then issued 3 tranches of pulse fishing licences: 22 in 2010 (of which 5% experimental), 20 in 2011-2012 (for the purpose of scientific study) and 42 in 2014 (also for the purpose of scientific study).<sup>56</sup> There were already doubts at the time whether the licences were lawful.

The House of Representatives regularly called for more pulse licences to be issued<sup>57</sup> and the State Secretary for LNV complied. The expansion of the Dutch pulse fleet met with great resistance from other EU fishers.<sup>58</sup> French fishers in particular said the new technique caught so many fish that their own trawlers were no longer viable. The Commission began an informal EU Pilot against the Netherlands for non-compliance with EU rules on pulse fishing. The case was closed in 2019 without consequences for the Netherlands. In January 2018, however, the European Parliament had voted for a complete ban on pulse fishing, shortly after environmental agency Bloom had described it as an ecological disaster<sup>59</sup> and had submitted many complaints about Dutch pulse fishing to the European Commission on behalf of French fishers.

On 13 February 2019, the European Parliament, the Council and the Commission reached agreement on a new regulation for the protection of marine ecosystems through technical measures, including a ban on pulse fishing as from 1 July 2021. On 16 April 2019, the ban was ratified by the European Parliament, and the Council agreed to it on 13 June 2019.

On 4 October 2019, the Netherlands appealed against the ban on pulse fishing.<sup>60</sup> The Court found against the Netherlands on 15 April 2021 and the Netherlands had to definitively stop pulse fishing.

### 5.3.2 Preliminary cases

If a national court has doubts about the correct application or interpretation of a particular aspect of EU law, it can or must ask the Court for clarification in a preliminary case.<sup>61</sup> The term 'preliminary' means that the Court's decision precedes a final decision by the national court.

The Court answers preliminary questions by means of a judgment or reasoned order. The national court then applies the clarification to the national dispute (Foreign Affairs, 2020-2020). The preliminary procedure is laid down in article 267 TFEU to guarantee the effective and uniform application of EU law.

#### Organisation

National parties, member states and EU institutions can take part in a preliminary procedure by making their position on the questions known to the Court. Participation in a preliminary procedure is therefore not reserved exclusively to the parties directly involved in a national dispute. The ministries themselves decide whether the Netherlands takes part in a particular case.

In principle, the Dutch government always comments on preliminary cases initiated by Dutch courts. The Netherlands participates in such cases mainly because it expects there may be consequences for Dutch laws, regulations or policy.<sup>62</sup> The Ministries of J&V, EZK, LNV, I&W and Finance (DG Fiscal Affairs) have procedures for the coordination of preliminary cases.

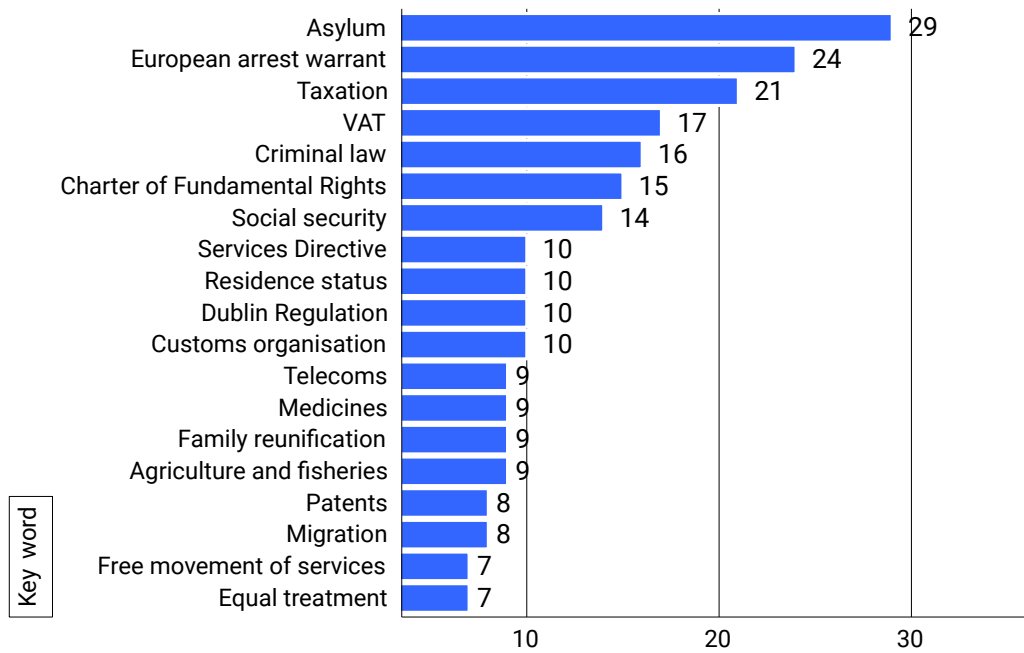
#### Preliminary cases in practice

Public sources indicate that a total of 4,953 preliminary cases were brought before the Court between 2010 and 2020. The Netherlands was involved in 605 of these cases: in 260 cases following a referral by a Dutch court, and in the other cases following a referral by a court in another member state. In a clear majority of the cases, the Court agreed with the Netherlands' point of view (Foreign Affairs, 2010-2020).

The Ministry of Foreign Affairs has an internal database on Court cases in 2015-2020. It contains information on 338 preliminary cases in which the Netherlands participated. Of these 338 cases, 141 (nearly 42%) were initiated by a Dutch court. Figure 7 shows the policy fields that featured most often in Foreign Affairs' database. Some cases related to more than 1 policy field.

**Figure 7** Policy fields in preliminary cases involving the Netherlands, 2015-2020

**Key terms linked to preliminary cases**



The ministries most frequently involved in preliminary cases are J&V, EZK, Finance and I&W.

**Case study: European arrest warrant**

The Court has delivered many preliminary judgments on the European arrest warrant since its introduction in 2002. The Netherlands implemented the Framework Decision incorrectly, as shown by the following case study.

## Case study European arrest warrant



Court judgments in preliminary cases lead to a change in the law and the European Commission opens an infringement procedure

### What is the problem?



**It follows from many of the Court's preliminary judgments that the Netherlands implemented the Framework Decision on the European arrest warrant (EAW) incorrectly in the Surrender of Persons Act (OLW)**

The European Commission also thinks the Netherlands incorrectly implemented the Framework Decision and therefore initiated an infringement procedure.

13-6-2002	Adoption of Framework Decision on European arrest warrant (Framework Decision) by the Justice and Home Affairs Council	
24-1-2006	1st Commission report on the implementation of the Framework Decision	
11-7-2007	2nd Commission report on the implementation of the Framework Decision	2007-2022
January 2009	Report on 4th round of mutual evaluations of the Netherlands submitted to the House on 16 February 2009	More than 60 preliminary judgments by the Court about the Framework Decision
As from 7-12-2018	Commission investigates implementation of the Framework Decision; infringement proceedings started where necessary	
10 July 2019	Amendment of Surrender of Persons Act in conformity with case law of the Court (effective as of 13 July 2019); emergency legislation	
2-7-2020	4th Commission report on implementation of the Framework Decision	
3-3-2021	Amendment of the Surrender of Persons Act in conformity with case law of the Court (effective as of 21 March 2021) re-implementation	
9-6-2021	European Commission opens infringement procedure for incorrect transposition of Framework Decision	
The present	The EAW file has not been closed; preliminary questions are still being asked at the Court and the infringement procedure is still active	

### How is the case resolved?

The OLW was amended by means of emergency legislation in 2019 and a comprehensive legislative amendment (re-implementation) of the OLW followed in March 2021. The OLW was amended in conformity with the Court's judgments in 2013-2020. According to the Commission, the amendments were inadequate and it opened an infringement procedure.



**The Netherlands waited a long time before changing the law and risked an infringement procedure. Furthermore, the Netherlands could probably have foreseen that the amendments were insufficient to avoid an infringement procedure.**

More information on this case is provided in chapter 8 of the appendix to this report (in Dutch).



**Case study: Integrated Approach to Nitrogen (PAS)**

Another well-known preliminary case with major consequences for the Netherlands concerns the Integrated Approach to Nitrogen (PAS). This 2017 preliminary case had a long history. It ultimately led to the Council of State ruling in 2019 that the PAS did not comply with the Habitat Directive. Its subsequent termination had serious social and financial consequences for the Netherlands. Our case study provides an insight into this case.

## Case study Integrated Approach to Nitrogen (PAS)



Preliminary questions put to the Court led to the Council of State (RvS) deciding that the Integrated Approach to Nitrogen (PAS) did not comply with the Habitat Directive

### What is the problem?



#### The RvS concludes that the PAS violates the Habitat Directive

The RvS put preliminary questions about the PAS to the Court in 2017. In the Court's opinion, the PAS complies with the Habitat Directive only if it meets strict conditions. The Court requires planned measures to achieve agreed results. The RvS concludes in May 2019 that the PAS does not meet the Court's conditions and therefore puts an end to it. Infrastructure, housing, farming and industrial projects come to a standstill. The government, other public authorities, agricultural, horticultural and environmental organisations have been looking for solutions since 2019.

- 2009 – 2010 Several warnings that the draft Crisis and Recovery Act partially violates EU law, including the Habitat Directive
- 31-3-2010 Crisis and Recovery Act comes into force; instruction to adopt the PAS anchored in the Nature Conservancy Act 1998
- 1-6-2010 Legal taskforce notes that allowing a higher nitrogen emission is formulated so generously it possibly violates EU law
- 13-10-2010 Unlike the European Commission, the taskforce thinks an increase in nitrogen deposition is permitted
- 31-1-2011 European Commission says in talks with the ministry that socioeconomic considerations may be taken into account but warns that deterioration of habitat quality and stagnation of conservancy goals are not permitted
- 11-4-2012 RvS provides information on draft PAS: EU law does not prevent an integrated approach as long as the Habitat Directive's conditions are satisfied
- 12-7-2012 Advisory committee on environmental impact reports: draft PAS seems to be based on expected nature restoration, not on guaranteed nature restoration, lack of certainty about nature restoration
- 15-8-2012 State secretary: enough certainty about nature restoration that economic growth is allowed in anticipation of it
- 18-3-2014 Agreement signed between state secretary and agriculture sector; economic potential (extra nitrogen) for farmers, who must observe subsequent ammonia reduction agreements. Agreements are unenforceable
- 21-10-2014 Netherlands Environmental Assessment Agency publishes critical report on the PAS: real danger that required nature restoration will not be achieved
- 1-5-2015 PAS becomes effective
- 17-5-2017 RvS puts preliminary questions about the PAS to the Court
- 7-11-2018 Preliminary judgment by the Court: PAS complies with Habitat Directive only if it meets strict conditions
- 29-5-2019 RvS rules that PAS does not meet the Court's conditions and terminates it

### How did the problem arise?

In the wake of the 2008-2009 economic crisis, the Netherlands sought ways to stimulate economic recovery, in part through the PAS. During the drafting of the PAS, the minister and the House of Representatives were warned from several quarters of possible violation of EU law. Unenforceable agreements were also made with farmers to stimulate the economy. There was no guarantee that nature restoration goals would be met.



The PAS was underpinned chiefly by economic interests. Warnings that it might violate EU nature conservancy law were received from various quarters at an early stage.

More information on this case is provided in chapter 9 of the appendix to this report (in Dutch).

**Case: Sofina judgment**

The Sofina judgment on dividend tax payable by non-resident taxpayers is an example of a preliminary case in which the Court answered questions raised by another member state, in this case France. This case led to the Netherlands amending its own tax laws. As explained in the box below.



A preliminary question put to the Court by a French court has consequences for the Netherlands.

### What is the problem?



**In a preliminary judgment on the Sofina case of 22 November 2018, the Court ruled that France was violating EU law**

The Court decided there could be no distinction between resident companies and non-resident companies with regard to the payment of dividend tax in France. Such a distinction would, the Court ruled, be incompatible with the free movement of capital in the EU. Dutch dividend tax makes no distinction between resident and non-resident investors but, according to the Ministry of Finance, Dutch tax law can lead to materially the same outcome as French law. Resident taxpayers can be refunded withheld dividend tax without limit or set it off against corporation tax payable. The implications of the judgment for the Dutch tax system were uncertain.

- **20-9-2017** French *Conseil d'Etat* asks the Court 3 preliminary questions about French dividend taxation's possible violation of the free movement of capital (Sofina case)
- **31-10-2017** Foreign Affairs asks Finance whether Dutch participation is advisable
- **22-12-2017** Dutch government makes a written submission
- **22-11-2018** Court delivers judgment in Sofina case
- **20-2-2019 to 14-5-2020** Ministry of Finance considers litigation to determine whether the Sofina judgment also has consequences for the Netherlands
- **15-9-2020** Announcement of legislative amendment and policy decision on Budget Day prompted by Sofina judgment
- **26-11-2020** Sofina policy decision includes provisions for non-resident taxpayers
- **21-9-2021** Amendment of several tax laws and other legislation (Tax Plan 2022): resident investors can no longer be refunded dividend tax or tax on games of chance without limit
- **1-1-2022** New law applicable and Sofina policy decision is consequently no longer materially applicable

### How was the case resolved?

The Ministry of Finance decided to take part in the preliminary Sofina case. The Netherlands made written submissions to the Court, arguing that France was not violating EU law. The Court decided otherwise. The options open to the Netherlands were then identified. Although the Ministry of Finance considered litigation in order to clarify whether the Sofina case had national consequences, it was decided to amend Dutch law rather than pursue litigation.



**A Court judgment in a French tax case had possible consequences for the Dutch tax system. The Netherlands accordingly proactively adapted its policy.**

More information on this case is provided in chapter 10 of the appendix to this report (in Dutch).

# 6. National procedures for complaints about compliance with EU law

## 6.1 Our findings in brief

This chapter looks at national procedures available to ministries when complaints are made about the implementation of EU law. We expect the Netherlands to resolve possible infringements of EU law through informal and formal national procedures and so avoid court cases wherever possible.

We found that the ministries had little insight into the national procedures available to resolve possible infringements of EU law. Most ministries did not know how many complaints were made about the implementation of EU law each year or how they were dealt with. This lack of insight is due to the absence of records on complaint procedures. The ministries also do not have dedicated procedures to deal with complaints or problems concerning the implementation of EU law.

## 6.2 Little insight into national procedures

### 6.2.1 Formal complaints and citizen letters

Citizens in the Netherlands can submit an official complaint about a public authority directly to the authority itself – also if the complaint relates to the implementation of EU law.<sup>63</sup> The ministries' websites state that complaints can be submitted only on the grounds given in chapter 9 of the General Administrative Law Act (AWB) (complaints about the way in which an administrative body has acted towards a person or third party in a particular situation).<sup>64</sup>

Alternatively, citizens can submit a complaint about a public authority's implementation of EU law by writing to a ministry. Every written document a public authority receives from a citizen is referred to as a citizen letter,<sup>65</sup> regardless of its form (letter, email or other medium). Moreover, the term 'citizen' embraces more than just an individual member of the public. Groups of citizens and organisations can also submit letters. These letters are handled in accordance with the procedures laid down in the AWB.

## **6.2.2 Complaints handling at the ministries**

### **Process descriptions and or manuals**

Our audit found that 4 ministries– Foreign Affairs, Finance, I&W and J&V – did not have process descriptions of how to handle standard complaints regarding the implementation of EU law. The Ministries of EZK and LNV, which formed a single ministry for most of the audit period, had a general complaints handling procedure within the meaning of chapter 9 of the AWB, but it does not refer to substantive complaints about national or EU policy. With a rare exception, the ministries do not have procedures to resolve possible EU-related problems.

### **Complaints handling and citizen letters in practice**

On request, 4 ministries (Foreign Affairs, EZK, I&W and LNV) informed us that between 2010 and 2020 they had received no letters complaining about the implementation of EU law and that they therefore could not retrieve them from their information systems. The Ministry of I&W received nearly 20,000 letters in total between 2010 and 2020. At least 52 of them concerned the Netherlands' implementation of EU directives, 18 the Netherlands' implementation of EU regulations and 50 referred to EU-related matters more generally. This is a small proportion of the 20,000 letters in total. Whether anything was done with the letters cannot be determined from the ministry's data.

The Ministry of J&V provided a number of emails from citizens with EU-related complaints. Some of them noted that the ministry's response was concise and substantive, and contained additional information for the complainant.

The Ministry of Finance provided more detailed information on possible EU-related complaints made by citizens between 2016 and 2020. The Financial Markets Directorate and DG Fiscal Affairs provided details on the complaints and explained how they had been handled: a brief substantive reply to the person making the complaint, and in two cases reference to the amendment of a bill or law in response to the complaint.

We conclude from the available information that ministers have limited insight into problems in the implementation of EU law and how they are handled. A ministry-wide

solution could prevent citizens' complaints reaching the European Commission, where they could lead to an EU Pilot or even a formal infringement procedure against the Netherlands.

We also found that ministries often received letters centrally and recorded them thematically without using EU-specific search terms. There is therefore no insight into the number and nature of complaints about the implementation of EU law across the years.

### **Information on citizen letters**

The Ministries of EZK, L&W and LNV refer in their annual reports to the number of citizen letters received, classifying them as objections (within the meaning of the AWB), written complaints and other letters and emails.<sup>66</sup> It cannot be seen from the statements received how many letters concerned EU law.

# 7.

# Evaluations and improvements by the ministries

## 7.1 Our findings in brief

This chapter looks at the ministries' evaluations of infringement procedures and any improvements they make to prevent future procedures. We expect the Netherlands will want to learn from the procedures and will therefore carry out regular evaluations and make improvements where necessary.

We found that very few government-wide or ministerial studies or evaluations of the incorrect implementation of EU law and any resultant disputes had been carried out between 2010 and 2020. No information was available on improvements prompted by the studies and evaluations. In so far as lessons are learned from possible violations of EU law and their resolution, they are learned informally, chiefly in discussions between file holders. Lessons are learned mainly from technical files and less from substantive and political files.

## 7.2 Few studies of EU law implementation and compliance

We asked how many internal or external studies and evaluations of EU law implementation and compliance and of resultant disputes were available at the ministries. The resultant picture was limited and incomplete.<sup>67</sup> We conclude that ministries carry out few studies of the problems that arise when implementing EU law. When performing our case studies, we came across some internal and external evaluations that the ministries had not provided to us. Berenschot & BügelHajema (2020), for example, had carried out an external evaluation of the PAS for the Ministry of LNV.



Because our request for information produced so little, we carried out our own analysis of policy reviews and interministerial policy studies (IBOs) conducted between 2010 and 2020.<sup>68</sup> We based the analysis on a central government list of completed and planned ministerial policy evaluations.<sup>69</sup> Our findings are summarised below.

- Between 2010 and 2020 central government carried out 5 IBOs of policy fields with an apparent EU component.<sup>70</sup> The Ministries of EZK, Finance and I&W (and their predecessors) were involved in most of these government-wide studies. Of the 5 IBOs, 4 considered the implementation of EU law. Only an IBO of air quality policy considered implementation problems and lessons learned by the Netherlands.
- Between 2010 and 2020, central government carried out 39 policy reviews that possibly considered EU law. We found 25 reports on the reviews, including: 10 on I&W's policy field, 5 on EZK's and 5 on Finance's. Most of these policy reviews considered fulfilment of EU obligations. There was virtually no consideration of the problems experienced by citizens and businesses due to the implementation of EU law or of any lessons learned by the ministries. Only a 2019 policy review of agriculture, fishery and food chains considered in passing the problems experienced by citizens and businesses owing to the Netherlands' implementation of EU policy (SEO, 2019). One of its findings was that EU regulations imposed a high supervisory burden on implementing organisations and a high administrative burden on farmers. It also noted that many farmers consider EU law as complex and contradictory which hold back innovation.

### 7.3 No structural improvement processes

Our audit found that the ministries did not have information on improvements prompted by evaluations of the implementation of EU law.

The Ministry of I&W keeps a summary of 10 EU Pilots concerning the environment, transport and energy initiated between 2011 and 2015. On the Pilots' completion, the European Commission asked the ministry to complete an evaluation form. This was not compulsory. I&W did not receive any further requests for evaluations after 2015.

Our audit also revealed that ministerial staff did not learn lasting lessons from possible violations of EU law and any resultant disputes. In practice, file holders discuss the strengths and weaknesses of policy implementation with each other on an ad hoc and informal basis following, for instance, an EU Pilot or infringement procedure. Government-wide lessons are sometimes discussed by ICER working groups. According to ministerial staff, lessons are learned chiefly from technical files,

less from substantive or politically-sensitive files. Political and administrative cases sometimes have to be referred to the Court before the minister takes substantive measures.

# 8.

# Conclusions

This chapter presents conclusions first on our government-wide audit and then on our case studies.

## **Government-wide conclusions**

The Netherlands is obliged to comply with EU law. We therefore expect the Dutch government to have knowledge of, insight in and an understanding of formal and informal procedures for compliance with EU law. It is important that both the government and the House of Representatives not only know the status of compliance with EU law but also appreciate the short and long-term legal and administrative risks and potential financial and social consequences. This information helps ministers make better long-term decisions and improves parliamentary oversight of government.

## **EU law: procedures and compliance**

Informal procedures initiated by the European Commission to discuss disputes with the Netherlands (such as the EU Pilot) often lead to a satisfactory outcome and prevent the Commission from initiating a formal legal procedure. If the Commission and the minister concerned are unable to settle a dispute informally, the Commission can decide to open a formal infringement procedure against the Netherlands. In most cases, the Netherlands then amends its laws, sometimes in response to a judgment delivered by the Court of Justice. The Netherlands can also be involved in a Court case that is not part of an infringement procedure. It can, for instance, initiate a case itself and a court can ask the Court of Justice for clarification of EU law. In these cases, the Court's ruling is usually in line with the Dutch point of view.

### **Coordination and alignment**

*In theory*, the government's consultation structures provide many opportunities for coordination and alignment of compliance with EU law. In practice, the ministries coordinate their stance and cooperate with each other only if protracted proceedings do not settle a dispute and the Commission refers a case to the Court. In these instances coordination and alignment are focused mostly on the procedural aspects instead of substantive coordination. There is no substantive coordination or alignment among the ministries regarding compliance or the financial and other risks to society of possible violation of EU law.

### **Learning from procedures**

The ministries rarely evaluate how violations of EU law come about or how they are resolved after intervention by the Commission or the ministries. Reflection on closed cases is usually oral, ad hoc and by individual file holders.

Thus, ministries do not learn in a structured way from earlier cases.

We also conclude that ministers in general have *little information* on the problems experienced by citizens and businesses due to the incorrect implementation of EU law. Ministries do not systematically collect information on informal procedures other than the EU Pilot. The information available on complaints received, notifications of possible violations of EU law and how they are handled is limited to the facts that are required by the Commission. It is not known whether and how ministries handle such complaints and notifications, or whether the underlying problem is resolved. There are few government-wide or ministerial documents (such as manuals) on how to respond to possible violations of EU law.

### **Conclusions on the case studies**

We studied 9 cases to gain an understanding of specific problems in the Netherlands' compliance with EU law. Each case concerned a specific problem and procedure that had arisen in practice. The 9 cases did not cover all conceivable situations and did not paint a fully representative picture. We nevertheless drew the following conclusions from them.

- *Long proceedings*

In 6 of the 9 cases, the procedure took a long time to complete, sometimes more than 10 years (e.g. the Water Framework Directive case). There is often a succession of informal EU Pilots and formal infringement procedures, sometimes leading to a Court case (e.g. Third Driving Licence Directive, residence permit fees, Water Framework Directive cases) and/or many preliminary decisions by the Court (e.g. the European arrest warrant case). In some cases, however, the Netherlands acts

proactively to end possible violations of EU law rather than wait for the Commission to initiate a procedure (as in the Sofina case).

- *Informal procedures are useful*

Informal procedures to resolve possible violations of EU law can be useful to prevent the initiation of formal infringement procedures. The informal nature of such procedures, however, can prolong non-compliance with EU law.

- *Differences of opinion*

In some cases, ministers test – or even breach – the limits of what is permitted under EU law (e.g. the residence permit fees, Water Framework Directive, Integrated Approach to Nitrogen, COVID-19 flight vouchers cases). There is no substantive coordination or alignment of such cases.

- *Potentially far-reaching consequences*

The Netherlands loses most of the procedures initiated by the Commission and the minister concerned then amends Dutch law. In extreme cases, procedures for the possible violation of EU law can have far-reaching social consequences (e.g. the Integrated Approach to Nitrogen case).

- *Achieving policy objectives is not always the goal*

In some informal procedures, the Netherlands deliberately opts for a short-term fix that only partially revises national policy, not structurally. Such solutions may close a procedure initiated by the Commission but do not achieve the policy objectives (e.g. the renewable energy case).

### **Final comment**

Every member state will seek to protect its own interests when new EU laws are negotiated. When adopted and (if necessary) transposed into national legislation, EU law becomes part of the European and national legal order. The Netherlands is then obliged to comply with it. The Commission's single market scoreboard shows that the Netherlands holds a middle position regarding compliance with EU law.

In disputes with significant societal and/or financial risks, an assessment with contrary expertise is often important. The Interministerial Committee on European Law (ICER) could play a role in this. This can reduce the risk of silo thinking at the ministries and can help prevent the Commission initiating new procedures against the Netherlands. It can also help prevent disputes lasting longer than necessary. Finally, urgent problems, such as water quality or nitrogen deposition, would not be unnecessarily prolonged and a further increase in the cost to society would be avoided.

# 9.

# Response of the government and the Court of Audit's afterword

The minister of Foreign Affairs responded to a draft of this report on 20 April 2023, also on behalf of the ministers of Economic Affairs and Climate Policy; Finance; Infrastructure and Water Management; Agriculture, Nature and Food Quality; and for Legal Protection. The response is summarised below. The complete response (in Dutch) has been published on [www.rekenkamer.nl](http://www.rekenkamer.nl). We close this chapter with our afterword.

## 9.1 Response of the government

With regard to *coordination and alignment*, the minister observes that owing to the complexity and wide range of EU law, responsibility at central government level is invested with the ministries responsible for policy. Government-wide coordination is therefore principally procedural in nature. Substantive interministerial consultation on cross-sector issues, dilemmas and problems, according to the minister, takes place both within ICER and on an ad hoc basis.

With regard to *EU law procedures and compliance*, the minister shares our view on the importance of informal procedures to resolve possible compliance disputes quickly. He also agrees with the report's emphasis on the importance of knowledge of and insight into the informal and formal procedures in place to enforce compliance with EU law. He notes that the European Commission is studying avenues to make the procedures and information concerning the member states' possible infringement of EU law more transparent and clearer. He also points out that the example of buffer strips given in the Executive Summary is not appropriate, as we did not investigate that case.

Regarding *lessons learned from completed procedures*, we rightly note according to the minister that the origin and resolution of EU law disputes are not systematically evaluated. This is due in part to the great variety of EU laws. In his opinion, our report provides no evidence to suggest that formal systematic evaluation would help prevent and resolve possible infringements of EU law. However, he recognises the importance of regular interministerial exchange of experiences and reflection on specific cases.

The minister has doubts about our conclusion that the ministries have *little information or documentation* about the problems citizens and businesses encounter owing to the incorrect implementation of EU law. He admits that citizens and businesses' complaints about EU law tend not to be classified separately. However, this does not mean they are not registered. According to the minister, complaints are handled in conformity with applicable agreements but are not available to the Court of Audit as separate "information".

The minister shares the conclusions on *our case studies* regarding the importance of joint consultation on urgent matters that have an EU dimension. This requires not only a contradictory, legal opinion from the civil service, but also solutions to complex challenges that are both legally feasible and also socially and financially feasible and practicable. Existing consultation structures such as ICER can, according to the minister, strengthen interministerial organisational linkages at both substantive and procedural level.

Finally, the minister accepts the importance of identifying possible implementation problems at an early stage, i.e. during assessment of new EU legislative proposals. The consequences for implementation should therefore be a fixed part of the assessment of new Commission proposals (BNC). With the intended legal embedding of EU information for the States General, the government is seeking to share such information with the States General as quickly and completely as possible.

## 9.2 Court of Audit's afterword

We conclude that the minister says he shares several of our conclusions and acknowledges that our comments are justified. Yet he does not attach concrete actions to his words. The minister says, for example, that he agrees with our view on the importance of ministries jointly discussing urgent matters that have an EU dimension, for instance within ICER. He also refers to the importance of regular interministerial exchange of experiences and reflection on specific cases. At the same time, he notes that owing to the diversity of issues, responsibility for specific

policy matters lies with the responsible ministers, and government-wide coordination will therefore remain principally procedural in nature. This was also evident from our audit.

It seems that urgent questions with consequential societal and/or financial risks to the Netherlands require more than just procedural coordination. We think substantive interministerial consultation and contrary opinions are necessary. They would help prevent procedures lasting longer than necessary and avoid escalation of the societal consequences and costs. We will follow how the government deals with these matters in the near future with interest. Many issues that are currently at play, such as the nitrogen problem and the quality of surface waters, have an EU dimension.



# Attachments

## Appendix 1 Terms, definitions and abbreviations

### Terms and definitions

Term	Definition
Citizen letter	Every written notification that a public authority receives from a citizen.
Council of the European Union	Together with the European Parliament, the most important decision-making institution of the EU. It is a single legal entity but meets in 10 configurations depending on the matter under discussion. It is made up of representative ministers from each member state.
Court of Justice of the European Union	The highest judicial authority of the EU. It oversees the uniform interpretation and application of EU law and compliance with it in cooperation with the member states' national courts.
Decision	Legal instrument of the EU. A decision is binding in its entirety. If the addressee is named, it is binding only on the addressee.
Direct cases	Cases in which the Netherlands (or another member state) appeals against a decision by an EU institution or intervenes in a case brought by an EU institution against another member state.
Directive	EU legislative instrument that is binding, as to the result to be achieved, upon each member state to which it is addressed but leaves the choice of forms and methods to national authorities.
EU law	All treaties concerning the establishment and functioning of the EU and all binding legal acts, such as regulations, directives and decisions, in force in the EU.

Term	Definition
EU Pilot	Informal consultation mechanism between the Commission and a member state to discuss possible violations of EU law. Usually precedes an infringement procedure in order to prevent one. Starts following a complaint by a citizen or business to the European Commission or on the Commission's own initiative.
European Commission	The executive arm of the European Union. Among other things, it makes legislative proposals, oversees the EU budget and enforces EU law.
European Commission letters	Letters sent by various levels of the European Commission to various levels of the ministries concerning problems with the implementation of EU law that are not subject to active infringement procedures or EU Pilots.
European Council	EU institution that defines the EU's overall political direction and priorities. It consists of the member states' heads of state and government, the European Council president and the president of the European Commission.
Expert groups and networks	The Commission can set up expert groups to advise it on the implementation of EU law. To improve cooperation, it can set up informal networks of representatives of the member states and other stakeholders responsible for implementing particular EU laws.
Framework decision	A framework decision is no longer recognised in the TFEU as a legislative instrument. It was previously part of the third pillar of freedom, security and justice. Framework decisions were used to harmonise the member states' laws. Given the implementation obligation at the time and their current material effect, they can still be relevant.
Implementation	All national legal measures taken to implement EU law.
Infringement procedure (also: infraction procedure)	Where an EU member state does not transpose a directive on time, in full and/or correctly into national law or does not resolve a suspected violation of EU law, the European Commission can initiate a formal infringement procedure. The procedure follows a series of steps laid down in the TFEU and can ultimately lead to a judgment by the Court of Justice (with potential financial sanctions).
Judgment	Ruling by the Court of Justice of the European Union.
Package meeting	Informal meeting between a Commission DG and a line ministry to discuss problems with compliance with EU law, such as transposition difficulties, active infringements and EU Pilot files.
Policy evaluation	A study of the efficiency and effectiveness of policy.
Preliminary question	Where there is uncertainty regarding the application or interpretation of a provision of EU law, a national court can (or must) ask the Court of Justice for clarification. The Court of Justice will answer the question and the national court will deliver a judgment based on the Court of Justice's clarification. The Court of Justice's clarification is binding on the national court.

Term	Definition
Regulation	EU legal instrument of general application that is binding in its entirety and directly applicable in all member states.
Single market scoreboard	Scoreboard of the European Commission showing the 27 member states' performance in informal and formal EU procedures.
SOLVIT	Informal single market mechanism of the European Commission; if a citizen or business submits a complaint about the application of EU law, it is handled by a national SOLVIT centre.
Union loyalty	Key criterion for this audit. The Netherlands is obliged to take measures to ensure compliance with the obligations arising out of the Treaties or acts of EU institutions, and desist from all measures that endanger achievement of the Union's objectives.
Violation	Problem with the implementation of EU law, non-compliance with EU law.

## Abbreviations

Term	Definition
ABJZ	Administrative and Legal Affairs Department (I&W)
AFP	Tax Policy Directorate (Finance)
ARES	Advanced Records system of the European Commission for all ordinary communication
AWB	General Administrative Law Act
AZ	Ministry of General Affairs
BNC	Working Group for the Assessment of New Commission Proposals
BZ	Ministry of Foreign Affairs
BZK	Ministry of the Interior and Kingdom Relations
CHW	Crisis and Recovery Act
CoCo	Coordination Committee for European Integration and Association Issues
Commissie M.E.R.	Commission for Environmental Assessment
COREPER	Committee of Permanent Representatives
CSO	Central Service Organisation (Foreign Affairs)
DCV	Consular Affairs and Visa Policy Department (Foreign Affairs)
DG	Directorate-General (European Commission)
DG Just	Directorate-General for Justice (European Commission)
DG MOVE	Directorate-General for Mobility and Transport (European Commission)

Term	Definition
DGFZ	Directorate-General for Tax and Customs Policy and Legislation (Finance)
DGM	Directorate-General for Migration (J&V)
DJZ	Legal Affairs Department
DWJZ	Legislation and Legal Affairs Department (J&V)
EAW	European arrest warrant
ECA	European Court of Auditors
ECER	Expertise Centre for European Law
EIZ	European and International Affairs Department of AFP (Finance)
ELI	Ministry of Economic Affairs, Agriculture and Innovation (predecessor of EZK)
EMA	European Medicines Agency
EMN	European Migration Network
EP	European Parliament
EU	European Union
EZK	Ministry of Economic Affairs and Climate Policy
FIN	Ministry of Finance
FM	Financial Markets Department (Finance)
FREEMO	Expert Group on the right to free movement of persons
FTE	Fulltime equivalent
GDPR	General Data Protection Regulation
HBJZ	Administrative and Legal Affairs Directorate (I&W)
HCEU	High Level Committee on the EU
I&M	Ministry of Infrastructure and the Environment (predecessor of I&W)
I&W	Ministry of Infrastructure and Water Management
IBO	Interministerial policy review
ICER	Interministerial Committee on EU law, with the units Court cases (H), Implementation (I) and Notification (N).
IHJZ	Interministerial Steering Group on Legal Affairs
IHW	Interministerial Steering Group on Legislation
ILT	Human Environment and Transport Inspectorate (I&W)
IMPEL	European Union Network for the Implementation and Enforcement of Environmental Law
IND	Immigration and Naturalisation Service

Term	Definition
IOWJZ	Interministerial Steering Group on Legislation and Legal Affairs
ISDE	Sustainable Energy Investment Subsidy Scheme
J&V	Ministry of Justice and Security
KCBR	Knowledge Centre for Policy and Legislation
KEV	Climate and Energy Outlook
LNV	Ministry of Agriculture, Nature and Food Quality
NGO	Non-Governmental Organisation
OLW	Surrender of Persons Act
OM	Public Prosecutor
PAS	Integrated Approach to Nitrogen
PBL	Netherlands Environmental Assessment Agency
PR EU	Permanent Representation of the Netherlands to the EU
RDW	Road Transport Agency
REA	Cabinet Committee on European Affairs
RPE	Order on Periodic Policy Evaluations
RvdR	Council for the Judiciary
RVO	Netherlands Enterprise Agency
RvS	Council of State
SCBA	Social Cost-Benefit Analysis
SME	Small and Medium Enterprise
SDE+	Renewable Energy Grant Scheme
SG	Secretary-General
SGBP	River Basin Management Plan (KRW)
SUA	Strategy and Implementation Department (IND)
SZW	Ministry of Social Affairs and Employment
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VAT	Value Added Tax
VWS	Ministry of Health, Welfare and Sport
WFD	Water Framework Directive
WOB	Government Information (Public Access) Act

Term	Definition
WODC	Research and Documentation Centre
WOO	Open Government Act
ZBO	Autonomous administrative authority

## Appendix 2 Audit methodology and standards

### **Audit design and conduct**

The audit objective was to paint a *government-wide* picture of problems in the implementation of EU law (possible violations, potential solutions, improvements), with detailed information on the ministries that experienced the most problems, complemented by 9 case studies.

For the *government-wide picture*, we investigated the situation at the Ministries of Foreign Affairs, Economic Affairs and Climate Policy (EZK), and Justice and Security (J&V), which coordinate the implementation of EU law in the Netherlands. For the detailed information, we also investigated the Ministries of Finance, Infrastructure and Water Management (I&W), and Agriculture, Nature and Food Quality (LNV). The selection of these ministries, and the cases they were involved in, was based in part on the findings of an internal preliminary audit carried out in 2021. In so far as possible, the case studies covered topics that had consequences for citizens and businesses, with the greatest possible variation in policy field, duration and type of procedure. A notification of intent with substantive background information was drawn up for each case study. The case studies were carried out uniformly with the aid of structured documentation (checklist, documents required, reporting template). We examined internal documents and databases kept by the ministries and the European Commission and held interviews with officials at the ministries concerned.

### **Confidentiality of information from the European Commission**

At present, a general principle of both Dutch and EU law is that documents in *active procedures* (EU Pilots, infringement procedures) are not made public, with the exception of what the Commission itself publishes on its website about active infringement procedures (subject, start date). The Commission provides no information whatsoever on active EU Pilots. This is in accordance with case law delivered by the Court of Justice (judgments of 14 November 2013, C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738 (LPN and Finland v Commission) and 11 May 2017, C562/14 P, ECLI:EU:C:2017:356 (Sweden v Commission)). Requests to publish information on *closed procedures* are honoured subject to two conditions: (1) publication of Dutch information is permitted unless there are grounds for refusal under the Government Information (Public Access) Act or the Open Government Act, and (2) information in documents issued by the Commission can be made public after consultation with the Commission (in accordance with article 5 of Regulation 10494/2001). An EU Pilot is closed when the Commission closes the file and announces that it will not initiate an infringement

procedure. If an infringement procedure does follow, the EU Pilot is closed when the infringement procedure ends (with or without a Court case).

For this audit, we accordingly applied the following criteria. The existence of closed and active procedures is in itself not a secret and we can refer to them. Documents on the procedures received from the Commission are confidential, documents received from the ministries fall under the Court of Audit's mandate, as laid down in the Government Accounts Act. Where appropriate, the information received was dealt with prudently and the contents were described in general terms without specific reference to underlying documents and without verbatim quotations.

### **External contacts and academic focus group**

Interviews were held with the Commission and the European Court of Auditors before and during the audit, in part in order to place the situation in the Netherlands in the wider EU context and to hear their thoughts on the situation in the Netherlands. At our request, the Commission voluntarily provided additional information on a number of issues.

An independent academic focus group was consulted on many occasions during the audit. It consisted of two political science professors with specific knowledge of the implementation of EU law. We consulted them on the information we should request to answer our audit questions, which case studies we should select, our substantive findings and the relationship with their academic expertise.

### **Analysis of existing academic expertise**

As part of the audit, we analysed existing academic expertise (2000-2021) with the aid of Google Scholar. We used English search terms in view of the larger language area and because English is considered the lingua franca in the social science world.

### **Limitations of data files received**

We received and analysed several data files from the Ministries of EZK and Foreign Affairs. In July and August 2021, the Ministry of EZK provided 2 versions of a database on SOLVIT cases. The first had been compiled by the ministry itself and the second by the Commission. Both files were generated by the same system but the file compiled by the Commission contained more information than the file compiled by the ministry. The ministry initially could not explain the difference in the number of cases in the files. Following contact with the Netherlands Enterprise Agency, it became clear that the Commission's data file also included cases that were 'not accepted as cases'. We therefore used the Ministry of EZK's data file for our analysis. A further



complication was that the Commission's files named the policy field and the DG responsible at the Commission but not the ministry concerned in the Netherlands. Our analyses of SOLVIT cases accordingly used the Commission's classification, with a link to the Dutch ministries where necessary.

From the Ministry of Foreign Affairs, we received databases with information from the Commission on EU Pilots (2010-2020, including a file with more specific information on 2013-2016), infringement proceedings (2010-2020) and Court cases (2010-2020, including a file with additional metadata on 2015-2020). We merged the files or parts of them where necessary for the audit. This was complicated by the fact that the 2 most important files from the Commission named the policy field and responsible DG but not the ministry concerned. Where possible, our analysis identified which ministries were involved in the Netherlands. Where this was not possible, we had to suffice with the Commission's classification.

The files on infringement procedures were initially not comparable and we first had to edit them. With the aid of other information provided by Foreign Affairs (internal quarterly infringement statements) we compiled a new aggregated file. File-keeping was sometimes poor: data were missing and other lead ministries were sometimes named than those referred to in underlying documents. These files also contained all infringement procedures, including procedures not relating to the single market. The information was therefore not comparable with the information on the Commission's single market scoreboard.

From the 6 ministries we audited, we also received additional statements of EU Pilots and infringement proceedings that were active in 2021. As our audit covered 2010-2020, we used these statement only if a case had also been active in the audit period.

### **Response to missing information**

In the following areas, the ministries could, at best, provide only partial information:

1. problems reported to the ministries by citizens and businesses regarding the implementation of EU law;
2. letters received by the ministries – at all levels – from the Commission regarding the implementation of EU law;
3. information on the ministries' participation in expert groups, networks and package meetings of/with the Commission;
4. information on lessons learned from analyses, studies and evaluations of problems implementing EU law.

The ministries were unable to provide full information because:

- poor or non-existent records of EU-relevant descriptions of the information prevented retrieval from information systems;
- the information, according to the ministries, did not exist.

We had to accept that a lot of information could not be retrieved from the ministries' information systems. In many cases, the systems did not include files or specific records with EU descriptions. We responded as follows. It was not possible to resolve points 1 and 2 above and we had to audit the sometimes limited information available to us. This influenced our findings on informal procedures, national procedures and improvement and learning processes. Regarding point 3, we drew on public sources published by the Commission and additional information we requested (and received) from the Commission. Regarding point 4, we sought out and analysed potentially relevant evaluations on the government's evaluation site.

### **Middle position of the Netherlands**

At various places in this report, we say that the Netherlands holds a middle position regarding compliance with EU law. This overall conclusion is based on an estimate of the following aspects: the number of formal and informal procedures brought against the Netherlands (quantitative) and whether the Netherlands' performance met the Commission's targets (qualitative).

The Commission's single market scoreboard shows that the number of SOLVIT cases brought against the Netherlands is not very high in comparison with other member states (except for cases involving businesses), but its performance is open to improvement. The audit found that the Netherlands does not meet the resolution rate target for SOLVIT cases but resolves problems within the Commission's deadline. The scoreboard provides no information on the deadline for informal EU Pilots.

Relatively few infringement procedures are brought against the Netherlands each year, but its performance resolving those cases is 'average'; on several indicators its performance is even below average. In 2021, the Netherlands scored poorly on the overall conformity index for the correct transposition of directives. The target is 0.5%, the EU average is 1.4% and the Netherlands' score is 1.7%.

### **Standards framework**

Having signed the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), the Netherlands is subject to all the rights and obligations arising from the Treaties and all legislation based on them. The member states'

legal systems are binding both on their own nationals (both citizens and businesses) and on themselves. EU law has direct application and takes precedence over the member states' national laws. This is also laid down in articles 92-94 of the Constitution. As a signatory to the EU Treaties, the Netherlands has committed itself to implementing and enforcing EU law in full and to refraining from taking any measures that are contrary to the obligations arising out of the Treaties (article 4 (3) TEU). This is known as the principle of Union loyalty. It means the Netherlands has undertaken to take all measures necessary to apply and implement binding EU legal acts. This is the key standard applied in our audit. As the basis for this standards framework, it is decisive for our findings.

Directives, regulations and decisions are binding legal instruments of the EU (article 288 TFEU). The member states are responsible for the timely and correct transposition of directives into national law and for the correct application and implementation of all EU law (article 291 (1) TFEU).

The EU Treaties formally task the Commission with overseeing the member states' compliance with and implementation of EU law. The Commission's oversight of the implementation of EU directives and regulations and fulfilment of the obligations arising out of them is usually detailed and technical in nature. It follows from article 17 TEU and article 258 TFEU<sup>71</sup> that the Commission must oversee the correct and timely application of EU law and take measures if a member state does not transpose a directive into national law on time or in full or does not apply EU law correctly. Under article 258 TFEU the Commission can initiate a formal infringement procedure against a national authority that does not apply EU law correctly.

The Treaties therefore require the Commission to investigate possible violations of EU law by the member states and, if necessary, initiate a formal infringement procedure. Under article 258 TFEU the Commission can refer a case to the Court of Justice of the European Union. Article 260 TFEU further states that if the Court finds that a member state has failed to fulfil its obligations, i.e. that it has violated EU law (acted irregularly), the member state must take the measures necessary to comply with the Court's judgment. If the Commission considers the measures to be inadequate, it can refer the case back to the Court, which can impose a lump sum or penalty payment.

A detailed standards framework was therefore drawn up using relevant sources<sup>72</sup> in accordance with these criteria. It was put to the ministries in advance of the audit. The standards applied are as follows.

*Organisation and coordination:* the response to problems with the implementation of EU law and their resolution is coordinated and functions correctly, with appropriately qualified staff and a clear allocation of tasks, responsibilities and powers.

*Notified problems:* the Netherlands refrains from all measures that are contrary to the obligations arising out of the EU Treaties; the Netherlands has taken all measures necessary for the application and implementation of binding EU legal acts (regulations, directives, decisions). The Netherlands promotes compliance by public authorities and complies with EU standards on the full and timely implementation of directives; the Netherlands keeps records of citizen letters and objections relating to problems in the application and implementation of EU law.

*Procedures to resolve problems:* the Netherlands resolves problems through appropriate EU and national procedures, whereby it fulfils applicable rights and obligations and meets targets and deadlines.

*Improvements:* where the Netherlands does not comply with EU law, it does not invoke provisions, practices or situations in its national legal order or the complexity of implementing the law concerned; to understand the causes of incorrect application or implementation of EU law, and the resultant problems, the Netherlands carries out studies and evaluations, applying the standards in place for policy reviews and policy evaluations in accordance with the Order on Periodic Policy Evaluation and the evaluation standards of the Integrated Assessment Framework; improvements made following a study or evaluation are effective.

For the purposes of this audit, we *assume* that the information and notifications recorded by Dutch ministers and implementing organisations regarding problems in the implementation of EU law and the resultant solutions are correct, orderly and accessible.

## Appendix 3 References

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## Appendix 4 Endnotes

- 1 The Court's decisions have introduced several principles of Union law. See, for instance, ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (Van Gend en Loos) and ECJ 15 July 1964, ECLI:EU:C:1964:66 (Costa v ENEL).
- 2 This is evidenced by, among other things, the government's response to the file on the enforcement of EU law issued by the Working Group on the Assessment of New Commission Proposals on 18 November 2022, further to Commission communication (COM(2022)518) of 13 October 2022.
- 3 More information on what we mean by 'middle position' is provided in appendix 2.
- 4 The principle of Union loyalty is laid down in article 4 (3) of the Treaty on European Union. It is also known as the loyalty principle and principle of sincere cooperation. Before the Treaty of Lisbon came into force in 2017, article 10 of the EC Treaty referred to the principle of Community loyalty.
- 5 This sentence has been adapted after the Board of the Netherlands Court of Audit approved the report.
- 6 See article 288 TFEU. There are also non-binding recommendations and opinions and binding non-legal acts: delegated acts and implementing acts. The TFEU no longer includes framework decisions, which were used in the past to harmonise the member states' laws. In view of the implementation obligation at the time and their ongoing material effect, however, they can still be relevant. See KCBR, 2017.
- 7 The Commission has exclusive right of initiative, see article 17 (2) TEU and article 289 (1) TFEU.
- 8 The Council and the European Parliament are co-legislators in the ordinary legislative procedure, see article 294 TFEU. In exceptional cases, such as in foreign and security policy, only the Council decides.
- 9 BNC files are concise informative documents on new EU policy proposals. They are prepared by the Working Group for the Assessment of New Commission Proposals (BNC) to inform parliament of the main points of Commission policy proposals.
- 10 The Commission is supported by its civil service and 39 agencies. The agencies include the European Medicines Agency (EMA), located in the Netherlands, and Europol. The Commission can also set up expert groups and specialist networks to advise it on all aspects of EU law and its implementation and on ways to improve cooperation.
- 11 The instrument used by the Commission is the single market scoreboard. See [https://single-market-scoreboard.ec.europa.eu/home\\_en](https://single-market-scoreboard.ec.europa.eu/home_en).
- 12 See article 19 TEU and [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies\\_en](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en).



- 13 Cabinet decision of 19 December 1997. See letter to parliament of 3 April 1998, session 1997-1998, parliamentary paper 25389 no. 32. ICER was established as a body of EU legal experts from various ministries under the leadership of the Minister of Foreign Affairs and the Minister of Justice in 1997, with the two ministries acting as both ICER's chair and secretary. ICER was established in response to the Securitel affair, in which the Netherlands did not comply with EU rules when drafting national law.
- 14 The ICER working groups have been part of the Interministerial Steering Group on Legislation and Legal Affairs (IOWJZ) since 2013 and since February 2019 subgroups of the Interministerial Heads of Legal Affairs (IHJZ) and the Interministerial Heads of Legislation (IHW), which are in turn part of IOWJZ. Since February 2019, the working groups have reported to IHJZ or IHW. Documents are put to IHJZ and IHW for approval and, where documents are relevant to senior civil servants or politicians, to IOWJZ. Where agreement is reached in the working groups, documents can be sent for information purposes to IHJZ and IHW.
- 15 Some of the Ministry of Foreign Affairs' staff are active in several categories and are included in all relevant categories.
- 16 See [https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-eu-level\\_nl](https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-eu-level_nl)
- 17 In the past 5 years, about 4,000 complaints per annum were made in the EU as a whole. This averages out at roughly 142 per member state per annum. Slightly fewer complaints were made about the Netherlands until 2018 and slightly more thereafter. The number of complaints, however, says nothing about the scale of the problems that prompted them. See [https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure/2021-annual-report-monitoring-application-eu-law\\_en#complaints](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure/2021-annual-report-monitoring-application-eu-law_en#complaints)
- 18 The French environmental organisation Bloom submitted a complaint to the Commission about electric pulse fishing in 2018. It thought the Dutch government had issued a large number of pulse fishing licences illegally. Source: <https://nos.nl/artikel/2270460-eu-ambtenaren-willen-procedure-tegen-Netherlands-om-pulsvissen>
- 19 The other 50 complaints related to a single topic (in the field of DG Taxation and Customs Union) and were combined to form a single infringement procedure.
- 20 The Commission's database provides no information on the follow-up to the other 15 of these 54 EU Pilots.
- 21 Source: [https://single-market-scoreboard.ec.europa.eu/governance-tools/eu-pilot\\_en](https://single-market-scoreboard.ec.europa.eu/governance-tools/eu-pilot_en)

- 22 See [https://ec.europa.eu/solvit/what-is-solvit/index\\_en.htm](https://ec.europa.eu/solvit/what-is-solvit/index_en.htm) for more information. Submission of a complaint to SOLVIT does not suspend any formal or administrative deadlines under national law.
- 23 Typical issues are the recognition of professional qualifications, visa and residence rights, trade and services, vehicles and driving licences, family benefits and pension rights, working abroad, access to education, cross-border capital movements and payments.
- 24 The European and International Affairs Department was responsible within the ministry. In October 2021, responsibility for SOLVIT was transferred to the Netherlands Enterprise Agency (RVO).
- 25 Source: <https://www.rvo.nl/onderwerpen/internationaal-ondernemen/kennis-en-informatie/eu-wetgeving/wetgeving/handelswetgeving/wederzijdse-erkenning>
- 26 It is known from the European Commission's annual reports that in recent years a small proportion of the SOLVIT cases handled by the Netherlands as the home centre were submitted by businesses (5 of the 85 in 2019, 4 of the 65 in 2018). Most of the complaints were submitted by citizens.
- 27 The SOLVIT database we received from the Ministry of EZK was incomplete. A relatively high number of cases were classified as 'Other'.
- 28 Source: [https://single-market-scoreboard.ec.europa.eu/enforcement-tools/solvit\\_en](https://single-market-scoreboard.ec.europa.eu/enforcement-tools/solvit_en)
- 29 Many of the cases concerning social security and the free movement of people are recorded in the Ministry of EZK's databank as 'other' and cannot be specified further.
- 30 Source: [https://single-market-scoreboard.ec.europa.eu/enforcement-tools/solvit\\_en](https://single-market-scoreboard.ec.europa.eu/enforcement-tools/solvit_en)
- 31 The letter from the European Commission to the Minister of I&W was not provided when we requested information on informal correspondence. We received it during the case study.
- 32 Although the Ministry of J&V's archive system is not designed to identify letters from the Commission, we nevertheless traced about 250.
- 33 Expert groups do not include Council working groups in which member state representatives prepare Council meetings at official level.
- 34 The Commission recognises four functions of expert groups: (1) preparation of legislative proposals and policy initiatives, (2) preparation of delegated acts, (3) implementation of EU legislation, programmes and policies, including coordination and cooperation with member states and stakeholders, and (4) preparation of implementing acts at an early stage in accordance with Regulation (EU) 182/2011.

- 35 Networks do not have formal powers. Decisions are usually consensual. Most networks are organised horizontally, not hierarchically.
- 36 We checked whether all groups were entered in the Commission's expert group register. In some cases, ministries had suggested other types of group, such as Council working groups and comitology committees.
- 37 See <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups?lang=en>
- 38 This is a discretionary power of the Commission. It is free to initiate an infringement procedure or take the next step at any time. The infringement, the member state's response and any subsequent dialogue may sometimes lead to the closure or suspension of a procedure if, for instance, the member state implements the EU provisions concerned or undertakes to do so in the foreseeable future. The procedure is sometimes referred to as an infraction procedure. An infraction procedure is the same as an infringement procedure.
- 39 This sentence has been adapted after the Board of the Netherlands Court of Audit approved the report.
- 40 Source: own analysis of the European Commission's Themis databank managed by the Ministry of Foreign Affairs. Where ministries were renamed between 2010 and 2020, we use the ministries' current names. The Commission provides information on its website about the decisions it takes in infringement proceedings; see [https://single-market-scoreboard.ec.europa.eu/enforcement-tools/infringements\\_en](https://single-market-scoreboard.ec.europa.eu/enforcement-tools/infringements_en)
- 41 The categorisation is taken from the European Commission. Of the 67 infringement proceedings initiated on substantive grounds in 2010-2020, 18 had not been closed by the end of 2020 and are not considered here.
- 42 A case was brought against the Ministry of I&W in January 2011 concerning non-conformity with EU Regulation 847/2004 and other EU legal provisions of the bilateral air services agreement between the Netherlands and the Russian Federation. A case has been brought against the Ministry of Finance concerning the discriminatory levying of dividend tax on non-resident insurance companies. This procedure was launched in 2012 when the Commission concluded that the Netherlands' response to questions asked during an EU Pilot in 2010 was inadequate. The Netherlands replied to the Commission's reasoned opinion in June 2014. The procedure has since been dormant.
- 43 Parliamentary paper 21 109 informs the House of Representatives every quarter about the status of transposing EU directives into Dutch law. The information touches briefly upon infringement procedures brought against the Netherlands for non-timely or suspected incorrect implementation of EU directives, regulations and decisions. The information consists of the case number, the ministry concerned,

- the EU provisions concerned, the action taken by the Commission, the substance of the disputed national policy and, briefly, the status of steps already taken.
- 44 See [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/)
- 45 This sentence has been adapted after the Board of the Netherlands Court of Audit approved the report.
- 46 See <https://ecer.minbuza.nl/ecer/eu-essentieel/inbreukprocedures/boetes-en-dwangsommen.html>
- 47 Source: own analysis of the European Commission's Themis database. The Commission's website (see [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/screen/home](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/screen/home)) also lists prior infringement procedures that led to Court cases. According to the database, there were 30 infringement procedures during the audit period (accessed on 10 January 2022).
- 48 The figure does not present data for 2012, 2016, 2019 and 2020. No Court cases were brought against the Netherlands in those years.
- 49 A further case was referred to the Court on 6 December 2012 (C-572-12). It is not included in the database on Court cases we received from the Ministry of BZ. The case related to the failure to implement Directive 2009/81/EC on time in the fields of defence and security.
- 50 Court 18 September 2021, C-473/11, ECLI:EU:C:2012:574 (Commission v Netherlands), regarding the special value added tax scheme for travel agencies; 25 April 2013, C-65/11, ECLI:EU:C:2013:265 (Commission v Netherlands), Directive 2006/112/EC concerning the common system of value added tax; 19 March 2013, C-301/11, ECLI:EU:C:2013:177 (Commission v Netherlands), concerning income tax – exit taxation of enterprises; 25 February 2016, C-22/15, ECLI:EU:C:2016:118 (Commission v Netherlands), Directive 2006/112/EC – concerning value added tax schemes for water sports organisations; 31 October 2019, C-395/17, ECLI:EU:C:2019:918 (Commission v Netherlands), concerning own resources – OCT EUR.1 certificates.
- 51 Court 26 April 2012, C-508/10, ECLI:EU:C:2012:243 (Commission v Netherlands), Directive 2003/109/EC concerning the status of third-party nationals who are long-term residents, Residence permit fees; 20 June 2013, C-635/11, ECLI:EU:C:2013:408 (Commission v Netherlands), Directive 2005/56/EC cross-border mergers of limited liability companies; Court 11 July 2013, C-576/10, ECLI:EU:C:2013:510 (Commission v Netherlands), Directive 2004/18/EC – award of concessions for public works contracts -; 10 May 2012, C-368/10, ECLI:EU:C:2012:284 (Commission v Netherlands), Directive 2004/18 EC award of contracts for sustainable public procurement – quality marks; 2 June 2016,

C-233/14, ECLI:EU:C:2016:396 (Commission v Netherlands), Directive 2004/38/EC entitlement to student public transport cards; 22 October 2014, C-252/13, ECLI:EU:C:2014:2312 (Commission v Netherlands), Directive 2002/73/EC equal treatment of men and women in labour process.

- 52 I.e., after the Netherlands responded in writing to the Commission's formal notice, after which the Commission dropped the infringement procedure and the Court did not hand down a judgment. The case was not considered in the Ministry of BZ's 2012 Annual Report.
- 53 See, for example, <https://www.rijksoverheid.nl/documenten/vergaderstukken/2021/10/25/jaarbericht-2020-procesvertegenwoordiging-hvj-eu>
- 54 See <https://curia.europa.eu/>
- 55 Source: <https://single-market-scoreboard.ec.europa.eu/countries/Netherlands>
- 56 See Timeline in Appendix 1 to House of Representatives, session 2018-2019, 32 201, no. 93.
- 57 In 2011 in the Slob motion, (parliamentary paper 21501-52, no. 550), in 2012 in correspondence with the State Secretary for LNV (parliamentary paper 21501-32, no. 673) and in 2013 in correspondence with the same state secretary (parliamentary paper 21501-32, no. 705).
- 58 Het Financiële Dagblad, 16 February 2019, 'Nederland riep onheil over zichzelf af in pulsvislobby' [Netherlands brought disaster upon itself in pulse fishing lobby].
- 59 See <https://www.nemokennislink.nl/publicaties/hoe-duurzaam-is-pulsvissen>
- 60 See <https://curia.europa.eu/juris/document/document.do?ocid=239916&pageIndex=0&doclang=nl&mode=lst&dir=&occ=first&part=1&cid=8678620>
- 61 A preliminary procedure is part of a national court's procedure. Because the procedure is laid down in TFEU and we are considering the Netherlands' participation in such procedures and their possible consequences for policy and laws, we have decided to consider preliminary cases here and not as a national procedure.
- 62 This principle is worked out in the manual used to assess the Netherlands' participation in preliminary cases. The criteria for Dutch participation are also set out in this manual (ICER, 2015). Instructions (Foreign Affairs, 2015b) are in place on the procedure to make and submit written comments in preliminary cases.
- 63 <https://www.rijksoverheid.nl/onderwerpen/kwaliteit-en-integriteit-overheidsinstanties/vraag-en-antwoord/waar-kan-ik-terecht-met-een-klacht-over-de-overheid>
- 64 Chapter 9 came into force on 31 March 2004 by act of 12 May 1999, Bulletin of Acts and Decrees 214 (bill 25 837).

- 65 Definition of the National Ombudsman. See (in Dutch) [https://www.nationaleombudsman.nl/uploads/rapport\\_2008250.pdf](https://www.nationaleombudsman.nl/uploads/rapport_2008250.pdf). There is also a category of ‘other letters’: letters that cannot be classified as requests, objections or complaints within the meaning of the AWB. The government has no formal procedures to deal with such letters.
- 66 See, for instance, <https://www.rijksfinancien.nl/jaarverslag/2020/XIII/onderdeel/904184> for the Ministry of EZK, <https://www.rijksfinancien.nl/jaarverslag/2019/XII/onderdeel/446835> for the Ministry of I&W, and <https://www.rijksfinancien.nl/jaarverslag/2019/XIV/onderdeel/488513> for the Ministry of LNV.
- 67 Relevant studies that we did find included the second National Risk Assessment of Terrorism Financing of 2020 and the Evaluation of the Explosives Precursors Act of 2021 (both J&V), a study carried out for EZK of whether implementation of 25 EU directives was ‘low burden’, and the regulatory burden that EU policy placed on citizens, for instance in the form of administrative burdens or compliance costs (Deloitte, 2013), and a study carried out for J&V of EU migration policy (European Migration Network, 2017, 2018, 2019, 2020, 2021; WODC, 2021).
- 68 Ministries must review every budget article at least once every seven years to establish how efficient policy has been and how it can be improved. Policy reviews are based on prior year studies.
- 69 Source: <https://www.rijksfinancien.nl/beleidsevaluatie/onderzoek/>
- 70 IBO Financing energy transition (2021), IBO Air quality (2019), IBO Cost efficiency of CO2 reduction measures (2015), IBO Agriculture, fisheries and food chains (2014) and IBO Transborder care: border-free within limits (2013/2014).
- 71 [https://commission.europa.eu/about-european-commission/what-european-commission-does/law\\_en](https://commission.europa.eu/about-european-commission/what-european-commission-does/law_en)
- 72 Such as TEU, TFEU and <https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/handleiding-wetgeving-en-europa> (in Dutch); [https://ec.europa.eu/internal\\_market/scoreboard/](https://ec.europa.eu/internal_market/scoreboard/); [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws\\_nl](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws_nl); [https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws\\_nl](https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_nl).



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**The Hague, June 2022**