# Counter-intuitive law considered

*Wim Timmer*

## 1. Introduction

In visual art and in poems there is a lot to be interpreted. As the law sometimes has traits of artistry - and then it is primarily about literary qualities -, I want to focus on a form of regulation that really needs some interpretation. This is what I call: *counter-intuitive law*.

The optimal compliance with regulations by its addressees is *voluntary* compliance. Voluntary compliance can at least minimize enforcement costs and maximize the yield sought by the legislator. In general, it is therefore advisable for the legislator to organize the rules in such a way that the addressees will agree with them and comply with the rules without appreciable resistance. This is an essential condition, particularly with open standards and goal-based regulation.[1] Not in all cases, voluntary compliance is feasible. For example, for good reasons tax legislation is laid down as prescriptive regulation, and is not cast in the mould of goal-based regulation. After all, this kind of rules depend for their effectiveness mainly on enforcement (supervision and fiscal criminal law) and not primarily on voluntary compliance.
If regulation is situated on a spectrum as to willingness to comply, then on the one extreme end the voluntary standards will be found, in the middle (for example) the fiscal norms and on the other end of the spectrum counter-intuitive law. In counter-intuitive law (hereinafter: CIL), these are norms in which the addressees recognize so little that compliance not only does not take place on a voluntary basis, but also giving the enforcers the greatest possible difficulties in moving the addressees in the right direction. For several - practical and principle - reasons this is an undesirable situation.
The essence of this essay is: what are the options for the legislator to avoid or reduce CIL?

## 2. Approach

To be able to answer the central question, an analysis of CIL is first priority. Therefore, I will start with a brief outline of this legal form (section 3). To this end, two examples of CIL are being examined, namely the *Act on the Promotion of Proportional Labour Participation of Immigrants* and the ban on smoking in cafés; on this basis I deal with a number of specific characteristics (sections 4 and 5). Next, I will show, based on an overview of examples, that CIL occurs in the broad public legal system (section 6). It is of course significant that CIL has negative consequences for the public esteem of law and of politics, as well as for the possibilities of enforcement, as explained in section 7. A small reassurance is that the experience of the CIL also has aspects of temporality (section 8). Finally, it is important that the legislator counteract the growth of CIL. With this in mind, proposals are included in response to the central question of the essay (section 9).

## 3. What is counter-intuitive law?

An example can clarify when we are dealing with CIL.
In the first decade of this century, carriage of goods by inland waterways was facing a difficult time. Due to the oversupply of transport capacity, the tariff setting ('the freight') had dropped below cost price, which brought inland shipping companies to sailing even more to obtain still some proceeds. Thus, the entrepreneurs entered into a vicious downward price spiral. Then the inland shipping companies decided to join forces (rare!). They asked the economics faculty of Erasmus University to develop an economic plan. This plan boiled down to the fact that a number of skippers would temporarily take their vessel out of service. Skippers remaining sailing would hand over to the first group a part of their freight, which would increase due to the non-competition. Everyone would be

better off, you would say. The plan was warmly supported the Minister of Transport, Public Works and Water Management, who was pleased at all that inland shipping stopped its own trousers instead of looking at the government. However, the Competition Authority did not agree. After all, this was a cartel, which ultimately would be a loss to consumers because they would, albeit indirectly, pay a higher rate than the market rate. Despite many discussions in the triangle inland shipping/Erasmus University, the Ministry and the Competition Authority, the position did not change.
Inland waterway operators were unable to understand the Competition Authority's position. After all, they wanted to make sensible attempts to have the sector survived, in everyone's interest, didn't they?

In my view, we face CIL, when the following factors occur, whether or not in combination:

a. the regulation is not in keeping with the interests of the addressee, for example because it does not contribute to his primary process or operating result, and
b. The addressee cannot possibly appreciate the scheme:
   1 ° because he does not endorse its objective,
   2 ° because he sees no task here for the government, or
   3 ° because the regulation has a broader effect than is justified by its objective. The latter is so called *overinclusiveness.*
c. An additional and reinforcing aspect is that in many cases there are no direct beneficiaries of the regulation, who could enforce, for example, compliance in a civil action. This feeds the addressees with the idea that no real interest is served with the CIL.
d. It is worth noting that a substantial part of the rules mentioned in this article have a European-law background. That should be of great concern in these days of looming exits.
e. We also often see that the rule is not easy to explain.[2]

CIL could be dismissed as just bad legislation as is often seen. However, the special feature of CIL is the combination of underlying bottlenecks, which leads to specific problems, namely the special unwillingness of the individuals to comply.

The following sections describe two examples of CIL.

## 4. Proportional labour participation[3]

On 1 July 1994, the *Act on the Promotion of Proportional Labour Participation of Immigrants* entered into force, an initiative act of left and right wing parties together (GroenLinks, D66 and VVD). The aim of the act was removing obstacles for minorities on their way to paid work and promoting their proportional employment participation. The core of the act consisted of the obligation for the employer to strive within his company for a proportional representation of persons belonging to the target groups. The employer had to keep an ethnic registration, for which all employees, whether or not belonging to the target groups, had to fill in a form. The resistance to the act was great, both from the employers' side and from the employees' side. The employers considered it a senseless act, given that they considered the problem of underrepresentation mainly a supply problem. Moreover, the legal obligations drove them at costs, and the consequences of not complying with 'proportionality' were uncertain.
Employees in turn objected to the act due to the registration requirement. In the house organ of a ministry it was called upon to exclude the act: 'why should we fill in this form, exactly in the year of the 50th May *(in 1995 for the fiftieth time Liberation Day 5 May was celebrated)* and in the year in which South Africa and Rwanda abolished ethnic registration?'

No longer than a year later, the law was softened: the employer did not have to add an auditor's statement to his public annual report, which was a considerable concession from a cost perspective. In addition, employees who objected to the registration in writing were exempt from it. The official title of the law was also reduced to *Act on the Promotion of Labour Participation for Minorities* (Wet SAMEN).
However, this softened act also did not lead to a structural improvement of the labour market position of ethnic minorities. In October 1998, only 7.5 percent of the Dutch employers appeared to have submitted an annual report, and in addition, two thirds of the responding employers did not make any extra efforts to employ immigrants. Although a few years later the number of filed annual reports increased, the conclusion of an interim evaluation was: 'On average, there seems to be a slight positive effect of the act on the employment participation of minorities. However, this effect is not significant.'
Politics were also divided on the importance of the act. The Christian Democrat Member of Parliament Terpstra expressed himself in an angry tone, 'If you come from abroad or if you have a foreign parent, you are weak and you must be helped by the state. If you come from the Netherlands and you are white, then you have no problem at all. Towards both groups this is sheer discrimination!' And, 'I am pleased with the opposition of many against this registration. Rosenmöller's answer - the end justifies the means - I deem to be down to standard, even if the law would be a good thing. But that is not the case either.'
Ultimately, this badly enforced act in 2004 silently expelled.

Here we see a combination of circumstances that are so characteristic of CIL. To begin with, the two groups on whom the obligations are laid have no own or direct interest in complying with them. Employers only had money or their reputation to lose, and employees, since they were already employed, had no interest in getting access of cultural minorities into the labour market. They did not see the usefulness of the obligations; if they might subscribe to the idealistic objective at all, they would not believe the goal to be achieved by the means provided by law. But the overtone of the opposition involved resistance to registering ethnicity. Moreover, because politicians were much divided about the law, the opponents and non-adopters had fair wind: non-compliance was justifiable.
Also quite unhelpful was the highly technocratic approach chosen by the political supporters of the law. Left wing parliamentarians such as Marijke Vos and Hannie Stuurman made an (unsuccessful) attempt to delete the expiration date from the SAMEN Act with an initiative proposal. In the Explanatory Memorandum to the bill they summarized their lack of understanding for the opponents: 'With all the tools offered by the authorities (internet site with question and answer bench, electronic tools, benchmark tool, social maps and a database with all the annual reports) the requested report can be delivered with the press of a button.' And: 'Experience shows that if the employer or the personnel officer provides good information, the willingness to cooperate with the registration is very high. That is only logical because it merely concerns two questions: what is the country of birth of yourself and what is the country of birth of your parents? That is not so bad if you compare it with what employers want to know about their employees.'

### 5. Smoking ban in cafés [4]

The introduction of smoking bans has generally been problem-free and noiseless. Consider the smoking ban in public buildings (since 1990), in public transport, at the workplace (both since 2004) and in the catering industry (since 2008). There is one exception to that problem-free introduction: the smoking ban in cafés. Bantema's research examines the causes of this, which he partly seeks

from (the nature of) the addressees, the café owners. However, I would like to comment on the *regulations* as a cause.

Goal of the smoking ban is protection of customers and staff. The regulations therefore have both an occupational health and safety background. Café owners are not necessarily critical about the goals as such, but especially about the realization of those goals by a smoking ban. They acknowledge the harmfulness of (co-) smoking, but also indicate that people should be free to decide for themselves. Moreover, what does the act mean if your staff already do smoke? Café owners also wonder whether smoking can be stopped by banning it in cafés. Another reaction was, 'It is too absurd for words that I cannot decide what happens in my own company. What are they meddling with?' They also consider it not fair that the owner of the café is fined: 'If I smoke in a train, I get the fine and not the train company.' Thus, they refer to legislation abroad, where the smoker is fined and not the café owner.

Initially, the smoking ban did not apply to small cafés without staff. According to (larger) bar owners, this exception led to unfair competition and uncertainty.
Furthermore, the bar owners turned their attention to the small political majority with which the smoking ban was adopted: 'A reflection with two seats more, that is hardly a majority.', and a lack of participation: 'I do not think that they listen to what we have to say, this is a cabal between the political parties, and is already settled in a kind of barter trade. In the end, they don't care about the entrepreneurs' opinion at all.'
Another factor involved here is the *circumvention*, which consists of two elements: the wish to avoid the law in combination with the possibility and space that legislation provides for it. This is the case when people perceive exceptions as well as descriptive and rigid definitions to make use of. The exception for small cafés without staff is therefore a good example of legislation that is excellent for circumvention. The abolition of this exception could therefore have positively contributed to a higher degree of compliance with the smoking ban in pubs in general.

An element of CIL that we see in this case is overinclusiveness, i.e. the operation of the rule is broader than its objective justifies. After all, many customers wish to smoke in the café and the staff do not always need protection, for example if there is no staff at all or if staff members are smokers themselves. Aside from this, there is little political support in the perception of the addressees. The smoking ban is experienced as a rule imposed from above whilst the stakeholders are none the better for it, and the pub owners feel strongly disadvantaged.
In particular, the smoking ban in small cafés can be pointed out as follows: the objective here is not to protect the staff, but to draw one line with the larger cafés. For a rule that is experienced as far-reaching as this one, this seems to be a measure too little convincing.

## 6. Some examples of CIL

Depending on the types of addressees, tentative other examples of CIL can be identified, sorted by type of addressee.

### *Addressees are companies*

**Competitive Trading legislation** - the example of inland shipping has already been mentioned above.
**Personal data regulation** - the regulations are so far-reaching, complicated and distant from the primary business process that strong additional enforcement options are necessary.[5]
**Compulsory statistics surveys** - companies experience this, because of the lack of every interest, as a major administrative burden.

*Addressees are citizens*

**Prohibition on the permanent residence of holiday homes** - no clear and supportive substantiation of this prohibition can be inferred from literature.
**Ban on downloading** - it is difficult to explain that people cannot store music or films from the Internet on their own computer and for their own use, even if their providers are in violation.
**Obligation to apply for an energy label for the sale of a home** - in the strongly private legal relations of the home sales, this aspect of public law is an odd one out.

A marginal case is the **ban on flying drones** - the conditions on which flying is allowed are drastic and numerous, but based on defendable grounds such as aviation, safety and privacy.[6]

*Addressees are governments*

A specific example of this category we saw in Amsterdam when the daughter of a well-known female writer was killed when cycling after being hit by a truck turning right. A lot of public dissatisfaction came up with this kind of danger on the road. Minister Netelenbos of Transport then decided that all trucks in the Netherlands should have an adequate right-hand side mirror, even though this requirement conflicted with the European rules, which were experienced as counter-intuitive!

**Confidentiality of regulations during the advisory period of the Council of State** - draft regulation that is under the Council of State, may not be shared by the lawyers or politicians with, for example, executive agencies, as a result of which effective implementation of the act afterwards is (unnecessarily) difficult to deal with.
**Obligation to call for tenders** - governments perceive this duty as an infringement and mistrust of their autonomy, and often as unnecessary red tape.
**State aid ban** - this principle of EC law evokes the same feelings of resistance as the obligation to call for tenders.
**Penalty for non-compliance paid by public authorities if the term of the *Act on public access to government information* is exceeded** – due to the associated workload the Public Access Act is mainly experienced as annoying by administrative authorities. Worse still, as agile citizens put their (substantively irrelevant) requests in such a way that governments can nearly not settle them in time, as a result of which they forfeit a penalty payment to these citizens.

It is important to point out that the label 'CIL' does not in itself has any significance for the substantive desirability or undesirability of the legislation in question. For example, the regulations for personal protection (the European General Data Protection Regulation) are very well justifiable, although the complexity and lack of personal interest make them sometimes far removed from the addressees. Otherwise, for the ban on the permanent residence of holiday homes cannot be pointed out any substantive desirability that justifies a powerful legal instrument such as a prohibition. In short, there is a certain dichotomy within the CIL: superfluous justice, like that of the holiday homes, and useful law, but ill-chosen arranged, such as obligatory statistics surveys. Based on this dichotomy I would like to outline possibilities for improvement in section 9.

## 7. What are the consequences of CIL?

The adverse consequences of CIL are diverse.
To start with, a standard that is experienced as CIL is difficult to enforce. The enforcement costs are high and results are limited. For example, the enforcement by the municipalities of the prohibition

on the permanent residence of holiday homes requires very intensive use of supervisors with high costs and a limited upshot. Many municipalities have therefore switched to tolerance constructions.

More fundamentally, CIL is bad for the status of law. The addressees will experience the regulations as a burden to be avoided, instead of as a rule of conduct that, in the interests of the community, and obviously, is to be respected. CIL thus has a negative effluence on (voluntary) compliance in general.
Moreover, the appearance of politics also runs aground. It confirms citizens in their possible mistrust of the government and of the legislator, local as well as national and supranational.

We saw an example of the latter in the early sixties. In those days, farmers grew against the compulsory payment to the agricultural board. Feelings became heated, and within the reach of the cameras, farms were confiscated from reluctant farmers, who were put out of their yards. This evoked a lot of resistance in society; the success of the Peasant Party was the result. At its electoral height, this party had seven seats in the Dutch Lower House of the States-General.

More specifically, it is also possible to point out the esteem of the European Union, which is blamed - to varying degrees understandably - for much bureaucracy. To this contributes the fact that national politicians, when it suits them, also refer to the EU as a source of uncontrollable and unwanted regulation. I can hardly think of a better way to put it than in the following quotation: 'For many European citizens, European law is more a source of technocratic standardization than a democratically legitimate reflection of shared values.' [7] The political situation in the United Kingdom makes us realize what the consequences are if a large part of the electorate shares this point of view.

## 8. Acceptance in the long term?

A reassurance may be that standards existing long enough often lead to acceptance. Examples of CIL from the past, that are never heard of anymore, are the crash helmet, the car seat belt and the prohibition on trading in shares with inside information.
However, the opposite is also conceivable, namely that some existing rules will no longer be taken for granted after a certain period. This might be the case, for example, in the social sector, where high administrative fines are no longer being plucked by citizens involved and by local authorities. Another example concerns the immediate cancellation of rights for the citizen in the event of exceeding the public deadlines, while governments have a milder regime when exceeding deadlines.

## 9. How to deal with the problem?

I would like to mention several suggestions to possibly solve the tough inconveniences of CIL.
In the first place, it is important that the legislator (being the combination of ministries and parliament, supported by the Advisory Division of the Council of State) make sensible assessments. The most important is of course: always consider whether the intended rule is desirable, with the total execution costs, material and immaterial, being weighed against the intended purpose of the rule.[8] In such a consideration, the *Act on the Promotion of Labour Participation for Minorities* might not have come about.

In addition, there are also suggestions to deprive CIL of the counter-intuitive character entirely or partially.

*Involve addressees in the drafting*

The first recommendation is to provide direct input from addressees in the realization of the standard. This has two aspects. In the first place, thus may be taken advantage of the insights of the consultees ('free advice'). Secondly, this can help to increase support for the standard.
Consultation of individuals can be carried out by organizing participation moments, conducting interviews, setting up panels with regular respondents from the field, applying Internet consultation, setting up working groups or organizing roundtable discussions.
Naturally, it is necessary that the respondents will be able to perceive that their suggestions have been taken in account in a serious manner. This can made clear, for instance, by the text of the regulation and by the Explanatory Memorandum to the bill.

*Involve enforcers in the drafting*

In a similar way, the input from the enforcers (regulators) must be sought – and taken seriously. Enforcers are expected to have the best view of how the addressees will receive the rules and how much effort they will have to put into enforcement themselves.

*Do not implement EU regulations too indiscriminately*

As the implementation of guidelines in our national law may possibly result in CIL, it is important for the legislator to be particularly alert to this bottleneck. All space that can be found for this must be used to prevent CIL. And more importantly: in the preliminary phase Dutch negotiators must have a keen eye for the risks of CIL. In addition, the starting point lies with the European legislator, who will also have to be aware of this risk.

*In the breach for addressees*

In drawing up and implementing rules, politicians and the administration must keep an eye on the interests of all the addressees, and always provide transparent and communicable assessments. They do not have to feel embarrassed if it turns out that policy works out differently than foreseen; where necessary they have to give themselves the luxury of second thoughts. In other words, making adjustments and showing considerable flexibility.

*Create legislation carefully*

Finally and more generally: when drafting regulations, it is important to think ahead, to think in scenarios and always to respect the proportionality and subsidiarity of measures. This may seem a general recommendation, but to date the countering of CIL is not yet standard in the assessment model. I hope that this will change one day.

## 10. Finally

Art is a metaphor of reality and gives us food for thought, provided we take time and spiritual space for it. Precisely because of the metaphorical aspect, reality can sometimes be better understood by art than through reality itself – and therein lies the chief enrichment of art. Art teaches us to see beauty in the everyday occurrences. Consider for instance the poem by Bianca Boer, that gives us, even if we are not in that situation, the sense of a sliding contact between parent and child. And Karin Rianne Westendorp shows us how pure feelings, of various kinds sometimes, play a role in our daily activities and may – should! – be important in this. In the cases of CIL, we also see the importance for legislators, administrators and politicians to be able to recognize how regulation works.
The world of the Academy, the one of science and education, requires a balance of research and recognizing. Especially for lawyers, with their socially relevant discipline, this matters a lot. Art can drag them and us along.

[1] Wim Timmer, Het doel wel gesteld. Een praktijkonderzoek naar de toepassing van doelregelgeving *[The goal has been stated. A practical study into the application of goal-based regulations]* (diss. Rotterdam), Den Haag: Boom Juridische uitgevers 2011.

[2] Bert Marseille & Marc Wever, Huisvuil en responsiviteit *[Garbage and responsiveness]*, Nederlands Juristenblad 2018, p. 275-277. They see interpretability as an important principle of regulation and governance, in addition to, for example, procedural justice and responsiveness.

[3] For this argument, among others, two Explanatory Memoranda have been used: Amendment of the *Act on the Promotion of Proportional Labour Participation of Immigrants* in connection with increasing the effectiveness of the act (*Act on the Promotion of Labour Participation for Minorities*), Parliamentary Documents II 1996-1997, 25 369, no. 3; and: Bill of the members Vos and Stuurman concerning the amendment of the *Act on the Promotion of Labour Participation for Minorities*, Parliamentary documents II 2003-2004, 29 275, no. 3.

[4] The information below is taken from: Willem Bantema, Cafés in opstand. Een rechtssociologische studie naar de naleving van het rookverbod door caféhouders *[Cafés in revolt. A legal sociological study into compliance with the smoking ban by bar owners]* (diss. Groningen), Groningen: 2016.

[5] For example, the very high fines that can be imposed under the General Data Protection Regulation can be pointed out to 2% of the annual worldwide turnover.

[6] Drones en privacy. Handleiding voor een gebruik van drones dat voldoet aan de waarborgen voor bescherming van de privacy; Ministerie van Veiligheid en Justitie *[Drones and privacy. Manual for the use of drones that meets the safeguards for privacy protection; Ministry of Security and Justice]*, 25 November 2015.
[7] Yvo Buruma, Foreword Nederlands Juristenblad 2016, no. 16.

[8] This has already been prescribed for years in Aanwijzingen voor de regelgeving *[Directions for regulation]*; see the Directions 2.2 and 2.3.