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## **ENFORCEMENT OF ENVIRONMENTAL LEGISLATION UNDER CRIMINAL LAW BY THE PUBLIC PROSECUTIONS DEPARTMENT IN THE NETHERLANDS**

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### **SUMMARY**

This article examines the role of the Public Prosecutions Department in the enforcement of environmental law in the Netherlands.

After a few opening remarks attention is focused on the relationship between the Public Prosecutions Department and governmental authorities. The relationship between the Public Prosecutions Department and the Environmental Protection Inspectorate is then examined. The author then turns to the Department's relationship with the police. The main focus of all these sections is cooperation in the enforcement network, which is absolutely essential for the enforcement of environmental law. The final part of this article looks at the structure of the Public Prosecutions Department and the instruments available to it in the field of environmental criminal law.

### **1 INTRODUCTION**

The Public Prosecutions Department is the only body in the Netherlands with responsibility for prosecuting criminal offences. Only a public prosecutor can institute criminal proceedings in the criminal division of a court; the police and members of the public do not have this right. The public prosecutor may also decide not to prosecute a case, either for lack of evidence or because he considers it in the public interest. Naturally, society has to be assured that the Public Prosecutions Department pursues a clear and consistent policy in the prosecution of cases, striking a balance between the interests of society, the authorities, the public and the environment.

Since the publication of the first National Environmental Policy Plan (NEPP) on 25 May 1989, the Dutch government has made millions of guilders available to the various authorities involved in implementing the plan and enforcing the law. The Public Prosecutions Department was among those to receive earmarked funds to take on and train extra staff and purchase the necessary facilities.

On 6 June 1990 the five Procurators General who head the Public Prosecutions Department published a report recommending that the enforcement of environmental legislation under criminal law be stepped up, thus prompting greater commitment on the part of the Department to the enforcement of environmental law.

Under section 4 of the Judiciary (Organisation) Act the Public Prosecutions Department has responsibility for law enforcement in the Netherlands. This responsibility is expressed mainly through criminal law, since the Public Prosecutions Department is a key link in the chain of criminal law enforcement (investigation, prosecution, trial and execution of sentence). This places the Public Prosecutions Department in an ideal position to monitor the impact of new and existing environmental legislation and assess whether enforcement under criminal law - sometimes in combination with administrative and private law sanctions - is likely to have the desired effect. As well as playing a key role in assessing the enforceability of new and existing environmental laws, the Department has a significant contribution to make in the system of official bodies with responsibility for ensuring that instruments are applied as efficiently as possible when violations are detected. The Public Prosecutions Department has consciously opted not to resort only to corrective measures which ensure that offenders pay for their crime and that standards are upheld, but also to concentrate on

remedying the environmental damage caused and depriving offenders of any illegally obtained financial advantage.

As pointed out above, enforcement of environmental law is the joint responsibility of the Public Prosecutions Department, the police and governmental authorities. In the Netherlands, the various bodies concerned (central government, provinces, municipalities and water boards) employ both supervisory and investigative officers. The former are primarily accountable to the governmental authorities, while the latter operate under the auspices of the Public Prosecutions Department. In addition, the Economic Offences Act (which covers most environmental crimes) accords police officers extensive powers to carry out checks whether or not they suspect that an offence has been committed. It was recognised from the outset that environmental law should be enforced jointly by the Public Prosecutions Department, as the government body responsible for prosecuting environmental offences, the police and the governmental authorities (central government, provinces, municipalities and water boards). Naturally, all these bodies must work closely together.

## **2 THE PUBLIC PROSECUTIONS DEPARTMENT AND GOVERNMENTAL AUTHORITIES**

It was recognised from the outset that the enforcement of environmental legislation would require a local and regional approach, since it is the regional authorities who issue licences to companies. Knowledge of the region and the cooperation of local authorities in the region were regarded as crucial. Such an approach also allows more account to be taken of specific regional environmental problems, such as manure, port pollution, horticulture and industry.

It was also acknowledged that regional cooperation between local government, the police and the Public Prosecutions Department would be essential. Provincial and municipal authorities are responsible for issuing licences and monitoring compliance with licence conditions, while the police and Public Prosecutions Department can only prosecute environmental offences successfully if they are kept well informed by local government. Cooperation also allows the most effective mix of enforcement instruments (administrative, civil and criminal law sanctions) to be applied.

In 1990 the Dutch government therefore decided to initiate the creation of an enforcement network for environmental law. On 11 October 1990 the environment minister, transport and water management minister, justice minister and interior minister wrote to the Lower House of Parliament setting out their intentions, outlining the proposed structure of the network, which centres on regional cooperation between municipalities (mostly involving one large municipality and the smaller surrounding municipalities).

The Public Prosecutions Department aims to participate fully in this network, and is willing to enter into arrangements and take on commitments. The Department participates in a number of consultative fora and uses the priorities agreed in those fora as the basis of its prosecutions policy.

Each environmental public prosecutor is a member of a number of regional multi-disciplinary committees in his district, which discuss issues such as:

- Joint programming and implementation of enforcement activities;
- Coordination of monitoring and investigative activities by the various regional government agencies;
- Joint enforcement projects on specific matters involving the police, the Public Prosecutions Department and local authorities;
- Problems with regional enforcement and particular companies;
- Exchange of administrative information on companies and the status of their licences, and of details of any offences they may have committed.

Enforcement of the law against corporate environmental crime lends itself particularly well to joint programming and implementation. Regional programmes are set up to coordinate the monitoring operations of the different bodies involved with regard to a specific industrial sector or company.

These plans might also specify what the regular police force will be expected to contribute by way of questioning witnesses.

Determining a joint enforcement strategy at regional level can also help the authorities and the Public Prosecutions Department to act in concert. Such a strategy might include agreements as to how the competent authority and the Public Prosecutions Department will respond in the event of environmental crime, and how they intend to exchange information in such instances.

The governmental authorities have little to do with the enforcement of laws against more minor offences, such as burning waste, making illegal discharges, dumping rubbish on the roadside and chopping down trees. However, they should be involved in cleaning up pollution.

Police surveillance is the main means of enforcement when it comes to this type of crime. It can be carried out on a project basis, focusing, for instance, on certain types of incidental crime for a certain period of time. Such projects are generally launched jointly by the local authorities, the Public Prosecutions Department and the police, who might also agree to bring all the cases uncovered during the project before the court at one special sitting. This attracts publicity and has a preventive effect.

Combating serious organised environmental crime is exclusively a matter for the investigative agencies and the Public Prosecutions Department. Governmental authorities can play no more than a supporting role, providing information or disposing of hazardous wastes, for example. They might also be involved in cases of bribery or official corruption.

Criminal investigations of serious organised environmental crime are usually complex, time-consuming affairs. If the governmental authorities act too soon, they might jeopardise the success of the investigation. If, for instance, they were to carry out an inspection at the premises of a company which was due to be searched by investigating officers, important evidence might be lost. The governmental authorities must therefore take account of the specific interests of criminal investigations.

Multidisciplinary environmental enforcement teams, with representatives of the municipalities, water boards, regional environmental inspectorate, province, police and Public Prosecutions Department are currently being set up in some regions. Work is also being done in some regions to set up a system for providing information from administrative and criminal records.

At national level, the Public Prosecutions Department and the governmental authorities meet in a number of consultative fora, the most important of which is the National Coordination Committee for Environmental Law Enforcement (LCCM), which is chaired by the Chief Inspector of the Environmental Protection Inspectorate. The committee has representatives from all the authorities involved in the enforcement of environmental law. It sets national enforcement priorities each year and makes recommendations to the relevant ministries.

Of course cooperation between the Public Prosecutions Department and the governmental authorities does not always run this smoothly. In the experience of the Public Prosecutions Department, the authorities are often not fully aware that criminal law can be used to lighten the burden of enforcement. Many administrative and supervisory officers are not even aware of all that the public prosecutor can do. Some seem to feel that resort to the criminal law is too drastic a step and are inclined to protect companies from such measures. This occurs particularly in situations where the authorities have already been holding talks with a company for some time about whether it should be obliged to observe all rules strictly. Governmental authorities are also sometimes keen to prevent their own - imperfect - role in a criminal investigation from becoming known. Their toleration of some illegal activities is a thorn in the side of the Public Prosecutions Department. The Department has informed the authorities that it takes a dim view of official toleration.

Governmental authorities will, in future, have to regard their role more as one of law enforcers than as an advisory service for companies. Only then will they be able to work together effectively with the Public Prosecutions Department. There are signs that the authorities are becoming better disposed towards the idea of enforcement by criminal law.

### **3 THE PUBLIC PROSECUTIONS DEPARTMENT AND THE ENVIRONMENTAL PROTECTION INSPECTORATE**

As far as the Public Prosecutions Department is concerned, the Environmental Protection Inspectorate occupies a unique position. The Inspectorate operates 'at a distance' from governmental authorities and its main responsibility is 'secondary monitoring'. It monitors the implementation of environmental policy by the local authorities such as provinces and municipalities. In this context it also keeps an eye on the quality of licences and monitoring activities. Here, the interests of the Public Prosecutions Department and the Environmental Inspectorate coincide. An enforceable licence and adequate monitoring are essential for effective enforcement under criminal law. The Inspectorate and the Public Prosecutions Department regularly exchange information on these matters. The Public Prosecutions Department may also call upon the help of the Inspectorate's Environmental Assistance Team at any time (see below).

### **4 THE PUBLIC PROSECUTIONS DEPARTMENT AND THE POLICE**

The police service in the Netherlands is divided into 25 regions. There is also a national service, the National Police Services Force. A special environment office has been set up in most of the regions to take charge of the enforcement of environmental legislation under criminal law. In regions with no environmental office, enforcement of environmental law is still a recognised part of regular police work. As stated above, enforcement of environmental legislation under criminal law is the responsibility of the Public Prosecutions Department; in practice this means that the environmental public prosecutor attached to a district court is responsible for the enforcement of these laws by the police in the regions within that court's jurisdiction.

The National Police Services Force has an Environmental Crime Department (part of the National Criminal Intelligence Division) which has the task of analysing and classifying criminal intelligence on environmental offences.

Each police region has its own chief, one of whom is in charge of environmental matters at national level and liaises with the other organisations involved in enforcement.

With the stepping up of environmental law enforcement and closer cooperation (in the form of joint priority setting and programming), the Public Prosecutions Department has to exercise increasing control over the enforcement activities of the police. This takes the form of input into the police service's annual programmes and participation in joint national or regional talks on enforcement with governmental authorities.

The enforcement of environmental legislation under criminal law requires certain environmental, legal and administrative know-how and experience. The police could, of course, take on experts who have the required skills and experience. However, this is not such an obvious move for the Dutch police, since they prefer their tasks and responsibilities to be formulated in general terms, calling upon the expertise of other government services or special investigative agencies if necessary. Employing specialists would also mean that the police would no longer have a direct line of contact with the governmental authorities.

When it comes to administrative know-how and operational information obtained from monitoring by supervisory officers, it is more effective to use experts who come from administrative authorities and are responsible for administrative enforcement. Such experts can always turn to their colleagues to obtain the information they require, such as details of the status of a particular company's licence, general information on a company, etc.

The special investigative agencies, who also assist the police, are part of government departments, and therefore function as an on-line connection with governmental authorities. The police work closely with the national Environmental Assistance Team and the Inspectorate for the Environment. The former can be brought in at the request of a public prosecutor, and consists of some 100 staff (experts in legislation, environmental protection and technology, and investigation

techniques) who are authorised to carry out investigations. They have general inspection duties and may also be deployed to support the police service's investigation work.

## **5 THE PUBLIC PROSECUTIONS DEPARTMENT: STRUCTURE AND INSTRUMENTS**

### 5.1 Structure

Enforcement under criminal law is carried out by investigative officers (mainly police officers) on the authority and responsibility of the Public Prosecutions Department. The Minister of Justice is accountable to Parliament for the Public Prosecutions Department. The Minister has a departmental working party on environmental law enforcement to help him in this task.

The Public Prosecutions Department is divided into the five regions served by appeal courts, each of which is further divided into two or three districts served by district courts (of which there are 19 in total). There are two or three police regions in each district.

Criminal cases are first brought before one of the 19 district courts by a public prosecutor; cases which go to appeal are brought before one of the five Courts of Appeal by an Advocate General. The public prosecutors in a district are under the leadership of the Chief Public Prosecutor, while the five Procurators General manage the Advocates General in the regions. The Procurators General are also responsible for running the Public Prosecutions Department at national level, with the assistance of a support section. Each Procurator General is responsible for a different field.

One of the five Procurators General holds the environment portfolio and is therefore responsible for the enforcement of environmental legislation under criminal law at national level. He or she is assisted by the support section's environmental policy unit. One Advocate General in each region is responsible for environmental cases which go to appeal.

In each of the 19 districts one or two public prosecutors have special responsibility for prosecuting environmental cases at first instance.

Besides the environmental policy unit, the Procurator General with the environment portfolio is also assisted by a number of national environmental committees whose members are public prosecutors. There are special committees for surface waters, agriculture and nature management, information and a more general environmental management committee.

### 5.2 Instruments

The most important pieces of environmental legislation for enforcement under criminal law are the Environmental Management Act (which came into force on 1 March 1993), the Pollution of Surface Waters Act and the Chemical Substances Act. Anyone who violates the bans and orders in these Acts may be prosecuted under the Economic Offences Act, which also stipulates sanctions and maximum sentences. The maximum sentence is soon to be raised from two to four years' imprisonment once a bill which is now in preparation has been passed. Maximum fines vary from NLG 10,000 to NLG 100,000. There are no minimum sentences in the Dutch legal system.

The trend is clearly towards stiffer sentences for environmental crime. The Procurators General have drawn up guidelines for the Public Prosecutions Department's policy on instituting legal action (eg. under legislation on manure or illegal discharges).

Companies which have committed environmental crimes may be forced to fully or partially cease their activities. Deprivation of financial advantage obtained by means of an offence is another penalty being applied to an increasing extent. Finally, the court can order a convicted offender to remedy the situation caused by his actions.

Before a case is brought to trial, the public prosecutor can take temporary measures if immediate action is necessary. He can, for example, order the suspect to desist from certain activities.

A small number of very serious environmental offences can be punished under the Criminal Code (art. 173a), with a maximum sentence of 12 years' imprisonment. Such crimes are usually also associated with other offences, such as falsification and fraud.

Individuals suspected of offences carrying a sentence of four years' imprisonment or more may be placed in pre-trial detention. Special investigation techniques, such as phone tapping, may also be used in such cases.

In general the police and public prosecutor have more powers in relation to environmental offences than to ordinary offences. They may, for instance, inspect a company's records whether or not they suspect that an offence has been committed.

Under Dutch criminal law, both natural and legal persons (companies) may be called to account under criminal law.

The public prosecutor may also decide not to prosecute a case, subject to a number of conditions. The offender might, for instance, be required to pay a fine, pay compensation for the environmental damage caused, invest in environmental improvements and/or clean up the pollution caused. The public prosecutor can also order a company to undergo an environmental audit. With large, complex companies, in particular, this can be an effective way of improving environmental management practices. Such conditions may also be imposed by a court in its judgment, should the public prosecutor decide to go ahead with the prosecution.

Some crimes call for a speedy response, for the sake of the suspect or because of the social relevance of the crime in question. It is in the interests of society that such cases be dealt with quickly. In addition to publicising the offence, the investigating officer may offer, on behalf of the public prosecutor, an out-of-court settlement in consideration of a fine. This is sometimes done as part of projects targeting small-scale environmental crimes. The public prosecutor also has the option of a 'fast-track procedure', whereby the suspect is brought before the court shortly after committing the offence.