
TARGETING AND CRIMINAL ENFORCEMENT

DE LANGE, A.

Public Prosecutor responsible for environmental matters in Middelburg, The Netherlands, and National Coordinator attached to the Support Division of the Public Prosecutions Department, P.O. Box 5015, 4330 KA Middelburg, The Netherlands

SUMMARY

Administrative authorities prefer enforcement by negotiation and persuasion, which can be described as 'cooperative enforcement'. Prosecuting authorities have little enthusiasm for this approach. They prefer a resolute approach, a punitive approach. The gap can be bridged by the use of what is known as 'responsive enforcement'. In principle responsive enforcement is cooperative, but has criminal law in the background. It is possible to switch to punitive enforcement if the reasons for the violation make this necessary.

1 INTRODUCTION

The authorities in the Netherlands have now had some 20 years experience with the enforcement of environmental legislation. There have been many problems, there still are some problems, and there are still some problems yet to be encountered. Even so, a lot has been learned in the course of the years, and a lot of progress has been made. The first few years were characterized by what is known as *cooperative* enforcement. Enforcement was above all approached in an administrative way, using negotiation and persuasion. Criminal law was then seen as the ultimate weapon. This philosophy was abandoned following a number of major environmental scandals.¹ Criminal law was also brought to bear, and as a result enforcement took on a more *punitive* nature. However both forms of enforcement still occasionally come into conflict with each other.

2 COOPERATIVE ENFORCEMENT

Administrative authorities in the Netherlands usually make use of cooperative forms of enforcement. They don't like to threaten companies - and there are good arguments for not doing so.

An administrator realizes that there are interests other than just those of the environment. This is quite understandable, as an administrator has broader responsibilities. There are also other matters, such as the number of jobs provided by the company. Ultimately violation of the environmental regulations is always frowned on by administrators, but this poor state of affairs is always compensated. The same company also brings prosperity, and that is as such a good thing. A company has to be way out of line before administrators decide to institute legal proceedings. These are some of the factors which determine the basic attitude of the administrators towards enforcement.

First of all attempts are made to persuade the company involved to better itself, and if this does not work then the authorities are quickly inclined to negotiate. Attempts are then made to find a compromise, and the authorities may even be prepared to permit companies (temporarily) to break the rules. In other words, violations are tolerated (condoning).

When administrators do decide to act, then this has only one purpose: to end the violation. This is also the responsibility of the authorities. The means of enforcement the authorities have at their disposal have been designed with this purpose. In The Netherlands these include a measure which entails a form of administrative coercion.

Termination of the violation is achieved by the authorities at the cost of the company concerned. The same is in fact also true for the penalty which the authorities impose on a company when ordering the company to end the violation within a specified time (which can also be immediately), under the forfeit of a specified sum. According to Dutch jurisprudence the amount of this penalty should be just sufficient to compel the offender to conform with the regulations. The penalty shall not be used as a means of punishment.² In practice penalties are not usually collected when the company has finally ended the violation - even when the time which had been granted to do so has been greatly exceeded.³

The above shows that no account is taken of the economic advantage enjoyed by the offending company by not complying with environmental regulations, for example the postponement of a specific investment for longer than necessary. As a result violation of the environmental regulations is regularly profitable in the long run - even when the regulations have been enforced. It's almost an invitation to break the rules.

Furthermore the violation of the environmental regulations is not thought of as a criminal act within the subculture of the business community, government, or the authorities. Environmental offences are often thought of as justifiable because they are economically necessary - or in some circles businessmen admire them as being a smart way of doing business. In this context an appeal, or procedures dealing with objections, is considered as nothing more than a difference of opinion in business affairs between a company and the authorities.⁴ Non-compliance with the regulations is accepted to a certain degree.

An important advantage of this kind of enforcement is that communication channels with the company are kept open. This results in a thorough knowledge of the company, and the company can also be advised how it can best comply with the regulations. Enforcement can be tailored to the situation, in particular for those violations which are the result of ignorance, always provided that the company is also willing to comply with the regulations.

The most important disadvantage is the risk that the activities of the enforcers have little effect, as a result of the enforcers either allowing the company too much leeway, or by allowing themselves to be played along with, or both. Cooperative enforcement is based on a close and continuous relationship between the company and the enforcer. The resultant mutual dependence can frustrate other methods of enforcement. Cooperative enforcement can lead to partial, or even complete non-enforcement, as was shown in a number of notorious environmental scandals in the Netherlands. One example was the environmental disaster in the town of Lekkerkerk in which it transpired that the council had known for years that toxic waste was being dumped amongst the rubble on which a housing estate was later built. Another was the Uniser affair, which clearly demonstrated the impotence of the authorities when supervising and acting against the largest chemical waste processing company in the Netherlands.

Another important disadvantage is that cooperative enforcement readily leads to legal inequality, which in turn leads to distortion of competition. Enforcement is not a matter of course. Or, as explained above, enforcement is executed in a manner which partly depends on a number of interests, and often interests other than those of the environment. Enforcement is also dependent on the individual relationship between the company and the relevant authority such as the municipality or province.

3 PUNITIVE ENFORCEMENT

Punitive enforcement attempts to ensure compliance with the regulations by tracking down violations, determining who is guilty, and finally punishing the offenders. Punitive enforcement is mainly carried out using criminal law. This is the responsibility of the Public Prosecutions Department, the police, and specialized investigation departments. These authorities also have their limitations. I'll discuss the strong points of criminal law first.

In principle the law is enforced without regard of the persons involved. 'Legal equality' must truly be almost part of the very genes of a Public Prosecutor! This is also why there is little understanding for those authorities that turn a blind eye to certain violations after they have balanced the various interests involved. This is also the reason for the past behaviour of the judicial authorities, when matters which did finally reach them were regularly dismissed because the authorities tolerated violation of the regulations by other companies in similar situations.

The emphasis of criminal law is on the imposing of sanctions and the deterrence of potential offenders. This form of enforcement would appear to be supremely suitable to situations in which the environmental regulations are violated in the pursuit of profits. Punitive enforcement increases the costs of the violation of the regulations, and as a result the offender might possibly decide not to repeat the offence - and potential offenders might decide not to take the risk.⁵

An important advantage is that not only companies (legal persons) but also the management can be prosecuted under criminal law. A legal person is in fact not much more than a framework under corporate law. Mistakes, or the decisions which result in environmental offences, are always made by individuals. Whether natural persons are prosecuted as well as the legal person obviously depends on the nature of the violation.

Another side of criminal law is that it reinforces the concept of 'right and wrong' in environmental legislation. Earlier it was explained that the violation of environmental regulations is sometimes thought to be a very clever way of conducting business, or at most a question of a difference of opinion with the authorities about business affairs. But if the Public Prosecutions Department decides to prosecute, then the more basic idea of "right and wrong" comes into play; an environmental offence becomes a criminal act. The Public Prosecutions Department has a "moral authority".⁶ This is undoubtedly an important weapon in the fight against environmental crime. Companies are usually extremely sensitive about damage to their good name and their reputation, which also acts as a strong deterrent. In other words the power of criminal law is not just based on the effect of the sanctions on the offender; it also - and quite possibly especially - acquires its powers from the effect of publicity accompanying a criminal prosecution.⁷

At the same time this 'right and wrong' in criminal law is also its weakness. Criminal prosecution stigmatizes. There is a real risk that the organization will isolate itself from its surroundings. Communications with the company become difficult, and this can hinder the realization of structural improvements in the situation. In addition it also acts as a deterrent for the administrative authorities, and as explained above they were already unenthusiastic about this punitive approach. As a consequence there is little readiness to pass cases to the Public Prosecutions Department, which is consequently deprived of an important source of information. The administrative authorities have the command over the supply of information. It's very different from the situation where citizens report cases of breaking and entering or violent crime to the Public Prosecutions Department of their own accord. It doesn't concern them. It should be remembered that environmental offences are usually perpetrated behind high fences and in distant industrial areas; or in any case far from extensively-populated areas. And it's not easy to establish whether there actually has been a violation. You can't see it from the colour of the waste water being discharged by the company. First of all measurements will have to be made; it should be realized that pollution is in fact permitted to a certain extent by virtue of the very

licence itself. Citizens can't carry out measurements and they don't usually have the authority to do so. In other words we depend on the supervisory civil servants working for the authorities to establish whether a company has violated the regulations. And if those civil servants don't deliver, or don't give sufficient information, then the Public Prosecutions Department won't be able to carry out its responsibilities.

It's not just the fault of the administrative authorities that cases are not transferred to the Public Prosecutions Department. For a long time the Public Prosecutions Department and the police weren't exactly enthusiastic about tackling environmental offences. Undoubtedly reasons for this were unfamiliarity with the subject matter, and the complex regulations. However even those cases which actually were taken on didn't always end up with the result that might have been expected. The Public Prosecutions Department and the police still compare environmental offences too much to other more traditional forms of crime, such as breaking and entering, robbery, and dealing in drugs. As such a comparison of the various forms of crime is very wise, as it results in more balanced enforcement in the various areas, and consequently better legal equality. But at the same time there is also a tendency to trivialize the offence, which is in part due to the unfamiliarity with the subject matter. This isn't really very surprising as companies and their managements don't fit in with the traditional image of crooks.

Those cases which were however considered to be serious were then often treated in the same way as organized crime. To some extent this is still the case. The efforts of the authorities are then in particular aimed at dismantling a criminal organization. However environmental offences are usually perpetrated by normal bona fide organizations, and of course it is the intention that they - in a *cleaned-up* form - continue to exist.⁸ Obviously Public Prosecutors appreciate this as well. None the less these kinds of cases all too often end in rather unimaginative prison sentences and (big) fines. Of course this is justifiable as such - but the environment is not always served by such an outcome. The authorities are especially interested in putting things back in order, the structural termination of the violation, and in the removal of the pollution.

4 RESPONSIVE ENFORCEMENT

In the preceding sections about cooperative and punitive enforcement I have described not only two very different strategies of enforcement, but also the two conflicting enforcement cultures of the administrative authorities and of the Public Prosecutions Department. A bridge must be built between the two cultures; and intensive efforts are being made to achieve this. As is also evident from other contributions to this volume, an enforcement structure has already been created in which the authorities, police and Public Prosecutions Department meet each other and come to agreement about enforcement matters. The structure provides for national, provincial, regional and local consultations. The agreements range from the making of programs to agreements about the approach in specific cases. This cooperation has already produced excellent results. This has allowed the police and the Public Prosecutions Department to take up an important position in the area of enforcement.⁹ However there is still room for improvement. We can really make a leap forward if we can merge cooperative and punitive enforcement in such a way that the advantages of both are kept, whilst the disadvantages are compensated as much as is possible. That's certainly possible. The solution is cooperative enforcement, with criminal law in the background: this is also known as responsive enforcement¹⁰.

Responsive enforcement is not a replacement for cooperative or punitive enforcement; on the contrary, it contains both forms. An exclusive choice of just one of these forms would be unwise. It is more a question of which combination of punitive and cooperative coercion is most appropriate to which situation. In each case the choice is made with the intention of matching the method of enforcement to the reason(s) for the violation. In this sense enforcement is a suitable

response to the violation. It is also assumed that long term compliance is only guaranteed when environmental regulations are accepted, and have been secured by a learning process in the organization in question¹¹.

Responsive enforcement can contribute to this process by a rather more inventive use of criminal law. I'll give a couple of examples¹².

Environmental offences which can readily be explained by organizational matters such as communication problems, or insufficient management or supervision within the company, do not warrant a strict punitive reaction. Enforcement should be of a cooperative nature, but with criminal proceedings in the background. In concrete terms this means that the offence is first reported. This shows the company that the violation is being taken seriously. After the offence has been reported a cooperative approach can be adopted. The matter can then be suitably concluded with either dismissal or a settlement, under the condition that the organization takes the necessary measures required. For example the condition can be made that an external investigation or *environmental audit* be carried out at the cost of the offender. The Public Prosecutions Department can even agree with the company that a *corporate environmental management system* be drawn up.

However when there is a corporate culture such that environmental offences are caused by indifference, extreme slovenliness, or a lack of motivation, then it is reasonable that the Public Prosecutions Department acts as '*moral authority*' and gives a clear indication of disapproval by serving a writ on the company, or offering a settlement with an accompanying press release. As far as I am concerned a fine or even a prison sentence are not sufficient in this instance. The company must above all be confronted with the consequences of its actions, by compelling the company to repair the environmental damage which it has caused. Furthermore, the corporate culture must also be influenced from within, by stipulating that the company sets up a corporate environmental management system, or if needs be appoints *compliance officers*. If a company cooperates, then the Public Prosecutions Department should explicitly take this into consideration as mitigation. This should be reflected firstly in an appreciable reduction in the punishment and secondly, and if possible of even more importance, the new corporate ideals must be emphatically stressed in court during the public prosecutor's closing speech, or in a settlement with the accompanying press release.

When the regulations have been violated on the basis of a calculated cost-benefit analysis then a businesslike reaction is warranted. In addition to traditional punishment, together with the accompanying negative publicity, the profit accrued by virtue of the violation should also be forfeited. It is reasonable to expect that this kind of company would experience a 'soft' approach as a victory in business terms.

5 CONCLUSION

Responsive enforcement bridges the existing differences in culture between the authorities, the police, and the Public Prosecutions Department. The authorities are reassured that the continued existence of companies is not threatened. Nor is the relationship between companies and government broken off. On the contrary, responsive enforcement puts the organization in order by the enforcement of various kinds of self-regulation, such as audits, corporate environmental management systems, compliance officers, etc. As a result the necessary communication between companies and the authorities remains intact. All these activities take place with criminal law in the background. This is vital. If necessary, the Public Prosecutor can, as the moral authority, hit companies where it hurts, by attacking their reputation. If companies

repent then they will always have the opportunity to clear themselves from (all) blame, and there is then no question of unnecessary stigmatization. In addition when criminal law is in the background - or in the foreground - then this will be advantageous to legal equality.

REFERENCES

1. These were notorious affairs in the Netherlands, such as Uniser (1981) and the Lekkerkerk housing estate (1980).
2. Voorzitter Afdeling Geschillen, Raad van State (Chairman of the Administrative Disputes Division of the Council of State), 20 July 1990, *Administratieve Beschikkingen* 1991, no. 245.
3. Michiels, F.C.A., Niemeijer, E., et al., *Wie is er bang voor de dwangsom?* Evaluatiecommissie Wet Milieubeheer, Achtergrondstudie no. 22, Den Haag 1994.
4. Huisman, W., de Lange, A., et al., *Milieucriminaliteit vergt handhaving op maat*, *Justitiële verkenningen*, volume 20, no. 9, 1994.
5. Huisman, W., de Lange, A., et al., p. 34.
6. *Ibid.*, p. 39.
7. On the basis of section 7. sub-section g, of the Economic Offences Act a judicial decision is allowed to be made public.
8. It is then advisable to talk in terms of "crime in the organization".
9. For example, see *Zesde Voortgangsbericht*.
10. See also Huisman, W., de Lange, A., et al., p. 34ff.
11. *Ibid.*, p. 43.
12. The examples have been taken from: Huisman, W., de Lange, A., et al.

