

## **STRATEGY ON ENFORCING ENVIRONMENTAL LAW THROUGH CRIMINAL LAW BY THE PUBLIC PROSECUTIONS DEPARTMENT IN THE NETHERLANDS**

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### **SUMMARY**

This paper describes the strategy of enforcement of environmental law through criminal law by the public prosecution department. It provides an overview of the environmental responsibilities of the department and defines the core provisions.

## **1 THE ROLE AND POSITION OF THE PUBLIC PROSECUTIONS DEPARTMENT**

### **1.1 Terms of reference**

Under Article Four of the Judicial Organization Act, the Public Prosecutions Department is responsible for law enforcement. This should be interpreted as enforcing law and the legal order, which goes beyond combating crime. Enforcement of law also implies legal protection. Responsibility for legal enforcement is mainly enacted in the field of criminal law, but not exclusively so.

### **1.2 Position in the chain**

The Public Prosecutions Department occupies a central place in the enforcement of criminal law. For example, it is responsible for identifying punishable offences and to this end has power to say how investigation will be carried out by the various investigative bodies.

In addition, the Department is the sole body with access to an independent court. This role of magistrate means that the basic principle governing the Department is that all its actions must be capable of being submitted for review to the court and public sessions.

The Department is also responsible for the final piece in the administration of criminal law - implementation of criminal verdicts. Thanks to its central role in the legal chain (investigation, prosecution, trial and implementation of sentence), the Public Prosecutions Department is the most appropriate body to ensure the most effective use of the scarce resources available to each of the links in the chain. This means that the Department is best placed to anticipate the consequences of existing or new regulations for the workload of all those involved in the enforcement of criminal law. Given this position, it is obvious that the Department should be the authority to decide whether the enforcement of criminal law can be expected to have the desired effect.

### 1.3 Position of the Public Prosecutions Department with regard to enforcement of the law

It is against the background of these general terms of reference that the Department is now outlining its position regarding the protection of the legal order as a collective right against illegal conduct and its consequences.

Legislation and regulation have an important part to play in government policy on providing adequate safety. In many cases, enforcement of criminal law is provided alongside administrative enforcement, each with its own enforcement resources. Meeting society's demand for enforcement of a safe legal order therefore cannot be the Department's responsibility alone. The Public Prosecutions Department must constantly be aware of the existing means of enforcement and of the bodies that have a part to play in this process. This requires an interplay with the other government bodies responsible, with the aim of developing a successful enforcement strategy and deploying effective enforcement tools.

### 1.4 Motives

The contribution that enforcement of criminal law can make to safety in society goes beyond the classical motives of retribution, confirmation of standards and prevention (general and special). Removing any gain or advantage acquired by contravention of the law and restoring or compensating damage incurred increasingly constitute grounds for action under criminal law. Crime must not pay.

### 1.5 Basic principles

Enforcing criminal law to apply legal standards to a satisfactory level covers prevention of punishable offences as well as repression. The Department has to comply with a number of important conditions in this respect:

- The enforcement of criminal law must be able to safeguard the safe legal order as a collective right which offers protection against violations of standards, which our society in all reason has a right to expect. This demands adequate capacity and quality of the resources available for enforcement and the right priorities.
- The enforcement of criminal law must comply with the requirement of equality before the law. This means that legal action must be taken against the perpetrators of crimes without distinction on the basis of personal circumstances - i.e. regardless of their legal status, social position or economic importance - in equal measure and in accordance with the severity of the offence committed.
- What determines the nature and speed of the legal system's response to an offence is the severity of the violation of legal order, the urgency for protective or reparatory measures and the need and opportunities for confirmation of standards. This requires a deliberate, balanced and creative use of the means and powers of criminal law enforcement.
- Adequate attention must be given to the position of victims of crime. This goes beyond considering those directly experiencing the disadvantages. Since some groups in society cannot speak for themselves, representatives and organizations must be seen as representing their interests; as is the case in administrative law and civil law (children, the elderly, nature and the environment).

- Care must be taken to ensure satisfactory degree of lawfulness. This implies constantly monitoring the protection of the position of suspects and those granting them legal aid. This calls for lawful and careful investigation and gathering of evidence, as well as protection of privacy.

#### 1.6 Relationships

- In relation to the courts, the Public Prosecutions Department occupies the position of magistrate with a monopoly of prosecution and the power to decide upon the expediency of prosecution.
- In relation to the police, the Public Prosecutions Department is the competent authority on investigation, both selecting and prioritizing cases, as well as the methods and resources to be used.
- In relation to the administrative authorities, the Public Prosecutions Department is a partner in legal enforcement and partner in authority over the police. The Department formulates the need for enforcement, prioritization, objectives and enforcement arrangements.

#### 1.7 Accountability

- The Department reports to the Minister of Justice and the courts.

## 2 **WHY THE PUBLIC PROSECUTIONS DEPARTMENT CONCERNS ITSELF WITH ENFORCING ENVIRONMENTAL LAW**

### 2.2 The Department's environmental duties

To contribute (by applying criminal law) to the integrated enforcement of environmental law by:

- a. investigation and prosecution;
- b. controlling the investigative services.

### 2.2 Objectives of deploying criminal law

- a. to confirm standards established in the interest of:
  1. the environment or public health;
  2. government credibility (standard-setting);
  3. fair competition;
  4. government control.
- b. restricting/repairing damage in urgent cases, including situations in which the government is unable to act.

- 2.3 The reasons for deploying environmental criminal law and the ways in which this is done are variable, as they depend upon:
- a. the type of suspect (bona fide/calculating/mala fide);
  - b. nature/degree of violation of standards;
  - c. nature/severity of consequences in violation of standards;
  - d. scale on which the type of violation occurs;
  - e. risk of "contamination" (multiplier effect).

### 3 THE DEPARTMENT'S ENVIRONMENTAL RESPONSIBILITIES

#### 3.1 Bringing criminal proceedings against infringement of *core provisions*

Core provisions are provisions which, within the law/regulation or licence of which they form part, are the core of protection of interests for which the legislation/regulation or licence exists.

A provisional (indicative) list of core provisions is included as Appendix 1.

#### 3.2 Bringing criminal proceedings against infringement of *non-core provisions*, if one or more of the following *circumstances* applies:

- direct significant encroachment or threat to the following interests: the environment or public health, credibility of the standard-setting government, fair competition, government controls; or
- the conduct of the perpetrator indicates a calculating or mala fide attitude; or
- significant "contamination hazard"; or
- offence occurs on a large scale with accumulation or possible accumulation of undesirable effects, while no competent administrative authority is in a position to take effective action; or
- international law compels enforcement, while no competent administrative authority is in a position to act effectively.

Where an effective approach so requires, *priorities* and *focal points* will have to be laid down in conjunction with government bodies and investigative services - at national and regional/local level - based on analysis of the area in question. They will have to be given some place within the policy plans of the Public Prosecutions Department and the investigative services.

### 4 HOW ENVIRONMENTAL RESPONSIBILITIES ARE SHAPED AT THE INVESTIGATION PHASE

One of the key powers of the Public Prosecutions Department is the expediency principle, i.e. to deliberate on the importance of prosecution in relation to other interests. The way in which the Department will generally apply the *expediency principle* during the investigation phase is laid down in the following measures:

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The investigative services are instructed to draw up an *official report* immediately (i.e. without prior warning) after an (initial) identification or examination, if the following applies:

- a. Infringement of a *core provision* unless the offence:
  - was not perpetrated deliberately
  - is clearly an isolated incident and
  - is small in scale

or

- b. Infringement of a *non-core provision*, if one or more of the following *circumstances* applies:
  - direct encroachment or significant threat to the following interests: environment or public health, credibility of standard-setting government, fair competition, government control; or
  - if the perpetrator's conduct indicates a calculating or mala fide attitude; or
  - significant "contamination hazard"; or
  - offence occurs on a large scale with accumulation or possible accumulation of undesirable effects, while no competent administrative authority is in a position to take effective action; or
  - international law compels enforcement, while no competent administrative authority is in a position to act effectively.

In other cases, having regard to the nature of the offence or the circumstances, there is in principle no need to begin criminal proceedings, and so the need to draw up an official report is dispensed with. In such cases, however, the Department may decide to send a *written warning letter* to the perpetrator if:

- a. the offence does not require an official report to be drawn up immediately, but where, in view of the *attitude* of the perpetrator, serious allowances must be made for the possibility that he will not automatically be prepared to cease offending or avoid re-offending; and
- b. the offence falls within the agreements that have been made on such "flanking" action by the Department with the competent administrative authority.

**APPENDIX 1 CORE PROVISIONS**

## 1 DEFINITION OF CORE PROVISIONS

Provisions which, within the regulation or licence of which they form part, constitute the core of the protection of interests for which the regulation or licence exists. The provisional list includes core provisions for which provisional agreement exists within the Public Environmental Prosecutions Department, following the results of an initial discussion on this point at the Platform on 28 May 1998.

## 2 ESTABLISHMENT-RELATED ACTS

- Setting up, changing, operating an establishment without a licence
- Discharging from an establishment without a licence
- Setting up, changing, operating an establishment without prior notification
- Failure to comply with the requirements in the event of an emergency
- Acting in contravention of the following types of regulations laid down on the basis of the Environmental Management Act or the Pollution of Surface Waters Act and which are of genuine importance to the protection of the environment, in view of the nature and risks of the establishment and the sensitivity of the environment (including administrative regulations which are of vital importance to effective control by the competent authority):
  - Air:
    - standard regulations
    - maintenance and operation of extraction installations and emission-restricting facilities
  - Noise/vibration:
    - standard regulations
  - Waste water:
    - regulations to avoid discharges of harmful or polluting substances or waste substances directly into surface water or the sewerage system
    - regulations to prevent discharges of blacklisted substances
    - maintenance and working of separators
    - standard regulations
  - Soil:
    - testing and inspection of underground tanks
    - clean-up by a recognized company
    - liquid-proof facilities and leakage trays
    - regulations to avoid illegal clean-up
    - benchmark studies
  - (Hazardous) waste substances
    - regulations to prevent incineration

- regulations to prevent the dumping of waste substances
- disposal of hazardous waste to an accredited collector
- registration obligations
- External safety
  - storage of hazardous (waste) substances and gases
  - instruction/expertise of personnel
- Emergencies
  - regulations to prevent emergencies occurring
  - notification required in the event of emergencies

### 3 ACTS INVOLVING SUBSTANCES / PRODUCTS

- Use of fertilizers in contravention of regulations
- Use of unauthorized pesticides or incorrect use of permitted pesticides
- Unauthorized use of (environmentally) hazardous substances or pesticides posing a direct threat to humans and the environment
- Use of illegal fireworks
- Selling fireworks to children below the age of 16
- Use of unauthorized substances in protected nature areas or designated environmental protection areas

### 4 ACTS INVOLVING WASTE SUBSTANCES

- Waste incineration or dumping (to a significant degree) of waste substances in the open without licence
- Introducing waste water or other waste substances other than from an establishment into the sewerage system or surface water (without/or in contravention of the licence)
- Failure to submit destruction material or incorrect submission of same
- Disposal of underground tanks in an improper manner
- Disposal of construction and demolition waste, contaminated soil, dredge spoil, industrial waste substances and hazardous substances in an improper manner
- Transferring (transporting) waste substances in an improper manner
- Demolishing buildings containing asbestos without licence or in an improper manner
- Unauthorized/improper collection of industrial waste substances or hazardous waste

## 5 ACTS INVOLVING ANIMALS/PLANTS

- Cutting down trees or hedges without licence or failing to comply with the requirement to replant
- Unauthorized acts involving protected birds or their nests or stealing lapwing's eggs in the closed period
- Plucking or taking cuttings from protected plants
- Poaching mammals, birds, reptiles, fish or other animals
- Hunting in an improper manner or outside the designated times
- Unauthorized acts involving protected plants and animals

## 6 ACTS THAT ENCROACH UPON THE SOIL, NATURE OR COUNTRYSIDE

- Seriously encroaching upon/destroying a habitat for flora or fauna or a nature reserve (without or in contravention of a licence)
- Removing (substantial) timber vegetation without licence or failing to comply with the replanting requirement
- Removal of earth (without/or in contravention of a licence)
- Damming up ditches (without or in contravention of a licence)
- Abstraction of ground or surface water (without or in contravention of a licence)
- Encroaching upon valuable land (without or in contravention of a licence)

Any of these acts whether or not in combination with collective offences connected with the above.