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# NATIONAL STRATEGY FOR ENVIRONMENTAL LEGISLATION ENFORCEMENT

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## SUMMARY

The Dutch national strategy for environmental enforcement is a framework that national and decentralized authorities can adopt as their policy. The basis principles are settled by an agreement between the competent authorities. These principles give two responses to offences of the environmental laws: (1) warning with period allowed for reversal of situation and (2) sanction and/or indictment. This paper describes the key tenants of the Dutch national strategy and details how the strategy is implemented.

## 1 INTRODUCTION

In the Netherlands, governmental responsibility for environmental management is decentralized. Moreover, a distinction is drawn between criminal law and administrative law. There are separate competent authorities for each area. As a result of this organizational structure and the division of responsibilities, there are some six hundred public sector organizations which enforce environmental legislation.

Businesses and the general public will come into contact with various authorities, possibly further to permit requirements. Many activities which are prohibited because they are harmful to the environment fall under the jurisdiction of more than one authority. Moreover, many infractions are the result of a chain of activities, with a different authority responsible for each link in that chain.

In this type of 'chain problem' (as well as in others) coordinated government action is required. Businesses and the public also regard coordination as desirable in the interests of justice and equal treatment under the law. At the same time, it is recog-

nized that the action taken should depend on the individual situation. Accordingly, the decentralized authorities have been assigned certain tasks, since they are closest to the problem and are in the best position to consider the interests at stake in a balanced manner.

The strategy described in this paper has been agreed by all authorities having enforcement responsibility. A national consultative body – the Bestuurlijk Landelijk Overleg Milieuhandhaving (National Administrative Platform for Environmental Legislation Enforcement; BLOM) has been instituted for the purposes of coordination. It includes representatives of the ministers of Justice, the Environment, Water, and Nature and Landscape, and representatives of the decentralized authorities (provinces, municipalities and water management authorities). This ensures uniformity of action wherever this is desirable. Certain infractions will always attract the same penalties no matter where they occur, and regardless of the situation.

The decentralized Dutch system entails that certain basic principles cannot be established by means of central (national) legislation. The competent authorities

have therefore decided to make certain agreements regarding their enforcement action based on consensus. This decision is based on the fact that the nature of environmental problems is usually such that no single authority can provide a solution which applies to the entire chain. If their enforcement action is to be effective, the Dutch authorities must cooperate with each other.

## 2 THE DUTCH NATIONAL STRATEGY

The Dutch national strategy is a framework which national and decentralized authorities can adopt as their policy line, or within which they can formulate their own policy.

The principles applied are:

- a) a recognizable and transparent enforcement line;
- b) decisive action against every infraction;
- c) appropriate combination of administrative law and criminal law;
- d) transparency regarding any deviations from policy.

The BLOM has established this strategy for all areas of enforcement in which its members are involved.

The strategy applies to all current forms of response or intervention further to a breach of environmental legislation. That response may vary from a warning to taking action, from an indictment under criminal law to administrative measures.

### 2.1 Terms and Definitions

In 1999, the Dutch Public Prosecutions Department published its 'Environmental Strategy'. This was primarily intended as a framework ensuring uniformity of action on the part of the regional public prosecutors' offices and the investigating officials of the regionally organized police force. By means of enforcement platforms, the criminal law strategy was given an important place at the provincial level, serving to coordinate enforcement action on the part of the relevant officials.

The strategy of imposing sanctions is regarded as an appropriate response, depending in particular on the nature and the consequences of the offence. In most cases, however, neither the nature nor the consequences of an infraction can be stated prior to the event. Nevertheless, it is necessary that the relevant authority should attempt to do so, and should do so in line with the strategy stated by the Public Prosecutions Department. The BLOM has classified certain offences as 'fundamental breaches of the law.' These are the offences covered by the "key regulations," a list of the main national ordinances and directives. The standard response to any infraction of these key regulations has been agreed between the Public Prosecutions Department and the BLOM, and is binding on each party.

However, the existence of the list of key regulations must not prevent each case being considered individually to determine whether the basic criteria for a 'warning' response or an 'action' response have been met.

### 2.2 The Importance of Compliance

The enforcement of regulations, permit conditions or general rules is the enforcement of an established norm. Before that norm came into existence, there will have been countless forms of commentary, consultation and democratic control. After all interests were duly considered, the norm was formalized by means of an Act of Parliament, directive or permit requirement, and it applies equally to everyone whom the norm addresses. Compliance with a norm that has been established by democratic means is the duty and obligation of every citizen and every legal entity, such as a corporation or company.

In drawing up its work plans, each regulatory authority will of course set certain priorities and will devote greater attention to more serious potential environmental effects and to 'suspect' companies. However, once an infraction has been identified – even a minor infraction on the part of well-intentioned company – an appropri-

ate response must follow.

### 2.3 The Importance of Enforcement

Enforcement of the regulations is important for the following reasons:

- a) To limit environmental damage and to ensure restoration to the original state.
- b) To prevent recurrence, whether by the same party or others.
- c) To cancel out any unfair advantage that the offender may have enjoyed.
- d) To reaffirm:
  - norms established in the interests of the environment or public health;
  - the possibility of government control (by means of quantified standards, etc.)

This being in the interests of:

- the credibility of the legislative apparatus;
- justice;
- fair competition.

Enforcement action is primarily concerned with repair, deterrence and sanction. In other words, it aims to restore the environmental situation to its prior state, to discourage the offender and others from committing offences in future, and to penalize the offender (thus cancelling out any unfair advantage gained). In addition, consistent enforcement action is necessary in the interests of legal certainty, justice, equality of treatment and credibility.

### 2.4 The Importance Of There Being Both Criminal Law Action And Administrative Law Measures

Both the criminal law system and that of administrative law are concerned with encouraging compliance with the established norms. The instruments of administrative law are primarily geared to terminating and reversing (insofar as possible) the current illegal situation, i.e. resolving the nuisance or damage caused and implementing appropriate provisions for the

future. The instruments of criminal law are primarily geared to penalizing the offender and removing any unfair (competitive) advantage that he may have enjoyed.

Both types of instrument also have a deterrent effect and are therefore preventative measures at both the individual and general levels. Because all these aspects come into play in almost every infraction of environmental legislation, a well-considered combination of the two forms of action is generally desirable. Each enforcement action will then be instigated by the civil authority and the Public Prosecutions Department working in tandem. Wherever possible, they will make general agreements regarding the nature of their cooperation, and will consult each other regarding each specific incident.

### 2.5 The Possibility of Legalization

In the light of the stated compliance objectives, it is also important to consider the possibility of legalizing ('decriminalizing') an offence, whereby the authorities must decide whether it is nevertheless possible to issue a permit after the event. The factors which must be considered are whether any unfair competitive advantage has been gained, whether the general sense of standards has been violated, and so forth. Where the results of the offence are clearly in violation of the objectives of the legislation, there is good cause for enforcement action despite any possibilities for legalization. A penalty under criminal law (further to due process instigated by the administrative authority) would then seem most appropriate, although it is possible that the authority will choose to impose some penalty under administrative law, either instead of or in addition to the criminal law sanction. The reasons for this must then, of course, be stated in the enforcement decision.

## 3 IMPLEMENTATION OF THE NATIONAL STRATEGY

There are generally two forms of response to an identified infraction: (1) a

written **warning** which states a date by which the illegal activity must be discontinued and (2) administrative and/or criminal law **action**, involving the preparation and imposition of an administrative sanction and/or the issuing of an indictment under criminal law. A warning is applied in cases involving a first offence relating to activities not covered by the key regulations. An administrative and/or criminal law action is taken for any breach of key regulations; in the event of persistent or repeated offences; or for an offence for which subsequent re-inspection is not possible.

### 3.1 Warnings

A warning with a deadline for restoration can be issued during or after an inspection, by means of an official report or an official letter. The warning is always in writing. Where subsequent re-inspection reveals that the illegal activities for which a warning was previously issued are continuing, or have been resumed, this is classed as a 'repeated' or 'persistent' offence, whereupon the second type of response – criminal or administrative action – will follow.

### 3.2 Administrative or Criminal Actions

An administrative or criminal action (e.g., coercive penalty payment, administrative coercion, (future) administrative settlement, possible closure or revocation of permit) is appropriate if it seems likely that a warning will have no effect, perhaps because subsequent effective re-inspection is not possible. This will be the case for incidental transport inspections, the trade in materials and waste materials, and the so-called 'free field' offences. The main group of offences to which the second type of response will be applied comprises those which breach the key regulations.

Based on agreements between the regulatory authorities and the Public Prosecutions Department, it will be determined whether an enforcement decision is to be taken or an indictment under criminal law is to be issued. In some cases, both courses of action may be taken. The process of tak-

ing action does not detract from the regulatory authority's responsibility to investigate all relevant facts and to determine the interests which will be influenced by the imposition of a sanction. All stakeholders will be invited to express their standpoints, giving the offender the opportunity to state whether he believes an infraction has indeed taken place, and whether there is any good reason to waive (or postpone) further enforcement action. It is also important to state exactly which regulations have been contravened, since this will determine whether the authority to take enforcement action exists. Furthermore, a decision must be taken with regard to the measures to be taken further to any administrative coercion, or the nature of the coercive penalty payment. Needless to say, the regulatory authority has to be able to prove that the alleged offence actually took place.

Even an indictment does not mean that prosecution will definitely follow. The Public Prosecutions Department must consider the likelihood of success, questions of evidence, and even opportunity.

### 3.3 Special Situations

In cases in which immediate action is required, the preliminary process may be omitted. Some situations are so urgent that administrative constraint is inappropriate (i.e. there is no 'grace period' in which to resolve the situation) while in some cases, the sanction is imposed at a later date.

If the illegal activities continue beyond the grace period, it is important that enforcement action is pursued in a consistent manner. This is in the interests of the credibility of the enforcement process as a whole, and in terms of the preventative and punitive effect of the instruments.

## 4 PREDICTABILITY

It is important that the response to a (potential) infraction should be predictable. Accordingly, not only the key regulations but the usual grace periods for reversal and restoration are laid down by means of internal enforcement guidelines.

The existence of the key regulations list does not absolve the regulatory authority from its duty of considering each case individually. This is particularly so when key regulations do not apply. Each case must be carefully assessed to determine whether there is a significant infraction for which action under administrative and/or criminal law is appropriate.

This would certainly be so if:

- there is direct impairment, or a significant and palpable risk of impairment, to the environment, public health, the credibility of the government, fair competition or government control, or
- the actions of the offender indicate a calculating or mala fide attitude, or
- there is a reasonable likelihood that a failure to take action will result in escalation of the illegal activities, or
- the illegal activities are being undertaken on a scale which is likely to lead to undesirable effects through accumulation, or
- enforcement action is mandatory under international law.

The enforcement decision includes a grace period within which the illegal activities must be discontinued in order to avoid the stated sanction being imposed. In formulating the national key regulations, efforts are made to establish the grace period and the level of any coercive penalties. In some cases, the payment of a financial penalty will avoid further criminal action (settlement), while in others a court hearing is always required. This too is established as part of the key regulations list.

#### 4.1 Transparent Individual Evaluation, In Consultation Between The Administrative Authority And The Public Prosecutions Department

No matter how carefully matters are assessed in advance, there will always be situations in which discretion is required and in which some deviation from the standard guidelines is required.

There are two reasons why a pre-

determined policy line can never be complete. Firstly, it is impossible – and fruitless – to attempt to list all possible offences, not least due to the complexity of some commercial operations. Secondly, even ‘foreseeable’ offences can take place in unforeseen circumstances. A degree of discretion is then required in the interests of justice and equality. Accordingly, the administrative authority and Public Prosecutions Department may decide to take a more lenient course, or indeed more stringent action than would normally be the case. However, the deviation from standard practice must be transparent and controllable.

In the case of violation of the key regulations, it will be possible to waive formal action in favour of a warning, if the offence:

- has not been committed deliberately;
- is clearly an isolated incident;
- is of limited extent and impact;
- has been committed by a party of otherwise good record who has been willing to take remedial action immediately.

#### 4.2 Offences Committed By Governmental Authorities

The enforcement of compliance on the part of another governmental authority (or a department of one’s own authority) is no different to that applying to other parties. Indeed, here it is even more important to ensure that the objectives of maintaining the general sense of standards and the credibility of the legislative apparatus are upheld.

Of course, certain judicial or practical complications can arise, particularly in the case of criminal prosecution of the central government or administrative action against one’s own authority. In such cases, democratic control remains the most effective instrument to ensure that the legislation is observed. Internal guidelines for the identification of an offence on the part of a governmental authority and for the action to be taken must therefore be geared to ensuring the best possible opportunities for

effective democratic control.

Other governmental bodies or public sector organizations which are found to have committed an offence will be treated in exactly the same way as companies and the general public in terms of administrative action.

Offences committed by one's own organization (other departments or allied organizations) will also be dealt with in line with the framework described above. The required level of transparency will be achieved by the following means:

- the inspector (or the director of the department) is authorized and required to report any breach of the key regulations committed by his own organization to the Public Prosecutions Department and to institute the usual administrative enforcement measures in full
- a copy of the report must be submitted not only to the director of the department or organization concerned, but also to the minister or other public administrator responsible for that organization, and to the minister responsible for environmental legislation enforcement.

All parties will respond to the report in such a way as to ensure that the results are open to democratic control.

Where the inspector identifies a key regulation offence committed by his own department but for which his own department is not the competent authority, he is to report this to the Public Prosecutions Department, to the minister or other public administrator responsible for the department, and to the competent authority.

## 5 SUMMARY

Response 1. Warning with period allowed for reversal of situation

- First offence, not relating to key regulations or Offence against a key regulation, but:
- Not deliberate and

- An isolated incident and
- Of limited extent and
- Offender of otherwise good record and
- Measures taken

Response 2. Sanction and/or indictment

- Offence against key regulation or
- Persistent/repeated or
- Incapable of re-inspection, or
- Direct impairment of:
  - environment
  - public health
  - government credibility
  - fair competition
  - government control, or
- Calculating or mala fide, or
- Likelihood of re-offending or
- Accumulation, or
- International obligation

Individual deviations from the Response framework:

- Key regulations.
- Reversal or grace period.
- Level of coercive penalty or settlement (to be documented with full reasons for decision).

Where a key regulation offence has been committed by one's own department, the notification of action is submitted to the director of the governmental department concerned (with the competent authority informed as appropriate) with copies sent to:

- the minister responsible for the enforcement of environmental legislation;
- the minister responsible for the organization in question.
- the Public Prosecutions Department.

**Warning**

**Action**

