Protection of the environment through criminal law in The Netherlands

Report of the delegation of The Netherlands for the EUFJE Conference of 30 and 31 October, Bolzano, Italy

1. Who can be held criminally liable?

a) Natural and legal persons

Natural as well as legal persons can be held criminally liable.
According to the general system of criminal law, legal persons are criminally responsible (art. 51 Criminal Code, dating from 1976; under the EOA since 1950). This applies to all offences. The legal person and/or the natural persons who instructed the prohibited action or who in fact were in charge of it, or all of them together can be prosecuted. In jurisprudence, the question under which circumstances a legal person can be held responsible for a criminal offence has been answered as follows: "The answer to this question depends on the circumstances of the case, to which also the nature of the (prohibited) conduct belongs. Therefore, it is difficult to formulate a general rule. Nevertheless, an important point of orientation for the attribution is whether the conduct has taken place or has been committed within the sphere of the legal person. Such a conduct can in principle be attributed to the legal person. There can be conduct within the sphere of the legal person if one or more of the following circumstances occur:

- it concerns acts or omissions by a person who, as an employee or on another basis, is working for the legal person;
- the conduct fits within the regular business of the legal person;
- the conduct has been of use for the legal person in its business;
- the legal person had the power to decide whether or not the conduct would take place and such or comparable conduct in fact was or had been regularly accepted be the legal person. Under such acceptance is comprised a situation in which the legal person has not taken the care that could be reasonably expected from it to prevent such conduct." (High Court 21-10-2003, 02229/02; ECLI:NL:HR:2003:AF7938).

There is no precondition requiring a conviction or any other particular result of a criminal proceeding against a natural person.

b) Inciting, aiding and abetting

According to the general system of criminal law, those who intentionally incite another person to commit an offence by means of gifts, promises, misuse of authority, threat, misleading or the provision of opportunity, means or information, will be punished on an equal footing as the committer himself. The same applies to those who cause another person to commit an offence as well as the co-perpetrators. As an inciter, a Dutch national has been prosecuted and punished who advertised forbidden fireworks in Dutch newspapers and sold them in Belgium to Dutch inhabitants whilst being aware that they would import those into the Netherlands. Aiding and abetting are also covered by the Criminal Code (artt. 47-49 Criminal Code).

2. Implementation of the offences mentioned in Art. 3 of directive 2008/99/EC

All acts mentioned in Art. 3 of directive are offences under the law of the Netherlands. Acting with (gross) negligence is, in jurisprudence, equalized with acting intentionally. Furthermore, people acting professionally are expected to take due diligence with respect to the environment. If that has not been the case, absence of responsibility will not easily be accepted.

3. Way of implementation of art. 3 of the directive

a) In the Criminal Code and/or environmental law?
b) Copy-paste?

No specific legislation has been enacted for the implementation of the directive. All offences mentioned in art. 3 were considered to be covered fully by the existing legislation, so the legislator did not choose for "copy-paste".

The Criminal Code contains four articles on environmental offences, under the heading of "Crimes against the general safety of persons or goods".
According to art. 173a Criminal Code, the intentional and illegal release of a substance on or into the soil, in the air or in the surface water is a crime, if this could lead to a hazard for public health or for the life of another person. This is also the case if the release is caused by negligence (art. 173b Criminal Code).
According to art. 161quater Criminal Code, the intentional exposure of human beings, animals, plants or goods to ionizing radiation, or contamination of human beings, animals, plants, goods, soil, water or air with radioactive substances is a crime, if this could lead to a hazard for public health or for the life of another person. The same is the case if the release is caused by negligence (art 161quinquies Criminal Code).

In environmental jurisprudence, the decision whether or not intent has been established, is made on a case by case basis. As far professionals or (legal) persons in business are prosecuted, the presumption is that they should be aware of their obligations with respect to the environment, and the primary question is if they have taken the reasonably expectable measures to comply with these obligations, including f.e. maintenance of their premises and installations. If not, they "have, willingly and knowingly, exposed themselves to the substantial possibility that an offence would occur". This is qualified in jurisprudence as "conditional intent" and, as such, subsumed under intent. It will cover all cases of serious negligence. In the end it will specify the seriousness of the crime and therefore will play a role in the decision on the modality and the amount of the punishment (which need only to be motivated in general terms in the sentence).The same applies, but less strictly, for private individuals.

All other material environmental provisions have been laid down in environmental legislation. Practically all provisions in the environmental legislation that contain obligations for private persons or organisations have been designated as criminal offences. The designation of the provisions in administrative environmental legislation the breach of which are considered criminal offences, can be found in art 1a of the Economic Offences Act (further: EOA).

The conclusion is that both ways are combined.

c) Specific (risks of) results?

In the articles of The Criminal Code mentioned under question 3a)b), specific (risks) of results as spelled out there have to be fulfilled. In general, this is not the case with provisions laid down in environmental legislation. There, the legislator has decided that the illegal behaviour **per se** results in a risk for man or the environment. Actual damage in any measure to human health or environment practically never forms a part of the description of the offence and therefore doesn't have to be proven by the public prosecutor. However, it can play a role in the amount of the punishment. In the case of intentional offences, in suffices to prove that the accused had an intention to act in a specific way; he cannot exculpate himself by asserting that he had no intention to break the law or that he had no intention to cause damage.
Under the legal provisions that require specific (risks of) results to be fulfilled, the burden of proof that that is the case lays with the public prosecutor. Therefore, he should (and very often does) include an expert report on this question in the criminal file. On this basis the judge has no problem to reach a conclusion. If the report is challenged by the defendant, an independent expert appointed by the judge has proven to be helpful.

4. Availability of criminal sanctions for environmental offences

a) Fines and imprisonment, minimum and maximum levels, organized criminal groups

According to the Criminal Code, the principal sanctions are imprisonment (for crimes), detention (for misdemeanours), community service and fines (art. 9).
The Criminal Code specifies general minimum sanctions of one day for imprisonment and detention (artt. 10 and 18) and € 3,- for fines (art. 23). In addition, the courts have the possibility to convict a (legal) person guilty without imposing a sanction (art 9a Criminal Code).
The Criminal Code also specifies general maximum sanctions: lifelong or 30 years of imprisonment, one year and four months of detention and 240 hours of community service. The maximum sanctions for imprisonment and detention are further specified per offence: in years for crimes, in weeks or months for misdemeanours). The maximum fines are classified in six categories, amounting (at this moment) from € 405,- to € 810.000,=. The Criminal Code stipulates explicitly that, if a legal person is convicted and the maximum fine does not lead to an appropriate sanction, the next higher category may be applied. The maximum fines have to be adapted to inflation regularly.

The maximum sanctions for the environmental crimes in the Criminal Code are as follows.

- Art 161quater (intentional release of ionizing radiation and radioactive substances): 15 years of imprisonment (lifelong if a human life is lost) and € 81.000 fine (fifth category);
- Art 173a (intentional and illegal release of a substance on or into the soil, in the air or in the surface water): 12 years of imprisonment (15 years if a human life is lost) and € 81.000 fine;
- Art 161quinquies and art 173b (the negligence varieties of artt. 161quater and 173a): one year of imprisonment (two years if a human life is lost) and € 20.250,- fine (fourth category).

The minimum and maximum sanctions of the Criminal Code are also applicable to environmental offences that are sanctioned under the EOA. The environmental offences under

the EOA are divided into three classes, the first and second being crimes if committed intentionally (including gross negligence) and misdemeanours if not, the third class being all misdemeanours. The distinction between class 1 and class 2 is in general made on the basis of the gravity of the possible environmental effects of the criminal offence.

The maximum sanctions under the EOA for class 1 crimes are six years imprisonment, 240 hours community service and € 81.000,- fine (for legal persons € 810.000,- if € 81.000,- would not be considered an adequate sanction) and for class 2 crimes two years imprisonment, 240 hours community service and € 20.250,- fine (for legal persons € 81.000 if € 20.250,- would not be considered an adequate sanction). Maximum sanctions for misdemeanours are one year (class 1) or six months (class 2 and 3) imprisonment and € 20.250,- fine (for legal entities € 81.000 if € 20.250,- would not be considered an adequate sanction). Furthermore, in cases in which the value of the goods with which or in relation to which the environmental offence has been committed, or the value of the goods obtained by the environmental offence is higher than one quarter of the maximum fine, a fine of the next higher category may also be applied (art. 6 EOA).

Under the Criminal Code, participation in a criminal organization is a separate and specific offence, with a maximum penalty of six years of imprisonment and/or a fine of € 81.000,-. For the founders, the leaders or the directors of the organization, the time of imprisonment can be increased to eight years (art 140 Criminal Code) Environmental offences and participation in a criminal organisation can be prosecuted jointly. The maximum imprisonment for both offences together may increase to one third above the highest maximum (art 57 Criminal Code).

b) Forfeiture of illegal benefits

As stated under 4a, the value of the illegally obtained gods can be discounted in the fine (art 6 EOA). Furthermore, any objects (including money) obtained by or from the proceeds of the offence, objects in relation to which or by means of which the offence has been committed or prepared and any rights in relation to these objects, can be confiscated as an additional criminal sanction (art 33a Criminal Code). Next to this, forfeiture of profits or advantages obtained by an offence can be realized as a non-punitive order *via* a separate procedure (art. 36e Criminal Code).

c) Remedial sanctions imposed by criminal judges

Under the EOA, criminal judges can among others for environmental offences:

- totally or partially close down an enterprise for a maximum term of one year (art 7 EOA; additional sanction);
- totally or partially deny specific rights or profits that have been or could be given by government in relation to the enterprise, for a maximum term of two years (f.i. the use of licenses; art 7 EOA; additional sanction)
- place the enterprise under custody for a maximum term of three (crimes) of two (misdemeanours) years (art 8 EOA, non-punitive order);
- impose a repair obligation at the expense of the trespasser (art 8 EOA; non-punitive order);

5. Actual use of criminal sanctions to punish environmental offences

a) Environmental offences brought to criminal courts; frequency and types

Environmental offences are brought to criminal courts on a regular basis, but the number is rather restricted. The cases the criminal courts deal with are mostly cases in which administrative enforcement is impossible, such as trade in and use of illegal fireworks, improper removal of asbestos, transgression of the European regulation on trans boundary shipment of waste.

b) Penalties

Most environmental offences are retaliated with fines. For natural persons, if a fine is considered to be inadequate, the next choice will be community service, whether or not combined first with a fine and second with a suspended prison sentence. Non-suspended prison sentences will be applied when the offences have had really serious consequences (f.i. lethal victims), when environmental offences are combined with other serious crimes (fraud, drug crimes), and in cases of recidivism. For legal persons, only fines can be applied.

Specific additional sanctions or non-punitive orders such as deprivation of specific rights, publication of the verdict, total or partial denial of specific rights or profits that have been or could be given by government in relation to the enterprise, placing of the enterprise under custody or imposing a repair obligation at the expense of the trespasser are applied seldom if not never. For remedial sanctions that can be issued by the administration (see par. 7b), nearly always the initiative lies with the administration. Total or partial closure of the enterprise takes place on an incidental basis only.

Confiscation, compensation and forfeiture of illegally obtained profits or advantages are applied regularly by the criminal courts.

c) Impediments for criminal sanctioning of environmental offences

In The Netherlands, there is an extensive practice of environmental law enforcement.
The reason why environmental offences do not reach criminal courts could be manifold, f.i.

- the ultimum remedium character of law enforcement by criminal prosecution;
- less offences because a credible system of environmental law enforcement has convinced the actors in the field that it is more profitable for them to comply with the law;
- a very effective system of settlement of criminal environmental cases between the trespassers and the public prosecutor, the investigating officers and the administrative organs that are competent to issue criminal fines;
- the “enforcement obligation in principle” for administrative authorities developed in jurisprudence of the Administrative Jurisdiction Division of the State Council (see under 8a)b);
- better prevention of environmental offences.

Field research would be necessary to sort this out. Only on that basis a decision should be made whether or not criminal environmental law enforcement should be strengthened and in what ways.

6. Structure of prosecuting environmental crime

The Public Prosecution Office, that has a branch in 10 areas within The Netherlands, is responsible for prosecuting all criminal cases. Besides these regional offices a functional branch of the Public Prosecution Office has been set up for complex fraud and environmental offences as well as for complex cases of forfeiture of illegal benefits. This branch is active over the whole country operating from four of the ten regional offices. It deals with all important environmental criminal cases. Minor cases stay within the realm of the 10 regional branches. All public prosecution (also in environmental cases) takes place under the responsibility of the Minister of Justice. There is an extensive training program for public prosecutors in the field of the environment (in which judges dealing with environmental criminal cases can take part as well).

All criminal environmental cases, albeit crimes or misdemeanours, shall be brought before specialized chambers of, in first instance, the 11 district courts and (in appeal) the four courts of appeal. In first instance these chambers sit either with a single judge (economic police judge) or with three judges (full economic chamber). All appeals have to be filed before a full economic chamber (EOA).

7. Availability of administrative sanctions for environmental offences

a) Possibility of administrative fines

Although in many fields of administrative law the authority to impose administrative fines is given to administrative organs, in the field of environment this authority does only exist to a limited extent: under the Act on Plant Protection Products and Biocides and under the Fertilizers Act. In other parts of environmental law, an extensive system has been developed of delegation an authority to specified administrative organs to impose criminal fines under the supervision of and in conformity with guidelines from the Public Prosecution Office. In case the person addressed by the criminal fine order enters a formal protest against such a fine, the case has to be brought before the criminal judge. In view of this system, no further need has been felt up to now for administrative fines in environmental matters, although the system is under review at present.

Under the Act on Plant protection Products and Biocides,
i) the public prosecution offices has to be consulted about the offence if its seriousness or the circumstances under which it is committed give cause for that (art. 94); this should lead to a choice for one of the routes;
ii) the maximum fine depends on the type of offence under a general maximum per offence of € 81.000,- for natural persons and a general maximum per offence for legal persons of either € 810.000,- or of 10 percent of the annual turnover in the year preceding the offence, if the latter is higher; there are no legal minimum sanctions (art. 97);
iii) the competent authority is the Minister of Economic Affairs for plant protection products, and the Minister of Environment and Infrastructure for biocides (art.90 jo art 1).
i) the public prosecution offices has to be consulted about the offence if its seriousness or the circumstances under which it is committed give cause for that (art. 55); this should lead to a choice for one of the routes;
ii) the Act gives fixed fines for certain types of offences (e.g. € x per excess kg of nitrates or phosphates; artt 57, 58, 58a 59), and a type dependent fine for other offences; for all offences

there are general maximum fines: € 81.000,- per offence for natural persons and € 81.000,- or € 810.000,- per offence for legal persons (art. 62); there are no legal minimum sanctions;
iii) the competent authority is the Minister of Economic Affairs.

b) Remedial sanctions

The available remedial sanctions are
- withdrawal of the environmental licence;
- administrative order to restore under penalty;
- administrative order to restore, implemented factually by the administration at the expense of the perpetrator if not of not timely implemented by the perpetrator himself.

The sanction of withdrawal of an environmental license belongs to the competence of the administrative authority that has issued the licence. It is not totally clear form jurisprudence whether or not the withdrawal has a penal character.
The competence for both types of administrative orders is regulated in the material environmental legislation (a.o. Environmental Management Act, Water Act, Flora and Fauna Act). This competence is distributed over national, provincial, regional and local authorities, that are required to co-ordinate their enforcement actions.

8. Actual use of administrative sanctions against environmental offences

a) Frequency and types of cases
b) Types of sanctions

Within the specific areas in which administrative fines are possible (see above under 7a), the presumption is that most offences are sanctioned by administrative fines. Criminal prosecutions under these acts have become rare. The reasons are probably that
- sanctioning by the administration is easier (no interference with the public prosecutor),
- the fines will be substantially higher, and
- the legal system is in principle: pay first, litigate later.

Withdrawal of licences for reasons of non-compliance seems to be rare. On the other hand, both types of administrative restoration orders are issued by many administrative authorities on a regular basis. One of the reasons for this is probably that the Administrative Jurisdiction Division of the State Council has, in jurisprudence, developed an “enforcement obligation in principle” for administrative authorities. This leads regularly to administrative court cases in which interested parties claim to impose an injunction to the administration to take enforcement measures. As a consequence of this practice, administrative enforcement of environmental law obligations forms an integrated part of environmental administration.
The system of criminal fines imposed by administrative authorities (see under 7a) is rather recent. As far as known, statistics are not yet available.

Niels Koeman
Emiel van den Berg
The Hague
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