

Environmental criminal law enforcement in The Netherlands: institutional aspects and experiences

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Mr. president, ladies and gentlemen,

It is a great honour for me to have the opportunity to present to you an overview of the Dutch experiences with environmental criminal law enforcement in the last twenty years. After a short introduction I'll focus on the institutional side as well as the complex relationship between criminal law enforcement and administrative law enforcement. In The Netherlands both law enforcement systems play a role in the enforcement of environmental law.

1. Introduction

In The Netherlands environmental criminal law enforcement started around 1980 thanks to some young public prosecutors who operated as pioneer in a new field of criminal law. Those prosecutors had been charged with the criminal investigation and prosecution of economic crime. This was mainly based on the Act on Economic Offences that came into force in 1951. This act can be seen as a *lex specialis* in relation to the Dutch Penal Code and the Dutch Code on Criminal Procedure. Violations of economic and environmental law are penalised in this act. For the most serious criminal offences, when committed intentionally, the threat of penalty consists of a maximum of six years in prison and a fine of at highest € 76.000 for natural persons and € 760.000 for legal persons. Until now only one person has been punished with six years in prison. This was in a waste-disposal case in the harbour of Rotterdam. In four cases on trade in illegal fireworks person were condemned to some years in prison. In the Probo Koala case recently a fine of € 1 million was imposed on the English/Dutch firm Trafigura by the district court at Amsterdam.

The Act on Economic Offences also provides criminal investigators, prosecutors as well as criminal judges with additional, specific competences, means and procedures that are mostly more suitable for the investigation, prosecution and trial of economic violations and violators than what is provided by the Penal Code and the Code on Criminal Procedure. According to this act there is a chamber of economic criminal judges for the trial of economic offences within each of the nineteen district courts and five courts of appeal.

The Dutch Minister of Justice has concluded that all elements of Directive 2008/99 on the protection of the environment through criminal law are covered by the combination of the Penal Code, the Code on Criminal Procedure, and the Act on Economic offences. So no legal activities on the implementation of this Directive were necessary.

In the Dutch legal system the public prosecutor has authority over the police, other criminal investigation bodies as well as criminal investigators who are in service of governmental bodies like municipalities, provinces and ministerial inspectorates. This enabled the pioneering prosecutors to initiate criminal investigations on environmental crime, even when the bosses of the investigation bodies had not been interested in this kind of crime. During the eighties some serious criminal cases related to illegal waste disposal got much media attention and illustrated the need for a more systematic abatement of environmental crime by the police and public prosecutors. This resulted in 1990 in extra financial means – on a structural base – for the enlargement of the capacity and expertise of police and public prosecutors' offices. The district courts and courts of appeal were enabled to train their economic criminal judges in environmental law.

These earmarked means have given a boost to the activities of the police and public prosecutors in this field, especially in districts with at least one full time environmental public prosecutor and a specialized investigation team of the regional police. This resulted in an increase in the number of environmental criminal cases. About 25% of these cases were brought to court for trial. The remaining cases, mostly relatively simple criminal cases on a local or regional scale, were settled out of court by the prosecutor. Around 2000 it appeared that the attention of most of the regional police forces and public prosecutors' offices for environmental crime was decreasing, although there were no indications that environmental crime was under control. On the contrary, there were strong signals that especially environmental violations related to economic activities on a superregional, national and international scale were increasing. These findings stimulated two major developments:

- 1) In 2004 the Ministers of Justice, Home Affairs and Environment agreed to a reorganisation of the criminal investigation and prosecution of environmental crime.
- 2) At the national level of government priorities have been set on the abatement of environmental crime.

By these steps the conditions for environmental criminal law enforcement have been improved, but further efforts and measures are needed as I'll show you.

2. Institutional aspects

Organisation

As result of the reorganisation decision now each of the 25 regional police forces has a permanent regional investigation team; in addition to these teams there are 6 permanent interregional investigation teams for the abatement of superregional and national environmental crime. In total there are about 460 environmental police investigators. Besides there are two special criminal investigation bodies at the national level. One is part of the new Ministry of Economy and Industry, in which the former Ministry of Agriculture, Food quality and Nature management has been merged; the other is part of the new Ministry of Infrastructure and Environment. Together they have about 150 investigators. Both the police and the ministerial investigation bodies are charged with the collection and analysis of data about environmental crime.

At the prosecution side the reorganisation decision has brought a great change. Since 2005 a new national prosecutor's office on the abatement of fraud and environmental crime has been charged with the co-ordination of all criminal investigation and information activities of the various investigation bodies and the prosecution of all kinds of environmental crime. In this office the prosecutors and their assistants specialized in environmental crime – about 100 persons – have been concentrated. The prosecutors operate from 4 regional offices, while the management and their staff are located in The Hague.

The reorganisation decision had been based on four main expectations:

- a. Centralisation would strengthen the environmental prosecutors' authority over the police and other criminal investigation bodies.
- b. Specialisation would bring environmental prosecutors in a better position to select proposals for criminal investigations and to give guidance to these investigations.
- c. Centralisation would create better opportunities to focus on national and international environmental crime.
- d. The combination of specialisation and centralisation would promote continuity – before 2005 most environmental prosecutors had not stayed in their job for more than 1,5 or 2

years – , legal and environmental expertise, as well as unity and consistency in the acting of the various prosecutors in court. In short: more professional quality.

A scientific evaluation in 2008 showed that the new organisation is potentially more effective and efficient than the previous one, but that further improvements are needed. The exchange of information between the various investigation bodies is still inadequate. A good insight in the seriousness and scale of environmental crime is still lacking. Capacity, expertise, and international contacts needed for the investigation of international environmental crime should be built up in the coming years. And, last but not least, additional investments in the competences of environmental prosecutors and their assistants are necessary to improve both the investigation and the prosecution side of their profession.

Another conclusion was that the setting of national priorities in combination with the making of intervention strategies – e.g. on trade in illegal fireworks – has contributed to more co-operation and exchange of information between the various criminal investigation bodies. By this the insight in systematic committed illegal activities and belonging modus operandi as well as in economic networks facilitating such activities has increased, as far as the priorities are concerned. This has resulted in a more effective criminal investigation and prosecution. However, it has not always led to higher penalties. Environmental prosecutors have experienced that it is not always easy to convince the judge that environmental crime is serious crime and ought to be sanctioned accordingly. This may be partly explained by the fact that the specialisation at the prosecution side has not yet been followed by specialisation at the judicial side. Environmental prosecutors of the national office still bring their criminal cases to 19 district courts, that not always have specialised environmental criminal judges. Therefore it is promising that as part of a broader debate about a plan of the Minister of Justice to reduce the number of district courts to 10, the introduction of 4-5 specialized economic criminal chambers for the trial of serious environmental cases on behalf of the district courts is being considered.

National priorities

To improve the effectiveness and efficiency of environmental criminal law enforcement national priorities have been set by the Ministers of Justice, of Environment, of Agriculture and of Water management together. The current priorities are:

- illegal asbestos removal
- illegal fireworks (consumer protection)
- illegal activities with contaminated ground
- illegal shipments of waste, and
- serious violations of nature conservation law like poaching of protected animals and deliberate destruction of their habitats.

For some of these items a national intervention strategy has been agreed on by the parties involved. This includes a definition of the problem to be reduced, the goals to be reached in a certain period of time (mostly five years), and the activities to be undertaken by each of the parties involved separately and together. Although not yet on all of these priorities significant results have been obtained, the first experiences indicate that priority setting in combination with an intervention strategy is indispensable for a more systematic approach of serious environmental crime. Especially the abatement of international trade in illegal fireworks for the Dutch consumer market has been quite successful, also thanks to an increasing co-operation with other EU member states as well as China. I hope that in the coming years

Directive 2008/99 will facilitate and further international co-operation on major kinds of environmental crime.

However, in my view the abatement of organized environmental crime related to shipment of waste, illegal trade in endangered species and overfishing requires more than co-operation between EU-member states. To be effective the criminal investigation should be organised on EU-level.

3. Co-ordination with administrative enforcement

Environmental criminal law enforcement in The Netherlands is complicated by the situation that the legislator has built up two different environmental law enforcement systems: a criminal one and an administrative one. No distribution of the parts has been made. Both of these systems apply to the whole range of environmental regulations. This implies that on almost all violations of environmental law both an administrative authority and the environmental prosecutor are competent to enforce. While the environmental prosecutors are part of one organisation – the national office – that acts under the political responsibility of the Minister of Safety and Justice, there are almost 500 competent authorities at the administrative side. All municipalities (431), provinces (12), water boards (26) and some ministries are in charge of the inspection and administrative enforcement on parts of the environmental legislation. All are political bodies with an autonomy based attitude that are not exclusively focused on enforcement tasks. No governmental organ has the power to instruct or co-ordinate the various administrative competent authorities. So both environmental law enforcement systems differ fundamentally on the legal as well as the institutional side.

From the beginning, both the institutional fragmentation of administrative environmental enforcement and the reluctance of many administrative competent authorities to take their enforcement task seriously – mainly due to political considerations – have proved to be an obstacle for environmental prosecutors to make agreements on sustainable co-operation, exchange of information, and distribution of the parts on the prevention and abatement of environmental crime. Therefore in The Netherlands criminal law enforcement is rather *primum remedium* than *ultimum remedium* as far as environmental violations are concerned.

This is an undesirable situation and should be changed as soon as possible, so concluded in 2008 an independent commission charged by the Minister of Environment with a survey on possible improvements of environmental law enforcement. It recommended the Minister of Environment to oblige the provinces and municipalities to establish 25 joint regional agencies to be charged with environmental inspections and enforcement on behalf of the municipalities and provinces, and in co-ordination or co-operation with the investigation teams of the regional police forces. Moreover, the administrative competent authorities should be provided with the power to settle simple violations of environmental law by means of a penal fine, under supervision of the environmental prosecutor and with, if necessary, a decisive role for the economic criminal judge.

These measures would enable the provinces and municipalities to take a greater share in environmental law enforcement, based on agreements with the national public prosecutors' office on fraud and environmental crime abatement on distribution of the parts, co-operation and exchange of information. This would create more room and capacity for investigation and prosecution of serious forms of environmental crime. And last but not least, these measures would provide better prospects for a proper enforcement of European environmental law as well as for a level playing field for the economic sectors involved.

Although the former Cabinet of Ministers agreed on these recommendations, until now only little progress has been made due to resistance of many municipalities fearing to lose control over the administrative law enforcement of environmental law. I'm still quite optimistic about the outcome of this process, though it remains to be seen how much priority the newly formed Cabinet of Ministers will give to this issue.

If against my expectations the proposed measures should not be taken, a remaining solution might be a decision by the national or European legislator to establish independent administrative competent authorities to be charged with environmental administrative law enforcement, instead of municipalities, provinces, water boards and ministries. This would create a situation similar to how administrative enforcement of competition law, energy law and privacy law is organised in the EU.

4. Closing remarks

I come to conclusions. In my presentation I have shown you that in the last twenty years progress has been made with environmental criminal law enforcement in The Netherlands. However, there is still a lot to do. Internationalisation of economic activities, especially global trade in waste and endangered species, as well as immanent depletion of natural resources like fish and other marine organisms, require adequate conditions for the enforcement of environmental law, both at national and European level. Environmental judges are the last link of the enforcement chain. You are in an excellent position to determine what should be done to improve legislation, criminal investigation, and prosecution in order to safeguard legal rights, level playing field, as well as the living conditions for present and future generations in Europe. Therefore I hope that this meeting can be the start of joint discussions between EUFJE and environmental public prosecutors of the EU member states about necessary steps to improve the abatement of serious environmental crime in the EU.

I thank you for your attention and wish you success with your joint activities.