

Environmental Law - The Netherlands

Over the past decade, the environmental issues have occupied a huge space in the concerns of the world, with worries such as climate change and sustainability. For businesses, these issues have become increasingly complex, with the ever-increasing body of legislation; regulators are placing new and more stringent demands upon businesses to meet enhanced environmental standards. This month, *Lawyer Monthly* learns about the legal implications of environmental issues within business, by speaking to Enide Perez and Alexander de Swart, partners at Dutch law firm, Sjöcrona van Stigt.

Q Please introduce yourself, your role and your firm.

Enide Perez: I have been a criminal defence lawyer since 1997, when I started with Sjöcrona van Stigt, a specialist criminal defence firm, based in The Hague and Rotterdam. From December 2002 to June 2008, I worked – also as a corporate criminal defence specialist - at one of the largest Dutch law firms in Amsterdam. In June 2008 I returned to Sjöcrona van Stigt as a partner at our office in The Hague. I specialise in cases involving economic offences, such as violations of environmental law and health and safety regulations (industrial accidents), tax offences and fraud cases.

Alexander de Swart: I am a partner at the Rotterdam office of Sjöcrona van Stigt Advocaten and mainly handle environmental criminal cases, major fraud cases and proceeds of crime cases. I successfully represented Amsterdam Port Services in the Dutch environmental criminal case arising from the 'Probo Koala's' alleged toxic waste matter in Ivory Coast. This case considered, among other things, the alleged discard of hazardous waste to a non-authorized recipient, alleged acts of negligence that could have a negative impact on the environment and the relationship between the MARPOL and Basel conventions.

Q What are the main legal issues businesses need to consider with regard to environmental law?

In the Netherlands, environmental crimes are vigorously tackled and punished. Previously, such offences were often settled under administrative law, whereas now criminal proceedings are increasingly instituted. Penalties can be severe and investigations often start by taking employees, including management, into custody. Imposition of prison sentences is no longer an exception

and businesses are both threatened with, and are actually being shut down.

Confusingly, investigations into environmental offences often begin under administrative proceedings and subsequently become criminal investigations conducted by the same officials. This is very important because our clients' rights and duties under administrative law differ from those under criminal law in the Netherlands. The two laws also provide for different coercive measures.

Finally, criminal proceedings may be instituted in the event of a violation of any permit stipulation. It should be noted that, in practice, environmental permits are voluminous. Even breaches of 'technical stipulations of a permit' are enforced under criminal law, regardless of whether environmental damage has occurred. Not surprisingly, therefore, even a 'compliant' company can be prosecuted under criminal law for an alleged environmental offence because of these extensive permit stipulations within Dutch and European regulations.

Q What challenges are raised when complying with environmental regulations? How can you assist your clients to navigate these challenges?

We regularly see problems arising due to delays by authorities in responding to questions from, and reports made by, our clients. That is at odds with running a business. Good, time-sensitive communication by authorities could bring much improvement.

One of the difficulties is that even after administrative authorities gave explicit permission for an act, the Public Prosecution Service still has its own discretionary power to prosecute. In certain cases, even the administrative authorities that gave permission are prosecuted, e.g. the Probo Koala case, in which the City of Amsterdam was charged after it gave permission to pump back waste from a barge into the Probo Koala. This situation creates

insecurity for businesses. In general, companies will contact the local authorities, since they are required to discuss, and are used to discussing, all relevant issues in relation to the permit with these authorities. When the local authorities permit a specific company procedure, the Public Prosecution Service should not then have the discretion to prosecute the company. Fortunately, in the Probo Koala case, the District Court of Amsterdam ruled that in the given circumstances the involved port facility could rely on the permission obtained from the City of Amsterdam and therefore couldn't be convicted, even if the alleged behaviour had violated the regulations.

Q What legislative changes do you feel could be made to further protect the environment, without impacting negatively on business?

Environmental law would benefit from more consistent and clear-cut regulations than is the case today. There is a plethora of international, European and national legislation, case law from various international and national courts, and (technical) policy documents on a variety of areas of environmental law. The market therefore is at risk of being flooded with regulations that are so complicated that both companies and [law] enforcers can hardly keep track of them. Not only that, but various governing bodies in different countries apply the same rules differently, which leads to unfair competition. This ambiguity creates unnecessary risks both to the environment and for businesses entering the international market. Simplification and harmonisation of regulations and the interpretation and application thereof, as well as clear points of contact where one can refer questions, would therefore seem a godsend for anyone dealing with environmental law. Unfortunately, it seems that, so far, more and more regulations are being adopted while no attempt is being made to improve clarity. This uncertainty is not only frustrating for companies which must comply with these regulations, but is also not helping to protect the environment.

Q What are the key types of litigation within Environmental law? Can you outline any recent cases you have been involved in?

Our firm has been involved in a wide range of environmental cases over the years, varying from big industrial fires to alleged illegal storage and transport of dangerous items. Many cases also relate to waste process facilities and the question of whether the waste is processed in accordance to the applicable permit and its conditions. Furthermore, we continually handle a vast amount of cases regarding the EC regulation on the supervision and control of the shipment of waste.

Since we have been so heavily involved in environmental cases over the years, we have good contacts within the industry and with experts in this field. Our Rotterdam office in particular deals with cases of all kinds of incidents that occur in the Port of

Rotterdam. Our office is also a full member of 'Deltalingq's', which represents the common interests of all the logistical and industrial companies in the Rotterdam Port.

Q What does the future hold for your firm?

It is a known fact that greater capacity will be made available in the future for criminal enforcement of environmental law. Environmental criminal law is one of the key governmental policy objectives. This means that more cases will be investigated and prosecuted by units of the Public Prosecution Service specialised in environmental offences. We expect to have our hands full in successfully concluding these matters. **LM**



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