

Chapter XX

THE NETHERLANDS

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I INTRODUCTION

The Dutch Public Prosecution Service (“the PPS”) is responsible for initiating the criminal prosecution of corporate conduct. In Dutch criminal law, there is no obligation for the PPS as a whole, or for individual public prosecutors, to actually prosecute a case that has been reported and investigated. Public prosecutors can, in theory, exercise full prosecutorial discretion in each case and can decide, for instance, to drop charges or offer an out-of-court settlement. In an out-of-court settlement, the usual main condition is the payment of a settlement by the defendant. Other conditions (such as paying damages to aggrieved parties) can also be added.

High-level policy targets may be formulated by the Ministry of Justice in some areas, and the Board of Procurators General (the ‘management’ of the PPS) can formulate more detailed policy guidelines, in some cases at the behest of the Minister of Justice. These targets and guidelines narrow the scope within which an individual prosecutor can decide to drop or prosecute a case. Also, in certain sensitive cases,¹ the individual public prosecutor will not be entirely at liberty to make far-reaching decisions without prior consultation with senior ranks of the PPS.

A public prosecutor not only prosecutes individuals and corporations before the criminal courts, but also directs the preceding investigation. These investigations are carried out by the regular police or one of the special investigation services, several branches of which exist, each specialising in a specific area of investigation. Tax crimes and commercial fraud cases are investigated by the Fiscal Intelligence and Investigations Service (‘FIOD’). The Social Intelligence and Investigations Service (‘SIOD’) investigates social security fraud. Environmental crime and public housing investigations are carried

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1 For example, those receiving extensive media coverage or involving publicly or politically exposed corporations or individuals.

out by the Intelligence and Investigations Service of the Ministry of Public Housing, Spatial Planning and Environment (VROM-IOD). The investigations branch of the General Inspection Service (AID-DO) carries out investigations concerning regulations issued by the Ministry of Agriculture. These special investigation services usually cooperate with and receive their directions from public prosecutors.

Special investigation services are supposed to act whenever there is sufficient suspicion that a crime has been committed. Such crimes may be discovered during prior phases in which other agencies have responsibility. Some of these agencies, services and departments also have the authority to impose fines for certain transgressions, including the Tax Authority and the Dutch Competition Authority; in terms of sectoral laws and regulations, these two authorities have relatively far-reaching powers of supervision.

During the initial phase of an investigation, individuals and corporations can be compelled to cooperate, for example, to allow officers of the relevant authority to enter premises or to provide documents. However, once it has been established that a criminal act has been committed, the defendant can no longer be compelled to cooperate. In this phase, an adversarial stance can be a valid option. Of course, the often fluid character of the boundary between the initial and the criminal investigation phases can give rise to discussions between counsel and the corporation under scrutiny.

II CONDUCT

i Self-reporting

There is no obligation in Dutch criminal law for companies or individuals to self-report after internal wrongdoing has been discovered within a company. Where a company chooses to self-report and criminal prosecution ensues, there is no formal mechanism or statute by which it may claim leniency. The fact may, however, be taken into account during sentencing.

In competition law, immunity and leniency regulations may apply; indeed, the Dutch Competition Authority has a specialist Leniency Bureau. Any company (and certain individuals) that is (or has been) involved in a cartel can gain immunity or have its fine reduced provided its leniency request is timely, and full cooperation is given during the course of the subsequent procedure. The first member of a cartel requesting leniency will gain full immunity if the Dutch Competition Authority has not yet started an investigation into the cartel (category A). Where an investigation is already underway, the first company to come forward can still (depending on timing and the value of the information provided) get a reduction of fines of between 60 and 100 per cent (category B). The second company from the same cartel (and companies further down the line) may get reductions ranging from 10 to 40 per cent (category C). It is possible for a company to make enquires (through counsel) to the Leniency Bureau to verify whether category A is still open; the Dutch Competition Authority will only provide an answer if the company undertakes to immediately present the leniency request if category A is still open.

ii Internal investigations

A corporation can choose to conduct its own internal investigation, whether or not it is under criminal investigation. If the investigators work under the direction of and receive orders from external counsel, attorney–client privilege can be asserted over the results of such an investigation; a formal written agreement from counsel to the investigators is advisable to underpin the assertion of privilege. Internal investigations depend primarily on the seriousness of the conduct under investigation and the budget of the company. An investigation can include tracing, testing and reviewing of documents, technical investigations (e.g., in the case of industrial accidents) and witness interviews. It is rare for individual employees to retain their own lawyers when being interviewed in this phase. During the course of the internal investigation, or after its completion, a company can choose to share the investigation results with the authorities. The decision to cooperate in this respect can be influenced by many factors, and in some cases, a valuable trade-off can be made. For example, the fact that important investigation results have been shared may influence the authorities in pursuing an administrative procedure rather than escalating the case to a criminal trial.

iii Whistle-blowers

Generally speaking, an employer and an employee are bound by the obligations imposed by Book 7, Title 10 (employment contracts) of the Dutch Civil Code. In the context of reporting misconduct by or within the corporation, the Civil Code’s provisions regarding good employment practice, the standards expected of a good employee and the duty of secrecy are especially relevant; that said, signing an employment contract cannot nullify the employee’s freedom of speech as guaranteed by the Dutch Constitution. Given the absence in the Netherlands of any centralised authority or agency dealing with individual whistle-blowers, companies are well advised to provide an opportunity and a procedure for employees to come forward and report misconduct.

For certain types of company, whistle-blower procedures are available. For listed companies, the Dutch Corporate Governance Code contains a best-practice provision that the management board must ensure that employees are able to report alleged irregularities of a general, operational or financial nature within the company to the chairman of the management board or to a designated official, without jeopardising their legal positions. The provision also says that such arrangements for whistle-blowers must be posted on the company’s website.

On 1 January 2010, a new whistle-blower regulation for employees in the state government and police sectors was also published, and on 9 March 2010, the Joint Industrial Labour Council issued a revised edition of its 2003 declaration regarding how suspicions of corporate misconduct should be dealt with. This declaration is intended to form the basis for drafting whistle-blower regulations at company or business sector level.

III ENFORCEMENT

i Corporate liability

A corporate entity can be held both criminally and civilly liable for the conduct of its employees. Under Dutch criminal law, criminal offences can be committed both by natural and by legal persons (corporations). Corporate criminal liability presupposes an act or omission by one individual or more.

An act by an individual can lead to corporate criminal liability if a judge rules that it is reasonable to attribute the individual's behaviour to the corporation. The Dutch Supreme Court has ruled that, generally, an act that has been committed 'within arm's length' or 'within the setting' of a company may be reasonably attributed to this company. If it is established that a corporate entity has committed a criminal offence, certain natural persons within the corporation (other than the individual material perpetrator), who can be proven to have directed or ordered the prohibited conduct, may also be held criminally responsible.

An act can be reasonably attributed to the company if the following non-exhaustive conditions are met:

- a* the behaviour (or failure to act) was displayed by someone who was working, as an employee or otherwise, on behalf of the company;
- b* the behaviour fitted into the regular pattern of operations of the corporate entity;
- c* the behaviour served the company's commercial purpose; and
- d* the company could influence whether the act took place, and would normally have accepted such an act taking place.

A corporate entity will be subject to civil liability for a wrongful act committed by an employee if there is a functional relationship between the wrongful act of the employee and the task with which he or she is entrusted. Such a functional relationship is present if the following two criteria are met: the instructions given to the employee concerning the task objectively contributed to the likelihood of the wrongful act occurring, and the employer has legal authority over the entire group of activities into which the wrongful act falls.

In the absence of any conflict of interest, the company and individual employees may be represented by the same counsel.

ii Penalties

The following criminal sanctions can be imposed on legal persons:

- a* payment of a fine;
- b* forfeiture;
- c* publication of the verdict;
- d* (partial or complete) closure of the enterprise; or
- e* deprivation of rights (most importantly, the right to act in a certain profession).

Criminal fines are grouped in six categories, ranging from a maximum of €380 (category 1) to a maximum of €760,000 (category 6) for each criminal conviction. There is no maximum amount, so fines could theoretically mount up without limit where more than one criminal act is involved.

Administrative sanctions can be imposed if the authorities decide to pursue an administrative rather than criminal procedure, as these different types of sanction cannot be combined. Apart from the imposition of a fine, the administration can opt for a reparative sanction. Those available are:

- a* enforcement of an administrative order (where the party is ordered to make reparations, and in the case of non-compliance, the administration will carry out such reparations at the transgressor's expense); or
- b* the imposition of an order for incremental penalty payments (where reparations must be carried out by a fixed date, otherwise the party incurs a penalty).

An administrative fine is possible under various administrative laws, and the amounts that can be imposed vary accordingly. Notwithstanding the fact that amounts may be fixed for certain transgressions, administrative courts must always ensure the proportionality of a fine.

iii Compliance programmes

There is no explicit provision in Dutch criminal law by which the existence of an internal compliance programme can serve as a formal defence. That said, the existence of such a programme can be used, for instance, to disprove a possible allegation that the company has failed to fulfil its duty of care, which may be an important element in the construction of a case for corporate criminal liability. The existence of a compliance programme may also be taken into account for sentencing purposes.

iv Prosecution of individuals

If individual employees are prosecuted, the company may pay their legal fees. If the company is also prosecuted, the company and individual employees can be represented by the same counsel provided there are no conflicts of interest. If such conflicts arise, the company should provide the individual employees with separate counsel, and should still pay their legal fees.

Depending on the circumstances, a company can choose to completely separate its own defence strategy from that of any employees who are co-defendants; this usually happens when the employees have acted against the company's interests or have defrauded the company. Termination of, or disciplinary measures against, such employees may be obvious steps to take, but are not formally required if the company is to cooperate with the investigation.

IV INTERNATIONAL

i Extraterritorial jurisdiction

In general, the Netherlands has jurisdiction under Dutch law over offences committed abroad but whose effects are felt in the Netherlands. This can be illustrated by the example of a Dutch computer being hacked by a computer user in Singapore. The Netherlands will have jurisdiction and may decide to investigate and prosecute, since the effect manifests itself in the Netherlands.

The Netherlands furthermore has jurisdiction over offences committed abroad by Dutch nationals if these offences are also punishable in the relevant foreign jurisdiction. This means that Dutch nationals must abide by the Dutch Penal Code when abroad, unless the acts that are punishable under Dutch law are not punishable under the relevant foreign law.

The Netherlands also has jurisdiction over offences where Dutch interests are at stake. In the case of the bribery of a Dutch official abroad, the Netherlands has jurisdiction, even if the official was bribed by a foreigner; specific Dutch interests are at stake, because of the official's nationality.

The Netherlands has universal jurisdiction over some very serious crimes, regardless of where and by whom the offence has been committed.² Universal jurisdiction often finds its basis in obligations under a convention.

ii International cooperation

Mutual assistance may include, for example, the extradition of a suspect (also known as 'extensive legal assistance') or the hearing of witnesses, seizure of goods or serving documents (also known as 'minor legal assistance').

The Netherlands is party to a large number of bilateral and multilateral conventions on mutual assistance, pertaining to minor as well as extensive legal assistance. As a result, the Netherlands will often provide legal assistance upon request to states that have instituted a criminal investigation, and these states will often reciprocate on the basis of these conventions.

Important multilateral conventions include the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters (both with additional protocols). Examples of bilateral conventions include the extradition treaties with the United States and Australia.

It must be determined on a case-by-case basis whether any conventions govern the legal relationship between the Netherlands and any other state, and, if so, which one. The conventions first and foremost state where mutual assistance must be provided, but also explicitly where mutual assistance can or must be refused; there is a difference between 'optional' and 'imperative' grounds for refusal. Not only the wording of the convention is important to whether mutual assistance must be provided, but also whether any reservations to the relevant convention have been made by the contracting states.

The most important condition for extradition still is the (qualified) double criminality. The Netherlands will only extradite a person if the offence that is the subject of criminal proceedings abroad is also prohibited under Dutch law. In the event of minor mutual assistance, this condition of double criminality is only relevant where the Netherlands has been requested to use coercive measures.

Known grounds for refusal to provide mutual assistance include, for example (1) criminal proceedings pending in the Netherlands for the same offence (2) the principle of *ne bis in idem*, (3) an imminent flagrant violation of the right to a fair trial as provided for in Article 6 of the European Convention on Human Rights ('the ECHR'). In addition,

2 For example, piracy at sea.

traditional grounds for refusal may be relevant, such as prosecution for offences that are clearly of a tax, political or military nature.

In the EU, mutual legal assistance is increasingly provided for at a supranational level in framework decisions. The principle underlying all of these decisions is the recognition and enforcement of a judicial decision throughout the whole of the EU. The best-known framework decision is that concerning the European arrest warrant, resulting in the replacement of extradition between EU Member States on the basis of the European Convention on Extradition by a simple surrender procedure. Other framework decisions include those on the mutual recognition of confiscation orders, default judgments and evidence warrants. For Schengen states, the Schengen Implementing Convention is important in terms of mutual assistance.

If the provision of the requested mutual assistance is not provided for in a convention – perhaps because the requesting state has not concluded a treaty on mutual assistance – such assistance may still be provided under Dutch law, as long as it does not require the use of coercive measures. Extradition will normally only take place on the basis of a treaty.

At a national level, the Surrender of Persons Act and the Extradition Act play a part, as well as the provisions on mutual assistance in the Dutch Code of Criminal Procedure. Treaty provisions prevail over national law, meaning that any applicable treaty governing the legal relationship must be examined first.

iii Local law considerations

As already mentioned, the starting point in the Netherlands is to provide mutual assistance under any treaty obligation where the provisions of the applicable treaty prevail and are not restricted under specific national legislation. If, however, it concerns a foreign court order directed at a foreign offshoot of a Dutch company, the submission of information held in the Netherlands may be required, such as information on a server of the Dutch headquarters. In such a case, a conflict of interest may arise, as on the one hand, the foreign order must be complied with by the foreign subsidiary on the basis of foreign law, but on the other, the Dutch Personal Data Protection Act is applicable, on the basis of which personal data may not necessarily be supplied.

As regards attorney–client privilege, the *Akzo* ruling of the European Court of Justice³ must be considered. The court ruled that in-house lawyers cannot invoke legal professional privilege before the European Commission in its capacity as competition authority.

V YEAR IN REVIEW

i Changes in criminal law

In the Netherlands, the *Salduz* rulings of the European Court of Human Rights (‘the ECtHR’) have led to debate, in particular on the question of whether a suspect has a right to be assisted by counsel during questioning by the police. To date, the Dutch

3 Case C- 97/08, 14 September 2010.

Supreme Court has ruled that although the suspect has the right to consult legal counsel before questioning, no right exists to assistance during police questioning. It is still by no means certain whether this ruling will stand up to the scrutiny of the Strasbourg court; meanwhile, a lot of Dutch case law has resulted.

A law came into effect on 1 January 2011 that has improved the position of victims in criminal proceedings; it also further incorporates the EU Framework Decision of 15 March 2001 into the Dutch legal system on the status of victims in criminal proceedings. Victims now have the right to receive a copy of the case file, even if they have not joined a claim for civil damages. The victim's right to speak and the right to join a claim for civil damages have also been changed.

ii Relevant case law

In July 2010, the Amsterdam District Court ruled on the case relating to the events regarding the vessel *Probo Koala*, early in July 2006, in Amsterdam. This case became known in particular because of the alleged impact of the waste on board the ship in the Ivory Coast. The Amsterdam court ruled against a number of defendants, but found neither an Amsterdam-based waste processing company nor the municipality of Amsterdam criminally responsible. This case was the most important environmental criminal case in 2010, and it will continue on appeal in 2011 or 2012. One of the major points of law under consideration pertains to the relationship between the European regulation on shipments of waste and the MARPOL Convention.

In September 2010, the Grand Chamber of the ECtHR decided on appeal in the case of the publisher *Sanoma*,⁴ where the court found that the Netherlands had violated Article 10 of the ECHR (right to freedom of expression). This case was about the seizure of visual records of an illegal street race, published in the Dutch magazine *Autoweek*. This was not the first time the Netherlands has fallen foul of the ECtHR. In November 2010, the Amsterdam Court of Appeal prohibited the eviction of squatters, finding that the Netherlands' new anti-squatting legislation⁵ contravened Article 8 of the ECHR (right to private and family life) because the authority to evict under criminal law was not subject to a judicial review.

In November 2010, the Dutch Supreme Court ruled for the first time that the very broadly worded provision on money-laundering did indeed necessitate some restrictions. The Supreme Court found a restriction necessary to prevent a disproportionate impediment to normal trade, as too strict an application of the money-laundering provisions would mean that property, once stolen, remain proceeds of a crime, even after having changed hands in a *bona fide* manner many times. Under certain circumstances, some behaviour cannot be considered money-laundering, according to the Supreme Court. These include whether the proceeds of a crime with a low value are mixed with legally obtained assets, and how much time has passed since these assets became mixed. The Supreme Court noted that this list of possible circumstances is non-exhaustive because of the many variations in money-laundering practice, which cannot realistically be anticipated.

4 *Sanoma Uitgevers BV v. The Netherlands* [2010] ECtHR 1284 (14 September 2010).

5 This came into force on 1 October 2010.

The largest ever Dutch fraud case concerns property fraud but is in essence about private bribery, an offence that only carries a maximum prison term of one year under Dutch law. Besides bribery, other allegations include participation in a criminal organisation, money-laundering, forgery and embezzlement, and the main suspects have all been summoned to appear in court. Several suspects have also filed requests to appoint new judges, claiming the judges were biased against them. At the time of writing, the case is still pending.

Another significant case dealing with the alleged bribery of a government official includes the former director of the port of Rotterdam. This case is currently on appeal, following the conviction by the Rotterdam District Court. A civil lawyer involved in the case was earlier acquitted by the court, who had been accused of having drawn up a false legal opinion; the Public Prosecutor has lodged an appeal against this favourable judgment for the lawyer. In 2011, the related case against a well-known Dutch businessman, who is *inter alia* suspected of having committed the aforementioned bribery, has also commenced before the court of first instance.

Finally, the criminal proceedings against the Dutch MEP Geert Wilders must also be mentioned – of all the criminal cases pending before the Dutch courts, this has received by far the most media interest. Members of Parliament enjoy immunity for statements made in parliament, and the PPS initially decided not to prosecute Wilders despite the fact that the case centres on a number of anti-Islamic statements he made outside Parliament. A number of interested parties lodged a complaint against this decision of non-suit with the Amsterdam Court of Appeal, which subsequently instructed the PPS to proceed with the prosecution; the case was brought before the Amsterdam District Court. Just before the completion of proceedings, the three judges hearing the case were successfully challenged for acting in a way prejudicial to Mr Wilders; the case has reopened in 2011 with three newly appointed judges.

VI CONCLUSIONS AND OUTLOOK

In 2011, the question as to what statements a Dutch politician may and may not make will be ruled on. The fundamental issue of the freedom of speech (as laid down in Article 10 of the ECHR), plays a prominent role; this also has to be weighed against other rights, such as freedom to practise a religion. The subject is not restricted to the Netherlands, as there is also much legal debate in other European states about statements made by politicians – in particular – about Islam.

The debate on the right to legal counsel during police questioning will also likely continue in the next few years. Whereas in the United States, a suspect *inter alia* has the right to have a lawyer present during police interrogations,⁶ in the Netherlands there is still reluctance to recognise this, even though the ECtHR guarantees the same fundamental rights as in the US. No doubt the discussion will continue.

6 *Miranda v. Arizona* 384 US 436 (1966).

ALEXANDER DE SWART

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Alexander de Swart is a partner at Sjöcrona Van Stigt. He mainly handles cases involving major fraud and proceeds of crime, and environmental criminal cases. He successfully represented clients in construction fraud and property fraud cases, and the case involving the Probo Koala. Mr de Swart is an experienced litigator, and he also has extensive experience in reaching out of court settlements.

Mr De Swart is a member of the Dutch Association of Defense Counsels, the International Bar Association and the European Criminal Bar Association. He has also published various articles in leading Dutch law journals. Most recently, he published two articles about the effects of the *Salduz* rulings of the European Court of Human Rights.

MAX VERMEIJ

Sjöcrona Van Stigt

Max Vermeij, who has been practising as a lawyer since 1999, joined Sjöcrona Van Stigt in 2007. He holds degrees in criminal law, tax law and cultural anthropology.

His fields of expertise are criminal economic and criminal tax law, and Supreme Court litigation. He has specific expertise in securities law and in the areas of inside information and compliance. Mr Vermeij has defended clients in major fraud cases, confiscation cases and environmental criminal cases, and also advises clients on privacy-related aspects of criminal cases.

He has authored and co-authored law review articles on professional legal privilege, anti-money laundering legislation, the implementation in the Netherlands of EU regulations on seizure, confiscation and asset recovery, insider trading aspects of negotiations between bidders and shareholders of target companies, and the possible consequences of the UK Bribery Act for Dutch legal entities.

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