

The International Comparative Legal Guide to:

Environment Law 2007

A practical insight to cross-border Environment Law



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Stibbe

1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in the Netherlands and which agencies/bodies administer and enforce environmental law?

The legal basis of environmental policy in the Netherlands can be found in the Environmental Protection Act of 1 March 1993. This is the most important and most extensive environmental act, which provides rules for cadastral plans, environmental quality standards, environmental impact statements, licences, waste products, financial provisions, enforcement and so on. Before the realisation of the Environmental Protection Act, Dutch environmental policy used to be primarily concerned with regulating acts threatening the environment.

More detailed rules on Dutch environmental policy can be found in environmental Acts, which regulate more specified areas such as *the Act concerning Pollution of Surface Waters, the Act concerning Pollution of Sea Water, the Act concerning Environmentally Hazardous Materials, the Soil Protection Act, etc.*

The responsibility for enforcement of environmental law has been transferred to the managing committees of the Provinces and municipalities. The environmental law is mainly based on issuing licences to “institutions” (see below question 2.1 for a definition of “institutions”), from which important environmental impacts and consequences can be expected. In these licences almost all environmental aspects concerning that “institution” are laid down. In general it can be said that the administrative organs of the provinces have the authority as far as the issuing of licences for larger “institutions” is concerned. The administrative organs of the municipalities have the authority to issue licences as far as the smaller “institutions” are concerned. As far as the administrative enforcement of environmental law is concerned, the authority that has the power to issue the licence is also empowered to enforce it.

In some specific situation the Minister of the Environment is the competent authority; for instance military institutions.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

Enforcement in this context means the legal capability of the authorities and third parties to force an “institution” to comply with the applicable environmental rules (laid down in laws and any applicable licences). The general rule is that the competent authority is obliged to enforce environmental law in a non-compliant situation. The authorities can use administrative and

criminal enforcement possibilities. The administrative enforcement instruments are:

- administrative enforcement: the power, after a written warning, to stop or remove that which was done in violation of the applicable environmental rules;
- penalties: the power of the authorities, after a written warning, to determine that a certain amount (per violation or per day) must be paid in case of acting or failure to act in violation of the applicable environmental rules;
- in certain cases: withdrawal of the licence. After such withdrawal, when the activities are not stopped, administrative enforcement will usually be resorted to or it will be ordered that penalties will have to be paid; and
- criminal penalties: in certain cases it is possible for the Public Prosecutions Department to demand the criminal court judge to impose a criminal penalty to a violator of applicable environmental rules.

The purpose of criminal enforcement is to punish the violator, where the purpose of administrative enforcement is to turn the illegal situation back into a legal situation. However in 2003, a proposal to introduce an administrative fine in the General Administrative Law Act has been made by the government. From the moment this proposal comes into force, the administrative authorities also have the opportunity to punish the violator of applicable environmental rules in certain cases, by imposing a fine on the violator.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

The authorities are required to involve the public by consultation in the procedure for awarding environmental licences. The draft permit is made available for the public and it is published that the draft permit is made available for the public and it is published that the draft permit is made available for the public. From this moment, a summary becomes available and anyone who so wishes has the opportunity to submit objections to the draft decision. A licence cannot be awarded if a draft decision has not been deposited by the authorities for inspection by interested parties.

Within this context it is important to note the regulations concerning the transparency of the government. Reference is made to Article 3:11, paragraph 2 of the General Administrative Law Act, the Government Information (Public Access) Act and, Chapter 19 of the Environmental Protection Act.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

On the basis of the Environmental Protection Act it is prohibited to establish, modify or operate an “institution” without a licence. It is, therefore, important to define the term “institution”. It concerns ‘any activity conducted by man through a company or at an extent as if this was conducted through a company, within a certain area’. Once it has been established that an “institution” as meant in the Act is involved, it must next be determined whether the licence requirement applies to that “institution”. Therefore, the ‘Institutions and Licences Environmental Protection Decree’ is needed. This Decree divides “institutions” into categories, which are summed up in two Annexes to this Decree. This enumeration is so extensive that almost all activities which can cause any significant nuisance have to be classified as an “institution” as meant in the Act.

An environmental permit is tied to the “institution” which is awarded for. As far as the transferability of the licence on the basis of the Environmental Protection Act is concerned, it can be said that such a licence applies and can be used by anyone who operates the “institution”. A new operator can, therefore, work under the same environmental permit as its predecessor, in a situation where the operation of the “institution” itself does not change. Since the 1 June 2003 a notification requirement has come into force, holding the obligation of a licence holder to notify the authority that an environmental permit is being transferred. This obligation can be found in Article 8.20 of the Environmental Protection Act. It has no constitutive effects.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

The rules concerning the appeal against the decision not to grant an environmental permit can be found in section 3.4 of the General Administrative Law Act in combination with Article 20.1 and further of the Environmental Protection Act.

Decision not to grant an environmental permit

Concerning the draft environmental permit including the conditions contained in it, the applicant and other interested parties can state their views to the regulator who published the draft. The regulator decides whether or not to grant or change the environmental permit, taking the views in account.

Only the applicant for the environmental permit has the right to appeal against the decision of an environmental regulator not to grant an environmental permit. The appeal must be lodged with the Council of State within six weeks. An applicant loses the right to appeal if this term has expired.

Appeal against the conditions contained in an environmental permit

Concerning the draft environmental permit including the conditions contained in an environmental permit, the applicant and other interested parties can state their views to the regulator who took the decision. The regulator decides whether or not to grant or change the environmental permit taking the views in account.

In the case the applicant or the other interested parties are still not satisfied with the content of the conditions contained in an environmental permit, there is the possibility to lodge an appeal

with the Council of State.

The decision as to whether to grant an environmental permit does not enter into force before the term within which it is possible to lodge an appeal has expired (six weeks). If during the six-week period a request is made to suspend the permit, the permit does not enter into force before the request is denied.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

The Dutch rules concerning Environmental Impact Assessments (EIA) can be found in Chapter 7 of the Environmental Protection Act in conjunction with the Environmental Impact Assessments Decree. This Decree is mainly based on EC-Directives. For a polluting industry, it is only necessary to conduct an EIA if the activities of that industry have significant detrimental effects on the environment. In respect to certain activities, the rule applies that a certain threshold value must be reached before there is an EIA obligation. Such activities and the decisions which are taken by the State in conjunction with this are summed up in the Environmental Impact Assessments Decree.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

First of all I would like to refer to the answer given to question 1.2. Furthermore it is important to note that in Dutch Law, the regulators have a principle-duty to use their enforcement powers when a rule is being violated. The formal toleration decision, in which a rule formally allowed to be violated, has become an exception in Dutch administrative law.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

In this context it is important to note the “Eural-list” in which the European Committee names all products that can be defined as waste and determines which waste can be defined as “dangerous waste”.

The Dutch rules (implemented from the European Law) concerning waste can be found in Chapter 10 of the Environmental Protection Act. In this Act the term ‘waste product’ is defined as: ‘all products, preparations or other goods, of which the holder, for the purpose of removal, exposes, is planning to expose, or has to expose’.

In Dutch environmental law a distinction is made between domestic waste, company waste and dangerous waste. Domestic waste is collected by the municipality. Dangerous waste involves an additional obligation, namely these products (the waste products that are designated as such) can only be disposed of by transferring them to a party who is authorised to collect them. For such a transfer to be legal, a written notification must be sent to the proper authority.

As far as normal corporate waste is concerned, the following additional obligation applies:

- When corporate waste is created in an institution with a licence, requirements can be imposed as to the prevention of waste products, storage, etc.
- Corporate waste can only be transferred to a party who is

authorised to collect it. More specific requirements can be provided for by the Provincial Environmental Regulation.

- Corporate waste may only be processed or dumped by an institution which has a valid licence. Sometimes the licence imposes limitations on the category of corporate waste which may be accepted. Furthermore, there are general rules which prohibit the dumping of certain waste products.
- No limitations may be imposed on the transfer of waste products to other provinces in the Netherlands.
- There are special rules with regards to the transfer of waste products outside of the Netherlands within the European Union. These rules can be found in Article 10.7 of the Environmental Protection Act and are based on EEC Regulation 259/93.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Firstly, it is important to note that the Soil Protection Dumping Decree, based on the Soil Protection Act consists of consequential requirements concerning the dumping of waste inside or outside the site of an “institution”.

The extent to which a producer of waste is allowed to store and/or dispose of waste on the site where it was produced, depends on the rules concerning the storage and disposal of waste set out in the environmental licence of that producer. Usually there is a maximum volume and time determined for the storage of the waste on-site under the condition that the waste will be given to a party who is authorised to collect it. There are producers of waste who possess a waste treatment plant themselves. In that case the processing of waste is allowed to take place on the actual site where it is produced. To control this on-site processing, the environmental licence provides special rules. Normally it is not permitted to dispose of waste permanently on the site it is produced.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

If the waste is transferred to an approved party in accordance with the rules concerning waste as regulated in Chapter 10 of the Environmental Protection Act, in principle the waste producer does not retain any residual liability in respect of the waste. Of course it depends on the facts and circumstances, and all parties have an obligation of care for waste as set out in Article 10.1 of the Environmental Protection Act.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

There are several regulations concerning the take-back and recovery of waste. These rules concern specific types of waste, like vegetable, fruit, and garden waste, brown and white goods, packaging, glass, construction and demolition waste etc. This means that the take-back obligation does not apply to all products that become waste at a later stage.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

As concerns liabilities, it is important to make a distinction between administrative, civil and criminal law:

With respect to the administrative and criminal law, reference can be made to the answer given to question 1.2.

With regard to the civil law, the following can be pointed out:

There are two bases for liability for environmental damage in the Dutch Civil Code, apart from contractual liability. There can be personal liability arising out of tort and certain specific liabilities.

Personal Liability arising out of Tort

Although in theory there are three categories of tortious conduct in the Dutch legal system, in practice only two are of importance:

- Act in violation of a legal obligation

Since Dutch environmental law includes a great number of written environmental norms, this category is of great importance in practice - consider, for example, the provision in the Environmental Protection Act, which provides that it is not permissible to undertake certain activities without a licence. Someone who acts in violation of this provision in principle commits a tortious act against those who the provision seeks to protect, such as neighbours and environmental organisations. The violation of a requirement tied to an environmental licence and against those whom the requirement seeks to protect is also a tortious act. Only certain parties can bring an action when someone acts in violation of a legal obligation. Only when a person is injured in an interest that the violated norm seeks to protect, can his legal action be successful.

- Act in breach of a duty of care

Besides written norms in the field of the environment, there are also unwritten obligations of care, the breach of which is a tortious act. For example, the situation where there is nuisance but no licence is required, or the situation where the duty of care supplements the written regime are circumstances in which there is no written legal regime but which are considered as obligations of care.

Special Environmental Liabilities

The Dutch Civil Code furthermore regulates certain environmental liabilities, which can be characterised as strict liability, i.e. fault or negligence is not required in order to become liable. Strict liability applies in the following cases:

- 1) Dangerous substances. Anyone who in his profession or company uses any substance or carries this with him, while it is known that the substance has certain effects which make it a special danger for persons or goods, is liable for such substance caused damage.
- 2) Operator of a dump-site. A similar liability exists for the operator of a dump-site for damage which occurs before or after the closure of the dump-site because of air, water or soil pollution as a result of substances dumped on the site. The term ‘operator’ not only includes the licensee, but also the person who operates the dump-site without a licence.
- 3) Operator of a bore-hole.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

- 1) In principle an operator can be held liable for environmental

damage notwithstanding that the polluting activity is operated within permit limits. Therefore reference should be made to case law; the Dutch Supreme Court has ruled that acting within the limits of the permit does not indemnify a person for actions which make him liable.

2) If an operator is liable notwithstanding that the activity is operated within permit limits, the rules of the licence are probably not strict enough. The Dutch authorities are authorised to adjust the rules of the licence to make it more stringent in such cases. Rules concerning the adjustment and modification of an environmental licence can be found in Article 8.22 and further of the Environmental Protection Act. In general it can be said that an environmental licence which was issued more than five to seven years ago has a greater chance of being adjusted.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

No, in principle directors and officers of corporations do not attract personal liabilities for environmental wrongdoing. When a corporation has committed a tortious act and is liable, this liability is limited in principle to that corporation and does not affect directors, shareholders or subsidiaries. Directors and others can be liable in addition to the corporation, but those directors must themselves have committed a tortious act. There are several examples of this in case law, for example, the executive/owner of a small corporation who operated a limited liability corporation which had dumped toxic substances into the soil in violation of the licence.

Where larger corporations are concerned, there are few examples in case law in which directors, shareholders or managers have been held liable for environmental damage which was caused by the corporation.

In the Netherlands operators (and employees) may get “professional liability insurances” to insure themselves or their employees for wrongdoing within the practice of a profession. For the insurance of environmental wrongdoing, reference is made to section 11.

In several cases, it is possible to use an environmental indemnity. It is important to point out though, that such an indemnity only count between the contracted parties.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

Share Sale

When the form of a share sale is chosen, the company that is taken over will still be liable for any tortious acts which were committed before the transfer, regarding both administrative law and civil law.

Asset Purchase

In case of an asset transaction, any potential liability for a tortious act, committed before the transfer, still remains with the selling company.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

In principle, lenders are not liable for environmental wrongdoing and/or remediation costs. In other words, lender liability does not exist, unless a lender has committed a tortious act himself.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The Dutch rules concerning soil contamination can be found in the Soil Protection Act. The Soil Protection Act is applicable to soil and groundwater contamination which is considered “serious” within the meaning of the Soil Protection Act. In general the polluter is obligated to clean up the contamination. As from 1 January 2006 the Soil Protection Act has been amended. The amended Soil Protection Act deems the decontamination of polluted soil an obligation of the owner or leaseholder of an industrial estate. Owners or leaseholders of industrial estates are obliged to remediate the soil and groundwater in case of serious contamination with a high risk of release into the environment and can be obliged to monitor the soil and groundwater contamination, regardless of whether they have actually polluted the area themselves.

In order to set in motion an effective approach of remediation of soil and groundwater of industrial estates, a new subsidy scheme for companies came into effect on 1 January 2006. In this subsidy scheme it is determined in which cases it is reasonable for companies to gain a contribution from the government for the clean up of industrial estates.

The Soil Protection Act provides several options for clean up.

As a first option, the Act provides for clean-up under one’s own responsibility. This clean up is a voluntary clean up.

The second option is an order to clean up. An order to clean up can be given to the polluter and/or the owner (including long lease), even if the owner did not pollute. Other orders to be given are:

- i) an investigation order, to be given to the other polluter, owner or user; and
- ii) an order to execute isolation provisions, to be given to the polluter, owner and user.

In case of a clean up by the State, the cost of investigation and conducting a clean up can be recovered from the person whose tortious acts caused the pollution. Taking case law into account, a distinction must be made in this respect between pollution that occurred after 1975 and pollution that occurred before this date. In respect of pollution caused after 1975, for a recovery action by the State, the normal requirements for an action in tort under Dutch law apply. Besides the causal connection, illegality itself must be shown. This is the case when any written rule of law or (unwritten) obligation of care is breached.

In respect of pollution that occurred before 1975 there is a more stringent illegality requirement. In general the polluter must have been seriously negligent. The limited case law shows that a Dutch court will not easily rule that pollution from before 1975 is tortious.

Aside from the recovery from an action in tort, the State can, when it conducts a clean up, order that the costs of investigating and cleaning up can be recovered from anyone who was unjustifiably enriched by the clean up, for example someone who bought polluted land for a low price and profited financially from the clean up conducted by the State.

5.2 How is liability allocated where more than one person is responsible for the contamination?

In principle, the Dutch law does not recognise several liability where it concerns the pollution of land. In the case where there are several successive owners or users of contaminated land, each of

whom is responsible for a part of the pollution, they can be held liable for their own part.

In this context it is important to note Article 6:99 of the Civil Code. If damage is caused by two or more events, for each of which a different person is liable, and it is definite that the damage came into existence due to least one of these events, the obligation to compensate the damage rests on each of these persons, unless one or more of them prove that the damage did not result from an event which they can be held liable for.

Owners and leaseholders of industrial estates may be liable for the contamination of their estates, even if they are not the party who polluted the site. Although the owner or leaseholder has the right to take recourse on the actual polluter.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

In Dutch law, a clean up cannot be started before a clean-up plan is set up. This plan describes one or more clean up options, and must be filed for approval with the proper authority. The clean up must be carried out in accordance with the approved clean up plan. The decision of the authority as to whether to approve a clean up plan is a decision that can be challenged by the person who needs to clean up and by third parties. If the clean up is under one's own management and there was a clean up according to that plan, the regulator cannot come back to the plan and require additional work to be done, unless new facts or circumstances occur. Usually the proper authority then gives a declaration that the clean up was carried out according to the approved plan.

When an owner or user is forced by the State to undertake a clean up, the agreement on the adopted clean up plan is often conditioned by the State, which means there is a certain conditionality within the clean-up plan and its approval. In that case, there is a possibility of setting further demands, or requiring additional work to be undertaken.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

In Dutch law, a rule does apply that a seller has an obligation to notify the buyer about deficiencies in the object which is being sold when he knows about these deficiencies. When the seller, taking for granted that he is also the polluter, knows or reasonably could know that a piece of land which he is selling is polluted, but does not notify the buyer of this, the seller will in principle be liable for the damages of the buyer. It can be expected from the buyer that he will investigate certain possible deficiencies of the object being sold, such as soil pollution.

Pursuant to administrative law, any potential liability for soil pollution remains with the actual polluter. In principle, any party that incurs damage from such soil pollution can claim damages from that polluter.

However, the parties can agree that the buyer indemnifies the seller from any claims relating to soil pollution. In this way the seller can transfer the risk of contaminated land liability to a purchaser. It is important to point out that such indemnity only counts between the contracted parties. This means that such an indemnity does not

have any effect with respect to third parties and does not discharge the indemnifier's potential liability where it concerns third parties.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

In Dutch law, the government is only able to obtain monetary damages from a polluter. The government cannot force the responsible party to bring back the situation that existed before the damage occurred. This is different where it is a case, for example, of soil pollution. Here, the costs of a clean up are clear and easily measurable and, therefore, possible to claim from the polluter.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

The Dutch rules concerning the power of regulators can be found in Chapter 5, section 5.2 of the General Administrative Law Act. Regulators under Article 5:11 of the General Administrative Law Act may exercise the following powers:

- Regulators are authorised to enter any site, taking along their equipment, with the exception of private residences when there is no approval of the resident. In those cases where the matter involves dangerous waste, an exception to the prohibition on entering private residences can be made under Article 18.5 of the Environmental Law Act.
- Regulators are authorised to request any information they wish concerning a corporation. In this case, several specific questions need to be answered. In principle a regulator can be informed by any member of the staff of a corporation.
- Regulators are authorised to insist on the inspection of the business data of a corporation, including accounting reports, reports of maintenance, administration, etc.
- Regulators are authorised to take samples, including taking measurements and weighing. If necessary, a regulator is authorised to open packaging. A regulator can only take samples away if a written proof is signed. If possible, the samples should be returned to the corporation.
- Regulators are authorised to inspect means of transportation, including their load, in those cases where the means of transportation give cause to do so.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Polluted groundwater going off-site to neighbouring land can be a tortious occurrence under certain circumstances. In that case the polluter, who owns or uses the polluted land, is obliged to disclose this pollution to the affected third parties.

In the case where the pollution does not migrate off-site, the polluter is in principle not obliged to disclose this pollution to an environmental regulator.

Many environmental licences, however, contain regulations in which an "institution" is obliged to disclose pollution if the

pollution is the result of an “uncommon incident”.

The obligation to disclose pollution in the case of an “uncommon incident” can also be found in Article 17.1 and further of the Environmental Protection Act.

Although there is no general obligation to disclose matters in the case there was no “uncommon incident”, a lot of land owners disclose the pollution anyway. Furthermore, one must not exclude the situations in which the non-communication of a polluter can constitute tortious conduct, considering the circumstances of the specific case.

A different situation arises when a polluter starts a voluntary clean-up. In that case he is obliged to report the extent of the pollution to the proper authority.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

In Dutch law, an Obligatory Soil Investigation Industrial Estate Decree exists, in which several “institutions” are listed. According to this Decree the responsible regulatory authority can assign an authority that is empowered for that purpose, to investigate the industrial estates of the “institutions” as listed in that Decree. It is important to point out that this Decree is rarely applied in practice.

Furthermore, there is an obligation for the owner of land with future building plans to report on the quality of that land in the planning application, especially as concerns the possible pollution of that land. A soil examination is therefore a condition to make building plans possible.

Furthermore it is possible that the regulations of an environmental licence enclose an affirmative obligation to investigate land for contamination.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

Reference is made to question 5.4.

When a seller knows about environmental problems concerning the object which is being merged or taken over, the seller has a notification obligation. If the agreement includes a clause in which the liability risks of the seller are taken over by the purchaser, the purchaser should at least be notified about every known environmental problem. In a situation where an environmental problem was known by the seller but not revealed to the prospective purchaser, the seller can be held liable by the purchaser for the costs which the purchaser had to make to clean up the ground. In that case, the liability remains with the previous owner.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier’s potential liability for that matter?

It is possible to use an environmental indemnity in this way. An owner who sells his polluted land can give a written indemnity to the purchaser, which guarantees that the purchaser cannot be held liable for any environmental claim in the future.

It is important to point out that such an indemnity only counts between the contracted parties. This means that such an indemnity does not have any effect with respect to third parties and does not discharge the indemnifier’s potential liability where it concerns third parties. A third party can always claim from the actual polluter in the case he got an order (Article 30 of the Soil Protection Act) by the State to clean up grounds he did not contaminate himself, through this clean up incurred costs.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

In general it is not possible to shelter environmental liabilities off balance sheet. Although it is not always necessary to specify certain claims as items on the creditors site of the balance sheet, the explanation or facility item will probably mention the environmental claims anyhow.

If a company tries to dissolve in order to escape environmental liabilities, and there are creditors who claim to rank as preferential to the assets of the dissolved company, it is possible to reopen the liquidation of the company. In that case the liquidator is authorised to claim back the share of the entitled parties. The rules concerning this issue can be found in Article 2: 23c of the Civil Code.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

No, in principle a person who holds shares in a company cannot be held liable for breaches of environmental law and/or pollution caused by the company. When a corporation has committed a tortious act and is liable, this liability is limited in principle to that corporation and does not affect the shareholders. Referring to the answer given to question 4.3, a shareholder can only be liable in addition to the corporation, when they themselves have committed a tortious act.

A parent company can only be sued for pollution in its national court if it committed a tortious act itself. For example if a Dutch parent company dumps waste at the site of a foreign subsidiary, it can be sued in its national court if the dump caused pollution which is tortious according to Dutch law.

8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

No, in general there are no laws to protect “whistle-blowers”.

8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

Group or “class” actions are available for pursuing environmental claims, on condition that a group has suffered the damages itself. This means that a group cannot claim compensation for third parties who suffered damages from an environmental incident.

Recently a new law, the Law on Collective Settlement of Massive Damages, came into force. This law gives the opportunity to foundations and societies which protect the interests of certain persons to settle agreements to compensate those persons who suffered the same damages. It is important to point out that this law

has not yet been applied to environmental claims.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in the Netherlands and how is the emissions trading market developing there?

In the Netherlands there is a CO₂-trading scheme and a NO_x-trading scheme in operation.

Over 95% of the companies entitled to participate in the CO₂-trading scheme obtained their emission permit on time. On 28 February 2005 the actual trading of the emission rights started.

The NO_x-trading scheme started on 1 June 2005. Approximately 200 companies joined the NO_x-trading scheme.

Both the CO₂-trading scheme and the NO_x-trading scheme are in their early stages, but it looks like they are developing steadily.

The Dutch Government submitted a new allocation plan for the next trading period (2008-2012). The European Commission recently disapproved this new allocation plan. Since the allocation plan for the previous period will cease to have effect in 2008, it is of great importance that the Dutch government will soon adapt the disapproved allocation plan and submit a new plan.

10 Asbestos

10.1 Is the Netherlands likely to follow the experience of the US in terms of asbestos litigation?

In Dutch litigation, asbestos claims are mostly restricted to the liability of an employer towards its employees in an asbestos factory, and to the liability of the owner of an asbestos factory towards the people living in neighbouring properties.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The presence of asbestos in a building is allowed, notwithstanding the fact that the owner of such a building has a notification obligation at the moment he sells his property. Special obligations may arise, however, when a building containing asbestos is demolished or refurbished.

However, when asbestos is used as a material to harden or increase ground, this will lead to liabilities and duties.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in the Netherlands?

In the Netherlands, there are several types of insurance that indirectly cover small forms of environmental risks, for example an extensive fire insurance, or liability-insurance. In general, however, there are no insurances that cover specific environmental liabilities. Insurances that do cover specific environmental liabilities are mostly tied up to a certain maximum amount of money.

11.2 What is the environmental insurance claims experience in the Netherlands?

In view of the answer given to the previous question, not much experience has been gained in the Netherlands as regards recent insurance claims concerning environmental risks.

The limited environmental insurance experience in the Netherlands arises mainly from insurances that were taken out in the past. In the past, when environmental problems did not play a leading role in companies, a few insurances were taken out, without specifying the liability part. This means that certain environmental risks that occur now, can be claimed for under the scope of the insurance taken out in the past.



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Practice overview: Niels specialises in environmental, housing, licensing, energy and regulatory issues. His work includes advising businesses, developers and public bodies (municipalities and provinces) on environmental and planning law matters and representing clients before the Dutch courts and in negotiations with government agencies and other public authorities.

Significant information: Niels has held a part-time professorship in environmental law and planning law at the University of Amsterdam since 1984.

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- Professor of Law, University of Amsterdam.
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