National report of the Netherlands

Prof. J.A.E. Vervaele/Dr. A. Klip

General Introduction to the Procedural Provisions of Administrative Law and Criminal Law in the Netherlands

While studying and analysing the regulation 2185/96 and Article 7 of the 2nd additional Protocol to the third pillar PFI Convention, in the light of the points mentioned in the questionnaire 'Corpus Juris Suivi' and further elaborated by M. Delmas-Marty in her paper, we have to take into account various sources of Dutch law:

1) the provisions of administrative law concerning administrative investigation or supervision (*police administrative, Überwachung*), which can be found both in the General Administrative Law Act (GALA) and in specific Statutes on substantive issues as the Import and Export Act, Agricultural Act, Customs Act, the General Act on State Taxes (GAST), *et cetera*, or in delegated legal regulations attached to the statutes (general administrative orders or ministerial regulations);

2) provisions of criminal investigation (*police judiciaire, Ermittlung*) related to offences in general, which can be found in the Code of Criminal Procedure (CCP);

3) specific provisions of criminal investigation (*police judiciaire, Ermittlung*) related to economic offences, which can be found in the Economic Offences Act (EOA);

4) specific provisions of criminal investigation (*police judiciaire, Ermittlung*) related to specific offences, such as, for instance, tax or customs offences, which can be found in the Customs Act (CA) and the General Act on State Taxes (GAST);

I. Administrative Investigation (*Toezicht, Police administrative, Überwachung*)

In the Netherlands until recently, there was no general law on administrative procedure. The regulatory framework concerning administrative investigation was provided in the specific substantive Acts, such as the Import and Export Act, Agricultural Act, Fisheries Act, the General Act on State Taxes, Customs Act, *et cetera*. During the last decade a General Administrative Law Act (GALA) was approved.[1] This Act has two particular features: 1) the aim is a general harmo

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1 For general comments, see A.J. Bok, et al, *Bestuursrecht, derde tranche, Algemene Wet bestuursrecht* (Ars Aequi Libri, Nijmegen, 1997); A.W.M. Bijloos and Th.J.M. Lindner, *De Algemene Wet Bestuursrecht; eerste tranche* (W.E.J. Tjeenk Willink, Zwolle, 1992); N. Verheij and H.G. Lubberdink, *Algemene wet bestuursrecht: derde tranche* (W.E.J. Tjeenk Willink, Zwolle, 1996);

nization and codification of the general features of administrative law and 2) the Act contains several parts, which enter into force step by step by means of tranches. General codification does not mean that all the procedural provisions in the substantive Acts are abolished. The GALA is a framework Act. The provisions of GALA apply if the substantive act does not provide specific rules; on the contrary, if the substantive act contains specific procedural rules, these rules can supersede the GALA provisions. Title 5, established in the third tranche of GALA, provides for specific rules on enforcement. Subtitle 5.1 contains the regulatory framework on administrative enquiry/investigation/supervision (*toezicht*). These provisions grant the administrative inspectors their competences: access to premises, administrative inquiry in the administration, *et cetera*. One could call this a minimum codification or harmonisation. Substantive acts can go further and provide for more far-reaching competences for administrative inspectors. In some financial substantive acts the inspectors have, for example, the competence to give binding enforcement orders about the financial policy of a corporation or to take more far-reaching coercive measures as regards goods (seizure).

As has been said, the subtitle 5.1 concerning the administrative investigation (*toezicht, police judiciaire, Überwachung*) came into force in the third tranche. The fourth tranche concerning administrative penal sanctions (administrative fines) is still being elaborated, so that at the moment only substantive legislative provisions cover administrative penal sanctions.

The GALA only applies in situations of administrative investigation. This means that the GALA does not apply when enforcement agencies (the police, inspectorates, Public Prosecutor, investigating magistrate) are investigating or prosecuting a criminal offence. Article 1:6 GALA explicitly excludes the application of GALA provisions to criminal investigations and prosecutions. This means that there is a clear legal separation between administrative investigation (*toezicht, police administrative, Überwachung*) and the criminal investigation (*opsporing, police judiciaire, Ermittlung*). In practice, certainly in the economic and financial fields, the special inspectorates for agriculture, fisheries, taxes, customs, economic issues, *et cetera* have both competences. This means that they can use both administrative investigative competences and criminal investigative competences in order to enforce (Community) law. The start of 'opsporing' (*police judiciaire, Ermittlung*) constitutes the division between them. Article 27 of the CCP states that there has to be a *reasonable suspicion*, based on facts or circumstances, before one is competent to use the provisions provided by the CCP. But in administrative proceedings such a suspicion is not needed to supervise. To conclude: as soon as there is a concrete suspicion of a criminal offence (which does not mean that there must also be a suspected person) the provisions of the CPP apply, which means that more far-reaching investigative competences can be used (coercive measures, legal search of premises, pre-trial detention, etc.), but also that stricter rights of judicial protection apply (the right to remain silent, for example).

M. Schreuder-Vlasblom, *De awb; het bestuursprocesrecht* (W.E.J. Tjeenk Willink, Deventer, 1997).

II. Administrative Enforcement in Detail

II.1 Administrative Investigation: Section 5.1 GALA

Due to the third tranche of the GALA coming into force, many of the inspection competences belonging to the supervisors, which were scattered across various substantive acts, have been codified or bundled together in a special section in the GALA, namely section 5.1 (Supervision). As stated above, the substantive acts can provide for more far-reaching provisions.

Who is competent to conduct an administrative investigation under dutch administrative law? Could that also be the Commission/Uclaf (Uclaf as an investigator under administrative law)? Article 5:11 GALA states that an administrative investigator or supervisor is a person, who by law/Act of Parliament or by delegated administrative regulations (general administrative orders or ministerial regulations) has been charged with the compliance of provisions of law/acts or the provisions of general administrative orders or ministerial regulations. When statutorily charging an inspector with the competences of administrative investigation, the competences foreseen in the GALA can be limited. Hence, some inspectors charged with administrative inspection has fewer competences than those provided for in the GALA (e.g., no competence to take samples), while other inspectors have more competences if the substantive acts which they have to enforce provide for more competences than under the GALA.

What does all this mean for Commission officials or Uclaf officials? This means that Uclaf could only be an administrative investigative authority under GALA, if a formal act or delegated Dutch regulations provide therefor, which in fact is not the case. However, Dutch legislations explicitly takes into account the far-reaching administrative investigation competences of European Commission officials in the field of unfair competition. In order to provide for the necessary competences at the national level to assist the Euro competition inspectors and in order to give to them the necessary protection, also criminal protection (Euro-officials as the victims of crime), as well as providing for criminal responsibility (Euro-officials as offenders), the Act to Implement the EC Competition Directives (Uitvoeringswet EG-mededingingsverordeningen (Stb. 129, 1997)) was approved. In the light of the new regulation 2185/96 and far-reaching autonomous investigative competences, it could be a good solution to provide for a similar instrument at the national level with regard to substantive issues related to the EC's finances.

Does the GALA offer other possibilities for officials of the European Commission or for Uclaf to became specifically involved in the administrative investigation, e.g. as a witness or expert? Article 5:15, § 3 GALA gives the supervisor the opportunity to appoint certain persons who can accompany him.[2] According to the explanatory memorandum, the legislator was here thinking of technical

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2 P.J.J. van Buuren and J.M. Polak, *Algemene wet bestuursrecht: de tekst van de Algemene wet bestuursrecht, inclusief de derde tranche voorzien van commentaar* (Kluwer, Deventer, 1997), pp. 180-181.

advisors or persons specializing in taking samples (experts).[3] The explanatory memorandum emphasizes the possibility for European officials to accompany the supervisor. However, this does not mean that the European official can have the competences of the national supervisor at his or her disposal. Uclaf officials could, however, assist the supervisor by pointing out the importance of certain documents, because, for example, they contain evidence of fraud. So, the Uclaf officials can operate as experts in European fraud during the investigative procedure.

When the addressee of the enforcement powers under GALA is unwilling to cooperate (not cooperating with an order to assist, an order to provide access to administration, etc.), he can be prosecuted for a criminal offence under Article 184 Criminal Code. In practice Uclaf officials cannot give such an order, but of course it can be done by the national enforcer together with Uclaf.

During the administrative investigation, the interrogation of 'suspects' and witnesses is not the central issue. Central is the gathering of information by searching premises, asking for documents, taking samples, *et cetera*. Nevertheless, during the administrative investigation the supervisor is entitled to ask for further information, which can be obtained by means of oral questioning (article 5:16 GALA).

II.2 The Imposition of Administrative Sanctions and Legal Protection Against such Sanctions: Chapters 4, 6, 7, 8 of GALA

An administrative sanction can be imposed upon the request of a party with a legal interest (*belanghebbende*) or upon the initiative of the administrative authority itself. A person or legal body which Article 1:2 of GALA recognizes as having a legal interest, has a specific position in the administrative procedures. Public bodies and public authorities can, under certain circumstances and in a given context, also be recognized as parties with a legal interest; this is the case when they are public authorities as defined under Article 1:1 GALA, and their legal powers and responsibilities give them a legal interest in this context (Art. 1:2 § 2 GALA). The European Commission or Uclaf cannot be a party with a legal interest within the meaning of Article 1:2 GALA, because they are by definition not a (Dutch) public authority within the meaning of Article 1:1. Therefore, they do not have the specific procedural position which other parties with a legal interest have.

The GALA contains three procedures:

1. The decision of an administrative authority/organ (*autorité administrative, Behörde*), imposing a remedial or punitive sanction;

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3 Also: N. Verheij and H.G. Lubberdink, *Algemene wet bestuursrecht: derde tranche* (W.E.J. Tjeenk Willink, Zwolle, 1996), p. 120.

At this stage there is no real contradictory 'trial' situation. The only obligations are that *the addressee and other parties with a legal interest* have to be heard before a sanction is imposed (Arts. 4:7 and 4:8 GALA) and that the grounds justifying the decision have to be stated (Arts. 3:46 and 3:47 GALA). The administrative authority takes its decision upon the 'evidence' gathered by the investigation. In administrative proceedings in the Netherlands there is a free regime, not a statutorily prescribed regime. This means that the administrative authorities can accept all forms of evidence and that the evidenciary value depends upon the free interpretation of whoever takes the decision.

As has been said, the right to be heard is limited to the addressee of the sanction (Art. 4:7 GALA) and other parties with a legal interest (Arts. 4:8 and 1:2 GALA). The Commission or Uclaf are not the addressees of the sanction, and neither are they a party with a legal interest. Nevertheless, they can, and in certain circumstances, must, be able tot contribute to the proceedings. The administrative authority which imposes the sanction is obliged to gather all information that can be relevant to its decision (Art. 3:2 GALA). In that context, witnesses and experts can be heard in order to provide 'evidence'; all in informal proceedings, albeit that the addressee has the right to react to such statements and facts. So, informally, the Commission or Uclaf can have a certain role in procedure, leading to the imposition of administrative sanction.

2. A complaint procedure, by which the same administrative authority has to reconsider the decision or a procedure of administrative appeal, by which another administrative body has to reconsider the decision;

The GALA makes it possible for the *addressee and other parties with a legal interest* to object to the sanction decision of the administrative authority (Arts. 1:2, 1:3 and 1:5 GALA). This can consist in a procedure of administrative objection or administrative appeal (depending on the Act).

At this stage, the addressee and other parties with a legal interest also have a right to be heard (Art. 7:2 GALA). The parties concerned may call, at their own expense, witnesses or experts, which may be heard (Arts. 7:8 and 7:22). The administrative authority in question decides whether these witnesses or experts will be heard or not. This decision is not susceptible to complaint or appeal (Art. 6:3 GALA). In the field of PFI, the party concerned will not be very interested in calling Euro-officials. The administrative authority may also request experts and witnesses to contribute to the factfinding (Art. 3:2 GALA); this could be the Commission or Uclaf. Again, the addressee is entitled to react to their statements and information. It should be noted that the addressee, seeking remedy by means of a complaint procedure or an administrative appeal, may not be worse off by the mere fact that has he sought a remedy (*non reforatio in peius*; Arts. 7:11 and 7:25).

3. A judicial review procedure by an administrative tribunal or court

At this stage we are dealing with a procedure at the level of judiciary, administrative branch (this can be compared with the *Conseil d'Etat*, *Bundesverwaltungs-*

gericht... or it can be specialized administrative tribunals such as, for instance, the College for Economic Activities, which is the highest administrative tribunal in many economic fields of Community law). Only at this stage are we dealing with fully contentious proceedings with *parties* (the economic operator (addressee of the sanction), other parties with a legal interest and the administrative authority) before an independent judge.

The persons interviewed by the supervisor during his investigation (Art. 5:16 GALA) can be summoned as witnesses later on in the administrative procedure. Only the court is competent to summon a witness, and the witness is obliged to comply and to testify, if necessary under oath (Art. 8:33 GALA). The witnesses summoned receive a notice to that effect. This notice not only states the subject of the summons, but also the penalties. The parties concerned are entitled to question witnesses, but the judge can prevent witnesses from answering certain questions.[4] A witness can be summoned by the court during the preliminary investigation in order to clarify the facts. The witness can also be summoned to appear in court (Arts. 8:46 and 8:60 GALA). A number of articles from the Code of Civil Procedure apply to witnesses. These articles contain, among other things, definitions of the right to refuse testimony (Art. 191 Code of Civil Procedure) and a provision relating to the detention of witnesses for contempt of court (Art. 199 Code of Civil Procedure).

An expert can be requested by the court during the preliminary investigation (Art. 8:60 GALA)[5] to conduct research. He can also be requested by the court to appear in court (Arts. 8:34 and 8:60 GALA). Experts are, unlike witnesses, not obliged to undertake the assignment or to take the oath (Art. 8:34 GALA). An expert does not have to be independent. Once they have accepted their appointment they have to cooperate, however.

The parties concerned can also call witnesses and experts, at their own expense. The court can deny the appearance of such witnesses and experts if it believes that they cannot contribute to the understanding of the case (Art. 8:63 GALA). These party-witnesses or experts are free to appear, but the court can summon them in. During the trial one cannot switch between being a witness or an expert. A witness plays a different role than an expert. The statement of a witness contains facts or circumstances that he has experienced himself. An expert is called because of his specialist knowledge (he 'guides' the judge). However, there is a possibility of combining these two roles, namely in the form of the expert witness (*getuige-deskundige*).[6] An expert witness may describe established facts in his statement, unlike an expert. The expert witness is not very common in administrative proceedings (see below: criminal law).

What does all this mean for a Commission or Uclaf official? Uclaf officials can be asked to provide further information by the Court under the heading of 'others' in Article 8:44 of GALA. This is not a compulsory order for 'others',

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4 J.B.J.M. Ten Berge et al., *Commentaar Algemene wet bestuursrecht* (Vuga, The Hague), pp. 8.1.6.1-4.

5 M. Schreuder-Vlasblom, *De awb; het bestuursprocesrecht* (W.E.J. Tjeenk Willink, Deventer, 1997), p. 147.

6 J.B.J.M ten Berge, *Bescherming tegen de overheid* (Zwolle, 1993), p. 260.

but Community law (case-law based on Art. 5, the *Zwartveld* case)[7] can oblige Community institutions to cooperate with the national authorities and the national judiciary to enforce Community law. Community officials and Uclaf officials can be summoned as witnesses or as experts in administrative proceedings during the court stage. The above mentioned provisions apply. Community officials or Uclaf officials can also be called by the parties (e.g. the administrative authority). The above mentioned provisions apply.
In the end, the value of the Uclaf evidence reamins at the court's descretion.

III. Criminal investigation: the Code of Criminal Procedure (CPP)[8]

A criminal prosecution may only take place on the basis of written law (Art. 1 CCP). The officials who are competent to prosecute are mentioned in the CCP. Article 141 CCP provides a list of officials who are competent to carry out criminal investigations (general criminal investigators). They – the most important are the Public Prosecutors and the police – are competent to investigate all offences, the ones foreseen in the Criminal Code (CP) such as forgery, bribery, *et cetera*, the ones foreseen in the special Economic Offences Act (economic offences related to substantive economic acts) and the ones foreseen in special substantive Acts as the General Act on State Taxes or the Customs Act (*special states; Nebengesetze*). Article 142 CCP makes it possible to appoint other criminal investigators (special criminal investigators). These investigators generally have only limited competences in the field of criminal investigation, e.g., only as regards agricultural offences. They are only allowed to conduct the investigations regulated in these special laws and are not allowed to conduct investigation relating to offences under the Criminal Code. In such a case they have to transfer the case to the police or the Public Prosecutor.

There are three successive phases in the criminal proceedings: the criminal investigation (*opsporingsonderzoek*) under the authority of the Public Prosecutor, the judicial preliminary investigation (*gerechtelijk vooronderzoek*) under the authority of the investigating magistrate (*rechter-commissaris, onderzoeksrechter, juge d'instruction*) and the hearing in court. The judicial preliminary investigation is skipped in most cases. Only when far-reaching coercive measures have to be taken, such as the search of premises *et cetera*, is the judicial preliminary investigation mandatory. Recently, a special criminal investigation procedure has been introduced: the financial criminal investigation, which aimed at seizing and forfeiting the profits gained from serious offences.

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7 *Zwartveld* case, ECJ, C-2/88.
8 See A. Minkenhof, *De Nederlandse strafvordering*, (J.M. Reijntjes, Deventer, 1998).

Criminal Investigation (*opsporingsonderzoek*)

There are no written rules for hearing of witnesses during criminal investigation.[9] Unlike the investigating magistrate, the criminal investigator has no means of forcing a witness to testify. Only voluntary testimony is possible. However, the means of coercion which the investigating magistrate can apply certainly encourages compliance.

The main rule in Dutch criminal law is that the defendant, the Public Prosecutor and the judge are free to call in experts. Of course the court will determine the necessity of the experts. They usually fulfil three functions: 1) they inform; 2) they give advice; 3) they conduct an investigation upon request. Experts are mostly called when a technical investigation has to be conducted. These investigations are mostly conducted by the Judicial Laboratory, but can also be conducted by other experts. During the criminal investigation phase, fewer articles apply concerning experts than during a judicial preliminary investigation. In fact there is only one, namely Article 151 CCP. The Public Prosecutor appoints the experts himself, without prior permission from the investigating magistrate. The defendant has to make a request to do so. The only condition is that the Public Prosecutor asks for a judicial preliminary investigation, by which the case will be handled under the authority of the investigating magistrate. In practice this article is hardly used and the appointment of experts is done by the Public Prosecutor or the police on his/their own initiative. The Supreme Court of the Netherlands has agreed with this practice[10] and the law will soon be changed on this point.

The reports of the judicial investigators can be expert reports in the sense of Article 344 (1) sub. 4 CCP. The case law of the Supreme Court in not very clear on this point, however. Sometimes the Supreme Court accepts that judicial investigators can be called in as experts, expert witnesses or as qualified witnesses. An accountant working for a judicial inspectorate could be called either as an expert or as a qualified witness, but the investigator cannot.[11]

This means that Uclaf officials could be called by the Public Prosecutor as experts, or that they could testify voluntary.

Judicial Preliminary Investigation (*gerechtelijk vooronderzoek*)

The investigating magistrate collects evidence during the judicial preliminary investigation. He is independent and that pus him in a neutral position above the Public Prosecutor.[12] Seizure is within the competence of the investigating magistrate (Art. 110 CCP). If the investigating magistrate decides to conduct an investigation in order to seize a particular object, he can also decide to be accom-

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9 G.J.M. Corstens, *Het Nederlandse Strafproces* (Gouda Quint, Arnhem, 1995), 260.
10 HR, 20 November 1990, NJ 1991, 19 March 1994, NJ 1994, 577.
11 See J. Hielkema, *Deskundigen in Nederlandse strafzaken* (Den Haag, 1996).
12 G.J.M. Corstens, *Het Nederlandse strafprocesrecht* (Gouda Quint, Arnhem, 1995), p. 289.

panied by certain persons that are appointed by him (Art. 110, para. 4 CCP). This is called assistance (*bijstand*: see below).[13]
They have access to premises and under the provisions of the General Act of the Right of Entry (GARE) to private homes in order to conduct a first-sight search (not a full search).

When GARE applies (in the case of private homes), Article 8 (2) GARE provides that experts can assist the judicial investigators, under the strict condition that they are mentioned in the 'writ' or authorization and that their presence is necessary for the investigation. Under the authority of those responsible for the search, the experts may act as searchers. If the addressee does not cooperate or does not allow the presence of the experts, he can be prosecuted under Article 184 Criminal Code, if these experts are competent to enter on their own. If not, as is the case with Uclaf officials, the addressee can only be prosecuted under Article 180 Criminal Code, if such opposition is backed up by violence or the threat of violence. Article 112 CCP deals with the situation where a search warrant is required on the part of the investigative magistrate, i.e. for a full search. However, this warrant is mandatory for full searches of both business premises and private homes! Here, too, he can be accompanied by experts, as provided under Article 110. He could therefore be assisted by Uclaf officials.

Two other articles make it possible for Public Prosecutors (Art. 150 CCP) and investigating magistrates (Art. 192 CCP) to survey a certain situation or an object that is, for example, impractical to move. In that way the Public Prosecutor or the investigating magistrate can gain an impression of the circumstances under which the crime was committed. Both the Public Prosecutor and the investigating magistrate are entitled to bring along certain persons who are appointed by them.

Experts are appointed by the investigating magistrate in his official capacity. The Public Prosecutor can order the investigating magistrate to appoint an expert. The defendant can make a request to that effect (Art. 227 CCP). An expert has a right to refuse, but if he accepts he has to fulfil his assignment. An expert is called for because of his specialist knowledge. His statements have to be substantiated (Arts. 234, para. 2 and 296 CCP). Experts may also be called in matters that concern judicial questions.[14] The evidence discovered in some cases is not always clear. For example, a chemist is needed to determine the relevance of blood samples in respect of the defendant. Generally speaking, an investigator lacks such expertise.

In that case experts are needed for the continuity of the investigations.[15] An expert can also be required to explain certain aspects to the judge in court.

Everyone can be a witness, as the CCP does not lay down any conditions for a witness other than that there has to be a connection between the statement and the offence. The defendant cannot be a witness, and a number of witnesses can

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13 G.J.M. Corstens, *Het Nederlandse strafprocesrecht* (Gouda Quint, Arnhem, 1995), p. 318.
14 HR, 25 November 1958, NJ 1959, 71.
15 G.J.M. Corstens, *Het Nederlandse strafprocesrecht* (Gouda Quint, Arnhem, 1995), pp. p. 316-232.

excuse themselves from this duty,[16] for example the mother or brother of the defendant. See Articles 217-219 CCP. The witness statement contains the facts or the circumstances which he himself has witnessed or has experienced (Art. 343 CCP). A witness must indicate as far as possible the source of the information (own observation, or *de auditu*; see Art. 287 CCP). Witnesses are heard by the investigating magistrate (Art. 210 CCP). They have the duty to answer all questions put to them, otherwise they can be detained by an order of the investigating magistrate (Art. 221 CCP). In most cases the statements of witnesses are very important during the judicial preliminary investigation. These statements are often used to gain a better impression of the situation (fact finding). During the trial, a witness has a different function. Then his statements are used to prove something, and the witness plays a more important role. Therefore, for example, he has to take the oath (Art. 284 CCP) if he appears in court.[17]

The investigating magistrate can hear the witnesses in his official capacity. However, the judge or the Public Prosecutor can order the investigating magistrate to hear a certain witness. The defendant can also indicate that he wishes to summon a witness, but he needs the cooperation of the Public Prosecutor (Art. 263 CCP). A witness can be detained for contempt of court (Arts. 213 and 282 CCP), if his statement is essential to the trial. An Uclaf official can be summoned as a witness, but this depends on the decision of the investigating magistrate, or on a proposal from the Public Prosecutor or the defendant.

That the investigating magistrate can call officials of the European Commission, including Uclaf officials, as witnesses was clearly illustrated in the famous ECJ *Zwartveld* case[18] in which a Dutch investigating magistrate requested legal cooperation in criminal matters, asking *inter alia* to hear Euro-inspectors as witnesses *à charge* or *à décharge* in a criminal fisheries case. In this case the ECJ decided that the denial of the European Commission to cooperate was not justified as Article 5 is binding on the EC and takes priority over the Protocol concerning privileges and immunities.

Expert witness (*getuige-deskundige*)

Sometimes an expert can also be called as a witness when he explains established facts (for example, a doctor points to the entry and exit points concerning a bulletwound): the expert witness (*getuige-deskundige*).[19] The role of the expert witness in criminal proceedings has become more and more important over the last few years. If a judge expects a person not only to declare what he has witnessed or experienced himself, but also to draw conclusions as an expert, the judge will have to administer two oaths (the person must take an oath as a witness

16 J.M. van Bemmelen, *Ons strafrecht 4: Strafprocesrecht* (Tjeenk Willink, Alphen aan den Rijn, 1989), p. 198.
17 J.M. van Bemmelen, *Ons strafrecht 4: Strafprocesrecht* (Tjeenk Willink, Alphen aan den Rijn, 1989), pp. 194-195.
18 *Zwartveld* case, ECJ, C-2/88.
19 G.J.M. Corstens, *Het Nederlandse strafprocesrecht* (Gouda Quint, Arnhem, 1995), p. 319.

and an oath as an expert).[20] Uclaf officials are experts in European fraud cases and can be called in this capacity.

If an expert or witness does not appear when summoned by the investigating magistrate or during the trial, he can be prosecuted for a criminal offence. In the case of *culpa* he can be prosecuted under Article 192 CC; in the case of *dolus* he can be prosecuted under Article 442 CC.

Dutch criminal procedure law has no provision for the victim to act as a prosecutor. The victim plays a passive role in the criminal proceedings: after the victim has informed the police of a crime, the police will take action. Everyone has the right to inform the police that a crime has been committed (Art. 161 CCP). The victim can join the criminal proceedings as the aggrieved party (Art. 51 CCP). Only the victim who has suffered directly because of the crime can do this. In the case of European fraud it is very doubtful whether the Commission will have suffered directly, as the first responsibility (see Community rules) lies with the Member States.

If the Public Prosecutor refuses to prosecute, the victim can file a complaint (Art. 12 CCP). Only the victim who has a direct interest can file such a complaint. This is the case when the victim's interests are severely damaged and the administration of justice demands the initiation of proceedings.

Investigation in Court – Evidence

Article 339 CCP provides a limitative list of aspects that can serve as evidence (the judge's own observations, statements of the defendant, statements of witnesses, statements of experts, and other written materials). This means that the CPP prescribes a legal system of evidence. Only the evidence prescribed can be taken into account by the court: declarations of the defendant, declarations of a witness, declarations of an expert, written documents. But the CCP does not prescribe the value of that evidence. So it is up to the court to evaluate the evidence. Reports by Uclaf officials can be used as expert reports, witness statements or as other written materials and can serve as evidence, but the importance of the reports depends on the evaluation of the court.

A victim can be heard in court as a witness. In court, the victim, as the aggrieved party, cannot call witnesses or experts, but he is allowed to submit documents (Art. 334 CCP). This can only be done in the procedure in which the victim appears as the aggrieved party and requests compensation.

The president of the court is the first to examine the witness. There is no examination-in-chief followed by cross-examination and re-examination. After this the witness will have to answer questions posed by the Public Prosecutor or the defendant (Art. 285 CCP). The Public Prosecutor comes first when the witness was proposed by the defendant and vice versa.

In most cases the expert will have done the necessary research before the court hearing commences. He will only comment on the results of his research. Experts cannot be detained for contempt. But they are obliged to comply with their

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20 A. Minkenhof, *De Nederlandse strafvordering* (Gouda Quint, Deventer, 1998), p. 321.

obligations they have undertaken in accepting the assignment (Art. 296 CCP). Non-compliance is punishable under criminal law (Art. 192 CCP).

IV. Economic Offences Act (EOA)

As was said in the introduction, the EOA has a special place in the Dutch enforcement system. The EOA is a framework Act containing special provisions for economic offences. What economic offences are, is defined in Article 1 and 1a of EOA by pointing to the specific articles in the hundreds of substantive laws. In reality EOA is the criminal law and criminal procedural law framework Act for the criminal enforcement of substantive rules in the social and economic fields. The EOA provides for specific rules for criminal procedure (criminal investigation and prosecution), specific rules for sanctions and specific rules for the court procedure. When no specific procedural rules are contained in the EOA, the rules of the CPP apply (e.g. concerning the investigating magistrate). This means that everything which has been said under point III, also applies to economic offences, unless otherwise provided under the EOA or the relevant substantive Act (the *specialis* principle: Art. 25 EOA). This *specialis* principle does not mean that the criminal conduct (committing or omitting) must be dealt with under the EOA, if possible. The Public Prosecutor has the freedom to prosecute a violation under the Criminal Code (for example, forgery) or under the EOA (for example, a false declaration under the Import and Export Act) or under both. In the latter case the Public Prosecutor decides whether the case will be dealt with by the specialized Chamber for Economic Offences applying the EOA procedure or by the ordinary Criminal Chamber applying the CPP procedure.

Who can investigate under the EOA? Article 17 EOA states:
1) the general criminal investigator under Article 141 CPP (see above)
2) the investigators specially designated by the responsible Ministers;
3) the officials responsible for criminal customs enforcement.
The investigators provided for under 2) and 3) are special criminal investigators, they are not competent to investigate offences under the Criminal Code. Most of them work at a in a specialist inspectorate, such as the Inspectorate of Agriculture and Fisheries, the Economic Inspectorate, the Inspectorate for Taxes and Customs, *et cetera*.

Articles 18-23 EOA provide for far-reaching investigative powers, with less restraints than the ones provided in the CPP. First of all, Article 27 CPP does not apply; this means that no **suspicion** is necessary in order to make use of these investigative powers. In that sense the EOA investigative powers can be used during a preliminary stage and can also be used for administrative supervision (*police administrative, Überwachung*). Although most authors assume that a

suspicion under the EOA is not required,[21] and this has been confirmed by case law,[22] it is still difficult to pinpoint the end of supervision and the start of (criminal) investigation.[23] This is important because most of the officials who derive their criminal investigative powers from the EOA work within inspectorates and have also administrative investigative powers provided by the substantive Acts and in GALA. Hence, the problem concerning the line to be drawn between administrative supervision and criminal investigations arises. The Supreme Court has accepted[24] that during the course of the investigation, the administrative powers can be replaced by criminal investigative powers (continuous investigation) and that administrative investigation powers may be used for judicial investigation, subject to the condition that the principles of due law (e.g. the *cautio* and the right to remain silent) continue to apply.

Secondly, the investigative powers provided for under EOA have a further-reaching legal effect. For example, under Article 18 the power to seize goods is much broader than the power to seize goods under the CPP, while goods also belonging to the corporation in which the offence has been committed can be seized. Thirdly, the EOA investigators do not need special 'writs' from the investigating magistrate as is the case under the CPP; they have more autonomous powers.

The EOA also provides preliminary measures, which can be taken by the Public Prosecutor and/or the investigating judge. This measures can include far-reaching sanctions, such as the withdrawal of a licence or the nomination of an *ad hoc* committee of directors.

Concerning witnesses and experts, the EOA only provides for one specific rule in Article 27 EOA, stating that the Public Prosecutor can nominate an expert without commencing a judicial preliminary investigation, as provided for in Article 151 CPP. Once again he has more independent. In other respect the rules of the CPP continue to apply. So reference is made to section III for the answers concerning the position of Uclaf.

Maybe one thing might be interesting to point out. Article 58 EOA provides the possibility to nominate contact officials. They are officials in public service, who render technical assistance to the Public Prosecutor. They are assigned by the responsible Minister and can also be heard as experts during the trial. They can be not only officials of the Ministries, but also for instance of the National Bank. As the only condition is that they belong to bodies with a public task, one could consider whether it would be possible to charge Uclaf officials with this duty. In principle, the answer is yes, and the only inconvenience I can see is that 'bodies with a public task' might be interpreted in the sense of the Dutch Constitution, and that does not as yet provide for international or supranational bodies in that sense.

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21 A.M. Fransen, 'Toezicht en opsporing, het onduidelijke voortraject bij de publieke rechtshandhaving', *DD* (1993) no. 2, p. 105.
22 HR, 9 March 1993, *NJ* 1993, 633.
23 A. Minkenhof, *De Nederlandse strafvordering* (Gouda Quint, Deventer, 1998), p. 116.
24 HR, 2 December 1935, *NJ* 1936, 250.

V. Special Acts: Customs Acts (CA) and the General Act on State Taxes (GAST)

These Acts in the financial field do not fall under the EOA. They have their own independent regimes. Here too the rules of CPP apply, unless these Acts provide for specific rules. The difference with the EOA is that *suspicion* is needed in order to use the investigative powers under CA and AWR, but the powers are wide and can be compared to the ones under the EOA. Special in these Acts is that the Tax Administration has a wide range of possibilities to settle the case or to impose administrative sanctions. All *procès-verbaux* (official reports) have to be sent to the Tax Administration, not to the Public Prosecutor. In guidelines provided by the Tax Administration and the Public Prosecutor, further agreements are detailed concerning which instances of tax or customs fraud will be dealt with in an administrative procedure and which cases will be dealt with in a criminal procedure. In practice, the Public Prosecutor is the only one who can prosecute a criminal tax case (the Tax Administration has no competence to prosecute), but to a large extent he is dependent upon the Tax Administration. It is also the Tax Administration that deals with a settlement in a case; in ordinary criminal cases it is the Public Prosecutor who settles a case.

The GAST and CA do not contain specific rules concerning the position of witnesses, experts or victims. They only provide in Article 84 GAST and Article 204 CA for the appointment of a contact official as is the case under the EOA.

All this means that the same principles apply as far as Uclaf is concerned. The only important difference is the predominant position of the Tax Administration. Maybe that this could offer possibilities for increased administrative cooperation within the framework of the first pillar, including Uclaf.

VI. Mutual Assistance

As far as the position of Uclaf in mutual assistance matters is concerned, the same rules apply as in national situations. So the answers above are the same for this situation. There are no special provisions concerning this situation.

Only one article should be mentioned, which could also could be of interest in matters of mutual assistance, certainly when there is an international rogatory commission.

When implementing the Schengen Conventions, the Dutch legislator provided for an new article in the Dutch criminal code: Article 185a:

> 'Met ambtenaren worden ten aanzien van de artikelen 179 tot en met 182, 184 en 185 gelijkgesteld personen in de openbare dienst van een vreemde staat of van een volkenrechtelijke organisatie die in Nederland op door het volkenrecht toegelaten wijze hun bediening uitoefenen'.

This means that officials from other states or from international organisations who act in conformity with international law in the Netherlands are in an identical position as national officials as far as the following articles are concerned.

179: coercing national officials by means of violence or a threat of violence (maximum sentence: three years' or a fine) with the aim to influencing the national official in his actions or to force him to abstain from acting

180: opposing an official in the course of his duties or service with violence or a threat of violence (one year imprisonment or a fine)

181: extended prison terms up to 4 years when there is physical injury to the official

182: extended prison terms up to 6 years when two persons act in concert with the same degree of force against the national official

184: intentional non-compliance with the request of a national official, even an official not having judicial investigative powers, but administrative investigative powers (3 month's imprisonment or a fine)

185: non-compliance with a court order or with an order of an official carrying out his duties in a public place and causing a breach of the peace or being willing to leave that place (two week's imprisonment or a fine)

So, Uclaf officials do have the same rights as national officials (having administrative investigative powers) to be protected under criminal law. Article 184 Criminal Code is important in the sense that non-compliance with an order by Uclaf officials during the investigation is a criminal offence.

Finally, many special statutes provide for the possibility that the enforcement agencies call in an expert from a foreign public authority during an administrative inquiry. Non-compliance with such orders from foreign experts carry the same consequences as non-compliance with the orders from national officials. Non-compliance with the order (from a national or foreign expert) is a criminal offence under the Economic Offences Act (2 year's imprisonment or a fine).

Conclusion

The Dutch administrative and criminal proceedings offer a number of situations in which Uclaf officials can play a role in the enforcement of Community law. Dutch law does not distinguish between the protection of financial interests and other substantive Community issues. Uclaf officials will always have to act under the supervision of the competent national authority. Only in competition cases is it possible to initiate an investigation without being supervised by national authorities. Maybe the Dutch Act to Implement the EC Competition directives can serve as an example.

Explicit references to non-Dutch enforcement authorities in Dutch legislation are rare, but they do exist. The Act on Supervision of Insurance Companies can serve as an example in that it gives Uclaf a clearly defined legal position in the case of an administrative investigation. Article 185 of that Act makes it possible

for foreign officials to participate in administrative investigation by the Dutch supervisor on request of the foreign supervisor. These officials have certain investigative powers (for example, they can investigate books). Interesting is the face that the addressees have to comply with enforcement orders by both the national and foreign investigators and that non-compliance is an economic offence. This example of transnational horizontal cooperation could be used as a source for elaborating rules for vertical cooperation with Uclaf. Another possibility is to provide for a specific rule in the Dutch GALA.

If the Uclaf were to have real judicial investigative powers, as proposed in the reports by the MEP, Bösch, a number of national provisions could cause problems:

- Article 142 CCP and article 17 EOA: the Minister of Justice will have to grant Uclaf officials the necessary competence. But the Minister will also have the power to dismiss Uclaf officials, and they have to work under the authority of the Public Prosecutor.
- Article 181 CCP: the examining judge is in charge of the judicial preliminary investigation
- Article 2 Criminal Code: the principle of territoriality

If Article 7 of the 2nd additional Protocol to the third pillar PFI Convention ('*la Commission prête toute l'assistance technique et opérationnelle afin de faciliter la coordination des investigations engagées par les autorités nationales compétentes*') has to be read as the coordination of judicial investigation, which seems logic within the framework of this instrument in the third pillar, then the Netherlands, after ratification, will have to implement the necessary instruments in order to provide for this international cooperation in criminal matters. This would mean that title X of the CPP, concerning international legal assistance in criminal matters (Arts. 552h-552hh), must be adapted by explicitly providing for Uclaf. This adaption would be special in the sense that the European Commission or the EU is not a state and international cooperation in criminal mattes is generally between states.

Last but not least, in order to give Uclaf a real position under Dutch law, it must be clear that Uclaf is an investigative body, with or without judicial investigative powers. This excludes the possibility to act as a victim. Another point is that real investigative powers must be separated from sanctioning powers. Therefore a certain form of independence on the point of Uclaf in isolation of the Commission would be necessary, so that the unit imposing sanctions at Community level is not the same as the unit investigating the irregularities or fraud.