

Summary

The WED on the slips – A study on the advisability of a revision of the Economic Offences Act

Reasons for and relevance of the study

The report entitled 'De WED op de helling' (*The WED on the slips*) is the result of a study carried out by three staff members of the Criminal Law and Criminology Department of the University of Groningen by order of the WODC (*Research and Documentation Centre of the Dutch Ministry of Justice*). The reason for this study was formed by the experiences in a number of legislative processes (and from interdepartmental contacts) that have given the legislative department of the Ministry of Justice the impression that the WED (*Economic Offences Act*), which dates back to 1951 and has been amended many times since then, no longer meets today's requirements. Further to this impression the study group was asked to take an integral and detailed look at the WED or, in other words: to put it 'in the dry dock' in order to carry out the most complete assessment possible. The key question in this assessment was whether the enormous expansion of the scope of the WED, and the changing character of the Act as a result of this expansion, could still be reconciled with the original objective from which the WED derives its right to exist, or at least did so initially. In the study instruction this key question was divided into a number of (possible) study questions relating to issues like:

- the WED's relation to administrative law and general criminal law;
- the criteria based on which, and the way in which, stipulations from special laws are designated as economic offences within the meaning of the WED (the comprehensive enumeration in Articles 1 and 1a of the WED);
- the system selected in respect of WED sanction right;
- the structure of preliminary measures;
- the separate proceedings for WED offences;
- the preliminary process in the enforcement of the WED (and the relationship between administrative control and criminal investigation).

Definition of the problem

The study group has 'translated' the key question and the (possible) study questions from the study instruction into the following central definition of the problem:

Does the WED still provide a framework for the criminal enforcement of important sections of the socio-economic (regulatory) law that:

- is dogmatically sound
- is structured systematically and coherently

- does justice to its relation to other enforcement instruments, and in particular to administrative enforcement instruments.

In other words: does the WED in its present structure still have a right to exist?

Study methods

The study was given a traditional juristic-dogmatic structure. Using the relevant Parliamentary documents and literature, much emphasis was placed on the analysis of the juristic-systematic starting points of the WED in relation to legislative changes that have occurred since its inception and the interpretation of the Act in case law.

It was not (empirically) assessed how the WED functions in practice.

However, on a limited scale interviews were held with a number of people who are practically involved in economic criminal procedure in the capacity of 'economic' public prosecutors, economic police court judges, public prosecutor's clerks and court secretaries. The interviews were held in the districts of The Hague, Leeuwarden and Rotterdam. The objective of the interviews was to spot potential obstacles on which, among other things, the study would be able to focus. The interviews also provided a platform for suggestions for the improvement or amendment of the WED.

In addition to the interviews, an expert meeting was also held toward the end of the study period, in which the main preliminary findings were put to a group of experts who are practically involved with the WED. This group consisted of persons employed in the various parts of the Public Prosecution Service (Office of the Public Prosecution Service, Dedicated Public Prosecution Service, as Public Prosecutor and as Advocate General), in the criminal courts and various Ministries (Ministry of Justice (the Directorate-General for Legislation, Administration of Justice and Legal Aid and the Directorate-General for Law Enforcement), the Ministry of Agriculture, Nature and Food Quality (Legal Affairs department) and the Ministry of Housing, Spatial Planning and the Environment). This expert meeting proved to be a useful tool in the verification of the preliminary findings of the study group. By and large, those present at the meeting could agree with the present proposals.

Main findings and conclusions

The analysis of the special characteristics of the WED

The original raisons d'être of the WED

The Explanatory Memorandum with the original draft WED gave two reasons for the need for a special Act to regulate the investigation, prosecu-

tion and adjudication of economic offences. In the first place it was felt to be important that the enforcement of the economic laws and regulations that existed at that time should be regulated and uniform. In the second place it was felt that the nature of 'the' economic offence required special provisions with regard to the judicial organisation and substantive and procedural criminal law. The Explanatory Memorandum based the need for special provisions on three characteristics that most economic offences were deemed to have in common: "they have only recently become an offence, they relate to interests that are too complex to be immediately understood by everyone and that may be susceptible to differing assessments, even by the courts and, finally, they have major advantages for the offender, which means their appeal exists not just at a superficial level, but also after sober consideration."

The special provisions intended by the party submitting the legislative proposal can be classified as follows:

- Provisions for guaranteeing the expertise of the judiciary and the Public Prosecution Service;
- A system of heavy penalties ('strict criminal law') and other provisions and arrangements that would enable powerful repression in economic areas;
- A system of partially broadened investigative powers, adapted to the type of economic offence;
- A simplified criminal procedure system (in respect of general criminal procedural law) and less strict procedural requirements;
- A system of ('drastic') preliminary measures.

As mentioned before, the WED has undergone quite a few changes since 1951, both in a qualitative and quantitative sense. It appeared the WED was becoming farther and farther removed from its original *raison d'être* and objectives.

The original, rather limited, effective scope of the WED was increasingly abandoned over the years and today the 'accommodation' of laws within the WED is, in many cases, based on pragmatic considerations: the WED offers a suitable instrumentarium for the criminal enforcement of the 'regulatory law' (*ordeningsrecht*), and not just the socio-economic (regulatory) law. It therefore appears that the legitimisation of special provisions – in respect of general criminal (procedural) law – is no longer derived from the 'special characteristics' of the offences to which the WED originally limited itself, but from the suitability and practicality of the special provisions for regulatory legislation in general.

It was assessed whether it was in fact still possible to derive sufficient justification from these special characteristics for the 'special provisions' outlined above and the other differences compared to general criminal (procedural) law, or whether – now that the WED appears to be becoming ever further removed from its original *raison d'être* – generalisation

of the ‘special provisions’ would make sense. In this context an analysis was performed of the ‘special provisions’ in the field of substantive law (the WED sanctions), enforcement of the WED in the preliminary phase (investigation versus control) and WED adjudication. This resulted in the following conclusions.

Characteristics and particulars of the WED

One of the ‘special provisions’ in the WED concerns the penalisation method, which differs considerably from the penalisation method in the Criminal Code.

The WED does not penalise conduct, but rather ‘violations of regulations’ prescribed by or pursuant to stipulations included in Article 1 or Article 1a. The penalisation of ‘violations of regulations’ highlights the ‘end piece’ character of criminal law: in regulatory legislation the Government acts in a regulatory capacity through command and prohibition rules and criminal law provides penalties. In other words, the special penalisation techniques that occur in the WED, among others, find their justification in the regulatory character of the underlying legislation. This does not change the fact that, in the context of a potential revision of the WED, a lot can be said for a different penalisation system, which could eliminate the long lists. In its place it would suffice to define the different categories of regulatory offences and the associated package of sanctions. The penalisation as a regulatory offence can then take place in the special legislation itself.

In addition the WED has its own (different) system of sanctions.

At first glance the WED system of sanctions is strongly coloured by the stipulations in Article 5 of the WED:

“Unless the law stipulates otherwise, in respect of economic offences no other provisions can be made with regard to the purport of the penalty or disciplinary measure than to impose the penalties and disciplinary measures in accordance with this Act.”

With this stipulation the legislator intended, on the one hand, to put a stop to the previously existing chaotic adjudication of economic offences by various disciplinary, criminal law and semi-criminal law authorities. Henceforth, the adjudication of economic offences was to be primarily the responsibility of the (economic) criminal court. On the other hand, Article 5 of the WED was regarded as a ‘guarantee against hidden penalisation’.

In recent years this ‘closed’ nature of the sanction system was put into perspective to a large extent, among other reasons because the legislator increasingly created exceptions to the principle of Article 5 of the WED by allowing non-criminal law sanctions with the purport of a penalty

in respect of economic offences. This concerns the administrative law enforcement processes in which sanctions such as administrative penalties and penalty orders can be imposed. The background of the emergence of the sanctions lies, for an important part, in changing views on the enforcement of the law and in the effort to achieve ways of settlement that are more effective than by means of criminal law. Little remains, therefore, of the criminal law primacy based on Article 5 of the WED in the enforcement of laws that come under the WED. The advance of administrative law enforcement, which is diametrically opposed to Article 5 of the WED, makes further repositioning of the WED a necessity.

A second notable characteristic of the WED sanction system is its *uniformity*. For every economic offence the possible penalties and measures that may be imposed do, in principle, follow on from Article 6 and onward of the Act. The possible monetary penalties and custodial sentences are, to an important extent, linked to the different categories of regulations as outlined in Articles 1 and 1A. For instance, for *all* regulations in Article 1 subsection 4 the rule applies that actions that contravene these regulations can only be penalised with a monetary penalty of the fourth category and/or a maximum imprisonment of six months (Article 6 paragraph 1 subsection 4, first sentence). The additional penalties of Article 7 and the measures of Article 8 can also be imposed for each economic offence.

The uniformity of the (closed) penalisation system did initially work well with the relatively limited number of strongly substantively cohesive economic offences. However, the current multitude of economic offences has a much less strong *substantive* cohesion. It can be said that this strongly reduced cohesion between 'the' economic offences will therefore need a suitably adapted and more varied penalisation system.

With regard to the specific characteristics of the WED penalties, the changing character of the WED means that the right to exist of a number of these sanctions (that differ from general criminal law) will have to be revised. Based on an analysis of the individual sanctions it has been shown that in nearly all cases much can be said for harmonisation between the provisions in question and their general law counterparts (also referred to as 'generalisation': the generalisation of provisions, laid down in special laws). For some sanctions the rule even applies that they can be cancelled altogether. Insofar as sanctions that are different (compared to general law) can still be justified, it is advisable to differentiate – more than is currently the case – in their scope of application, also in view of the (considerable) difference in character of, and the strongly reduced cohesion between, the different regulations that have been brought within the effective scope of the WED over time.

The analysis of the system of the (broad) WED investigative powers, and the developments that have occurred in this respect since 1951, result in the following findings.

In general terms we can say that the inherent enforcement problems that are characteristic of regulatory legislation require optimum coordination between the administrative control powers and criminal investigation powers. In view of the above the legislator has therefore endeavoured, in the context of the 'amending legislation 3rd tranche of the Awb (*General Administrative Law Act*), to harmonise title III of the WED ('of the investigation') as much as possible with section 5.2 of the Awb ('monitoring compliance'). This coordination is not only desirable or necessary for practical reasons, but also because of a number of more substantive reasons. In legislation that is classed as regulatory legislation, effective enforcement is generally the priority. In this context, criminal enforcement normally applies as the criminal 'end piece' of the primarily administrative enforcement mechanisms and strategies. This means, almost by definition, that the investigative powers will have to keep pace with the control powers that have been allocated to the administration. After all, it is hardly reasonable or defensible that the special character of the legal relationships that are standardised by regulatory legislation justify 'broad' control powers (which, incidentally, not infrequently can result in the imposition of considerable administrative penalties), while the investigation of regulatory offences is subject to stringent limitations, such as, for instance, the requirement of concrete suspicion. In this context it must be remembered that violations of regulatory legislation generally only come to light as a result of active control and investigation on the part of the Government. After all, where violations only constitute an infringement of 'the general interest' that is protected by regulatory legislation, and the privacy of individual citizens is therefore not affected, the Government cannot rely on the supply of crime reports. In this situation reactive investigation based on concrete suspicion will generally not suffice.

The broader investigative powers – compared to the Code of Criminal Procedure – can therefore certainly be justified in principle. In this context it is also eminently defensible that, in the context of the criminal enforcement of the legislation that comes within the scope of the WED, a 'broad' investigation definition is used. Although, in the context of the WED, a broader investigation definition (compared to the Code of Criminal Procedure) is already used, it is advisable to use an investigation definition for which *not* the 'suspicion criterion' (either in a diluted form or not, as in the WED), but the 'objective criterion' is the deciding factor. In this case, investigation can be defined as: an inspection on the part of the Government that is aimed at enabling criminal enforcement of the legal order. It may be clear that, in view of the strong interrelation between the administrative and criminal enforcement of regulatory legis-

lation, it is necessary to be able to determine which normative framework (guarantees, conditions, authority relationships, etc.) apply in concrete cases. A broad investigation definition, in which the objective criterion is the priority, is the solution for this.

The WED system of broad investigative powers (compared to the Code of Criminal Procedure) is easily defended as a system. However, this does not apply to each of the *separate investigative powers* for which title III of the WED provides. Especially with regard to the confiscation powers of Article 18 of the WED it can be demonstrated that there is insufficient justification for these differing (from their general equivalent) powers. It is therefore advisable that the confiscation powers of Article 18 of the WED are generalised (harmonised with the system in the Code of Criminal Procedure).

For a number of other WED investigative powers the rule applies that they can be done away with, as they no longer have any independent relevance. For the WED investigative powers that do have an independent right to exist, the same comments apply that were made in respect of the differing sanctions (compared to general criminal law) for which the WED provides: it is advisable to (legally) differentiate more in the application of these powers than is currently the case. This too relates to the ever greater scope the WED has been given over time. As increasing numbers of categories of violations are brought within the scope of the WED, and there is a corresponding reduction in substantive cohesion, the need for customisation increases: diversity in unity.

The analysis of the system of preliminary measures (Articles 28 and 29 of the WED) resulted in a number of findings that can be summarised as follows.

The preliminary measures concern rapidly deployable and powerful measures that can fulfil an important function in preventing recidivism and terminating continuous offences. Both the measures from the Public Prosecutor and the court measures therefore appear to be invaluable for realising effective enforcement of the law, even to the extent that it should be assessed whether the preliminary measure may be useful in areas other than socio-economic (regulatory) law.

Another characteristic is the *transaction powers* of Articles 36 and 37 of the WED. Article 37 provides the option to allocate the transaction powers of the Public Prosecutor to certain authorities and persons who have been charged with a public task, provided this is done under the supervision of and in accordance with guidelines provided by the Public Prosecution Service. It appears that this structure can – in theory at least – enhance the effectiveness of law enforcement, as the settlement powers can be transferred into the hands of specialist authorities or persons who, unlike

– in many cases – the Public Prosecution Service, have relevant special expertise. An important advantage of the arrangement of Article 37 of the WED is the fact that the exercise of the transaction powers is coordinated by the Public Prosecution Service by means of guidelines. This promotes unity in law enforcement. These advantages continue to exist if the option of granting transaction powers to parties other than the Public Prosecution Service is converted into the option to give parties other than the Public Prosecution Service the authority to issue penalty decisions (cf. the legislative proposal that has been submitted to this effect).

A further special characteristic of the WED is the fact that the *adjudication* of economic offences is primarily the responsibility of so-called ‘economic chambers’. It is an established fact that the need for expertise and specialisation in the area of the adjudication of economic offences still applies today. The rule still applies that the legal matter in question is difficult to deal with. However, at the same time it can be said that, especially because of the enormous number of differing regulations that are enforced through the WED, ‘real’ specialisation has become unachievable within the judiciary. It can be said that the complete abolishment of economic adjudication will, from a systematic and practical point of view, not cause any particular problems. The procedural law foundation of economic adjudication hardly has any added value; in actual fact specialisation can depend on self-regulation within the courts.

The WED seen in the light of legal developments

The question about the WED’s right to exist cannot be answered solely on the basis of a comparison with general law. After all, the question is not just whether the WED in its current form still has a right to exist, but also whether a new, revised WED could fulfil a useful function. To this effect the orientation and role of the WED in the enforcement of regulatory law have been outlined in the light of a number of developments. Some examples of these developments: the enormous flight the administrative enforcement of regulatory law has taken in the last few decades; the increasing ‘Europeanisation’ of the regulatory law; the restructuring of investigation and prosecution practices and the ‘Public Prosecution Service Penalty’ legislative proposal. In view of the situation as it is currently developing in the field of criminal law, it was subsequently assessed whether there is a need for new and different provisions within the WED.

The main conclusion is that there are good grounds (and no dogmatic obstacles) for including provisions relating to the coordination of administrative and criminal law enforcement, and to collaboration in this area, in the revised WED. It must therefore be assessed which function a

revised WED can fulfil in this respect. In particular, the following could be considered: (1) the institutionalisation of consultation formats, (2) the documentation of a coordinating role of the Public Prosecution Service, (3) a statutory outline for enforcement arrangements, (4) an arrangement for information exchange and (5) an arrangement for the so-called ‘hitching a ride’ on someone else’s powers.

A number of other conclusions that have resulted from the exploration of the most current developments in the area of economic criminal law are:

- In a potential revision of the WED the starting point must be that, in addition to criminal enforcement, there are other forms of enforcement. Article 5 of the WED, which provided for an exclusive role for the WED in the punitive enforcement of economic law, has been superseded;
- The strength of the WED as it has developed lies in its unifying function. It can be said that this unifying function is not only extremely important to legislation that has been brought within the scope of the WED, but for regulatory law as a whole. The starting point for a potential revision of the WED would therefore have to be that it must provide an overall arrangement for the criminal enforcement of – in principle – the whole of regulatory law;
- The progressive ‘Europeanisation’ process can (once again) create a need for special provisions – differing from general law – in the area of regulatory law. A revised WED provides the necessary possibilities for this. A revised WED would be a perfect place for direct penalisation of EU directives, should such penalisation be required.

The final balance

The findings resulting from the analysis of the special characteristics and provisions of the current WED, embedded in a careful consideration of the most recent developments in this area, were the basis of a number of general conclusions and recommendations that constitute the conclusion of this study. This concerns a selection from a number of variants of more or less drastic forms of harmonisation and/or integration of economic and general law, which – to focus the attention – have been reduced to three models. Model 1: abolishment of the WED. Model 2: a drastic revision of the WED. Model 3: a more or less limited harmonisation. Based on a number of substantive and pragmatic considerations the assessment ultimately resulted in the following recommendations.

- Three separate developments – generalisation, the increases in the effective scope of the Act and the loss of exclusivity – have undermined the WED’s right to exist. It is advisable for the WED to be drastically revised. In this process the WED should be converted into a WOD (Regulatory Offences Act), in other words a framework Act that, in principle, encompasses the entire criminal law as it applies to regulatory law;

- A new WOD should only include provisions for points at which deviation from general law is justified. Where possible, harmonisation is recommended. Insofar as there is still a requirement for different provisions in the area of economic criminal law, this is a result of the regulatory character of that law, not because of its economic character.