

# The punishability of legal entities and de facto directors from Dutch and European perspective

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## **1. Introduction**

Liability under criminal law is a subject that typically makes clear that criminal law is essentially something of practical nature. Not because of the lack of details of such liability; this part of criminal law is unfortunately all too often highly complicated. No, because of the practical approach that in the application and therefore in the practice of criminal law a solution will always be found in order to come to effective enforcement. As such, criminal law focuses on targeting the perpetrator, irrespective whether the perpetrator is a natural person or a legal entity.

I already mentioned it, the liability of legal entities under criminal law is not without certain complications. I assume that this is the case in many countries. This morning, I wish to briefly outline to you the contours of the system known to us in the Netherlands, when companies are prosecuted under criminal law. This concerns the liability of companies and the liability of what are referred to in our system as 'factual leaders'.

Apart from that, I wish to pay special attention to several aspects. I wish to show you several sub-fields so as to tell you something about the practice of the prosecution of legal entities and factual leaders. I will discuss a number of trends in the fields of criminally negligent homicide, environmental crimes and tax crimes. I will also briefly shed some light on several extraordinary non-criminal consequences occurring in such types of cases might have.

Lastly, I will briefly pay attention to a common denominator that concerns us all: the European Union, because there the liability of companies under criminal law is at hand in the context of environmental crimes.

## **2. Brief outline of the Dutch system**

### 2.1 Two obstacles hindering the punishability of legal entities

One of the most important pillars of Dutch criminal law is the principle of legality. No fact is punishable than on basis of a prior legal provision. This starting point is the first obstacle hindering the prosecution of legal entities, because the crimes described in Dutch law are often of a factual nature. Dutch criminal law is thus based on the factual, physical capacity of someone being an offender.

The second obstacle lies in the fact that punishability requires that there is intent or guilt. Legal entities do not have a ratio (mens rea), no conscience and can therefore hardly commit acts intentionally or be negligent.

### 2.2 Imputation of factual crimes

In spite of the starting point that the principle of factual capacity of being an offender is central in Dutch criminal law, criminal law in the Dutch system is not limited to factual perpetrators. We know various appearances of offender ship.

The most common kind is the ordinary way of being an offender arising from a person's own acts with the corresponding forms of participation. This includes, among other things, participation, complicity and inducement.

In addition, there is a fictitious way of being an offender. In this case, the legislator assumes that certain persons are offenders without this being based on specific behaviour. An example is the Driving Hours Act, which provides that certain actions that are in violation of the Driving Hours Decree are considered to have been committed by employers.

A third form is the so called 'functional perpetrator'. According to this legal construction, he who has not himself committed the crimes is still considered to be the offender, if he acts by way of another party. This legal construction makes the punishability of legal entities possible.

It is of importance that in principle there are two ways to come to the punishability of legal entities.

The first way is an extensive interpretation of the description of the crime, so that the legal entity itself can be considered the perpetrator. The second, most important, way is based on the legal construction of imputation.

In the case of extensively interpreting the description of a crime, the most important aim is to conceive the crime such that it does not only include the physical act but also the facilitation of this physical act. When the crime concerns the transport of waste without a permit, not only the physical act of transporting is in that case included in this transport, but the concept of transport is interpreted in such a way that it does not only include the factual act of transport, placing the waste into a lorry and transporting it by road, but also bringing about this act of transport. Thus, the legal entity that owns the lorries, employs the drivers can also be prosecuted.

The tenet of imputation is based on the principle that the legal entity acts by way of persons who are employed by the legal entity or otherwise direct the course of affairs within the legal entity. The core problem with imputation is that it goes too far to put each act of a person within the company on a par with an act of the legal entity. The core question that has to be answered with regard to imputation is therefore from when are these acts of the legal entity and until when are these only acts of individual natural persons.

### 2.3 Imputation, intent and guilt

In order to be punished as a party guilty of committing a crime, intent or guilt has to be established with regard to the perpetrator. Intent is present when the perpetrator has committed a certain act knowingly and willingly.

The minimum requirement for intent is conditional intent. Conditional intent is present, roughly put, when a party willingly and knowingly accepts the considerable chance that the forbidden consequence shall occur. For example: building a temporary bridge in the knowledge that the bridge does not comply with safety requirements and therefore may not hold but still making it available to the public in the hope that it will be all right, will probably be sufficient for conditional intent, when it turns out that the bridge collapses under a normal load.

Guilt (*culpa*) is present when the perpetrator has acted recklessly, rashly or culpably negligently or without required due care. The core difference with intentional acts is that in case of guilt the will is not aimed at the criminally objectionable consequences.

It will be clear on the basis of these definitions that a legal entity cannot have intent or guilt without imputation. For not only the factual acts but also the aims have to be attributed to the legal entity. In other words, when can we say that a legal entity has accepted something willingly and knowingly and when can we establish that a legal entity has acted negligently?

#### 2.4 Development of the punishable legal entity in Dutch case law

In the Netherlands, the punishability of legal entities was initially developed in case law. The Supreme Court of the Netherlands phrased clear imputation rules for the first time in the Iron Wire Judgment of 23 February 1954.<sup>1</sup> The imputation of a crime to another party than the physical perpetrator is possible, when the party to whom attribution is to take place could decide on whether or not the criminal act was to occur (had in its power to endorse it or stop it) and when that party has accepted this act or similar acts taking place. Since then, these criteria have been referred to as the criterion of control and acceptance.

After the Iron Wire Judgment of 23 February 1954, the courts have used the tenet of the functional capacity of being an offender to also come to the punishable liability of legal entities. Subsequently, the legislator also construed legal entities as potential perpetrators by law in 1976. Nowadays, the Dutch Criminal Code includes Article 51, which reads that punishable acts can be committed by natural persons as well as legal entities.

Paragraph 2 of Article 51 of the Criminal Code provides that, if a punishable act is committed by a legal entity, prosecution can be instituted against and sanctions can be imposed on the legal entity as well as the factual leaders<sup>2</sup> of the prohibited acts as well as both the legal entity and the factual leaders.

These past few decades, there were countless cases in which the imputation of criminal acts to legal entities and factual leaders played an important role. An important milestone in this context is the Zijpe judgment of 21 October 2003.<sup>3</sup> In this judgment, the Supreme Court further explained the criteria for the punishability of the legal entity. For a proper understanding of this judgment, I will briefly outline the facts on which the criminal proceedings were based.

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<sup>1</sup> Dutch Case Law 1954, 378 (Iron Wire)

<sup>2</sup> As well as against and on the party giving the orders thereto. I will here further ignore this party – which incidentally gives fewer complications than the factual leader.

<sup>3</sup> Supreme Court 21 October 2003, Dutch Case Law 2006, 328 (Zijpe)

It involved a piece of land that had been entrusted by the owner (a company) to a legal entity (another company). Subsequently the latter company charged an employee of the owner's with the factual management of the land. It was established with regard to this piece of land that it had been spread with semi-liquid manure (without being ploughed under) in violation of the rules. The Court of Appeal sentenced the company entrusted with the land for this. The Court of Appeal was of the opinion that the managing company had been negligent. That company had allegedly done too little in order to prevent the unlawful spreading of semi-liquid manure over the land. The Supreme Court quashed the Court of Appeal's judgment, because the Court of Appeal had omitted to establish which tasks and powers the management entrusted to the suspected company exactly included in view of the connection between it and the owner and the factual manager. Now that these tasks and powers of the company had not been established, no conclusion could be drawn with regard to the negligence with regard to these tasks or powers.

The most important part of the judgment does not concern this formal ground for quashing but concerns what the Supreme Court observes with regard to the matter of when an act has been committed by the legal entity.

The Supreme Court advances the starting point that a legal entity can be considered as a perpetrator if the act in question can reasonably be imputed to the legal entity. When exactly imputation is possible depends on the specific circumstances of the case, which also include the nature of the forbidden act. The Supreme Court considers that acts that have been committed within the scope of the legal entity can in principle be imputed to the legal entity.

Subsequently, the Supreme Court states that an act can be committed within the scope of the legal entity, when one or more of the following circumstances occur:

1. The acts involve acts or omissions of a person who is active on behalf of the legal entity on the basis of employment or on another basis;
2. The act fits in with the normal business operations of the legal entity;
3. The act was useful to the legal entity in the business operated by it;
4. The Iron Wire criteria: Did the legal entity have control over the act taking place or not, and has the legal entity accepted the act during the factual course of affairs or did it usually accept the act? Acceptance also includes the omission to exercise the due care that can reasonably be required from the legal entity in order to prevent the act.

The judgment was especially important, because prior to the judgment the punishability of legal entities could only be established on the basis of the Iron Wire criteria.<sup>4</sup> The Supreme Court made it clear in the Zijpe judgment that these criteria not only concern the old criteria of control and acceptance.

It is also important to stress that the Supreme Court also accentuated, in fact broadened the Iron Wire criteria. For the Supreme Court also judged that the acceptance criterion is met when the company has not taken the due care that can reasonably be required from the legal entity with regard to the prevention of the criminal act.

It should be clear that the judgment of the Supreme Court and the testing criteria – the topoi - can have a very broad scope. The sole fact that the act has been committed by an employee or that the act fits in with the normal business operations or that the act has been useful to a company and that this can lead to criminal liability of a company, very much resembles strict liability. However, strict liability is a form that, in my opinion, is rightly considered with much scepticism in criminal law and jurisprudence.

I am of the opinion that in the interpretation of the Zijpe judgment, it has to be considered that the Supreme Court also makes quite a few reservations. For instance, the Supreme Court only indicates when acts may take place within the scope of the legal entity. It is therefore not true that the applicability of one of the four circumstances can automatically lead to this conclusion.

In the second place, the Supreme Court does not interfere with the starting point that the circumstances of the case have to ensure that the imputation is reasonable.

In the third place, the Supreme Court states that the nature of the prohibited act is important for the imputation. Thus imputation can for instance thus be assumed more easily in a fishing company in which illegal net reduction is effected by fishermen<sup>5</sup> - which act in any case fits in line with the business operations – than in a transport company whose lorry drivers commit the crime of people smuggling.

In the fourth place, it is important that the points of view, the topoi, refer to the imputation of the act, but also that in addition the question has to be considered whether there is intent or guilt – or

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<sup>4</sup> See for instance Supreme Court 14 January 1992, Dutch Case Law 1992, 413.

<sup>5</sup> Supreme Court, 29 March 2006, LJN: AR7619.

whether these can be imputed. The Supreme Court therefore says in so many words that, apart from the imputation of the act, the question of intent/guilt has to be dealt with. It is obvious that aspects of imputation also play a role in this question; so the topoi will again play a role here. However, it is true that the courts have to pay separate attention to it and that imputation of the act only does not suffice.

These qualifying observations do not affect that the imputation of acts to legal entities appears to be quite simple when the acts have taken place within the scope of the legal entity, or when the act has been useful to the legal entity in the business operated by it. In these cases, it will be relatively simple to consider the legal entity as the perpetrator.

## 2.5 Prosecuting the factual leader

I have already briefly mentioned that a punishable legal entity can be prosecuted and that the legal entity can be sentenced, as well as the factual leaders of the forbidden act, as well as both the legal entity and the factual leaders. The question arises in which cases persons can be prosecuted as “factual leaders” of these legal entities as the de facto responsible parties of the legal entity.

By way of preliminary observation, I state that in our system of criminal law the legal entity and the factual leader are interconnected in a special way, namely that the liability of the factual leader is accessory to that of the legal entity. If it turns out that the legal entity has not committed a criminal act, the factual leader cannot be liable under criminal law.

In addition, there is an interesting fluctuation in the connection between legal entity and factual leader. The liability of the legal entity is construed by way of the imputation of acts of natural persons: down-up imputation. These persons are sometimes factual leaders, but this is not essential (can also be other persons/employees). Subsequently the liability of the factual leader is construed as a result of the imputation of legal entity’s liability to this factual leader: up-down imputation.

But who is this factual leader? It is very important that, when interpreting the concept of factual leader, the focus is not so much on the de facto director of the legal entity – for example in the structure of the company – but on him or her who has de facto led the forbidden acts. This is an important difference. For instance, a departmental manager within the company need not necessarily qualify as a de facto director of the legal entity – for he or she is accountable to the board of directors – but under certain circumstances he or she can indeed be considered as someone who has de facto led forbidden acts and is thus a factual leader.

There need not therefore necessarily be a legal basis for the de facto leading. The point is that there is a factual leader. As said before, it is then not important whether he or she only directs two persons or directs the whole company in the top of the organisation.

Case law has developed the criteria on the basis of which factual leaders can be prosecuted. This case law has been developed in the Slavenburg case law.<sup>6</sup> He who has the duty to exercise due care for a certain course of affairs based on his position will be held liable in case of neglecting this responsibility as a factual leader, if he intentionally omits, in spite of having knowledge of certain acts, taking his responsibility in that aspect, for example by forbidding the act.<sup>7</sup> This approach relates to the stimulation of a forbidden act, when one conscientiously accepts the considerable chance that a forbidden act will take place and one omits to take measures to prevent the forbidding act from being committed in the situation in which one was authorised and was reasonably obliged to interfere.

Three criteria are generally derived from this: knowledge or awareness, power or the authority of control, and acceptance.

The criteria, and this is not surprising because this also has to do with imputation, are closely geared to the criteria discussed by me in the context of imputing criminal acts to legal entities. An important difference between the imputation of criminal acts to a legal entity and the imputation of criminal acts committed by a legal entity to factual leaders is the fact that the minimum requirement of conditional intent always has to be present in case of factual leaders. In other words, the factual leaders have to have willingly and knowingly accepted the considerable chance that the criminal act would take place, whereas in case of the legal entity intent need not necessarily be present in case of a culpable offence.

### **3. Sentencing in white-collar cases**

As the saying goes, the proof of the pudding is in the eating. Therefore let me, after this theoretical explanation, take a look with you at the practice of the sentencing of legal entities and factual leaders. I will address the so-called white-collar cases. I do not strive for completeness but will give you a sketch of practice in the Netherlands.

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<sup>6</sup> Supreme Court, Dutch Case Law 1986, 125; and Supreme Court 1986, Dutch Case Law 1987, 321.

<sup>7</sup> Some considerations on the tenets of participation and de facto directing derived from criminal law can be found in the Fourth Tranche of the General Administrative Law Act and Professor *Jonkheer* M. Wladimiroff.

The sentences and modalities of penalty imposed in white-collar cases are diverse and the cases quite often have a strongly casuistic nature. In order to be able to outline a picture of the state of affairs in the Netherlands, I will discuss a few cases. I will thus briefly discuss the way in which the courts have decided that legal entities and factual leaders were punishable. At the end, I will briefly outline a number of modalities of penalty outside classic criminal law.

### 3.1 Working conditions; criminally negligent homicide

The case of the Amercentrale involved a power station in which cleaning activities were performed. To that end, a scaffolding of over 60 metres high had been built in the power station and subsequently collapsed. Due to this accident, 5 people working there at the time were killed. The case was special, because the whole chain of legal entities involved were sentenced in the end – or took settlement penalties- : the principal (owner of the power station), the main contractor, the sub-contractor and sub-sub-contractor as well as the the designer of the scaffolding.

Briefly summarised, the District Court was of the opinion that the companies could be blamed for the collapsing of the scaffolding. The District Court judged that the design of the scaffolding was unsound, insufficiently accurate calculations had been made in order to establish the maximum load and finally no proper action had been taken when a check established that the scaffolding sagged at some places. In addition, the District Court judged that all legal entities had not complied with their tasks of checking the safety and maintaining a safe working area.

The District Court imposed on the parties involved fines of €100,000, €300,000 and €450,000. The designer was sentenced with one year imprisonment, which was decreased to six months in appeal.

### 3.2 Environmental crime

In the mid 1990s, a fireworks factory exploded in Enschede. As a result a whole district was destroyed and 20 people were killed and 950 injured. The Court of Appeal judged that the company running the fireworks factory, SE Fireworks, had intentionally violated safety rules and was guilty of the fire. The Court of Appeal also took into consideration in this aspect that there was only conditional intent. The major cause for the large extent of the disaster was ascribed to the presence of too many and too heavy fireworks. In this aspect, the Court of Appeal came to the assessment that there was guilt but no intent. In addition, it was taken into account that a number of other factors had played a role, for which SE Fireworks could not be blamed. One of these was that the government as

the granter of permits and enforcer had made serious mistakes. The Court of Appeal sentenced the director to one year imprisonment.

### 3.3 Tax cases

In tax cases, the tenet of imputation is less complicated in some areas. Companies are generally held to file tax returns and if the tax return is found to be incorrect, it can in principle be established that the company has filed an incorrect tax return. What has to be done as well is to establish the intent of the company to do so. This intent has to be imputed, of course.

In general, the prosecuted companies are fined. It is conspicuous that these fines are often lower than the fines imposed in cases that are prosecuted under administrative law.

This can be explained by the fact that in administrative law cases sentencing often takes place on the basis of standardised percentages of the insufficiently paid taxes. In case of intent, these percentages amount to 50% and in case of serious and extensive fraud 100%.

In criminal cases, a somewhat common practice can be observed with regard to the sentences imposed to factual leaders. In cases with a fraud sum of at least 1 million euro prison sentences were imposed of 6 months to 1 year in the past few years. An exception was made for the directors of a considerable VAT roundabout fraud with a damage of more than 35 million euro. The Court of Appeal imposed a prison sentence of almost 6 years.

### 3.4 Administrative fines in competition cases

Competition cases are only penalised with administrative fines in the Netherlands, although legislation is being prepared to have enforcement also take place via criminal law. The fines imposed are considerable, though. These correspond with the fine system used by the European Commission, so that up to 10% of the turnover of a legal entity can be imposed. It goes without saying that competition fines are imposed on companies.

It is interesting that in October 2007 the Dutch Competition Act was amended such that natural persons who acted as factual leaders or as principals of the company can be fined as well. Thus the imputation known from criminal law is introduced in Dutch competition law.

With regard to imposing fines, the contrast between criminal cases and competition cases can be called large. The Construction Sector Fraud case can be mentioned as an example that clearly dem-

onstrates this. It involved a range of cartel actions covering almost all of the Netherlands between construction companies in the period from the mid-1990s to the end of 2002. Because prior to 1998 competition violations were punishable under criminal law, the largest cases in this investigation led to criminal cases. But the Dutch Competition Authority also imposed fines.

Where the criminal cases ended for the legal entities involved in a fine ranging from EUR 45,000 to 100,000, for a total of some 600,000 where the Competition Authority imposed fines of up to tens of millions in some cases with a total for the Construction Fraud Sector of over 235 millions Euros. Although the Competition Authority obviously dealt with more companies than the criminal court, the difference in overall outcome is striking.

### 3.5 Additional procedural aspects

Apart from the actual punitive enforcement under criminal law and administrative law, the number of alternative ways of enforcement are growing in the Netherlands. Strictly speaking, these are not punitive sanctions, but in practice this is sometimes nevertheless what it amounts to. I will mention two; the cancelling of permits and naming and shaming.

#### 3.5.1 Cancelling of permits

The municipalities in the Netherlands are charged with the issuing of many permits to companies. Since some years, the municipalities in the Netherlands have been authorised to test whether the party applying for certain permits can be considered as sufficiently sound and integer. The municipalities can refuse permits, if they fear that the permit will be used for the facilitation of criminal acts. A sentencing under criminal law of the parties involved in the permit application can produce the suspicion that justifies a refusal or cancelling of the permit. Thus a company can get the economic death penalty as an – unforeseen and unintentional – consequence of a prosecution, because the permit that is necessary for its business – for instance an operating permit – is cancelled.

Incidentally, we know a similar system in tenders in the European Union. Criminal sentences can give rise to a ground for exclusion, in some cases even imperatively, in the context of the Tender Directive (2004/18/EC).

#### 3.5.2 Naming and shaming

Supervisory authorities, such as *De Nederlandsche Bank*, the Dutch Central Bank, regularly use naming and shaming in the context of their supervisory duties. The name of the violator of rules and regulations is publicly announced in combination with the indiscretions committed. This use is criticised. The criticism is in particular directed against the fact that naming and shaming is used before the correctness of the charges has been established by an independent court. The justification generally advanced is that naming and shaming should not be seen as a sanction tool but as a tool to inform the general public as well as possible. I cautiously observe that this is a very practical approach indeed, whereby the presumption of innocence is put under pressure, to say the least.

These are my reflections on the Dutch part. But as I said in the introduction, the European Union is on the advance as well.

#### **4. Comparison with Directive 2007-0022**

The legislative proposal for Directive 2007-0022 includes Article 6 that charges the Member States to ensure that legal entities can be held liable for the crimes mentioned in Article 3 of the Directive that have been committed to their advantage by persons acting as individuals or as members of a body of the legal entity who have a managerial position in the legal entity on the basis of the authority to represent the legal entity or the authority to take decisions on behalf of the legal entity or the authority to exercise control within the legal entity.

Although at first it was doubted that Europe would be able to find the sword of criminal law in the EC Treaty, the argument was decided as you well know with the judgment of 23 October 2007 of the Court of Justice (in the case C-440-05) following the judgment of 13 September 2005 (in the case C176/03) to the detriment of the Euro sceptics. The EC Treaty offers a basis for a criminal enforcement by the Member States, but the level of the sanctions is not part of the powers of the EC.

When reading Article 6 of the now proposed Directive, two matters in particular catch the eye. In the first place, the Directive appears to attach decisive importance to the criterion of advantage. Only if the crimes have been committed to the advantage of the legal entity, can the legal entity be prosecuted for them. As I have already argued, the criterion of advantage is only an indicator in the Dutch system so as to come to the punishability of the legal entity, but it need not be decisive at all. I consider the question justified whether the proposed text of the Directive is felicitous in this aspect. Legal entities need not be punishable on the basis of the Directive solely because of the fact that the act was not advantageous for the legal entity. In my opinion, there are a number of situations possible in which a legal entity, as a result of imputation, can be blamed for the occurrence of serious

damage to the environment without it being possible to argue that the crime has been committed to the advantage of the legal entity. In particular when serious damage to the environment is the result of faulty supervision, that faulty supervision of the crime need not at all be committed to the advantage of the legal entity. In any case, the current editing of the article will give rise to proceedings and - in my estimation - the Court of Justice will have to be called in so as to shed light on it, if Article 6 is not rendered clearer as yet.

Secondly, it is important that the liability of a legal entity in the first paragraph of Article 6 can in principle only occur by acts or omissions of persons who have a managerial position in the legal entity. The Dutch system lacks this limitation. In the Netherlands, the acts of all employees can in principle qualify for imputation.

The scope of the proposed Directive is less narrow, however, than the first paragraph of Article 6 lets suppose. The second paragraph of Article 6 includes that a legal entity can also be punishable if managers have performed a faulty supervision or faulty inspection as a result of which a person under the direction of that manager was able to commit the factual criminal acts.

Such an approach is understandable. In criminal law, we are in principle averse to strict liability and in this context it is not suitable to hold the legal entity criminally liable for acts for which managers of said legal entity, who, in my opinion, can be considered to be the conscience of the legal entity in a certain sense, cannot be blamed.

The system proposed in the Directive, however, does not give a solution for the capacity crimes. A capacity crime is a crime that can solely be committed by the person who has the capacity in question. For instance, acting in violation of a permit can only be committed by the permit holder. However, if the permit holder is a legal entity, the situation might arise that crimes consisting of the company having acted in violation of the permit cannot be held punishable if the directors of that company cannot be considered to have perpetrated the permit.

The subordinate who is morally blamed cannot be criminally prosecuted either in such a situation, for example as a co-perpetrator. For a punishable perpetrator is necessary for a punishable co-perpetrator, and there is none in this case.

Apart from that last point, it will be interesting to see to what extent an interaction will occur between European criminal liability of legal entities – such as it will be interpreted by the Court of Jus-

tice – and Dutch criminal liability, or as far as the national case law of other Member States is concerned.

## **5. Final observation**

Whatever will flow from that, Dutch practice in criminal procedure has to make do with the basis for liability as outlined by me. In view of the case law discussed, it manages to deal on that basis quite easy. Sometimes a bit too easily, in my opinion. Moreover, the time that white-collar cases were concluded with a financial slap on the wrist belongs to the past in the Netherlands. Potential criminal liability and in particular the derivate of the factual leader is an item on the agenda of the business community. This was apparent quite recently, when it was proposed – which proposal now leading to an Act in preparation – to enforce cartel violations again under criminal law. The Dutch newspapers were filled with comments from the business community; in their mind this was a bridge too far.

Briefly put, the criminal liability of legal entities and especially of factual leaders is a sensitive spot in the business community. And Europe is also aware of it now, as is apparent from the proposed Directive. The trend is clear at this stage. And I must say I do not think of it as a wrong course of action in itself, if only the practical approach of criminal enforcement does not amount to strict liability. That would really be a bridge too far.