Chapter 6
Corporate Criminal Liability in the Netherlands

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Contents

6.1 Introduction

This chapter will provide a brief overview of the concept of corporate criminal liability in the Netherlands.[1] Following a description of the historic development of this concept, attention will be paid to the substantive law regarding corporate liability – including the concept of secondary liability and defenses – and to specific rules for the trial and the punishment of legal

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[1] See, for a more extensive treatment of the subject, Gritter 2007. For a recent treatise in English, see De Doelder 2008.

M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability*, Ius Gentium: Comparative Perspectives on Law and Justice 9, DOI 10.1007/978-94-007-0674-3_6,

persons.[2] Special attention will also be paid to the position in Dutch criminal law of public law legal persons, such as the provinces. The chapter will be completed with a short evaluation of the concept of corporate criminal liability in the Netherlands.

6.2 Historical Development

At the time the Dutch Penal Code (DPC) came into force in 1886, the legislator was of the opinion that criminal offenses could only be committed by natural persons.[3] This opinion was strongly influenced by the "classical ideas" of German scholars, such as von Feuerbach and von Savigny. There was, of course, an awareness of the fact that corporations existed. To deal with crimes committed in a corporate context, several offenses were designed which addressed the officers of a legal person.[4] This was done under regulatory law and within the DPC.

The next important step in the development of corporate criminal liability was taken *outside* the formal boundaries of criminal law. During the Great Depression, the Dutch legislator was confronted with exceptional circumstances that called for exceptional measures. In order to combat the consequences of the depression effectively, the Dutch legislator developed a special branch of law that was disciplinary in nature and which made it possible, amongst other things, to prosecute and punish corporations. The legislator was of the opinion that the official body of criminal law was not a suitable mechanism with which to combat the economic crisis. An adaptation of the criminal law was deemed inappropriate because it was believed that the special measures would only be temporary: as soon as the depression ended, the special disciplinary law was to be abolished. The depression, however, was followed by the Second World War. The special disciplinary law was maintained during the war in order to regulate, as far as possible, the economy in that period.

After the war, the legislator paid special attention to the enforcement of economic law. With the development of several special measures to address the depression and regulate the economic situation during the war – within and outside the field of criminal law – the rules governing the criminal and quasi-criminal enforcement of economic law had become quite diffuse. The law had become such that, in certain cases, several criminal and quasi-criminal courts were competent. In 1951, a new act was passed

[2] In this chapter, the words "corporation" and "legal person" will be used as synonyms, although not every legal person in Dutch criminal law is necessarily a corporation.

[3] Gritter 2007, 33 et seq.

[4] In particular, *bestuurders* and *commissarissen* (managing directors and supervisory directors).

to unify the rules governing the investigation, prosecution, and punishment of economic crimes. The quasi-criminal, disciplinary branch of the law that had become so important was abolished.

This new act, the Economic Offenses Act (EOA), applied, and continues to apply, to the enforcement of economic offenses. Economic offenses were – and remain – a group of regulatory offenses that are usually, but not always, of an economic nature and labeled as such by the legislator. The legislator was of the opinion that effectively combating these economic crimes would require special substantive and procedural rules. According to the legislator, the special features of economic offenses necessitated a different approach than was appropriate for other, non-economic offenses. One of the special substantive rules for the combating of economic offenses was set out in art. 15 EOA. This article established that economic crimes could be committed by legal persons and that legal persons could be prosecuted and punished. Accordingly, since 1951, the criminal liability of corporations has been accepted in the Netherlands in the field of economic regulatory law. In the explanatory notes to the EOA, the Dutch legislator gave criminal liability, not only a practical basis, but also a more fundamental one. It stated that the acceptance of corporate criminal liability made it possible to apply appropriate sanctions in this field of law, such as the suspension of business activities.[5] In addition, the government expressed the view that corporations should have legal personality in this area of law and were susceptible to punishment: "Corporations also have a name to lose."[6]

Article 15(2) EOA listed a number of factors that a criminal court could take into account when determining whether a particular corporation had committed a particular economic offense. It provided, for instance, that an economic offense is committed by a corporation, if the offense was actually committed by natural persons who acted within the scope of the corporation's activities (e.g., on the basis of their employment), regardless of whether any particular individual committed the offense or whether the offense was committed by a number of individuals acting collectively. In the explanatory notes to the EOA, the government stated that liability could also be established on the basis of other factors, for instance in case the crime was addressed to persons acting in a certain capacity (e.g., as "employer") or in relation to crimes of omission.[7]

Article 15 EOA was repealed in 1976, when a general provision regarding corporate criminal liability came into force: art. 51 DPC. To this day, this article is regarded as the basis for corporate criminal liability in Dutch criminal law in *every* area of the criminal law.

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[5] Official Parliamentary Documents 1947/48, 603.3, 19.

[6] Official Parliamentary Documents 1947/48, 603.3, 19.

[7] Official Parliamentary Documents 1947/48, 603.3, 19.

6.3 The Dutch Concept of Corporate Criminal Liability

6.3.1 The Reforms of the Mid-1970s: Art. 51 DPC

Since 1976, a corporation under Dutch criminal law has been able to commit any offense in principle.[8] Its liability is therefore no longer restricted to the class of "economic offenses". Article 51 DPC states:[9]

1. Offenses can be committed by natural persons and legal persons.
2. If an offense has been committed by a legal person, prosecution can be instituted and the punishments and measures provided by law can be imposed, if applicable, on:

    1. the legal person, or
    2. those who have ordered the offense, as well as on those who have actually controlled the forbidden act, or
    3. the persons mentioned under 1. and 2. together.

3. For the application of the former subsections, equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purpose.

When an offense is committed by a legal person, the prosecution service decides whether the corporate suspect will be prosecuted, or any other natural or legal person for ordering or controlling the offense. Criteria for this decision are not laid down in the DPC.[10] The establishment of corporate criminal liability will be discussed in the following section. We will address the *actus reus* and the *mens rea* of an offense, as well as grounds for defense and justification. However, we will first consider the scope of art. 51 DPC: the legal entities that can commit an offense.

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[8] De Hullu 2009, 163. Some scholars tend to restrict the scope of art. 51 DPC by excluding offenses of a more physical nature, such as rape. In our opinion, a corporation can be criminally liable regardless of the nature of the offense. Whether a corporation in a particular case should be prosecuted for a more physical offense, like rape or battery, is another matter. (Please note that the Dutch prosecution service *[Openbaar Ministerie]* does not operate a system recognizing the principle of mandatory prosecution, meaning that the legality principle does not apply).

[9] The translation is an adaptation of the one used by De Doelder 2008, 566.

[10] In several cases, however, the prosecution service is bound by its own policy rules regarding this decision.

6.3.2 Legal Persons in Criminal Law

According to art. 51 DPC, offenses can be committed by "legal persons". Therefore, in applying art. 51, the first question is whether a particular entity has legal personality. The answer to this question is found primarily in Dutch private law. In arts. 2:1, 2:2, and 2:3 Dutch Civil Code (DCC), legal personality is, for instance, attributed to the *besloten vennootschap* (BV, i.e., a limited company) and to the *naamloze vennootschap* (NV, i.e., a public limited company). Legal personality has also been attributed to state organs, such as the provinces, though special problems surrounding the prosecution of state organs will be discussed separately, at 6.4.

Article 51(3) widens the scope of the criminal law by stating that certain entities without legal personality in civil law can nevertheless commit offenses. Its list includes collective entities such as firms and partnerships but it excludes sole traders. In the case of sole trader enterprises, the owner of the business may, under certain circumstances, be "vicariously liable" for offenses committed within the scope of his/her business.[11]

6.3.3 Secondary Liability

Article 51(2) DPC provides for secondary liability if an offense is committed by a legal person. It covers natural and legal persons who order the commission of an offense and persons who "actually control" the commission of such an offense. This secondary liability is not limited to the "formal" officers of a legal person (e.g., its directors) nor to persons who act as if they hold an official position within the legal person. As a result, employees without any authority may be held criminally liable within the framework of art. 51(2) DPC.[12] In addition, it enables punishment of mere passive involvement in an offense committed by a legal person. The Dutch Supreme Court (DSC) has ruled that "conditional intent" *(dolus eventualis)* suffices, in any event, for this form of secondary liability.[13]

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[11] Usually, the liability of the owner of a business is termed "vicarious liability". In Dutch law, however, the question of liability of the owner always amounts to a question of whether the owner has himself committed the offense. See also below at 6.3.4.1.

[12] See Wolswijk 2007, 86.

[13] See DSC, December 16, 1986, Nederlandse Jurisprudentie (NJ) 1987, 322; DSC, December 16, 1986, NJ 1987, 322 *(Slavenburg)*. See for an extensive analysis of art. 51(2) DPC, Wolswijk 2007, 81 et seq.

6.3.4 Criminal Liability

6.3.4.1 Actus Reus

During the twentieth century, Dutch courts developed several "criteria" or "factors" that were relevant to establishing the criminal liability of a corporation. As the factors and criteria were quite different, the core principles of corporate criminal liability were rather diffuse and elusive. In one case, the fact that the corporation had gained from the offense (made a "profit") was decisive;[14] in another, criminal liability was grounded on a finding that the offense (water pollution) was committed during the "normal conduct of the company's business".[15] The pollutant emerged during the normal, everyday production processes of the company's factory.

Several cases indicated that the "criteria" that had previously been developed to establish the vicarious liability of the owner of a sole-trader enterprise could also be decisive to establishing the criminal liability of a corporation. These criteria originated from a case that raised the question of whether the owner of a business (a natural person) could be held criminally liable for several offenses actually committed by an employee.[16] The employee had illegally exported goods and made untrue statements in export documents. In general terms, the DSC ruled that an owner could be held criminally liable for the conduct of his/her employee if the conduct was at his/her "disposal" (or if the owner could have intervened to prevent the offense), and if, having regard to the course of events, it could be said that the owner had "accepted" the conduct. These criteria – in short, "disposal and acceptance" – were subsequently applied by the DSC in relation to the establishment of corporate criminal liability in several cases.[17] Several authors argued that these criteria ought to be regarded as the main factors for establishing corporate criminal liability.

In 2003, the DSC clarified the law by providing a general ruling on how corporate criminal liability is established.[18] The Supreme Court ruled that the *basis* for criminal liability is, in any event, the "reasonable" attribution of (illegal) conduct. Accordingly, a corporation can only be held criminally liable if there is an (illegal) act or omission that can be "reasonably" imputed to it. To make this more concrete, the DSC provided a guiding principle for "reasonable attribution": the attribution of certain (illegal) conduct to the corporation may under certain circumstances be reasonable if the (illegal) conduct took place within the "scope" of the corporation. The

[14] DSC, January 27, 1948, NJ 1948, 197.

[15] DSC, February 23, 1993, NJ 1993, 605.

[16] DSC, February 23, 1954, NJ 1954, 378 *(IJzerdraad)*.

[17] See DSC, July 1, 1981, NJ 1982, 80; DSC, January 14, 1992, NJ 1992, 413; DSC, November 13, 2001, NJ 2002, 219.

[18] DSC, October 21, 2003, NJ 2006, 328 *(Drijfmest)*.

DSC then summed up with four situations (or "groups of circumstances") in which conduct will, in principle, be carried out "within the scope of a corporation":

- The act or an omission was allegedly committed by someone who works for the corporation, whether under a formal contract of employment or not.
- The impugned act or omission was part of the everyday "normal business" of the corporation.
- The corporation profited from the relevant conduct.
- The allegedly criminal course of conduct was at the "disposal" of the corporation and the corporation "accepted" the conduct, that acceptance including the failure to take reasonable care to prevent the act or omission from being carried out.

The circumstances enumerated can all be traced back to earlier decisions and earlier legislation. However, the decision by the DSC to extend the circumstances or criteria that are of relevance in establishing "vicarious liability" – the criteria of "disposal and acceptance" – was a remarkable innovation. In the 2003 decision, the DSC also ruled that a corporation may be found to have accepted a course of action, if it had failed to take reasonable care to prevent the conduct in the first place. Previously, several authors had argued that the criterion of "acceptance" came down to some form of intent. The 2003 case showed, however, that, while acceptance *can* come down to proof of intent, proof of intent is not necessary. Mere proof of a failure to take appropriate steps to prevent criminal harm may establish acceptance.

The DSC case has clarified the concept of corporate criminal liability, but it has not solved every problem, of course. The exact meaning of the case is still discussed and will probably continue to be debated. The debate focuses on the precise meaning of each criterion, i.e., the scope of each circumstance, the weight accorded to the various circumstances, and the true meaning of "reasonable attribution of (illegal) conduct" as the basis for corporate criminal liability. In our view, the Dutch approach towards corporate criminal liability can be characterized as "open": there is no rigorous theory to turn to for guidance. In particular, Dutch criminal law does not recognize a theory, such as the "identification doctrine", in which senior executives alone can cause the corporation to be liable. In fact, any employee can cause its corporate employer to commit an offense in Dutch criminal law so long as the facts can be construed to show that the corporation ultimately "committed" the offense. As has been shown, other factors may also lead to corporate criminal liability.

The Dutch approach may put some pressure on legal certainty but it has several advantages, in our opinion. The open approach leaves room for "tailor-made" jurisprudence, in which the courts are free to weigh relevant

circumstances and factors. It acknowledges that the possible variation in cases is, in fact, endless. As long as the reasoning in a verdict is sufficient, the jurisprudence will be transparent.

6.3.4.2 Mens Rea

In the 2003 case on corporate criminal liability the DSC limited its considerations explicitly to the *actus reus* of the offense.[19] As the case has no direct relevance to the establishment of the mental element of a crime in relation to a corporation, the law on this point has to be found elsewhere. It should be noted that this section is mainly concerned with offenses that require proof of a mental element: the so-called *misdrijven*. As far as misdemeanors or contraventions (*overtredingen*) are concerned, the prosecuting authority is usually relieved of the burden to prove a mental element. In such cases, proof of a criminal *actus reus* suffices for punishment.[20]

DSC case law shows that there are roughly two approaches to establishing corporate "intention" and "negligence", which are the main subjective elements in Dutch criminal law. A first "indirect" way to establish *mens rea* comes down to the *attribution* of a natural person's mental state to the corporation.[21] A natural person's intention can, thus, in certain circumstances be "ascribed" to the corporation. A second, more "direct", way is to derive corporate *mens rea* from other circumstances closely related to the corporation itself, such as its policies and decisions. By means of its agents, a corporation may make a confession, for example.[22] Alternatively, a corporate representative could state in court that it was known within the corporation that fraudulent acts took place but that management had decided not to take any action. It could, thus, be proved that the *legal person* intended the fraud.

The "direct" way of establishing the *mens rea* of a corporation is particularly suited to cases of gross negligence. In Dutch criminal law, gross negligence can be derived "objectively" from the failure to act according to standards of conduct. If the failure to meet the standards causes death, for instance, manslaughter by gross negligence may be established.

6.3.4.3 Justification and Excuse

Like natural persons, corporations can raise defenses that, if accepted, will justify, or excuse, otherwise unlawful conduct. In theory, a legal person may plead any defense a natural person could raise under Dutch criminal law. Of

[19] The case concerned a misdemeanor that did not require proof of a mental element.

[20] Insofar as grounds for excuse or justification are absent; see below at 6.3.4.3.

[21] See for an example, DSC, October 15, 1996, NJ 1997, 109.

[22] See DSC, March 14, 1950, NJ 1952, 656.

these defenses, the extra-statutory (unwritten) general defense of "lack of sufficient culpability" requires special attention. This exculpatory defense contains several specific important grounds for exculpation, including the exercise of "due diligence". In relation to a corporation, a defense of due diligence, successfully raised, will most probably have the effect of rebutting proof of the *actus reus*. This is, at least in theory, a logical consequence of the 2003 DSC case, in which the "acceptance of conduct performed" (one of the criteria for vicarious liability) was said to include "the taking of reasonable steps to prevent the commission of the offense".[23]

6.3.5 Sanctions

There is no section in the DPC regulating the sanctions that can be applied to a convicted legal person. It must be deduced from the nature of the particular criminal sanction whether it is applicable.

As far as the primary sanctions are concerned, only the fine is relevant. The DPC sets a maximum fine for each criminal offense. There are six categories. The maximum for the first category is €380; the maximum for the sixth category is €740 000. Every criminal offense is assigned to one of the first five categories. However, where a legal person is convicted and the applicable category does not allow for appropriate punishment, a fine from the next higher category may be imposed (art. 23(7) DPC). Therefore, if the criminal offense is assigned to the fifth category (€76 000), a fine of €760 000 may be imposed on a legal person. The question remains whether €760 000 is an appropriate punishment in the most serious cases.

Of course, imprisonment is not an option in sentencing legal persons. Dutch criminal lawyers also generally assume that the same is true of community service since a legal person cannot be imprisoned if it does not carry out the order and the DPC does not provide the option of a subsidiary fine.

Secondary sanctions under the DPC are the forfeiture of certain rights, forfeiture of assets, and publication of the verdict; only the latter two sanctions can be imposed on legal persons. Publication of the verdict can be a very effective sanction but is not often imposed, perhaps because the media attention surrounding the prosecution will usually have damaged the legal person's reputation already.[24]

In addition to these punitive and deterrent sanctions, the DPC also provides for the imposition of "measures". Those which relate to the mental health of the convicted person are clearly irrelevant to legal persons. Another measure concerns the prohibition of the circulation of property

[23] See for this effect of the defense of "lack of sufficient culpability", De Hullu 2009, 169; Gritter 2007, 57.

[24] Court of Rotterdam, June 13, 2000, LJN: AA6189 (www.rechtspraak.nl).

(Article 36c/36d DPC). This measure can also be applied to property belonging to a legal person. Consider, for instance, shirts imported without a permit.[25]

The DPC also provides a measure permitting the imposition of an obligation to pay a specified sum of money corresponding to unlawful profit (art. 36e DPC). This measure can also be imposed on legal persons. The same is true for a compensation measure – an obligation to pay a specified sum to the state on behalf of the victim (art. 36f DPC). The state then hands the money over to the victim.

Looking beyond the DPC, there are specific secondary sanctions which can also be imposed on legal persons. Of particular relevance is the EOA and its offenses relating to the regulation of economic activities, including environmental law.[26] If a legal person is convicted of such a crime, it is possible, not only that the verdict will be published and extended forfeiture ordered, but also that some or all of the activities of the legal person may be suspended for a maximum term of 1 year. This sanction has, for instance, been imposed on a legal person convicted of selling dairy products not fit for human consumption.[27]

If the interests in question are such that action should be taken immediately, the court may order a temporary cessation of all or some of the legal person's activities. Such a temporary measure was imposed, for example, on a shipyard where working conditions were unsafe.[28] Evading such a measure is a criminal offense according to the EOA. The courts may also order the withdrawal of advantages granted to a corporation by public authorities, such as grants or permits, for a maximum term of 2 years under the EOA; however, this sanction is only occasionally imposed.

Where a criminal offense is deemed to be related to the regulation of economic activities, a few specific measures are also available. The court may hand over control of specified economic activities of the convicted person to another person. And, it may oblige the convicted legal person to do whatever it omitted in breach of the law or to undo whatever it did contrary to the law at his/her (at its) expense unless the court decides otherwise. Again, these two measures are also only occasionally imposed.

Finally, a legal person may be dissolved before, during, or after prosecution for a criminal offense. This can affect the options for sanctioning the legal person and the possibility of executing such sanctions. If the legal person is indicted after its dissolution was knowable to a third party, the right to prosecute is lost; however, those responsible for the criminal

[25] DSC, January 10, 1984, NJ 1984, 684.

[26] The EOA is not only applicable to legal persons: depending on the offense in question, a natural person can also commit an "economic offense".

[27] Court of Appeal of Den Bosch, December 12, 2006, LJN: BH9824.

[28] Court of Middelburg, February 9, 2009, LJN: BH2342.

offense committed by the legal person may still be prosecuted. Conversely, if the legal person is indicted before its dissolution was knowable to a third party, the right to prosecute is preserved.[29] If a legal person transfers economic activities connected to a criminal offense to a second legal person, the first legal person can still be prosecuted.[30]

6.4 The Special Position of Public Law Legal Persons

Article 51 DPC states that criminal offenses can be committed by natural and legal persons.[31] The DCC states that the state and any province, municipality, or district water boards are legal persons. The same is true for many other public law organizations. Consequently, public law legal persons can, in principle, commit criminal offenses.

The DSC has indeed acknowledged this possibility. In 1987, for instance, it upheld the conviction of the University of Groningen[32] for excavating a burial mound in Anloo without the requisite permit. The DSC stated that the university could not claim immunity because it was not a public body falling under Chapter 7 Dutch Constitution. Immunity can only be claimed, therefore, by this kind of "constitutional" public body.

Little more than 10 years later, the DSC clarified the circumstances in which a body under Chapter 7 Dutch Constitution may claim immunity from prosecution. Quashing a decision of the Court of Appeal in Leeuwarden to grant immunity to a municipality,[33] the DSC decided that the immunity of public bodies falling under Chapter 7 Dutch Constitution only applies when, as a matter of law, the acts concerned could only, according to the law, be executed by civil servants acting within the framework of the body's assigned tasks. This new criterion reduced the immunity of public bodies under Chapter 7 Dutch Constitution, and, since then, immunity has been rarely accepted. In 2008, for instance, the DSC upheld the conviction of a municipality for tax fraud in connection with a housing project.[34]

The state, however, still enjoys immunity. In 1994, the DSC decided that the state could not be convicted for acts committed by the Ministry of Defense, which allegedly contravened environmental law.[35] It stated that

[29] For instance, DSC, October 2, 2007, NJ 2008, 550.

[30] DSC, April 17, 2007, NJ 2007, 248.

[31] See for a more extensive treatment of the special position of the public law legal person, Roef 2001.

[32] DSC, November 10, 1987, NJ 1988, 303.

[33] DSC, January 6, 1998, NJ 1998, 367.

[34] DSC, April 29, 2008, NJ 2009, 130.

[35] DSC, January 25, 1994, NJ 1994, 598.

acts of the state are considered to further the public interest. To that end, the state can act on all matters, by legislation, government, etc. Ministers are held responsible for acts of the state in Parliament and via a special procedure for prosecuting their malfeasance. It is not compatible with this system to hold the state itself criminally responsible for its actions.

Meanwhile, a bill that would change this state of affairs has been put forward by a number of members of Parliament.[36] The bill would add a subsection to art. 51 DPC, which puts prosecutions of public law and private law legal persons on an equal footing. Punishment would, however, be excluded where the commission of the criminal offense by a civil servant or a public law legal person could reasonably be considered necessary for the execution of a task assigned by law. This bill, if and when enacted, will put an end to the immunity from prosecution enjoyed by the state and all other public law legal persons listed in Chapter 7 Dutch Constitution. The Dutch state will be able to prosecute the Dutch state. It is only to be hoped that the state receives a fair trial, as it is doubtful that it has recourse to the European Court of Human Rights if its trial was not fair.

6.5 Procedural Law

Chapter VI of Book IV Dutch Code of Criminal Procedure (DCCP) is devoted to the prosecution and trial of legal persons.[37] Firstly, the chapter contains a provision on the representation of a legal person in criminal proceedings. In criminal proceedings a legal person is represented by one of its directors (art. 528 DCCP). This article details when a legal person is deemed to be present at a trial and who may be empowered to exercise the rights of the defendant at the trial. These rights include the right to question witnesses and expert witnesses, as well as the right to appeal against the decision of the court on behalf of the legal person.[38]

However, the corporate defendant is not only the beneficiary of procedural rights: it is also treated as a source of information. Article 528 DCCP does not specifically provide that a statement made by a director representing a legal person is to be regarded in a manner comparable to a statement made by a defendant. Nevertheless, in a series of cases concerning the right to remain silent, the DSC seems to have equated the two types of statement to a large extent. When a legal person is prosecuted, the right to silence is possessed by the director who represents the legal person[39] and a representative cannot be called to testify as a witness against the corporation he/she

[36] Official Parliamentary Documents 2007/08, 30 538.

[37] See for a more extensive treatment of the subject, Van Strien 1996.

[38] DSC, May 21, 2002, NJ 2002, 398.

[39] DSC, October 13, 1981, NJ 1982, 17.

represents.[40] Legal persons and their representatives may also enjoy the privilege of non-disclosure.[41]

The legal person is given the choice of which director will represent it. The legal person may also choose to be represented by several directors at the same time.[42] Considered along with the jurisprudence concerning the right to remain silent, this means that a legal person can effectively supply each of its directors with the right to remain silent.

The court can order the appearance in person of a specific director; it can even order the police to bring him/her to court to attend trial (art. 528 DCCP). The court has the same power with regards to the defendant and any witnesses. These orders do not influence the rights and obligations of the director as a representative of the legal person.

The fact that a representative of a legal person has been granted the right to remain silent during the trial can be connected with the human rights recognized in the European Convention on Human Rights (ECHR),[43] especially Art. 6. The DSC has, in some cases, acknowledged that legal persons have human rights that can be violated. One of these rights is the right to be tried without undue delay.[44] Legal persons also benefit from Art. 8 ECHR. However, an attempt to argue that Art. 8 ECHR implies that legal persons cannot be punished for not publishing their annual accounts has failed.[45]

Chapter VI also contains some provisions regarding the communication of court notices. Article 529 DCCP is of crucial importance. It provides that court notices are to be delivered to the address or the office of the legal person, or to the address of one of its directors. Notification can also be effected by sending the court notice by post. A special form of notification, to which additional prescriptions are applicable, is that of service. Service of a court notice is effected by handing the notice to one of the directors or to a person authorized by the legal person to receive the notice. The director of a legal person which is him-/herself a director of a second legal person, is held to be a director of the second legal person.[46] A person does not need a special mandate to be authorized to receive documents on behalf of the legal person. If a person is authorized to collect mail at the post office, he is also authorized to receive a court notice on behalf of the legal person. Furthermore, if a legal person nominates the address of

[40] DSC, June 25, 1991, NJ 1992, 7.

[41] DSC, June 29, 2004, NJ 2005, 273.

[42] DSC, January 26, 1988, NJ 1988, 815.

[43] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, November 4, 1950, in force September 3, 1953, ETS No. 5.

[44] DSC, June 19, 2001, NJ 2001, 551.

[45] DSC, December 15, 1992, NJ 1993, 550.

[46] DSC, July 8, 2003, NJ 2003, 596.

its legal counsel as its address, the legal counsel and his/her employees are considered authorized.[47]

The service of a court notice to a director or a person authorized by the legal person is to be made at the address of the legal person, at the office of the legal person, or at the address of one of the directors. The mere attempt to serve the notice at the address of the legal person, however, does not suffice. If the notice cannot be served at this address, an attempt has to be made to serve the document at the address of one of the directors.[48] The document can also be served on a director or authorized person at another place. Serving the document on one of these persons is considered as a notification in person. This is of special importance in the service of summons. When notification is effected in person, the period during which the legal person may have recourse to legal remedies ends just 2 weeks after the judgment is pronounced.

A court notice can also be served on an employee of the legal person who declares that he/she is willing to deliver the notice to his/her superiors, though this is not a notification in person. If the judicial notification cannot be served on one of the individuals mentioned above, it will be served at the registrar of the court where the trial will be, or was, held.

6.6 Jurisdiction

The DPC is applicable to anyone who commits a crime on Dutch territory (art. 2 DPC), including a foreign or Dutch legal person. The DPC is also applicable to every Dutch person who commits a crime outside the Netherlands, where this act constitutes a criminal offense according to the law of the state on whose territory the crime is committed. This provision is also arguably applicable to a Dutch legal person: the DSC decided so in a case involving a comparable jurisdiction clause.[49] A Dutch person found responsible for a crime committed abroad by a foreign legal person can also be prosecuted in the Netherlands.[50] Moreover, it is not relevant whether the law of the state where the crime is committed recognizes the criminal responsibility of natural persons for crimes committed by legal persons.[51]

[47] DSC, November 22, 1994, NJ 1995, 188.
[48] DSC, January 25, 2000, NJ 2000, 343.
[49] DSC, December 11, 1990, NJ 1991, 466.
[50] DSC, February 12, 1991, NJ 1991, 528.
[51] DSC, October 18, 1988, NJ 1989, 496.

6.7 Evaluation

In all, the concept of corporate criminal liability is not controversial in the Netherlands. The flexible approach to the matter adopted by the DSC, as demonstrated in its landmark 2003 case, is in line with the views of most leading authors on substantive criminal law. An important remaining contentious issue is the special position of public law legal persons, principally the state. On current indications, this special position will be abolished, or at least diminished, within a few years.

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