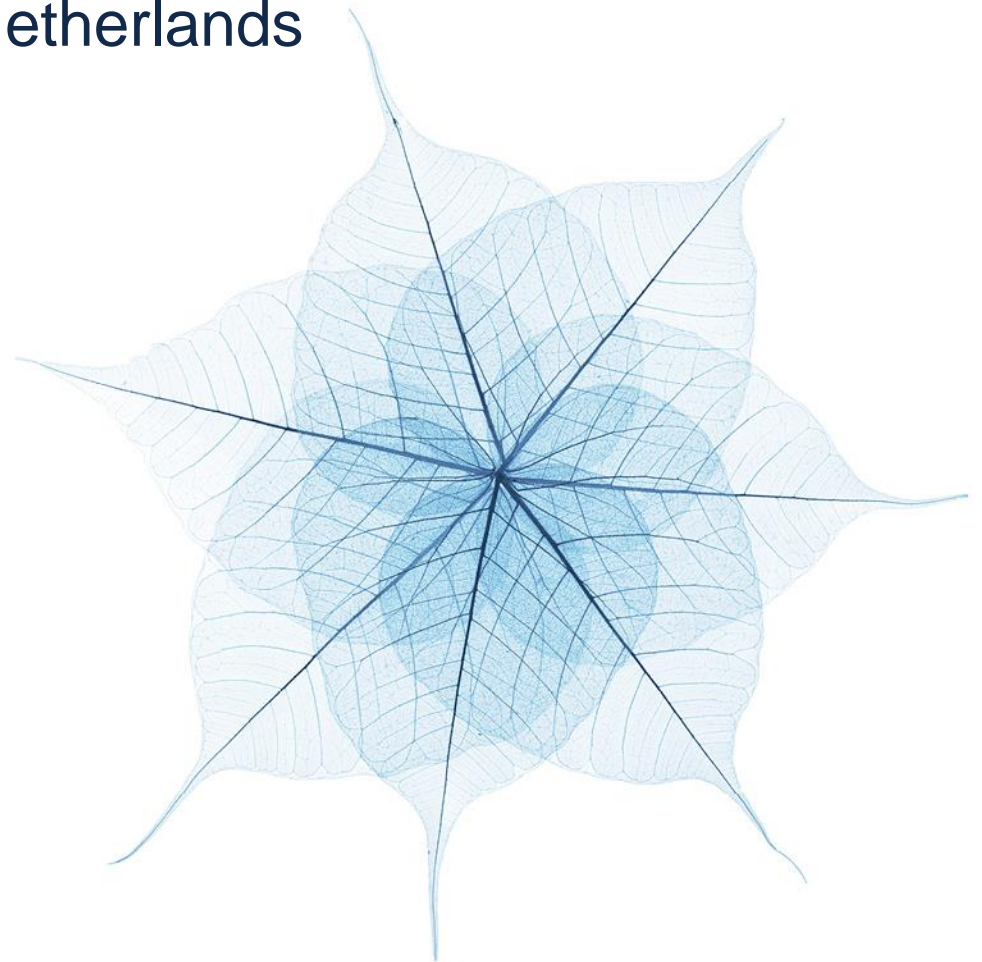


Corporate liability in the Netherlands

ECBA conference 25 April 2015

Dr. Dian Brouwer



Equal treatment of individuals and corporates:

Sect. 51 para. 1 Dutch Criminal Code:

“Criminal acts can be committed by natural persons and bodies corporate.”

But: only natural persons can act in a physical sense.

Question: When can an act of a natural person be considered an act of a body corporate?

Attribution of criminal act to corporate

Dutch Supreme Court (HR 21 oktober 2003, LJN: AF7938):

- “... when the act has taken place within the sphere of the body corporate.”

“... sphere of the corporate...”

Non-limitative enumeration (HR 21 oktober 2003, LJN: AF7938):

- It is an act of an employee or someone working for the corporate;
- the act fits the regular course of business of the corporate;
- the act benefitted the corporate in its business;
- the corporate was in a position to prevent the act, but the act was acceted or condoned – or in the past similar acts have been accepted or condoned

Extended individual responsibility:

Sect. 51 para. 1 Dutch Criminal Code:

“If a criminal act has been committed by a body corporate, prosecution and sentencing can be directed against:

- 1° that body corporate, or*
- 2° the individuals that have factually directed the prohibited act, or*
- 3° both.”*

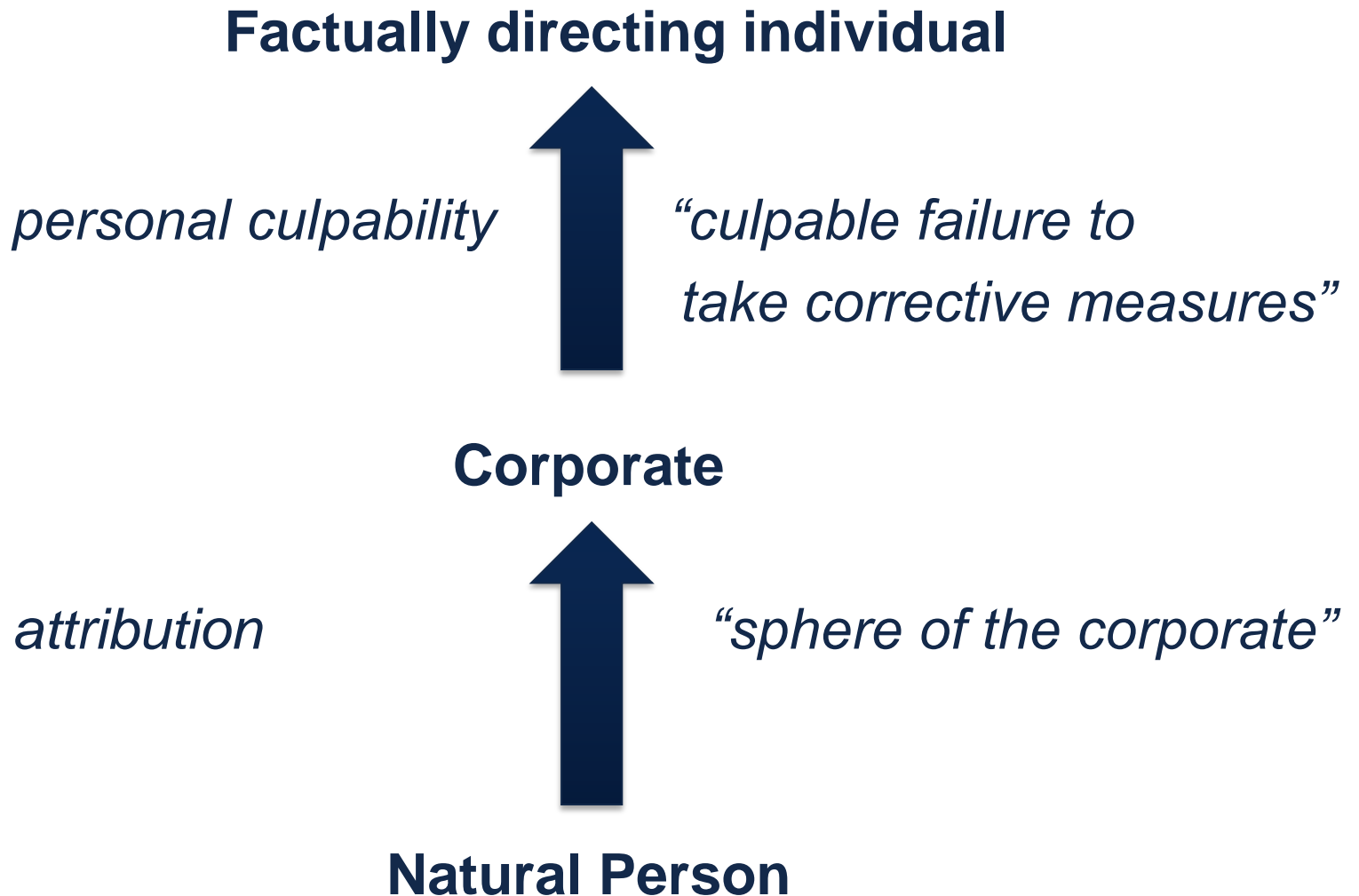
“.... factually directing...”

HR 16 december 1986, NJ 1987, 321:

An individual that:

1. Has some awareness of the relevant conduct or of previous occurrences of similar conduct of the corporate; and
2. Has the authority and the obligation to take preventive or corrective measures;
3. But fails to do so, thereby,
4. Intentionally accepting the possibility of criminal conduct by the corporate;

In short:



To the case at hand...

Indictments of companies only in A; indictments of individuals only in B

Suppose B is the Netherlands.

Jurisdiction:

- Acts have an effect in the Netherlands (pollution Dutch soil, health issues Dutch residents), so:
- Dutch courts can prosecute all companies and individuals connected as factual directors to these acts under Dutch law

The case at hand...

Suppose individuals are charged in the Netherlands.

i) Defences for directors (charged with factually directing):

- the company (I was responsible for) did not commit a criminal offence (Note: company is not a co-defendant in B);
- I was not in a position of authority or/nor under the obligation to act to prevent misconduct;
- I was not aware of any misconduct (now or in the past);

Success of defences depend on position of director in corporate structure and evidence of awareness.

The case at hand...

Indictments of companies only in A, And Suppose A is the Netherlands.

Jurisdiction:

- Acts have an effect outside of the Netherlands; no jurisdiction for dumping as such;
- However: Dutch courts have jurisdiction over Dutch companies committing criminal offences abroad;
- For non-Dutch companies active in the Netherlands: criminal organisation/conspiracy and perhaps money laundering took place on Dutch soil;

The case at hand...

Suppose the companies are charged in the Netherlands.

iii) Defences for companies:

- The illicit acts of the company's employees should not be attributed to the company;
- Factual defences:
 - The company did not engage in a conspiracy
 - The company was not aware of criminal origin of revenues
 - Etc.

The case at hand...

As to the remaining questions, the answers under Dutch law would be:

ii) No.

iv) No immunity, but possibly a credit in sentencing.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Geneva, Glasgow, Hamburg, Istanbul, Kyiv, Leipzig, Lisbon, Ljubljana, London, Luxembourg, Lyon, Madrid, Mexico City, Milan, Moscow, Munich, Muscat, Paris, Podgorica, Prague, Rio de Janeiro, Rome, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

www.cmslegal.com