

Summary of study into the legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights, by Professor A.G. Castermans and Dr. J.A. van der Weide

This report describes the questions a Dutch civil court will ask in assessing the liability of a Dutch company for involvement in the violation of fundamental, internationally recognised rights. It focuses more specifically on the liability of a Dutch legal person for a subsidiary operating abroad, but also looks into liability for suppliers.

Background

The report was commissioned by the Minister for Foreign Trade of the Netherlands and is intended to serve as a basis for debate on:

- the conclusions of a study to be commissioned by the European Commission into the legal framework on human rights and the environment, applicable to European enterprises operating outside the EU;
- the framework put forward by Professor John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

For this reason, we have tried to adopt a comprehensible style and to avoid a technical description of statutory provisions, case law and dogmatism under Dutch law and that of neighbouring countries. The report deals solely with a description of legal issues under current Dutch law. Non-legal alternatives such as access to the National Contact Points for the OECD Guidelines for Multinational Enterprises are not discussed.

The report is partly based on specific legislation, such as certain offences defined in the criminal law, the competence of the civil courts and the applicable civil law. In some areas, it elaborates on openly formulated statutory provisions in civil law to establish liability.

There are no national or international examples of legislation providing for explicit liability applicable to companies for the harmful effects on fundamental internationally recognised rights of the actions of their foreign subsidiaries or suppliers. Nor are there many court rulings on this issue. In the Netherlands the first three cases in this field are now pending, so we have to wait and see how the Dutch court will deal with these claims.¹ The report is therefore largely based on the authors' own assessment, based on a very small number of foreign examples or on related legislation, judgments and legal literature in other matters.

¹ On 30 December 2009, the Dutch court has considered himself to be competent to hear these claims. This ruling was made after the release of this report.

Research questions

Under current Dutch law, could a Dutch legal person be held liable for the involvement of a subsidiary in the violation of fundamental, internationally recognised rights abroad? Who can hold the Dutch parent company liable? The focus in this report is on liability under civil law.

In deciding whether victims of violations of fundamental, internationally recognised rights can claim compensation from a Dutch parent company, the Dutch courts follow a tried and tested procedure.

- First, the court determines whether it is competent to decide on the claim.
- Next, it ascertains which law is applicable: Dutch law, or the law of another country.
- Only then does it assess the claim and the facts underlying the claim.

Jurisdiction of the court

As explained above, the court first assesses whether it is competent. In case a claim for compensation is brought against a Dutch legal person, the Dutch court may consider itself competent – in accordance with Council Regulation (EC) No. 44/2001, or Brussels I (see section 4.2). In view of the court's jurisdiction, it is not inconceivable that the foreign subsidiary may also be involved in the same proceedings.

Applicable law

The Dutch court will in principle have to base the substantive part of its judgment on the law of the country where damage occurred. In most cases therefore, it will not be based on Dutch law. This applies both to the liability of the subsidiary and to that of the parent company (due to failing supervision). This rule is derived from Council Regulation (EC) No. 864/2007, or Rome II.

In exceptional cases the Dutch court will be able to apply Dutch law, especially if grounds of public policy can be invoked. E.g. if according to the law of another country a violation of fundamental, internationally recognised norms is not recognised as such, the court might find that the application of the foreign law would conflict with domestic public policy. In this exceptional case the court can hold to apply Dutch law. Partly for this reason, the report devotes considerable attention to the procedure Dutch courts have to follow in deciding whether a parent company is liable for the involvement of a subsidiary in the violation of fundamental, internationally recognised norms (see section 4.3).

Liability: duty of care

Dutch law contains no exhaustive codification of liability on the part of companies for involvement in the violation of fundamental, internationally recognised rights. Although a large number of rules are elaborated in criminal law – on the basis of treaties – these mostly apply to offences committed within national borders. One of the only exceptions to the territoriality rule is in the case of crimes against humanity, such as genocide and slavery, committed by a natural person or a company. A company which commits such an offence may also be sued by interested parties in the civil courts, either in order to halt the commission of the offence or to claim compensation for the victims (see section 2.2).

But even beyond the provisions of criminal law, there are rules based on fundamental, internationally recognised rights. In the Netherlands and elsewhere in Europe, the civil law system works with open standards that can be elaborated to focus on a specific situation. Liability vis-à-vis injured parties already exists – quite apart from criminal liability – if the company in question acted in breach of the duty of care that rests on all members of society. Whether the company can be accused of such a breach depends on the seriousness of the harm, the size of the risk and how difficult or onerous it is to take precautionary measures (see sections 2.3 to 2.6).

The extent of the duty of care also depends on developments in the relevant branch of industry. Current developments on the issue of corporate social responsibility is highly relevant here. Companies are increasingly required to be alert to the risks of violations of fundamental, internationally recognised norms by suppliers or other partners in the supply chain.

As codes of conduct and business practice increasingly request companies to exercise due diligence to fulfil their corporate social responsibility, companies which ignore such requests will increase their liability risks (see section 2.4 to 2.6).

Liability for failing supervision

As independently operating legal persons, the subsidiaries of Dutch parent companies are responsible for their own actions. One legal person cannot in principle be held liable for the actions of another. But in case law – in the Netherlands and elsewhere in Europe – it has been assumed that a parent company may have a duty of care vis-à-vis the creditors of its subsidiary, although the rulings on this issue are largely concerned with subsidiaries that cannot meet their financial obligations in relation to creditors. If a subsidiary acts unlawfully vis-à-vis the injured parties, the parent company's degree of liability will be greater according to the amount of influence it exercised or could have exercised on the policy adopted and pursued by the subsidiary (see section 3.3). In this connection too, developments in the field of corporate social responsibility are relevant. Codes of conduct can influence standard practice: they can help persuade parent companies to shoulder their responsibilities in situations where according to the code, they are expected to encourage awareness of the risk of violations of fundamental, internationally recognised norms by subsidiaries or suppliers within the firm (see section 3.4).

Evidence

The court must subsequently ascertain whether the claimant has put forward sufficient facts, and where necessary proof, to enable it to allow the claim. In this respect the court also has to apply the law of the country where damage occurred. However, on a number of procedural issues Dutch law has to be applied, even in international disputes. The court may for example order a party – possibly at the request of the other party – to submit certain documents. A special procedure to obtain information may also be available in case of doubts concern the policy of a company. The Amsterdam Court of

Appeal may launch an inquiry at the request of certain parties, which may include the issue of the company's attitude to corporate social responsibility (see section 5.4).

The writing of this report

The draft version of this report was discussed in Leiden on 26 November 2009 with representatives of a number of companies and civil society organisations. General references were constantly made to violations perceived by all to be extremely serious: slavery, child labour and exposure to hazardous substances. The way the court will deal with a specific claim will depend on the violation which took place and the context in which the legal person operates. Nevertheless, detailed discussion per country and per fundamental right would have complicated this report to such an extent, without affecting the core of the procedure, that we decided against such a detailed treatment. However, the greater the harm caused by the violation and the bigger the risk that the violation would occur due to corporate activity, the earlier liability issues will rise if the company in question does not take appropriate precautionary measures where it should have.

During the consultation the question was raised if the report described 'hard and fast rules' or if it was describing the authors' assessment of the situation. On this we can state that the remarks about the competence of the courts and the applicable law are based on international provisions leaving little scope for interpretation. But there are practically no 'hard and fast' substantive rules concerning liability itself. Our findings in this respect are based on general rules of liability law and corporate law. And our interpretation of them is based on experience in the administration of law in other fields.

Finally, various participants referred to questions that have now been put to The Hague district court in three cases brought by the Friends of the Earth Netherlands (*Vereniging Milieudefensie*) and some members of the Nigerian Oruma community against Shell for damage caused by oil spills. We did not discuss these proceedings, mainly because the court still has to establish the facts. The legal questions raised in these proceedings are, however, dealt with in general terms in our report.

About the authors

Alex Geert Castermans is professor in civil law at Leiden University and deputy judge at The Hague district court. He obtained a doctorate from Leiden University in 1992 on the subject of the duty of disclosure during the negotiation phase. From 1992 to 2004 he was a practising attorney in The Hague, from 1997 as partner at Pels Rijcken & Droogleeveer Fortuijn (attorneys and notaries The Hague). From 2004 to 2008 he was chairman of the Equal Treatment Commission in Utrecht. In his inaugural lecture on 28 November 2008 he pondered the question of why in the drafting of the Civil Code (1947-1992) so little attention was paid to the interaction between civil law and human rights. He has also studied the significance of the growing interest in corporate social responsibility, with a view to the interpretation of open statutory norms in contract law and liability law.

Jeroen van der Weide studied notarial law and civil law at the VU University Amsterdam. He then worked as a notary-designate at De Brauw Blackstone Westbroek (attorneys and notaries in Rotterdam), followed by a lectureship in private law and private international law at the VU University Amsterdam. In 2006 he obtained his doctorate in the field of international property law. Since 2007 he has lectured in civil law at Leiden University.
