

Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea*

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‘The corporation has a will, it makes decisions, and doing that will or will not take into account the law. The corporation also has a corporate conscience.’¹

1 Introduction

Continental European criminal law doctrine used to have great difficulties with accepting the notion of corporate criminal liability, and in some countries it still has. In more pragmatically oriented countries, like early adopter the Netherlands, this acceptance took place even though this newly to be introduced actor had not yet properly been embedded into the existing legal theories on *actus reus* and *mens rea*. It is this same lack of proper theoretical foundation that has resulted in other more dogmatically oriented countries staying true to the adage of *societas delinquere non potest*, upholding their rejection of corporate criminal liability.

And while it looks like the proponents of corporate criminal liability will eventually win out,² the struggle for a suitable theoretical foundation remains. Coercing the corporation into a legal theoretical framework that was originally designed to be only applicable to human beings has been far from easy. Surprisingly, these difficulties do not seem to surface in legal practice that often; quite to the contrary one might say. Despite the lack of clarity on the criteria for establishing corporate *actus reus* and *mens rea* criminal courts, at least in the Netherlands, have been quite successful in dealing with non-human entities as defendants. The academic debate however continues without any indications that it will settle within the foreseeable future.

Is this absence of a sound dogmatic foundation disturbing, and if so, why? The relative ease with which criminal courts and prosecutors seem to be able to deal with corporate criminal liability can mean several things. Perhaps the theoretical relevance of the *actus reus* and *mens rea* discussion is overestimated? Yet, it could also imply that fundamental legal principles, like the foreseeability of liability and the culpability principle (*nulla poena sine*

1 Röling, 1957, p. 28-29.

2 See for recent developments in long-time opponent and dogmatic giant Germany Engelhart, 2014.

culpa), are constantly on the verge of being violated which would pose a great risk for the defendant.³ Moreover there could be an unevenness in the way legal entities are being prosecuted, meaning that small corporations where *actus reus* and *mens rea* can easily be assessed face a greater risk of prosecution than their more substantive and more complex counterparts. This would pose a threat to the legitimacy of corporate criminal liability and the current prosecutorial policy. And last but not least, the choice for a certain theoretical foundation of corporate criminal liability will not be without consequences for the scope and nature of that liability.

This brings us to the main *research question* and the focus of this article. All countries that embrace corporate criminal liability are, depending on their own legal system, to a more or lesser extent confronted with the same aforementioned issues regarding *actus reus* and *mens rea*. Strikingly however, there has been extensive (comparative) research on the aspect of corporate *actus reus*, while attention for *mens rea* has been minimal. Anthropomorphic approaches of corporate *mens rea* have proven to be inadequate and undesirable and do not provide for a solid theoretical foundation for liability. A more corporate culpability oriented model is favoured by many, but thus far a truly convincing model that can serve both doctrine as well as legal practice is still lacking.⁴ Interestingly, such a normative framework is not only sought after in law, but also in the field of business ethics. Research in the field of economic crimes has a long history at the Willem Pompe Institute and in the true tradition of our Institute this article aims to enrich the current state of corporate criminal liability with new insights from this non-legal, but still normative discipline. After all, questions of responsibility and accountability are not merely legal in nature. In ethics Bratman's theory of shared intentions – intentions which can be traced back to a 'web of attitudes of the individual participants' – has been presented as a potential foundation for such a framework.

In this contribution we will focus on the question whether the theory of shared intentions could serve as a concept for corporate *mens rea*. Following this introductory section (Section 1), the next section will shortly address why business ethics was chosen as a frame of reference (Section 2). Then, two general models of corporate criminal liability and corporate intent will be distinguished. We will also explain why the Netherlands has been chosen to serve as an illustration for both (Section 3). The actual description of the Dutch situation will follow (Section 4). The second 'border crossing' aspect of this contribution, besides the aforementioned comparative approach, is highlighted in the penultimate section (Section 5) where both the ethical concept of intentionality and Bratman's theory of shared intentions will be discussed. Finally (Section 6) we will analyse if and to what extent the models and the

3 Cf. Meyer, Van Roomen & Sikkema, 2014, p. 53-54.

4 Cf. Cavanagh, 2011, p. 415-416.

theory of shared intentions could serve as a theoretical foundation for corporate *mens rea*.

2 Why business ethics as a frame of reference?

Law, criminal law in particular, and ethics are both normative disciplines. Disciplines that also deal with the similar issues of responsibility and accountability. For business ethics this means addressing both the underlying principles as well as the actual assessment of ethical or moral issues that (could) arise in a business setting. As a consequence the questions that have emerged in criminal law with regard to corporate criminal liability, have also risen in the field of business ethics against the background of moral personhood and agency of corporations. Not only are the questions similar, the arguments made in favour or against also show a great deal of resemblance. Due to all these parallels, insights from the field of business ethics could prove fruitful for the discussion in the legal domain.

In the legal domain Von Savigny argued that corporations are incapable of committing criminal acts since all alleged acts and intentions of the corporation are in reality acts and intentions of the natural persons taking refuge behind the corporate veil. Acts and intentions for which they themselves can only be held responsible, for it is a fundamental principle of criminal law that no one can rightfully be punished for someone else's crime.⁵ Their criminal acts and intentions cannot be attributed to the legal entity itself, for such an attributed will would be fictitious. Criminal law aims at finding and punishing those with actual criminal intentions. In that quest it cannot settle for any fiction.⁶

The exact same argument is made in ethics by Velasquez. All alleged acts and intentions are in reality acts and intentions of autonomous individuals, therefore responsibility should rest on their shoulders.⁷ In sum, the 'Identität des Verbrechers und des Bestraften'⁸ or mental and bodily unity⁹ is seen as crucial for both legal as well as moral responsibility. Acts have to originate in the agent who is eventually held responsible.¹⁰

The view that legal persons are mere fictions has been challenged by Von Gierke and Hafter. According to their real entity theory any collective that has been consciously shaped results in a whole that is greater than the sum of its individual parts: a collective entity that has a natural ability to form its own will. An ability that inherently flows from its functioning in society and exists

5 Von Savigny, 1840, p. 310-317.

6 Van Lennep, 1887, p. 25.

7 Velasquez 1983, p. 114-122.

8 Von Savigny, 1840, p. 313.

9 Velasquez, 1983, p. 118 and 120.

10 Ibid., p. 114. Cf. Weigend, 2008, p. 937-938.

regardless of its acknowledgement by law as being legitimate.¹¹ Proponents of corporate moral responsibility also see the corporation as more than a mere aggregation of individuals. Corporate responsibility is not the sum of all individual responsibilities scraped together. It therefore cannot be split up and divided amongst its members. It is an own and specific responsibility that needs to be distinguished from the personal responsibilities of its associates.¹²

In both approaches personhood, be it legal or moral, is strongly identified with being human or at least with having human capacities. As such both visions situate the legal person in their own particular way within the paradigm of free will.¹³ Only entities which possess free will can be true moral persons or persons in the sense of the law, meaning they must be able to *display intentionality*.

3 Two models of corporate criminal liability

For the argument we want to make in this article it is vital to make a clear distinction between two strongly related but separate questions that have to be answered when dealing with corporate criminal liability. The first question is that of corporate *actus reus*: when can a corporation be said to have acted in the sense of the law? The second question relates to corporate *mens rea*: when can a corporation be said to have acted intentionally, recklessly or with gross negligence? Even though these two questions are hard to disentangle since they overlap to a certain extent, this distinction is very relevant, yet often left unattended.

From a comparative perspective this lack of attention for corporate *mens rea* can be easily explained, but it also poses a problem that tends to be forgotten when comparing legal systems. Even though corporate criminal liability has now been accepted almost throughout Europe, its further elaboration differs (strongly) per country. Several legal systems have opted for a (more) *strict liability* approach for corporate actors, meaning that, at least for specific offences, neither intent nor gross negligence is required in order to impose liability.¹⁴ A second restriction comes from the fact that certain countries (like

11 Von Gierke, 1887, p. 5, 9, 603-635 and 672-706; Von Gierke, 1902, p. 7-13; Hafter, 1903. As such a corporation is also capable of committing criminal acts (Von Gierke, 1887, p. 743-769; Hafter, 1903, p. 1-2).

12 See Section 5 for references.

13 Cf. Groot, 1988, p. 45.

14 For example regulatory offences ('quasi'-strict liability) and strict liability offences in the English penal system; see Keiler, 2013, p. 442-443. An objective model of liability, effectively declaring corporate culpability irrelevant, is also found in English statutes imposing vicarious liability. An interesting variation can be found in the UK Bribery Act 2010, introducing a statutory due diligence defence if the organisation had adequate procedures in place to prevent bribery by associated persons. See Keiler, 2013, p. 450-453 and Meyer, Van Roomen & Sikkema, 2014. American case law also imposes vicarious liability by automatically imputing the criminal intent of corporate agents to the corporation (Bucy, 1991, p. 1102-1104).

France and the United States) only allow corporate criminal liability for specific listed offences.¹⁵ Understandably both approaches focus on the area where the practical need for corporate criminal liability is felt most: offences of a (more) regulatory nature, leaving out the crimes considered to be belonging to the 'core' of criminal law. Yet it is these crimes where issues relating to corporate *mens rea* manifest themselves most prominently.

An in-depth analysis would therefore be served best by focusing on a legal system where there are little restrictions on corporate criminal liability and where even corporations are deemed capable of acting intentionally, recklessly or with gross neglect. The Netherlands meets these criteria. It is also one of the few European civil law systems with a long tradition in corporate criminal liability. As such it serves as a good illustration for the argument we want to make in this article. And, even though the argument we put forward applies to corporate *mens rea* in general, we will limit ourselves to the question of corporate *intent* where the need for a proper theoretical foundation is felt most explicitly. In general, it will be less problematic to establish corporate negligence,¹⁶ because in regard to crimes of negligence it is possible to deduce corporate fault directly from the violation of a duty of care.¹⁷

Nowadays almost all European countries seem to have accepted the notion of corporate criminal liability at least to a certain extent, although the conditions which allow for criminal liability still vary. Within that great diversity of systems two main models can be distinguished.¹⁸

The first model is normally described as a *derivative model*. Corporate criminal liability is constructed by way of attribution, which in essence comes down to transferred or indirect liability.¹⁹ Actions and culpability of individuals who are in some way associated to the corporation are attributed to the corporation.²⁰ This is generally seen as a more classical, but also less desirable way of constructing corporate criminal liability. According to critics this approach holds the corporation responsible for the guilty behaviour of others instead of establishing liability on the corporation's own conduct. A flagrant violation of one of the most fundamental principles of substantive criminal law and a sin in the eye of many legal scholars.²¹

15 De Maglie, 2005, p. 548-549 and 551-553.

16 Cf. Gritter, 2007, p. 71.

17 Keiler, 2013, p. 496.

18 Here we will focus only on these models. Please note however that some legal systems have opted for a general or 'one size fits all' liability scheme (e.g. the Netherlands), whereas others prefer to use different models depending on the nature of the offence (e.g. the United Kingdom; Wells, 2011, p. 24).

19 Gobert, 2008, p. 71; Weigend, 2008, p. 933.

20 Cavanagh, 2011, p. 414.

21 Weigend, 2008, p. 933. This is a recurring argument that has previously been raised in relation to the fiction theory of legal entities (see Section 2).

Criticism is however not merely theoretical in nature. In various legal systems this multi-stage approach requires as a first step that one must identify the physical act or acts of one or more individuals associated to the legal person. Acts that are subsequently (step two) attributed to the legal person. When the offences occurred cannot be traced back to one or more identifiable individual acts (step one), this can pose an insurmountable problem for establishing corporate criminal liability.²²

The second model is one of *organisational fault*. Under models of organisational fault liability is directly and solemnly based on the own malfeasance of the corporate actor, thereby breaking the traditional link with the individual liability of its associated members. The corporation is no longer held responsible for the faults of others, instead liability is constructed on grounds of deficiencies within the structures, systems, policies, and culture of the corporation itself.²³ As a consequence it is no longer required that (identifiable) individuals within the corporation were at fault. Even when no individual can be singled out, the corporation can still be held liable.²⁴ While this is seen as a great advantage of this holistic model, according to some it does require that corporations can be seen as moral agents for such an approach to be justifiable.²⁵

The distinction between the two models mainly serves an academic function by clearly identifying several approaches that can be used to construct corporate criminal liability. At the same time the difference between the two is inadvertently exaggerated and can falsely lead to the assumption that the two approaches are mutually exclusive. In reality most systems have adopted a combined and more comprehensive scheme that exhibits features of both models.²⁶ Both models in the end may reflect more of a practical method to prove liability in a certain case, than a fundamental substantive positioning on the nature of corporate criminal liability.²⁷ Although the latter is not excluded: the British ‘directing mind’ doctrine and the French interpretation of ‘organes ou représentantes’ do reflect a more restrictive view on the scope of justifiable attribution.²⁸ In the next section we will take a closer look at the Dutch penal system, which provides an example of a practical approach which combines elements of both theoretical models that were discussed above. This example may clarify that theoretical difficulties do not always lead to problems when applying the rules on corporate liability in practice.

22 Gobert, 2008, p. 68; Weigend, 2008, p. 933-934.

23 Cavanagh, 2011, p. 415 and 429; Gobert, 2011, p. 144-146; Weigend, 2008, p. 934.

24 Cavanagh, 2011, p. 415 and 430; Gobert, 2008, p. 71. Cf. Weigend, 2008, p. 936-945.

25 Cavanagh, 2011, p. 429-430; Pascal, 2011, p. 33. Cf. French, 1984, p. 173 who states that the question of corporate criminal liability is strongly related to the issue of moral agency.

26 Sun Beale, 2009, p. 1493-1494.

27 Cf. Sikkema, 2010, p. 12.

28 See for more on the ‘directing mind’ doctrine and the ‘organe’ approach a.o. Cavanagh, 2011, Gobert & Punch, 2003 and De Maglie, 2005.

4 Corporate criminal liability and intent in Dutch criminal law

4.1 Corporate criminal liability in the Netherlands²⁹

As was stated above (in Sections 1 and 3) the Dutch legal system accepted corporate criminal liability quite early and in a pragmatic manner, so without many theoretical discussions. In practice, the prosecution of legal entities does not seem to raise many problems. Corporate criminal liability is not limited to specific categories of offences and corporations are deemed capable of acting intentionally.

The criminal liability of legal persons is provided for in Article 51(1) of the Dutch Criminal Code (DCC). This provision states, in broad terms, that offences may be committed by natural persons and legal persons. If an offence is committed by a legal person, criminal proceedings may be instituted and the punishments may be imposed (a) against the legal person; or (b) against those who ordered or actually directed the commission of the offence; or (c) the persons mentioned under (a) and (b) together (Article 51(2) DCC). The public prosecutor has full discretionary powers to choose who to prosecute, depending on the circumstances of each case.

The exact criteria according to which a criminal offence can be attributed to a corporation have, for a long time, been heavily debated. Also, case law regarding corporate criminal liability has been very precarious.³⁰ However, in a 2003 judgment, the Dutch Supreme Court (*Hoge Raad*) held that whether or not a legal person is criminally liable for an offence has to be assessed by having regard to the special circumstances of the case. Whether or not criminal liability can be attributed to a corporation depends on the question whether the offence can ‘reasonably’ be imputed to the legal entity. This may be the case if the (illegal) conduct took place *within the ‘sphere’* (‘scope’) of the legal entity. Conduct can be considered to have taken place in the sphere of the legal entity in one or more of the following circumstances:

1. the act was committed by someone who is employed by or works for the legal entity;
2. the act was part of the normal business activities of the legal entity;
3. the legal entity benefited from the act; and,
4. the legal person had the power to decide whether or not the conduct took place and accepted such or similar behaviour.³¹

29 This section is largely based on Meyer, Van Roomen & Sikkema, 2014, p. 46-49. See for other recent literature in English on corporate criminal liability in the Netherlands De Doelder, 2008; Keulen & Gritter, 2010 and 2011.

30 Mevis, annotation to HR 21 October 2003, *NJ* 2006, 328.

31 HR 21 October 2003, *NJ* 2006, 328, para. 3.4.

These criteria are considered to be neither cumulative nor exclusive, but are tools or factors to determine the liability of the legal entity. However, an assessment of lower case law shows that courts often assess all of these criteria together when determining the liability of the entity for the commission of an offence.³²

As stated above, the last criterion that has been formulated by the Supreme Court stipulates that criminal liability can be attributed to the legal entity, if that entity has 'accepted' the occurrence of the offence. This acceptance could be established if the entity has not taken reasonable diligence to prevent it. This means that a legal person can be held liable if it did not prevent the act even though it was in its power to do so. A company could escape liability if it has established effective internal controls, ethics and compliance rules and if it did everything in its power to prevent the act.³³

It appears that the failure of the corporation to take adequate due diligence to prevent the offence is only one of the many criteria based on which criminal liability can be attributed to the corporation. It is, nevertheless, still a criterion of significant importance. According to the literature, the existence of adequate supervision and control measures is often important to determine whether the offence was part of the normal business activities of the legal person and whether the corporation accepted the commission of the offence.³⁴ Whether a corporation has taken adequate due care will be assessed based on statutory obligations, requirements emanating from contractual obligations, but also on the specific circumstantial situation of the criminal act.³⁵ Lower case law regarding the liability of corporations for failure to take adequate preventive procedures also indicates that the adequacy of supervision and control by the corporation is not only assessed based on statutory requirements, but also on customary professional standards and other self-regulatory measures.³⁶ A relevant question when assessing adequacy is whether the costs of taking adequate preventive measures would not have outweighed the risk of the occurrence of the offence and the harm caused by it. Case law seems to be quite strict in this respect; in many cases, measures have been considered to be inadequate to prevent criminal liability.³⁷

Based on the previous analysis of corporate criminal liability in the Netherlands, it can be concluded that the criteria for the attribution of this kind of liability largely depend on the specific circumstances of the case. The lack of adequate supervision and control is, however, in many cases an

32 Hornman, 2010, p. 370-401.

33 OECD Report 2013, p. 16-17.

34 De Hullu, 2012, p. 168.

35 Kelk & De Jong, 2013, p. 498.

36 See Rb. Dordrecht 5 March 2008, ECLI:NL:RBDOR:2008:BC6022.

37 Hornman, 2010, p. 390-392.

important criterion in this assessment. The lack of adequate supervision and control could lead to the criminal liability of a legal entity for criminal acts committed by one of its employees. However, whether or not the existence of adequate supervision or control measures will always exempt legal entities from criminal liability for offences committed by their agents has been subject of debate.³⁸ The criteria developed in the 2003 Supreme Court judgment are not formulated as cumulative requirements. The existence of one of the four situations (or criteria) mentioned above could indicate that it is reasonable to attribute actions committed by its associates to the legal entity. This means that the absence of one of the situations mentioned will not necessarily lead to the conclusion that the actions of the associates cannot be attributed to the legal entity. According to the *fourth* criterion, criminal liability can be established if the legal person accepted the occurrence of the offence, which may be the case if the legal person has not taken reasonable diligence to prevent it. It is disputed whether showing that the legal entity did take adequate measures can be used to exempt liability based on (one of) the *first three* criteria.³⁹

Several authors argue that the Supreme Court, in its 2003 judgment, hangs on to an approach which is founded on the attribution of the actions of individual employees to the legal person.⁴⁰ It is true that the Supreme Court – referring to the Explanatory Memorandum to Article 51 DCC⁴¹ – states that a legal person can only be criminally liable if the action concerned can be (reasonably) ‘attributed’ to it. However, it should be noted that the Supreme Court only refers to attribution of the (*criminal*) act and *not* to the actions of *natural persons*.

In the opinion of other authors the 2003 judgment implies that corporate criminal liability does not necessarily need to be established through attribution of the conduct of individuals. They argue that liability can also be based in a more ‘independent’ and ‘direct’ way on the corporation’s policies.⁴² Especially the Supreme Court’s second criterion (whether the act was part of the normal business activities) does not match the classical ‘attribution’ approach.⁴³ The same seems to be true with respect to the third criterion (whether the legal person benefited from the act). Therefore, a court may use (one of) these two criteria in cases in which the offence cannot be traced back to one or more identifiable individuals working for the corporation. On the other hand, the first and the fourth criterion focus on the (power over and acceptance of) acts of an individual employed by or working for the corporation. These two criteria seem to be particularly useful in cases in which it is obvious that a certain

38 See for example Hornman, 2010, p. 392-394 and De Hullu, 2012, p. 168.

39 Cf. Sikkema, 2010, p. 44-50.

40 Vellinga & Vellinga-Schootstra, 2005, p. 533; Mevis, annotation to HR 21 October 2003, *NJ* 2006, 328; Van Elst, 2006, p. 420.

41 *Kamerstukken II* 1975/76, 13 655, no. 3, p. 8.

42 De Valk, 2009, p. 389; Kessler, 2007, p. 221-222; Sikkema, 2010, p. 22-23.

43 Hornman, 2010, p. 381-382.

employee or employees committed the offence. When the ‘acceptance’ of the criminal act is based on the lack of due diligence on the part of the legal person, because it did not take all reasonable measures to prevent the act, the focus shifts back to the corporation as such (internal controls, compliance rules etc.).

It is shown above that the Dutch criteria for corporate criminal liability encompass elements of both the *derivative* model and the model of *organisational fault* (see Section 3). This combination of approaches confirms that both models are not necessarily mutually exclusive. As a result, the scope of corporate criminal liability in the Netherlands seems to be quite wide. Neither a criminal act by an identifiable individual, nor the ‘acceptance’ of the offence by the corporation itself, are general conditions for liability.

4.2 Corporate intent in the Netherlands

According to Article 51 DCC offences can be committed by legal persons. This provision does not distinguish between serious offences and lesser offences. Under the general doctrine of Dutch criminal law, every serious offence contains, either explicitly or implicitly, an element of guilt.⁴⁴ For offences that contain an element of guilt, this guilt of the offender must be proven based upon the standards of that specific degree of guilt (for instance, negligence, gross negligence or intent).⁴⁵

Considering that a legal person does not have a mind of its own, this raises the question how one can establish that this legal person has acted intentionally. In this context, a number of different approaches can be distinguished. Firstly, corporate intent may be established by way of attribution of an individual’s guilt to the legal person. Such an attribution is possible when a manager’s intentions are concerned, but in some circumstances a lower ranking officer’s intent may also suffice. According to the Explanatory Memorandum to Article 51 DCC, the possibility to attribute a natural person’s intent to the legal person depends on the internal organisation of the legal person and the natural person’s function and responsibilities.⁴⁶ In other words, the organisation’s internal structure and the allocation of duties are decisive in this respect.⁴⁷ It has also been accepted in case law that a legal person’s intent can sometimes be based on a regular employee’s intent, especially with respect to small firms. Lack of knowledge or consent of the manager(s) does not necessarily change this.⁴⁸

In addition to the approach according to which *one* natural person’s intent is attributed to the legal person, a second version of the ‘attribution’ approach

44 De Hullu, 2012, p. 202. Dutch criminal law distinguishes two degrees of criminal offences: *misdriften* (serious offences) and *overtredingen* (lesser offences).

45 Meyer, Van Roomen & Sikkema, 2014, p. 48.

46 *Kamerstukken II 1975/76*, 13 655, no. 3, p. 19.

47 Gritter, 2007, p. 65-66.

48 HR15 October 1996, *NJ* 1997, 109.

can be distinguished. In this approach, the knowledge and intentions of several individual officers are ‘scraped together’.⁴⁹ The intent of more than one individual is combined and subsequently this ‘united’ intent is attributed to the legal person.⁵⁰

Finally, a legal person’s intent may be based on corporate policies, the corporate decision structure or the normal procedures within the corporation. Evidence of these policies and procedures may appear from minutes of staff meetings or other documents. This approach focuses on the legal person’s ‘own’ or ‘separate’ culpability.⁵¹

The different methods to establish corporate *mens rea* to a large extent correspond to the different approaches with regard to proving corporate *actus reus*, that were discussed earlier (Sections 3 and 4.1). In Dutch criminal law, the relevant factors for ‘reasonable attribution’ of the (criminal) act to the legal person also comprise features of both the derivative model and the organisational fault model. The method of ‘scraping together’ the intentions of several individual employees is comparable to the so-called ‘aggregation doctrine’. According to this doctrine (which was rejected in UK case law), all the acts and mental elements of the various relevant persons within the company are combined, to ascertain whether in total they would amount to a crime if they had all been committed by one person. Thus, this doctrine seems to provide a ‘third way’ between a purely derivative model on the one hand and a model of organisational fault on the other hand. It acts as middle ground between both perspectives.⁵²

In some cases a combination (mix) of both methods can be applied to establish corporate intent.⁵³ For example, it is possible that in specific cases the intent of more than one employee can be attributed to the legal person, while at the same time corporate policies can be relevant. One worker might be aware of a certain risk, while one of the managers did not properly instruct his subordinates and the corporation as such did not implement adequate internal controls. In the end, it all comes down to a case-by-case assessment of the corporation’s intent, considering all relevant factors and factual circumstances. In spite of all the theoretical discussions, the establishment of corporate intent does not seem to cause many problems in practice.⁵⁴ Still, the question remains whether the lack of a proper theoretical foundation raises problems on a more fundamental level. Therefore, in the next section, we will explore the field of business ethics, in search of a more convincing framework for corporate *mens rea*.

49 Topping, 1984, p. 101-102; Kelk & De Jong, 2013, p. 514-515; Jörg, 1990, p. 56.

50 Van Dijk, 2008, p. 265.

51 Kelk & De Jong, 2013, p. 513-514.

52 Cavanagh, 2011, p. 425-429.

53 Gritter, 2007, p. 67 and p. 74-75.

54 De Hullu, 2012, p. 269-270.

5 Intentionality from an ethical perspective: function and meaning

5.1 Intentionality, why is it relevant?

In business ethics and philosophy the concept – or better: concepts⁵⁵ – of intentionality serves different purposes and has a somewhat dissimilar meaning compared to the legal domain. In ethics being able to act intentionally is a prerequisite for being a moral person or agent, which are central concepts in business ethics. After all, in order to be eligible for a moral reproach one must qualify as a moral person/agent, since only moral persons/agents are able to reflect on their actions and therefore can duly be called to account. And that is what business ethics is about: accountability; whereas law focusses on liability. Intentionality as understood here must not be confused with intent as an element of a criminal offence, as meant in the previous section. Here intentionality refers to intent in its pre-legal more philosophical meaning (or meanings⁵⁶).

Moral personhood is one of the three concepts of personhood distinguished by French, besides metaphysical and legal personhood.⁵⁷ In a legal sense being a person requires nothing more than being the subject of rights and duties. In order to qualify as a moral person however, such mere (*passive*) ownership is insufficient. One must also be able to *actively* exercise those rights, whereas otherwise they would be an empty shell or, in terms of the second section, a fiction.⁵⁸ Only if a person had the ability to exercise those rights and to account for the usage thereof, can this person be said to be eligible for accountability. This requires that the person was able to act intentionally.⁵⁹ Moreover, in the view of many ethicists, it also seems to imply a capacity to reflect thereon. This would require freedom of will and of action plus decisional and legal competence. After all, only the outcome of free choice can be a morally righteous one.⁶⁰

The logical question is: can a corporation display such intentionality and reflection? According to the majority opinion corporations can be qualified as more restrictive moral agents, but not as full-fledged moral persons as was originally argued by French.⁶¹ Some state, in line with the arguments postulated in Section 2, that moral responsibility can only exist for own personal acts and intentions and that such a responsibility cannot be transferred to a legal entity.

55 We are fully aware that there is no clear-cut notion of intentionality, neither in philosophy nor in ethics, and that this concept is used in various distinctive meanings. In this contribution we will follow the interpretation as it is generally used in business ethics.

56 See previous footnote.

57 French, 1979, p. 207.

58 *Ibid.*, p. 210.

59 *Ibid.*, p. 211; Davidson, 1971, p. 7.

60 Manning, 1984, p. 79.

61 French, 1979, p. 207. The difference between the two will become clear later in this section.

By interpreting acts in a physical sense and intentionality in a strict mental sense, moral personhood remains restricted to human beings.⁶²

Such a narrow interpretation is however not self-evident. Intentionality as understood here primarily requires the ability to reflect on own past behaviour and to anticipate on possible consequences of envisioned behaviour. As such, it makes a stronger reference to mental rather than biological features.⁶³ And when emphasis shifts from the ability to display virtue or vice (or emotion) as only humans can, to the ability to reason and to live up to a duty of care, the argument to exclude corporations loses credibility.⁶⁴ Such a purely rational approach, however, has met with some unease.⁶⁵ Only representatives of the corporation can act out of emotion and truly care for the interests of others, and as such act, care or reflect in an ethical manner, the corporation itself cannot.⁶⁶ It is in that sense amoral: unable to make moral considerations.⁶⁷ For the ethical assessment of the displayed behaviour, these underlying motives are however seen as crucial.⁶⁸

This is where the distinction between moral personhood and agency comes into play. Moral persons are fully capable of acting intentionally and to reflect thereon. Moral agents can also act intentionally in the way described above, but only have a limited ability to reflect on their behaviour. In the latter case it would suffice that a specific moral reproach can be made in a certain area, as would be the case for corporations.⁶⁹ The area of corporate social responsibility provides a good example. Therefore, most ethical scholars now prefer to use the more limited notion of moral agency instead of moral personhood when it comes to corporate responsibility.⁷⁰

Even though his initial argument for corporate moral personhood was met with substantial criticism, French's theories on the moral status of corporate actors remain, according to Arnold, amongst the most influential ones in the

62 Velasquez, 1983, p. 114. As such, all moral persons have to be metaphysical persons (human beings), yet not all metaphysical persons (e.g. young children) meet the standards to qualify as a full moral person.

63 Naffine, 2003, p. 364.

64 Here the discrepancy with phenomenological literature shows itself most clearly. There intentionality is seen as a directedness of a subject towards an object in the outside world (see more extensively De Jong, 2009, p. 273-302 and 2011). This orientation can also be seen in the belief-desire theory that will be outlined in Section 5.3. Being able to actually reflect on those desires is not necessarily required. This is where the ethical perspective differs. As such the latter is also strongly interwoven with the notion of free will.

65 Manning, 1984; Moore, 1999; Ewin, 1991; Sheppard, 1994.

66 Ewin, 1991, p. 751-752; Sheppard, 1994, p. 152 and 155-156.

67 Cf. Wempe & Melis, 1997, p. 34-35.

68 Bovens, 1998, p. 56; Ewin, 1991, p. 751-753. Some state that the same holds true for criminal law as a 'profoundly moral business' (Weigend, 2008, p. 936).

69 Bovens, 1998, p. 56-57; May, 1989, p. 45. Cf. Cavanagh, 2011, p. 429-430.

70 Manning, 1984; Moore, 1999. Even French himself switched to this more restricted concept (see French, 1995 and Arnold, 2006).

field.⁷¹ An influence that has silted through into criminal law and remains largely unaffected if one considers corporations to be moral agents instead of full-fledged moral persons. Strikingly however reference to French's theories has remained limited to his earlier work in which he introduced his famous Corporate Internal Decision (CID) Structure. His subsequent work in which he elaborates on this has gotten much less attention.

5.2 *The Corporate Internal Decision (CID) Structure as a foundation for moral agency*

If one is to label the corporation as a moral agent in itself, one cannot rely on the attribution of actions and intentions, these actions have to be intended by the corporation itself.⁷² In the end every action of the corporation, however, is an act of one or more individuals associated to the corporation. How then, can such an act be seen as a corporate act? This is where French's Corporate Internal Decision (CID) Structure comes into play. According to French, this CID Structure does not just organise all associated individuals into a decision-making and acting entity, it also allows us to qualify those decisions and actions as corporate.⁷³ Through the CID Structure the corporation can tap into experience and manpower from its own ranks and accomplish 'a subordination and synthesis' of the intentions and acts of one or more of its associated members, elevating the outcome thereof into a true corporate decision and/or act.⁷⁴

This CID Structure specifies how decisions should be made within a corporation. As such it is of a prescriptive and not of a merely descriptive nature.⁷⁵ It is constituted by the following elements:

1. an *organisational or responsibility flowchart* that outlines the internal power structures, more specifically it identifies departments, managerial levels and relations, lines and scopes of authority, dependency relations etc.;
2. a set of *corporate decision recognition rules*, which consist of:
 - a. procedural rules; and
 - b. policies.⁷⁶

Through this CID Structure the intentions and actions of the associated individuals become part of a larger whole, in which all these individual intentions and actions form links as part of a larger chain. It is the CID Structure that redefines the whole sum of individual intentions and actions into

71 Arnold, 2006, p. 280.

72 French, 1979, p. 211.

73 French, 1996, p. 151.

74 French, 1979, p. 212.

75 Arnold, 2006, p. 289; French, 1995, p. 31.

76 Arnold, 2006, p. 288-289; French, 1979, p. 212-213; French, 1984, p. 48; French, 1996, p. 151; Jörg, 1990, p. 154-155; Van Strien, 1996, p. 91-92.

own intentions and actions of the corporation. Put differently, it *incorporates* them.⁷⁷ Corporate intent is therefore not a ‘tarnished illegitimate offspring’ of human intent, but true corporate intent.⁷⁸

French’s notion of the CID Structure has not gone unnoticed by criminal law. In the Netherlands it has been embraced by former ‘Pompean’⁷⁹ and now Supreme Court judge Nico Jörg and has popped up in the academic debate on various occasions (see Section 6).

5.3 Further developments: Bratman’s planning theory of intentionality & Arnold’s twist to shared intentions

Originally the CID Structure served as a foundation for French’s original *belief-desire theory of intentionality*:

‘[W]hen the corporate act is consistent with, an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so on, in other words, as corporate intentional.’⁸⁰

For reasons not relevant in the argument we wish to make here, French later revised this position and embraced Bratman’s *planning theory of intentionality*.⁸¹ According to his theory mere desires, nor a single plan directly result in action, and neither do they allow for intentionality to go on.⁸² Plans however do form a more concrete stimulus to proceed onto action.⁸³ Moreover plans usually form part of a larger not yet fully elaborated plan, are consecutive, mutually adjusted, and can and normally will be revised along the way.⁸⁴ As such they make up the core of intentionality. An intentionality which, as a consequence of the way the planning process is shaped within the CID Structure, is arranged, re-arranged and combined into something that can truly be described as being done for corporate reasons or purposes and to advance corporate plans, ergo: as corporate intentional action.⁸⁵

Building on French’s arguments Arnold states that it is Bratman’s concept of *shared intentions* that offers a solid foundation for corporate intentionality.⁸⁶ A shared intention – in short – is the result of a combination of:

77 French, 1979, p. 212.

78 French, 1996, p. 152.

79 The term ‘Pompean’ is eponymous and refers to Willem Pompe. It is used to describe people who are or were once associated to the Willem Pompe Institute.

80 French, 1979, p. 213.

81 French, 1996. Also see Arnold, 2006.

82 Bratman, 1985, p. 213.

83 French, 1996, p. 150.

84 Bratman, 1985, p. 223.

85 French, 1996, p. 149-152.

86 Arnold, 2006, p. 283.

- a. the mutual intention of all participants to engage in a certain joint activity;
- b. the meshing subplans of the intentions of all participants; and,
- c. common knowledge of all participants regarding a. and b.⁸⁷

As such the concept of shared intentions primarily reflects the existence of a relationship between all those taking part in the shared intention. Bratman formulates the concept of shared intention as follows:

‘[S]hared intention (...) is not an attitude in any mind. It is not an attitude in the mind of some fused agent, for there is no such mind; and it is not an attitude in the mind or minds of either both participants. Rather, it is a *state of affairs* that consists primarily in attitudes (none of which are themselves the shared intention) of the participants and interrelations between those attitudes.’⁸⁸

Shared intention is therefore not a mental state or a transcending of all individual intentions into an attitude in the mind of some sort of a super-agent, rather it is a *web of attitudes* between all participants which interlocks all individual intentions.⁸⁹

By focussing on the relationship amongst the participants as being constitutive, neither the implications of existing hierarchal relationships, nor differences in the opinions, beliefs, desires, goals, and intentions of all participants, will infringe the existence of the web. As a consequence shared intentions themselves need not be harmonious since there is no fused or collective mind. Nor need they be grounded in the prior premises or be of the same significance. It is the relationship amongst these intentions that is decisive.⁹⁰ Certain individuals will always have stronger positions and thereby be better equipped to influence the eventual outcomes. Nonetheless the framework remains. And that is what the concept of shared intentions provides for. It serves as a framework and allows for coordination.⁹¹

If one is willing to approach shared intentionality as it is outlined here, then it is also possible to let go of the assumption that intentionality should refer to some sort of (psychological) mental state. Holding on to such a traditional interpretation, corporations would automatically be excluded from acting intentionally,⁹² unless one were willing to see the legal person as some sort of super-agent as advocated by Von Gierke. Such a super-agent would however, to use an anthropomorphic expression, be inherently schizophrenic since it is

87 Bratman, 1993, p. 121; Arnold 2006, p. 286.

88 Bratman, 1993, p. 122-123 [our italics].

89 Bratman, 1993, p. 111 and 123, 1997, p. 143; Arnold, 2006, p. 286 and 291.

90 Bratman, 1993, p. 111; Arnold, 2006, p. 286 and 288-289.

91 Bratman, 1993, p. 112.

92 In this sense: Weigend, 2008, p. 936-945. The term ‘mental state’ however can also refer to more normative phenomena (see more extensive De Jong, 2011).

composed of so many members with different and opposing views and thoughts. As said, the beauty of shared intentions is that they need not be harmonious.⁹³ All participating individuals can therefore participate for different and, to a certain extent, even opposing reasons.⁹⁴

It is all of these states of affairs, comprised of the intersecting attitudes of all participating individuals and the CID Structure, which make up the intentionality of the corporation. The CID structure in that sense serves as the frame upon which the attitudes of all associated are interwoven to form the intentions of the corporation.⁹⁵

6 Analysis and conclusions: significance for criminal law?

In Dutch legal doctrine, French's notion of the CID Structure has been embraced by several authors as a (possible) theoretical foundation for corporate criminal liability. Jörg has stated that corporate will and corporate knowledge develop within the internal decision structure, independently from the knowledge of (senior) management. Corporate objectives and corporate policy may result in conduct of employees which is unknown to management. Thus, it is possible to disconnect the legal person from its managers.⁹⁶ According to Jörg, through their internal decision structure, legal persons even possess the ability to differentiate between good and evil, to act accordingly and to account for their own behaviour.⁹⁷ Van Strien has pointed out that French's theory is not convincing where it focuses on the corporation's official structure and formal procedures. She suggests that the factual power relations and informal rules on decision-making should also be taken into account.⁹⁸

Can Bratman's concept of shared intentions offer a more solid foundation for corporate intent? Since the concepts of 'shared intentions' and a 'web of attitudes' were not developed to serve either as foundation or legitimation of corporate criminal liability or corporate intent, one should be careful in randomly transposing them into the field of criminal law. A strict interpretation of Bratman's concept of shared intentions, would, for example, render it useless for criminal law, for it would then require that there was a mutual intention to commit a specific offence (joint activity). If one is willing to adhere to a more lenient interpretation – there is a mutual intention to participate in the corporate activities, during which one or more associated members engage in criminal behaviour – it could be useful.

93 Arnold, 2006, p. 286.

94 Bratman, 1993, p. 122.

95 Arnold, 2006, 291.

96 Jörg, 1990, p. 154-157. See also De Hullu, 2012, p. 114-115, Van Strien, 1996, p. 78-79, and Buruma, annotation to HR 29 April 2008, *NJ* 2009, 130 (all referring to Jörg, 1990).

97 Jörg, 1990, p. 162.

98 Van Strien, 1996, p. 91-93.

The web of intentions shows similarities with French's CID Structure, be it that French places more significance on the formal relations within the organisation, whereas the web is largely *informal*. Both however rearrange the acts and intentions of persons associated to the corporation into something that can be called corporate intent. And thus they allow for the construction of corporate intent, even if no single associated individual shares that specific intention.⁹⁹ Considering that shared intention is not a mental state, but rather a web of attitudes, there is no need to make reference to the 'ability to differentiate between good and evil' (Jörg) or a 'corporate conscience' (Röling).

Other than French's original belief-desire theory of intentionality, which seems to focus on *organisational* fault and corporate *policy*, Bratman's concept rather seems to be oriented towards shared intentions of several *individuals* (*participants*). The shared intention consists primarily in attitudes of the *participants* and *interrelations* between those attitudes. In that respect, this concept resembles the derivative models of corporate criminal liability and – more specifically – the 'aggregation doctrine'. It can justify an aggregated approach of corporate intent, since it shows that the 'scraping together' of the fragments of intention is not done at random. On the other hand, the attitudes of the participants are reshaped by the CID structure into something that can be truly described as *corporate* intentional action. The 'scraping' takes place with the background of the web in mind and taking the mutual relationships between the participants into account. In that the criticism that this kind of aggregated corporate intent is merely derived from natural persons and these intentions are not the true intentions of the corporation seems to be misplaced. The rearranging process makes these intentions fully fledged *corporate* intentions. The CID structure serves as the frame upon which the attitudes of the participating individuals are interwoven to form the intentions of the corporation. It is this combination of derivative and organisational elements that could provide a convincing theoretical foundation for corporate *mens rea*.

Much of the modern literature on corporate culpability has rejected the derivative models, favouring a model of organisational fault. A model based on organisational fault captures the true nature of modern decision-making better than derivative models. In an organisational fault model, there is no need to prove personal culpability of any individual(s). Furthermore, a derivative model makes it easier to hold small-scale companies liable, while it may encounter difficulties in regard to large corporations. In practice it might prove very difficult for the prosecution to unravel which individual actually committed the crime within a large and complex structured company.¹⁰⁰ Attributing an individual employee's intent to a legal person thus remains a possibility especially suited for small(er) firms (see Section 4.2).

99 Cavanagh, 2011, p. 430-431; also see Section 5.3.

100 Keiler, 2013, p. 465-467.

However, it is by no means suggested that a doctrine based on organisational fault would be perfect. The primary criticism of such doctrines is that it might be very difficult for prosecutors to prove such organisational fault, for example that a certain culture or unwritten rules and policies existed within a corporation.¹⁰¹ Taking into account that no single model has provided a completely satisfactory method for imposing criminal liability on corporations, it seems sensible to be pragmatic and allow a combination of different methods to establish corporate intent. Furthermore, the difference between derivative models on the one hand, and organisational models on the other hand, should not be exaggerated. The aggregation doctrine can be seen as a middle ground to both models, because it views a corporation as a collective unit. Although it still depends on the showing of human culpability, it has more in common with models based on organisational fault than models based on individual fault.¹⁰² The aggregation of various elements into one offence may turn innocent activities of individuals into corporate wrongdoing.¹⁰³ It was shown above that the concept of shared intention could provide a theoretical basis for such ‘scraping together’ of intentions.

The Dutch Supreme Court, ruling that the establishment of corporate intent does not require that associated natural persons have acted intentionally, has chosen an approach in which organisational fault *can* be decisive.¹⁰⁴ At the same time, a legal person’s intent can sometimes also be based on an individual employee’s intent.¹⁰⁵ Whether this is possible in a certain case depends on the internal organisation of the legal person and the natural person’s position and responsibilities (see Section 4.1). It appears that both models can be used alternatively (and maybe even in a ‘mix’) to establish corporate intent, depending on the circumstances and the available evidence. In our view such a pragmatic approach should be supported, considering that no single model is completely satisfactory.

However, it should not be forgotten that in the end it is the *corporation’s* intent that must be established. After all, a legal person is more than the sum of its parts and corporate liability must be distinguished from the personal responsibilities of its associates (see Section 2). If a corporation can demonstrate that it has taken all reasonable care to prevent the occurrence of criminal acts, it cannot be considered to have breached its duty of care. This means that there should be a possibility to invoke a due diligence defence, which prevents the establishment of corporate liability if the corporation acted with due care.¹⁰⁶ In a doctrine

101 Cavanagh, 2011, p. 432-436 (on the ‘corporate culture doctrine’).

102 Ibid., p. 427-429.

103 Keiler, 2013, p. 468.

104 HR 29 April 2008, *NJ* 2009, 130.

105 HR 15 October 1996, *NJ* 1997, 109.

106 Keiler, 2013, p. 502.

which focuses solely on an individual corporate agent's intent and automatically imputes this intent to the corporation, a corporation would even be convicted if one 'maverick employee' displayed criminal conduct, contrary to express corporate policy.¹⁰⁷ Ultimately, a single (even high-ranking) individual's intent, and even the scraping together of several individuals' intentions, cannot be decisive, if the corporation itself did not breach its duty of care. In such cases, attribution of intentions would indeed contravene the fundamental principle that no one can rightfully be punished for someone else's crime (Von Savigny).¹⁰⁸ In Dutch criminal law, the taking of due diligence measures is one of the relevant factors for the possibility to 'reasonably' attribute the *actus reus* to the legal person.¹⁰⁹ In cases where the *actus reus* is attributed to the legal person using (one of) the other criteria formulated by the Supreme Court, and the *mens rea* of one or more natural persons is also attributed to the legal person, the corporation can still be exculpated. Thus, the due diligence defence can be used to rebut an initial presumption that the corporation (intentionally) committed the offence.¹¹⁰ This is in line with the concept of shared intention. In our view, establishing corporate culpability is not about automatically imputing a (maverick) employee's intent to the corporation, or arbitrarily scraping together the intentions of random individuals. It is about the attitudes of the participants and interrelations between those attitudes, which are reshaped by the corporate structure and policies (CID structure) into the corporation's *own* intentional action.

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¹⁰⁷ Bucy, 1991, p. 1103-1104.

¹⁰⁸ See Section 2.

¹⁰⁹ I.e. under the fourth criterion of the 2003 Supreme Court judgment (see Section 4.1): 'acceptance' of the occurrence of the offence could be established if the entity did not take reasonable diligence to prevent it.

¹¹⁰ Based on the doctrine of 'absence of all guilt'; see Meyer, Van Roomen & Sikkema, 2014, p. 48-49.

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