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## **Book Review**

# **EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY**

**JAMES GOBERT  
& ANA-MARIA PASCAL  
LONDON: ROUTLEDGE, 2011**

**Reviewed by Mark FENWICK**

## BOOK REVIEW

### EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY

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One of the most important changes brought about by the entry into force of the Lisbon Treaty was the introduction of a new framework for European Union criminal law. The problematic characterization of criminal law as belonging to the third “pillar” of the Union and hence an “intergovernmental” issue was finally ended, thus placing criminal law issues on an equal footing with other areas of Union law.

Criminal law was first introduced into the EU as part of the creation of the “third pillar” in connection with the Maastricht Treaty in 1993. Subsequently, in 1999, the Amsterdam Treaty clarified the Union’s objectives in the “Justice and Home Affairs area” and established the concept of Freedom, Security and Justice. In addition, the important Tampere Council of 1999 and the Hague Program that followed transferred the internal market concepts of *mutual recognition* and *mutual trust* of judicial judgments into a criminal law context.

The Lisbon Treaty was significant because it introduced a more “supranational” approach in this area by abolishing the pillar structure and “constitutionalizing” criminal law. Of central importance are Articles 82 and 83 of the Treaty on the Functioning of the European Union. Whereas Article 82 restates the principle that judicial cooperation in criminal matters be based on the principle of mutual

recognition, Article 83 deals with substantive criminal law and establishes the principle that European institutions may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of serious crimes involving a cross border dimension or effects. The Council is given the power to identify wrongful acts that meet these criteria. Moreover, Article 83 enumerates a number of areas where the EU shall have legislative competence, namely organized crime, money laundering and terrorism.

As a potential check on these powers, Articles 82(2) and 83(1) and (2) introduce a so-called “emergency brakes” procedure, whereby a Member State may apply an emergency brake if the proposed legislation would affect a fundamental aspect of a Member State’s criminal justice system. This type of provision clearly shows the strong link that still exists between criminal law and national state power, as well as on-going anxieties amongst Member States about the potential loss of national sovereignty in criminal law matters. Although the relevant Treaty provisions provide other Member States with the option to push forward with legislation, despite such opposition – “if at least nine Member States wish to establish enhanced cooperation” – the existence of this kind of check on harmonization in this area points to the potential difficulties that still remain in developing a legitimate and effective sphere of European criminal law.

These recent developments at the EU level provide the background and context for the issues raised in this important collection of essays on the issue of *corporate* criminal liability. Over recent years, there has been a growing awareness of the transnational harm that companies, which conduct their business activities in a reckless or grossly negligent manner, can cause. Corporate scandals involving firms such as Enron, Lehman Brothers and Siemens are just a few high profile examples of companies whose unlawful behavior has had far-reaching – in some cases, even global – economic ramifications. In the context of regional organizations where the effects of corporate wrongdoing clearly spill over into other states, the question of how to

respond in a consistent, effective and principled way represents an important issue.

Nevertheless, a central finding of this volume is to highlight how the issue of what constitutes an appropriate response to corporate wrongdoing continues to divide jurisdictions within Europe. Most obviously, the issue of whether to even introduce *corporate* criminal liability, in addition to individual criminal liability, is still a contentious one amongst Member States, as is the secondary question of how to define the scope and limits of such a doctrine. As the Editors concede in their introduction, a comprehensive review of law in this area would be a “virtually impossible task” and settle on the more modest aim of providing the reader with “a sense of the diversity of laws that have been enacted.”

States taking a positive view of the potential of corporate forms of criminal liability have “transplanted” concepts of vicarious liability from a civil law context into the criminal law. This entails “imputing” criminal offences to a company that have been committed by a particular group of employees (for example, in the version favored by English law, the group senior managers). The problem with vicarious liability doctrines of this kind is that they seem to lack a principled basis, most obviously in the sense that a company can be exposed to the risk of a conviction despite having made reasonable, even rigorous, efforts to prevent the underlying criminal behavior. The illegal activities of one “rogue” employee can potentially expose the company to the costs of a criminal conviction and possible collateral damage to innocent third parties. The only check on the broad scope of such liability seems to be the exercise of prosecutorial discretion not to prosecute in those cases where the company has made reasonable efforts to prevent wrong doing.

However, in those jurisdictions where prosecutorial discretion is more constrained and the approach to criminal law is more principled, rather than pragmatic, imposing criminal liability on corporations has proven problematic.

It is for this reason that several states, such as Germany and Sweden have rejected corporate criminal liability altogether in favor of administrative legal liability. However, such an approach raises utilitarian concerns about the limited effectiveness of the deterrent effects of administrative liability on the grounds that they lack the stigma or “moral weight” associated with a criminal conviction.

A further source of differentiation covered in this volume is between those jurisdictions that seek to establish corporate liability as a general principle of criminal law (i.e. there is a presumption that “person” applies to corporations in the absence of clear reasons *not* to do so) and those states that prefer to adopt “designer” statutes addressing specific areas of corporate activities. Such statutes often impose strict or absolute liability and thus avoid the whole issue of how to conceptualize corporate *mens rea*, again raising concerns about the appropriateness of criminal liability.

This timely and provocative collection has a number of distinctive features; firstly, and perhaps most importantly, it provides a “snap shot” of the diversity of approaches that currently exists within European states over how to regulate corporate wrongdoing. The recent swathe of corporate scandals has prompted many jurisdictions to enter into a systematic re-evaluation of their strategies for dealing with corporate wrongdoing, and this book provides an overview of important developments occurring across Europe. The range of jurisdictions covered is impressive and by making much of this material available for an English language audience it provides a valuable reference point for anyone interested in this fast-moving field of law.

A second distinctive feature of this book is the emphasis placed on what is perhaps the key issue that advocates of corporate criminal liability need to address, namely the comparative institutional question, i.e. is *corporate* criminal liability likely to be more effective than *individual* liability in preventing corporate wrong-doing. What is the “value-added of *corporate* forms of criminal

liability? Of particular importance in this regard is the discussion in Part II of the book that seeks to emphasize the importance of criminological research in resolving this question. Thus far, much of the discussion on this point has been conducted at a more abstract level, so the attempt to examine empirically these issues represents an important departure that surely needs to be taken further.

As European criminal law emerges from the shadows and takes on a more central role within Union law, the challenge of managing the kind of legal diversity that exist between different Member State responses to socially undesirable transnational corporate activities will become increasingly urgent. A book such as this one that seeks to promote awareness of the diversity of legal mechanisms for tackling transnational corporate wrongdoing, as well the range of issues that need to be resolved, reveals the size of the challenge that surely lies ahead.

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