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Hands-off Prosecution: Feasibility of the European Approach

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The position of European institutions

- **2016 EU Council conclusions on business and human rights**
- **2016 European Parliament resolution**

'[c]alls on the Member States to tackle legal, procedural and practical obstacles that prevent the prosecuting authorities from investigating and prosecuting companies and/or their representatives involved in crimes linked to human rights abuses'

- **2016 Council of Europe resolution**

calls on Member States 'to establish criminal or equivalent liability for the commission of crimes under international law caused by business enterprises, treaty-based offences, and other offences constituting serious human rights abuses involving business enterprises'

***Why* has the criminal law not been popular in the European CSR context (1)**

- 1. Not all human rights violations qualify as violations of criminal law**
- 2. Criminal law requires the action of a public prosecutor**
- 3. Securing a criminal conviction is based on a more demanding standard of proof**
- 4. The criminal law may be too blunt a mechanism**
- 5. Not all European states know the concept of corporate criminal liability**

***Why* has the criminal law not been popular in the European CSR context (2)**

6. The principle of legal certainty

7. The retributivist goal of criminal law may be ill-suited to repair the damage done to victims

8. Some corporations are no more than shell companies

9. Prosecutors may face daunting investigative obstacles in extraterritorial cases

10. Criminal law is a shared competence of the EU and its member states

(art. 83 TFEU)

Article 83 TFEU

'The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.'

'On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.'

... 11. Jurisdiction?

- There are plenty of opportunities under the nationality and territoriality principles.
- But practical challenges abound.
- See also 2016 report of the International Corporate Accountability Roundtable

How does jurisdiction work in a civil law country?

The case of the Netherlands

- **Liability :**

- negligence – omissions – duties of care
- direct liability
- complicity

- **Jurisdiction:**

- territoriality
- nationality
- universality

Duties of care in the criminal law

- Organizational failures
- Duties of care and BHR
- Was it *reasonably possible* for the Dutch corporation to take precautionary measures?
- Scope of BHR due diligence
- Exceptionally: direct attribution

Nationality principle

- Place of activity irrelevant
- Dual criminality
- Direct attribution?

Territoriality principle

- Acts or omissions in the Netherlands
- Also foreign corporations
- Violations in different states...

Universality principle

- Offenses
- Presence requirement

Money-laundering Participation in an international criminal organization

- **Territorial connection**
- **Money-laundering**
 - *Argor Heraeus case*
- **Participation**
 - *Rabobank case*

Conclusion

- Plenty of options to prosecute
- Courage
- Resources
- Cooperation