

The Allocation of Criminal Liability within an Undertaking

Gorm Toftegaard Nielsen

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1 Statement of the Problem

Article 2 of the Danish Criminal Code states: ‘Unless otherwise provided, Chapters 1 to 11 of this Act shall apply to all punishable offences’. This means that all the general provisions of the Criminal Code such as rules concerning jurisdiction, prescription, mens rea etc. apply both when dealing with Criminal Code offences, such as robbery, rape and arson, and when dealing with punishable offences involving breaches of special administrative provisions such as building regulations, tax law and health and safety at work regulations. The most important variation of this general rule is that in principle there is a requirement for intention in order for there to be criminal liability for infringement of the Criminal Code’s provisions, while liability for a breach of other laws, typically administrative provisions, in principle merely requires negligence.

The principle stated in Article 2 means that in Danish law there is only one set of general rules for criminal cases. Thus, in Denmark, there is no special criminal law for administrative offences. This is important, since most of the cases which involve the allocation of criminal liability within an undertaking concern special legislation. It is rare for an undertaking to commit a Criminal Code crime. The problem examined here is: who should be punished when an undertaking commits a crime? Should it be a senior manager or a subordinate employee? As far as can be seen, this question has not been the subject of much attention by legal writers either in Denmark or elsewhere.¹ This may be due to the fact that many countries have a special system for dealing with such cases in the form of a special procedure for administrative offences. The lack of discussion in the Danish legal literature is because there are few legal rules in this area and little case law. The lack of case law is due to the fact that the prosecution authorities themselves decide who is liable when bringing a prosecution.

Article 23 of the Criminal Code regulates the liability of accessories in the following rule: ‘The penalty in respect of an offence shall apply to any person who has contributed to the execution of the wrongful act by instigation, advice or action.’ The provision is very broad and with the words ‘instigation’ and ‘advice’ it covers all forms of intellectual participation, just as the word ‘action’ covers all forms of physical participation. The most important restriction thus lies in the requirement that the person concerned should have contributed to the execution of the wrongful act. This does not imply that the actions of the accessory should be essential for carrying out the wrongful act. It is not even a requirement that the participation should in fact have influenced the carrying out of the action. For example, if A has agreed with B and C to commit a crime, A will be criminally liable as an accessory, even he breaks the agreement by not turning up when the crime is committed. Under Article 23, A will be criminally liable, not merely for having made the agreement, but for having participated in the commission of the crime itself. Because of the wording of Article 23, Danish

1 See however, Sysette Vinding Kruse: *Erhvervslivets kriminalitet*, 1983, p. 82-103; and Lasse Lund Madsen: *Strafbar medvirken i erhvervsforhold*, 2009 p. 323-339.

law does not need special rules on conspiracy, for example. If the agreement is not carried through to action, A, B and C will all be criminally liable for an attempt to commit the agreed crime, unless they all voluntarily abstain from committing the crime. In addition to the broad scope of the wording of Article 23, it is characteristic that it does not distinguish between principals and accessories, as is the case with the rules on accessories in most countries. Thus, in practice it does not matter whether participants themselves carry out some criminal action or merely assist the person who carries it out. Consequently it is often a matter of chance whether Article 23 is referred to in the indictment and in the judgment. The question is not considered important by the courts.

2 Internal and External Aiding and Abetting

As stated, Article 23 applies to both Criminal Code crimes, such as assault and theft, as well as for criminal offences committed by undertakings which are otherwise carried on lawfully, for example breaches of health and safety at work regulations. It could thus be tempting to believe that the problems concerning the two types of cases should be solved in the same way. However, this is far from being the case. If A, B and C commit a bank robbery together, all are punishable for the robbery. On the other hand, if a construction company breaches the building regulations it cannot be assumed that the manager and all the subordinate employees involved in the building work will be prosecuted. This and similar situations are referred to as '*internal aiding and abetting*', since those who are involved in committing the crime are all employed in the undertaking. In such cases the prosecution authorities will not even consider punishing all of those involved. Instead, a decision is made about which of the participants should be prosecuted. Another question is whether in these cases a prosecution should also be brought against the property developer – the party which is the client of the building company. In this situation the liability of an accessory is called '*external aiding and abetting*', as at least two undertakings are involved. In these cases too it cannot be assumed that both undertakings will be prosecuted. In many cases it will be reasonable to assume that company V1 has contracted with company V2, because V2 has expertise in the area in question – in this case construction – and that it is in the interests of society for V1 to let V2 carry out the work instead of doing the work itself. It can hardly be required that V1 should check the legality of the arrangements of V2. On the contrary, V1 should be able to rely on V2 complying with the building regulations, unless of course V1 gives direct orders concerning the unlawful part of the construction work. Article 30(3) of the Danish Law on construction contains a special rule on the allocation of criminal liability in such cases. The rule refers to a common-sense solution, which will often be the starting point for the prosecution authority's deliberations on external aiding and abetting and other kinds of cases.

3 The Special Aspects of Internal Aiding and Abetting

As stated, the practice of the prosecution authorities shows that, for example, in cases of robbery prosecutions are typically brought against all those who fulfil the conditions of the Criminal Code for criminal liability. Conversely, the starting point for offences against administrative rules will be that prosecutions should only be brought against a limited number of those who fulfil the conditions for criminal liability. There is no authoritative explanation for this phenomenon which, like much else in Danish law, is more based on pragmatism than principle. However, this practice can be explained on the basis of the two forms of aiding and abetting referred to.

If A, B and C agree to commit a robbery together, there is a joint enterprise to commit a crime. From the point of view of society, there is nothing beneficial about this enterprise. It is the opposite situation when building workers meet up for work in the morning. It is naturally not only in the interests of the construction company but it is also socially beneficial that construction workers should go to work. In contrast to the robber, in principle they meet in order to carry out lawful work. Another important difference is that the robbers typically share the proceeds of their robbery between them, while construction workers typically have no financial advantage in carrying out their work unlawfully. If any party has a financial advantage from this, it will usually be the construction company. This suggests that there should be some reticence in prosecuting the construction workers, and that liability should instead be put on the owner and/or senior manager of the company. The inclination to focus on the criminal liability of the senior manager is naturally reinforced by the fact that all undertakings have some hierarchy, which is also socially beneficial. In contrast, there is not typically any hierarchy between the robbers, though of course there could be a criminal gang. However, any such hierarchy will not be beneficial to society. There is a fourth clear difference. Those who embark on robbery, theft etc. as accessories are quite clear from the start that they are engaged in some criminal act. It is the opposite with building work. The building regulations are highly complex, and it is hardly necessary for society that all ordinary building workers should know all the rules, while such there could reasonably be a requirement made of the engineers and architects who design buildings and play an important role in the management of construction firms. As with much administrative regulation, building regulations are characterised by the fact that a building must typically be built in accordance with some licence for a specific building project, involving various drawings and substantive descriptions etc. Society does not have an interest in individual building workers going around with such materials all the time. On the contrary, like so much other rational production, rational building works take place with the production workers or construction workers being supervised by a person who has the licence documentation. This means that if there is an infringement of the rules, it is not appropriate to require ordinary workers to know the rules. Finally, there is a considerable evidentiary problem in determining which workers fulfil the conditions for criminally liability. None of the workers are obliged to make statements to the police.

It may be possible to identify an ordinary worker who appears to have infringed a regulation, but they will usually be disinclined to say anything about

the involvement in the infringement of their colleagues or even their superiors. This is understandable, as they will not find life in the workplace very easy after having stood witness against their superiors. It is thus the general experience of prosecutors that it is often possible to identify the lowest ranked in an undertaking who has been involved in some infringement, but it is often kept hidden that their infringement is the result of the actions of their superiors. It should be added that there is nothing unlawful in an employee covering for their superiors and taking the whole blame themselves. This will also mean that the fine will be relatively small, and the undertaking will be able to cast itself in a positive light by paying the worker's fine so the worker is indemnified. The undertaking will get off lightly, as the fine will be measured against the income of the worker. It is therefore understandable that the prosecution authorities generally try to put the responsibility on the senior manager of the undertaking.

4 The Liability of Senior Management

As stated above, the liability of senior managers should be assessed in accordance with the general rule on liability on Article 23 of the Criminal Code. It is thus clear that a senior manager who has physically participated in an infringement can be punished. But it is seldom that a senior manager participates physically in an infringement. Sometime a manager will have given orders for the infringement, but he will of course typically keep quiet about this, while those receiving such orders will not wish to inform against their manager to the police or the courts. The manager's liability must usually be based on the fact that they knew about the infringement but did nothing about it, quite possibly because the infringement benefited the output of the undertaking. For example, in some cases it has been possible to show this when the police have confiscated the tachograph discs from buses and lorries of transport companies. In several cases it has been clear that drivers have repeatedly submitted discs which show that they have driven for longer periods than allowed without the owner of the transport company having stopped these infringements. However, it is only rarely that the prosecution can prove that employers have remained passive when clearly aware of the infringements of their employees. If the evidence is clear, then there is no doubt that a manager can be punished as an accessory.

As stated, the Criminal Code only has the general rule in Article 23, which contains nothing specific about the conditions for punishing a manager as an accessory to the infringements committed by subordinate workers. However, management responsibility is regulated by law in one particular area. In Article 3 of the Law on the criminal liability of ministers it is stated that: 'A minister is regarded as aiding and abetting the actions of their subordinates if:

1. they have been aware that the action in question would be taken and have refrained from seeking to prevent it,
2. the action has been a necessary or natural means for implementing a decision for which the minister is responsible, or
3. the minister has promoted the carrying out of the action by not ensuring reasonable supervision and giving directions.'

Cases against ministers in respect of the performance of their ministerial responsibilities are heard by the Special Court of Indictment and Revision, which consists of an equal number of Supreme Court judges and persons elected by Parliament. These persons may not be Members of Parliament. The prosecution is brought by Parliament. One minister has been found liable under these provisions. On 22 June 1995 a former Minister of Justice was found guilty of having infringed the Law on aliens for a seven month period for having prevented a number of family members from obtaining residence permits, even though they had a right to residence permits under the law in order to join their family members who were resident in Denmark as political refugees from Sri Lanka.

The Minister decided that in these cases there should not be grants of the residence permits which the persons in question were entitled to under the law. When the cases had been processed they were put in abeyance under the Minister's general decision. The indictment against the Minister was that, as Minister of Justice, he had been responsible for the cases not being decided. 15 of the 20 members of the Special Court of Indictment found the Minister responsible for taking the decision in question. The situation was thus covered by Article 3(2), but this provision was not named in the judgment, nor was there a reference to its wording. One cannot help being surprised that the indictment did not characterise the minister's conduct by reference to the provisions in Article 3, but merely stated that he, as minister, was responsible for the civil servants not completing the processing of the cases.²

In adopting the rule on the management liability of ministers in the Law on the responsibilities of ministers, it has been pointed out that this was a special situation and it should not be assumed to be generally applicable. The usual textbooks on criminal law do not refer to this provision when dealing with the question of a manager's liability as an accessory, which is generally dealt with very briefly. Thus Knud Waaben merely states as follows on management liability:³

'... where at the higher level it is shown that there are failings with regard to the planning of the work, the establishment of controls and security measures, the appointment of properly qualified junior management etc. Decisions on individual liability at the higher level can be based on the unwritten rules on the failure to act (where there is a duty to act) and negligence. But liability may also be found to relate to actions (for example, wrong instructions given to employees) and intentional circumstances (for example, approving the carrying out of work in unlawful conditions, during the sick leave of a manager, or without waiting for the repair of defective materials).'

Vagn Greve's presentation⁴ contains a more comprehensive discussion of the criminal liability of managers. The presentation does not refer to the rule in the Law on the criminal liability of ministers, but recommends that the solution

2 On the whole of this system for liability, see Jens Peter Christensen: *Ministeransvar*, 1997.

3 *Strafferettens almindelige del I, Ansvarslæren*, 4th ed., 1997 p. 219.

4 *Det strafferetlige ansvar*, 2nd ed., 2004 p. 179-181.

should to some extent be found in the company law rules on the duties of the board of directors and individual directors, which are dealt with in detail. For example, it is stated that the allocation of functions between directors can affect criminal liability so that the director who is responsible for the work in an area in which an infringement has been committed can be found guilty, while one or more of the other directors with responsibilities for other work areas may be exculpated; this is illustrated by a case from the Western High Court, where proceedings were brought against two owners of a partnership who had, among other things, neglected to keep tax accounts. The partner responsible for the accounts was punished. The other owner, who was a bricklayer, did not have anything to do with the accounts and knew nothing about the infringements; he was found guilty in the District Court but not guilty in the High Court, with reference to the allocation of responsibilities.⁵ The case clearly demonstrates an important problem. The prosecution has a tendency merely to base criminal liability on the fact that the accused is responsible because they are the senior manager or owner of the undertaking. However, this does not justify them being punished for every infringement committed by an employee of the undertaking. It is not a criminal offence to own or manage an undertaking. There must be some criminal involvement in the infringement committed by the employee, and this must be made clear in the indictment. However, there have been many cases where this has not been the case. In addition to the case just referred to, there was a decision of the Western High Court where the accused was indicted for, 'as the responsible manager', failing to return a questionnaire sent to the undertaking,⁶ and a Supreme Court decision where the accused 'as chairman' of a football club was responsible for the fact that a floodlight mast at the club's ground was not properly maintained, so that a boy was killed by touching the mast.⁷ In one area of the law the owner of an undertaking has objective liability. Under Article 83 of the Law on health and safety at work, an owner of an undertaking owned by a partnership or a sole proprietor is liable for certain infringements of the employees. There will often be objective management liability, as these will be small undertakings where the owner is also the manager of the firm.

In one particular area in Denmark there has been a well established practice for indicting and convicting managers of undertakings. In 1967 the taxation of employees at source was introduced, which means that when paying wages and salaries the employer has to withhold the amount which the employee should pay in tax. The employer must then pay this amount directly to the tax authorities. Failure to make such payment was punishable. The starting point in these cases was that it was the undertaking that was punished and not the manager. However, if the same person was the majority shareholder, chief executive and the day-to-day manager, they were punished instead of the

5 U [Ugeskrift for Retsvæsen] 1984.643 V.

6 U 1979.659 V.

7 U 1993.551 H. In Lasse Lund Madsen: *Strafbar medvirken i erhvervsforhold*, 2009, p. 325 ff., several examples are given of cases where managers have been convicted without evidence of their personal fault.

company, without there being proper proof of their personal guilt. If the accused was not the owner of the undertaking, but only the chief executive and day-to-day manager, the undertaking paid 80 % of the fine and the manager the remaining 20 %. Here again there was typically no proper proof of the personal guilt of the manager. It is surprising that in these cases, where the amount of the fine was often quite considerable, there was no discussion of the manager's personal guilt. This is probably due to the fact that the punishment for not paying the withheld tax was so onerous that infringements were virtually only committed by undertakings which did not have sufficient liquidity to pay the State. This is because the fine meant that an undertaking paid what was effectively very high extra interest for the late payment, with the risk of being found being 100 %. The oversight of whether an undertaking has sufficient liquidity to pay its creditors is so clearly one of the key responsibilities of a manager, that it was unlikely to be mistaken to establish an overwhelming presumption that the manager was involved in the failure to pay the withheld tax in these cases. Apart from the problems of placing liability in these cases, one could also debate the justice of punishing managers for illiquidity for which they may not be to blame. This criminal liability was abolished in 2004. This was not because legislators objected in principle to this criminalisation of the lack of ability to pay, but because its enforcement demanded too many resources of the tax authorities.

Apart from the area of tax, there is no established practice for bringing prosecutions against the senior managers of undertakings. In some cases prosecutions are brought against members of the board of directors and in some cases prosecutions are brought against the chief executive. In these cases there is generally a requirement for evidence to be given that the manager is personally involved in the infringement. However, even in these cases it is the exception that a manager is personally accused. This is because authority to prosecute the undertaking itself was introduced in Denmark at an early stage.

5 Corporate Liability

At the beginning of the 1900s, Danish agriculture invested in developing the export market for butter. The view was that such a project required there to be a guarantee of the quality of the butter which was produced in a large number of cooperative dairies. It was agreed that the butter should be marketed using the Lurpak trade mark, and in order to ensure quality, effective sanctions were introduced for dairies which did not meet the agreed quality standards. The agricultural sector therefore needed an effective system of penalties against defaulting dairies. Previously proceedings for a dairy's infringement of the regulations had been brought against either the chairman of the board or the day-to-day manager of the dairy – the dairy manager. It was agreed that the liability of the person against whom, proceedings were taken was not necessarily because they had done anything wrong personally, but was based on a legal fiction. In order to avoid people who were in fact innocent being punished, Parliament introduced the Butter Act (Law No 109 of 10 April 1926); Article 4 of the Butter Act made it possible to punish the dairy as a legal person: 'If the owner or user is

a cooperative, limited company or similar and if the infringement is only liable to punishment by a fine, then the undertaking by the person of the chairman of the board shall be held liable.' The intention was that dairy cooperatives should be punished and that the chairman of a cooperative should only stand as its representative, but apparently the wording was not easily understood.

In the following decades several laws included provisions whereby companies could be punished. However, there were no provisions on when a company could be punished for a given infringement, and the case-law gave no clear answer. It was first in 1996 that general provisions were included in the Criminal Code on the conditions for punishing a company. First, it is a requirement that the special law in question should give authority for punishing companies; see Article 25. According to Article 27(1), such an infringement can be punishable if it is committed by one or more of the employees of the undertaking as part of the operation of the undertaking, and if the employees have acted intentionally or negligently, if the law infringed makes criminal liability conditional merely on a duty of care. There is no requirement for evidence that any member of the company's management should be to blame. The fault of an ordinary employee is sufficient, and the employee need not be identified.

The fact that for many years it has been possible to prosecute and convict undertakings has led to considerable restraint in seeking to punish members of the management of a company. As stated, the only clear exception to this has been in the area of taxation, where there has been a significant tendency to bring proceedings against persons. Some cases involve such gross infringements that the sentence given was often for imprisonment. Such gross infringements naturally lead to prosecutions being brought against persons. Imprisonment is widely used in animal welfare cases, and prosecutions are typically brought against persons rather than undertakings. In 1990, 158 passengers and crew died on board the ship *Scandinavian Star*, which was sailing from Oslo in Norway to Frederikshavn in Denmark. The ship had been put in on the route with such haste that it had been impossible for the crew to learn the necessary emergency procedures for dealing with a fire on board. The ship's captain, the shipping line and its chief executive were all sentenced to 6 months unconditional imprisonment, which was the maximum sentence provided in the law for such cases. The case did not deal with the disaster itself, but only the ability of the ship and its crew to deal with the situation. It is presumed that the fire was started by one of the passengers who died in the fire.⁸ In other areas prosecutions are not in practice brought against members of the management. This appears always to be the case when a company is punished for infringements of health and safety at work regulations. In most cases of infringements of marketing law, prosecutions are overwhelmingly only brought against companies.

In the area of administrative offences, prosecutions are typically brought by the administrative authority which has competence in the area in question. As appears from the examples given, these authorities follow different practices with regard to their tendency to prosecute the manager of an undertaking where

8 U 1994.62 H. The case is discussed in detail by Lars Bo Langsted: *Lovens strengeste straf*, in Peter Garde et al (eds.): *Mindeværdige Retssager*, 2002 p. 257-270.

there is an infringement. In order to ensure more uniform practice, the Director of Public Prosecutions has issued a notice on the choice of whom to prosecute in cases involving corporate liability, the Notice of the Director of Public Prosecutions (RM) 5/1999. The notices of the Director of Public Prosecutions are published on the Director of Public Prosecutions's website, but they are not legal rules in a formal sense, but internal instructions, which are issued to all subordinate prosecutors, which means all prosecutors in practice. There is thus a direct order from a superior to his subordinates. The Notice only covers the choice of whom to prosecute in those cases where the legislation provides for bringing a prosecution against a company. In principle, a prosecution is always brought against the company, and against a member of the management if they – typically a senior manager – have committed a serious offence intentionally or by gross negligence. Where a senior manager, who otherwise fulfils the conditions for criminal liability, avoids liability because of the company's liability, the cases concern less serious infringements or serious infringements where the manager concerned has merely acted with simple negligence. The Director of Public Prosecutions refers to the fact that there are areas where the legislation imposes independent and individual liability for infringements of managers, and gives the example of the liability of skippers of fishing boats for unlawful fishery, air pilots for infringements of air traffic regulations, and surveyors for infringements of their special regulations.

As indicated, the Notice of the Director of Public Prosecutions is not followed to the letter. For example, in cases of breaches of health and safety at work regulations prosecutions are only brought against the company and not against the members of the company's management. Conversely, with tax offences, prosecutions are usually brought against individuals and not against companies.⁹ As stated, the Director of Public Prosecutions has issued internal instructions, and there is considerable uncertainty about what their significance is if a prosecuting authority brings a prosecution in contravention of these instructions. In a case which has been widely discussed, the prosecuting authorities brought proceedings when a boy who was training at his football club was killed when he was adjusting the light from a lighting mast. The boy's death was due to a short circuit at the top of the mast, and this was linked to the fact that the lighting system had not been checked and serviced for several years. A prosecution was brought against the chairman of the football club, even though it was agreed that he had not infringed the electricity regulations either directly or by gross negligence, but only by simple negligence. According to the then applicable instructions of the Director of Public Prosecutions, the prosecution should have been brought against the football club, and not against anyone in the management of the club. Neither the District Court nor the High Court appear to have been aware of this problem, but it was examined in detail in the Supreme Court. The predominant view of legal theorists was that the courts cannot dismiss a case by reference to internal instructions. On the other hand, most can see that it is paradoxical that the Director of Public Prosecutions should conduct a case in the Supreme Court and that the Court should just pass judgment, even

⁹ See Jan Pedersen: *Skatte- og afgiftsstrafferet*, 2nd ed., 2001, p. 88 ff.; and G. Toftegaard Nielsen in *Hyldestskrift til Jørgen Nørgaard*, 2003 p. 998.

though some subordinate prosecutor has brought the prosecution in contravention of the Director of Public Prosecutions's instructions. If a case is brought against a person by mistake, should the court add insult to injury and convict the accused? The Supreme Court cited an extract of the instructions of the Director of Public Prosecutions, and argued that the chairman of the football club had not had special cause to be concerned about the lighting system, that his was a voluntary post, and that a prosecution could have been brought against the club. The Court then concluded: 'Under these circumstances, the Supreme Court does not find that the accused has shown negligence such as to justify imposing criminal liability on him in his capacity as chairman for the club.' It is natural to interpret the judgment as a finding that the accused had acted with simple negligence but not gross negligence, and was therefore found not guilty. The Supreme Court arrived at a decision which corresponded to a finding that the accused should not be found guilty because according to the internal instructions he should not have been indicted. But on the other hand it is clear that the Supreme Court did not arrive at this conclusion merely on the basis that the prosecution had been brought in contravention of the internal instructions.¹⁰

6 Issues Concerning Managers of Small Personally-owned Firms

The Danish rules on corporate liability cover all undertakings except personally-owned undertakings with fewer than 10-20 employees.¹¹ As stated above, when a prosecution is brought against an undertaking, its management will often avoid being personally indicted. If there is no undertaking to be prosecuted, typically because it is too small to fall under the heading of corporate liability, the management's risk of being prosecuted and found guilty is accordingly greater. It is difficult to decide whether there is an increased risk for such managers in practice. In reality, these cases often concern farmers whose undertakings are carried on in the form of a sole proprietor with a work force of considerably fewer than 10. If, for example, there is a significant pollution from slurry, it will be possible to place the responsibility on the person who has spread the slurry on the fields, but in practice the police and prosecution authorities will probably be more inclined to see whether it is possible to punish the owner of the undertaking. However, this requires it to be possible to attach some personal blame to the owner.

In one area it is possible to punish the owner of a small personally-owned undertaking for a breach by the undertaking, regardless of whether the owner is blameworthy. According to Article 83 of the Law on health and safety at work, an employer can be punished for a number of breaches of the law, even though a breach cannot be ascribed to the intention or negligence of the employer. However, it is a condition for such liability that the breach should be committed

10 G. Toftegaard Nielsen: *Thomsen skulle ikke have været tiltalt*, in *Festskrift til Hans Gammeltoft-Hansen*, p. 473 ff.

11 See Vagn Greve et al: *Kommenteret Straffelov, Almindelig del*, 8th ed., 2005 p. 241.

intentionally or negligently by one or more persons connected with the undertaking or by the undertaking as such. This rule creates equality between small personally-owned undertakings – typically agricultural holdings – and larger undertakings. This equality is seen in the fact that the owner of a small undertaking can be liable for the infringements of their employees, but the punishment is only a fine and under no circumstances can this be converted to imprisonment, as is the case with normal fines that require some personal fault. The rule referred to has been further complicated by an amendment in 2006,¹² which exempts certain kinds of named offences which are otherwise covered by objective liability.¹³

7 The Criminal Liability of Ordinary Employees

In the criminal offences dealt with here it will often be an employee who has committed the offence. As referred to in section 3 above, there are a number of considerations which naturally lead to some restraint in punishing ordinary employees who infringe special legislation as part of the operation of an undertaking.

In the Notice of the Director of Public Prosecutions, referred to above, on the decision as to whom to bring proceedings against in cases of corporate liability, it is also stated that, where it is possible to bring proceedings against the undertaking, ‘proceedings should not normally be brought against an ordinary employee, unless there are particular reasons for doing so. This can be the case if there is a serious infringement which the ordinary employee has committed intentionally, and possibly on their own initiative.’ This makes it clear that ordinary employees should not be prosecuted merely because the conditions for criminal liability exist. There must be extraordinary serious circumstances.

On the liability of ordinary employees, there are also cases where the legislation imposes independent and individual responsibility on persons for compliance with the rules. For example, if an employee of a freight transport company drives with an excessive load, both he and the company can be punished. Altogether in the area of road traffic the practice is clearly to punish the driver. In some cases both the driver and the company are punished, while in other cases, for example traffic offences such as exceeding the speed limit or driving through a red light, it is only the driver who is punished, even though under Article 118(10) of the Law on road traffic, there is general authority to punish undertakings. There is no authority for punishing an undertaking for drinking and driving. Generally there is also a tendency to punish drivers outside the area of the road traffic laws. For example drivers are liable together with employers for breaches of the rules on drivers’ rest periods. There is also a tendency to punish drivers for breaches of animal welfare regulations when transporting live animals.

¹² Law No 300 of 19.4.2006.

¹³ G. Toftegaard Nielsen: *Selskabsansvar i arbejdsmiljøsager*, in *Festskrift til Jørn Vestergaard*, 2008 p. 387 ff.

The restrictions referred to on bringing proceedings against subordinate personnel only directly concern employees in an undertaking who can be independently liable. This means that the restrictions do not apply to employees in smaller personally-owned undertakings such as agricultural holdings. Thus, if a farm employee spreads slurry and thereby pollutes a watercourse, there are no internal instructions or legal provisions which limit the employee's liability. On the face of it, it seems regrettable for a carpenter, who is employed in a personally-owned carpentry firm, to be prosecuted for an infringement for which his colleague, who is employed in a corresponding undertaking carried on by a private company, is not prosecuted. In many cases one would not even contemplate prosecuting ordinary employees. This applies, for example, to shop assistants who sell unlawful goods (with the exception of fireworks) and take part in printing illegal marketing material etc. No more would it be thought appropriate to punish a secretary who has merely written out the manuscript of their boss.

Many of the infringements of subordinates are presumably linked to the instructions or orders they have been given. Normally it does not excuse liability that some unlawful act has been committed while obeying an order. However, this general maxim is derived from cases concerning general crimes and war crimes. This typically involves intentional crimes of a serious nature and breaches of rules which society can justifiably expect will be known to all citizens. But, as referred to above, the situation is different if an ordinary employee unintentionally infringes the rules of a special law. Knud Waaben argues that the State does not have an interest in creating an obligation to obey in the private sector, where employees are not subject to punishment for refusing to obey an order to do something unlawful. However, it should be mentioned that an employee can risk being dismissed and that in certain cases it can be reasonable just to punish a superior.¹⁴ It is perhaps too hasty to conclude that the State does not have an interest in private employees carrying out the work they have been set to do. Under Article 82, No 6, of the Criminal Code, in measuring the quantum of punishment account should generally be taken of the mitigating circumstance that the act has been carried out, among other things, as consequence of coercion. Under Article 83, in cases where there are mitigating circumstances punishment may be remitted. In most of these cases the prosecuting authorities will not indict.

In one area legislation has been made stricter since the Director of Public Prosecutions issued his Notice. The Law on health and safety at work was amended by Law No 300 of 19 April 2006. Criminal provisions were introduced in Article 82, following paragraph 3, as follows:

'In passing sentence in accordance with paragraph 1, to the extent that the employer has fulfilled their obligations under Chapter 4 of this Law [on various actors' general duties under the Law] it shall be considered an aggravating circumstance that an employee, intentionally or with gross negligence, is in breach of the requirements of the law concerning

14 Knud Waaben: *Strafferettens almindelige del I, Ansvarslæren*, 4th ed., 1997 p. 114.

1. the use of means of personal protection,
2. the use of extraction measures,
3. the use of protective equipment or security measures,
4. the use of proper working methods, or
5. certificates for the use of cranes and fork-lift trucks.’

According to Article 84, the undertaking is not liable in these cases. This also applies to employers in small personally-owned undertakings, see Article 83(3).

The subtitle of the amending Law is: Restrictions on the criminal liability of employers and the increase of punishment for certain offences committed by employees etc. As the title indicates, the intention was to increase the use of punishment for ordinary employees and exempt undertakings from liability where the undertakings had fulfilled their obligations. The provisions was clearly not prepared by the Ministry of Justice, as under Article 27 of the Criminal Code an offence is considered to be the offence of the employer merely by being committed by an employee in the course of their employment. When Article 82(3) of the Law on health and safety at work says that an employer has fulfilled their obligations, it does not mean the legal employer, i.e. the company, but the management of the undertaking. This means that in such cases the company is to be found not liable if no blame is attached to the management, and instead the subordinate employee is to be punished for the breach of the law. If an employee dies in carrying out work, it is possible that the undertaking can be punished for negligent homicide under Article 241 of the Criminal Code. With breaches of this provision, Article 27(1) of the Criminal Code will have been fulfilled. This suggests that, where there is nothing to blame the management for but only the ordinary employees, an undertaking must be found not guilty of breach of the Law on health and safety at work, but guilty of negligent homicide. As has been said, employers in small personally-owned undertakings have objective liability for the offences of their employees. Under Article 83(3) this liability is limited in the same way as the liability of companies. The Director of Public Prosecutions has issued Notice No 8/2006 on breaches of the Law on health and safety at work. In the Notice the Director of Public Prosecutions reviews the previous practice on the basis of the commentary to the draft law, and states that there has been a certain tightening up, as prosecutions will now also be brought against employees in cases where it is not sought to make the undertaking liable. There is no mention that this is a clear departure from the Director of Public Prosecutions’s own Notice discussed above on the prosecution of employees. There is likewise no mention of the fact that in this area of the law the practice is not to prosecute members of the company’s management.¹⁵

15 For a more detailed discussion see G. Toftegaard Nielsen: *Selskabsansvar i arbejdsmiljø-sager*, ‘Lad toppen gå fri, straf kun den, den står den bi’, in *Festskrift til Jørn Vestergaard*, 2008 p. 387 ff.

8 Conclusion

In cases where it is possible to punish an undertaking which has committed an offence against special laws, the undertaking is prosecuted. If members of the senior management have participated in committing the offence intentionally or by gross negligence, then according to the notices of the Director of Public Prosecutions they should be indicted. However, this only occurs to a limited extent and depends considerably on the practice of the competent authority. On the other hand, there is broad agreement that punishing the company means that there is no need to institute fictive criminal liability for senior managers who are in fact not to blame. Prosecutions are only very seldom brought against most ordinary employees, apart from cases under the law on health and safety at work, where legislation has recently changed the law, so the main rule in this area is to bring prosecutions against the ordinary employee directly responsible and not against the company. Apart from this, various laws, primarily road traffic laws, are interpreted so that the primary liability is the personal liability of the driver, while the liability of the company is corresponding less than under the general rules.

Abbreviations

U: *Ugeskrift for Retsvæsen* – a weekly legal periodical. The first number indicates the year, and the number after the full stop indicates the page number. H refers to case reports of decisions of the Supreme Court. Ø and V refer to case reports of decisions of the Eastern and Western High Courts respectively. B after the year shows that the reference is to an article in the commentary section of the periodical.