Actus reus and participation in European criminal law
SCHOOL OF HUMAN RIGHTS RESEARCH SERIES, Volume 60

The titles published in this series are listed at the end of this volume.
Actus reus and participation in European criminal law

JOHANNES KEILER
During one of our first meetings in 2007 my supervisor warned me that “writing a PhD may jeopardise your health”. At this point in time I thought he was joking; after all I had just landed my dream job. Five years later I am still convinced that doing legal research is my dream job, but I also came to realise after some sleepless nights pondering criminal liability, that there might be a kernel of truth in this statement. Corresponding to the current zeitgeist one should perhaps even consider printing this statement in bold letters on top of every PhD contract.

Writing this book has overall been an immensely enjoyable experience; one which would not have been possible without the help of many people, to whom I am very grateful. First and foremost, I would like to thank Gerard Mols, Michael Faure, Jacques Claessen and John Spencer for reading and approving the manuscript of this book. I would also like to thank everyone at Maastricht University and the department of criminal law for making this book possible and for creating a very enjoyable working atmosphere.

Moreover, thanks are due to my supervisor André Klip. Your clear and critical view of criminal law and legal research has helped and guided me throughout this research and has shaped and influenced my thinking on criminal law. Your passion regarding European criminal law has been truly inspiring. Thank you for your confidence in me and your ever–calm presence when I was on the verge of panic.

I wish to thank my co-supervisor, David Roef, for all our inspiring and challenging discussions about the foundations of criminal law and criminal liability (long may they continue!). Thank you also for all your invaluable feedback, advice and support during this project. You have greatly contributed to my growth as a scholar.

Part of this project also consisted of verifying the results of this comparative research with academics and practitioners from the investigated penal systems. In Germany Oberstaatsanwalt Lutz Bernklau and Richter Gerd Nohl helped to improve my knowledge of German criminal law and the German legal culture. In England I am indebted to Peter Alldridge, David Ormerod, William Wilson and Jeremy Horder. Thank you for welcoming me in London and giving me ample opportunity to discuss many issues of English criminal law. I am particularly indebted to William Wilson for closely reading and commenting on one of my early drafts on English criminal law.

At Oxford Andrew Ashworth diligently read and commented on my draft report on English criminal law. Thank you for warmly welcoming me at this beautiful University and for our valuable discussion on criminal law.

A factor which was very influential to this book was that I had the privilege to be part of the research team on European criminal law at Maastricht University, consisting furthermore of Jeroen Blomsma, Anne-Sophie Massa and Christina
Acknowledgements

Peristeridou-Rübenach. I have learned a lot from all of you and you have greatly contributed to my development as a researcher. Thank you. Our common visits of many conferences and trips abroad will always remain with me.

Jeroen, my partner in crime during the last five years: thank you for our invaluable countless discussions on criminal liability, this research project, etc. You have been my perfect counterpart in this project and you played a huge role in making me feel at home here in Maastricht.

Roland, thank you for making me feel at home here in Maastricht and for all our immensely interesting, stimulating as well as hilarious discussions in and outside the University. You have certainly helped to sharpen my view on the different shades of grey always to be found between the clear black and white poles of a matter.

I would also like to thank everyone in and outside the university for all their support and for all the great spare time activities. You know who you are!

Kati, thank you for being there and for your endless support, patience and understanding throughout the past five years. Thank you also for your very valuable feedback and comments on earlier drafts of this book. You were always willing to listen and help out wherever possible and you always knew when it was time for me to take a break. Without you this book would not have been possible.

Last but not least, I would like to thank my family and friends back home. Mum, Dad, Steffi, thank you for your support during my entire life. You shaped me and without you I would not stand where I stand now. Mats, Nielse, Leo, Mike and Much, thank you for warmly welcoming me every time I return to Austria, be it only for a few days. Your friendship means a lot to me and you are the living proof that the saying “out of sight out of mind” need not always be true.

Maastricht,

12 November 2012
CONTENTS

Acknowledgements ......................................................... vii
List of Abbreviations ..................................................... xv

Chapter I
Introduction ................................................................. 1

1. European criminal law ................................................. 1
2. The need for a general part ........................................... 3
   2.1. Practical Relevance ............................................. 3
   2.2. Theoretical relevance .......................................... 5
3. Research questions .................................................... 6
   3.1. Introduction ..................................................... 6
   3.2. Elaborated research questions and outline .................... 8
      3.2.1. Perpetration ............................................... 8
      3.2.2. Participating in crime – the multiple actor scenarios .. 10
      3.2.3. Inchoate liability ......................................... 10
      3.2.4. Corporate Criminal liability ............................ 11
4. Methodology ............................................................. 12
   4.1. Introduction ..................................................... 12
   4.2. Comparative research ......................................... 13
      4.2.1. The investigated penal systems ......................... 13
      4.2.2. Comparative methodology ............................... 17
   4.3. Criteria for synthesis ......................................... 18
      4.3.1. External criteria for the synthesis ...................... 18
      4.3.2. Internal criteria for the synthesis ..................... 20
5. Criminal Liability .................................................... 29
   5.1. Definition ....................................................... 29
   5.2. Harm versus Culpability and Objectivism versus subjectivism in the law .................................................... 31
   5.3. The framework of criminal liability ........................... 32
   5.4. Criminal liability in the risk society ......................... 34

Chapter II
Perpetration – The elements of crime .................................. 39

1. Introduction ............................................................. 39
2. The doctrine of conduct or the conundrum of the baseline of criminal liability ........................................... 41
   2.1. Introduction ..................................................... 41
Chapter III
Modes of liability – The multiple actor scenarios ............................................. 153

1. Introduction ........................................................................................................... 153
2. Terminology and outline ..................................................................................... 154
   2.1. Terminology ..................................................................................................... 154
   2.2. Outline ............................................................................................................ 156
3. Unitarian and differentiated concepts of participation ........................................ 157
4. The derivative nature of the accomplices’ liability ............................................. 159
   4.1. Introduction ..................................................................................................... 159
   4.2. Rationales for secondary liability .................................................................... 160
   4.3. The nature and quality of the derivative relationship .................................... 163
5. The concepts of participation in England: a short introduction ......................... 167
   5.1. The English approach to participation ........................................................... 168
   5.2. Secondary forms of participation .................................................................... 171
      5.2.1. Actus reus .................................................................................................. 171
      5.2.2. The fault element in complicity ................................................................. 177
   5.3. An expansion of liability – The Serious Crime Act 2007 ............................... 180
6. Perpetration: Choices and Dilemmas .................................................................. 183
   6.1. Introduction ..................................................................................................... 183
   6.2. A Restrictive or extensive conception of perpetration? ................................. 185
      6.2.1. The different connotations of perpetration ............................................. 185
      6.2.2. The restrictive concept of perpetration .................................................... 186
      6.2.3. An extensive concept of perpetration ...................................................... 188
   6.3. A Subjective or objective approach to perpetration? ..................................... 189
   6.4. Concluding remarks ....................................................................................... 192
7. Vertical forms of perpetration .............................................................................. 194
   7.1. Introduction ..................................................................................................... 194
   7.2. The Perpetrator behind the scene ................................................................... 195
      7.2.1. The German hegemony over the act doctrine ....................................... 196
      7.2.2. The Dutch doctrine of functional perpetration .................................... 200
      7.2.3. The English doctrine of vicarious liability ............................................. 209
      7.2.4. Evaluation ............................................................................................... 212
   7.3. Perpetration by means .................................................................................... 214
      7.3.1. The traditional scope of the doctrine ..................................................... 214
      7.3.2. The different designs and limitations of the doctrine ............................. 217
      7.3.3. Extending perpetration by means .......................................................... 222
      7.3.4. Concluding remarks .............................................................................. 227
   7.4. Instigation ....................................................................................................... 229
      7.4.1. Introduction ............................................................................................... 229
      7.4.2. Instigation in Germany and the Netherlands ......................................... 230
      7.4.3. The fault element of instigation ............................................................... 233
      7.4.4. Errors of the perpetrator and their effect on the instigator ................... 235
      7.4.5. The means of instigation in the Dutch penal system ............................... 235
8. Horizontal forms of perpetration ........................................... 240
  8.1. Co-perpetration ............................................................... 240
     8.1.1. Expanding the scope of mutual attribution ................. 245
     8.1.2. Is mere presence sufficient to establish co-perpetration? 248
     8.1.3. The limits of mutual attribution .............................. 253
  8.2. The English doctrine of joint criminal enterprise .............. 258
  8.3. Concluding remarks ..................................................... 262
9. Assisting a criminal offence ................................................ 266
  9.1. Introduction .................................................................... 266
  9.2. Assistance in the Netherlands, Germany and England/Wales 266
  9.3. The scope and nature of assistance .................................. 269
     9.3.1. The scope of assistance ........................................... 269
     9.3.2. The nature of assistance ......................................... 271
  9.4. The furthering effect of aid (causality) ............................. 273
  9.5. The fault element of assistance ....................................... 280
10. Limitations to participatory liability – Withdrawal .................. 291
    10.1. Withdrawal from participation in a joint enterprise ....... 292
    10.2. Withdrawal from assistance and encouragement ............ 293
11. The notions of perpetration and participation in EU Law ......... 295
    11.1. Introduction ............................................................... 295
    11.2. The notions of agreement and concerted practices .......... 299
    11.3. The objective requirement .......................................... 300
    11.4. The subjective requirement ........................................ 302
    11.5. The model of participation in competition law ............... 303
    11.6. Evaluation ............................................................... 303
12. Preliminary conclusion ...................................................... 306
13. Towards a European concept of participation ......................... 311
    13.1. Introduction .............................................................. 311
    13.2. A normative concept of participation in crime ............... 311
    13.3. Trivial assistance ...................................................... 317

Chapter IV
Inchoate offences: Attempt and preparation ............................ 321

1. Introduction ................................................................. 321
2. Two patterns of criminality ................................................ 324
   2.1. The pattern of manifest criminality a.k.a. the harm-centred view 324
   2.2. The pattern of subjective criminality a.k.a. the culpability- centred view 325
2.3. The communalities of the two patterns ............................. 326
3. The Objective – Subjective Debate ..................................... 327
4. The pattern of criminality in the culture of control ................. 328
5. Attempt versus preparation .............................................. 331
Contents

9.4.2. Voluntariness ................................................. 418
9.4.3. The actus contrarius in complete attempts ................. 421
9.5. Voluntary withdrawal from preparation? ....................... 425
10. Inchoate offences in the European Union ......................... 426
11. Conclusion .......................................................... 431
  11.1. Preparation ..................................................... 431
  11.2. Criminal attempts ............................................. 432

Chapter V
Criminal liability of legal entities .................................. 437

1. Introduction .......................................................... 437
2. Alternative and complementary methods to tackle corporate wrongdoing ........................................ 441
  2.1. Introduction ..................................................... 441
  2.2. Regulatory offences ............................................. 442
  2.3. Strict liability offences ........................................ 445
  2.4. Personal liability of corporate directors ...................... 445
3. Models of Corporate criminal liability ........................... 447
  3.1. Introduction ..................................................... 447
  3.2. Objective models of liability: Vicarious liability and the benefit theory ........................................ 450
  3.3. The identification doctrine in English law .................... 453
      3.3.1. The application of the identification doctrine .......... 455
      3.3.2. Acting within the scope of corporate duty ............. 456
      3.3.3. The Meridian Case: Towards a more flexible approach of identification? .................................... 457
      3.3.4. The impact of the Corporate Manslaughter and Corporate Homicide Act 2007 ............................... 458
  3.4. The identification doctrine in the German Administrative Offences Act ............................................. 459
  3.5. The identification doctrine in European Union Law .......... 463
  3.6. The attribution of fault ........................................ 464
  3.7. The pitfalls of the identification doctrine ................... 465
  3.8. Alternative models of liability ................................ 467
      3.8.1. The Drijfmest (slurry) judgment ........................ 477
      3.8.2. Jurisprudence after the Drijfmest (slurry) judgment .... 482
      3.8.3. The Corporate Manslaughter and Corporate Homicide Act 2007 .................................................. 485
4. Corporate culture and ethos ........................................ 493
  4.1. Introduction ..................................................... 493
  4.2. Organisational fault ........................................... 493
5. Conclusion ............................................................. 497
  5.1. Introduction ..................................................... 497
  5.2. Corporate liability ............................................... 500
Chapter VI
Conclusion – Towards a general part of European Criminal Law ........ 503

1. Introduction ........................................ 503
   1.1. The increasing normativity of criminal liability .... 504
   1.2. The limits of criminal liability .................. 504

2. A European concept of actus reus ........................................ 508
   2.1. The conduct requirement ......................... 508
   2.2. Omission liability ................................ 509
   2.3. Causality ........................................ 512

3. Multiple actor scenarios ........................................ 513

4. Inchoate offences ........................................ 517

5. Corporate criminal liability ........................................ 522

6. Concluding remarks ........................................ 524

Selected Bibliography ........................................ 527
Summary ........................................ 557
Samenvatting ........................................ 569
Curriculum Vitae Johannes Keiler ........................................ 583
# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeals Cases</td>
</tr>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>appl. no.</td>
<td>application number</td>
</tr>
<tr>
<td>Art</td>
<td>Article</td>
</tr>
<tr>
<td>All ER</td>
<td>All England Law Reports</td>
</tr>
<tr>
<td>BayObLG</td>
<td>Bayerisches Oberstes Landesgericht</td>
</tr>
<tr>
<td>BeckRS</td>
<td>Beck-Rechtsprechung</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof</td>
</tr>
<tr>
<td>BGHSt</td>
<td>Bundesgerichtshof’s Official Gazette, criminal cases</td>
</tr>
<tr>
<td>BVerfG(E)</td>
<td>(Decision of the) Bundesverfassungsgericht</td>
</tr>
<tr>
<td>CLR</td>
<td>Commonwealth Law Reports</td>
</tr>
<tr>
<td>COM</td>
<td>Document originating from the EU Commission</td>
</tr>
<tr>
<td>Cox CC</td>
<td>Cox’s Criminal Cases 1843–1945</td>
</tr>
<tr>
<td>CPS</td>
<td>Crown Prosecution Service</td>
</tr>
<tr>
<td>Cr App R</td>
<td>Criminal Appeal Reports</td>
</tr>
<tr>
<td>Crim LR</td>
<td>Criminal Law Review</td>
</tr>
<tr>
<td>DPC</td>
<td>Dutch Penal Code</td>
</tr>
<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
</tr>
<tr>
<td>EC</td>
<td>European Communities</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention of Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECR</td>
<td>European Court Reports</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EPPO</td>
<td>European Public Prosecutor’s Office</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EWCA</td>
<td>England &amp; Wales Court of Appeal</td>
</tr>
<tr>
<td>EWCA Crim</td>
<td>England &amp; Wales Court of Appeal (Criminal Division) Decisions</td>
</tr>
<tr>
<td>EWHC</td>
<td>England &amp; Wales High Court</td>
</tr>
<tr>
<td>GA</td>
<td>Goldhammer’s Archiv für Strafrecht</td>
</tr>
<tr>
<td>GDR</td>
<td>German Democratic Republic</td>
</tr>
<tr>
<td>GPC</td>
<td>German Penal Code</td>
</tr>
<tr>
<td>HMG</td>
<td>Hoog Militair Gerechtshof</td>
</tr>
<tr>
<td>HRRS</td>
<td>Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht</td>
</tr>
<tr>
<td>HR</td>
<td>Hoge Raad</td>
</tr>
<tr>
<td>JA</td>
<td>Juristische Arbeitsblätter</td>
</tr>
<tr>
<td>JR</td>
<td>Juristische Rundschau</td>
</tr>
<tr>
<td>Jura</td>
<td>Juristische Ausbildung</td>
</tr>
</tbody>
</table>
List of Abbreviations

JuS Juristische Schulung
JZ Juristenzeitung
KB King’s Bench
LJ(J) Lord Justice(s) of Appeal
MDR Monatsschrift für Deutsches Recht
MPC Metropolitan Police Commissioner
NbSr Nieuwsbrief Strafrecht
NJ Nederlandse Jurisprudentie
NJB Nederlands Juristenblad
(N)JW (Neue) Juristische Wochenschrift
NJOZ Neue Juristische Online Zeitschrift
NSStZ(-RR) Neue Zeitschrift für Strafrecht (-Rechtsprechungsreport)
OJ L Official Journal of the EU – Legislation
OJ C Official Journal of the EU- Information and notices
OLAF European Anti-Fraud Office
OLG Oberlandesgericht
OWiG Ordnungswidrigkeitengesetz
QB(D) Queen’s Bench (Division)
R Regina
Rb. Rechtbank
Re Regarding (ablative of res)
REV Revised version of a EU document
RG Reichsgericht
RGSt Reichsgericht, criminal cases
s Section
StV Strafverteidiger
StGB Strafgesetzbuch
TEU Treaty on the European Union
TFEU Treaty on the functioning of the European Union
UK United Kingdom
UKHL United Kingdom House of Lords
UKPC United Kingdom Privy Council
US United States (of America)
v versus
WLR Weekly Law Reports
ZRP Zeitschrift für Rechtspolitik
ZStW Zeitschrift für die gesamte Strafrechtswissenschaft