

The Concept of Intent in Rulings of the Court of Justice of the European Union

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*The concept of intention is used in different ways in many regulations of the EU. The Court of Justice of the EU has given a description of intention and accepted *dolus eventualis* as a form of intention. This article examines several relevant judgments of the Court, especially case C-396/12. These judgments show a double emancipation process. Not only are legal concepts used in the European Union emancipated from those concepts used in the national legal traditions of the Member States. These concepts are also emancipated from the field of law in which they were developed in the Member States.*

1 INTRODUCTION

In case C-396/12, the Court of Justice of the EU gave an explanation of the meaning of the concept of intentional non-compliance in Regulations Nos 1698/2005 and 1975/2006, again accepted *dolus eventualis* (a description of which will be given below) as a form of intent, and gave a ruling on the criteria according to which a beneficiary of aid may be held responsible for an act or omission of a third party.

The European Union (EU) common agricultural policy is partly aimed at developing and encouraging an environmental-friendly farm management in accordance with provisions of the Treaty of the Functioning of the European Union (Articles 38 and 191 respectively). Farm management is supported by subsidies in the form of income support for farmers (called beneficiaries of aid) who in return are obliged to take measures that are aimed at protecting the environment. One aspect of this environmental friendly farm management is that the spreading of manure must take place at a low level in emissions. Not respecting this and other requirements as a result of an action or omission directly attributable to the beneficiary of aid shall lead to the cancelation or reduction of subsidies (Article 51 Regulation No 1698/2005). The regulations do not make clear what national authority should carry out inspections, nor what authority should be

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charged with the decision to cancel or reduce the income support. In the Netherlands, the Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*) (formerly the General Inspection Service (*Algemene Inspectiedienst*)), carries out inspections to assess compliance with the regulation requirements of the common policy. When the Authority finds an instance of non-compliance, a provincial executive of the province within which the farm is situated adopts a decision to cancel or reduce the subsidy.

A distinction is made between non-compliance due to negligence on the part of the beneficiary of aid and intentional non-compliance (Article 23 Regulation No 1975/2006). The meaning of negligence and intent are not made clear in the regulations. Article 8 of the Dutch Policy Decree on the adoption of the common agricultural policy (*Beleidsregels over de toepassing van het normenkader randvoorwaarden in het kader van de directe inkomenssteun aan landbouwers in het kader van het Gemeenschappelijk landbouwbeleid*), describes various criteria on the basis of which it may be determined whether the beneficiary of aid acted intentionally. Amongst others, these criteria concern: ‘the complexity of the cross-compliance concerned’, whether or not there was ‘a long-established, settled policy’, and the farmer’s ‘active performance of an act or the deliberate omission of an act’.¹

In the case which I will discuss in this article, the General Inspection Service carried out an inspection to assess compliance with the requirements of the common agricultural policy by the Van der Ham holding. The Service determined that manure had been spread in a manner which was in breach of the common agricultural policy. It was established that the manure was spread by an agricultural contractor who was employed by Van der Ham. In accordance with the aforementioned Policy Decree, the Provincial Executive of the province of Southern-Holland reduced the subsidies to Van der Ham by 20%, stating that the latter had intentionally failed to comply with the rules of the Decree. Intent was established ‘on the ground that the obligation to spread manure in a manner which is low in emissions is a long-established, settled policy within the meaning of Article 8(2)(c) of the Decree’.

Van der Ham and his wife (Van der Ham-Beijersen van Buuren) started an action against this decision. The district court of The Hague dismissed the claim, but the Dutch Council of State stayed the procedure and asked three questions to the Court of Justice of the European Union (hereafter: the Court). These three questions were: ‘How should the term “intentional non-compliance” (...) be understood?’, ‘Does European Union law preclude a ruling in a Member State

¹ Decree 24 Jul. 2006, *Staatscourant* 2006, 148, p. 8, replaced by the Decree of the State Secretary for Economic Affairs, Agriculture and Innovation of 16 Dec. 2010, *Staatscourant* 2010, 20450. The criteria for establishing intention are mentioned in Art. 5 of the new Decree. They are the same as the ones in Art. 8 of the former Decree.

that there is “intentional” non-compliance with a scheme, within the terms of those regulations, simply because one or more of the (...) circumstances (mentioned in Article 8 of the Policy Decree (or rules?) obtained”; ‘Can “intentional non-compliance” be attributed to the beneficiary of the aid if a third party carries out the works on his instructions?’ The ruling of the Court is interesting because it gives a (regulation-dependent) description of intent, accepts ‘*dolus eventualis*’, makes clear how to decide whether or not someone acted intentionally, and lays down when a beneficiary of aid acts intentionally in the event an act is committed by a third party hired by the beneficiary of aid.

2 THE COURT’S RULINGS

The Court answered the first question as follows. First, the relevant regulations do not describe the meaning of ‘intentional non-compliance’. Secondly, these regulations do not refer to the law of the Member States.² It follows from this that ‘intentional non-compliance’ must be determined by ‘an independent and uniform interpretation’. In deciding on the meaning of ‘intentional non-compliance’, the Court took into account ‘the usual meaning of those words, the context of those articles [art. 23 Regulation No 1975/2006 and Articles 66 and 67 Regulation No 796/2004] and the objective pursued by the legislation of which they are part’ (paragraph 32). The Court ruled that ‘intentional non-compliance’ is made up of two elements, an objective element (‘non-compliance’) and a subjective element (‘intent’). Intent is described as engaging in particular conduct ‘either with the aim of bringing about a situation of non-compliance with the rules on cross-compliance, or not seeking such an objective but accepting the possibility that non-compliance may result’ (paragraph 35).

The Court answered the second question by firstly stating that that the relevant regulations do not lay down ‘methods for taking evidence to establish that non-compliance with the requirements of cross-compliance was intentional’ (paragraph 39). Therefore, Member States are free to incorporate rules of evidence to establish intent (paragraph 40). When a Member State uses ‘long-established, settled policy’ as a criterion with high probative value for establishing intent, it must make it possible for the beneficiary of aid ‘to adduce evidence of the lack of intent in his conduct’ (paragraph 41).

Concerning the third question, the Court remarked that the sanctioning regulations were developed to cancel or reduce the subsidies for those who receive these subsidies and do not act in accordance with the regulations (pars. 44, 52).

² Court of Justice of the European Union 27 Feb. 2014, Case C-396/12, para. 31 (Van der Ham and Van der Ham-Reijersen van Buuren). In the following I will refer to the relevant paragraphs in the text.

The reduction or cancellation of subsidies is only allowed in the event that non-compliance with the regulations is committed negligently or intentionally. However, referring to the opinion of Advocate-General Kokott, the Court stated that the European legislator ‘wanted [to] make the beneficiary of aid responsible both for his own acts or omissions and those of third parties’ (paragraph 46). Therefore, the question the Court had to answer, was not whether or not a beneficiary of aid can be held responsible under Regulations Nos 796/2004 and 1975/2006 for acts which he did not commit personally. Rather, the question was on the basis of which criteria he may be held responsible if the act was committed by a third party. It follows from this that even if a third party committed the act, it must be established that the beneficiary of aid acted intentionally or negligently (paragraphs 47, 48).

A beneficiary of aid may be held responsible for acts committed by a third party, but where ‘a third party who carried out work on his plot on his behalf, it is necessary that the conduct of that beneficiary is intentional or negligent’ (paragraph 49). The Court further considered that, ‘even if the beneficiary of aid’s own conduct is not directly the cause of that non-compliance, it may be the cause through the choice of the third party, the monitoring of the third party or the instructions given to the third party’ (paragraph 50). Finally, whether or not the third party himself acted intentionally or negligently is irrelevant for the purpose of answering the question whether or not the beneficiary of aid may be held responsible for his negligent or intentional conduct (paragraph 51).

3 THE COURT’S DESCRIPTION OF INTENT

3.1 A ‘UNIFORM’ CONCEPT

The concept of intent is frequently used in different types of European Union legislation and is expressed in various ways, for example as ‘intentional’ (Regulation No 1975/2006); ‘knowingly’ (Directive 2005/60/EC), ‘knowingly and intentionally’ (Regulation No 423/2007), ‘with intent’ (Directive 2008/841/JHA). The Court has thus far not given a general ruling on the meaning of intent.³

In 1979, the Court agreed in the *Rinkau* judgment that intent is a concept that should be regarded as an independent concept within the European Community. This is necessary ‘in order to ensure as far as possible that the rights

³ In competition cases, the Court focuses on the knowledge of the applicant. In ECJ 1 Feb. 1978, Case C-19/77 (Miller); ECJ 11 Jul. 1989, Case C-246/86 (Belasco) the court ruled that, to establish whether or not the applicant acted knowingly, it has to be established whether the applicant could have been aware ‘that they had as their object the restriction of competition between its customers’ (Belasco case, para. 18).

and obligations of the contracting States and of the persons concerned arising from the Convention [of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters] are equal and uniform'.⁴ Equal and uniform treatment of persons thus form the Court's main arguments for an independent interpretation of the concept of intent. In the more recent case of *Afrasiabi and others*, the Court ruled that intent is a concept that should be given an autonomous and uniform interpretation throughout the European Union.⁵ The Court does not deploy the principles of equality in the *Afrasiabi and others* judgment, but points only to the lack of reference in the legal systems of the Member States, for the purposes of interpreting intent. In my view, this is a different approach, where a more instrumental perspective is taken, vis-à-vis the more fundamental reference to the principles of equality and uniformity in the *Rinkau* judgment?

In both the *Rinkau* and *Afrasiabi and Others* judgments, the Court uses the term uniform. This could be seen as somewhat misleading, because it is clear that the Court does not strive for a general interpretation on the concept of intent, applicable for the whole of EU law. A uniform interpretation of intent actually means a uniform interpretation of intent, as described in Regulation No 423/2007 concerning restrictive measures against Iran. According to Article 7 of that Regulation, knowingly and intentionally participating in activities that, directly or indirectly, circumvent the measures against Iran shall be prohibited. Similar descriptions of intent can be found in other regulations concerning restrictive measures against various states, such as Syria.⁶ Whether the autonomous and uniform interpretation of 'knowingly and intentionally' in Regulation No 423/2007 can be used in other regulations that use the same terms for intent, is unclear. I do not think it to be unacceptable that one variation of intent, such as 'knowingly and intentionally', used in various regulations dealing with the same issue (e.g., introducing restrictive measures against a state), may be interpreted similarly in those regulations that deal with different subject areas. This would be recommendable from the point of view of uniformity, and would enhance equality. However, the Court should be clearer on this point.

3.2 'THE CONTEXT OF THOSE ARTICLES'

Returning to the *Rinkau* judgment, the Court stated that intent 'must be explained by reference, first, to the objectives and scheme of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and

⁴ ECJ 26 May 1981, Case 157/80, para. 11 (*Rinkau*).

⁵ ECJ 21 Dec. 2011, Case C-72/11, para. 66 (*Afrasiabi and others*).

⁶ See Art. 9 Regulation No. 269/2014 and Art. 12 Regulation No. 224/2014.

Commercial Matters and, second, to the general principles which the national legal systems have in common.⁷ In the *Van der Ham* judgment, the Court did not refer to the ‘general principles’ of the legal systems of the Member States. For the interpretation of intent, the Court takes into regard ‘the usual meaning of those words, the context of those articles and the objective pursued by the legislation of which they are part’ (paragraph 32).⁸ Thus, for the explanation of the meaning of intent, grammatical and teleological interpretation are important methods. The grammatical interpretation method seems also to be have used in the *Afrasiabi and others* case, indicated by the fact that the Court uses synonyms to describe the words ‘knowingly’ and ‘intentionally’.⁹ However, a teleological interpretation is more commonly used by the Court.¹⁰

The use of the words ‘context of those articles’ has been used only once before the *Van der Ham* judgment.¹¹ In that case, the Court was asked whether a company could invoke *force majeure*. The interpretation thereof was dependent on the ‘particular context’ of the articles which the company had to comply with. The ‘particular context’ not only refers to the specific place of the articles in certain legislation, but also to the interests those articles mean to protect. This seems insignificant for the meaning of intention. In the *Van der Ham* case, the phrase of ‘particular context’ seems to refer to the form of intent (e.g., can *dolus eventualis* be accepted?) and the way of proving intent.

3.3 THE MEANING OF INTENTION

According to the Court, if a directive or regulation does not make any reference to the legal systems of the Member States, it is not necessary to refer to the general principles of the legal systems of the Member States. Obviously, for the

⁷ ECJ 26 May 1981, case 157/80, para. 11 (Rinkau). Note that the Court refers to the ‘legal systems’ in general, not to one particular part of those legal systems, like civil law or criminal law. The Court seems to make clear that, however certain concepts have been developed in a particular part of the law (like intention in criminal law), that does not mean that for the interpretation of that concept within European legislation, the Court is obliged to follow the interpretation of that concept in that particular part of the law.

⁸ See also ECJ 4 May 2010, Case C-533/08, para. 44 (TNT Express Nederland); ECJ 22 Nov. 2012, Case C-219/11, para. 13 (Brain Products). See on the Court’s interpretation methods G. Beck, *The Legal Reasoning of the Court of Justice of the EU* 187–233 (Hart Publishing 2012).

⁹ ECJ 21 Dec. 2011, Case C-72/11, para. 66 (Afrasiabi and others). In case of doubt, a text of a provision should not be judged in isolation. In that case, ‘it requires that it be interpreted and applied in the light of the versions existing in the other official languages’ (ECJ 10 Sep. 2009, Case C-199/08, para. 54 (Eschig)).

¹⁰ See amongst others ECJ 9 Mar. 2006, Case C-436/04, para. 35 (van Esbroeck); ECJ 16 Nov. 2010, Case C-261/09, para. 38 (Mantello); ECJ 27 May 2014, Case C-129/14PPU, para. 79 (Spasic).

¹¹ ECJ 7 May 1991, Case C-338/89 (Danske Slagterier). By force majeure is meant ‘abnormal and unforeseeable circumstances, outside the operator’s control, the consequences of which, in spite of the exercise of all due care, could not have been avoided’ (ECJ 17 Oct. 2002, Case C-208/01 (Parras)).

interpretation of concepts used in both EU Law and the national legal systems of the Member States, the Court is free to be inspired by the legal systems of the Member States. Both Advocates-General Bot and Kokott refer to general principles (in particular international human rights¹² – Not only to the Charter of fundamental rights of the European Union – but also to the laws that the Member States of the European Union have in common.

From these general principles, the Advocate-General in the case of *Afrasiabi and others* (Bot) deduces that ‘the offender should have acted in full awareness and of his own free will, that is to say, that his awareness and will should not have been overborne by mental disorder and/or constraint’. According to Bot, the words intentionally and knowingly (in Regulation No 423/2007) ‘designate therefore the mental element inherent in the offence here specifically penalized, as expressed by the legislation providing the basis for the offence, in accordance with the requirement of precision demanded by the principle of the legality of the criminal law’.¹³ Referring to the *Afrasiabi and others* judgment, Kokott concludes in her opinion in the *Van der Ham* case, that intention is made up of two elements: a mental element and the element of a free will. According to Kokott, this conclusion ‘is based on a view sufficiently widely accepted in Europe (...) for it to be assumed that the European Union legislature is guided by it when using the term intent’.¹⁴

The Court uses the word ‘aim’ to describe intention as used in Regulation No 1975/2006. By using this word, it is clear that the element of free will is part of the concept of intent. Less clear is whether the mental element is part of the concept of intent. This concept is not mentioned in several translations of the Court’s judgment, including the English, French and Dutch translations. However, a reference to the mental element can be found in the German translation of the Court’s judgment (‘bewusst’). One could conclude from this that when the term ‘intent’ is used in a European Union regulation, this only contains the free will element, and not the mental element.¹⁵ The fact that the Court emphasizes the mental element in the case of *Afrasiabi and others* can be explained by the fact that besides to intent, the term ‘knowingly’ is used in Regulation No 423/2007. It seems that the term intent solely contains the free will element, such as in the *Van*

¹² Note that the European Court of Human Rights has ruled that the interpretation of intention is for the contracting states to decide. See e.g., ECtHR 30 Aug. 2011, No. 37334/08 (G./United Kingdom).

¹³ Opinion A-G Bot in Case C-72/11, para. 84 (*Afrasiabi and others*).

¹⁴ Opinion A-G Kokott, Case C-396/12, para. 35 (*Van der Ham*) (hereafter: Opinion). See on intention in European criminal law U. Sieber, *Europäisches Strafrecht* 276 (Nomos 2011) which states: ‘Das europäische Strafrecht geht vom Vorsatz als dem Wissen und Wollen der Tatverwirklichung aus.’

¹⁵ In ECJ 28 Oct. 2010, Case C-367/09, para. 77 (Belgisch Interventie- en Restitutiebureau) the Court judges that for intention, proof of knowledge is necessary. This brings Klip to the conclusion that knowledge is part of intention (*European Criminal Law. An Integrative Approach* 202, n. 793 (Intersertia 2011)). The aforementioned judgments show that this is not generally the case.

der Ham judgment. However, we cannot conclude from either judgment that the Court limits the meaning of the *doctrine* of intent to the element of free will. The Court only explains the meaning of the word ‘intent’, as used in EU regulations.¹⁶

4 THE RELATIONSHIP BETWEEN INTENT AND NON-COMPLIANCE: *DOLUS MALUS*?

Another question arising from the Court’s judgment in *Van der Ham* is how intention is related to non-compliance in Regulation No 1975/2006.¹⁷ In criminal law doctrine, two views can be distinguished in this regard. In the first view, intent has a neutral character, which means that for proving intent, it is not necessary to establish that the actor wanted to breach the law, nor that he knew that he was breaching the law. What is necessary, is that he knew what the consequences of his act would (or could) be and that his aim was that those consequences occur. In the second view, to prove intent, it is necessary to establish that the actor knew that his conduct or the consequences of his conduct was illegal and that he wanted to trespass the law. In this view, intention is described as *dolus malus*.¹⁸

In the *Van der Ham* case, the Court ruled that intentional non-compliance exists of two elements, an objective and a subjective element. In what way these elements are interrelated, is not made clear. The impression may be that the two elements are not related to each other. This could imply that the Court has embraced the first view of intent described above. However, it is important to realize that for cancelling or reducing income subsidy, the beneficiary of aid must have non-complied intentionally. The acts of the beneficiary of aid are thus aimed at non-compliance or the beneficiary of aid accepts the possibility that non-compliance may result from his acts. This more closely resembles *dolus malus* (paragraphs 35 and 37).¹⁹ However, the fact that the Court accepted that intent of non-compliance can be proved if there was ‘a long-established, settled policy’ forms an argument that *dolus malus* is not the view the Court holds with regards to

¹⁶ In general, it is clear that intention should be distinguished from negligence (ECJ 26 May 1981, Case 157/80, para. 11, 15 (Rinkau)). Acts that were committed intentionally are more serious than acts that were committed non-intentionally. Therefore, acts committed intentionally justify a higher penalty (ECJ 15 Jul. 1970, Case 41/69, para. 186 (ACF)).

¹⁷ In general, intention is related to all elements of a regulation of which intention is part of (Sieber et al., p. 276).

¹⁸ See J. Blomsma, *Mens Rea and Defences in European Criminal Law* 85–88 (Intersertia 2012).

¹⁹ *Dolus malus* is not the same as *mala in se*. The latter refers to crimes which are criminalized because they are ‘wrong in themselves’ (R.A. Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* 89 Hart Publishing 2007). However, it is not necessary to use *dolus malus* in the description of a *mala in se*, because the crime is wrong in itself.

intent, as it is then not necessary to prove that the beneficiary of aid knew that what he was doing was wrong.

Embracing *dolus malus* in this case would have been contrary to what is generally accepted in Dutch law, but also in the criminal law of other legal systems of Member States of the European Union. However, the increase in amount and complexity of European legislation could provide an argument to accept *dolus malus*.²⁰ EU legislation, however, is not clear on this point.²¹ An argument for the neutral vision on intent is that citizens who act in a certain highly-regulated part of the public sphere, should be aware of the regulations that have been adopted in that part of the public sphere. Unawareness of the law can only be an excuse under exceptional circumstances.

5 DOES THE COURT ACCEPT *DOLUS EVENTUALIS*?

The Court distinguishes intent from negligence.²² This important distinction does not make clear what form of intent is acceptable under EU law. Blomsma argues that *dolus eventualis* should not be accepted as the lowest form of intention available in EU law. Rather, he argues for strengthening of the position of negligence (in the form of recklessness) in EU law.²³ It would appear however that the Court is taking a different stance. In the *Van der Ham* judgment, the Court describes intent not only in terms of ‘aiming’ but also in terms of ‘accepting the possibility that non-compliance may result’ (pars. 35, 37, 42). In the Dutch and German versions of the *Afrasiabi and others* judgment, the Courts uses the expression ‘op de koop toenemen’ or ‘billigend in kauf nehmen’.²⁴ These expressions are used in describing *dolus eventualis*²⁵ and can be seen as a translation of accepting the possibility (see the English translation of the *Afrasiabi and others* judgment).

In the *Van der Ham* judgment, the Court ruled that the lowest form of intent can be described as accepting the possibility that non-compliance may result. Legal

²⁰ See Blomsma 88–93 (2012).

²¹ See e.g., Art. 6 Directive 2013/40/EU (‘intentionally, the access without right’); Art. 5 Directive 2011/92/EU (‘intentional conduct, when committed without right’); Art. 3 Directive 2008/99/EC (‘unlawful and committed intentionally’).

²² In ECJ 26 May 1981, Case 157/80, para. 15 (Rinkau) negligence offences are described as offences which were not intentionally committed and may result from carelessness’. A variation of negligence, serious negligence, ‘must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation’ (ECJ 3 Jun. 2008, Case C-308/06, para. 77 (Intertanko)).

²³ Blomsma 164–166 (2012).

²⁴ ECJ 21 Dec. 2011, Case C-72/11, para. 67 (Afrasiabi and others). See also Opinion paras 35, 36.

²⁵ See K. Hoffmann-Holland, *Strafrecht Allgemeiner Teil* 60–63 (Mohr Siebeck 2011); J. de Hullu, *Materieel strafrecht* 225–232 (Kluwer 2012—).

doctrine recognizes accepting the possibility as the lowest possible (however, not generally accepted) form of intent.²⁶ The fact that the Court has accepted this form of intent, is interesting. It makes clear that the Court does not take much notice of the way in which *dolus eventualis* is discussed in the various legal systems of the Member States.²⁷ The Court's decision follows from and is in agreement with its ruling that in defining intent, it has regard for 'the usual meaning of those words, the context of those articles and the objective pursued by the legislation of which they are part'.

In the *Van der Ham* judgment, the Court does not refer to the legal traditions of the Member States. How can we explain this? One explanation could be that, the Court does not see fit to interpret intent from the perspective of the dogmatic foundations of the legal systems of the Member States, because there are too many differences among the law of the Member States with regards to the interpretation of intent, including the issue as to what should be the lowest acceptable form of intention. Another explanation could be that, traditionally, intent is a concept that is classically used in criminal law, but has nowadays also come to be used in administrative and tax law. Taking the criminal law perspective as a starting point could lead to decisions that are not in accordance with the goals of both administrative and tax laws. By not referring to the national (criminal) legal systems of the Member States, the Court is able to develop its own interpretation of intent which may be useful in different fields of law.²⁸ A third explanation for choosing 'accepting the possibility', as the lowest form of intent could be that the Court does not want a gap to exist between intent and negligence. However, from a dogmatic point of view, preventing such a gap from occurring does not require that the lowest form of intent should be accepted. An alternative would be to accept a higher form of negligence. That would make the lowest form of intent less relevant. However, it is possible that the Court does not want to introduce a higher form of negligence in regulations that do not explicitly use this form of negligence (like Article 4 Directive 2005/35/EC ('recklessness' or 'serious negligence') and Article 9, under f Directive 2011/93/EU ('recklessness')).²⁹ We

²⁶ See amongst others R. Card, A.R.N. Cross & P.A. Jones, *Criminal Law* 79–87 (Oxford U. Press 2008); G. Williams & D.J. Baker, *Textbook of Criminal Law* (Sweet & Maxwell 2012) Nos 4-019–4-024. See also various European handbooks in criminal law, for example: J. Remmelink, *mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse strafrecht* 205–206 (Gouda Quint 1996); P. Canin, *Droit pénal général* 66 (Hachette 2013); Hoffmann–Holland 2011, pp. 60–61.

²⁷ See Blomsma 2012, pp. 99–134, 142–164.

²⁸ I cannot go into this argument in more detail. See in general R. Widdershoven, *Encroachment of Criminal Law in Administrative Law in the Netherlands*, 6 Electronic J. Comp. L. (2002).

²⁹ It may be possible that the Court accepts a difference between negligence and recklessness. However, in what way negligence and recklessness differ, the Court does not clear. From the Court's judgments, we know that the Court recognizes various forms of negligence (see Blomsma 2012, p. 174), but it is not clear whether the Court sees recklessness as a form of negligence (or vice versa). Neither is it clear

can only speculate as to this final point. The Court should make clearer clear how intent and negligence interrelate, especially when the national legal traditions are of no direct importance for an autonomous and uniform interpretation of these concepts.

6 CRITERIA TO PROVE INTENT?

In *Van der Ham*, the Dutch provincial executive decided that Van der Ham had acted intentionally on the basis that spreading manure in conformity with the common agricultural policy was ‘a long-established, settled policy’. Following the Opinion of Advocate-General Kokott, the Court rules that such an objective criterion to prove intent is acceptable, provided that the State makes it possible for the beneficiary of aid ‘to adduce evidence of the lack of intent of his conduct’ (paragraph 41),³⁰ especially if the criterion that is used has a high probative value. The Court does not make clear in the *Van der Ham* case what is meant by high probative value, nor why some criteria have a high probative value.³¹ The phrase is used in other judgments, especially in competition cases. In those cases, ‘high probative value’ is used for evidence that is very reliable. The reliability of evidence, e.g., of certain statements, is measured by, among others: ‘(i) the weight of consistent indicia supporting those statements and (ii) the absence of indicia that they might have tended to play down the importance of their contribution to the infringement and maximise that of other undertakings’.³²

According to the Advocate-General, most of the criteria mentioned in Article 8 of the Dutch Policy Decree ‘appear capable of supporting a finding of intent’.³³

whether the Court accepts any liberty on the part of the member states (the national courts in particular) to describe both negligence and recklessness in accordance with their own national legal standards. If that is case, no doubt differences among the member states will occur. For example, the meaning of negligence under English law differs from that under Dutch (and German) law. Under Dutch law, negligence does not have a whole objective meaning. Next to this, recklessness is a form of negligence. This means that to establish recklessness and negligence is similar. Third, negligence and recklessness differ on the part of the objective element (the more careless the defendant acted and the more serious the risk for grave consequences, the sooner an act can be called reckless). Under English law, negligence is not an extreme form of negligence, and recklessness and negligence differ especially on the side of the subjective element, which in case of negligence is only being taken into account in exceptional cases. See D. Ormerod, *Smith and Hogan's Criminal Law* 128, 148–150 (Oxford U. Press 2011); D.J. Baker, *Textbook of Criminal Law*, No. 5–002 (Sweet & Maxwell 2012).

³⁰ See also ECJ 23 Dec. 2009, Case C-45/08, paras 43–44 (Spector).

³¹ This could be explained by the fact that the Court decided that, because the relevant regulations have not laid down ‘methods for taking evidence to establish that non-compliance with the requirements of cross-compliance was intentional’ (para. 39). As a consequence, ‘the Member States have the option of laying down provisions to establish the intentional nature of an infringement of the rules of cross-compliance’ (para. 40).

³² ECJ 16 Jun. 2011, Case T-191/06, para. 113 (FMC Foret); ECJ 27 Jun. 2012, Case T-448/07, para. 58 (YKK and others).

³³ Opinion, para. 45.

However, not all criteria are suitable for proving intent in themselves. The criterion of the complexity of a provision or requirement, has a less higher probative value than other criteria, mentioned in Article 8 of the Decree, because a complex provision could easily be misunderstood.³⁴ The weight of consistent indicia supporting the statement made in this criterion is less high and therefore less reliable.

7 THE RESPONSIBILITY OF A BENEFICIARY FOR ACTS COMMITTED BY A THIRD PARTY

The final question of the Dutch Council of State to the Court was whether the beneficiary of aid can be held responsible for acts committed within his company, without having committed those acts himself, as they were committed by a third person. If so, the further question was on what grounds the beneficiary of aid may be held responsible for acts committed by a third person within the beneficiary's holding? The answer to the first question was both short and quickly given. Referring to the legislative history of the relevant regulations, both the Advocate-General and the Court conclude that the first question must be answered in the affirmative.³⁵

More important is the ruling of the Court (and the opinion of the Advocate-General), on the criteria on the basis of which to decide whether the beneficiary of aid can be held responsible for acts committed by a third person. The responsibility of the beneficiary of aid is not a form of strict liability. As I understand the Court's decision, the beneficiary of aid is held responsible for intentional or negligent non-compliance, *as if* he himself did not comply with the national legislation (the Dutch Decree), even if in fact it was a third party 'who carried out work on [the beneficiary's] plot on his behalf' (paragraph 49). *As if* the beneficiary of aid did not comply with the rules himself means that, in order to establish his responsibility, intent on his part must be proven.³⁶

³⁴ Opinion, para. 47, 42.

³⁵ See Opinion, paras 54–61, and the Court's ruling in paras 44–46.

³⁶ Compare Opinion, para. 81. Advocate-General Ruiz-Jarabo Colomer stated that the *ius puniendi* is limited by the principle of guilt and the 'principle that punishment should only be applied to the offender', which he sees as a complement of the principle of culpability, and 'whose first and most important manifestation is that only the perpetrator can be charged in respect of unlawful conduct.' Colomer agrees that these principles have a more limited meaning in administrative cases (see the Opinion of Advocate-General Ruiz-Jarabo Colomer, case 204/00P, paras 63, 64 (*Aalborg Portland*)). The Court did not follow Colomer in his opinion (compare Blomsma 2012, pp 224–225). In the *Van der Ham* case, what is emphasized is the fact that intention or negligence should always be proved, because they are a condition for reducing or cancelling a subsidy (and determine the amount of the reduction). The fact that intention or negligence also has to be established in a case where the non-compliance was not committed by the beneficiary of aid does not mean that the Court changed

The Court distinguishes a beneficiary of aid whose acts or omissions have caused non-compliance directly from a beneficiary of aid whose acts or omissions have caused non-compliance only indirectly. The first is the least problematic. From the fact that the beneficiary of aid caused non-compliance directly (e.g., he gave the order not to comply), follows that he caused non-compliance intentionally. In that case it would be against the purpose of the relevant regulations not to make the beneficiary of aid responsible for non-compliance with the relevant regulations. In my view, the beneficiary of aid can best be described as an *auctor intellectualis*, in other words an inciter. However, the relevant regulations (and the Decree) do not refer to incitement or other forms of participation. Therefore, not describing the beneficiary of aid as an inciter is quite an obvious choice,³⁷ because the introduction of forms of participation, without any basis in the relevant regulations, would be in violation of the principle of legal certainty.

Determining whether the beneficiary of aid may be held responsible when his acts or omissions have only indirectly caused the non-compliance is less simple. Whether or not he can be held responsible is based on three arguments: ‘the choice of the third party, the monitoring of the third party or the instructions given to the third party’ (paragraph 50). It is not necessary to establish that the third party intentionally or negligently did not comply with the conditions set in the Decree and the relevant regulations (paragraph 51). This means two things. First, it is not necessary to establish whether the third party did not comply intentionally or negligently. This makes clear that establishing intent or negligence on the part of the beneficiary of aid does not depend on the third party’s intention or negligence. Second, the beneficiary of aid may be held responsible, even if the third party acted intentionally or negligently. As a result, the beneficiary of aid cannot hide behind the third party’s own responsibility for non-compliance (pars. 52, 53).

A beneficiary of aid may be held responsible ‘for the infringement if he acted intentionally or negligently as a result of the choice or the monitoring of the third party or the instructions given to him’ (paragraph 53). When the beneficiary of aid, in choosing, monitoring or giving instructions to a third party, acted intentionally or negligently, he may be held responsible for not complying with the relevant regulations. In the *Van der Ham* case, both intent and negligence are related to the circumstances under which the non-compliance occurred. The more influence the beneficiary of aid had on the acts of the third party, the more easily

its view. The importance of the Court’s ruling lies in the fact that, in the present circumstances, it sees the beneficiary of aid as if he himself non-complied with the Decree.

³⁷ Compare Opinion, paras 54–61.

may his intent or negligence be established, and the sooner the beneficiary of aid can be 'made'³⁸ responsible for non-compliance.³⁹

Whilst both the criteria of instructions and monitoring are closely linked with the act of non-compliance as such, it is less easy to make such a connection when it comes to the third criterion. We can assume that instructions and monitoring refer to the third party's activity's on the plot of land of the beneficiary of aid (compare paragraph 49), and that the latter may only be held responsible if he intentionally or negligently failed in monitoring or giving instructions to the third party. The criterion of the choice of the third party can be understood as follows. When the beneficiary of aid hires a third party to work on his plot, if it could not have been expected that the latter would not comply with the rules or even was hired because of his reliability and knowledge of the rules with which he should have complied, 'making' the beneficiary responsible for the third party's non-compliance would be less likely.

Interestingly, the criteria are depicted alternatively in the German, English and French translations of the judgment, but cumulatively in the Dutch translation.⁴⁰ From the assumption that the alternative enumeration is the correct version of the Court's judgment, it follows that each of these criteria are sufficient for proving intent (or negligence). So, intentionally choosing a third party who is expected not to comply, may result in the beneficiary of aid's responsibility. That means that responsibility may be established quite easily. This is in accordance with the legislative history of the relevant regulations, but one could question whether responsibility should be established so easily on the basis of a criterion that is not closely linked to the act of non-compliance. On the other hand, this criterion makes clear that the beneficiary of aid should pick his staff carefully and instruct his employees on a permanent basis, especially concerning the regulations with which the beneficiary of aid must comply in order to receive subsidies. However, it is not clear whether this criterion can be explained in this way and the Court should expand on this in more detail in future judgments.

³⁸ To be made responsible are the terms used in the German translation of the judgment ('gemacht werden').

³⁹ Several of these criteria resemble the criteria the Court developed in establishing responsibility of a parent company for the activities of subsidiaries. In the Akzo Nobel and others case, the Court ruled that the parent company can be held responsible for activities of subsidiaries when the parent company can 'decisive influence' or 'there is a rebuttable presumption that the parent company does in fact exercise decisive influence' over the conduct of the subsidiaries (ECJ 10 Sep. 2009, Case C-97/08 P, paras 60–62 (Akzo Nobel and others)).

⁴⁰ And again, the Court does not refer to the legal traditions of the Member States. See for a different, and in my opinion at present outdated opinion, Sieber 2011, p. 277.

8 SOME CONCLUDING REMARKS

The Court has opted for an autonomous and uniform interpretation of intent. The question remains why the Court did not choose for a general description of the concept of intent and then give a derivative explanation per regulation or directive. The Court's acceptance of *dolus eventualis*, the lowest form of intent generally recognized in doctrine, will, I suspect, lead to various cases before the Court. Not only because accepting the lowest form of intent will probably give rise to difficulties for national courts who do not recognize *dolus eventualis*, simply because it is not part of their daily legal vocabulary, but also because it is not clear why the Court has chosen for this form of intent and not for a broader concept description of negligence. Not accepting strict liability, and ruling that a beneficiary of aid must have acted intentionally or negligently, is not new, but the manner in which the Court described how a beneficiary of aid may be held responsible for an act committed by a third party, is.⁴¹ What is interesting, is that a beneficiary of aid is responsible for non-compliance, because he is held responsible *as if* he committed the act of non-compliance himself. As a consequence, it must to be established that the beneficiary of aid acted intentionally or negligently. This is because intent or negligence are necessary to establish liability. To establish whether the beneficiary of aid acted intentionally or negligently, national authorities must take into account the choice for, the instructions to, or the monitoring of the third party. Whether these criteria are enumerated alternatively or cumulatively is at present unclear. It is not unthinkable that the criteria of instructions and monitoring are of the most value, in particular because they are more closely linked to the actual non-compliance of the third party. The question is whether it is desirable to use the criterion of the choice of the third party to establish liability of the beneficiary of aid.

An important element of this case is that national legal traditions are no (longer) relevant for the meaning and form of legal concepts such as intent and negligence. To understand such legal concepts, the Courts takes into account 'the usual meaning of those words, the context of those articles and the objective pursued by the legislation of which they are part'. Apparently, an autonomous interpretation of legal concepts means that these concepts are to be developed independently from the legal traditions of the Member States of the European Union. This is not just the case with concepts that are relatively new or are under development in the Member States, but also with well-established concepts, such as that of intent. We can call this a double emancipation process. The legal concepts used in the European Union are emancipated from those concepts used in the

⁴¹ Compare J. Keiler, *Actus Reus and Participation in European Criminal Law* 200–209 (Intersertia 2013).

national legal traditions of the Member States. But, and here we see a second emancipation process, these concepts are also emancipated from the field of law in which they were developed in the Member States. Both forms of emancipation give the Court much room to manoeuvre and thus to develop its own doctrine. Legal scholars whose research takes place on the boundaries of various parts of the law are challenged to conduct more research in the field of substantive law in order to assist the Court in further developing its concepts.