

WHO'S WHO LEGAL

Business Crime Defence 2015: Discussion

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Who's Who Legal brings together [Niels van der Laan](#) of De Roos & Pen and Vânia Costa Ramos of Carlos Pinto de Abreu e Associados to discuss growing areas of legal work and future developments in the field.



One of the most significant changes that has been reported in the white-collar landscape is the growing aggressiveness of regulators and prosecutors' offices worldwide. Is this something you have noticed in your jurisdiction? Have you had to adapt your practice in any way as a result?

Niels van der Laan: The Dutch regulators and prosecutors are picking up on this global change and both want to have a piece of the pie. It's important in my practice to inform clients that although prosecutors might bark, they don't always bite. Although the US model of "cooperation, cooperation and cooperation" has been gathering followers in the Netherlands, and often there are good grounds to use this strategy, sometimes there is a lot to win if you are willing to fight.

Vânia Costa Ramos: In Portugal, particularly as a response to the severe financial and economic crisis, and public opinion blaming financial institutions and politicians for the never-ending austerity measures applied in Portugal, a growing aggressiveness towards white-collar crimes or regulatory offences has been felt over the last years, with more prosecution and harsher penalties. This has led to some changes in our practice, since the defence in white-collar cases faces multiple problems that impact on the defence strategy – such as how to deal with parallel prosecutions (both in-country and cross-border). It is now also of tantamount importance to decide from the outset whether a "cooperative" strategy will be adopted, or not. This is a massive change since the tradition in criminal defence was not to be cooperative, in particular in the early stages of proceedings. The aggressiveness of regulators and prosecutors has to be taken into account when conceiving a strategy, but carefully, since the legal framework for "deals" in Portugal is not very well settled yet and depends on the area involved (competition, financial markets, stock exchange, corruption, etc).

Financial institutions and tax-related work have been highlighted as key areas of activity over the past year. Which industries have been the most active in your jurisdiction? Does this mark a change from previous years?

Niels van der Laan: In the Netherlands there seems to be an increased focus on large-scale foreign corruption. Until recently, the Netherlands tended not to target companies for overseas corruption. The Netherlands could be said to have had a rather realist perspective on foreign trade in the past. The

Dutch economy is based in no small part on foreign trade, and the authorities were always somewhat hesitant to prosecute large national companies for corruption abroad, so as not to unduly damage Dutch companies' competitiveness. Foreign bribery was only criminalised in 2001 due to OECD obligations. Even then, up until 2006, the Dutch tax code still allowed for some costs pertaining to certain types of foreign bribery to be tax deductible. It is only in the past few years that the investigation and prosecution of foreign corruption has seen a large increase in the Netherlands. There exist various international and national political reasons behind this policy adjustment, but one that has received insufficient attention in my opinion is that we were, until recently, not very used to large settlements like those that are nigh on commonplace in the US. Moreover, because generally all cases went to trial, the financial interest of prosecutors in investigating these complex foreign bribery cases was limited.

This situation has shifted over the past years. The prosecution is now increasingly targeting the large enterprises, resulting in record-breaking settlement after record-breaking settlement. A cynic could be tempted to say that, in the end, it's all about the money. It's important for corporations to understand when it's time to surrender and when it is better to fight.

Vânia Costa Ramos: In our jurisdiction there has been major activity not only in financial and tax-related work, but also in public procurement/corruption cases and in the pharmaceutical area. This fits into the trend observed over the last years, but it might be said that prosecution of corruption offences has experienced growth, not only in practice, but also in the public awareness. The liaisons between holders of political or public offices and the financial world have also been in the limelight.

The "US-style" model of internal investigations and self-reporting has been gaining momentum across the globe as companies attempt to pre-empt external intervention. Have you noticed similar developments across your client base? How do you expect this particular strand of business crime defence to progress?

Niels van der Laan: We have always had a relatively large internal investigations practice in our firm, but we are seeing a considerable increase of this "US-style" model across the Netherlands. Because of the increasing scale on which internal investigations are carried out, which are historically not part of the services offered by many Dutch firms, there is also increasing discussion about the parameters within which these investigations should take place. For example, there is a lot of public debate on the question of legal privilege within internal investigations. A ruling from the district court in The Hague in the *Vestia* case, in which it was decided that legal privilege did not apply for a purely fact-finding investigation, put this question in the spotlight.

We see it increasingly. Companies decide to open their books for forensic investigators trying to prevent public embarrassment, while taking the eventual payment of a large settlement for granted. As I've said, this can be a very suitable strategy and response to possible misconduct within the company, but you have to understand that you'll not always receive the benefits you are hoping for. For example, the last Dutch multinational company that self-reported ended up with a wired boardroom after a raid by the Dutch prosecutor. That said, they were eventually able to settle the case, which might have saved the company from bankruptcy.

Vânia Costa Ramos: Yes, we have noticed this tendency and our practice is developing this type of service in connection with foreign experienced practitioners, who are prepared to conduct such investigations. Nonetheless the internal investigations model is not established yet and companies are still typically using their internal resources for these investigations, instead of hiring a specialised external law or auditing firm. I believe that with time, companies will realise that internal investigations conducted by independent external legal counsel, together with a team of financial/IT/investigation experts, are the most solid and beneficial for companies. White-collar criminal boutique practices, such as ours, are particularly fit to lend internal investigation the necessary independence and credibility.

Our sources have spoken of cybercrime and cybersecurity matters as “the next big thing”. Would you agree? Are there any other developments you are expecting?

Niels van der Laan: The problem we see with cybercrime is that it is looking more and more like a cat-and-mouse game in which investigators are trying to find fraudsters who hide themselves in the darkest places of the internet and are not steps but miles ahead of them. Physically the fraudsters often reside in jurisdictions that are not overly compliant – so even when they are finally traced an eventual prosecution is still not at all guaranteed. It seems somewhat impossible to catch most cybercriminals. When a company finds out it's been hacked, the criminals are long gone. Because of that, in the Netherlands the focus is increasingly shifting to prevention and informing the public, trying to warn them about the risks of the internet. But it seems an uphill battle. Just a few weeks ago word got out that a group of fraudsters made millions by simply sending a spoof e-mail from the CEO of a multinational company to the financial administration asking them to transfer a large sum to a foreign account. If a crime is that simple, how are we going to fight it?

Vânia Costa Ramos: I totally agree with this assessment. Safety of information, cybersecurity and the problems concerning the accuracy, completeness and reliability of the information flows will be setting the clock in the future. The gathering, custody, access and dissemination of information are now clearly the most strategic and valuable asset of any institution – be it small, medium-sized, large or worldwide. This will certainly change the paradigms of criminal investigation and prosecution, as well as of the defence. In the future, traditional concepts such as territoriality or assessment of the evidence will have to be modified or abandoned in the framework of cyber-prosecution and cyber-defence. There is currently a pressing need for effective education, prevention and regulation of these matters.

Have there been any changes in the legal market in your jurisdiction? What is the balance like between full-service firms and boutiques in this field? Are you expecting that balance to change in the near future?

Niels van der Laan: Although in some instances there could very well be a benefit in using a full-service firm, we see a growing market for boutique firms with specific knowledge of financial criminal law. More and more companies understand the benefits of hiring well-equipped boutique lawyers with competitive rates. By having not only a great deal of knowledge, but also a great deal of trial experience on board, boutique firms have a unique understanding of the pros and cons of taking a case to trial. If one does not fully understand and grasp what will happen if the case goes to trial, it is hard to correctly advise when it is better to settle. Perhaps as importantly, knowledge about the pros and cons of taking a case to trial gives one the upper hand when it comes to negotiating more beneficial terms to a settlement, as the expected trial outcome will often serve as the reference point for these negotiations for the prosecution.

However, it is not only companies that increasingly understand the benefits of procuring the services of a boutique firm. My firm and I often work alongside large, full-service firms to add our own specific trial experience and knowledge on criminal investigations, as a lot of lawyers specialised in white-collar fraud from full-service firms don't often appear in court anymore.

Vânia Costa Ramos: There have not yet been significant changes in the rules of the legal profession, such as the requirements governing the establishment and operation of law firms. Consequently to this day there were no major changes in the legal setting of the law firms. This is not to say that there is not a clear and growing distinction between full-service law firms and boutiques. I do not anticipate major changes to the legal framework in the near future, since recently the law regulating the legal profession has been amended. Nevertheless, these days changes occur abruptly and with a striking impact – not always directly via a statutory amendment. Law firms incorporated in Portugal are not allowed to be multidisciplinary practices. Nevertheless, it is expected that multidisciplinary law firms will enter the market directly or indirectly (via other EU states), creating a distortion on competition between law

firms. This is clearly an area where there should be universal rules and common, equitable and non-discriminatory criteria, having in mind the legal profession's public interest features. The advocate is as an essential element of administration of justice, ensuring the exercise of rights, privileges and immunities for which the maintenance of professional confidentiality is a precondition. This precondition might be subject to dangerous restrictions once legal services are just "another service". The flipside to the growth of multidisciplinary mass-work firms providing legal support is that the added value of specialised boutique law firms will be reinforced in the future: a high degree of specialisation, quality, modernity, international practice and a personalised handling of the client's case.

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