Summary

The main question this thesis poses is whether or not effectiveness of enforcement has been taken into consideration in the make-up of present day regulatory law. The subject-matter of this book has been specified in the first chapter, after a small survey of the central theme. Chapter 2 deals with the impact of considerations of effectiveness on the choices between different ways of enforcing or settling breaches of the regulatory law. Chapters 3, 4 and 5 look at the influence of considerations of effectiveness on the origins and development of matters or phenomena of criminal liability: the application of the fault principle (chapter 3), liability for the acts of employees (chapter 4) and the liability of corporations and persons in control of management (chapter 5). These three chapters also treat the existence and application of similar phenomena in Dutch, English and German systems of administrative fining and in English and German criminal law. The last chapter, chapter 6, contains concluding observations.

Three areas of law have played a special role in this thesis: the law concerning the annual accounts of corporations, Health and Safety law and Competition law. Chapter 2 is partially based on the background of the ways these areas of law have been or are being enforced. In the chapters 3, 4 and 5 the general findings concerning the said matters of liability have been set off against the existence and concrete application of these matters in those three areas of law.

Chapter 2 firstly deals with the background of the choice for the criminal enforcement of regulatory law through the Dutch Economic Offences Act (Wet op de economische delicten). After that it considers the background of the enforcement through criminal law of the Dutch law concerning annual accounts, Dutch Health and Safety law and Dutch Competition law. The research shows that the historical choice for criminal law in the Dutch Economic Offences Act and in the three mentioned areas of law is mainly based on the presupposed general deterrent effect of the criminal law. According to the legislator, the criminal law is an effective way of enforcing regulatory law because it is generally deterrent.

Criminal law is not the only way in which Dutch regulatory law is being enforced. Since the end of the last century a growing part of Dutch regulatory law is being enforced by a system of administrative fining. Today, administrative fining can be found in Dutch Health and Safety law and in Dutch Competition law. The second chapter considers the essence of administrative fining, as well as the background of the introduction of administrative fining in Dutch Health and Safety law and Dutch Competition law. One of the conclusions that
has been drawn in chapter 2 is that the Dutch system of administrative fining can be seen as a modification or an improvement of criminal procedure.

Besides administrative fining, chapter 2 also treats the enforcement of regulatory law through disciplinary law and civil law. In respect of disciplinary law, the research has focused partially on the roots the Dutch system of economic-diciplinary law (economisch tuchtrecht) has in old systems of disciplinary law that have been developed during the depression of the 1930’s and during the second world war. The origins of these old systems of disciplinary law show a remarkable similarity with the background of the introduction of administrative fining in modern regulatory law. With regards to civil law, the research has concentrated on the importance of the general action of obtaining a civil court order (based on s. 3:296 of the Dutch Civil Code), and on other (special) civil actions Dutch law provides for enforcing the law concerning annual accounts, Health and Safety law and Competition law.

Chapter 2 closes with some general observations on the influence of considerations of effectiveness on the choice between different ways of enforcing regulatory law. On the basis of the material provided in this chapter it has been demonstrated that the need for effective enforcement not only plays an actual role in choosing between different systems of enforcement, but that it is also a legitimate factor of consideration in choosing between systems and in adjusting existing systems of enforcement such as the criminal law. In the light of ideas developed by the Dutch scholar Hulsman it is argued that – given a certain legitimate need for effectiveness – the enforcement of breaches of regulatory law can be allotted to the sanctioning system that has the most suited set of instruments for meeting this need. Ultimately, the characteristics of a sanctioning system define the ‘allotment of wrong’. However, the interest of effective enforcement should always be weighed against the interest of adequate legal protection.

Chapter 3 is concerned with the question of whether the application of the fault principle in the case of infractions (overtredingen) has been influenced by considerations of effectiveness. The specific operation of the fault principle shows a combination of an aspect of instrumentality with an aspect of legal protection: the prosecutor does not have to proof the existence of mens rea, while in a case of established ‘due diligence’ an acquittal is assured. The object of a statute, or the legislative purpose of an act, can shift the balance, so that – in a specific case - there is less room for accepting a due diligence-defence. In the end, the weighing up of the different aspects results in a judgement that ought to be reasonable.

In German and English law there are also close relations between the way the fault principle is applied and the interest of effective enforcement. The English courts have held that the creation of ‘strict liability’ is acceptable if – among other factors – strict liability “will be effective to promote the objects of the statute”. In case of a strict liability-offence, the prosecuting authority does not have to proof the existence of mens rea. The English legislator has served
legal protection by coupling statutory defences of due diligence to statutory offences of strict liability. Apart from that, ‘general defences’, originating from the common law, may probably be raised in matters of strict liability. However, English law does not recognize a general due diligence-defence, comparable with the Dutch defence of afwezigheid van alle schuld (‘lack of relevant culpability’). In German criminal law and in the German system of administrative fining (Ordnungswidrigkeitenrecht), intention (Vorsatz) or negligence (Fahrlässigkeit) must in each case be proved by the prosecuting authority. However, at least in the system of administrative fining, German law does not seem to pose a high standard of proof regarding intention. Furthermore, as with English law, German law does not recognize a general due diligence-defence. In German literature it is argued that the recognition of such a defence would weaken the general deterrent effect of the criminal law. In so far the (recognized) defences do not lead to an acquittal, all that is left is compliance with the law.

In chapter 4 the research focuses on liability for the acts of employees. As for Dutch law, the so called functioneel daderschap (‘functional perpetration’) is given some close observations. This kind of liability can be seen as ‘vicarious liability’. In this chapter it is argued that functioneel daderschap is, in essence, omissions liability (liability for committing an offence by omission). The conclusion has been drawn that the Dutch basis for liability plegen (liability for committing an offence single-handedly) has beforehand given enough room for solving questions of vicarious liability. The need for solving such questions is closely related to the interest of effective enforcement. By focusing on the person who is, through his special position in the business, best placed to prevent the commission of offences, the effectiveness of enforcement is served.

German criminal law and the German system of administrative fining also do not have a special form of liability for solving questions of vicarious liability. In German law, vicarious liability comes down to liability for committing an offence by omission. In addition to this, the German system of administrative fining provides for a special administrative offence that poses an administrative fine on not taking the right measures to prevent the commission of an administrative or criminal offence in a business. In English criminal law, the courts have adopted the civil law concept of vicarious liability (the liability of the ‘master’ for certain acts of his ‘servants’). The vicarious liability-doctrine is to be seen as a deviation of the common law-principle that no one can be held criminally liable for the acts of another. The existence of vicarious liability in English criminal law is closely related to the interest of effective enforcement. The English courts have held that regulatory law can not in each case be effectively enforced without recognizing vicarious liability.

Chapter 5 examines the liability of corporations and persons in control of the acts of a corporation. The background of the liability of corporations in Dutch law is partially pragmatic. In the eyes of the legislator, the recognition of corporate liability serves the effectiveness of the enforcement of regulatory law. Besides this, the recognition of corporate liability meant the recognition of the
corporation as a subject of the criminal law. English criminal law has been familiar with corporate liability since the nineteenth century. The recognition of corporate liability in English law was the consequence of several important social developments, such as the industrialization and the emergence of companies. In German criminal law, corporations are held not to be capable of committing offences. In the German system of administrative fining it is, however, possible to fine a corporation.

If a corporation has committed an offence, not only the corporation can be charged and punished. Persons who were in actual control of the conduct that constituted the offence and persons who ordered the commission of the offence can also be charged and punished (see s. 51(2) of the Dutch Criminal Code). Initially, Dutch law only provided regulations that held the directors of corporations as such liable, if ‘their’ corporation had committed an offence. Nowadays the Dutch legislator addresses persons who were in actual control of the offence, committed by the corporation, in order to safeguard the effectiveness of enforcement. English criminal law holds provisions that are similar to the Dutch s. 51(2). German law, which does not recognize corporate criminal liability, shows two solutions. Firstly, several regulations address the officers of corporations as such. In those cases only those officers can commit offences. Secondly, German law has special provisions in case a regulation addresses persons in a certain capacity, such as ‘employers’. In that case, the criminal law as well as the German system of administrative fining contains provisions that extend the scope of those regulations to corporate agents such as the directors of the company.

The fifth chapter also treats the conditions on which corporations may be held criminally liable. The Dutch legislator did not want to bind the courts by formulating conditions of liability. It is argued that it is not sure which course the Dutch supreme court (Hoge Raad) has set. According to English criminal law, the liability of a corporation can be based on either the ‘identification doctrine’, or vicarious liability. In the first case the corporation is liable for its own acts, in the latter it is liable for the acts of others. From English case law it can be derived that the choice between these foundations of liability partially depends on the interest of effective enforcement. Furthermore, the determination of liability in accordance with the identification doctrine seems also to be influenced by the interest of effective enforcement. According to the classic approach, only the acts and states of mind of persons who constitute the ‘controlling mind and will’ of the corporation can make the corporation liable for its own acts. This group of persons is formed by superior officers that carry out management functions. Recent English case law shows that the group of persons that can make the corporation liable for its own acts should not be predefined in that way. The Privy Council has considered that the answer to the question which persons can make a corporation liable for its own acts depends on the definition of the particular offence in question and the purpose of the act. The consequence is that different offences can involve different conditions of liability. In German law, the administrative fining of corporations is based on con
duct by superior officers that constitute an offence. In German literature it is argued that this limited group of persons ought to be extended. Such an extension would promote the effectiveness of enforcement.

Chapter 6 contains concluding observations. After the summing up of the main conclusions of the preceding chapters, the material from the chapters 3, 4 and 5 has been analysed. It is argued that the influence of considerations of effectiveness on conditions of liability is an influence that is legitimate. Furthermore it is argued that the concrete influence of the interest of effective enforcement depends on the definition of the offence and its purpose. Based on this, it is argued that, in principle, there is no room for predefined conditions of liability that are independent from the definition of an offence. The end result is based on a weighing of different interests. The interest of effective enforcement can and may play a decisive part in that process.