Mark Pieth
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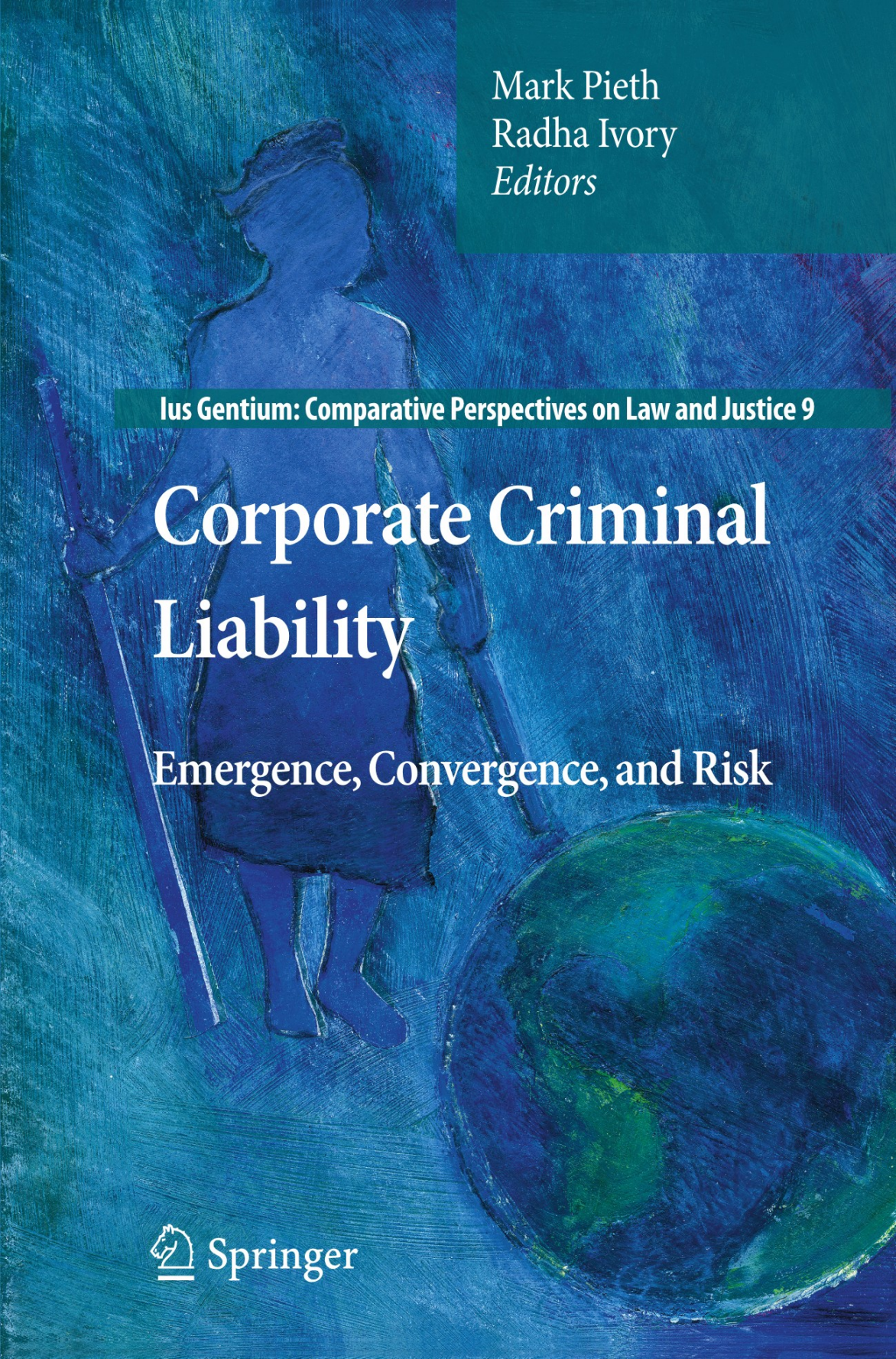
Editors

Ius Gentium: Comparative Perspectives on Law and Justice 9

Corporate Criminal Liability

Emergence, Convergence, and Risk



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CORPORATE CRIMINAL LIABILITY

IUS GENTIUM

Comparative Perspectives on Law and Justice

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CORPORATE CRIMINAL LIABILITY

EMERGENCE, CONVERGENCE, AND RISK

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Preface

This book is made up of the contributions of country experts and the general report on corporate criminal liability presented to the XVIIIth International Congress of Comparative Law held in Washington, DC, in the northern summer of 2010.

It was a wise decision of the organizers to invite contributions on this specific topic as it has virtually exploded over the last decade: nearly all international treaties on economic and organized crime insist on the creation of corporate criminal liability (or, if not criminal, then quasi-criminal or administrative liability). Traditional resistance to CCL in continental European and Latin American civil law jurisdictions is weakening rapidly. In parallel, common law countries are reconsidering their approaches to imputation, which seem, by turns, too strict or too restrictive. A common standard is emerging.

This preface gives me the opportunity to thank all contributors to this book as well as the team that made it possible: Nadia Barriga, Denise Berger, Marnie Dannacher, Raphaël Eckert, and Rebekka Gigon.

By far the largest contribution, though, has been made by my colleague, Radha Ivory. She has not only shared the writing to the general report, which now appears as the first chapter to this book, but she has edited all the English language texts and has had the overall responsibility for the book's production.

Last but not least, I would like to thank the publisher for its support.

Basel, October 2010 Mark Pieth

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List of Abbreviations

AC	Appeal Cases
ACHR	American Convention on Human Rights
ACT	Australian Capital Territory
AfCHPR	African Charter on Human and Peoples' Rights
AfCommHPR	African Commission on Human and Peoples' Rights
aff'd	affirmed
AG	Aktiengesellschaft
al.	alinéa
ALI	American Law Institute
ALRC	Australian Law Reform Commission
APG	Asia/Pacific Group on Money Laundering
ARC	Act against Restraints on Competition
art(s).	article(s)
Assoc.	Association
ATF	Recueil officiel des arrêts du Tribunal fédéral suisse
AU	African Union
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BMS	Bristol Myers Squibb Corporation
BRIC	Brazil, the Russian Federation, India, the People's Republic of China
Bull.	Bulletin
BV	besloten vennootschap
BVerfG	Bundesverfassungsgericht
C. pén.	Code pénal
Cass. ass. plén.	Cour de Cassation, Assemblé plénière
Cass. ch. req.	Cour de Cassation, Chambre des Requêtes
Cass. civ.	Cour de Cassation, Chambre civile
Cass. crim.	Cour de Cassation, Chambre criminelle
CCL	corporate criminal liability
CCP	Code of Criminal Procedure
CCS	Code civil suisse

CEDH	Convention de sauvegardes des droits de l'homme et des libertés fondamentales
cert.	certificate
cf./cfr.	conferatur
Ch(s).	Chapter(s)
CHF	Swiss Francs (currency)
Chron.	Chronique
Cir.	Circuit
cl(l).	clause(s)
Cm	Command Papers of British Parliament
CMCH Act (UK)	Corporate Manslaughter and Corporate Homicide Act 2007 c. 19
COE	Council of Europe
coll.	collection
Com DP	Scottish Law Commission Discussion Paper
Comm.	Commission
coord(s).	coordinator(s)
Corp.	Corporation
CP	Code pénal
CPP	Code de procédure pénale suisse
CPS	Crown Prosecutions Service/Code pénal suisse
CPS Act	Criminal Procedure (Scotland) Act 1995 c. 46
CPSEW (UK)	Crown Prosecutions Service of England and Wales
Cr. App. R	Criminal Appeal Reports
Crim. L. R.	Criminal Law Review
Cst	constitution
d. lgs.	decreto legislativo
DCC	Dutch Civil Code
DCCP	Dutch Code of Criminal Procedure
DER	Derecho Comparado/El Derecho-Jurisprudencia General
Div.	Division
DOJ	Department of Justice
DPA	Deferred Prosecution Agreement/Droit pénal administratif
DPC	Dutch Penal Code
DSC	Dutch Supreme Court
e.g.	exempli gratia
EC	European Community(ies)
ECHR	European Convention on Human Rights
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ed(s).	editor(s)
éd(s).	éditeur(s)
edn.	edition
édn.	édition

EOA	Economic Offenses Act
ER	English Reports
et al.	et alia
et seq.	et sequitur
etc.	et cetera
ETS	European Treaty Series
EU	European Union
EWCA Civ	Court of Appeal (Civil Division)
EWCA Crim	Court of Appeal (Criminal Division)
F. Supp.	Federal Supplement
Fasc.	Fascicle
FATF	Financial Action Task Force
Fed. Reg.	Federal Register
FF	Feuille fédérale
GA	Goltdammer's Archiv für Strafrecht (Journal)
GmbH	Gesellschaft mit beschränkter Haftung
GOC	government-owned corporation
GRECO	Group of States against Corruption
H&S	Health & Safety
HC	House of Commons
HL	House of Lords
HRC	Human Rights Committee
Hrsg.	Herausgeber
HSE	Health and Safety Executive
HSW Act	Health and Safety at Work etc. Act 1974 c. 37
i.e.	id est
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ibid.	ibidem
ICCPR	International Covenant on Civil and Political Rights
ILM	International Legal Materials
Inc.	Incorporated
IPPF	International Penal and Penitentiary Foundation
JC	Justiciary Cases
JHA	Justice and Home Affairs
L.O.	Legal Observer
LCD	Loi contre la concurrence déloyale
LCEW (UK)	Law Commission of England and Wales
let.	lettre
LIFD	L'impôt fédéral direct
Ltd.	Limited
MENAFATF	Middle East and North Africa Financial Action Task Force
Mgmt.	Management
MNE	Multinational Enterprise

MP	Members of Parliament
MPC	Model Penal Code
n(n).	note(s)
N.Y.	New York
NGO	non-governmental organization
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
no(s).	number(s)
NPA	Non-Prosecution Agreement
NStZ	Neue Zeitschrift für Strafrecht
NSW	New South Wales (Australia)
NV	naamloze vennootschap (i.e. a public limited company)
OECD/OCSE	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union (Communities)
Ord(s).	Orders
OWiG	Ordnungswidrigkeitengesetz
ÖZDEP	Freedom and Democracy Party (registered political party)
Pacte ONU II	Pacte international des Nations Unies relatif aux droits civils et politiques
para(s).	paragraph(s)
pt(s).	part(s)
PUK	Partnerships United Kingdom
QB	Law Reports, Queen's Bench
reg.	regulation
Rép. Min.	Réponse ministérielle
Rev.sc.Crim.	Revue de Science Criminelle et de Droit Pénal Comparé
RJDA	Administrative Law Reports (Canada)/Recueil general de jurisprudence de droit administratif et du conseil d'état
ROA	Regulatory Offenses Act
RR	Revised Reports
RS	Rechtssache/Recueil systématique du droit fédéral
RSC	Revised Statutes Canada/Revue de Science Criminelle et de Droit Pénal Comparé
s(s).	section(s)
SA	Société Anonyme
SADC	Southern African Development Community
SCCR	Scottish Criminal Case Reports
Sch.	Schedule
SCR	Supreme Court Reports
SDNY	Southern District of New York
SI	Statutory Instruments
SLT	Scots Law Times
somm.	sommaire

Stat.	Statute
StGB	Strafgesetzbuch
sub nom.	sub nomine
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
USAM	United States Attorney's Manual
USC	United States Code
USDOJ	United States Department of Justice
USGAO	United States Government Accountability Office
USSC	United States Sentencing Commission
v.	versus
VBlBW	Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg)
VbVG	Verbandsverantwortlichkeitsgesetz
Vic.	Victoria
vol(s).	volume(s)
WGB	OECD Working Group on Bribery in International Business Transactions

Part I
The Analytical Framework

Chapter 1
Emergence and Convergence: Corporate Criminal Liability Principles in Overview

Mark Pieth and Radha Ivory

Contents

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1.1 Emergence: An Introduction to Corporate Criminal Liability Principles

1.1.1 Corporate (A)morality and Corporate Risk

Criminal law traditionally focuses on personal guilt. Criminal law is, it seems, intricately linked to notions of culpability, blame, and the infliction of loss on an offender. Its offenses commonly require proof of an accused person's mental state.[1] And its fundamental principles hold that criminal sanctions should address the individual responsibility of the wrongdoer without harming innocent third parties.[2] With these considerations in mind, lawmakers around the world traditionally adhered to the principle *societas delinquere non potest*.[3] Corporations could, like human beings, hold rights and duties under private law but they could not be regarded as possessing the moral faculties that would enable them to be addressees of the criminal law.[4]

It is, however, equally obvious that corporations can cause substantial harm.[5] They have been drivers of industrialization and the globalization of the economy. Their negligence has resulted in severe injury to individuals, groups, and the natural environment (consider the catastrophe at Bhopal)[6] and their deliberate abuses of power have highlighted their apparently privileged position relative to other persons and entities. The power of some modern corporations,[7] especially multinational enterprises (MNEs),

[1] Allens Arthur Robinson 2008, 1; Hasnas 2009, 1329 et seq.; Weigend 2008, 938 et seq.
[2] Hasnas 2009, 1335 et seq., 1399 et seq., 1357. Cf. Beale 2009, 1484 et seq., 1500 et seq.
[3] Böse (this volume); Perrin (this volume).
[4] Hasnas 2009, 1333; Weigend 2008, 936.
[5] Beale 2009, 1482 et seq.
[6] See, e.g., Waldman 2002.
[7] Beale 2009, 1483.

may make it difficult for public authorities to apply mechanisms of legal control. The difficulties typically go beyond the simple application of political influence to decision-making processes. Increasingly, decentralized corporate structures and complex internal procedures may prevent law enforcement agencies and criminal justice authorities from identifying the individual wrongdoer(s) within a corporation. Further, though such harm may result from the acts or omissions of individual "rogue employees", it may also be the expression of a corporate culture that tacitly condones, or at least tolerates, wrongdoing. When corporate systems or cultures are to blame, sanctions against lone – possibly low-level – employees seem an inadequate response.[8]

Moreover, as systems for the provision of goods and services become more varied and complex, these problems are being replicated outside the commercial sector. In industrialized economies, companies are only one vehicle for investment. National private laws recognize other structures (trusts, partnerships, *Anstalten*, *Einzelunternehmer*, etc.) some of which have legal personality under national law and others which are legally identified with their owners. Further, individuals and groups of citizens are not the only participants in the economy: many governments and government agencies are also engaged in commercial activities, including in industries or sectors with higher levels of "compliance risk".[9] Finally, neither companies nor governments are the only large, complex institutions whose stakeholders have the opportunity to harm others through their collective operations. Non-government, non-profit entities operating in the "public" sector may provide important social services and otherwise exercise considerable influence over human health and well-being.[10]

These considerations explain the increasing willingness of lawmakers in many jurisdictions to impose criminal liability on corporations and other enterprises, particularly in the area of economic crime and particularly on the basis of devious corporate culture rather than individual wrongdoing. The stigma and sanctions of the criminal law promise greater deterrence from corporate misconduct and more opportunities for asset recovery, compensation, and mandatory corporate reform. At the same time, the peculiarities of corporate personality and the restraints posed by principles of fair procedure may limit the ability of lawmakers to check corporate power through the criminal law.

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[8]See, generally, Weigend 2008, 932 et seq.

[9]OECD Working Party on Export Credits and Credit Guarantees, OECD Council Recommendation on Bribery and Officially Supported Export Credits TD/ECG(2006)24, December 18, 2006, Paris.

[10]Humanitarian Accountability Partnership International 2008, 7 et seq.; Lloyd/Warren/Hammer 2008, 5, 9.

1.1.2 Theories of Corporate Personality and Models of Corporate Liability

If corporate liability evolved historically as a response to the changing role of corporations, it evolved doctrinally from the recognition of corporations as legal persons capable of holding rights and obligations separate to those of their human stakeholders (owners, employees, managers, etc.).[11] Private law offered two opposing explanations of corporate personality both of which relied heavily on anthropomorphic imagery[12] and each of which has given rise to models of corporate criminal liability (CCL).

First, according to the fiction (or "nominalist") theory of corporate personality,[13] the corporation is nothing more than a legal construct, a term used to describe a group of individuals constituted at any one time.[14] The corporation, on this view, can only act through its human representatives, its operational staff being its "limbs", its officers and senior managers its "brains" or "nerve center".[15] The corporation may bear criminal guilt on the nominalist view but only because it can be identified with a human being who serves as its "directing mind and will".[16] This is known as the identification (or "alter ego") model of corporate criminal liability.[17]

Second, the reality theory recognizes the corporation as possessing a distinct personality in its own right, as well as being a person under law.[18] Early on, this view of corporate personality allowed legal entities to be held vicariously liable for the civil wrongs of their servants.[19] Eventually, in some jurisdictions, it was extended to allow the imputation of criminal wrongdoing and states of mind to the corporation.[20] Elsewhere, it has given rise to holistic (or "objective") and aggregative models of liability. Holistic models, unlike the identification and vicarious liability models, do not require the imputation of human thoughts, acts, and omissions to the corporation. Rather, they regard corporations as themselves capable of committing crimes through established internal patterns of

[11] Wells 2010, C. 10.

[12] Heine 2000, 5.

[13] Deckert (this volume); Wells 1999, 120 et seq.

[14] Wells 2001, 84 et seq.

[15] *HL Bolton (Engineering) Co. Ltd.* v. *TJ Graham & Sons Ltd.* [1957] 1 QB 159 at 172 (Denning LJ).

[16] *HL Bolton (Engineering) Co. Ltd.* v. *TJ Graham & Sons Ltd.* [1957] 1 QB 159 at 172 (Denning LJ); Wells 2000, 5; Wells 2001, 84 et seq., 93 et seq.

[17] Pieth 2007a, 179 et seq.; Wells 2000, 5.

[18] Wells 2001, 85.

[19] Wells 2001, 132 et seq.

[20] See Deckert (this volume); Nanda (this volume).

decision-making (corporate culture or corporate (dis)organization).[21] Aggregative approaches also treat the corporation as the principal offender but they do so by adding together the different acts, omissions, and states of mind of individual stakeholders, particularly corporate officers and senior managers.[22] They are something of a compromise between the vicarious and holistic approaches.[23]

National CCL rules, as they have been pronounced or enacted throughout the world, reflect these models of liability. Though the two imputation doctrines are still most widely represented, there are signs that the logic of holistic liability, with its emphasis on corporate (dis)organization and culture, is increasingly popular.

1.1.3 The Development of Corporate Criminal Liability Rules in Common Law Jurisdictions: The UK, the Commonwealth, and the US

The first steps towards corporate criminal liability were taken in common law jurisdictions, common law sources having been among the first to talk about ethics in corporations and the deterrent effect of sanctions on company behavior.[24] Both in the United Kingdom (UK)[25] and in the United States (US),[26] the industrial revolution and the attendant expansion of the railroads[27] led courts to apply the civil law doctrine of vicarious liability in criminal cases. In US federal law, in particular, the doctrine of *respondeat superior* allowed courts to impute corporations with the misbehavior of employees acting within the scope of their responsibilities and for the (intended) benefit of the company.[28] The theory was first developed on the basis of specific statutes and was rapidly generalized to crimes with a mental (fault) element. The strict form of vicarious liability, which emerged in the US, enabled corporations to be attributed with crimes that they had attempted to prevent, e.g., by issuing instructions or implementing compliance systems. Only much later were prosecution and sentencing guidelines amended to allow decision-makers to take compliance programs into account.[29]

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[21] Wells 2000, 6.

[22] Pinto/Evans 2003, 220; Wells 2000, 6; Wells 2001, 6.

[23] Wells 2001, 156.

[24] Coffee 1999a, 13 et seq.; Weigend 2008, 928; Wells 2001, 81 et seq.

[25] Wells 2001, 63, 86 et seq.

[26] Coffee 1999a, 14; Nanda (this volume).

[27] DiMento/Geis 2005, 162 et seq.; Wells 2001, 87 et seq.

[28] Coffee 1999a, 14 et seq.; DiMento/Geis 2005; Nanda (this volume); Wells 2000, 4.

[29] Coffee 1999a, 27, 37; Nanda (this volume). See below at 1.6.1.2.

In the UK, vicarious liability was gradually limited to regulatory or so-called "objective" offenses created by statute; for traditional *mens rea* (or fault-based) offenses, the acceptance of nominalist theories of corporate personality by the British courts led to the application of the identification model of liability.[30] Hence, from the 1940s, corporations under English, Welsh, and Scottish law could be held responsible for the acts, omissions, and mental states of individuals who served as their alter egos.[31] Over the next 50 years, the identification theory was maintained,[32] though it was interpreted so as to apply in a very narrow range of cases.[33] Only in the 1990s, after several severe accidents[34] and considerable international pressure,[35] did British Parliament introduce new rules for corporate manslaughter[36] and bribery.[37] The Law Commission of England and Wales (LCEW [UK]) is not undertaking a general review of CCL rules,[38] despite earlier indications that it would.[39] And, though its August 2010 consultation paper included a number of proposals on CCL,[40] the commission seemed to take a general view that the criminal liability of corporations should be more limited than it is at present, at least in "regulatory contexts".[41]

The evolution of criminal corporate liability in Commonwealth countries has been far more dynamic: courts in Canada[42] and New Zealand (as affirmed by the Privy Counsel)[43] have reinterpreted the concept of the "directing mind" to go well beyond the concept recognized by English

[30] Stark (this volume); Wells 2001, 93 et seq., 103 et seq.

[31] *HL Bolton (Engineering) Co. Ltd.* v. *TJ Graham & Sons Ltd.* [1957] 1 QB 159 at 172 (Denning LJ). See further LCEW 2010, paras. 5.8 et seq.; Stark (this volume); Wells 2001, 93 et seq.

[32] *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] AC 153.

[33] Wells 2001, 115.

[34] Such as the loss of the Herald of Free Enterprise and the Southall Railcrash. See further Wells 2001, 41 et seq.; below at 1.4.1.6.

[35] OECD 2005b, paras. 195 et seq.; OECD 2008b, paras. 65 et seq.

[36] CMCH Act (UK). See further Wells 1999, 119; Wells 2001, 105 et seq.; Wells (this volume).

[37] Bribery Act 2010 (Bribery Act [UK]). See further Wells (this volume).

[38] LCEW (UK) (February 19, 2010), 'Personal Email Correspondence from Peter Melleney, Criminal Law Team'. Cf. LCEW (UK) 2008a, paras. 3.13 et seq.

[39] LCEW (UK) 2008b, para. 6.39.

[40] LCEW (UK) 2010, Proposals 13–16, paras. 8.13 et seq.

[41] LCEW (UK) 2010, Parts 3, 4, 7. See further Wells (this volume). A "regulatory context" is "[a context] in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialized area of activity": LCEW (UK) 2010, para. 1.9.

[42] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662. See further Coffee 1999a, 19; Ferguson 1999, 170 et seq.

[43] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500. See further Pinto/Evans 2003, paras. 4.24 et seq.; Wells 2001, 103 et seq.

and Welsh courts.[44] Furthermore, at the federal level, Australia has passed legislation to supplement its traditional identification model of liability with a holistic approach. The Criminal Code Act 1995 (Commonwealth) (Criminal Code Act [Australia]) puts deficient corporate culture center stage, thereby shifting away from the imputation of individual guilt to the corporation and focusing more objectively on the fault of the corporation – as a collective – itself.[45]

1.1.4 The Recognition of Corporate (Criminal) Liability in the Civil Law Jurisdictions of Europe and the Americas

1.1.4.1 CCL in the Civil Law Jurisdictions of Europe and the Americas

Recent extensions of CCL principles in common law countries have paralleled the emergence of corporate liability rules in civil law jurisdictions in Europe and the Americas. Long hostile to notions of corporate mind, morality, and guilt,[46] lawmakers on the Continent found themselves under increasing pressure to sanction corporate wrongdoers in the decades after World War II. The post-War economic boom in Western Europe had increased the visibility of industrialization's pitfalls, e.g., the environmental hazards, the harms to public health, and the unscrupulous exploitation of natural resources, particularly in the Third World. The emergence of the risk society, as it has been termed,[47] motivated the introduction of CCL rules in Belgium,[48] Denmark,[49] and France.[50]

International political developments set off a much more radical extension of corporate criminal liability principles in civil law countries from 1989. The fall of the Berlin Wall and East-West détente increased the pace of globalization,[51] facilitated the expansion of the European Union (EU),[52] and generated more fears about the risk posed by transnational (economic) crime.[53] States expressed these concerns over the next two decades with

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[44] See further below at 1.4.1.4.

[45] Criminal Code Act 1995, Act No. 12 of 1995 as amended, s. 12.3; Coffee 1999a, 30; Heine 2000, 4; Wells 2000, 6; Wells 2001, 136 et seq. See further below at 1.4.1.5.

[46] Cf. Böse (this volume).

[47] Beck 1986; Giddens 1991; Giddens 1999; Prittwitz 1993; Wells 2001, 42.

[48] Faure 1999.

[49] Nielsen 1999, 321.

[50] Deckert (this volume).

[51] Beck 1998.

[52] McCormick 2009, 218 et seq.

[53] Passas 1999.

an entirely new system of international treaties and non-binding standards against organized crime,[54] money laundering,[55] corruption,[56] and the financing of terrorism.[57] These instruments typically required signatories to introduce criminal or equivalent forms of non-criminal liability or sanctions for legal persons or similar entities.[58] In many cases, their implementation at the national level is monitored by peer review bodies. So, it happens that

[54]United Nations Convention against Transnational Organized Crime, November 15, 2000, in force September 19, 2003, 2225 UNTS 209 (UN Convention on Transnational Organized Crime).

[55]FATF, FATF 40 Recommendations, adopted June 20, 2003, as amended October 22, 2004, Paris (FATF Recommendations), Recommendation 2(b).

[56]See, e.g., Inter-American Convention against Corruption, March 29, 1996, in force March 6, 1997, Treaty B-58; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999 (OECD Convention on Foreign Bribery); Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests – Joint Declaration on Article 13(2) – Commission Declaration on Article 7, July 26, 1995, in force October 17, 2002, OJ No. C 316, November 27, 1995, 49 (EU Convention on the Protection of the ECs' Financial Interest); Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, May 26, 1997, in force June 25, 1997, OJ No. C 195, June 25, 1997, 2; Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12 (Second Protocol to the EU Convention on the Protection of the ECs' Financial Interest); Criminal Law Convention on Corruption, January 27, 1999, in force July 1, 2002, 173 ETS (COE Criminal Law Convention on Corruption); Protocol Against Corruption to the Treaty of the Southern African Development Community, August 14, 2001, in force July 6, 2005 (SADC Protocol against Corruption); African Union Convention on Preventing and Combating Corruption, July 11, 2003, in force August 5, 2006, (2004) XLIII ILM 1 (AU Convention on Corruption); Council Framework Decision 2003/568/JHA of July 22, 2003 on combating corruption in the private sector, in force July 31, 2003, OJ No. L 192, July 22, 2003, 54 (EU Framework Decision on Private Sector Corruption); United Nations Convention against Corruption, December 9–11, 2003, in force December 14, 2005, 2349 UNTS 41 (UN Convention against Corruption). See further Pieth 2007b, 19 et seq.

[57]International Convention for the Suppression of the Financing of Terrorism, January 10, 2000, in force April 10, 2002, 2178 UNTS 197 (Terrorist Financing Convention); FATF, FATF IX Special Recommendations, adopted October 2001, as amended February 2008, Paris (FATF Special Recommendations), Special Recommendation II; FATF, Interpretative Note to Special Recommendation II: Criminalizing the financing of terrorism and associated money laundering, Paris, paras. 12 et seq.

[58]OECD Convention on Foreign Bribery, Arts. 2, 3(2); COE Criminal Law Convention on Corruption, Art. 18; Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Art. 3; Terrorist Financing Convention, Art. 5; EU Framework Decision on Private Sector Corruption, Arts. 5(1), 6(1); UN Convention on Transnational Organized Crime, Art. 10; SADC Protocol against Corruption, Art. 4(2); AU Convention on Corruption, Art. 11(1); FATF Recommendations, Recommendation 2(b); FATF Special Recommendations, Special Recommendation 6; UN Convention against Corruption, Art. 26.

the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention on Foreign Bribery), requires state parties "to establish the liability of legal persons for the bribery of a foreign public official", to ensure "effective, proportionate and dissuasive" punishment, and to participate in evaluations by the OECD Working Group on Bribery in International Business Transactions (WGB).[59] Later instruments from the EU and Council of Europe (COE) repeated the sanctioning requirement in the OECD Convention,[60] calling on state parties to impute legal persons with the wrongdoing of "leading persons" and to treat a lack of supervision by a leading person as triggering corporate responsibility.[61] Austria,[62] Hungary,[63] Italy,[64] Luxembourg,[65] Poland,[66] and Switzerland[67] were motivated by these developments to enact new corporate liability statutes. Some of these statutes closely reflect the EU and COE rules, as we will see below,[68] whereas others adopt "open"[69] or holistic models of liability, at least for serious economic and organized crimes.[70]

1.1.4.2 Non-criminal Solutions in European and American Civil Law Jurisdictions

Several civil law countries, whilst maintaining that corporations can do no wrong, have recognized quasi-criminal forms of responsibility. German,[71]

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[59] OECD Convention on Foreign Bribery, Arts. 2, 3(1) and (2), 12. See further Pieth 2007a.

[60] COE Criminal Law Convention on Corruption, Art. 19(2); Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Art. 4(1); EU Framework Decision on Private Sector Corruption, Art. 6(1). See also Terrorist Financing Convention, Art. 5(3); FATF Recommendations, Recommendation 2(b); FATF Special Recommendations, Special Recommendation 6. See further Weigend 2008, 928 et seq.

[61] COE Convention on Corruption, Arts. 18, 19(2); Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Arts. 3, 4(1); EU Framework Decision on Private Sector Corruption, Art. 5(1).

[62] Verbandsverantwortlichkeitsgesetz 2006; Hilf 2008; Zeder 2006.

[63] Santha/Dobrocsi (this volume).

[64] De Maglie (this volume); Manacorda 2008; Sacerdoti 2003.

[65] Braum 2008.

[66] Kulesza 2010.

[67] Heine 2008; Perrin (this volume); Pieth 2003; Pieth 2004.

[68] See, generally, below at 1.4.2.

[69] Belgium and the Netherlands. On Belgium: Bihain/Masset 2010, 2 et seq.; on the Netherlands: Keulen/Gritter (this volume). See further below at 1.4.2.3.

[70] Switzerland. See Heine 2008, 307 et seq.; Perrin (this volume); Pieth 2003, 356 et seq., 362 et seq.; Pieth 2004, 603 et seq. See further below at 1.4.2.2.

[71] Böse (this volume); Weigend 2008, 930 et seq.

Italian,[72] Chilean,[73] Russian, and (to a more limited extent) Brazilian[74] laws are hybrids of this nature. They are frequently portrayed as compromise solutions[75] or as a "third track":[76] their nominally "administrative" sanctions are handed down by criminal judges; however, they are considered "criminal" for the purpose of mutual legal assistance and they may result in the corporation being ordered to pay considerable sums of money, cease operations, or undergo deregistration.[77]

1.1.4.3 European and American Civil Law Jurisdictions Without CCL

Finally, for all the rapid change in civil law jurisdictions during the last decade, one should not neglect to mention that a large group of European and American countries still objects altogether to the notion of corporate liability – criminal or quasi-criminal. Within Europe, Greece,[78] the Czech Republic,[79] and the Slovak Republic[80] have found it especially difficult to take the step, as has Uruguay in Latin America.[81] In Turkey, CCL rules were abolished and only reintroduced in draft form under intense international pressure.[82]

When justifying decisions not to criminalize corporate wrongdoing, many of these countries argue on principle; frequently, however, political and economic considerations are impeding the introduction of corporate liability from the background.

1.1.5 CCL Beyond Europe and the Americas: Asia, Southern Africa, and the Middle East

The social, economic, and international legal developments that precipitated the introduction of CCL laws in Europe and the Americas have also

[72] De Maglie (this volume); Manacorda 2008; Sacerdoti 2003.

[73] Salvo (this volume).

[74] OECD 2007b, paras. 149 et seq.

[75] Böse (this volume).

[76] De Maglie (this volume). See, generally, Manozzi/Consulich 2008.

[77] Böse (this volume); Pieth 2007a, 183. See further below at 1.6.2.2.

[78] Mylonopoulos 2010.

[79] Jelínek/Beran (this volume). For criticism, see OECD 2009a; OECD Working Group on Bribery in International Business Transactions (July 20, 2009), 'Letter to His Excellency, Ing. Jan Fischer CSc., Prime Minister of the Czech Republic'.

[80] For criticism, see OECD (July 20, 2009), 'Letter to His Excellency, Mr. Robert Fico, Prime Minister of the Slovak Republic'; OECD 2010.

[81] Langón Cuñarro/Montano 2010.

[82] OECD 2009c, paras. 49 et seq.

prompted law reforms in other countries and regions. Countries around the globe have come under significant pressure to ensure that corporate entities involved in money laundering, corruption, illegal trusts, or embargo-busting are taken to court. Asian jurisdictions, such as Japan,[83] Korea,[84] Hong Kong,[85] and Macau,[86] which are well-integrated into the global economy and the international financial regulatory system, have adopted general corporate liability principles along the lines of the imputation models used in other parts of the world. New Asian economic powers, the People's Republic of China[87] and India,[88] have also recognized corporate criminal liability, though in China probably only for economic crimes[89] and in India only as a result of a recent controversial Supreme Court decision.[90] According to international monitoring reports, moreover, CCL rules figure in the laws of Israel,[91] Qatar,[92] and the United Arab Emirates[93] in the Middle East, and in the law of South Africa.[94]

1.1.6 Conclusions

Therefore, CCL rules are a common – if not universal – feature of domestic criminal laws. The risks associated with industrialization and the challenges of globalization have prompted lawmakers of the civil and common law traditions to impose criminal or quasi-criminal sanctions on corporate wrongdoers. They have used three models to enable findings of corporate "guilt": (1) attributing the collective with the offenses of its employees or agents; (2) identifying the collective with its senior decision-makers; and (3) treating the corporation as itself capable of being a criminal (and moral) actor either through the aggregation of individual thoughts and behaviors or an assessment of the totality of the deficiencies in its corporate culture and organizational systems. The points of similarity and convergence between

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[83] Cf. Pieth 2007a, 182, n. 43. See, generally, OECD 2005a, paras. 158 et seq.; Shibahara 1999.

[84] OECD 2004b, paras. 101 et seq.

[85] FATF 2008, paras. 119 et seq.

[86] Godinho 2010.

[87] See, generally, Chen 2008, 274 et seq.; FATF 2007; Jiachen 1999.

[88] Asia/Pacific Group on Money Laundering 2005, para. 66.

[89] Chen 2008, 275; Coffee 1999a, 24 et seq.; Jiachen 1999, 76.

[90] *Standard Chartered Bank & Ors.* v. *Directorate of Enforcement & Ors.* (2005) AIR 2622, cited in APG on Money Laundering 2005, para. 66.

[91] OECD 2009b, paras. 47 et seq.

[92] MENAFATF 2008a, para. 154.

[93] MENAFATF 2008b, para. 92.

[94] OECD 2008a, paras. 38 et seq.

these models become apparent as we consider the substantive conditions and the defenses to CCL, the procedures for imposing CCL, and its attendant sanctions in European and American common law and civil law jurisdictions.[95]

1.2 Entities That May Be Criminally Liable

In describing the substantive conditions for corporate criminal liability, a threshold question is: "What type of collective may be held criminally or administratively responsible?" As noted above, privately-owned commercial corporations (companies) are not the only collective entities with the capacity to harm communities and confound traditional methods of regulation. Jurisdictions may impose liability on entities without legal personality that operate an "enterprise", they may impose liability on publically as well as privately-owned corporations, and they may criminalize the acts and omissions of non-government, non-profit organizations.

1.2.1 Common Law Jurisdictions

1.2.1.1 The UK and the Commonwealth

In the surveyed British and Commonwealth jurisdictions, legal persons are the traditional addressees of CCL rules. General law identification doctrines, which apply to non-statutory offenses, were developed to address the problem of whether and, if so, how groups with fictional personality could assume moral responsibility under law.[96] Even Australia's otherwise innovative codification of CCL rules is expressed to apply to "bodies corporate".[97] For statutory offenses, rules of statutory interpretation in many common law jurisdictions deem references to "persons" to include partnerships and unincorporated bodies,[98] as well as bodies corporate.[99]

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[95]We received reports on Belgium, Chile, France, Germany, Greece, Hungary, Italy, Macau (SAR), Poland, Portugal, Scotland, Spain, Switzerland, the Czech Republic, the Netherlands, the United States (US), and Uruguay, as well as a chapter on England and Wales for this volume. Our additional research was concentrated on the common law jurisdictions of Australia and Canada.

[96]Wells 2001, 81 et seq.

[97]Criminal Code Act (Australia), s. 12. See also Interpretation Act 1987 No. 15 (New South Wales) (NSW) (Australia), s. 21; Occupational Health and Safety Act 2000 No. 40 (NSW) (Australia), s. 32A(2).

[98]See, e.g., Interpretation Act 1978 c. 30 (UK), s. 5 and Sch. 1; Interpretation Act, RSBC 1996, c. 238 (British Columbia) (Canada), s. 29. See further Pinto/Evans 2003, paras. 2.14 et seq.; Stark (this volume).

[99]See, e.g., Acts Interpretation Act 1901, Act No. 2 of 1901 (Australia), s. 22(1)(a) and (aa).

British and Commonwealth jurisdictions do, however, consider a wide variety of entities as capable of possessing legal personality. Aside from companies established by individuals to engage in trade and commerce, some recognize partnerships,[100] municipalities,[101] charitable and incorporated non-profit or voluntary associations,[102] and corporations established as vehicles for public-private partnerships[103] as legal persons in their own right. The Crown itself has legal personality, though at common law it is immune from prosecution.[104] Crown immunity may also benefit crown bodies (e.g., government departments or agencies) but whether this extends to fully or partially government-owned corporations (GOCs) will depend on the jurisdiction and the offense in question.[105]

Furthermore, some common law legislatures are taking a broader view of the objects of CCL rules, shifting their focus from legal personality to qualities of "enterprise" and "organization". As a result of 2004 reforms, the Canadian Criminal Code now applies to "organizations", defined to mean "(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality or (b) an association of persons that (i) is created for a common purpose (ii) has an operational structure and (iii) holds itself out to the public as an association of persons".[106] Likewise, the UK's Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 (CMCH Act [UK]) applies to "organizations", including listed government departments, police forces, and other unincorporated employers.[107] Also, with the Bribery Act 2010 c. 23 (Bribery Act [UK]), the UK criminalizes the facilitation of bribery by defined "commercial organizations".[108]

1.2.1.2 The US

Whereas British and Commonwealth jurisdictions have traditionally focused on the liability of corporations *qua* legal entities, US federal lawmakers have been willing to apply CCL rules to unincorporated entities and

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[100] See, e.g., Limited Liability Partnerships Act 2000 c. 12 (UK); Stark (this volume) (Scotland).

[101] See, e.g., Local Government Act 2002 No. 84 (New Zealand).

[102] See, e.g., Associations Incorporation Act 1981 No. 9713 of 1981 and Regulation 1999 (Queensland) (Australia); Charities Act 2006 c. 50 (UK).

[103] E.g., Partnerships UK plc, a company established to invest in public sector projects, programs, and businesses. 51% of its equity is owned by private sector institutions. The remaining shares are owned by HM Treasury. See further Partnerships UK 2010.

[104] Sunkin 2003.

[105] Cf. CMCH Act (UK), s. 11(1) and (2)(b). See further Sunkin 2003.

[106] Criminal Code RSC 1985 c. C-46 (Canada) (Criminal Code [Canada]), ss. 2, 22.1, 22.2. See further Allens Arthur Robinson 2008, 25 et seq.

[107] CMCH Act (UK), s. 1(1) and (2).

[108] Bribery Act (UK), s. 7(1) and (5).

individuals. On the one hand, the interpretative provisions of the United States Code (USC) define the words "person" and "whoever" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals".[109] Other undertakings could, presumably, be covered if it were consistent with the statute. On the other hand, the US courts have developed the doctrine of *respondeat superior* from principles of vicarious liability, which renders individual masters liable for their servants' civil wrongs.

1.2.2 Civil Law Jurisdictions

Generally, civil law jurisdictions apply corporate criminal liability rules to legal persons and to organizations that lack (full) legal personality but carry on an enterprise. At § 30, the German Regulatory Offenses Act 1987 (Regulatory Offenses Act [Germany]) refers, for example, to legal persons and to associations with partial legal capacity (such as unincorporated associations and some partnerships).[110] Article 11 Portuguese Criminal Code is also specifically addressed to legal persons and their equivalents (e.g., civil societies and de facto associations).[111] Provisions to similar effect are found in Italian,[112] Dutch,[113] Belgian,[114] Polish,[115] Chilean,[116] and Spanish law,[117] as well as in the law of Macau.[118] Provisions of French[119] and Hungarian[120] law refer only to legal (or "moral") persons. However, these concepts are broadly defined to include all persons established under public and private law with or without profit goals (France) and all legal persons with commercial goals established under private law (Hungary).[121] Switzerland alone expressly abandons the dichotomies between individuals and groups, legal persons, and persons without legal personality: art. 102 of its Criminal Code applies to enterprises, i.e., legal persons in private law, legal persons in public law, societies, and sole traders.[122]

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[109] Nanda (this volume), citing 1 United States Code (USC) 1.

[110] Böse (this volume).

[111] De Faria Costa/Quintela de Brito 2010, 26 et seq.

[112] Decree No. 231 of 2001 (Italy), art. 11; de Maglie (this volume).

[113] Criminal Code (Netherlands), art. 51; Keulen/Gritter (this volume).

[114] Criminal Code (Belgium), art. 5; Bihain/Masset 2010, 1 et seq.

[115] Collective Entities' Legal Responsibility for Acts Forbidden under Penalty Act 2002 (Poland); Kulesza 2010, 2 et seq.

[116] Law No. 20.393 (Chile); Salvo (this volume).

[117] Criminal Code (Spain), art. 31bis; Boldova/Rueda (this volume).

[118] Godinho 2010, 1 et seq.

[119] Criminal Code (France), art. 121-2; Deckert (this volume); OECD 2000b, 11.

[120] Act CIV of 2001 on the Criminal Measures Applicable to Legal Persons, art. 1(1); Santha/Dobrocsi (this volume).

[121] See above nn. 118, 119.

[122] Perrin (this volume); Pieth 2003, 359; Pieth 2004, 603.

As to the state/non-state and profit/non-profit distinctions, civil law jurisdictions generally provide some measure of immunity to governments, their organs, and agencies,[123] some extending this protection to non-state actors that are highly integrated into national or international political processes.[124] The French Criminal Code, for instance, expressly excludes the state itself from the category of moral persons that may be criminally liable and imposes special restrictions on proceedings against local authorities.[125] It does, however, permit prosecutions against non-profit organizations.[126] The Belgian,[127] Italian,[128] and Hungarian[129] laws contain similarly broad exclusions for the state and public agencies, Italy also exempting organizations that carry out functions of constitutional significance (e.g., political parties, unions, and non-economic public authorities)[130] and Hungary[131] and Belgium[132] entities without commercial goals (i.e., non-profit organizations). Polish[133] and Swiss[134] laws would seem to exclude a narrower range of state organizations, though Switzerland may well exempt charitable or public interest organizations, at least for offenses perpetrated in the execution of their humanitarian mandates. It follows that the liability of GOCs and non-profit organizations under civil law CCL rules will generally depend on the scope of any express exclusions and on any explicit or implicit requirement that the alleged corporate offender is commercial in orientation.

1.3 Offenses for Which Corporations May Be Liable

Just as states may limit CCL to certain entities, so they may limit CCL to certain offenses. In fact, concerns that corporations cannot, or should not, be held liable for offenses that require proof of *mens rea*, that apparently protect "private" interests, and that are regulated only at the

[123] On France: Deckert (this volume); on Hungary: Santha/Dobrocsi (this volume); on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 2 et seq.; on Portugal: de Faria Costa/Quintela de Brito 2010, 16 et seq.

[124] On Italy: de Maglie (this volume); on Portugal: de Faria Costa/Quintela de Brito 2010, 26 et seq.

[125] Deckert (this volume).

[126] OECD 2000b, 48.

[127] Bihain/Masset 2010, 1.

[128] De Maglie (this volume).

[129] Santha/Dobrocsi (this volume).

[130] De Maglie (this volume).

[131] Santha/Dobrocsi (this volume).

[132] OECD 2005d, 37.

[133] Kulesza 2010, 2 et seq.

[134] Pieth 2003, 359. Cf. Perrin (this volume).

national level, have characterized judicial and political debates about CCL in many countries.[135] Hence, the question, "What is the scope *ratione materiae* of CCL rules?", can be broken down into "Can corporations be held liable for offenses that require evidence of the mental state of the accused?" and "Can corporations commit all offenses or only those that are typically associated with the economic, environmental, or social impact of the modern (multinational) corporation, especially as reflected in international instruments?"

1.3.1 Common Law Jurisdictions

Though common law jurisdictions have struggled with both these questions, the imputation of offenses with a mental element has historically been the greatest point of difficulty. Initially, corporations were only regarded as capable of committing offenses of strict liability, i.e., offenses without a fault element.[136] This changed, as mentioned, with the extension of vicarious liability principles by US federal courts and the recognition of the identification doctrine in Britain and the Commonwealth.[137] Both models now allow organizations to be imputed with the states of mind of their human stakeholders.

The type of conduct that can be imputed to corporations has been less controversial in common law jurisdictions than in some civil law jurisdictions. As a rule, whether corporations may commit a particular crime is a matter of interpretation – of the statute or the common law norm.[138] And, to the extent that early authorities suggested corporations could not be liable for certain crimes involving deceit and assault (e.g., perjury, rape, and murder),[139] modern legislators in Canada,[140] the

[135] Jelínek/Beran (this volume); Pieth 2003, 360; Wells 2001, 3 et seq.

[136] Wells 2001, 89 et seq.; Pinto/Evans 2003, 15 et seq.; Nanda (this volume).

[137] Wells 2001, 93 et seq.; Pinto/Evans 2003, 39 et seq.; Nanda (this volume).

[138] Nanda (this volume); Wells 2000, 9.

[139] *R.* v. *Great North of England Railway Co.* (1846) 115 ER 1294; *New York Central & Hudson River Railroad Co.* v. *United States* 212 US 481 (1909); *Dean* v. *John Menzies (Holdings) Ltd.* [1981] SLT 50; *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662. See further LCEW (UK) 2010, Pt. 5; Nanda (this volume); Stark (this volume); Wells 2001, 89.

[140] See, e.g., Criminal Code (Canada), Pt. V (Sexual Offenses, Public Morals, and Disorderly Conduct), Pt. VI (Invasion of Privacy), Pt. VII (Disorderly Houses, Gaming, and Betting), Pt. VIII (Offenses against the Person and Reputation), Pt. IX (Offenses against Rights of Property), Pt. X (Fraudulent Transactions relating to Contracts and Trade). See also Crimes Against Humanity and War Crimes Act, SC 2000, c. 24.18.

US,[141] and the UK[142] have taken a different view, at least to the extent that such offenses can be committed by officials "in the scope of their employment".[143] The LCEW (UK) has also recently recommended the restriction of criminal laws in regulatory contexts to "seriously reprehensible conduct" for which prison terms for individuals or unlimited fines would be appropriate punishments.[144] If its proposals are adopted, many low-level criminal offenses frequently applied to corporations in England and Wales would be repealed and replaced with "civil penalt[ies] (or equivalent measure[s])".[145] Ironically, Australian "corporate culture" principles apply to the narrowest range of offenses (generally, those which are matters of international concern).[146] However, this is more likely due to the scope of the federal government's law-making power in Australia than to in-principle opposition to the "corporatization" of some criminal acts and omissions.[147]

1.3.2 Civil Law Jurisdictions

By contrast, amongst civil law jurisdictions, the type of act or omission has assumed greater importance than the presence or absence of fault as an element of a crime. For, in displacing the traditional principle of *societas delinquere non potest*, they explicitly acknowledged the possibility of corporate fault (or administrative liability for criminal offenses, as a substitute). However, since many civil law states introduced CCL rules to combat specific risks and/or to comply with specific international obligations, they were forced to deal with the questions of whether corporations should only be held liable for stereotypically "corporate" crimes, for conduct subject to an international criminalization obligation, or for all crimes on the books.

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[141] See, e.g., USC, Ch. 7, s. 116 (Female genital mutilation), s. 117 (Domestic assault by habitual offenders), s. 641 (Theft etc. of public money, property, or records). Cf. LCEW (UK) 2010, para. 5.10.

[142] Bribery Act (UK); CMCH Act (UK), s. 1; Sexual Offences Act (Scotland) 2009 (asp. 9), s. 57.

[143] Crown Prosecutions Service of England and Wales (CPSEW [UK]) 2010, para. 12.

[144] LCEW (UK) 2010, Proposals 1 and 2, see further paras. 1.28 et seq., Pts. 3, 4.

[145] LCEW (UK) 2010, Proposal 3. See further LCEW (UK) 2010, paras. 1.28 et seq., 1.61, 3.1 et seq., 6.5.

[146] See e.g., Criminal Code Act 1995 (Australia), s. 70.2 (Bribery of foreign public officials), s. 71.2 (Murder of a UN or associated person), s. 103.1 (Financing terrorism), Ch. 8, Div. 268 (Genocide, crimes against humanity, war crimes, and crimes against the administration of the justice of the International Criminal Court).

[147] Criminal Code Act (Australia), ss. 2, 12.3. See further Allens Arthur Robinson 2008, 15.

1.3.2.1 The "All-Crimes" Approach

French, Dutch, Belgian, Hungarian, and German legislators opted for the broadest "all-crimes" approach: in France[148] and the Netherlands[149] corporations may be held liable for any crime, in Belgium[150] and Hungary[151] for all crimes of intent, and, in Germany, for all "crimes and regulatory offenses".[152]

1.3.2.2 The "List-Based" Approach

Czech,[153] Italian,[154] Polish,[155] Portuguese,[156] and Spanish[157] lawmakers chose to restrict corporate criminal and quasi-criminal liability by reference to lists. The listed offenses reflect concerns about typically "corporate" risks, as well as the influence of international and regional crime control initiatives, as these have changed over time. For example, Italy's Decree No. 231 of 2001 was once limited to bribery, corruption, and fraud but, after amendments at the turn of this century, now applies to financial and competition offenses, terrorism, slavery, money laundering, handling stolen goods, female genital mutilation, involuntary manslaughter, and offenses involving serious workplace injuries; it may be extended to environmental crimes in the future.[158] Some speculate that the Czech Corporate Criminal Liability Bill of 2004 may have succeeded had it likewise contained a more limited list of crimes.[159]

1.3.2.3 The Dual Approach

Alone among the civil law states surveyed, Switzerland incorporates both the all-crimes and list-based approaches, creating one basis of liability for economic crimes addressed in international instruments and another for the remaining domestic offenses.[160] Hence, by art. 102(2) Criminal Code (Switzerland), an enterprise may be liable for organized crime,[161]

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[148] Criminal Code (France), art. 121-2 ("in the cases provided for in the law"). See further Deckert (this volume).
[149] Keulen/Gritter (this volume).
[150] Bihain/Masset 2010, 1. See also OECD 2005d, para. 123.
[151] Santha/Dobrocsi (this volume).
[152] Böse (this volume).
[153] Jelínek/Beran (this volume).
[154] De Maglie (this volume).
[155] Kulesza 2010, 3 et seq.
[156] De Faria Costa/Quintela de Brito, 27 et seq.
[157] Boldova/Rueda (this volume).
[158] De Maglie (this volume).
[159] Jelínek/Beran (this volume).
[160] See, generally, Pieth 2003, 360 et seq.
[161] Criminal Code (Switzerland), art. 260ter.

the financing of terrorism,[162] money laundering,[163] and various forms of corruption[164] simply by virtue of the fact that it failed to prevent the offense through necessary and reasonable organizational measures. For other offenses, art. 102(1) provides that the enterprise may be liable when the individual offender cannot be identified, and hence prosecuted, due to the enterprise's state of disorganization.[165]

1.4 Natural Persons Who Trigger Liability

All models of corporate criminal liability depend on the attribution of individual acts, omissions, and states of mind to a corporation or enterprise,[166] though each attributes the corporation or enterprise with the thoughts and actions of different natural persons. These differences are not merely academic: how a jurisdiction describes the category of person who can trigger corporate criminal or administrative liability determines, to a large extent, the types of organizations to which the criminal law applies. Narrow rules, which only impute corporations with offenses by corporate officers, organs, and senior executives, will rarely result in convictions against large companies in which lower-level agents, consultants, and employees collectively execute corporate operations.[167] However, broad rules, which impute the organization with any agent's or employee's misconduct, may render corporations disproportionately liable for the misdeeds of lone individuals who contravene well-established rules and internal cultural norms of good behavior (so-called "rogues").[168]

Thus, a key issue is, "Which natural persons in which circumstances are capable of triggering the criminal liability of the corporation?" The surveyed jurisdictions dealt with this issue in one of three ways:

- by imputing the corporation with offenses by any corporate agent or employee – no matter what steps others in the corporation had taken to prevent and respond to the misconduct *(strict vicarious liability)*, or if others had not done enough to prevent the wrongdoing *(qualified vicarious liability)*;

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[162] Criminal Code (Switzerland), art. 260^{quinquies}.

[163] Criminal Code (Switzerland), art. 305bis.

[164] Criminal Code (Switzerland), arts. 322ter (bribery of Swiss public officials), 322^{quinquines} (abuse of influence of Swiss judicial and military officials), 322(1)^{septies} (bribery of foreign public officials); Federal Law of December 19, 1986, on Unfair Competition (Switzerland), art. 4a(1) (active and passive bribery in the private sector).

[165] Perrin (this volume); Pieth 2003, 365 et seq.; Pieth 2004, 604.

[166] Pieth 2003, 360.

[167] Pinto/Evans 2003, para. 4.20; Wells 2001, 115.

[168] Cf. Beale 2009, 1488.

- by identifying the corporation with its executive bodies and managers and holding it liable for their acts, omissions, and states of mind *(identification)*; and
- by treating the collective as capable of offending in its own right, either through the aggregated thoughts and deeds of its senior stakeholders *(aggregation)* or though inadequate organizational systems and cultures *(corporate culture*, *corporate (dis)organization)*.

A similar schema is used in a 2009 OECD recommendation on the implementation of the Convention on Foreign Bribery.[169]

As to the conditions for attribution, these would seem to play a greater role in jurisdictions that regard corporations as vicariously liable for offenses by non-executive stakeholders. They have, however, been recognized as part of common law identification doctrines in the Commonwealth and they are embedded in holistic corporate liability principles. Moreover, all the jurisdictions surveyed seemed to require some degree of connection between the offense and the corporation's objectives, whether that connection is established by reference to the scope of the individual offender's powers or duties, the corporation's perceived interests, or the actual or intended corporate benefit.[170]

1.4.1 Common Law Jurisdictions

1.4.1.1 Strict Vicarious Liability: US Federal Law

Vicarious liability principles, as they have been developed in US federal law, allow legal entities to be imputed with offenses by all agents and employees, regardless of their individual functions within the corporation, their status in the organizational hierarchy, or the organization's attempts to prevent the individual wrongdoing.[171] Once the prosecutor shows the person to be a corporate agent or employee, the issue becomes whether the person was acting, at least in part, for the corporation's benefit and within the scope of his/her duties; if so, the corporation is imputed with the agent's or employee's offense,[172] even if it had developed and implemented appropriate

[169] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 26, 2009, Paris (OECD 2009 Recommendation), Annex I, para. B.

[170] Pieth 2003, 361 et seq.

[171] Hasnas 2009, 1342.

[172] Coffee 1999a, 14 et seq.; Nanda (this volume).

corporate compliance systems.[173] In this way, vicarious corporate criminal liability norms in US federal law have assumed a uniquely strict form.[174] Corporate liability principles under US state law tend to be less strict, many of these state legislatures and courts having adopted rules similar to those set out in the US Model Penal Code.[175]

1.4.1.2 Qualified Vicarious Liability: UK Regulatory Offense Legislation

The UK uses a milder version of vicarious liability to impute corporations with some statutory offenses.[176] Typically, these statutes deem a "person" guilty of an offense without requiring evidence of intent, negligence, or another state of mind. In other words, they employ principles of strict liability. However, they are also typically accompanied by a due diligence defense, which allows the offender to avoid liability if he/she can prove that he/she took all reasonable precautions to prevent the commission of the criminal act or omission.[177] Therefore, such regulatory offense statutes are better regarded as examples of qualified vicarious liability than a strict vicarious liability approach.

1.4.1.3 Identification: The Narrow UK View

Such legislation was at issue in *Tesco Supermarkets Ltd.* v. *Nattrass (Tesco Supermarkets)*,[178] ironically the leading case on who acts as the directing mind and will under general law identification principles in England and Wales. In *Tesco Supermarkets*, the House of Lords asked whether the corporate owner of a supermarket chain could be imputed with the criminal negligence of its employee. A supermarket store manager had failed to correctly display a sale item and the company was charged with a breach of the Trade Descriptions Act 1968. The company defended the charges, arguing, first, that it was a different person to the store manager and, second, that it had exercised due diligence to prevent the store manager's offense.

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[173] Cf. American Law Institute 1962, para. 2.07; *United States* v. *Ionia Management SA* 555 F. 3d 303 (2009) at 310 (McLaughlin, Calabresi, and Livingston JJ). See further Nanda (this volume). Note also that the LCEW (UK)'s provisional proposals include a suggestion that Parliament create a generic due diligence defense to all statutory strict liability offenses in England and Wales: LCEW (UK) 2010, Proposal 14 and Pt. 6. See further below at 1.5.1; and Wells (this volume).

[174] Nanda (this volume).

[175] American Law Institute 1962, para. 2.07. See Nanda (this volume); Wells 2001, 131.

[176] See, generally, Wells 2001, 85 et seq.

[177] LCEW (UK) 2008b, 118 et seq.

[178] [1972] AC 153 at 1 (Reid LJ).

The House of Lords agreed.[179] For slightly different reasons, each of the law lords found that the store manager was not the corporation's "directing mind and will" and so did not offend as the company. *Tesco Supermarkets* became authority for the proposition that companies are criminally responsible for the offenses of their corporate organs, corporate officers, and other natural persons who have been delegated wide discretionary powers of corporate management and control.[180]

1.4.1.4 Identification: The Broader View from the Commonwealth

Tesco Supermarkets is the leading case on the concept of the alter ego in England and Wales and has been extremely influential throughout Great Britain and the Commonwealth. However, the House of Lords did not take a clear view on the nature of the power that makes a person the directing mind and will. As a result, it is not clear whether it is necessary that the directing mind and will is a person formally empowered to manage the corporation's general affairs under general or specific rules of association or whether it is sufficient that he/she controls a relevant aspect of the corporation's operations (in law or in fact). Subsequent English courts tended to adopt a narrower view in criminal contexts,[181] whilst some Commonwealth courts have adopted broader interpretations.

First, since *Canadian Dredge and Dock Co.* v. *R. (Dredge and Dock)*,[182] the Supreme Court of Canada has treated a person's capacity for decision-making in a particular operative sector of a corporation as determinative of his/her capacity to act as the corporation. So, in that case, the defendant companies could be imputed with bid-rigging by non-executive managers as those managers had been acting within the scope of their duties and to

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[179] Pinto/Evans 2003, para. 4.14.

[180] *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] AC 153 at 171 et seq. (Reid LJ), 179 et seq. (Morris of Borth-y-Gest LJ), 187 et seq. (Dilhorne LJ), 192 et seq. (Pearson LJ), 198 et seq. (Diplock LJ). See, generally, Pinto/Evans 2003, paras. 4.12 et seq.; Wells 1999, 120 et seq.; Wells 2001, 98.

[181] *Attorney General's Reference (No. 2 of 1999)* [2000] QB 796; [2000] 2 Cr. App. R. 207; [2000] 3 All ER 182; *R.* v. *P&O European Ferries (Dover) Ltd.* [1991] 93 Cr. App. R. 72. Cf. *El Ajou* v. *Dollar Land Holdings Ltd*. [1993] EWCA Civ. 4; *Director General of Fair Trading* v. *Pioneer Concrete (UK) Ltd.* [1995] 1 AC 456; *Stone & Rolls Ltd. (in liq.)* v. *Moore Stephens (a firm)* [2009] 1 AC 1391 at paras. 39 et seq. (Phillips of Worth Matravers LJ), paras. 221 et seq., 256 et seq. (Mance LJ). See, generally, LCEW (UK) 2010, paras. 5.48 et seq.; Pinto/Evans 2003, paras. 4.23 et seq., paras. 13.9 et seq.; Wells 2001, 112 et seq. Cf. CPSEW (UK) 2010, para. 20 (requiring prosecutors to consider the purpose of certain regulatory offenses and referring to *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500, discussed next).

[182] [1985] 1 SCR 662, paras. 29, 32 (Estey J). See further Allens Arther Robinson 2008, 24 et seq.; Wells 2001, 130 et seq.

benefit the corporation, at least in part.[183] The companies could not avoid liability on the basis that they had issued "general or specific instructions prohibiting the conduct".[184] The limits of imputation were fraud against the company that solely benefited the individual and "form[ed] a substantial part of the regular activities of [their] office".[185]

Second, in *Meridian Global Funds Asia Ltd.* v. *Securities Commission (Meridian)*, the Privy Council upheld a New Zealand court's decision to determine the directing mind and will "by applying the usual canons of [statutory] interpretation [to the norm in question], taking into account the language of the rule (if it is a statute) and its content and policy".[186] In that case, the legislation required disclosure of share purchaser information in fast-moving financial markets.[187] The Privy Council found that only senior operative personnel could effectively act as the company for those purposes and, moreover, that the general rules of attribution were sufficient to determine who these people were and the scope of their authority.[188]

1.4.1.5 Corporate Culture: Australian Federal Law

At the federal level, Australia relies on both identification and holistic models of corporate criminal liability. Section 12.2 Criminal Code Act (Australia) provides that the physical elements of an offense committed by an employee, agent, or officer of a body corporate must be attributed to the corporation if the individual was acting within the actual or apparent scope of his/her employment or authority. Section 12.3 then elaborates that the fault elements of intention, knowledge, or recklessness must be attributed to a body corporate that expressly, tacitly, or impliedly authorized or permitted them. The code also contains special rules for establishing corporate criminal negligence.[189]

Authorization or permission is established in one of four ways, i.e., by proving that:

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[183] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 21 (Estey J).

[184] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 43 (Estey J).

[185] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 65 et seq. (Estey J).

[186] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500 at 507 (Hoffman LJ).

[187] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500 at 511 (Hoffman LJ).

[188] *Meridian Global Funds Asia Ltd.* v. *Securities Commission* [1995] 2 AC 500 at 506, 511 et seq. (Hoffman LJ).

[189] Criminal Code Act (Australia), ss. 5.5, 12.4(2). See further Beale 2009, 1499 et seq.

- the body corporate's board of directors carried out the relevant conduct intentionally, knowingly, or recklessly, or authorized or permitted the commission of the offense expressly, tacitly, or impliedly;[190]
- a high managerial agent of the body corporate engaged in the conduct intentionally, knowingly, or recklessly, or expressly, tacitly, or impliedly authorized or permitted the commission of the offense[191] unless the body corporate proves that it exercised due diligence to prevent the conduct or the authorization or permission;[192]
- a corporate culture existed within the body corporate that directed, encouraged, tolerated, or led to non-compliance with the relevant provision;[193] or
- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[194]

"High managerial agents" are corporate employees, agents, or officers "with duties of such responsibility that [their] conduct may fairly be assumed to represent the body corporate's policy".[195]

Therefore, under Australian federal law, it is permissible but not necessary to prove that an offense was committed by a human stakeholder whose thoughts, acts, and omissions were attributable to the body corporate. If the prosecution relies on the corporate culture provisions, it will look more broadly for evidence of attitudes, policies, rules, and general or localized patterns of behavior or practices.[196] Evidence of the high-level individual's acts, omissions, and states of mind remains relevant to the question of fault, since s. 12.3(4) authorizes the court to consider, in assessing corporate culture, whether a high managerial agent authorized the act or a lower-level offender reasonably believed that he/she would have received the high managerial agent's authority or permission. However, until these provisions are judicially considered, it is not possible to know exactly how much weight individual managerial (in)action will be given by the Australian courts.

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[190] Criminal Code Act (Australia), s. 12.3(2)(a). Note that under s. 12.3(6), "Board of directors" is defined to mean "the body (by whatever name called) exercising the executive authority of the body corporate."

[191] Criminal Code Act (Australia), s. 12.3(2)(b).

[192] Criminal Code Act (Australia), s. 12.3(3).

[193] Criminal Code Act (Australia), s. 12.3(2)(c).

[194] Criminal Code Act (Australia), s. 12.3(2)(d).

[195] Criminal Code Act (Australia), s. 12.3(6).

[196] Criminal Code Act (Australia), s. 12.3(6).

1.4.1.6 UK Law Reforms

The particular narrowness of the British identification doctrine has prompted criticism and calls for reform.[197] Unsuccessful attempts to introduce aggregation principles before the courts prompted legislative action by Parliament in relation to specific high-profile "corporate" offenses and LCEW (UK) proposals in relation to statutory offenses more generally.

Case Law: Aggregation Rejected

The capsize of the Herald of Free Enterprise on its way from Zeebrugge in 1987 resulted in the deaths of almost 200 people and the prosecution of P&O European Ferries (Dover) Ltd. (P&O Ferries) for reckless manslaughter.[198] The coroner found that the events leading to the accident could have been prevented had proper organizational measures been considered and implemented by the board of P&O Ferries.[199] However, none of the board members had sufficient knowledge of these deficiencies to themselves be criminally liable for the deaths nor had any of them performed the errors of omission that led to the ferry's capsize. The prosecution argued, nonetheless, that the facts known to each of them could be regarded collectively and treated as the recklessness of the corporation. The coroner and the Queen's Bench on appeal rejected this approach. For Lord Justice Bingham (Justices Mann and Kennedy agreeing) aggregation of individual acts and states of mind was inconsistent with the local doctrine of identification.[200] Notably, such an approach had been regarded as consistent with corporate criminal liability principles under US federal law.[201]

Statutory Reforms of Manslaughter and Bribery Offenses: A Holistic, Aggregative, or Qualified Identification Approach?

UK Parliament has subsequently enacted two laws that appear to depart from the narrow identification doctrine and, at least at first blush, to introduce elements of a holistic approach into UK law.

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[197] See, e.g., Drew/UNICORN 2005, 3; LCEW (UK) 2010, paras. 5.81 et seq.; OECD 2005b, paras. 295 et seq.; OECD 2008b, paras. 65 et seq.

[198] *R.* v. *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr. App. R. 10; *R.* v. *P & O European Ferries (Dover) Ltd.* [1991] 93 Cr. App. R. 72. See further LCEW (UK) 1996, para. 6.05; Wells 2001, 106 et seq.

[199] *R.* v. *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr. App. R. 10 at 13 (Bingham LJ).

[200] *R.* v. *HM Coroner for East Kent; Ex parte Spooner* (1989) 88 Cr. App. R. 10 at 16 et seq. (Bingham LJ). See Wells 2001, 108. See also CPSEW (UK), para. 25.

[201] *United States* v. *Bank of New England NA* 821 F. 2d 844 (1987) at 856 (Bownes J), cited in Podgor 2007, 1541.

First, to broaden the range of circumstances in which legal entities may be held criminally liable for an individual's death,[202] the CMCH Act (UK) creates the offense of "corporate manslaughter" ("corporate homicide" in Scotland).[203] Other things being equal, an organization commits corporate manslaughter "if the way in which its activities are managed or organized (a) causes a person's death and (b) amounts to a gross breach of a relevant duty of care owned by the organization to the deceased".[204] The act removes the requirement of an offense by a company officer, organ, or senior manager and enables the jury to consider "the extent to which… there were attitudes, policies, systems or accepted practices within the organization that were likely to have encouraged [a failure to comply with health and safety legislation]… or to have produced tolerance of it".[205] The CMCH Act (UK) is thus said to depart from the identification model, even to approach an aggregative[206] or a corporate culture model of responsibility.[207] Still, the prosecution must show that "the way in which [the corporation's] activities [were] managed or organized by its senior management [was] a substantial element in the breach…".[208] So, successful prosecutions will depend, in practice, on evidence of the acts, omissions and knowledge of senior corporate figures.[209]

Second, to address bristling domestic and international criticism,[210] the Bribery Act (UK) creates an offense of "Failure of commercial organizations to prevent bribery" in England, Wales, Northern Ireland, and Scotland.[211] In line with the OECD's anti-bribery convention and 2009 recommendations, the act deems relevant commercial organizations guilty of an offense if a person associated with them bribes someone else with the intention of obtaining or retaining specified benefits for the organization.[212] The offense is one of strict liability, a Parliamentary joint committee having rejected a recommendation that the offense include an element of negligence on the part of a natural person employed or connected with the company and responsible for ensuring corporate compliance with anti-bribery laws.[213]

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[202] Explanatory Notes: Corporate Manslaughter and Corporate Homicide Act 2007 (July 27, 2007), 8 et seq.; Wells 2001, 106 et seq.

[203] CMCH Act (UK), s. 1(1).

[204] CMCH Act (UK), s. 1(1).

[205] CMCH Act (UK), s. 8(3).

[206] LCEW (UK) 2010, para. 5.92; Cartwright 2010, para. B.31.

[207] Belcher 2006, 6; Gobert 2008, 427.

[208] CMCH Act (UK), s. 1(3).

[209] Gobert 2008, 428.

[210] Parliament 2009, para. 72; OECD 2005b; OECD 2008b.

[211] Bribery Act 2010 (UK), s. 7(1).

[212] Explanatory Notes: Bribery Act, paras. 50 et seq.

[213] Parliament 2009, para. 89. Cf. LCEW (UK) 2008b, paras. 6.100 et seq.

Nonetheless, the act's "adequate systems defense" allows the organization to avoid liability by proving "[it] had in place adequate procedures designed to prevent [associated persons] from undertaking such conduct".[214] It would seem that the reference to the commercial organization's procedures was intended to allow the courts to look at the practical measures that had been implemented throughout the company to prevent bribery.[215] On this basis, it could be regarded as akin to a requirement that organizations accused of bribery demonstrate the existence of an adequate "corporate culture".

Future Law Reforms: New General Principles for Statutory Offenses?

Finally, if the preliminary proposals of the LCEW (UK) are any guide, some British jurisdictions will adopt a more open, "context-sensitive, interpretative" approach to attribution of liability for statutory offenses.[216] In its August 2010 consultation paper, the LCEW (UK) called on Parliament to specify principles of attribution for statutory offenses and, in the absence of such provisions, on the English and Welsh courts to use general rules of statutory interpretation to determine how corporate liability for particular offenses is to be established.[217] It saw "no pressing need for statutory reform or replacement of the identification doctrine",[218] as, in its view, there was already authority for the proposition that the courts should select the most appropriate approach to liability for the statutory offense in question.[219] It would seem, moreover, that it considered holistic ("corporate culture") models of liability to figure among the approaches available to the courts, in addition to the vicarious and identification models for liability they have traditionally used.[220]

Thus, the LCEW (UK) has arguably attempted to recast the Privy Council's approach in *Meridian* as the basic approach to attribution of individual acts and omissions to corporations in English and Welsh law. It would seem, moreover, to have taken a broad and quite "open" view of the

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[214] Bribery Act (UK), s. 7(2).

[215] Parliament 2009, para. 92.

[216] LCEW (UK) 2010, paras. 5.7, 5.013 et seq.

[217] LCEW (UK) 2010, Proposal 13: "Legislation should include specific provisions in criminal offenses to indicate the basis on which companies may be found liable, but in the absence of such provisions, the courts should treat the question of how corporate fault may be established as a matter of statutory interpretation. We encourage the courts not to presume that the identification doctrine applies when interpreting the scope of criminal offenses applicable to companies." See further LCEW (UK) 2010, 1.60 et seq., Pt. 5.

[218] LCEW (UK) 2010, para. 5.104.

[219] LCEW (UK) 2010, para. 5.104 and the discussion of the case law in Pt. 5 generally.

[220] LCEW (UK) 2010, paras. 5.103 et seq. See further Wells (this volume).

individuals or collections of individuals through whom a corporation may think or act in accordance with the *Meridian* doctrine. Whether English and Welsh legislators and courts are willing to accept the commission's flexible but uncertain approach to liability remains to be seen, however. And, having completed its consultations in late 2010, the LCEW (UK) is not itself expected to issue its final report until Spring 2012.[221]

1.4.2 Civil Law Jurisdictions

1.4.2.1 Jurisdictions with Imputation Models: Identification and Vicarious Corporate Liability

Of the civil law jurisdictions that employ imputation models of corporate criminal or quasi-criminal liability, all enable the corporation to be identified with its organs, officials, and senior executives and most enable it to be held vicariously liable for the offenses of its junior employees, agents, and (in some cases) third parties. Placing these laws on a continuum, the French provisions are triggered by the narrowest range of stakeholders (corporate organs and representatives), Polish and Hungarian rules by the widest (leading persons and persons under their supervision, as well as third parties), and German, Italian, Portuguese, Spanish, and Chilean laws occupy positions between the two extremes, being triggered by varying assortments of individuals and bodies. In all cases, express conditions of liability, such as the requirement of a connection between the corporation's aims and the offense, limit the types of individual acts imputable to the collective.

Identification with Senior Corporate Organs and Representatives: France

At one end of the continuum, French law imputes corporations only with offenses by their organs and representatives, "organs" being individuals and bodies who act as the corporation under its rules of association in law or in fact[222] and "representatives" being those who have been delegated executive powers within a certain area of corporate operations.[223] A further condition – that the organ or representative was acting on behalf of the legal person in committing the offense – has been interpreted broadly to capture acts in the name of the legal person and activities intended to advance "the organization, operations, and objectives of the [legal] person".[224]

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[221] LCEW (UK) 2010, iii.

[222] Criminal Code (France), art. 121-2. See further Deckert (this volume).

[223] Deckert (this volume).

[224] OECD 2000b, 13.

Identification and (Indirect) Vicarious Liability: Germany

Like France, Germany enables corporations to be imputed with offenses by senior managers and, somewhat indirectly, with offenses by junior personnel that result from an omission by senior corporate figures.

First, § 30 Regulatory Offenses Act (Germany) allows courts to impose administrative sanctions on corporations for offenses by a broad range of senior managerial stakeholders:

- representative organs of a legal person or a (human) member of such an organ;
- the chairperson or a board member of an unincorporated association;
- a partner authorized to represent a partnership;
- a person with general authority to represent a legal person, unincorporated association, or partnership or who is a general managerial agent or authorized representative of one of these entities; and
- other persons responsible for the management of the business or enterprise of one of the above entities, including those who supervise the management of the entity or are involved in other ways in controlling it at the executive level.[225]

Once it is established that the human offender was acting in one of these capacities, the prosecutor must demonstrate either that the entity's duties were violated through the commission of the offense or that the entity was enriched, or should have been enriched, through the commission of the offense.[226] The corporation's duties (and the range of offenses for which it can be held liable) are determined having regard to its objectives, these indicating in turn the scope of its corporate risk *(Unternehmensrisiko)*. Given the ancillary nature of the corporate sanction, the conviction of an individual is a de facto criterion as well.

Second, under § 130 Regulatory Offenses Act (Germany), a corporation may be (indirectly) punished for any breach of corporate duties when such a breach resulted from a failure by a corporate representative to faithfully discharge his/her duties of supervision.[227] In this second provision, the corporation is not made liable for the breach per se but for a natural person's intentional or negligent failure to carry out his/her supervisory duties,[228] including careful selection, appointment, and oversight by corporate representatives.[229]

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[225] Regulatory Offenses Act (Germany), § 30(1). See further Böse (this volume).
[226] OECD 2003, 32.
[227] Böse (this volume).
[228] Böse (this volume).
[229] Böse (this volume).

Identification and Vicarious Liability: Italy, Portugal, Spain, and Chile

Italian, Portuguese, Spanish, and Chilean CCL rules go a step further than the German rules by allowing corporations to be imputed with offenses by senior managers and persons under their supervision. For example, art. 5(1) of Italy's Decree No. 231 of 2001 provides for the imposition of administrative penalties on organizations for offenses by persons with representative, directorial, or managerial functions of a corporation or one of its organizational units, as well as by persons who exercise (de facto) management and control of the corporation. They may also be liable for offenses by persons "subject to the authority" of a representative, director, or manager. In any case, the offense must have been committed in the interest of the organization or to its advantage and not solely in the interests of the individual or third party.[230]

Portuguese, Spanish, and Chilean criminal liability provisions also allow the corporation to be held liable for the acts and omissions of leading persons. Article 11(2) Portuguese Penal Code provides that a corporation may be criminally liable for offenses by natural persons who occupy leadership positions or by other persons who act under a leading person's authority.[231] Persons with leadership positions are those within the entity's organs, those who represent the organization, and those with authority to exercise control over the entities' activities.[232] To offend for the corporation, the leaders or subordinates must have acted in the collective name and interest of the entity and due to a breach of the leader's duties of supervision and control.[233] Likewise, the new art. 31bis(2) Spanish Criminal Code establishes the criminal liability of certain entities for offenses committed by their legal representatives, administrators (de jure and de facto), and employees with power of agency, as well as other persons who act under the authority of such senior figures.[234] Managers trigger art. 31bis when they commit an offense on behalf of the entity or for its benefit; for anyone else, liability arises when the offense is committed in the exercise of the entity's "social activities", on its behalf, for its benefit, and due to a lapse in control by senior figures.[235] Chilean law also attributes corporations with offenses by their owners, controllers, responsible persons, chief executives,

[230] De Maglie (this volume).

[231] De Faria Costa/Quintela de Brito 2010, 28 et seq.

[232] De Faria Costa/Quintela de Brito 2010, 30.

[233] De Faria Costa/Quintela de Brito 2010, 30 et seq., esp. 33.

[234] Boldova/Rueda (this volume).

[235] By contrast, Spanish Criminal Code, art. 129(1)(a), which allows for the imposition of administrative sanctions on entities, does not identify a particular person as the primary author of the offense, nor does it set out conditions for the imposition of liability, except to require a hearing between the prosecutor and the owners of the undertaking and its representatives.

representatives, administrators, or supervisors and persons who are under direction or supervision of one of those people.[236]

Identification and Vicarious Liability: Poland and Hungary

At the other end of the continuum, Poland and Hungary are prepared to impute corporations with offenses by leading persons, persons under the supervision of leading persons, and third parties. Article 2 Polish Act of October 28, 2002 on the Liability of Collective Entities for Acts Prohibited under Penalty (Liability of Collective Entities Act [Poland]) distinguishes between natural persons who act under the authority or duty to represent the entity, natural persons who are allowed to act by such leading persons, and natural persons who act with the consent or knowledge of leading persons.[237] The Hungarian Act CIV of 2001 on the Criminal Measures Applicable to Legal Persons similarly imputes entities with offenses by members or officers authorized to represent the legal person or participate in its management, members or agents of the supervisory board, members and employees of the corporation, and other people.[238] Had it succeeded, the 2004 Czech Corporate Criminal Liability Bill would have provided for CCL in similar situations.[239]

The apparent breadth of the Hungarian and Polish provisions is qualified by their extensive conditions for liability.[240] In both states, criminal proceedings may only be brought against the corporation when a human offender has been convicted first – a potential impediment to corporate prosecutions according to international monitoring bodies.[241] Other conditions for imputation depend on the human offender's proximity to senior management; they repeat the concepts of representation ("behalf of"), authority ("scope" of activities or power), mismanagement, and knowledge familiar from other civil law jurisdictions.[242]

1.4.2.2 Corporate (Dis)organization: Switzerland

Alone among the surveyed civil law jurisdictions, Switzerland takes an overtly holistic approach to the question of corporate liability.[243] Under

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[236] Salvo (this volume).

[237] Kulesza 2010, 4 et seq.

[238] Santha/Dobrocsi (this volume).

[239] Jelínek/Beran (this volume).

[240] Kulesza 2010, 4; Santha/Dobrocsi (this volume).

[241] GRECO 2004, 56; OECD 2005c, paras. 43 et seq.; OECD 2007a, 155 et seq.; OECD 2009 Recommendation, Annex I, para. B. See also GRECO 2006, para. 84.

[242] On Hungary: see Santha/Dobrocsi (this volume); on Poland: see Kulesza 2010, 5.

[243] Heine 2000, 4; Perrin (this volume). See further Pieth 2003; Pieth 2004.

art. 102(1) Criminal Code (Switzerland), an enterprise is liable for offenses committed within the framework (scope) of its entrepreneurial objectives and in the execution of its business activities provided that the offense cannot be attributed to a particular individual because of organizational deficiencies in the enterprise itself. Under art. 102(2), an enterprise is liable for listed economic crimes "if [it] may be accused of not having taken all necessary and reasonable organizational measures to prevent such an offense."

Corporate liability is subsidiary to individual liability under art. 102(1) and primary under art. 102(2); however, in neither case is it strict.[244] Each paragraph should be read as making corporate liability conditional on proof of corporate fault, i.e., deficiencies in organization.[245] Specifically, each requires proof, not only that an offense was committed, but also that it was reasonably foreseeable for an enterprise with the aims, objectives, and characteristics of the accused enterprise and that it was allowed to occur – in the case at hand – because of the absence or inadequacy of systemic preventative measures.[246] In addition, the subsidiary nature of liability under para. 1, means that there must be a connection between the enterprise's organizational deficiencies and the fact that an individual offender cannot be identified.[247]

In determining what standard of organization is required of the enterprise, it has been submitted elsewhere that the courts will look at the general law of agency and negligence, industry-specific statutory regulations, private or non-binding standards, and the particular risk profile of the enterprise (its size, operations, aims, customers, geographical presences, etc.).[248] Moreover, in assessing the sufficiency of the level of organization in the accused enterprise, it would seem that courts should have particular regard to the decisions of corporate organs, the existence, scope, and enforcement of compliance policies or systems, the knowledge, acts, and omissions of corporate officers and senior executives, and the patterns of behavior amongst individuals connected to the organization as employees or otherwise.[249]

1.4.2.3 "Open" Models: Imputation, Aggregation, and/or Holistic Approaches

Two civil law jurisdictions under review dispense with the need to prove the commission of an offense by an identified human stakeholder without

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[244] Perrin (this volume); Pieth 2003, 362 et seq.; Pieth 2004, 604 et seq.
[245] Pieth 2003, 363 et seq.; Pieth 2004, 603 et seq.
[246] Perrin (this volume); Pieth 2004, 604 et seq.
[247] Perrin (this volume).
[248] Perrin (this volume); Pieth 2003, 365 et seq.; Pieth 2004, 604 et seq.
[249] Perrin (this volume); Pieth 2004, 606 et seq.

committing to a single alternative model of imputation. In so doing, they invite the application of holistic principles, aggregative models, and traditional imputation doctrines of liability.

First, in the Netherlands, a corporation will be regarded as having committed an offense when this is "reasonable" in the circumstances. For Dutch courts, imputation is reasonable when the offense was committed "within the scope" of an entity having regard to certain "guiding principles".[250] The courts ask (amongst other things) whether the person worked for the entity, whether the conduct was part of the everyday business of the entity, whether the entity profited through the criminal act or omission, and whether the entity controlled and accepted the criminal acts or omissions given its relationship with the alleged individual offender and its managers' acts and omissions.[251] The Dutch open model, while not expressly holistic or aggregative, enables the courts to attribute corporations with the acts of potentially all employees taking into account the conduct of other individuals in the organization.[252]

Second, in Belgium, art. 5 Criminal Code deems legal persons "criminally liable for offenses that are intrinsically connected with the attainment of their purpose or the defense of their interests or for offenses that concrete evidence shows to have been committed on their behalf." Insofar as art. 5 does not mention a person (or persons) who offends as or on behalf of the corporation, it signals that liability is not contingent upon proof of the commission of an offense by a certain type of human stakeholder. Hence, the Belgian law leaves open the question of how corporations incur criminal liability, particularly for offenses that include an element of *mens rea*.[253] Belgian authorities are yet to take a clear position on whether – as a matter of fact – a corporation is liable whenever an offense is intrinsically connected to its purpose or was committed in defense of its interests or whether imputation presumes some element of corporate fault.[254] The former interpretation would see Belgium adopt a form of strict liability based on the subjective or objective relationship between the company and offense. If corporate fault is required, it remains to be seen whether it is based on the acts or omissions of corporate organs or senior executives with supervisory responsibilities or whether it is established having regard to the adequacy of the corporation's systems for preventing and responding to this kind of offense. So, the Belgian law could move closer to the standard European model of qualified vicarious liability or the holistic Swiss (dis)organization model.

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[250] Keulen/Gritter (this volume).
[251] Keulen/Gritter (this volume).
[252] Keulen/Gritter (this volume).
[253] OECD 2000a, 8.
[254] Bihain/Masset 2010, 2 et seq.

1.4.3 Liability of Corporations for Acts of Related Entities

The 2010 oil spill in the Gulf of Mexico and the subsequent attempts at "blame shifting" between the corporate owner of the drilling platform, operator, and contractor[255] have highlighted further issues relating to the question of who can trigger CCL: can corporations be criminally liable for acts or omissions committed by, or in association with, other collective entities, particularly their own subsidiaries, contractors, and agents? Other recent academic surveys[256] have found that states are generally willing to hold corporations liable in civil law for damage caused by their foreign subsidiaries, at least where there is evidence of parent-company control.[257] Moreover, it would seem that, in most states, corporations may be liable in criminal law for complicity in another company's offense[258] and (in the US, at least) through imputation with their offense.[259] Though a detailed examination of these principles is beyond the scope of our introductory chapter and this volume, we observe that many of the same issues relating to the identification of a single (corporate) perpetrator arise[260] and that objective ("enterprise") liability[261] and due diligence[262] models are being suggested as alternatives to imputation between corporations.

1.5 Special Defenses to Liability for Corporate Offenders

Given the peculiarities of corporate personality, it could be supposed that corporations would benefit from specialized exculpatory rules relating to the existence and general effectiveness of their governance and compliance systems. It would seem, however, that such explicit exculpatory rules are rare and that jurisdictions – civil and common law alike – generally consider the (in)effectiveness of compliance measures as part of the substantive conditions for liability.

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[255] Fifield 2010, 6.

[256] Thompson/Ramasastry/Taylor 2009, 873 et seq.; Zerk 2006, 215 et seq.

[257] Zerk 2006, 235 et seq.

[258] Ruggie 2007, 831 et seq.

[259] Clough 2008, 916 et seq.

[260] Zerk 2006, 229.

[261] Pitts 2009, 421 et seq.

[262] Clough 2008, 917 et seq. (suggesting parent companies be required by law to take reasonable steps to prevent criminal violations by their subsidiaries).

1.5.1 Common Law Jurisdictions

On the one hand, appeal courts in common law jurisdictions have failed to recognize a general law "corporate compliance" excuse or defense. In the UK, a narrow interpretation of the identification doctrine makes evidence of corporate good practice irrelevant: the corporate defendant will only avoid liability if its alter ego could rely on a general law defense or excuse to avoid personal liability.[263] Even Canada, which takes a broader view of the directing mind and will, does not regard one employee's or officer's good conduct as cancelling out another's criminal act or omission.[264] The US approach to vicarious liability is stricter still, though the existence and effectiveness of corporate compliance programs are highly relevant factors at other points in the proceedings and at sentencing.[265]

The general law position is modified by statute in some jurisdictions. In the UK, due diligence is already a defense to many strict liability statutory offenses (see e.g., the Bribery Act [UK]). Further, if the provisional proposals of the LCEW (UK) are accepted, it will be available in broader form in relation to *almost any* statutory offense that does not include fault as an element (this to ensure fairness to the accused corporation).[266] In Australian federal criminal law, meanwhile, a body corporate may avoid liability for the conduct of a high managerial agent by proving that it "exercised due diligence to prevent the conduct or the authorization or permission".[267] The traditional excuses of mistake of fact and intervening conduct or event are also modified to accommodate the special features of corporate criminal liability.[268]

1.5.2 Civil Law Jurisdictions

Equally few civil law jurisdictions have been willing to consider corporate compliance as capable of removing liability. Exceptionally, Italy, Portugal, Spain, and Chile have created or are contemplating express defenses that allow the court to assess corporate compliance programs. Article 6 Decree No. 231 of 2001 (Italy) sets out the "defense of organizational models".

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[263] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at para. 43 (Estey J).

[264] *Canadian Dredge & Dock Co.* v. *R.* [1985] 1 SCR 662 at paras. 48 et seq., esp. 65 et seq. (Estey J).

[265] Nanda (this volume).

[266] LCEW (UK) 2010, Proposals 14 and 15 and Questions 1 and 2; paras. 1.68 et seq.; Pt. 6, esp. paras. 6.19 et seq., 6.67 et seq., 6.70 et seq., 6.95 et seq.; Wells (this volume).

[267] Criminal Code Act (Australia), s. 12.3(3).

[268] Criminal Code Act (Australia), ss. 12.5, 12.6.

It allows companies that have "adopted and effectively implemented appropriate organizational and management models…" to avoid liability for offenses of senior managers or junior employees when other listed conditions are met.[269] Article 11(6) Portuguese Penal Code excludes liability for junior employees and senior figures when "the actor has acted against the orders or express instructions of the person responsible", though it is uncertain whether "instructions" may be given as part of a general corporate compliance program and, if so, whether they must be credibly monitored and enforced.[270] Spain's art. 31bis also allows entities to avoid liability if they confess after the fact, collaborate with authorities, make reparations, and take preventive measures.[271] Switzerland, by contrast, takes the opposite approach, imputing the corporation with liability only when deficiencies in organization are positively established by the prosecutor.

1.6 Sanctions and Procedure: Charging, Trying, and Punishing Corporate Offenders

Recognizing corporations as capable of committing offenses is the first step in making them objects of criminal law. However, when the substantive conditions for liability are met, the offender still has to be charged, tried, and punished. The issue then becomes whether to treat corporations the same as human offenders during the investigation and trial and at sentencing and, if not, where and how adjustments to, or departures from, traditional rules are warranted. In the area of criminal procedure, it manifests in questions about the procedural rights of the corporation.[272] If lawmakers in the past were generally content to treat corporate defendants like individuals,[273] in the last two decades, they have been more willing to amend procedural rules to reflect the peculiarities of corporate personality and the perceived power of corporations in adversarial proceedings against the state. In sentencing, this issue manifests in questions about the appropriate sanctions and sanctioning principles for corporations: are financial penalties the optimal sanction for corporate offenders? Do they best express society's indignation and deter other organizations from similar acts (or omissions)? In any case, is deterrence the only legitimate goal for sanctioning corporate offenders or could corporations, like human beings, be rehabilitated or otherwise prevented from committing further crime?[274]

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[269] De Maglie (this volume); OECD 2004c, para. 43.

[270] De Faria Costa/Quintela de Brito 2010, 32.

[271] Boldova/Rueda (this volume).

[272] See, generally, Pieth 2005, 603 et seq.

[273] Pinto/Evans 2003, paras. 8.1 et seq.; Stark (this volume).

[274] Henning 2009, 1426 et seq.

1.6.1 Common Law Jurisdictions

1.6.1.1 The UK and the Commonwealth

Procedure

The general rules of criminal procedure in the UK and the Commonwealth treat corporations in much the same way as individuals: the prosecutor has discretion to charge a corporation and brings the charges in accordance with consolidated or court-specific procedural rules.[275] In England and Wales, a joint guidance on corporate prosecutions for offenses other than manslaughter[276] sets out additional factors to be considered in determining whether a corporate prosecution is in the public interest.[277] Weighing in favor of prosecution are a corporate history of offenses, warnings, sanctions, and charges, together with the facts that "(b) The conduct alleged is part of the [company's] established business practices; (c) The offense was committed at a time when the company had an ineffective corporate compliance system;... (e) [The company failed] to report wrongdoing within a reasonable time... [and] (f)... properly and fully...".[278] Conversely, the lack of prior enforcement actions, a "genuinely proactive approach" (evidenced by the provision of sufficient information about corporate operations "in [their] entirety" and "the making of witnesses available"), "genuinely proactive and effective corporate compliance program[s]", and "[t]he availability of civil or regulatory remedies" militate against a prosecution, amongst other things.[279] The guidance does not mention the rights to silence or the privilege against self-incrimination, though prosecutors have a general duty to act in a way that is compatible with rights under the European Convention on Human Rights (ECHR).[280]

Further, in July 2009, the UK Serious Fraud Office published a guidance in which it indicated it would consider pursuing "civil outcomes" and "global settlements" with "corporates" that self-report overseas corruption. The guidance sets out the issues for consideration, among them, whether "the Board of the corporate [is] genuinely committed to resolving the issue and moving to a better corporate culture" and whether "at the end of the investigation... the corporate [will] be prepared to discuss restitution

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[275] CPSEW (UK) 2010, paras. 1, 4 ("A company... should not be treated differently from an individual because of its artificial personality."); Pinto/Evans 2003, paras. 8.1 et seq.; Stark (this volume).

[276] CPSEW (UK) 2010.

[277] CPSEW (UK) 2010, para. 32.

[278] CPSEW (UK) 2010, para. 32, "Additional public interest factors in favor of prosecution", (a)–(f).

[279] CPSEW (UK) 2010, para. 32, "Additional public interest factors against prosecution", (a)–(d), see also (e)–(h).

[280] Human Rights Act 1998, c. 42, s. 6(1).

through civil recovery, a program of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner".[281] The first such global settlement between American and British prosecutors and a corporate defendant (Innospec Ltd.) was considered *ultra vires* by the UK courts[282] and it is speculated that the Serious Fraud Office (UK) may revise its policy.[283] Nonetheless, the guidance is remarkable for its apparent similarity to CCL procedures and sanctions under US federal law and for the comments on corporate sentencing options and principles it drew from the UK courts.[284]

The fact that corporations are often charged under regulatory statutes may also raise special procedural issues in practice. As noted above, regulatory offenses are frequently established through simplified procedures without evidence of the mental state of the accused person and subject to a reversed burden of proof for the fact of due diligence.[285] They may also require cooperation between the accused corporation or its employees, agents, or officers and regulatory authorities in other (administrative) proceedings.[286] Presuming that regulatory offenses give rise to criminal charges, some commentators ask whether they violate the presumption of innocence and the privilege against self-incrimination, such as those in Art. 6 ECHR as incorporated into the UK's own Human Rights Act 1998.[287] If so, the question is whether corporate defendants are entitled to claim these protections or whether such rights are unnecessary – even inappropriate – in litigation against such potentially powerful inhuman actors.[288] As it stands, the European Court of Human Rights and many common law courts have accepted that corporations may claim at least some procedural rights, such as those mentioned in Art. 6.[289] Moreover, in our view, it is good policy to preserve basic procedural rights in criminal proceedings against corporations. Fair procedure rules are not merely mechanisms for equalizing power imbalances between governments and defendants nor are they merely reflective of the need to preserve human dignity in a situation of coercion; equally, they respond to the nature of the adversarial

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[281] Serious Fraud Office (UK) 2009, 3.

[282] *R.* v. *Innospec Ltd.* [2010] EW Misc. 7 (EWCC).

[283] Cleary/Candey 2010; Eversheds Fraud Group 2010.

[284] *R.* v. *Innospec Ltd.* [2010] EW Misc. 7 (EWCC) at paras. 39 et seq. (Thomas LJ).

[285] See above at 1.4.1.2.

[286] Pinto/Evans 2003, paras. 12.39 et seq.

[287] See, generally, Pinto/Evans 2003, paras. 12.9 et seq.

[288] Arzt 2003, 457; Nijboer 1999, 317. See further Pieth 2005, 603 et seq.; Pieth 2009, 201 et seq.

[289] Emberland 2006, 56; Pinto/Evans 2003, paras. 12.57 et seq.; van Kempen (this volume); Woods/Scharffs 2002, 552. Cf. Australia, Evidence Act 1995, Act No. 2 of 1995 as amended, s. 187.

criminal proceeding as a mechanism for negotiating competing versions of the truth and allocating legal responsibility.[290] In any case, when small private corporations are the subject of criminal prosecutions, it may be difficult to distinguish, in fact, between individual and corporate economic interests.[291]

Sanctions

When it comes to punishing corporate offenders, fines are still the primary sanction in the UK and the Commonwealth, though other financial and non-financial penalties are also available depending on the jurisdiction, the organization, and the offense in question.[292] The significance of fines is explained, at one level, by the inapplicability of custodial sentences to corporate offenders. At another level, it reflects the dominant conception of corporate personality and corporate liability in British and Commonwealth criminal law: if the corporation is a legal fiction that facilitates commercial collaborations, a monetary sanction may be regarded as the most appropriate punishment and incentive for corporate reform.[293] Similarly, if corporate guilt is derived from a senior individual's wrongdoing, there is no logical reason to require corporate cultural reform.

Given the importance of corporate fines in British and Commonwealth corporate criminal law, it is somewhat surprising that the level of fines has been low historically, at least in the UK.[294] For Wells, this is due primarily to the type of offenses for which corporations are convicted: most successful corporate prosecutions are for regulatory offenses, which do not include an element of harm and are generally tried in the lower courts.[295] At the same time, it may be symptomatic of the relative lack of statutory or judicial guidance on how to impose fines large enough to restrict corporate profits without endangering the entity's financial viability – and with it the livelihoods of "innocent" creditors, employees, contractors, and agents. Australian and Canadian federal legislation deals with the calculation of the maximum fine for corporate offenders but not with the principles for

[290] Pieth 2005, 605 et seq.; Pieth 2009, 202 et seq.

[291] LCEW (UK) 2010, para. 7.10; van Kempen (this volume).

[292] On the UK: see Pinto/Evans 2003, 133 et seq.; Wells 2001, 32; on Australia: Crimes Act 1914, Act No. 12 of 1914 as amended (Crimes Act [Australia]), s. 14B; Australian Law Reform Commission (ALRC) 2006, Pt. H.30; on Canada: Criminal Code (Canada), s. 735(1).

[293] Wells 2001, 34.

[294] Black 2010, paras. A.15 et seq. (on fines for regulatory offenses generally); Clarkson/Keating/Cunningham 2007, 260; Wells 2001, 32 et seq.

[295] Wells 2001, 33.

determining which level of fine is appropriate;[296] they are vulnerable to the same criticism.

The emphasis on fines in the UK and the Commonwealth may be changing. Regulatory statutes already enable courts to impose a wider range of non-financial sanctions than is available under general law[297] and Commonwealth jurisdictions have identified corporate sentencing options and principles under general law as in need of reconsideration and possibly reform.[298] Further, in our view, the expansion of CCL rules to cover non-profit and public sector agencies will, in due course, prompt lawmakers to reconsider the appropriateness of fines and deterrence in punishing corporations. Also, and perhaps most significantly, the guidances discussed above indicate that UK prosecutors and regulators are keen to apply US-style enforcement strategies, particularly in relation to economic crimes.[299]

1.6.1.2 The US

Procedure

Of all the jurisdictions surveyed, the US has made the most substantial adjustments to its criminal procedure rules for corporations. Recognizing that an indictment may itself seriously threaten a corporation's financial viability, the federal government has empowered prosecutors to defer charges or forestall an investigation against a corporation by means of deferred and non-prosecution agreements (DPAs and NPAs). In exercising their discretion to conclude such agreements with corporations, prosecutors are to have regard to factors determined by the US federal Department of Justice (USDOJ). The memorandum, "Bringing Criminal Charges Against Corporations", issued by US Deputy Attorney General Holder in 1999 (Holder Memo) initially listed eight company-specific and offense-specific factors, including:

- "The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges";

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[296] Crimes Act (Australia), s. 4B(3); Criminal Code (Canada), s. 735(1). See also Crimes Legislation Amendment (Serious and Organized Crime) 2010, Act No. 2 (Australia), Sch. 8 (increasing the maximum penalty for bribery offenses for bodies corporate without introducing principles for the application of such penalties).

[297] See, e.g., Regulatory Enforcement and Sanctions Act 2008, c. 13. See further Allens Arthur Robinson 2008, 11, n. 17; Black 2010, A.45 et seq.; DOJ (Canada) 2002.

[298] ALRC 2006; DOJ (Canada) 2002; New South Wales Law Reform Commission 2003, para. 5.17.

[299] Cotton 2009.

- the corporation's remedial actions "including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution and to cooperate with the relevant government agencies"; and
- the collateral consequences of indictment "including disproportionate harm to shareholders and employees not proven personally culpable".[300]

The Holder Memo was revised and made stricter still by Deputy Attorney General Thompson. His 2003 "Principles of Federal Prosecution of Business Organizations" (Thompson Memo)[301] emphasized "the authenticity of a corporation's cooperation. . ." and "the efficacy of corporate governance mechanisms".[302] It made clear that corporate attempts to "impede the quick and effective exposure of the complete scope of wrongdoing under investigation. . . should weigh in favor of a corporate prosecution".[303] As examples of such non-cooperative behaviors, the memo cited "Overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel,. . . incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation".[304] The Thompson Memo was criticized for encouraging prosecutors to make adverse decisions on the basis of a corporation's refusal to waive privileges, to pay large sums in settlement, and to undertake extensive (and expensive) administrative, operational, and personnel changes,[305] often under the supervision of an external "monitor" with powers and functions sometimes akin to those of a probation officer.[306] Others have noted the lack of objective and well-researched criteria for determining the terms and measuring the effectiveness of such arrangements[307] and hence their mixed effectiveness in practice.[308]

Reform bills on DPAs and NPAs are currently before US legislators.[309] Meanwhile, Sixth Amendment arguments have been accepted by US courts

[300] United States Department of Justice (USDOJ), Office of the Deputy Attorney General 1999, points 4, 6, 7. See further Nanda (this volume).

[301] USDOJ, Office of the Deputy Attorney General 2003.

[302] USDOJ, Office of the Deputy Attorney General 2003, third paragraph.

[303] USDOJ, Office of the Deputy Attorney General 2003, third paragraph.

[304] USDOJ, Office of the Deputy Attorney General 2003, Principle VIB.

[305] Hasnas 2009, 1353 et seq.; Nanda (this volume). Cf. Beale 2009, 1492 et seq.

[306] Khanna/Dickinson 2007; Nanda (this volume).

[307] Coffee 2005; Ford/Hess 2009; United States Government Accountability Office (USGAO) 2009, 21 et seq.

[308] Ford/Hess 2009, 728 et seq.

[309] Nanda (this volume).

in *United States* v. *Stein & Ors*[310] and (implicitly) by the successors to Deputy Attorney General Thompson. They amended the rules relating to the conclusion of DPAs and NPAs[311] and clarified the primary responsibilities of monitors and principles for negotiating their appointments, duties, and terms in office.[312] Commentators have also called for the recognition of a good faith affirmative defense to CCL[313] or a requirement that the prosecution prove a lack of due diligence to prevent the offense by the corporation.[314] All the same, DPAs and NPAs remain a common means of obtaining financial payments, admissions of wrongdoing, and commitments to reforms from suspected corporate offenders in the US – all without conviction or charge.[315]

Sanctions

Presuming the corporation is indicted and convicted, US federal law also provides a particularly wide range of sanctioning options. US federal courts may impose large fines and may order corporate offenders to make restitution to identified victims of crime, to otherwise remediate the harm, to eliminate or reduce the risk of future harm (e.g., through the introduction of corporate compliance and monitoring systems), and to undertake community service.[316] The appointment of compliance monitors and advisors is particularly in vogue. The United States Sentencing Commission's Guidelines Manual contains also the most detailed corporate sentencing guidelines of any jurisdiction considered here.[317] They set out general principles for corporate punishment and state how specific factors are to be weighed in determining the level of fine.[318] Amongst other things, they empower courts to make substantial reductions for companies that had in place effective compliance and ethics programs at the time of the offense.[319] For Wells, these rules on mitigation of sentence effectively provide

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[310] 435 F. Supp. 2d 330 (2006); aff'd 541 F. 3d 130 (2008); remedy 495 F. Supp. 2d 390 (2007). See further Nanda (this volume).

[311] USDOJ, Office of the Deputy Attorney General 2006; USDOJ, Office of the Deputy Attorney General 2008b. See further Nanda (this volume).

[312] USDOJ, Office of the Deputy Attorney General 2008a; USDOJ, Office of the Deputy Attorney General 2010; USDOJ, US Attorneys 1997, §§ 9-28.000 et seq. and Criminal Resource Manual, Title 9, §§ 163 and 166. See further Nanda (this volume).

[313] Nanda (this volume), 33; Podgor 2007.

[314] Hasnas 2009, 1356 et seq.; Weissman/Newman 2007, 449 et seq.

[315] Nanda (this volume); USGAO 2009, 13 et seq.

[316] Nanda (this volume).

[317] United States Sentencing Commission (USSC) 2009, Ch. 8. See further Nanda (this volume).

[318] USSC 2009, Introductory Commentary and § 8C.

[319] USSC 2009, §§ 8B2.1, 8C2.5(f).

an affirmative defense to strict vicarious corporate liability under US federal law.[320] At the very least, they evidence the deterrent and rehabilitative function of US CCL rules.

1.6.2 Civil Law Jurisdictions

1.6.2.1 Procedure

Civil law jurisdictions take a middle road between the minimalist or assimilationist approach of Australia and Canada and the exceptionalist approach of the United States and (to a more limited extent) England and Wales. France,[321] Germany,[322] the Netherlands,[323] Switzerland,[324] Hungary,[325] and Poland[326] have all introduced special rules for criminal proceedings against corporations. These enable individuals, not only to appear for the corporation, but also to exercise certain rights on the corporation's behalf during the proceedings. They clarify, in addition, the competence and compellability of other corporate "insiders" to testify against the corporation and the interaction between charges against corporations and individuals.

For example, an enterprise charged under Swiss law appears in the proceedings through a representative of its choice. The representative must be an individual with unlimited power to represent the enterprise under private law and may not be a person who is him-/herself accused of an offense on the same or related facts.[327] The representative has the same rights and obligations as the accused,[328] including the enterprise's privilege against self-incrimination (the *nemo tenetur* principle).[329] The enterprise's other human representatives are similarly non-compellable (i.e., they cannot be required to give evidence as witnesses against the enterprise), however, they may be asked to give information in another capacity (as *Auskunftspersonen*, i.e., informants).[330] All other employees and agents are competent and compellable – including individuals who do not exercise formal power but are nonetheless extremely well-informed about executive decisions and corporate operations (e.g., personal assistants to company

[320] Wells 2001, 35.
[321] Deckert (this volume).
[322] Böse (this volume).
[323] Keulen/Gritter (this volume).
[324] Perrin (this volume). See further Pieth 2005.
[325] Santha/Dobrocsi (this volume).
[326] Kulesza 2010, 6 et seq.
[327] Pieth 2005, 609.
[328] Art. 102, para. 2, first sentence. See Pieth 2005, 610.
[329] Pieth 2005, 610.
[330] Pieth 2005, 611 et seq.

officers).[331] Similarly, a corporation defending administrative proceedings in Germany has the right to be heard and be represented by one or more legal representatives provided those individuals have not been charged in relation to the matter. Except for the representative/s, any natural person may be called as a witness against the corporation, even if his/her conduct could have been attributed to the corporation.[332]

There is little to suggest that prosecutorial discretion has been used to obtain waivers or admissions or secure concessions from corporations without indictment or trial in civil law jurisdictions. This may be due simply to the lack of prosecutorial discretion not to charge suspects in some civil law jurisdictions (the legality principle) or to the failure of prosecutors to seriously consider corporate charges in exercising the discretion they are given. Responding to the latter criticism, Hungarian legislators curtailed prosecutorial discretion in 2008, requiring investigative authorities to "notify the prosecutor without delay" of information incriminating a legal entity.[333] Following the amendments, prosecutors lost their power to discontinue an investigation, though they retained discretion to later discontinue the proceedings.[334] German officials responded to similar criticisms by announcing that they would consider introducing prosecutorial guidelines.[335] It remains to be seen whether they draw on the American (and now British) approach.

1.6.2.2 Sanctions

The sanctioning options and principles for corporate offenders in civil law jurisdictions are also broadly similar to those in common law jurisdictions. All the jurisdictions surveyed enable their courts to impose fines on corporate offenders[336] and many enable (or require) them to confiscate or forfeit the proceeds and/or instrumentalities of offenses.[337] The rules for calculating the fine and determining the things liable for confiscation and so the

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[331] Pieth 2005, 612 et seq.

[332] Böse (this volume).

[333] Santha/Dobrocsi (this volume).

[334] GRECO 2006, para. 85; Santha/Dobrocsi (this volume).

[335] OECD 2003, paras. 122 et seq.

[336] The exception was Spain. Until reforms to its criminal code were enacted, Spanish courts could only fine individuals as a result of which corporations would be jointly liable. See Boldova/Rueda (this volume).

[337] Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Switzerland, and Portugal. On Belgium: Bihain/Masset 2010, 20; on France: Deckert (this volume); on Germany: Böse (this volume); on Hungary: Santha/Dobrocsi (this volume); on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 5; on Switzerland: Perrin (this volume); on Portugal: Faria Costa/Quintela de Brito 2010, 40 et seq.

possible quantum of financial penalties, differ considerably between the jurisdictions and, within jurisdictions, between offenses. Some jurisdictions specify a minimum and/or maximum,[338] whilst others multiply the penalty for individual offenders.[339]

As to sentencing factors, in addition to general considerations relating to the offense, the offender, the investigation, and the proceeding, courts in a number of civil law jurisdictions may have regard to the economic capacity of the corporation, the impact of the fine on third parties, and the actual or intended financial benefit to the corporation from the offense.[340] Recalling the American approach, Italy has enabled its courts to reduce a fine by up to half if the corporation makes restitution to victims, otherwise attempts to remedy the consequence of the offense, and undertakes preventative reforms to its organizational model.[341] Corporate compliance systems and subsequent remedial or reparative actions are also considered in the German administrative penalty regime, though some argue that this is inconsistent with the imputation of liability.[342]

In addition, many of the civil law jurisdictions surveyed provide alternative non-financial penalties for corporations. France pioneered this approach, developing an elaborate system of restraint orders for corporate offenders, which was later the blueprint for the penalties recommended in the EU Second Protocol to the Convention on the Protection of the ECs' Financial Interests.[343] Thus, when financial sanctions (alone) are inappropriate,[344] French courts may injunct corporations from performing specific professional or social activities, from tendering for public contracts, and from engaging in certain types of financial transaction; they may also order the closure of one or more of its establishments or the dissolution of the corporation itself (the corporate death sentence).[345] French courts may also

[338] Chile, Belgium (crimes punishable with life imprisonment), Germany, Hungary, the Netherlands, and Poland. On Chile: Salvo (this volume); on Germany: Böse (this volume); on Hungary: Santha/Dobrocsi (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 5.

[339] France and Portugal. On France: Deckert (this volume); on Portugal: de Faria Costa/Quintela de Brito 2010, 35 et seq.

[340] France, Italy, Germany, Hungary, Poland, and Portugal. On France: OECD 2004a, para. 150 and Deckert (this volume); on Italy: OECD 2004c, para. 204; on Germany: OECD 2003, para. 124 and Böse (this volume); on Poland: Kulesza 2010, 6; on Portugal: de Faria Costa/Quintela de Brito 2010, 37; on Hungary: Santha/Dobrocsi (this volume).

[341] De Maglie (this volume); OECD 2004c, para. 204.

[342] Böse (this volume).

[343] Second Protocol to the EU Convention on the Protection of the ECs' Financial Interests, Art. 4(1).

[344] Deckert (this volume).

[345] Deckert (this volume).

appoint a *mandataire de justice* who, like the US corporate monitor, supervises the measures taken by the corporation to prevent the repetition of the breach.[346] Other jurisdictions similarly provide for temporary injunctions on trade, business, and other related activities,[347] exclusion from eligibility for public contracts and funding,[348] license restrictions or cancellations,[349] supervision or corporation probation orders,[350] publication of the sentence,[351] and dissolution or deregistration.[352] Some of these penalties are ordered as part of the criminal or quasi-criminal proceeding, others may be imposed as ancillary consequences by regulatory bodies.

1.7 Convergence: The Past, Present, and Future of CCL

1.7.1 Historical Concepts

At the beginning of this chapter, we introduced three models of corporate criminal or quasi-criminal liability. These, we noted, have emerged around the world in response to historical events and changing attitudes towards corporate risk and regulation.

The first model of vicarious liability was developed from the *respondeat superior* doctrine in tort law by which the master was liable for the civil wrongs of his/her servant. By analogy, the company was said to assume

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[346] Deckert (this volume).

[347] Chile, Belgium, Italy, Hungary, Poland, and Portugal. On Chile: Salvo (this volume); on Belgium: Bihain/Masset 2010, 21; on Hungary: Santha/Dobrocsi (this volume); on Italy: de Maglie (this volume); on Poland: Kulesza 2010, 5 et seq.; on Portugal: de Faria Costa/Quintela de Brito 2010, 40.

[348] Chile, Poland, and Portugal. On Chile: Salvo (this volume); on Poland: Kulesza 2010, 5; on Portugal: de Faria Costa/Quintela de Brito 2010, 40. Belgium and Germany indirectly exclude companies with criminal records from public contracting and licensing: on Belgium: OECD 2005d, para. 134; on Germany: Böse (this volume).

[349] Italy and Portugal. On Italy: de Maglie (this volume); on Portugal: de Faria Costa/Quintela de Brito 2010, 40.

[350] Belgium, Italy, and the Netherlands (for some economic crimes). On Belgium: Bihain/Masset 2010, 21 et seq.; on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume);

[351] Chile, Belgium, Italy, the Netherlands, Poland, Portugal, and Switzerland. On Chile: Salvo (this volume); on Belgium: Bihain/Masset 2010, 21; on Italy: de Maglie (this volume); on the Netherlands: Keulen/Gritter (this volume); on Poland: Kulesza 2010, 6; on Portugal: de Faria Costa/Quintela de Brito 2010, 40; on Switzerland: Perrin (this volume). See further on Hungary: Santha/Dobrocsi (this volume) and on Germany: see Böse (this volume).

[352] Chile, Belgium, Germany, Hungary, and Portugal. On Chile: Salvo (this volume); on Belgium: Bihain/Masset 2010, 21; on Germany: Böse (this volume); on Hungary: Santha/Dobrocsi (this volume); on Portugal: Faria Costa/Quintela de Brito 2010, 35 et seq.

responsibility for its agents and employees.[353] Initially used in criminal law in relation to strict liability offenses, it was expanded in the US to enable the imputation of all crimes to a corporation, even when the company had reasonably attempted to prevent the wrongdoing. The vicarious liability model has been criticized.[354] Nonetheless, it has been adopted – in its qualified form – as a basis of liability in international instruments, in many of the surveyed civil law jurisdictions, and common law regulatory offense statutes.

The second model identifies the corporation with its directing mind and will and holds the corporation liable only for his/her criminal acts and omissions.[355] Emanating from the fiction theory of legal personality, the identification theory was developed in the UK to hold corporations liable for *mens rea* offenses. It was adopted in Commonwealth jurisdictions and has been integrated into civil law approaches and international standards, albeit in less restrictive form. Critics consider the traditional form of the identification doctrine, as applied to date in the UK, ill-suited to prosecuting larger companies and therefore of limited use in combating economic crime.[356]

A third model of liability is described as holistic or objective insofar as it treats the corporation as the offender and shifts the focus of the inquiry from imputing fault from individuals to identifying deficiencies in the corporate structure.[357] Central to this model of responsibility is the organogram, the corporate regulations, and the procedures that reflect the corporation's particular "organizational culture".[358] Critics of this approach object to its apparent breadth and uncertainty.[359] Its supporters argue that it more accurately reflects the nature of corporate responsibility, corporate decision-making, and community (consumer) expectations about corporate identity and risk-management.[360] For these reasons, it is said to be the more appropriate basis for imposing liability on corporations in criminal law.

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[353] Coffee 1999a; Nanda (this volume); Pieth 2007a, 178 et seq.; Wells 2001, 85, 88, 93, 131, 133.

[354] Heine 2000, 4; Nanda (this volume); Pieth 2007a, 179; Wells 2000, 5; Wells 2001, 152 et seq.

[355] Stark (this volume); Wells 2001, 85, 93 et seq.

[356] OECD 2008b, 65 et seq.; Stark (this volume).

[357] Coffee 1999a, 30; Heine 2000, 4; Pinto/Evans 2003, para. 4.20; Wells 2000, 6.

[358] Coffee 1999a, 20; Wells 2001, 156 et seq.

[359] Stratenwerth 2005, 416.

[360] Wells 2001, 158 et seq.

1.7.2 Convergence

To summarize these developments in Europe and the Americas in the last two decades is to observe the adoption and extension of CCL and equivalent non-criminal liability rules, as well as their apparent convergence around the notion of organizational systems and culture as the loci of corporate fault.[361] Our survey of national corporate criminal liability rules in selected common and civil law jurisdictions enables us to draw the following specific conclusions about legal developments in this area:

First, it would seem that corporate criminal liability rules generally apply to legal persons and unincorporated groups that carry out an enterprise. Though a number of civil law jurisdictions restrict CCL rules to enterprises with commercial goals, all surveyed common law countries and some civil law countries are prepared to apply criminal law norms to non-profit non-government entities, at least when they are engaged in trade and commerce. Both common law and civil law jurisdictions provide some exclusions from liability for the state; the extent to which this exclusion applies to government-owned corporations is an open question, especially under general CCL rules in common law jurisdictions.

Second, as to the offenses for which organizations may be liable, all jurisdictions that recognize corporate criminal or quasi-criminal liability allow corporations to be held liable for crimes of *mens rea*. There is some discomfort, particularly in civil law jurisdictions, with the notion that corporations may be liable as principals for all crimes, especially those that do not reflect "typical" corporate risks. That said, legislators in common law and civil law jurisdictions alike have been willing to recognize corporate liability for a variety of offenses that protect "private" interests under domestic law. On this basis, we observe a general, if sometimes tentative, expansion of the notion of corporate crime – from crimes committed in the context of industrial and commercial activity to crimes committed in the context of a group that facilitates or at least stands to benefit from the individual wrongdoing.

Third, corporations can be imputed with the misconduct of an increasingly broad group of human beings. The US has long acknowledged that a wide range of people is capable of triggering vicarious liability and, already in the 1980s and 1990s, decisions in the Commonwealth broadened the narrow UK reading of the directing mind and will to further decision-makers. More recently, UK legislators have been using vicarious – even holistic – notions of liability for regulatory offenses and statutory reforms of offenses at common law. Civil law jurisdictions have drawn on the experience in common law countries and the models developed in international

[361] See, generally, Heine 1995, 248 et seq.; Pieth 2007a, 181 et seq.; Wells 2001, 140 et seq. On Australia: Wells 2001, 137; on Switzerland: Pieth 2004.

instruments. Generally, they permit the qualified vicarious liability of the corporation for acts of agents, employees, and (in some cases) third parties, as well as the identification of the corporation with its organs and senior executives. A minority applies open or holistic models of liability, which treat the company as itself capable of committing criminal offenses through the aggregated acts, omissions, and states of mind of its senior stakeholders and generalized organizational deficiencies. An emerging issue is the scope and basis for corporate-to-corporate liability under national law.

Fourth, the vast majority of jurisdictions considers the adequacy of corporate compliance systems and the relationship between the corporate offense and objectives at some point. American criminal lawyers have taken the most innovative – and controversial – approach to the issue, imposing liability without fault but allowing corporations to mitigate their punishment or to avoid indictment on the basis of their compliance systems. Courts in Britain and the Commonwealth have generally been less receptive to evidence of compliance systems, though recent law reforms and reform proposals, prosecutions guidelines, and civil actions indicate that UK lawmakers and prosecutors may see some merit in the US approach. In civil law jurisdictions, these considerations are usually embedded in criteria for determining whether the company can be imputed with a natural person's offense or (as in Switzerland) treated as having behaved "criminally" itself. A minority of civil law jurisdictions have provided adequate systems defenses.

Fifth, the adoption of CCL rules has precipitated modifications to principles of criminal procedure and punishment in many jurisdictions. To accommodate corporate defendants, many states have refashioned their rules on representation, the competence and compellability of witnesses, the role of the parties in the proceeding, and the privileges of the accused. Some have gone to considerable lengths to provide appropriate alternatives to imprisonment and probation, which are available in relation to individual offenders. Again, in both respects, US federal law stands out even though it is not uniformly admired by American legislators and scholars.

1.7.3 Implications

The adoption, extension, and convergence of European and American CCL rules is significant for stakeholders in, and observers of, corporate regulatory processes.

For company promoters and managers, the frequency of CCL or equivalent administrative rules in diverse jurisdictions reduces the scope for "forum shopping", i.e., the selection of home and host states less likely

to prosecute corporate wrongdoing. In this way, CCL laws complement extraterritorial jurisdictional rules, which enable home states to prosecute crimes committed abroad, and voluntary corporate social responsibility initiatives, which encourage legal actors to adhere to governance standards throughout their groups and operations. At the same time, as CCL models converge around notions of defective corporate systems or culture, and corporate penalties and prosecution strategies around corporate compliance reforms, it becomes possible for MNEs to standardize their internal compliance strategies internationally, thus potentially reducing compliance costs and actual incidences of wrongdoing. Such cost savings may support other incentives for corporations to adopt more exacting governance standards.[362]

For regulators and commentators, the spread of CCL rules based on notions of corporate culture or organization is likely to lead to greater interest in the actual impact of criminal or quasi-criminal liability norms on corporate behavior. Do such liability rules reduce the likelihood that individuals, communities, and natural environments will be put at risk by corporate operations?[363] And, in any case, do they adequately reflect community condemnation of such events when they occur? In answering these questions, academics and policy makers alike will face other difficult questions, including the appropriateness of public-*cum*-moral condemnation as a goal of the corporatized criminal law, the means for measuring the effectiveness of CCL rules, and the place for normative check-and-balances in an increasingly future-oriented and rehabilitative criminal law.[364]

1.7.4 Outlook

The continued extension, expansion, and convergence of CCL rules in Europe and the Americas will be determined by a number of factors, among them, the willingness of national legislators and judges to embrace the regulatory/preventative dimension of criminal law and to recognize the legitimacy of collaborations between public prosecutors and corporate defendants as mediated by technical experts and standards. A further and related question is whether CCL or comparable rules are likely to be introduced and/or extended and enforced in states with growing markets and corporate groups,[365] such as Brazil, the Russian Federation, India, and the People's Republic of China (BRIC). On the one hand, if the European and

[362] Coffee 1999b, 663 et seq., 692.
[363] Laufer 2006, 184 et seq.; Pitts 2009, 379.
[364] Henning 2009, 1419 et seq., 1426 et seq.
[365] The Economist 2010, 3 et seq.; Wagstyl 2010, 7.

American experience is any guide, industrialization, economic globalization, and international regulation may prompt BRIC lawmakers to make greater use of CCL rules in controlling corporate risks and power. Moreover, the proliferation and enforcement of legal rules in European and American states may make it politically more difficult for them to refuse to recognize and punish corporate wrongdoing, regardless of any international legal obligation to do so.[366] On the other hand, CCL rules are only one means of approaching corporate control. They are not yet a universal feature of national criminal laws and, where they exist, they are often new and/or sporadically enforced. Furthermore, factors peculiar to the BRIC states and the international economic and political system of the early twenty-first century, may militate against the adoption, expansive interpretation, or aggressive enforcement of criminal or quasi-criminal corporate liability laws in emerging markets. This could, in turn, affect the willingness of lawmakers and enforcers in Europe and the Americas to extend and/or enforce their own CCL rules, as well as their conceptions of the regulatory alternatives.

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[366] Cf. Bismuth 2010, 226.

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Part II
Country Reports

Chapter 2
Corporate Criminal Liability in the United States: Is a New Approach Warranted?

Ved P. Nanda

Contents

2.1 Introduction

Corporations as well as individuals may be held criminally liable for wrongful acts under both federal and state law in the United States. The number of federal crimes is estimated to exceed 4 000 and some states have also statutorily expanded the reach of corporate criminal liability.[1] Professor Sara Sun Beale explains the over breadth of federal criminal law:

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[1]Beale 2007, 1504 et seq. The United States Sentencing Commission's *Guidelines Manual* includes a detailed list of the offenses for which criminal liability can be imposed under federal law: USSC 2009. Those crimes that can only be committed by a natural person are, of course, excluded from the reach of corporate criminal liability.

M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability*, Ius Gentium: Comparative Perspectives on Law and Justice 9, DOI 10.1007/978-94-007-0674-3_2,

> Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses. In many instances, federal law overlaps almost completely with state law…[2]

Notwithstanding this dual jurisdiction, the focus of this chapter is on federal criminal law.

The following examples of penalties on corporations between December 2008 and September 2009 illustrate the imposition of such liability. In September 2009, the pharmaceutical company Pfizer was fined $1.3 billion as a criminal penalty for having illegally marketed its painkiller "Bextra", which the company later withdrew.[3] In February 2009, the Swiss bank UBS AG entered into a deferred prosecution agreement with the US Department of Justice (USDOJ), paying $780 million in fines, penalties, and interest for aiding US citizens to avoid paying taxes on undeclared accounts at that bank.[4] In January 2009, Eli Lilly and Company entered a plea agreement, admitting guilt to a criminal charge of distributing misbranded drugs with inadequate directions for use and agreeing to pay a $515 million fine and forfeit $100 million in assets.[5] And, in December 2008, the multinational German corporation, Siemens AG, entered a guilty plea to violating the Foreign Corrupt Practices Act, while agreeing to pay a criminal fine amounting to $450 million.[6] And these are only a few selected cases of serious corporate misconduct, which has especially been on the rise since the 1990s.[7]

Corporate scandals, such as Enron and Worldcom, eventually led to increasing public demand for holding corporations accountable for illegal acts and resulted, in 2002, in the establishment of the Corporate Fraud Task Force by then-President George W. Bush. The purpose was to "strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes."[8] The US Congress also took action by enacting the Sarbanes-Oxley Act in 2002, which mandates stricter corporate

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[2]Beale 1995, 979, 997 et seq.

[3]USDOJ 2009c.

[4]USDOJ 2009a.

[5]USDOJ, Office of Consumer Litigation 2009.

[6]USDOJ 2008.

[7]Beale 2007, see above n. 1.

[8]Executive Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), amended by Executive Order No. 13,286, 68 Fed. Reg. 10,619 (February 28, 2003) (hereafter Executive Order 2002).

oversight and compliance.[9] Federal prosecutions became aggressive and, as a result, there were more than 1 100 convictions in corporate fraud cases.[10]

Created by courts through the common law, the doctrine of corporate criminal liability is based on the civil law system's doctrine of *respondeat superior*.[11] The principle of vicarious criminal liability applies, under which the *actus reus* – the performance of a legally prohibited act – and the *mens rea* – criminal intent – of an individual who acts on behalf of the corporation are automatically imputed to the corporation. Thus, if an employee or agent of the corporation commits an offense by an act, commission, or failure, while acting within the scope and nature of his/her employment, and acting, at least in part, to benefit the corporation, the corporation is criminally liable.[12] However, both these conditions – that the employee must be acting within the scope of his/her actual or apparent authority and the employee's act must benefit the company – have been expansively interpreted by courts. Consequently, in federal courts, a low-level employee's act can be imputed to a corporation and, no matter how genuine and effective the corporation's compliance program may have been otherwise in deterring the criminal conduct, the corporation is still liable. In this respect the US law is relatively unique.

The doctrine of corporate criminal liability, however, has its critics. Their main ground is that, because corporations cannot act on their own or form criminal intent, there is no theoretical justification for the doctrine.[13] Instead, they argue, civil regulatory enforcement is the appropriate sanction for corporate wrongful actions.[14] Among the various documents calling for reform of the doctrine, is a 2008 white paper issued by the US Chamber Institute for Legal Reform and co-authored by the former Director of the US Department of Justice Enron Task Force, Andrew Weissmann.[15]

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[9] Sarbanes-Oxley Act (2002); Egan 2005, 305 (discussing the act's general rules).

[10] Browning 2006.

[11] This doctrine holds "an employer or principal liable for the employee's or agent's wrongful acts conducted within the scope of the employment or agency": Black's Law Dictionary 2004. In an 1892 case, *Lake Shore & Michigan SR Co.* v. *Prentice,* 147 US 109, 110 (1892), the US Supreme Court said, "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal."

[12] *United States* v. *One Parcel of Land,* 965 F.2d 311 (7th Cir. 1992) holding that if the agent was "acting as authorized and motivated at least in part by an intent to benefit the corporation", the agent's knowledge and culpability is imputable to the corporation, citing *US* v. *Cincotta,* 689 F.2d 238, 241–242 (1st Cir. 1982), cert. denied *sub nom. Zero* v. *United States,* 459 US 991 (1982).

[13] Fischel/Sykes 1996, 320.

[14] Parker 1996, 381; Baker 2004, 350.

[15] Weissmann/Ziegler/McLoughlin/McFadden 2008, 1.

The paper asserts that, if the need for vicarious criminal liability ever existed, it "has been severely undermined by the growth of the regulatory state."[16] The authors call upon "legislators, academics, and practitioners to press the case for a greater recognition of the harmful and counterproductive consequences of the current system and to seize the opportunities for reform" they outline in their paper.[17]

Before discussing the nature of the reforms suggested by critics of the current doctrine, I consider it essential to describe the current US practice. Thus, a brief historical review will be followed by a description of the current state of the US doctrine. Next will be a section on alternative approaches suggested. The final section will be an appraisal, with some recommendations and conclusions.

2.2 Historical Perspective

Under English common law, a corporate entity could not commit a crime and, hence, could not be indicted for any wrongful act of its constituents. However, as corporations began to play an important role in society, and were seen as capable of doing significant harm, their regulation and punishment by courts for public nuisances began.[18] In a 1635 case, the King's Bench held a corporation liable for nonfeasance – the failure to prevent a bad act.[19] Subsequently, the courts continued to distinguish between nonfeasance and misfeasance – the commission of a bad act – for determining criminal liability of corporations. The rationale for the distinction, and for not imputing criminal liability to a corporation for misfeasance, was derived from the prevailing view that the corporation lacked the capacity to form the requisite criminal intent to commit an illegal act. Courts held corporations criminally liable for acts of employees within the scope of their employment as they applied the theory of vicarious liability, which they had borrowed from tort law.[20]

In determining the issue of corporate liability, until the mid-nineteenth century, US courts generally followed the earlier practice of English courts.[21] The distinction between criminal nonfeasance and misfeasance,

[16] Weissmann/Ziegler/McLoughlin/McFadden 2008, 16.

[17] Weissmann/Ziegler/McLoughlin/McFadden 2008, 20.

[18] Brickey 1982, 406, suggests that the theory of these cases is that "since the corporation had the power to abate the nuisance, there could be no question that it had a duty to exercise that power."

[19] *Case of Langforth Bridge*, 79 ER 919 (KB 1635), cited in Brickey, 1982, 401.

[20] Brickey 1982, 402 et seq.

[21] *State* v. *Great Works Milling & Mfg. Co*., 20 Me. 41, 43 (1841) not extending corporate criminal liability to acts of misfeasance because a corporation "can neither commit a

however, did not have much traction in the US, as state courts began rejecting the distinction and applying the doctrine of corporate criminal liability, initially limiting the imposition of such liability to strict liability offenses.[22]

A century ago, the landmark Supreme Court decision in the 1909 case *NY Central & Hudson River RR Co.* v. *United States*[23] marks the beginning of the current US practice of imposing criminal liability on corporations for crimes committed even by low level employees. The court extended the application of agency principles under which a corporation is subjected to civil liability for acts of its agents.[24] It determined that a corporation was capable of forming a criminal intent and thus "may be liable criminally for certain offenses of which specific intent may be a necessary element."[25]

The case involved the violation of a federal statute, the Elkins Act, under which vicarious criminal liability was imposed on common carriers for illegal rebates granted by their agents and officers.[26] Enforcing the legislation adopted by congress, the court affirmed the common carrier's conviction, stating that, to give immunity to corporations "from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[27] The policy rationale was that, since "the great majority of business transactions in modern times are conducted through [corporations]", they should be held accountable.[28] The Court stated emphatically, "We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through agents and officers, shall be held punishable…"[29] It did, however, observe that "there are some crimes, which in their nature cannot be committed by corporations."[30]

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crime or misdemeanor by any positive or affirmative act, or incite others to do so, as a corporation."

[22] Weissmann/Ziegler/McLoughlin/McFadden 2008, 14 et seq.

[23] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481 (1909).

[24] *Old Monastery Co.* v. *United States*, 147 F.2d 905, 908 (4th Cir. 1945).

[25] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 493 (1909).

[26] The Elkins Act, Pub. L. No. 57-103, Ch. 708, 32 Stat. 847 (1903), specifically provided that in "construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person."

[27] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 496 (1909).

[28] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 495 (1909).

[29] *NY Central & Hudson River RR Co.* v. *United States,* 212 US 481, 494 (1909).

[30] 212 US 494.

2.3 The Current US Practice

2.3.1 General Overview

By the mid-twentieth century, the US law had sufficiently developed to impose liability on a corporation for the criminal act of an employee within the scope of his/her employment.[31] The courts held corporations criminally liable even if the statute at issue was silent as to whether liability may be imposed on a company for the actions of its employees under the rationale that the term "person" is broadly defined to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[32]

The Supreme Court stated, in a 1958 case, that, just because the owner of a business entity does not personally participate in a criminal act, does not mean that "[t]he business entity [can] be left free to break the law."[33] The established principle is that a corporation may be held criminally responsible for the "acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation."[34] To illustrate, the Court held in *United States* v. *Cincotta*[35] that "within the scope of employment" meant that the agent had been "performing acts of the kind which he is authorized to perform", and that the agent, in part, had the intent to benefit the employer.[36] However, the corporation need not even necessarily benefit from its agent's actions for it to be held liable, as the Fourth Circuit stated in *United States* v. *Automated Medical Laboratories*:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which

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[31] *US* v. *Armour & Co.,* 168 F.2d 342, 343 (3rd Cir. 1948); *US* v. *George F. Fish Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) (*per curiam*).

[32] 1 USC 1.

[33] *United States* v. *A&P Trucking Co.*, 358 US 121, 126 (1958).

[34] *United States* v. *Richmond*, 700 F.2d 1183, 1195 n. 7 (8th Cir. 1983), citing *United States* v. *DeMauro,* 581 F.2d 50, 53 (2d Cir. 1978), abrogated on other grounds, *United States* v. *Raether,* 82 F.3d 192 (8th Cir. 1996). *United States* v. *Jorgenson*, 144 F.3d 550, 560 (1998).

[35] *United States* v. *Cincotta*, 689 F.2d 238, 241 (1st Cir. 1982), cert. denied *sub nom. Zero* v. *United States,* 459 US 991 (1982).

[36] *United States* v. *Cincotta*, 689 F.2d 238, 241 et seq. (1st Cir. 1982). *United States* v. *Potter,* 463 F.3d 9, 25 (1st Cir. 2006) stating that an agent acts within the scope of employment if "the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."

> may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.[37]

If a criminal act benefits only the employee, officer, or director, such as the employee accepting a bribe that does not benefit the shareholders of the corporation, vicarious liability would not apply.[38]

Other cases have held that, for imputing criminal liability to the corporation, it is not only the high-level corporate officer or director who must have acted.[39] And, even if the illegal actions of the agents were contrary to company policies, explicitly expressed, and, even if those actions were contrary to clear instructions, vicarious criminal liability may be imputed to the corporation because the particular agents may be difficult to identify and their conviction may be ineffective as a deterrent to others within the organization.[40] On the other hand, punishment of the organization as a whole is "likely to be both appropriate and effective."[41]

In a 2009 case, *US* v. *Ionia Mgmt. SA*,[42] the Second Circuit Court of Appeals affirmed a judgment of conviction on a jury verdict, finding the company guilty for the criminal acts of some non-management employees. The company was indicted on the charge that its agents and employees had illegally dumped the oil-contaminated bilge waste from a ship Ionia was operating and managing and then had doctored the ship's oil record book to conceal the dumping. Thus, the company was charged with violating the Act to Prevent Pollution from Ships.[43]

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[37] *United States* v. *Automated Medical Laboratories, Inc.,* 770 F.2d 399, 407 (4th Cir. 1985), quoting *Old Monastery Co.* v. *United States,* 147 F.2d 905, 908 (4th Cir. 1945) (internal citation omitted).

[38] *United States* v. *Cincotta*, 689 F.2d 238, 242 (1st Cir. 1982).

[39] *United States* v. *Basic Construction Co*., 711 F.2d 570, 573 (4th Cir. 1983) rejecting the contention that the government must prove that "the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the… laws"; *Standard Oil Co.* v. *United States,* 307 F.2d 120, 127 (5th Cir. 1962): "[T]he corporation may be criminally bound by the acts of subordinate, even menial, employees."

[40] *United States* v. *Hilton Hotels Corp*., 467 F.2d 1000, 1004 et seq. (9th Cir. 1972), cert. denied 409 US 1125 (1973). *United States* v. *Beusch*, 596 F.2d 871, 878 (9th Cir. 1979): "[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but… the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation"; USDOJ, US Attorneys (1997), *USAM*, as revised and amended, <www.justice.gov/usao/eousa/foia_reading_room/usam/index.html>, § 9-28.800.B. Comment 2008: "The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior.*"

[41] *United States* v. *Hilton Hotels Corp*., 467 F.2d 1000, 1006 (9th Cir. 1972).

[42] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303 (2d Cir. 2009).

[43] 33 USC 1901.

Notwithstanding the arguments put forward by the company and several *amici curiae*, including the US Chamber of Commerce and the Association of Corporate Counsel, that the court should revisit the precedent set by *NY Central*, the court held that "there was ample evidence for a jury to have reasonably found that the [ship's] crew" had acted within the scope of their employment,[44] and thus followed the *NY Central* precedent to affirm the jury's finding. It did not accept the *amicis*' suggestions that "the prosecution, in order to establish vicarious liability, should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees."[45] It held that "a corporate compliance program may be relevant to whether an employee was acting within the scope of his employment, but it is not a separate element", and that adding such an element "is contrary to the precedent of our Circuit on this issue."[46]

In a 1987 case, *United States* v. *Bank of New England*, *NA*,[47] a federal appellate court applied what is known as the "collective knowledge" theory of corporate criminal liability. The case concerned the Currency Transaction Reporting Act and its regulations, under which banks are required to file currency transaction reports within 15 days of any customer currency transaction in an amount of more than $10 000.[48] If banks fail to file the required report, they can be held criminally liable.[49] The court held that the knowledge of individual employees acting within the scope of his/her employment can be imputed to his/her employer,[50] which meant that what the employees collectively knew equaled the employer's knowledge and satisfied the *mens rea* element of the offense. And, even though employees may not know that they are involved in wrongdoing, "the aggregate of those components constitutes the corporation's knowledge of a particular operation."[51]

It is also worth noting that, after several years of deliberations on the topic of corporate criminal liability, in 1962, the American Law Institute presented its proposed official draft of the Model Penal Code (MPC),[52] which adopts the *respondeat superior* standard. Under its s. 2.07(1)(a), an offense by an agent acting within the scope of his/her employment, and on

[44] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303, 309 (2d Cir. 2009).
[45] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303, 310 (2d Cir. 2009).
[46] *US* v. *Ionia Mgmt. SA*, 555 F.3d 303, 309 (2d Cir. 2009).
[47] *United States* v. *Bank of New Eng.*, 820 F.2d 844 (1st Cir. 1987).
[48] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 847 (1st Cir. 1987).
[49] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 847 (1st Cir. 1987).
[50] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 855 (1st Cir. 1987).
[51] *United States* v. *Bank of New Eng.*, 820 F.2d 844, 856 (1st Cir. 1987).
[52] ALI (1962). The ALI had discussed its Tentative Draft No. 5 in 1956. A thorough and insightful analysis of the Code may be found in Brickey 1988, 593.

behalf of a corporation, is imputed to the corporation when a legislative purpose to impose such liability "plainly appears."[53] However, the corporation is exonerated from liability if "the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission."[54] In the absence of a statutory provision, s. 2.07(1)(c) provides that a corporation is liable only if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his/her office or employment."[55] States have selectively adopted the MPC, having developed similar requirements either through common law doctrine or through legislation.

Courts generally follow the *NY Central* precedent and juries are routinely instructed that, notwithstanding a company's explicit policies and procedures to prevent and deter illegal action, a company should be held criminally liable for the acts of even a low-level employee.

2.3.2 The US Department of Justice's Sentencing and Charging Guidelines and Prosecutors' Role in Charging Corporations

In 1991 the US Department of Justice added a new chapter, "Sentencing of Organizations", to the United States Sentencing Guidelines Manual.[56] It enumerated four factors to be considered toward increasing the punishment of corporations: (1) the tolerance of, or involvement in, criminal activity; (2) the corporation's prior history; (3) the corporation's violation of an order; and (4) the corporation's obstruction of justice.[57] Corporate punishment could be mitigated by reliance on two factors: (1) the existence of an effective compliance and ethics program; and (2) self-reporting, cooperation, or acceptance of responsibility.[58]

Eight years later, in June 1999, the then-US Deputy Attorney General Eric Holder released a memorandum to all Component Heads and

[53] Section 2.07(1)(b) provides that a corporation is accountable if it fails to discharge specific duties imposed on corporations by law.

[54] Section 2.07(5). But in cases of strict liability or if the defense is "plainly inconsistent with the legislative purpose in defining the particular offense", the corporation will be liable.

[55] Section 2.07(1)(c). Brickey 1982, 593, studies the Model Penal Code's practical application in the US.

[56] USSC 2009.

[57] USSC 2009, Introductory comment.

[58] USSC 2009, Introductory comment.

United States Attorneys entitled "Bringing Criminal Charges Against Corporations" (Holder Memo).[59] Although the memorandum was not binding on prosecutors, they were told they should consider the following factors in all cases that involved a decision whether to charge a corporation: (1) the nature and seriousness of the crime; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's past history of similar misconduct; (4) the corporation's cooperation and voluntary disclosure; (5) the corporation's corporate compliance programs; (6) the corporation's efforts at restitution and remediation; (7) the collateral consequences of the indictment; and (8) the non-criminal alternatives to indictment.[60]

Under the comment to the factor "Cooperation and Voluntary Disclosure", the prosecutor is to consider corporate waivers of the attorney-client and work product privileges when deciding whether the corporation has cooperated with the Department of Justice's investigation.[61] Although a waiver of privileges is not an absolute requirement for a finding of a corporation's cooperation with the government, critics assert that the Holder Memo encouraged aggressive tactics by prosecutors to pressure corporations to conduct investigatory work on their behalf. Illustrative is the comment that "[t]he sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations."[62]

In 2001, Enron and several other corporations faced criminal prosecutions. Enron's auditor, Arthur Andersen, LLP, was convicted on June 15, 2002, by a federal jury of obstructing justice in an official proceeding of the Securities and Exchange Commission, in conjunction with instructions to its employees to destroy documents relating to its accounting work for Enron.[63] An Andersen partner, Michael Odom, had urged Andersen's employees to comply with the firm's retention policy. He added, "If it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great… we've followed our own policy, and whatever there was

[59] USDOJ, Office of the Deputy Attorney General 1999.

[60] USDOJ, Office of the Deputy Attorney General 1999, I.A-VI.B.

[61] USDOJ, Office of the Deputy Attorney General 1999, VI.A, General Principles.

[62] Zorno/Krakaur 2000, 147.

[63] *United States* v. *Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004). The conviction was under the "corrupt persuasion" prong of § 18 USC 1512(b)(2)(A) and (B), which provides: "Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to… cause or induce any person to (A)… withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding… shall be fined under this title or imprisoned not more than ten years, or both."

that might have been of interest to somebody is gone and irretrievable."[64] The Court of Appeals for the Fifth Circuit affirmed, finding no reversible error.[65]

On May 31, 2005, a unanimous US Supreme Court overturned the judgment of the Court of Appeals, remanding the case for further proceedings, as it found the jury instructions on which the verdict was based, flawed. However, long before that time, in August 2002, the firm had already agreed to stop auditing public companies and the outcome was that, by the end of 2002, the firm, which employed 85 000 people, was left with only 3 000 employees.[66] Eventually it dissolved. As one commentator observed, there was "a clear causal connection between the firm's felony conviction and its consequent inability to audit public companies, an inability that, for a public accounting firm, amounted to death."[67] The story of Arthur Andersen, LLP, a giant accounting firm, is a telling case study of how devastating an indictment against a corporation can be.[68]

As mentioned earlier, President George W. Bush authorized the establishment of a corporate fraud task force within the Department of Justice in 2002.[69] In January 2003, then-Deputy Attorney General Larry D. Thompson issued a memo entitled "Principles of Federal Prosecution of Business Organizations" (Thompson Memo), which revised the 1999 Holder Memo.[70] In the revisions, the main focus was on an "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[71] The memo was binding on all federal prosecutors,[72] who were thus required to consider, "in evaluating the corporation's cooperation", the corporation's response to a request for privilege waivers and its advancing of legal fees to its employees.[73]

As part of its purpose to encourage corporate cooperation, the memo stated that prosecutors may enter into "a non prosecution agreement in exchange for cooperation when a corporation's 'timely cooperation appears

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[64] *Arthur Andersen, LLP* v. *United States*, 544 US 696, 700 (2005), quoting *United States* v. *Arthur Andersen,* 374 F.3d 281, 286 (5th Cir. 2004).

[65] *United States* v. *Arthur Andersen*, 374 F.3d 281, 284 (5th Cir. 2004).

[66] Ainslie 2006, 107, provides an analysis of the Arthur Andersen saga.

[67] Ainslie 2006, 108.

[68] Ainslie notes that "the indictment, the conviction, and the consequent prohibition against appearing before the Securities and Exchange Commission were sufficient to kill the company…" Ainslie 2006, 109.

[69] Executive Order 2002.

[70] USDOJ, Office of the Deputy Attorney General 2003.

[71] USDOJ, Office of the Deputy Attorney General 2003, Introduction.

[72] USDOJ, US Attorneys 1997, Criminal Resource Manual, Title 9, § 163.

[73] USDOJ, Office of the Deputy Attorney General 2003, § VI.B.

to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.'"[74]

The message in the memo's introductory note was a cause of concern for corporations, as it stated:

> Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.[75]

The General Principle and the Comment on the section "Cooperation and Voluntary Disclosure" elaborated on this message. The former stated that,

> [i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.[76]

Among the factors included in the Comment, the prosecutor was authorized to consider,

> a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement.[77]

The Comment provided the examples of a corporation's conduct in impeding the government's investigation to include:

> overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation, including, for example, the direction to decline to be interviewed; making representations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.[78]

Finally, the Comment stated that "a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution", as it is to be considered along with other factors, especially those relating

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[74] USDOJ, Office of the Deputy Attorney General 2003, § VI.B.

[75] USDOJ, Office of the Deputy Attorney General 2003, Introduction.

[76] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

[77] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

[78] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

to the corporation's past history and the role of its management in the wrongdoing.[79]

The Thompson Memo generated further criticism.[80] As one such critic argued,

> under authority of the Thompson Memo, federal prosecutors were able to force corporations to hand over privileged information and do the government's investigatory work, all in hopes that the government hammer would not swing the way of the corporation itself.[81]

In response to the criticism from the corporate legal community, on December 12, 2006, Deputy Attorney General Paul J. McNulty issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations" (McNulty Memo). The memo acknowledged concerns that the Department's "practices may be discouraging full and candid communications between corporate employees and legal counsel."[82] It added that "it was never the intention of the Department for our corporate charging principles to cause such a result."[83]

The McNulty Memo superseded the prior memos. Recognizing that the "attorney-client and work product protections serve an extremely important function in the US legal system", it announced that their waiver would not be a prerequisite to a finding of the company's cooperation in the government's investigation and that prosecutors would only request the waiver "when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[84] The memo instructed prosecutors that, after finding a legitimate need, they "should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct (Category I)."[85]

A prerequisite for a prosecutor's request that a corporation waive the attorney-client or work product protections for Category I information was a written authorization from the US Attorney, who must consult with the Assistant Attorney General for the Criminal Division before either granting or denying such a request.[86] Prosecutors could request the corporation to provide attorney-client communications or non-factual attorney work product (Category II) "[o]nly if the purely factual information provides an

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[79] USDOJ, Office of the Deputy Attorney General 2003, § VI.A.

[80] According to Ball/Boleia 2009, 246 et seq.; Bharara 2007, 73: "[C]orporate defendants, subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing."

[81] Ball/Boleia 2009, 248.

[82] USDOJ, Office of the Deputy Attorney General 2006, Introduction.

[83] USDOJ, Office of the Deputy Attorney General 2006.

[84] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

[85] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

[86] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

incomplete basis to conduct a thorough investigation", and such information "should only be sought in rare circumstances."[87] A prerequisite for Category II information requests was the approval of the Deputy Attorney General.

On the issue of advancing attorneys' fees to employees or agents under investigation or indictment, the guidelines stated that prosecutors should not generally take this factor into account.[88] However, the guidelines provided that, in extremely rare cases, "when the totality of the circumstances show that [the advancement of attorneys' fees] was intended to impede a criminal investigation", this may be taken into account.[89] The rest of the McNulty Memo generally followed the Thompson Memo provisions.

A case involving the indictment of employees of accounting firm, KPMG, on charges of accounting fraud, *United States* v. *Stein*,[90] presents a pertinent case study of the Department of Justice's pressure on a company to cooperate with the government on the government's terms. The charge was related to the company's advancing of attorneys' fees to employees indicted for activities undertaken in the course of their employment. The District Court ruled that the government deprived the defendants of their right to counsel under the Sixth Amendment of the US Constitution as it had caused KPMG to impose conditions on advancing legal fees to defendants and subsequently to cap the fees and eventually to end payment.[91] Subsequently, the court ruled that dismissal of the indictment was the appropriate remedy for the constitutional violations.[92] On appeal, the Second Circuit Court of Appeals ruled that KPMG had acted under the government's pressure and that the government had,

> unjustifiably interfered with the defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants.[93]

Notwithstanding the McNulty Memo revisions, corporations' concerns remained unabated. Thus, on August 28, 2008, Deputy Attorney General Mark Filip revised the McNulty principles in a memo (Filip Memo), setting forth the revised principles in the United States Attorney's Manual (USAM) for the first time and made it binding on all federal prosecutors within the

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[87] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.2.

[88] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.3, n. 3.

[89] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.3, n. 3.

[90] *United States* v. *Stein,* 435 F.Supp.2d 330 (SDNY 2006), aff'd 541 F.3d 130 (2d Cir. 2008).

[91] *United States* v. *Stein,* 435 F.Supp.2d 330, 367 (SDNY 2006).

[92] *United States* v. *Stein,* 495 F.Supp.2d 390 (SDNY 2007).

[93] *United States* v. *Stein,* 541 F.3d 130, 136 (2nd Cir. 2008) (footnote in the text omitted).

Department of Justice.[94] The principal revisions were to the "'cooperation' mitigating factor, as well as how payment of attorneys' fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, will be considered in the prosecutive analysis."[95] The memo states that "the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law."[96] According to the memo, "[c]ooperation is a potential mitigating factor, by which a corporation… can gain credit in a case that otherwise is appropriate for indictment and prosecution."[97] Noting that a corporation's decision not to cooperate "is not itself evidence of misconduct", the memo states that failure to cooperate does not support or require the filing of charges against it.[98]

On attorney-client and work product protections, the memo acknowledged the wide criticism that the Department of Justice's policies "have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work product protection", and that the Department's position on these issues "has promoted an environment in which those protections are being unfairly eroded to the detriment of all."[99] The memo directs prosecutors not to ask for such waivers. However, the corporation under investigation may voluntarily disclose the relevant facts and receive credit from the government for such disclosures.[100] In a footnote, the memo includes other dimensions of cooperation beyond the disclosure of facts, such as providing non-privileged documents and other evidence, assisting in the interpretation of complex business records, and the making available of witnesses for interviews.[101]

The memo notes that the government cannot compel the disclosure of facts and the corporation has no obligation to make such disclosures.[102] Thus, if a corporation fails to provide relevant information, this does not mean that it will be indicted; the only outcome will be that the corporation will not be entitled to mitigating credit for that cooperation.[103] However, as a "relevant potential mitigating factor", cooperation alone does not determine whether or not to charge a corporation: the government may charge even the most cooperative corporation pursuant to the principles

[94] USDOJ, Office of the Deputy Attorney General 2008b, Introduction.
[95] USDOJ, Office of the Deputy Attorney General 2008b, Introduction.
[96] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.300.B.
[97] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.700.A.
[98] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.700.A.
[99] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.710.
[100] USDOJ, Office of the Deputy Attorney General 2008b, USAM, § 9-28.720.
[101] USDOJ, Office of the Deputy Attorney General 2008b, n. 2.
[102] USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(a).
[103] USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(a).

enumerated in the guidelines, "if, in weighing and balancing the factors described [in the guidelines] the prosecutor determines that a charge is required in the interests of justice."[104] The memo also states that a corporation need not disclose legal advice given by a corporate counsel, and prosecutors may not request such communications' disclosure as a condition for the corporation's eligibility to receive cooperation credit. The same applies to non-factual or core attorney work product.[105]

The guidelines prohibit prosecutors from telling a corporation not to advance or reimburse attorneys' fees or provide counsel to employees, officers, or directors under investigation or indictment, nor should prosecutors take into account whether a corporation is taking such action.[106] The guidelines similarly prohibit prosecutors from requesting a corporation to refrain from entering into a joint defense agreement and provide that the mere participation of a corporation in such an agreement "does not render the corporation ineligible to receive cooperation credit."[107] The memo also states that counsel who believe that prosecutors are violating these guidelines are encouraged to raise their concerns with the United States Attorney or Assistant Attorney General.[108]

It is, however, worth noting that, according to the memo, the guidelines "provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice."[109]

The concern with preserving the attorney-client privilege and attorney work product protections available to corporations led to a legislative initiative. Senator Arlen Specter (R-PA) introduced a bill in the US Senate, the Attorney-Client Privilege Protection Act, in 2006, and reintroduced it in 2008 and again in 2009.[110] On November 12, 2007, a similar bill was passed in the House of Representatives as HR 3013.[111] In the latest – 2009 – version of the act, the US Congress states, after finding, inter alia, that "[a]n indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to

[104]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(a).

[105]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.720(b).

[106]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.730.

[107]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.730.

[108]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.760.

[109]USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9-28.1300.

[110]The latest version is S. 445: Attorney-Client Privilege Protection Act of 2009, introduced in the US Senate on February 13, 2009, <www.govtrack.us/congress/billtext.xpd?bill=s111-445> (hereafter S. 445).

[111]HR 3013: Attorney-Client Privilege Protection Act of 2007, introduced in the US House of Representatives on July 12, 2007 by Rep. Robert Scott (D-VA), <www.govtrack.us/congress/bill.xpd?bill=h110-3013> (hereafter HR 3013).

survive post-indictment or to dispute the charges against it at trial",[112] it would prohibit any US agent or attorney in any federal investigation, or criminal or civil enforcement matter, from: demanding or requesting any organization, employee, or agent to waive the protection of the attorney-client privilege or attorney work product doctrine;[113] offering to reward, or actually rewarding, an organization, employee, or agent for waiving these protections;[114] or threatening adverse treatment or penalizing an organization, employee, or agent for declining to waive these protections.[115]

The Act also prohibits an agent or attorney of the United States from considering the following facts in making a civil or criminal charging or enforcement decision or determining whether an organization or its employees, officers, directors, or agents are cooperating with the government: a good faith assertion of the protection of the attorney-client privilege or attorney work product doctrine; the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee, officer, director, or agent of an organization; and the preparation of a bona fide joint defense, or conclusion of an information sharing or common interest agreement between an organization and its employees, officers, directors, or agents.[116]

In introducing the bill, Senator Specter acknowledged that the Filip Memo's guidelines prohibit prosecutors from asking for privilege waivers "in nearly all circumstances", but asserted that, "as evidenced by the numerous versions of the Justice Department's Corporate Prosecution Guidelines over the past decade, the Filip reforms cannot be trusted to remain static", as they "are subject to unilateral executive branch modification", and thus, "to avoid a recurrence of prosecutorial abuses and attorney-client privilege waiver demands, legislation is necessary."[117]

In response to a written question on the issue of the impact of the 1999 Holder Memo, Eric Holder, now Attorney General, said:

> When the so-called Holder Memo was issued on June 16, 1999, we did not contemplate nor envision what the practice in the field appears to have become in certain jurisdictions or by certain prosecutors, namely the blanket demand that corporations waive their attorney-client privilege as a litmus test of the corporation's good citizenship. . . The disparity between our practice and what has developed over the ensuing nine years in the field is significant."[118]

The bill has yet to be acted on by Congress.

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[112] HR 3013, § 2(8).

[113] HR 3013, § 3, amending 18 USC, Ch. 201, by inserting § 3014(b)(1)(A).

[114] S. 445, above n. 110, § 3, amending 18 USC Ch. 201, by inserting § 3014(b)(1)(B).

[115] S. 445, above n. 110, § 3, amending 18 USC Ch. 201, by inserting § 3014(b)(1)(C).

[116] S. 445, above n. 110, § 3, amending 18 USC Ch. 201, by inserting § 3014(b)(2)(A) and (B).

[117] Coyle 2009.

[118] Attorney General Eric Holder, quoted in Coyle 2009.

2.3.3 *Deferred Prosecution Agreements and Non-prosecution Agreements*[119]

While corporate criminal investigation by the Department of Justice may result in a corporation's indictment and prosecution, the Speedy Trial Act of 1974[120] authorizes the prosecutor to defer prosecution, as it provides that time limits under the Act are suspended during "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."[121]

Beginning with the 1999 Holder Memo,[122] and continuing through the Thompson Memo,[123] the McNulty Memo,[124] and finally the Filip Memo,[125] the DOJ has authorized pre-trial diversion (deferred prosecution) by prosecutors as they enter non-prosecution agreements in exchange for corporate cooperation. The Filip Memo is more detailed. In the guidelines, "Principles of Federal Prosecution of Business Organizations", which are now set forth in the USAM, prosecutors are explicitly instructed to "consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases."[126] Thus,

> where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness

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[119] There is voluminous literature on such agreements. For illustrative purposes see Zierdt/Podgor 2008, 1; Spivack/Raman 2008, 159.

[120] 18 USC § 3161.

[121] 18 USC § 3161(h)(2).

[122] USDOJ, Office of the Deputy Attorney General 1999, § VI.B.

[123] USDOJ, Office of the Deputy Attorney General 2003, § VI.B.

[124] USDOJ, Office of the Deputy Attorney General 2006, § VII.B.1.

[125] USDOJ, Office of the Deputy Attorney General 2008b; USAM § 9–28.1000.

[126] USDOJ, Office of the Deputy Attorney General 2008b, USAM § 9–28.1000(A), General Principle.

> of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.[127]

The difference between Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs) is that while criminal charges are filed in the former, with prosecution deferred and charges to be subsequently dismissed (provided the company successfully complies with certain specified terms in the DPA for a period of time), no criminal charges are filed in the latter but the investigation remains pending until the company fulfills the conditions set in the NPA.

These agreements have proliferated since 2003. According to a Washington Legal Foundation study, "Federal Erosion of Business Civil Liberties",[128] there were eighteen such agreements through 2002.[129] Subsequently, the number increased to forty-seven between 2003 and 2006; there were forty such agreements in 2007 alone and sixteen in 2008.[130] A combination of reasons led to this growth. These include: the establishment of the Corporate Fraud Task Force in 2002 following the Enron debacle; the indictment of Arthur Andersen and its dissolution following the firm's decision not to accept the terms of a DPA offered by the US Attorney; and the issuance of the Thompson Memo in January 2003. As a result of these developments, prosecutors began aggressively investigating corporations.

Although the terms and conditions in these agreements vary according to the individual prosecution, there are several common elements in both DPAs and NPAs. Four specific agreements will be considered for illustrative purposes – two in 2005, one by KPMG and the other by Bristol Myers Squibb Co. (BMS), and two in 2009 – one by Beazer Homes, USA, Inc. (Beazer) and the other by UBS AG, Switzerland's largest bank.

2.3.3.1 Examples

KPMG

In the KPMG agreement,[131] which the company entered into after the government's tax shelter investigation, fines, restitution, and penalties amounted to $456 million. The firm agreed to cease its private client and

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[127] USDOJ, Office of the Deputy Attorney General 2008, USAM § 9–28.1000(B), Comment.

[128] Washington Legal Foundation 2008.

[129] Washington Legal Foundation 2008, 6–2, Ch. 6, Deferred Prosecution and Non-Prosecution Agreements.

[130] Finder/McConnell/Mitchell 2009, 15.

[131] USDOJ 2005.

compensation and benefits tax practice, and agreed to cooperate with the government to provide complete and truthful disclosure of all relevant documents and records. KPMG agreed to make available its employees, officers, and directors to provide information and testimony; and accepted and acknowledged responsibility for its wrongful conduct in committing tax evasion in preparing false and fraudulent tax returns. The US Attorney's office retained discretion to determine if KPMG violated any provision of the agreement and to recommence prosecution, and KPMG established a permanent education and training program to promote compliance and ethics in its work. It also agreed to oversight and monitoring by an individual selected by the US Attorney's office, with the monitor having extensive power.

BMS

BMS entered into an agreement[132] after it was charged with securities fraud for inflating its sales and earnings. It admitted guilt and promised full cooperation with the government. The company had already undertaken a long list of arduous remedial steps. Nonetheless, the prospective reform and remedial measures included: the appointment of a non-executive chairman of the board and another board member approved by the US Attorney; the making of significant personnel changes; the replacement of many officers, including the Chief Financial Officer; and, in addition to more than $500 million it had already agreed to pay to its shareholders, the paying of $300 million more in restitution. An independent monitor with extensive powers was appointed. The company also endowed a chair in business ethics at Seton Hall University Law School, the *alma mater* of the US Attorney.

Beazer

The company entered into a DPA,[133] acknowledging fraudulent mortgage origination practices and also admitted to having engaged in a scheme to commit securities and accounting fraud. It waived its right to indictment on these charges. The company ceased the business activities of Beazer Mortgage Company. It terminated executives and employees who had been identified as responsible for the misconduct and agreed to cooperate with the US in its ongoing investigation. The company paid restitution of $10 million to homebuyer-victims of its fraudulent scheme to increase its profit margin and promised to pay up to an additional $50 million as it recovered financially.

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[132] Deferred Prosecution Agreement Between BMS and the United States Attorney's office for the District of New Jersey, June 13, 2005, <www.justice.gov/usao/nj/press/files/pdffiles/deferredpros.pdf>.

[133] USDOJ 2009b.

UBS

The charge was that UBS conspired to defraud the US by impeding the Internal Revenue Service with secret banking accounts. UBS agreed to provide the government with the "identities of, and account information for, certain United States customers of UBS' cross-border business." In the DPA[134] it agreed to exit the business of providing banking services to US clients with undeclared accounts and agreed to pay $780 million in fines, penalties, interest, and restitution. It acknowledged responsibility for its actions and omissions, and promised continued cooperation and remedial actions.

As illustrated by these cases, the terms and conditions of such agreements generally include a company's:

- admission of the wrongful act as it admits to the "statement of facts" in the DPA;
- commitment to cooperate with the government's ongoing investigation, which may require making its employees and documents available and providing evidence of wrongdoing by its employees;
- payment of restitution;
- restrictions on its business activities;
- governance reforms;
- commitment to future compliance;[135] and
- appointment of a monitor to oversee compliance with the terms of a DPA or NPA.

Major concerns with these agreements relate to the wide discretion of prosecutors (i.e., that companies are at their mercy and accept onerous terms and conditions and provide many concessions to avoid the stigma of indictment and its other disastrous consequences); the lack of set standards, which could result in abusive use of DPAs and NPAs; and the lack of judicial review of such agreements.

In response to these concerns, recent developments include:

- the announcement of new DOJ policies regarding restitution and the selection and role of monitors; and
- a congressional initiative aimed at regulating DPAs and NPAs.

2.3.3.2 New DOJ Policies

As to restitution, in 2008, the DOJ announced a new policy that would prohibit extraordinary restitution, such as that paid by BMS to Seton Hall to establish a chair. Under the new policy,

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[134] USDOJ 2009a.

[135] On compliance programs: Finder/McConnell/Mitchell 2009, 16 et seq.; Podgor 2009.

> [p]lea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to charitable, educational, community, or other organization or other individual that is not a victim of the criminal activity or it not providing services to redress the harm caused by the defendant's criminal conduct.[136]

As to the selection and role of corporate monitors in DPAs and NPAs in reviewing compliance, Acting Deputy Attorney General Craig Morford issued a memorandum on March 7, 2008, entitled "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations",[137] clarifying the monitor's role as being

> to evaluate whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct. A well-designed ethics and compliance program that is not effectively implemented will fail to lower the risk of recidivism.[138]

To select monitors, DOJ components are to establish a selection committee and review a panel of qualified candidates, with the Deputy Attorney General having the final say.[139] As to the duration of the monitorship, the memo provides a list of factors and the duration depends upon the agreement.[140]

2.3.3.3 Congressional Initiative

A congressional initiative aimed at regulating DPAs and NPAs, HR 1947, "Accountability in Deferred Prosecution Act of 2009", was introduced in the US House of Representatives on April 4, 2009.[141] This bill, which is identical to the one introduced in the prior congress, HR 6492, would require the Attorney General to "issue public written guidelines for deferred prosecution agreements (DPA) and non-prosecution agreements (NPA)." Thus, the guidelines would: identify the circumstances in which an independent monitor is warranted to oversee the operations of a corporation being investigated and the monitor's duties; define the means of establishing the terms and conditions of such agreements, including penalties; describe the process for ensuring compliance with, and identifying breaches of, the guidelines; set the duration of such agreements; describe "what constitutes the cooperation... required by the agreement from the organization and its employees with respect to any ongoing criminal investigations"; and define

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[136] USDOJ, Office of the Deputy Attorney General 2008b, incorporated in USAM § 9-16.325 (2008).

[137] USDOJ, Office of the Deputy Attorney General 2008a.

[138] USDOJ, Office of the Deputy Attorney General 2008a.

[139] USDOJ, Office of the Deputy Attorney General 2008a.

[140] USDOJ, Office of the Deputy Attorney General 2008a.

[141] <thomas.loc.gov/home/gpoxmlc111/h1947_ih.xml>.

when and why it would be appropriate to use an NPA rather than a DPA. Under the bill, the Attorney General would be required to establish rules for the selection of independent monitors under DPAs that require monitors to be drawn from a national list of possible monitors. The bill would also require increased public disclosure of NPAs and DPAs.

2.4 Appraisal and Recommendations

Critics of the current US practice on corporate criminal liability argue that the current doctrine – application of a strict *respondeat superior* doctrine in the criminal context – created through common law by courts, lacks, not only congressional action, but also Supreme Court precedent.[142] They assert that *NY Central* was a mistake[143] and that, as it has been misread and misapplied by courts, it is contrary to the goals of criminal law.[144]

Critics also contend that the current doctrine under which the corporation can be held criminally liable for the act of a lowly employee,[145] and even when the employee has acted in violation of a corporate policy explicitly forbidding such action,[146] makes no sense and indeed serves no useful function. Similarly, finding corporations criminally liable based upon the "collective knowledge" of the corporation's employees as the sum of the knowledge of all the corporation's employees,[147] places enormous undue burden on the corporate actor.

Hence, various reform measures have been offered. Professor Ellen Podgor suggests a "good faith" affirmative defense be incorporated into the US legal system and thus made available to corporations that exert themselves "to achieve compliance with the law as demonstrated in their corporate compliance program."[148] Professor Peter Henning offers rehabilitation as the proper goal of applying criminal law to corporations.[149] Andrew Weissman and David Newman would like the burden to be placed "on the government to prove that a company's program was inadequate as

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[142] Weissmann/Ziegler/McLoughlin/McFadden 2008, 2.

[143] Hasnas 2009.

[144] Weissmann/Ziegler/McLoughlin/McFadden 2008, 2 et seq.; Khanna 1996, 1477, arguing that corporate criminal liability serves no valid legal purpose.

[145] See above n. 39.

[146] See above n. 40 and accompanying text.

[147] See above nn. 47–51 and accompanying text.

[148] Podgor 2007, 1538.

[149] Henning 2009; Meeks 2006, 77.

a prerequisite to criminal corporate liability."[150] Similarly, it is proposed that civil remedies should suffice to meet the goal of deterrence.[151]

Professor Beale aptly argues for retaining corporate criminal liability:

> The frequency of corporate misconduct, the extraordinarily serious consequences of such conduct, and the difficulty of proving many corporate and white collar offenses should make us cautious about restricting the legal tools that are available to combat corporate misconduct. Criminal liability should not be the only remedy, but the hammer of corporate criminal liability should remain in the toolkit of responses to serious corporate misconduct, particularly since many other tools have been eliminated or restricted.[152]

The US Department of Justice provides the following rationale for corporate criminality:

> Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.[153]

The public benefits the DOJ details include "a unique opportunity for deterrence on a broad scale", when a corporation is indicted for criminal misconduct that is widespread in its industry. Also, there may be specific deterrence of a corporate indictment by changing the culture of the corporation and the behavior of its employees. Furthermore, in some specific crimes, such as environmental crimes or sweeping financial frauds, there is a substantial federal interest to indict because such crimes carry a major risk of great public harm.[154]

Does corporate criminal liability accomplish a useful function for law enforcement purposes? Undoubtedly it does, as it reflects society's need to ensure that corporations tow the line by scrupulously adhering to the rule of law. After all, corporations currently play such a central role in everyday life, they wield such enormous powers, and so many of them have been recently involved in serious misconduct.

The strict *respondeat superior* approach to corporate behavior in a criminal context is currently entrenched in the US legal system. As alternatives, the reforms discussed earlier are indeed worthy of consideration. However, the alternative approach suggested by the American Law Institute

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[150] Weissman/Newman 2007, 451. In *US* v. *Ionia Mgmt. SA,* 555 F.3d 303 (2nd Cir. 2009), discussed above nn. 42–46 and accompanying text, the court rejected this argument.

[151] Rischel/Sykes 1996, 310; Hamdani/Klement 2008, 217.

[152] Beale 2007, 1505 et seq.

[153] USAM, see above n. 40, § 9-28.200.A, General Principle.

[154] USAM, see above n. 40, § 9-28.200.B, Comment.

in the MPC seems well-suited both to meeting the societal need for effective corporate regulation and to allaying corporations' concerns with the current doctrine.

The MPC adopts the *respondeat superior* standard when a legislative purpose to impose such liability "plainly appears."[155] However, it adopts the "due diligence" standard, under which no liability would attach if "the high managerial agent having supervisory responsibility over the subject matter of the offense" used due diligence to prevent the commission of the wrongdoing.[156] Furthermore, where there is no applicable statutory provision, criminal liability would not be imputed to the corporation by the wrongful act of any employee but only of the board of directors or high managerial agent acting on behalf of the corporation within the scope of his/her (or its) office or employment.[157] As to DPAs and NPAs, the current developments mentioned earlier, coupled with the adoption of reforms suggested in the congressional initiative, will provide the necessary protection against what is perceived as potential prosecutorial abuse because of the excessive discretion prosecutors currently enjoy.

Although the new approach endorsed here is not likely to be adopted immediately, it certainly is warranted.

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[155] ALI 1962, § 2.07(1)(b).

[156] ALI 1962, § 2.07(5).

[157] ALI 1962, § 2.07(1)(c).

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Chapter 3
Corporate Criminal Liability in England and Wales: Past, Present, and Future

Celia Wells

Contents

3.1 Introduction

We usually think of law reform as a three-stage sequence in which an issue inadequately covered by existing law is identified, followed by proposals to fill that gap, leading to legislative change and improvement. The recent

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history of corporate criminal liability in England and Wales has transposed the last two stages of this process.[1] During the period that the reform of corporate criminal liability has been under consideration by the Law Commission of England and Wales (LCEW), legislation dealing with two discrete offenses, corporate manslaughter and bribery, has introduced two more versions of corporate liability to add to the existing principles that apply to other offenses.[2] The commission's project began by looking at corporate criminal liability in general but it has metamorphosed over the period of review into "Criminal Liability in Regulatory Contexts".[3] My aim in this chapter is to shed some light on the confused and changing picture of the criminal liabilities of corporations in England and Wales. I will only be discussing the liability of the corporation or organization *as* an entity, *as* a legal person, although in many cases there may be parallel or alternative liability of directors, officers, employees, or agents.[4] The chapter is in five parts: the theoretical background, common law principles, corporate manslaughter, bribery, and reform proposals.[5]

3.2 Theoretical Background

Corporations are slippery subjects.[6] Images are everything: images of crime, of "criminals", of risk and safety, of business, and of government. At one level, the argument in respect of corporate criminal liability is about the metaphysical, at another about the functions, purposes, and complexity of legal responses, and at yet another about variations in procedure and enforcement mechanisms. Corporations are legal, not human, persons, it is said, and together they are the lynchpin of prosperity, the driving force behind modern life. How can it make sense to bring them kicking and screaming before a criminal court, when they can only kick and scream through their human agents? Oddly perhaps, these questions are not asked when corporations are the subject of administrative regulation or private law suits. Criminal law has some distinctive characteristics: it is pre-eminently concerned with standards of behavior, backed by a system

[1]This chapter deals mainly with England and Wales but some legislation, particularly in the regulatory field, applies across all parts of the United Kingdom and thus includes Scotland and Northern Ireland.

[2]The Law Commission's program of criminal law reform has been interrupted by specific government referrals on bribery and homicide.

[3]Consultation Paper No. 195, 2010, see further below at 3.6.

[4]Either directly or via a common statutory "consent and connivance" provision, which links directors to corporate offenses, see Stark (this volume).

[5]The chapter draws on a number of my publications: Wells 2001; 2006; 2008; 2009; 2010.

[6]Friedman 2000 likens them to poltergeists. See, generally, Wells 2001.

of state punishment, and usually requires proof of fault such as intention, knowledge, or recklessness. In contrast, tort law, which functions mainly to compensate for harm caused, has a lower standard of proof, and uses broad objective notions of negligence; a company or other person can insure against the risk of civil, but not criminal, liability.

There is, however, much in modern regulatory systems that challenges the simple functional distinction between criminal laws that punish and private (tort) laws that compensate. Health and safety, financial, and other regulation are prime examples of the blurred edges between these two visions. In some jurisdictions, health and safety regulation occupies a formal position outside criminal law, attracting administrative penalties, which to some extent sidestep the problem of corporate criminal liability. In England and Wales, health and safety laws (and other regulation) have been tacked onto criminal law, rather like an ill-fitting and unwelcome extension. These regulatory schemes share some characteristics of mainstream criminal law – not least that they use criminal procedures and impose criminal penalties – but in other ways they are quite different from, and are certainly perceived by the specialist enforcement agencies and those they regulate as quite distinct from, criminal law. There is often a close relationship between the regulators and the regulated: standards are set, warnings are issued, and formal enforcement employed as a last resort.[7] The offenses themselves are defined not in terms of results (such as causing death) but in terms of failure to comply with risk-assessed standards and are often based on strict liability since they do not require proof of fault. Although regulatory schemes are a clear response to industrialization and globalization, they do not generally distinguish between the individual entrepreneur and the incorporated company; they address "employers" or "sellers", and it is left to the courts to interpret these terms to include corporations and to devise rules of attribution, as appropriate. Somewhat ironically, given that administrative or "civil" penalties emerged in jurisdictions that did not have the option of corporate criminal liability, regulatory agencies in England and Wales have begun to use negotiated "civil" penalties.[8]

Even in jurisdictions that have long recognized corporate criminal responsibility, this concept has been treated as something of an outcast, to be tolerated rather than encouraged. That is partly because criminal law had already absorbed ideas of individualist rationality and moral autonomy by the time that corporations became significant social actors. Thus, criminal law was endowed a limited conceptual vocabulary with which to adapt to the developing dominance of business corporations. It described corporations through a dualist anthropomorphic metaphor, namely the "brains" of management and the "hands" of workers. Three key features recur in any

[7] See, generally, Hawkins 2002.
[8] Wells 2010a.

discussion of corporate criminal liability: corporate personality, corporate responsibility, and corporate culture.

3.2.1 Corporate Personality

Corporate liability proceeds from the assumption that a corporation is a separate legal entity, in other words that it is a *legal* person, a term that can include states, local authorities, and universities. We should clarify what it means to say that an entity is a legal person. As Hart wrote: "In law as elsewhere, we can know and yet not understand."[9] The word "corporation" does not correspond with a known fact or possess a useful synonym. Lying behind the question "What is a corporation?" is often the question "Should they be recognized in law?" It is the *context* in which we use words that matters. Sometimes we want to describe (and therefore ascribe responsibility to) a corporation as a collection or aggregation of individuals and sometimes as a unified whole. Thus, Hart suggests the better question is not "What *is* a corporation?" but "Under what conditions do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?"[10]

This then leads to the conclusion that we cannot deduce whether, why, or how to hold a corporation liable for criminal conduct by defining what a company is. If we state that it is a mere fiction or that it has no mind and therefore cannot intend, we "confuse the issue."[11] Nor does it help to decide whether a corporation is either a person or a thing. A corporation is neither exclusively a "person" nor a "thing".[12] As Iwai argues, the corporation is both a *subject* holder of a property right – its assets – and an *object* of property rights – the interests of its shareholders, its owners. It is the "person/thing duality" that accounts for most of the confusion about the essence of a corporation.[13]

Organizations usually begin with a single instrumental purpose; they are a means to an end.[14] But they often become more like *an end in themselves*, preserving their existence in order to survive and, importantly, acquiring an autonomous character or, as some have put it, taking on a

[9]Hart 1954. See also Hoffmann 2003, xiv.

[10]Hart 1954, 56.

[11]Hart 1954, 57.

[12]Iwai 1999. See also Note 2001 observing the categories of human person, human non-person, and non-human person.

[13]Iwai 1999, 593.

[14]Harding 2007, Ch. 2 distinguishes organizations of governance and representation from organizations of enterprise, although the categories may overlap. Here I am talking more of organizations of enterprise.

social reality. This is important because it shows us the error in seeing all corporations or organizations in the same light. It does not help to say that a corporation is "only" a shell, a nominalism, any more than to say the opposite, that a corporation is necessarily "real". Sometimes they are one, sometimes the other.

The notion of treating a collection of individuals *under one name* is neither new nor is it confined to organizations that are also separate entities. An *unincorporated* association can be a "person". An unincorporated association is not a separate entity, it does not have separate legal personality, but that does not prevent its being prosecutable. As the Court of Appeal has put it, the "simple legal dichotomy" between the separate legal personality of the corporation and the unincorporated association is deceptive, concealing a more complicated factual and legal position.[15]

3.2.2 Responsibility

Harding reminds us that responsibility means accountability or answerability,[16] it is "the allocating device which attaches such obligations to particular persons or subjects of the order in question."[17] Responsibility is an umbrella term under which shelter four different senses or meanings: role-responsibility, capacity-responsibility, causal-responsibility, and liability-responsibility.[18] *Role* responsibility is a useful concept in the context of corporate liability. There are two sides to this. One aspect is that individuals within organizations have specific roles or duties or individuals "take responsibility" for the actions or mistakes of others. A second aspect is that individuals and organizations themselves may bear responsibility for an activity. An example here would be the owner of a ship or of an aeroplane. Owners of ships, planes, and trains have responsibilities.[19] Employers have responsibilities.

Capacity responsibility refers to the attributes, rationality, and awareness, necessary to qualify someone as a responsible agent. This is often seen as the stumbling block to corporate or organizational liability for it appears to assume human cognition and volition. If we are to accept *the idea* of corporate responsibility, we must necessarily find a different way of expressing capacity than one that immediately precludes anything other

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[15] *R* v. *L* (*R*) *and F*(*J*) [2008] EWCA Crim 1970 (Hughes LJ).

[16] Harding 2007, Ch. 5, quoting Hart 1968, 265.

[17] Harding 2007, 103.

[18] From Hart 1968, Ch. IX. The discussion here is taken from Harding 2007, Ch. 5.

[19] Much of the jurisprudence on the "directing mind" of the company derives from civil maritime liability cases. See cases cited in *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission* [1995] 3 WLR 413.

than an individual human. While this is an argument that has underpinned the work of the increasing number of scholars in the field,[20] it is raised here in headline terms in order that it can be seen for what it is – an argument about one sort of thing (human individuals) applied to another thing (corporate "persons"). For a corporate person to be liable, a form of capacity that is relevant to the corporate person is required. The fact that the capacities relevant to humans are inappropriate is neither here nor there.

The third dimension, *causal* responsibility, can be seen as the link between role and capacity responsibility and liability.[21] Thus, if car driver, X (role), has capacity (she is not attacked by a swarm of bees) and she crashes into Y's property, she has caused damage and may be liable for causing damage. But on another view, cause responsibility is more blurred, crossing into, and affecting the assessment of, capacity or role.[22] Car park attendant, P, negligently directs X to reverse into a parking place, causing her to damage another car. Has X caused that damage? Or was her role responsibility affected by the supervision of the attendant? As Harding states, such "causal complexity can be seen very clearly in a situation involving both individual and organizational actors."[23]

Liability responsibility is the culmination of the three senses of responsibility outlined above. Because establishing liability is the allocating device referred to earlier, it provides the *raison d'etre* for, and is the purpose behind, establishing role, capacity, and causal responsibility.

3.2.3 Corporate Actors and Corporate Culture

The third key feature is that of the organization as an autonomous actor, one that "transcends specific individual contributions."[24] "Theories of organizations tend to confirm that it is right to think of the corporation as a real entity; they tell us something about how decisions are made and the relationship between the individual, the organization, and wider social structures."[25]

Acceptance of the corporation as an organizational actor in its own right is similar to that of the state in international law.[26] Harding suggests four

[20] Fisse/Braithwaite 1993; Gobert/Punch 2003; Leigh 1969; Wells 2001.
[21] Broadly the view of Hart/Honore 1968, see Harding 2007, 111.
[22] Broadly the view of Norrie 1991.
[23] Harding 2007, 111.
[24] See Harding 2007, 226 et seq.; Wells 2001, Ch. 4.
[25] Wells 2001, 151.
[26] Wells/Elias 2005, 155.

conditions for autonomous action: an organizational rationality (decision-making); an irrelevance of persons (that human actors occupy roles and can be replaced in those roles); a structure and capacity for autonomous action (physical infrastructure and a recognizable identity); and a representative role (that it exists for a purpose, the pursuit of common goals).[27]

3.3 Common Law Principles

Criminal offenses in England and Wales first developed through the common law (in the sense of decided cases), although many have since been partly or wholly defined by statute and yet more are creatures of statute. Under successive Interpretation Acts the word "person" in a statute includes corporations.[28] The general principles of criminal law are also a mixture of common law and statute. This creates the possibility – as has occurred with corporate liability – of a complex and not necessarily consistent set of rules. The *general* principles in relation to corporate liability are not in statutory form. They apply to all criminal offenses unless a statute specifically provides otherwise, as is the case with corporate manslaughter and bribery. Two main types of corporate liability evolved applying to different groups of offenses. The history has been patchy, subject to the ebbs and flows of ideological and judicial preferences, and any attempt to see it as in any way logical or incremental is likely to be unrewarding. Very roughly, we can say that agency or vicarious liability applies only to regulatory offenses, many of which are offenses of strict liability and do not require proof of fault, and identification liability applies only to non-regulatory offenses, most of which require proof of fault. Where the vicarious route applies, the corporate entity will be liable for any offenses committed by its employees or agents. The company could be summonsed and fined if, for example, one of its employees sold food that was unfit for consumption. The reasoning was that the company/employer was the contracting party in the transaction, the employee merely the means through which the sale was concluded. This also fitted with a reluctant acceptance of the need for regulation; as these were not "really" criminal offenses in the true sense, the defendant corporations were not "really" criminal.

The idea that corporations might be able to commit "proper" offenses, ones that required proof of intention or knowledge or subjective recklessness, was resisted until the mid-twentieth century. The perceived difficulty

[27] Harding 2007, Ch. 9.

[28] Since 1827, Interpretation Acts have stated that, in the absence of contrary intention, the word "person" includes corporations: see now Interpretation Act 1978 c. 30. Courts in fact were generous in finding contrary intention and rarely did so when the offense required proof of fault.

of attributing *mens rea* to a soulless body was overcome by the invention of the doctrine of identification (or controlling mind). Applying to non-regulatory fault-based offenses, this attributes to the corporation only the acts and *mens rea* of the top echelon senior officers of the company. As the so-called mind or "brain" of the company, the directors and other senior officers are "identified" with it. More significantly, of course, a company is then *not* liable for offenses carried out by any managers or groups of employees lower down the chain. While radical in extending corporate liability to serious offenses, this development later served a sceptical judiciary with a perfect alibi in their distaste for criminal liability applied to businesses. In the third quarter of the twentieth century the mood was pro business; financial fraud was one thing, holding businesses criminally liable beyond that was another.

In contrast, courts have been increasingly sympathetic to a broad and more punitive corporate liability in regulatory areas such as health and safety and environmental protection over the last 20 years. The Health and Safety at Work etc. Act 1974 c. 37 (HSW Act) imposes on employers a duty "to ensure, so far as is reasonably practicable, the health, safety and welfare at work, of all his employees."[29] It is an offense "to fail to discharge" this duty.[30] Ruling on the respective burdens on the prosecution and defense in such cases, the House of Lords made clear that the onus is on the employer, which will often be a corporation, to show that it was not reasonably practicable to prevent a breach of the duty; there is no obligation on the prosecution to give chapter and verse on the particulars of the breach of duty so long as a *prima facie* breach is established.[31] Lord Hope pointed to three factors: that the act's purpose was both social and economic; that duty holders were persons who had chosen to engage in work or commercial activity and were in charge of it; and that, in choosing to operate in a regulated sphere, they must be taken to have accepted the regulatory controls that went with it.[32]

Prosecution of non-regulatory criminal offenses is undertaken by the Crown Prosecution Service (CPS). There is an evidential threshold (a realistic prospect of conviction) and a public interest threshold.[33] Specific guidance on corporate prosecutions states that prosecution of a company

[29]HSW Act, s. 3.

[30]HSW Act, s. 33. Section 40 provides that the onus is on the employer to show that all reasonably practicable steps have been taken. Weismann 2007 argues that liability should follow where corporation lacks adequate compliance.

[31]*R* v. *Chargot Ltd* [2008] UKHL 73, para. 21. The Supreme Court has now replaced the House of Lords as the final appellate court.

[32][2008] UKHL 73, para. 29.

[33]CPS 2010a, paras. 4.1 et seq.

should not be a substitute for individual liability.[34] In assessing the public interest, prosecutors should take into account the value of gain or loss, the risk of harm to the public and unidentified victims, to shareholders, employees and creditors, and the stability of financial markets and international trade: "A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favor of prosecution."[35] Factors in favor of prosecution include: the existence of previous criminal, civil, and regulatory enforcement actions against the company; evidence that the alleged conduct is part of the established business practices of the company; the ineffectiveness of any corporate compliance programs; the issuance of previous warnings to the company; and the company's failure to self-report within a reasonable time of its learning of the wrongdoing. Factors against prosecution include: proactive responses by the company, such as self-reporting and remedial actions; a clean record; the existence of a good compliance program; and "the availability of civil or regulatory remedies that are likely to be effective and more proportionate." This last factor suggests that, where there is an alternative regulatory offense, suspected corporate offenders continue to attract a hands off, or a kid glove protective hand, prosecution policy.

3.4 Corporate Manslaughter

The first attempted prosecution of a company for manslaughter arose from the 1926 strike by miners. In a pattern repeated even now, the company employed the best lawyers of the day to challenge the legal basis of the indictment. At the trial, the case was dismissed on the ground that it was not possible to prosecute a company for a serious offense, such as manslaughter.[36] This was consistent with the idea that companies could be regulated but they were not "real" criminals. They might avoid tax but they were not fraudsters, for example. They might cause death to their workers or to the public but this was a price to pay for legitimate commerce. Over time and in areas such as revenue fraud, the courts became less tolerant and eventually developed the narrow identification route for holding corporations liable for offenses requiring intention or knowledge.[37] But the idea that a corporation might commit an offense of violence, such as manslaughter, was a step too far and lay dormant until the early 1990s. Why did it revive then? Disasters such as rail crashes, ferry capsizes, and industrial plant explosions led to calls for enterprises to be prosecuted for manslaughter. The

[34] CPS 2010b, para. 8.
[35] CPS 2010b, para. 30.
[36] *R* v. *Cory Bros Ltd* [1927] 1 KB 810.
[37] Wells 2001, 93 et seq.

campaign for corporate accountability reflected changes in risk perception and a more secular blaming culture to which factors such as twenty-four hour news as events unfold and the politicization of crime in the last 20 years have contributed.

This "cultural shift" towards blaming collective institutions for the misfortunes that befall us[38] led to a quantum leap in legal discourse and the changed perception of health and safety laws already described. There is a confusion in many of the contemporary arguments about corporate manslaughter. It is viewed by some proponents as reinforcing health and safety at work legislation, ensuring that companies take safety more seriously. For others, however, it has more symbolic and less instrumental appeal. Unlike health and safety regulation (which operates through a model of shared responsibility between employers and employees, and a partnership between the specialist regulators and the industries they oversee) the use of mainstream criminal law represents a clear denunciation in the form of naming and shaming where corporate negligence has caused death.[39]

There are multiple potential targets of blame in relation to negligently-caused disasters or work-related deaths. Blame can be placed on one, or a combination of, three potential defendants: the frontline operator; individual directors and officers; and the company or employing organization. It is now more likely that professional negligence will lead to the prosecution of an individual for manslaughter.[40] There has been an increase in the fines imposed for health and safety offenses that are brought against employers, who may or may not be companies, and also an increase in the number of fatal cases referred to the Crown Prosecution Service for parallel manslaughter investigations.[41] As a result, there have been more work-related manslaughter prosecutions against both individuals and companies. Although running at two or three a year, this represents a significant increase from the total of ten in the 50 years up to 1998.[42] Yet, the courts continued to demonstrate reluctance to embrace corporate manslaughter, resisting opportunities to mold the identification principle into something more appropriate for large-scale corporations, suggesting this must be a matter for the legislature. The result was that the few successful manslaughter prosecutions have been confined to small enterprises or sole traders. This is ironic in two respects: the conviction of a very small company achieves little since the legal separation of the legal person from those who

[38] See, generally, Douglas 1992.

[39] This is, of course, a caricature of a much more complex picture.

[40] Quick 2006.

[41] The *Work Related Deaths Protocol for Liaison*, which was introduced in 1998, has improved inter-agency cooperation.

[42] As reported by the Centre for Corporate Accountability 2002.

run it is notional; and the courts' unwillingness to adapt the identification principle belied the fact that it was their own invention in the first place.

The Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 (CMCH Act) (applying to the whole of the UK) introduced a stand-alone offense of corporate manslaughter, which in Scotland will be known as corporate homicide.[43] For deaths after April 2008, organizations can no longer be prosecuted under common law gross negligence manslaughter.[44] Neither individual directors nor senior managers can be liable for this offense.[45] The organization's culpability builds on that of senior management but only the organization can be charged with corporate manslaughter.[46] The act is complex and the offense definition itself is full of ambiguities and interpretive uncertainty.[47] It appeared as the result of an unwanted pregnancy. The government had begun the reproductive process with promises made at the start of Labour's period in office in 1997. By the time the egg was fertilized, a strong case of parental cold feet had set in and the infant by no means received the loving care that would nurture its full potential.[48] The discussion is ordered as follows: the offense itself; the threshold question ("To which organizations does the CMCH Act apply?"); the relevant duty of care; the conduct element (causing death); the culpability element (gross breach); the role of senior management; the exemptions for public activities; penalties and prosecution policy.

3.4.1 The Offense

An *organization* will commit the offense *if the way in which it manages or organizes its activities* both *causes a death* and amounts to *a gross breach of a relevant duty of care* owed by the organization to the deceased.[49] The offense is only committed if the way senior management have managed or organized activities has played a substantial role in the gross breach.[50]

3.4.2 The Threshold Question

All corporations and some unincorporated bodies (such as trade unions, employers' organizations, and partnerships that are also employers), police

[43] CMCH Act (UK), s. 1(5)(b).
[44] CMCH Act (UK), s. 20.
[45] CMCH Act (UK), s. 18.
[46] CMCH Act (UK), s. 18.
[47] Ormerod/Taylor 2008.
[48] Wells 2001 and 2005.
[49] CMCH Act (UK), s. 1(1).
[50] CMCH Act (UK), s. 1(3).

forces, and most Crown bodies are covered.[51] The death (or the harm which led to the death) has to occur in the UK.[52]

3.4.3 The Relevant Duty of Care

The core of the definition relates the relevant duty to the private law of negligence.[53] The notion of breach of duty of care appeared in the leading House of Lords case on common law manslaughter.[54] Under the CMCH Act it includes the duties owed to employees, as occupier of premises, as a supplier of goods or services, construction or maintenance or other commercial activity, and to those detained in custody.

3.4.4 Causing Death

There needs to be a death of a person to whom a duty was owed. Taken from the prosecutor's standpoint, the CMCH Act does not make things easy in terms of causation. It requires proof that a death was caused "by the way that an organization managed or organized its activities". The difficulty is that, of course, organizations act through individuals, through frontline workers as well as through managers. In anticipation of the potential difficulties in showing how an organization *causes* a result, the LCEW, in its draft bill on corporate killing, included an explanatory provision that a management failure "may be regarded as a cause of a person's death *notwithstanding that the immediate cause is the act or omission of an individual*."[55] The government argued that causation is no longer a difficult issue in criminal law.[56] This was an extraordinary statement. Both in civil and in criminal law causation is fraught with problems. The House of Lords, in quashing a conviction for manslaughter, commented that, "Causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises."[57] The causation notes in the CPS Guidelines on corporate manslaughter state that although it will not be necessary for the management failure to have been the sole cause of death, "the prosecution will need to show that 'but for' the management failure *(including the substantial element attributable to senior management),*

[51] CMCH Act (UK), s. 1(2).
[52] CMCH Act (UK), s. 28(3).
[53] CMCH Act (UK), s. 2.
[54] *R* v. *Adomako* [1995] 1 AC 171.
[55] LCEW 1996, cl. 4 (2)(b), emphasis added.
[56] During the scrutiny of the Draft Corporate Manslaughter Bill in 2005.
[57] *R* v. *Kennedy* [2007] UKHL 38.

the death would not have occurred."[58] But what s. 1(1) CMCH Act in fact states is that the organization is guilty if the way its activities are managed "(a) causes a person's death and (b) amounts to a gross breach of a relevant duty of care…". The qualification in relation to senior management in s. 1(3) refers to the "breach". The guidelines have conflated the two elements of causation and breach of duty of care. Causation may be difficult to prove – and will certainly give rise to legal argument – in large public authorities or corporations. Nonetheless it is curiously under-defined in an act which over-defines, as we have seen, in relation to threshold and also, as will now be shown, to culpability issues.

3.4.5 The Culpability Element

Suppose, then, that a death has occurred and that it can be said to have been caused by the way that the organization's activities were managed or organized. In addition, it must be shown that there was *a gross* breach of a relevant duty. Most commentators regard it as appropriate to limit any corporate manslaughter offense to *gross* breaches. A departure from a standard of care is "gross" if the "conduct… falls far below what can reasonably be expected of the organization in the circumstances."[59] This builds on the common law definition of gross negligence but avoids the circularity of saying that the *criminal* standard for negligence is met when the jury thinks the breach was *criminal*.[60] The CMCH Act goes further, providing some factors for the jury to take into account. Again, these seem to complicate rather than clarify.

To begin with, the "the jury must consider whether the evidence shows that the organization failed to comply with any health and safety legislation that relates to the alleged breach…" and, if so, how serious the failure was and how much of a risk it posed.[61] Section 8 continues that a jury *may* also consider the extent to which the evidence shows that there were "attitudes, policies, systems or accepted practices within the organization" that were likely to have encouraged, or produced tolerance of, the failure to comply with such legislation. They may also have regard to any health and safety guidance relating to the breach. These are effective instructions to the trial judge. She must instruct the jury to take into account breaches of health and safety legislation. But how that is taken into account will be left to the mysteries of the jury room. She must instruct the jury that they may take into account company culture and/or breaches of guidance. It is also

[58] CPS Guidelines (emphasis added).
[59] CMCH Act (UK), s. 1(4)(b).
[60] *R* v. *Adomako* [1995] 1 AC 171.
[61] CMCH Act (UK), s. 8(2).

explicitly stated that none of this prevents the jury from having regard to other matters they consider relevant. This is odd. In one sense, s. 8 states the obvious for it must be reasonable to expect an organization to have regard to health and safety legislation and guidance. The rest is not mandatory. And none of this actually helps the jury decide whether the failure is "gross" or falls "far below" what can be reasonably expected.

3.4.6 Senior Management

The offense is only committed if the way senior management have managed or organized activities has played a substantial role in the gross breach.[62] This in turn means we need to know to whom or what "senior management" refers. "Senior management" means the persons who play "significant roles" in making decisions about, or in actually managing, the "whole or a substantial part" of the organization's activities.[63] It might appear that the more definitions we are given the better except that the adjectives "significant" and "substantial" leave much room for debate. What does "substantial" mean? It is used twice – once to define the extent to which senior management is involved in the breach and once to define those within an organization who might be regarded as "senior" management. Often in criminal law, the word, "substantial", is broad denoting *de minimis* – not much more than a minimum. In common usage, it can mean something much more restrictive, more like "a large part of". In relation to its use to define those within an organization who might be regarded as part of the *senior* management, it could well be interpreted as including only a narrow range of people whose responsibilities are central to the organization's decision-making. The reasoning here is that "substantial" supplements "the whole", suggesting that it means something close to the whole if not the whole itself. And this still leaves the question of "significant" role. Far from addressing the difficulties in capturing organizational fault, the CMCH Act slips between two grammatical uses of the word "management". The term "management" can mean either "the action or manner of managing", or the "power of managing", or it could function as a collective noun for "a governing body".[64] By requiring the substantial involvement of "senior management" and then defining this body as "those persons who play significant roles", the act gives the lie to the government's claimed commitment to an organizational version of fault that is not derivative on the actions of specified individuals.

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[62] CMCH Act (UK), s. 1(3).

[63] S. 1(4)(c).

[64] That is, it can be an adjectival or collective noun, Shorter Oxford English Dictionary 1977.

3.4.7 The Exemptions

The CMCH Act does, however, circumscribe when a public authority, as opposed to a commercial organization, may be liable. Section 3(1) states that a "duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a 'relevant duty of care'." An exclusively public function is one that either falls within the Crown prerogative or is "by its nature, exercisable only with authority conferred by or under a statutory provision".[65] This means, "the *nature* of the activity involved must be one that requires a statutory or prerogative basis, for example, licensing drugs or conducting international diplomacy."[66] It would not cover an activity "simply because it was one that required a license or took place on a statutory basis."[67] In other words, merely because a function is carried out by a public body or free of charge to the public does not make it "exclusively public". Indeed, if the CMCH Act is interpreted to mean anything else it would render almost nugatory any role in relation to public authorities acting in any capacity other than as employers or occupiers. Emergencies provide a further set of (complicated) exceptions that would be relevant in the health care context.[68]

3.4.8 Penalties

The CMCH Act provides for three types of penalty: a fine, a publicity order, and/or a remedial order. The maximum fine is unlimited as it is for offenses under the HSW Act when sentenced in the Crown Court. Combined sentencing guidelines for corporate manslaughter *and* health and safety offenses causing death were published in January 2010.[69] The factors that courts should consider in assessing the financial consequences of a fine include: the effect on the employment of the innocent; the effect upon the provision of services to the public.

A *publicity order* would require an organization convicted of corporate manslaughter to advertise the fact of its conviction, specify particulars of the offense, the amount of any fine imposed, and the terms of any remedial order that has been made. The purpose of the *remedial order* under which an organization may be ordered to take steps to remedy the breach is unclear. This is another example of confusing the underlying aims of an

[65] CMCH Act (UK), s. 3(4).
[66] CPS Guidelines.
[67] Ministry of Justice, Explanatory Notes, para. 27.
[68] CMCH Act (UK), s. 6
[69] Sentencing Guidance Council 2010. See Davies 2010.

offense of corporate manslaughter. Rather than minimizing risk directly, which is the main function of health and safety regulation, the aim of this offense is to punish in a retributive sense. It may secondarily act as a general deterrent or encouragement to take safety compliance more seriously but the time lag between the event and the trial renders the idea of relevant remedial action impractical. A manslaughter trial would not, in any case, be the most effective forum in which to decide on appropriate remedial action. The penalty for failing to comply with any remedial order, a fine, would again only be enforceable against the organization itself. The government has rejected the suggestion that company directors should be liable for failing to take the specified steps.

3.4.9 Prosecution Policy

The CPS guidance[70] draws attention to many of the points of uncertainty in the CMCH Act. It also deals explicitly with the relationship between prosecutions for the new offense and those under health and safety legislation, which are prosecuted by the Health and Safety Executive (HSE). Any organization that is an employer could be liable for HSW Act offenses as well as for manslaughter. The guidance refers to the existing protocol for liaison agreed between the CPS, the HSE, and other regulatory agencies under which each agency will investigate within its own area of operation (the police will conduct the investigation into any possible manslaughter, the HSE for health and safety breaches) but any prosecution arising should be managed jointly.[71] The CMCH Act itself states that where an organization is charged both under the CMCH Act and HSW Act, the jury may return a verdict on both charges.[72] The guidance comments: "As a jury may take into account whether, and the extent to which, the organization has breached H&S, it is unlikely that the defense will plead guilty to HSW Act unless the prosecution agrees not to pursue the corporate manslaughter charge."

3.5 Bribery

The UK has been under much pressure from the Organization for Economic Cooperation and Development's Working Group on Bribery, which has recognized that the identification route to corporate liability – which could

[70] <www.cps.gov.uk/legal/a_to_c/corporate_manslaughter>.

[71] See above n. 41.

[72] CMCH Act (UK), s. 15.

otherwise apply to bribery offenses – is wholly inadequate in meeting the UK's obligations under the OECD's anti-bribery convention.[73]

In considering the reform of bribery offenses, the LCEW was initially unwilling to introduce a new corporate provision ahead of its general review of corporate liability. A stand-alone corporate offense of *negligently failing to prevent bribery* was bolted onto the government's Draft Bribery Bill in 2009.[74] This was rejected by the Parliamentary scrutiny committee[75] and the eventual Bribery Act 2010 c. 23 renders a company liable for bribery offenses committed by its employees and agents unless it can show that it has adequate procedures.[76] The importance of this concession for the development of corporate liability in England and Wales cannot be over emphasized. From the frying pan of identification – and the curdled sauce of the CMCH Act – we were in danger of consigning corporate accountability for bribery to the fire of negligent failure. Bribery is the first "proper" offense (one that requires proof of intention or knowledge) to have a strict form of corporate liability, an approach which is consistent with employers' liability for breaches of health and safety duties under the HSW Act. This may not mean that corporate liability for all offenses will follow the Bribery Act model in the future. It is more likely that both bribery and health and safety offenses will be treated as *sui generis*.

3.6 Reforming the General Principles

The LCEW has been considering the reform of corporate liability principles for some time but has been sidetracked by more pressing projects. The original project was pursued under three heads: the scope of the consent and connivance doctrine, which imposes liability on individual directors for crimes committed by companies; the identification doctrine; and the status of the doctrine of delegation.[77] This slow moving vessel was subsumed in 2009 into the mainstream of the government's regulatory reform agenda. Under this, the LCEW agreed to examine "the use of the criminal law as

[73] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999.

[74] See Wells 2009.

[75] Parliament 2009.

[76] Bribery Act 2010, s. 7. The commercial organization is liable for the actions of those associated with it, including those who perform services for it, employees, agents, and subsidiaries (s. 8).

[77] The commission proposes that directors' liability should be limited to proof of consent or connivance with the company's offense and not, as in some regulatory statutes, inclusive of mere "neglect". The delegation doctrine is of limited application where, for example, a license holder delegates performance of duties to another, see LCEW 2010, Pt. 10.

a way of promoting regulatory objectives and public interest goals." The consultation paper published in August 2010 leads on from, and is dominated by, the two broad aims of this new project: to introduce rationality and principle into the structure of criminal law, as it is employed against business enterprises, and to consider a general defense of due diligence.[78]

The commission's focus has shifted from the recognition that criminal law was both incoherent and unresponsive to corporate wrongdoing to the (misplaced) perception that business entities are disproportionately targeted by criminal law. As a result of the context-specific reforms in relation to manslaughter and bribery, both of which were driven and molded by political considerations, the opportunity to develop a general doctrine of corporate criminal liability has probably been lost. The consultation paper takes a pragmatic view and, skating lightly over generic provisions, such as those in Australia's Criminal Code Act 1995,[79] concludes that having one basis for corporate liability is unlikely to be workable or desirable.[80] Legislation, it proposes, should include specific provisions in criminal offenses to indicate the basis on which companies may be found liable; but, in the absence of such provisions, the question should be a matter of statutory interpretation. This frankly conservative approach is tempered by the entreaty that, "we encourage courts not to presume that the identification doctrine applies when interpreting the scope of statutory criminal offenses applicable to companies."[81] When it comes to protecting companies from strict liability offenses, which are mainly found in the regulatory sphere, the consultation paper speaks in much stronger terms, proposing an across-the-board statutory power to apply a reverse onus defense of due diligence to any existing strict liability offense.[82] The favored form of this defense is "showing that due diligence was exercised in all the circumstances to avoid the commission of the offense."[83]

3.7 Concluding Comments

With the exception of the Bribery Act 2010, the "bark" of corporate liability has generally been much worse than its "bite" (because of reluctance to prosecute, limitations of the identification doctrine, relatively low level of fines, and so on). It is going to be fascinating to see how the commission's final proposals reconcile the rhetoric of needing to be fair to businesses and

[78] This chapter draws on Appendix C of the Consultation Paper, 'Corporate Criminal Liability: Exploring Some Models', Wells 2010b.

[79] Criminal Code Act 1995, Act No. 12 of 1995 as amended, Pt. 2.5, Div. 12.

[80] Para. 5.91.

[81] Proposal 13, para. 5.110.

[82] Proposal 14, para. 6.95.

[83] Proposal 14, para. 6.96.

release them from the (alleged) restrictions of regulatory offenses with the reality that compliance is well within the grasp of the corporations with the greatest opportunities for wrongdoing: the large national and multinational enterprises. Due diligence makes sense as a way of tempering vicarious or strict liability, and the Bribery Act provision is a good example of a stricter form of liability attaching to a serious *mens rea* offense that, under common law principles, would be subject to the identification doctrine. But to add due diligence to offenses that come within the regulatory sphere would be to narrow their existing liability.

Dissatisfaction with both the vicarious and identification routes has led to an emerging principle based on company culture that exploits instead the dissimilarities between individual human beings and group entities. Vicarious liability is regarded as too rough and ready for the delicate task of attributing blame for serious harms. It has been criticized for including too little by demanding that liability flow through an individual, however great the fault of the corporation, and for including too much by blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault. This of course begs the question of how to conceptualize "corporate" fault. The company-culture principle owes its philosophical heritage to Peter A. French, who identified three elements in company decision-making structures: a responsibility flowchart, procedural rules, and policies.[84] A legislative example of this approach can be found in the Australian Criminal Code Act 1995.[85] Under the code, intention, knowledge, or recklessness will be attributed to a body corporate whenever it expressly, tacitly, or impliedly authorized or permitted the commission of an offense. Such authorization or permission may be established, inter alia, where the corporation's culture encourages situations leading to an offense. "Corporate culture" is defined "as an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[86] Thus, evidence of tacit authorization or toleration of non-compliance or failure to create a culture of compliance will be admissible. The CMCH Act adopts a flawed version of it occupying an uneasy no man's land between the identification and culture (or system) approaches.

Corporate criminal liability in England and Wales is volatile, unpredictable, and disorderly. The question of how criminal law can accommodate the corporation has been taxing lawyers for well over a century. When it was first asked the business corporation was a much less sophisticated instrument than now and played a less central role in national

[84] French 1984, 1 et seq.

[85] Criminal Code Act 1995, Act No. 12 of 1995 as amended. The Australian Capital Territory has incorporated it in the Criminal Code Act 2002, including workplace manslaughter in Pt. 2A of the Crimes Act 1900.

[86] Criminal Code Act 1995, s. 12.3(6).

and global economies. Nonetheless, the legal adaptation has not kept pace. There remains, in the UK at least, a patchwork of answers, in fact more of a collection of cut-out pieces waiting to be sorted before being sewn together to make a coherent structure than a joined-up article. In respect of full-blown criminal liability, the vicarious model assumes that all employees contribute to the corporate goal. This is a good starting point but a blunt instrument in terms of encouraging or rewarding the development of effective compliance policies. In theory, it is better combined with a due diligence defense; in practice, multinational companies can hide behind this sort of defense while smaller businesses may be caught. This would replicate the differential application of the identification model, which works best against small companies where it is least needed.[87] The identification model is not appropriate as a single model. On their own, neither of these models is a solution. They are better conceived as part of a broader organizational model that is responsive to different forms of criminal offenses. At the same time, we have a box-set of mechanisms in the form of regulatory/civil and criminal penalties enforceable against the corporation itself and/or against its directors, the use of which reveals contradictory messages from different prosecution and regulatory agencies.[88]

We tend to talk quite loosely about regulation and crime, with the result that techniques developed for molding behavior through regulatory standards have been applied in the pursuit of serious white collar and corporate crime such as fraud and bribery. While the Law Commission's consultation paper states that corporate fraud should be dealt with under the Fraud Act 2006 rather than through context-specific financial services regulatory provisions, the key questions lie in enforcement policies and practices. The distinctions between the different types and forms of control are perhaps more apparent than real – again much enforcement of crime against individuals deploys negotiation, discretion, and selectivity.[89]

There is increased recognition that regulatory offenses are concerned to prevent harms and that they are just as, and perhaps more, threatening to health and welfare than many so-called "real" crimes. An unsafe mine or steelworks can damage employees and the public, a corrupt corporation can similarly wreak damage to the economy that places a professional shoplifter in the shade. There remains, however, a serious lack of clarity about the harm or culpability inherent in what might be broadly called "economic offenses". The opposing forces of regulatory and crime rhetoric have produced some interesting microclimates in which corporate crime enforcement has grown at different rates and in different forms.

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[87] Gobert/Punch 2003.

[88] The Regulatory Enforcement and Sanctions Act 2008 empowers regulatory agencies to impose civil penalties.

[89] Bussman/Werle 2006.

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Chapter 4
Corporate Criminal Liability in Scotland: The Problems with a Piecemeal Approach

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Contents

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4.1 Introduction

The United Kingdom (UK) has three distinct legal systems: England and Wales, Northern Ireland, and Scotland. There are close similarities – and important differences – between the English and Welsh, and Northern Irish systems in most areas,[1] including the criminal law.[2] Scots criminal law is considerably more distinct,[3] although it has been heavily influenced by its nearest neighbor, and in many instances identical criminal legislation applies in both jurisdictions. Further, reference to English case law is frequently made in Scottish practice.[4] This cross-fertilization is facilitated by the fact that no United Kingdom jurisdiction has a criminal code:[5] much criminal law is still uncodified common law, which is found in the decisions of courts rather than in legislation.

The approach of English law to corporate criminal liability is covered elsewhere in this book.[6] This chapter focuses on the approach of Scots law and makes references to variants in English practice, where appropriate.[7] It argues that Scots law on this issue has been clarified somewhat in recent years, particularly as a result of the decision by the Appeal Court[8] in *Transco plc* v. *HM Advocate (Transco)*.[9] Nevertheless, a number of matters remain unclear. Five problematic areas will be explored:

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[1] Dickson 1992.

[2] For an account of differences, see Stannard 1984.

[3] In particular, the United Kingdom Supreme Court (recently established under the Constitutional Reform Act 2005 c. 4) has general jurisdiction over appeals from the Scottish civil, but not criminal, courts. It does, however, have jurisdiction in respect of "devolution issues" arising in the Scottish criminal courts, which can include a claim that a criminal prosecution is in breach of the accused's rights under the European Convention on Human Rights. See further Jones 2004.

[4] See McDiarmid 1996, 161 et seq.

[5] Draft codes have been produced in both jurisdictions but have not been enacted. See Clive/Ferguson/Gane/McCall Smith 2003; Dennis 2009.

[6] See Wells (this volume). See also: Gobert/Punch 2003; Horder 2007; Law Commission of England and Wales 1996, Pt. VI; Wells 2001.

[7] Furthermore, except for the section on reform, the focus will be upon Scottish discussions of corporate criminal liability.

[8] In Scotland, the High Court of Justiciary is the supreme criminal court and has both a trial and an appellate jurisdiction. "Appeal Court" is employed here as a shorthand reference to the latter.

[9] 2004 JC 29.

- the manner in which criminal liability may be ascribed to a corporation;
- the range of offenses that can be committed by a corporate entity;
- the types of corporation capable of assuming criminal liability;
- the sentences available to the courts when punishing a corporation; and
- procedural and evidential issues.

The paper concludes with five (tentative) proposals for reform.

4.2 Ascribing Criminal Liability to a Corporation

This section describes the haphazard development of corporate liability in Scots criminal law. Because the law is not codified, it is found in a mixture of court decisions and statutes, created by the UK and Scottish Parliaments.[10] The decentralization of the Scottish criminal law-making process has impacted upon the development of the law on corporate criminal liability. As discussed below, the courts have been less willing to impose criminal liability upon corporations for common law offenses and those statutory offenses that require *mens rea*.[11] It will be argued that, where *mens rea* is required for an offense, Scots law adopts the "identification" model of corporate fault. Consequently, to find a corporation guilty of a crime, the court must find that its "directing mind" committed the criminal act or omission or sanctioned its commission by the corporation's agents or employees.

Before considering this issue of identification, it is useful to explain two forms of corporate liability in Scotland, which manage to avoid the involvement of a "fiction": explicit "corporate" liability offense provisions and vicarious liability.

4.2.1 Explicit Provision for Corporate Liability

First, if an offense is one of strict liability (i.e., it does not require *mens rea*), the courts may hold a corporation liable without attributing to it the

[10] The Scottish Parliament (created by the Scotland Act 1998 c. 46) has legislative competence in all areas except those that are specified in the 1998 Act as "reserved" to the UK Parliament. Although general criminal law is not "reserved", health and safety law is: Scotland Act 1998 c. 46, Sch. 5, Pt. II, para. H2. It should be further noted that the fact that the Scottish Parliament has legislative competence does not remove the competence of the UK Parliament to legislate in the same area. But, by convention, the Scottish Parliament should give its consent to such legislation. See Batey/Page 2002; Burrows 2002.

[11] See below at 4.3.1 et seq.

culpability of its agents and employees.[12] In other words, no "fiction" concerning the *mens rea* of the corporation is involved and no extra difficulty is encountered by the prosecution.[13]

In certain instances, Parliament can also provide for the conviction of a corporation's senior officers for a strict liability offense. For example, s. 37 of the Health and Safety at Work etc. Act 1974 c. 37 provides that:

> Where an offense under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offense and shall be liable to be proceeded against and punished accordingly.

Similar provisions are found in a number of other statutes.[14]

4.2.2 Vicarious Liability for Crime

Second, Parliament can ascribe criminal liability to a corporation through vicarious liability. Clearly, a corporate entity "can only act through its employees or servants."[15] Through vicarious liability, the actions of an employee or agent are simply attributed to his/her employer (who might be a corporation) *if* those acts are incidental to his/her employment or agency.

This transfer of liability is, however, problematic in Scots law because there is a presumption against vicarious liability for crime.[16] Nevertheless,

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[12] See, e.g., *Macnab* v. *Alexanders of Greenock Limited and Another* 1971 SLT 121 at 125 (Lord Justice-Clerk [Grant]).

[13] Gordon 2000, para. 8.89.

[14] A random sample of Acts of the Scottish Parliament from the last 5 years produced the following examples: Breastfeeding etc. (Scotland) Act 2005 (asp. 1), s. 3; Licensing (Scotland) Act 2005 (asp. 16), s. 141; Animal Health and Welfare (Scotland) Act 2006 (asp. 11), s. 45; Housing (Scotland) Act 2006 (asp. 1), s. 189; Aquaculture and Fisheries (Scotland) Act 2007 (asp. 12), s. 40; Adoption and Children (Scotland) Act 2007 (asp. 4), s. 115; Public Health etc (Scotland) Act 2008 (asp. 5), s. 119; Glasgow Commonwealth Games Act 2008 (asp. 4), s. 36; Flood Risk Management (Scotland) Act 2009 (asp. 6), s. 92; Sexual Offences (Scotland) Act 2009 (asp. 9), s. 57; Marine (Scotland) Act 2010 (asp. 5), s. 163.

[15] *Docherty* v. *Stakis Hotels Ltd; Stakis Hotels Ltd* v. *Docherty* 1991 SCCR 6 at 14 (Lord Justice-Clerk [Ross]).

[16] In relation to common law offenses, see: *Haig* v. *Thompson* 1931 JC 29 at 33 (Lord Ormidale); *Mitchell* v. *Morrison* 1938 JC 64 at 76 (Lord Justice-General [Normand]); *Dean* v. *John Menzies (Holdings) Ltd.* 1981 JC 23 at 33 et seq. (Lord Cameron), 36 (Lord Stott), and 39 (Lord Maxwell); *Transco plc* v. *HM Advocate* 2004 JC 29 at para. 53 (Lord Hamilton). On statutory offenses, see: *Haig* v. *Thompson* 1931 JC 29 at 33 (Lord Anderson); *Duguid* v. *Fraser* 1942 JC 1 at 5 (Lord Justice-Clerk [Cooper]). On doubts about vicarious responsibility for crime generally, see: *Linton* v. *Stirling*

as Sir Gerald Gordon QC notes, the legislature may provide expressly for vicarious liability in a statute, or the courts may find vicarious liability to be implicit in the wording of a statute.[17] Hence, "it would seem that the prosecution of *personae fictae* for... vicarious liability offenses poses no greater problems than are encountered where human beings are prosecuted for such offenses."[18] Such prosecutions have succeeded against natural persons (usually employers or licensees whose employees have breached the law) in many cases. Where liability is both strict and vicarious, no extra rule of attribution has been required to convict a corporation.[19]

4.2.3 Offenses Requiring Mens Rea

So far, the discussion has concentrated on offenses that do not require *mens rea* on the part of the accused corporation: in strict liability, a culpable mental state is not an element of the offense; in vicarious liability, it is the employee's mental state (if relevant) that is important. However, many offenses – both statutory and common law – require proof of fault and the courts have long grappled with the question of whether a corporation may commit them. The Scottish courts have tended to discuss the issue of corporate liability in an incoherent manner.[20] This necessitates a detailed examination of the Appeal Court's jurisprudence.

4.2.3.1 The Early Decisions

Clydebank Co-operative Society v. *Binnie (Clydebank)* was the first modern case on corporate criminal liability and is indicative of the Appeal Court's approach.[21] There, the charge related to the use of a motorcar as a

(1893) 1 Adam 61 at 70 (Lord McLaren); *Wilson* v. *Fleming* (1913) 7 Adam 263 at 270 (Lord Justice-General [Strathclyde]); *Gair* v. *Brewster* (1916) 7 Adam 752 at 756 (Lord Justice-General [Strathclyde]); *Bean* v. *Sinclair* 1930 JC 31 at 36 (Lord Justice-General [Clyde]).

[17] Gordon 2000, para. 8.42. It has been suggested that the implication (rather than explicit provision) of vicarious responsibility is more common: Gane/Stoddart/Chalmers 2009, para. 3.18.2.

[18] Gordon 2000, para. 8.89 (footnotes omitted). On natural persons and vicarious liability, see, e.g., *Mitchell* v. *Morrison* 1938 JC 64; *Swan* v. *MacNab* 1977 JC 57.

[19] See, e.g., *Wilson* v. *Allied Breweries Ltd. and James Irwin, Wilson* v. *Chieftan Inns Ltd. and John Jamieson* 1986 SCCR 11. There, it was held that it was unnecessary to demonstrate which employee committed the offense in order for the corporation to be convicted. The offense was under the (now repealed) Licensing (Scotland) Act 1976 c. 66.

[20] Mays 2000, 53. See, similarly, Whyte 1987.

[21] 1937 JC 17.

public service vehicle without an appropriate license.[22] The accused company was alleged to have "permitted" this use. The court was clear that, in order to have permitted this infraction, the company itself would have had to have been under a duty of inquiry (i.e., it would have had to be shown that the company *ought* to have inquired as to the use of the car, based on the facts of which it was aware, and had failed to do so).[23] The company's awareness was inferred from the objective facts of which its transport manager was aware.[24] The Lord Justice-General (Normand) thought "that, when the appellants through their manager had *brought home* to them knowledge" of the circumstances from which a duty to inquire could arise, their failure to do anything fixed them with liability.[25]

Although clear that the knowledge of an employee or agent could be "brought home" to the accused company, the court in *Clydebank* did not elucidate exactly how, when, and why this transfer took place.[26] This makes it difficult to tell whether the court simply imposed vicarious liability or whether it took a new approach.[27]

Subsequent courts have asserted, however, that vicarious liability is not at issue when considering corporate liability for statutory offenses that require *mens rea*.[28] For instance, the trial judge in *MacDonald* v. *Willmae Concrete Co. Ltd.*[29] made clear that "knowledge" of the possibility of criminal conduct had to be "brought home" to the accused company before it could be found liable.[30] Similarly, in *Mackay Brothers* v. *Gibb (Mackay Brothers)*,[31] the court was concerned with whether the knowledge of the company's garage manager could be imputed to the company. This transfer of knowledge was remarkable in that the court accepted that the garage

[22] Road Traffic Act 1930 c. 43, ss. 67, 72 (now repealed).

[23] *Clydebank Co-operative Society* v. *Binnie* 1937 JC 17 at 24 et seq. (Lord Justice-General [Normand]) and 26 (Lord Fleming).

[24] *Clydebank Co-operative Society* v. *Binnie* 1937 JC 17 at 24 (Lord Justice-General [Normand]).

[25] At 24 et seq. (emphasis added).

[26] A number of cases regarding strict liability offenses suggest that the courts were nonetheless aware of a different approach to statutory offenses requiring *mens rea*. See, e.g., *Patterson* v. *Cam'nethan Oatmeal, Limited* 1948 JC 16; *Muir* v. *Grant & Co* 1948 JC 42; *Behling, Limited* v. *Macleod* 1949 JC 25.

[27] Ross 1990, 266. Ross notes a similar lack of clarity in the later case of *Brown* v. *W Burns Tractors Ltd.* 1986 SCCR 146, where the wilful blindness of a clerical assistant was attributed to her employer.

[28] Interestingly, in the prosecution of a natural person for a strict liability offense in *Duguid* v. *Fraser* 1941 JC 1, the court again was at pains to stress that it was not imposing vicarious liability: at 4 et seq. (Lord Justice-Clerk [Cooper]) and 7 et seq. (Lord Mackay).

[29] 1954 SLT (Sh Ct) 33.

[30] At 33.

[31] 1969 JC 26.

manager had been wilfully blind, i.e., he had not been aware that the air pressure in the tires of a hire car was too low[32] because he had refused to check. The Lord Justice-Clerk (Grant) again suggested that the court was not concerned with vicarious liability: the question was whether knowledge of the defect was "brought home" to the company through the garage manager.[33] Unfortunately, little more was said about *why* this imputation was possible. The Lord Justice-Clerk reached his decision on the basis that such imputation had been competent in *Clydebank*.[34] Lord Wheatley suggested that the delegation of responsibility meant that the manager's "knowledge or notional knowledge must be attributed to" his employer.[35] Lord Milligan again took a different tack, noting that if knowledge was not transferred to the corporation, the will of Parliament would have been frustrated.[36]

Vagueness thus reigned and also infected the final case indicative of the court's early approach: *Macnab* v. *Alexanders of Greenock Limited and Another*.[37] There, the crucial matter was whether the accused company was to be accorded a statutory defense of "due diligence."[38] The Lord Justice-Clerk (Grant) noted that "[a] body corporate can act only through its officers and servants and it is by reason of their actings – and their actings alone – that an offense can be *brought home* to the body corporate."[39] The only way of escaping the imputation of such liability was by implementing a policy which disavowed the relevant conduct.[40] The corporation had not done this and so was held liable.

From these cases, it is clear that the courts required that the *mens rea* elements of a statutory offense were "brought home" to a corporation through its employees or agents. Not much more than this could be gleaned from the judges' opinions: was there a requirement, for example, that the employee be of a senior level? Most cases involved those in management positions but nowhere was seniority described as essential. This changed, however, when

[32] An offense under the Motor Vehicles (Construction and Use) Regulations 1966 (SI 1966, No. 1288), reg. 82(1)(f), as amended by the Motor Vehicles (Construction and Use) (Amendment) (No. 4) Regulations, 1967 (SI 1967, No. 1753).

[33] At 31. Ross notes that it is possible to read the decision in *Mackay Brothers* as holding that vicarious liability is only employed where the intention of Parliament would otherwise be frustrated: Ross 1999, 54.

[34] At 31.

[35] At 33.

[36] At 35.

[37] 1971 SLT 121.

[38] Under the Trade Descriptions Act 1968 c. 29, s. 1(2).

[39] At 125 (emphasis added).

[40] *Macnab* v. *Alexanders of Greenock Limited and Another* 1971 SLT 121 at 125 (Lord Justice-Clerk [Grant]).

the Scottish courts adopted the approach taken by the House of Lords in *Tesco Supermarkets* v. *Nattrass (Tesco Supermarkets)*.[41]

4.2.3.2 The Law Following *Tesco Supermarkets*

In *Tesco Supermarkets,* it was held that the "directing mind" test suggested in earlier cases[42] represented the law of England and Wales. This meant that, before a corporation could be found criminally liable for a statutory offense requiring *mens rea*, a person of sufficient seniority in the corporation must have possessed the necessary mental state.

Decisions of the House of Lords are not binding on the criminal courts in Scotland: they are merely persuasive. Consequently, it was not inevitable that the "directing mind" test would become part of Scots law. The Appeal Court next considered the Scottish approach in *The Readers Digest Association Limited* v. *Pirie (Readers Digest)*.[43] There, a failure by junior employees to input data into a computer resulted in the accused company issuing unmerited demands for payment.[44] The question for the court was whether the company had had "reasonable cause" to believe that it was entitled to payment, as this would have negated criminal liability. The court found that the employees' actions had been counter to the policies and practices of the company, and that this meant that *its* demands for payment were neither unreasonable nor criminal.[45]

In concluding his opinion in *Readers Digest*, the Lord Justice-Clerk (Wheatley) noted that:[46]

> The facts… clearly show that there was no mens rea on the part of the company, or anyone who could be said to be the "mind" of the company in relation to the dispatch of the demand for payment. The observations of Lord Reid [in *Tesco Supermarkets*] on the position of a company *vis-á-vis* its employees, and the limited circumstances in which the "mind" of an employee can be said to be the "mind" of the company… are relevant to this point.

Lord Kissen also found "some assistance" in the decision in *Tesco Supermarkets*[47] but this approach was not adopted by the third judge, Lord Milligan. He utilized something more like the early Scots method outlined above, holding that "constructive knowledge may in certain circumstances

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[41] [1972] AC 153.

[42] *Lennard's Carrying Co Limited* v. *Asiatic Petroleum Limited* [1915] AC 705 at 713 et seq. (Viscount Haldane LC); *Bolton (HL) (Engineering) Co Ltd.* v. *TJ Graham & Sons Ltd.* [1956] 3 WLR 804 at 172 et seq. (Denning LJ).

[43] 1973 JC 42.

[44] An offense under the Unsolicited Goods and Services Act 1971 c. 30, s. 2(1).

[45] *Readers Digest Association Limited* v. *Pirie* 1973 JC 42 at 48 (Lord Justice-Clerk [Wheatley]).

[46] At 48 et seq.

[47] At 52.

be attributed to the management" of a company. However, he did nothing to clarify when attribution would be appropriate.[48]

The majority of the opinions in *Readers Digest* therefore suggest that the "directing mind" fiction in *Tesco* had been incorporated into Scots law.[49] Indeed, in *Dean* v. *John Menzies (Holdings) Ltd. (John Menzies)*,[50] Lord Cameron suggested the decision in *Tesco Supermarkets*, "if technically not binding in this country… [is] necessarily to be treated with the highest respect."[51] He found "no reason in principle why a different rule of law should operate in Scotland" when company law was the same both there and in England and Wales.[52] In that same case, Lord Stott adopted something of a compromise between the early Scots approach and the decision in *Tesco Supermarkets*, holding that the element of "shamelessness" necessary for conviction of the offense charged ("shameless indecency")[53] must be "*brought home* to a person or persons who may be looked upon as the controlling mind of the company" before a conviction would be competent.[54] The third judge in *John Menzies*, Lord Maxwell, was less convinced by the approach adopted in *Tesco Supermarkets*. He noted that, although "[f]iction has frequently been employed both in England and Scotland to attribute to a corporation human characteristics which it cannot have… the fiction which has been employed is not always the same fiction."[55] Furthermore, he argued that the "controlling mind" test in *Tesco* bore little relation to the test employed in previous Scots cases, such as *Clydebank* and *Mackay Brothers*.[56] Lord Maxwell even doubted that *Readers Digest* had incorporated the approach in *Tesco* into Scots law: the decision was reached, he argued, not by the imputation (or not) of "knowledge", but on the intention of Parliament to not punish companies for the unsanctioned actions of junior employees.[57]

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[48] At 50.

[49] See, similarly, *MacPhail* v. *Allan and Dey Ltd.* 1980 SLT (Sh Ct) 136 at 138 (Sheriff Scott).

[50] 1981 JC 23.

[51] At 31.

[52] At 31. See, most recently, the Companies Act 2006 c. 46, which – except where expressly provided – extends to the whole of the United Kingdom.

[53] Here, comprising the sale of allegedly indecent and obscene magazines. This offense no longer exists, having been abolished by judicial fiat: *Webster* v. *Dominick* 2005 JC 65. It is arguable that the decision in *John Menzies* was influenced by a belief that prosecutions for this offense had become more common than was desirable. See further Gane 1992, ch. 8.

[54] *Dean* v. *John Menzies (Holdings) Ltd.* 1981 JC 23 at 36 (emphasis added).

[55] At 39.

[56] At 40 et seq.

[57] At 42.

Lord Maxwell's opinion in *John Menzies* thus added a layer of uncertainty to the Scottish approach.[58] As noted above, two judges in that case (Lords Cameron and Stott) accepted that the approach in *Tesco* was correct, whilst another (Lord Maxwell) doubted that one clear "fiction" was always applied. Lord Cameron was, however, dissenting. So, the majority appears to have reached the conclusion necessary to answer the case (i.e., "Could a company be charged with 'shameless indecency'?") without agreeing on how an employee's shamelessness might be imputed to the company. This left the law in an unsatisfactory state.

It appears from cases after *John Menzies* that the controlling mind test was nonetheless being applied consistently. For example, in *Purcell Meats (Scotland) Ltd.* v. *McLeod (Purcell Meats)*[59] the Lord Justice-Clerk (Ross) suggested that a conviction for attempted fraud would only be achieved if the prosecution could prove that: "[T]he persons by whose hands the particular acts were performed were of such a status and at such a level in the company's employment that it would be open to the sheriff to draw the conclusion that the acts fell to be regarded as acts of the company rather than acts of the individual."[60]

As Gordon noted in his commentary on this case, the court does not engage with (or even mention) Lord Maxwell's doubts about *Tesco* in *John Menzies*.[61]

Similarly, in *Docherty* v. *Stakis Hotels Ltd.; Stakis Hotels Ltd.* v. *Docherty (Stakis)*,[62] it was noted that, to be held criminally liable for the relevant offense,[63] the accused corporation would need to be shown to have had *control* over the management of the business.[64] Such control had been delegated to a manager and the court was of the opinion that the Crown should have proceeded against him rather than his employer.[65] This decision, as Gordon noted, did little "to clarify the position of Scots law in relation to the criminal liability of companies."[66] Nevertheless, the court does appear to have accepted that the manager was too far removed from the company for his actions to have been imputed – or "brought home" – to it.

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[58] Stewart 1981, 225.

[59] 1986 SCCR 672.

[60] At 676.

[61] Gordon 1986, 677.

[62] 1991 SCCR 6.

[63] Under the Food Hygiene (Scotland) Regulations 1959 (SI 413), reg. 32(2) (now repealed).

[64] *Docherty* v. *Stakis Hotels Ltd.; Stakis Hotels Ltd.* v. *Docherty* 1991 SCCR 6 at 14 (Lord Justice-Clerk [Ross]).

[65] *Docherty* v. *Stakis Hotels Ltd.; Stakis Hotels Ltd.* v. *Docherty* 1991 SCCR 6 at 14 (Lord Justice-Clerk [Ross]).

[66] Gordon 1991, 16.

Thus, by the time *Stakis* was decided, *Tesco Supermarkets* appears already to have been accepted as representing the law of Scotland, Lord Maxwell's objections in *John Menzies* notwithstanding.

All the same, as Ross has noted, "it [was] not clear on what basis or at what level… attribution [could] take place. The court [seemed] concerned with the extent to which an employee [had] responsibility for management of the company's affairs."[67]

This point was to remain similarly unclear until the decision in *Transco*.

4.2.3.3 The Effect of *Transco*

Transco is the most recent Scottish case to consider corporate criminal liability for common law offenses. Accordingly, it will be discussed further below.[68] For present purposes, two elements of the decision are noteworthy.

The first is Lord Osborne's acceptance that the decision in *Readers Digest* did, in fact, incorporate the decision in *Tesco Supermarkets* into Scots law, although "it has to be recognized that the matter was not apparently the subject of controversy."[69] He was happier to conclude that the identification thesis was part of Scots law by virtue of the decision in *Purcell Meats*.[70] Once again, discussion of Lord Maxwell's doubts in *John Menzies* is conspicuously absent from Lord Osborne's judgment and the other judges' opinions.

Second, the court considered the issue of aggregation, i.e., whether the "accumulation of states of mind of separate individuals at various stages" could be attributed to a corporation for the purposes of establishing the presence of corporate *mens rea*.[71] This point was dealt with shortly by Lord Hamilton, who found it "wholly inconsistent with the identification theory."[72] Aside from pointing out that the English courts had rejected the "aggregation" doctrine, the judge provided no other justification for his stance.[73]

Transco thus clarified the mode of attribution for offenses that require *mens rea* in Scotland: a "senior level"[74] employee or agent of a corporation

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[67] Ross 1990, 266.

[68] See below at 4.3.2 et seq.

[69] *Transco plc* v. *HM Advocate* 2004 JC 28 at para. 19.

[70] At 21.

[71] This wording is taken from *Transco* v. *HM Advocate* 2004 JC 29 at para. 61 (Lord Hamilton).

[72] At 61 (citing *Attorney General's Reference (No. 2 of 1999)* [2000] 3 WLR 195).

[73] In any case, "aggregation" would not have helped the Crown in *Transco*: see Chalmers 2004, 264 et seq.

[74] The legislature can provide expressly for this: see the Breastfeeding etc. (Scotland) Act 2005 (asp. 1), s. 3.

must possess the requisite *mens rea* before the corporation can be found criminally responsible for the offense.[75] An aggregation of individual mental states, none of which is itself *mens rea*, will not suffice. In short, unless Parliament provides otherwise,[76] the identification thesis applies *to all offenses* that can be committed by a corporate entity and for which *mens rea* is required. This makes the prosecutor's task exceptionally difficult in relation to all but the smallest corporations and has led to calls for law reform, as discussed at the end of this chapter.[77]

In the meantime, it is useful to explore other areas of uncertainty in the Scots approach, beginning with the range of crimes for which corporations may be prosecuted.

4.3 Which Crimes May Be Committed by a Corporate Entity?

The Scottish courts have adopted different approaches to statutory and common law crimes that require *mens rea*. Accordingly, these types of offense will be considered separately.

4.3.1 Statutory Offenses

Statutory offenses can be dealt with shortly. As noted above, the Scottish courts have long accepted that a corporation can commit a statutory offense, even if it requires the presence of *mens rea*.[78] This result is

[75] This should not be taken to mean that the corporation's senior officers need to be convicted of an offense before the corporation itself can be proceeded against. Although the point has never come up squarely before the Appeal Court, it is probably unnecessary to instigate proceedings against the company's officers at all. See, in this regard, the (obiter) comments in *MacLachlan* v. *Harris* 2009 SLT 1074 at para. 12 (Lord Clarke).

[76] See, e.g., the CMCH Act (UK), c. 19, s. 1. This requires that fault be found in "the way in which [a corporation's] activities are managed or organized." This takes a more holistic view than the identification theory, though s. 1(3) still requires that the senior management of the corporation played a *substantial* part in the breach that caused the death.

[77] See below at 4.7.1 et seq.

[78] The civil law has also been clear on the possibility of delictual liability for "malice": *Gordon* v. *British and Foreign Metaline Co* (1886) 14 R 75. Despite this, Ferguson suggests that provision for prosecution of companies in the Summary Jurisdiction (Scotland) Act 1908 8 Edw. VII. c. 65, s. 28 "was necessary because it had been very much a doubtful proposition that companies and other legal persons were amenable to the criminal law": Ferguson 2006, 176. He suggests that this doubt centered on the need for *mens rea* in common law offenses (ibid.) but provides no authority for his argument. See, however, Gane/Stoddart/Chalmers 2009, para. 3.25; Stessens 1994.

achieved generally through the use of the word "person" in the definition of a crime. The Interpretation Act 1978 provides that "person" should be read to include "a body of persons corporate or unincorporate."[79] Hence, statutes enable corporations to be found liable for a wide range of acts and omissions.

Exceptionally, courts may also read a statute as explicitly or impliedly *excluding* corporate liability.[80] It has been held, for example, that a statutory offense requiring "control" over a state of affairs cannot be committed by a corporation.[81]

4.3.2 Common Law Offenses

Corporate criminal liability for common law offenses is more problematic, largely because it has only been discussed in three reported cases.[82] The first case was *John Menzies*. As discussed above, the accused company was charged with "shameless indecency"[83] for stocking indecent magazines in its shops. At trial, the charge was dismissed as incompetent. On appeal by the prosecution,[84] the majority (Lord Stott and Lord Maxwell) upheld the trial judge's ruling, whilst Lord Cameron saw no reason, in principle, why a corporation could not commit a common law offense.

It should be noted that the majority entertained no doubt about the propriety of finding a corporation liable for a statutory offense requiring *mens rea*.[85] Their concern related to the need to prove "shameless" conduct. Lord Stott felt that a company could not be "shameless", nor did he "think

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[79] Interpretation Act 1978 c. 30, Sch. 1. See further the Interpretation and Legislative Reform (Scotland) Act 2010 (asp. 10), Sch. 1, para. 1.

[80] See, e.g., the construction of the Pharmacy Act 1868 (31 & 32 Vic. c. 121) (see now the Pharmacy Act 1954 c. 61) in *Gray* v. *Brembridge* (1887) 1 White 445 and the reading of the Food Hygiene (Scotland) Regulations 1959 (SI 1959/413) (see now the Food Hygiene (Scotland) Regulations 2006/3) in *Docherty* v. *Stakis Hotels Ltd.; Stakis Hotels Ltd.* v. *Docherty* 1991 SCCR 6.

[81] *Docherty* v. *Stakis Hotels Ltd*.; *Stakis Hotels Ltd*. v. *Docherty* 1991 SCCR 6.

[82] *Stirling* v. *Associated Newspapers Limited* 1960 JC 5 involved contempt of court (which is not a crime) against a newspaper. Gordon suggests "this may be regarded as special": Gordon 2000, para. 8.90. This is the only case uncovered during research where the perceived "benefit" of breaking the law was discussed (per the Lord Justice-General [Clyde] at 12). It can thus be assumed that the conferral of such a benefit is not a precondition of criminal liability for a corporation.

[83] As noted above, this offense ceased to exist following *Webster* v. *Dominick* 2005 JC 65.

[84] In Scotland the prosecution may appeal judgments against it in summary cases but not (at the time of writing) in solemn cases. The law on prosecution appeals has recently changed. See the Criminal Justice and Licensing (Scotland) Act 2010, ss. 73–76 (these provisions are not yet in force.)

[85] *Dean* v. *John Menzies (Holdings) Ltd.* 1981 JC 23 at 35 et seq. (Lord Stott).

it would be sound public policy to introduce an additional element of fiction into an area of law in which… commonsense is not noticeably at a premium."[86] As noted above, Lord Maxwell was preoccupied with the claim that there was one "fiction" at work in corporate crime.[87] He also objected, however, to the vagueness of the charge and the implications of finding a company liable for a common law offense without fair warning that this was a possibility.[88] Lord Cameron (dissenting) dismissed these doubts as ill-founded.

Although the judges differed over the specific offense of shameless indecency, they all agreed that certain common law offenses could not be committed by a corporation. The clearest example was murder. Lord Cameron suggested that this was due to the mandatory sentence for murder: a sentence of life imprisonment could not be implemented against a corporation.[89] Lord Stott agreed and suggested that it would not be possible for a corporation to possess "that wicked intent or recklessness of mind necessary to constitute the crime of murder."[90] He also doubted that a corporation could commit perjury or reset – though no argument is presented as to why (the point is merely asserted as "self-evident").[91]

So, from Lord Cameron's perspective, there was nothing to prevent a company from forming *mens rea* in principle; Lord Stott and Lord Maxwell disagreed. This led Gordon to conclude that the Crown would be unlikely to proceed against companies on common law charges in the future.[92] The decision in *Purcell Meats* proved him wrong.

The charge in *Purcell Meats* was attempted fraud. "Premium" tax stamps on beef carcasses at the accused company's premises had been removed and replaced with manufactured "exemption" stamps in an attempt to avoid paying tax on the carcasses. The issue on appeal was whether the charge of attempted fraud (a common law offense) was competent, given that the Crown did not name the employees who had changed the stamps in the charge. The court upheld the competency of the charge. Nevertheless, the Crown's case could only succeed at trial *if* it could prove that the

[86] At 37.

[87] See above the text accompanying nn. 55, 56.

[88] At 45 et seq.

[89] At 29.

[90] At 35.

[91] At 35. Presumably perjury is impossible because the company itself cannot give evidence (see below at 4.6.4). Reset is a more puzzling example for reasons of substantive law, which can be ignored here.

[92] Gordon 1984, para. 8.80 et seq.

actions complained of were perpetrated by a suitably senior employee of the company.[93]

What is striking about the judgment in *Purcell Meats* is its complete failure to discuss *John Menzies* (even though the case was cited in argument before the court), as well as its failure to clearly state its reasons.[94] The lack of a firm answer is perhaps unsurprising: the court in *Purcell Meats* only considered the competency of the charge, noting, in so doing, the extreme practical difficulties the Crown might encounter in proceeding against a company at trial.[95] However, the fact remains that the decision still left the state of the law unclear. All that can be gleaned from the decision is that attempted fraud (and, by extension, fraud) can be committed by a company whilst, following *John Menzies*, shameless indecency (and, presumably, the other examples cited by the majority in that case)[96] cannot. So, although the court in *Purcell Meats* did not contradict the earlier decision in *John Menzies*, it was open to the charge that it "assume[d], rather than decide[d], that it is the law that a company can commit fraud."[97] On this view, the law was being developed in a piecemeal, if not inconsistent, manner, which made the extraction of clear principles difficult. This problem was exacerbated by the fact that there are very few Scottish appeals annually.[98]

The court, in fact, had to wait nearly 20 years to re-consider the issue of corporate liability for a common law offense. In *Transco*, the charge was culpable homicide (the Scottish equivalent of manslaughter). The Crown alleged that, through a series of mistakes, a gas supply to a house – which the accused company had a duty to maintain – had been left in a dangerous state of repair. This caused an explosion, which destroyed a bungalow and killed its four occupants. The court decided that "in appropriate circumstances, a corporate body in Scotland might be convicted of culpable homicide… but *only upon the basis of the principle of identification*."[99] In the event, the Crown failed to satisfy this test (no senior individual offender could be identified) and Transco plc was acquitted. It was, however, found guilty of a statutory offense[100] and fined £15 million. Following this

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[93] *Purcell Meats (Scotland) Ltd.* v. *McLeod* 1986 SCCR 672 at 676 (Lord Justice-Clerk [Ross]) (see above the text accompanying n. 60).

[94] See the notes on counsels' submissions in *Purcell Meats (Scotland) Ltd.* v. *McLeod* 1986 SCCR 672 at 675. Cf. Gordon 1986, 676.

[95] See further Gordon 1986, 676.

[96] See above the text accompanying nn. 89 and 91.

[97] Gordon 1986, 677.

[98] In 2008–2009, 2 191 criminal appeals were concluded. 78% of these appeals related to sentence only. See further Scottish Government 2009.

[99] *Transco* v. *HM Advocate* 2004 JC 29 at para. 22 (Lord Osborne) (emphasis added).

[100] Under the Health and Safety at Work etc Act 1974 c. 37, ss. 3, 33(1).

outcome – which was seen as unsatisfactory[101] – the law was changed in the manner discussed below.[102]

It is difficult to generalize the Scottish approach to corporate liability for common law offenses from the three decisions discussed above. They do not appear to apply a single principle. All that can be said, with confidence, is that a corporate entity can commit fraud and culpable homicide provided that the conditions for identification are made out by the prosecutor. It is impossible to be sure whether other charges will be competent in relation to corporations. This is deeply regrettable and might, as Mays argues, be a result of a lack of prosecutorial "enthusiasm" for charging corporations with common law offenses.[103] As noted above, Mays might be guilty of confusing cause and effect: the lack of clarity in the law might be influencing charging practice. Whatever the cause of the unsatisfactory Scottish situation, however, it is clear that corporations do not have fair notice of the crimes for which they may be held liable.[104]

4.3.3 Codifying the Common Law

One final point of note is that a number of traditional common law crimes involving sexual violence have recently been legislated upon in the Sexual Offences (Scotland) Act 2009. When these offenses are committed with the connivance (or as a result of the neglect) of a "relevant individual" in a corporation, that corporation may be proceeded against. "Relevant individuals" are defined as follows:[105]

> (2) In subsection (1), "relevant individual" means—
>
> (a) in relation to a body corporate (other than a limited liability partnership)—
>
> (i) a director, manager, secretary or other similar officer of the body,
> (ii) where the affairs of the body are managed by its members, a member,
>
> (b) in relation to a limited liability partnership, a member,
> (c) in relation to a Scottish partnership, a partner,
> (d) in relation to an unincorporated association other than a Scottish partnership, a person who is concerned in the management or control of the association.

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[101] See Chalmers 2004, 263: "Rightly or wrongly, the denunciatory effect of a conviction for culpable homicide would inevitably have been greater than that of a conviction for a violation of the 1974 Act." See, similarly, *Transco* v. *HM Advocate* 2004 JC 29 at para. 25 (Lord Osborne); Scottish Executive 2005, para. 5.3.

[102] See below at 4.7.1.

[103] Mays 2000, 54.

[104] Mays 2000, 55.

[105] Sexual Offences Act (Scotland) 2009 (asp. 9), s. 57.

Three points stand to be noted. First, it is clear that this definition adheres to the identification principle: the individuals involved must be of a senior level. Second, special provision is made for the imposition of a fine if a corporation is convicted of offenses, such as rape, for which imprisonment is the normal sanction.[106] It is unclear, however, how this fine is to be calculated. Third, now that rape is a "statutory" crime, it remains to be seen whether the courts will take a different approach to the possibility of its commission by bodies corporate. If the legislation pertaining to sexual offenses represents something of a trend, and more areas of the common law are codified in due course, these questions ought to be addressed.

At present, then, it is unclear which crimes may be committed by a corporate actor. Fortunately, the law is surer of which types of corporate actor may be prosecuted.

4.4 Which Types of Corporate Entity May Be Prosecuted?

4.4.1 Provisions in the Criminal Procedure (Scotland) Act 1995

The Criminal Procedure (Scotland) Act 1995 (CPS Act) determines which corporate entities can be prosecuted under Scots law. Proceedings on indictment, which occur before a judge and a jury, can be commenced against a "body corporate."[107] Summary proceedings can occur against a "partnership, association, body corporate or body of trustees."[108]

The parties referred to in these provisions are clearly different. The point has never arisen directly but it was "tentatively" suggested in *Aitkenhead* v. *Fraser (Aitkenhead)*[109] that a trust could be tried on indictment.[110] If this suggestion represents the true position with regard to trusts, it is submitted that there is no reason in principle why an unincorporated partnership or association might not also be tried upon indictment.[111]

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[106] Sexual Offences Act (Scotland), s. 48(3).

[107] CPS Act 1995 c. 46, s. 70. It has been held that a local authority may also be considered as a body corporate: *Armour* v. *Skeen* 1977 SLT 71.

[108] CPS Act, s. 143.

[109] 2006 JC 231.

[110] *Aitkenhead* v. *Fraser* 2006 JC 231 at para. 6 (Lord Drummond Young).

[111] Cf. Ferguson 2006, 177 et seq.

4.4.2 Corporations and Separate Legal Personality

The Scottish courts have considered briefly the matter of separate legal personality. Companies incorporated under the Companies Act 2006 (and its predecessors) are treated as having separate personality. Accordingly, in most situations, the courts can simply assume that a prosecution against a company is competent.

The position of entities without separate legal personality is more complicated. In *Aitkenhead*, the Appeal Court considered the issue of whether the Crown should name trustees in a charge and, if so, in which capacity. Trusts are peculiar organizations as they have no separate legal personality independent of their trustees.[112] The court reasoned that, "[t]he word 'corporate' [in the CPS Act] clearly does not refer to separate legal personality." [113] As a consequence, to prosecute a trust, the Crown must name each of the trustees *in their capacity as trustees* in the charges.[114] In short, unless legislation provides otherwise, trusts are not exempt from criminal liability simply by virtue of the fact that they lack separate legal personality.[115] The same must be true, it is submitted, for unincorporated associations.

For collectives that do have separate legal personality (such as companies and partnerships under Scots law),[116] a further question is whether they can be prosecuted after their dissolution. This question was considered in *Balmer* v. *HM Advocate*.[117] The charge against a dissolved partnership was held to be incompetent as the partnership's separate personality ceased when it was dissolved. If the Crown was to have any recourse, it was against the individual partners.[118] This decision may make the prosecutor's case more difficult to establish[119] but it appears sensible: once a corporate entity no longer exists, *it* cannot be fined and the denunciatory effect of a conviction is lost. This raises a point concerning the

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[112] See, generally, Scottish Law Commission 2006.

[113] *Aitkenhead* v. *Fraser* 2006 JC 231 at para. 8 (Lord Drummond Young).

[114] At para. 9. It should be noted that there is no question of the trustees incurring personal liability through such a prosecution.

[115] See, for example, the CMCH Act (UK), s. 1(2) – where trusts are not mentioned. For criticism, see Ferguson 2007, 253.

[116] The rule for partnerships is found in the Partnership Act 1890 (25 & 26 Vic. c. 39), s. 4(2). Limited Liability Partnerships also have separate legal personality: Limited Liability Partnerships Act 2000 c. 12, s. 1(2).

[117] 2008 SLT 799.

[118] *Balmer* v. *HM Advocate* 2008 SLT 799 at para. 82 (Lord Eassie). The Crown failed in further attempts to prosecute the directors of the partnership. A fatal accident inquiry began on November 16, 2009.

[119] As recognized in *Balmer* v. *HM Advocate* 2008 SLT 799 at para. 82 (Lord Eassie).

possible punishments that may be imposed upon corporations, the subject of the next section.

4.5 What Penalties Can Be Imposed Upon Corporations?

Three main forms of penalty will be considered here: imprisonment, fines, and publicity orders.

4.5.1 Imprisonment

It was noted in the above discussion of common law offenses that murder carries with it a mandatory life sentence.[120] It will be remembered that this led the judges in *John Menzies* to conclude that the offense could not be committed by a body corporate.[121] A separate issue arises in relation to other offenses. This is because a life sentence, although potentially available in relation to any common law crime (and some statutory offenses),[122] is not mandated. It is unclear how the court will treat corporations convicted of these offenses, but they will presumably impose a monetary fine. This is because it is only in relation to the offense of corporate homicide (discussed below) that alternative sanctions are presently available.[123]

4.5.2 Fines

As noted above, Transco plc was fined £15 million for a health and safety offense, which had caused the deaths of four people. It is unclear whether this fine is equivalent to the length of imprisonment that would have been imposed upon an individual who caused a similar harm in a similar manner.

It was also pointed out above that the courts will, in the future, have to impose fines on corporations for certain sexual offenses because imprisonment is not an option.[124] Guidance on how to carry out this calculation may

[120] The label "life sentence" is somewhat misleading. In practice, the court sets a "punishment part" when passing sentence. This details the minimum length of time, which the accused must spend in prison before she can be considered for parole. If the accused never qualifies for parole, however, she will be held in prison for her entire life.

[121] See above the text accompanying n. 89.

[122] For instance, the crime of rape is now statutory and carries a maximum sentence of life imprisonment. See the Sexual Offences Act (Scotland), s. 1 and Sch. 2.

[123] See below at 4.5.3.

[124] See above at 4.3.3.

have to be given by the Appeal Court in due course, especially as the level of fine involved is unlimited in some offenses (e.g., rape).[125] At present, no such guidance exists.[126]

One potential difficulty with resorting to fines to punish a "corporation" (construed widely) is, of course, that such measures might be inappropriate where they might impact upon the provision of public services (hospital trusts, local councils, etc). This is a problem, which has not been discussed hitherto in the Scottish context.[127] It does, however, raise the issue of alternative sanctions, which might be imposed upon a corporation.

4.5.3 Remedial and Publicity Orders

Following the failure by the Crown to gain a conviction against Transco plc for culpable homicide (and a number of similar incidents in England and Wales),[128] the Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 (CMCH Act) was passed. This introduced two new measures, which are relevant to sentencing.

First, the court may impose an order that forces the corporation to remedy:[129]

> (a) the breach [in relation to which the prosecution took place];
> (b) any matter that appears to the court to have resulted from the relevant breach and to have been a cause of the death;
> (c) any deficiency, as regards health and safety matters, in the organization's policies, systems or practices of which the relevant breach appears to the court to be an indication.

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[125] Sexual Offences Act (Scotland), Sch. 2. It is likely that the Appeal Court will take years to establish anything like a coherent set of sentencing principles. This is clearly problematic. See, similarly, Chalmers 2006, 296 et seq.

[126] There are provisions for the introduction of sentencing guidelines in the Criminal Justice and Licensing (Scotland) Act 2010, Pt. 1.

[127] See, however, Ashworth 2009, 154.

[128] The competency of charges of manslaughter through gross negligence against corporations were, nonetheless, upheld in *Attorney General's Reference (No. 2 of 1999)* [2000] 3 WLR 195 and *R* v. *P&O Ferries (Dover) Ltd.* (1991) 93 Cr App R 72. Corporate liability for common law manslaughter was, however, removed by the CMCH Act (UK), s. 20. There is no equivalent provision on corporate liability for common law culpable homicide: this charge still remains competent. Another high-profile incident of corporate failures leading to death was the explosion of the Piper Alpha offshore oil platform. The operating company was never prosecuted but corporate failures were identified by Cullen 1990.

[129] CMCH Act (UK), ss. 9(1)(a)–9(1)(c).

Also, if it is considered appropriate,[130] a court may make a publicity order, which places the corporation under an obligation to advertise: "(a) the fact that it has been convicted of the offense; (b) specified particulars of the offense; (c) the amount of any fine imposed; (d) the terms of any remedial order made."[131]

Breaching a remedial or publicity order is a separate offense, which must be tried on indictment.[132] These orders are, therefore, clearly meant to be taken seriously and perhaps represent an attempt to reproduce the stigma of conviction for natural persons. These provisions only came into force recently, so their full impact is yet to be felt in Scotland. They are, however, certainly a step in the right direction in that they break the traditional tendency towards monetary fines as punishment for corporate crime, even where such measures are inappropriate.

Before considering which other reforms of Scots law's approach to corporate criminal liability might be desirable, it is necessary to consider briefly a final area of uncertainty: the procedural matters attendant upon the prosecution of a corporation.

4.6 Procedural Matters

There are a number of procedural matters that contribute to a lack of clarity in the Scottish approach to corporate criminal liability.

4.6.1 Responsibility for the Prosecution of Crime in Scotland

First, it should be noted that prosecution for crime rests almost exclusively with the state in Scotland. The Lord Advocate – a member of the Scottish Government[133] – heads the Crown Office and Procurator Fiscal Service (COPFS), an umbrella organization comprised of regional offices. Although technically competent, private prosecutions are extremely rare;[134] effectively *all* prosecutions in Scotland are brought by the COPFS.

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[130] CMCH Act (UK), s. 10(2).

[131] CMCH Act (UK), ss. 10(1)(a)–10(1)(d).

[132] CMCH Act (UK), ss. 9(5), 10(4).

[133] Scotland Act 1998 c. 46, s. 44(1).

[134] The right exists in solemn cases (i.e., proceedings before a jury), but not in summary cases (where a judge sits alone): Criminal Justice (Scotland) Act 1995 c. 20, s. 63. This right requires the assent of the High Court and (at least) the acquiescence of the Lord Advocate. Accordingly, it has been exercised successfully twice in the last hundred years: *J&P Coats Limited* v. *Brown* 1909 JC 29; *X* v. *Sweeney and Others* 1983 SLT 48.

COPFS prosecutes in the "public interest" and has ultimate discretion to proceed or abandon a prosecution[135] (or, as the case may be, accept or reject a guilty plea).[136] This has impacted upon the development of the law on corporate liability: if the Crown does not proceed against a corporation in relation to a certain offense, the crime cannot be committed by a corporation in practice. The COPFS does not provide detailed reasons for its decisions, nor are its decisions subject to judicial review. In consequence, a layer of uncertainty is added to the law, particularly with regard to common law offenses.[137] On October 2, 2008, a specific COPFS division was set up to investigate and, if required, prosecute alleged breaches of health and safety law.[138] This might make the prosecution of such offenses more consistent in Scotland but it is unlikely that the COPFS will publish explicit guidance on its approach.

4.6.2 Jurisdictional Issues

Second, there are questions about the jurisdiction of Scottish courts over corporate crime. The jurisdiction of United Kingdom courts over crime is generally territorial.[139] Nationality jurisdiction may be asserted only where it has been specifically created by statute.[140] Parliament has created nationality-based jurisdiction for only a few statutory offenses,[141] without any consistent use of terminology.[142] Frequently-used terms, such as "a British subject",[143] are unlikely to include non-natural persons. The principal (and perhaps only) exception is the phrase "a United Kingdom person";[144] however, relatively few statutory offenses can be committed

[135] The Lord Advocate is described as "master of the instance" in *Boyle* v. *HM Advocate* 1976 JC 32 at 37 (Lord Cameron).

[136] *Strathern* v. *Sloan* 1937 JC 76. This case concerned summary procedure but the court reaffirmed earlier authorities dealing with solemn cases.

[137] See Mays 2000, 54.

[138] See COPFS 2008. In practice, these breaches are reported to the COPFS by the Health and Safety Executive.

[139] Gordon 2000, para. 3.41; *MacLeod* v. *Attorney-General for New South Wales* [1891] AC 455 at 458 (Lord Halsbury LC): "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed."

[140] See *Treacy* v. *DPP* [1971] AC 537 at 552 (Lord Morris of Borth-y-Gest).

[141] Hirst 2003, 49.

[142] See Hirst 2003, 204 for a list of terms in use.

[143] As to the meaning of this phrase, see British Nationality Act 1981 c. 61, s. 51.

[144] See the sources cited above in n. 79. The phrase "United Kingdom person" was always specifically defined to include corporate bodies.

by "a United Kingdom person" outside the UK.[145] The term has been used only in a small number of recent statutes concerned with national security.

As for the statutory offenses of corporate manslaughter and corporate homicide, s. 28 of the CMCH Act provides as follows:

> (1) Subject to subsection (2), this Act extends to England and Wales, Scotland and Northern Ireland.
> (2) An amendment made by this Act extends to the same part or parts of the United Kingdom as the provision to which it relates.
> (3) Section 1 applies if the harm resulting in death is sustained in the United Kingdom or—
>
> (a) within the seaward limits of the territorial sea adjacent to the United Kingdom;
> (b) on a ship registered under Part 2 of the Merchant Shipping Act 1995 (c. 21);
> (c) on a British-controlled aircraft as defined in section 92 of the Civil Aviation Act 1982 (c. 16);
> (d) on a British-controlled hovercraft within the meaning of that section as applied in relation to hovercraft by virtue of provision made under the Hovercraft Act 1968 (c. 59);
> (e) in any place to which an Order in Council under section 10(1) of the Petroleum Act 1998 (c. 17) applies (criminal jurisdiction in relation to offshore activities).
>
> (4) For the purposes of subsection (3)(b) to (d) harm sustained on a ship, aircraft or hovercraft includes harm sustained by a person who—
>
> (a) is then no longer on board the ship, aircraft or hovercraft in consequence of the wrecking of it or of some other mishap affecting it or occurring on it, and
> (b) sustains the harm in consequence of that event.

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[145] Biological Weapons Act 1974 c. 6, ss. 1–1A, as amended by the Anti-terrorism, Crime and Security Act 2001 c. 24, s. 44 ("Restriction on development etc. of certain biological agents and toxins and of biological weapons"); Anti-terrorism, Crime and Security Act 2001 c. 24, s. 47 ("Use etc. of nuclear weapons"), s. 50 ("Assisting or inducing certain weapons-related acts overseas"), s. 79 ("Prohibition of disclosures relating to nuclear security"). Insofar as offenses under the 1974 and 2001 Acts are concerned, "a United Kingdom person" is defined as "a United Kingdom national, a Scottish partnership or a body incorporated under the law of a part of the United Kingdom": s 56(1) of the 2001 Act and s 1A(4) of the 1974 Act as amended. Offenses under the Counter-Terrorism Act 2008 c. 28, Sch. 7 ("Terrorist Financing and Money Laundering") "may be committed by a United Kingdom person by conduct wholly or partly outside the United Kingdom": Sch. 7, s. 32(1) and s. 44(1) ("United Kingdom person" being defined as "a United Kingdom national or a body incorporated or constituted under the law of any part of the United Kingdom"). Offenses created under the Export Control Act 2002 c. 28 (see, e.g., Export Control (Iran) Order 2007, SI 2007/1526) may apply to "a United Kingdom person", defined as "a United Kingdom national, a Scottish partnership or a body incorporated under the law of a part of the United Kingdom": s. 11(1).

It will be noted that it is not essential that the death itself occurs in the United Kingdom, only that the harm that results in it does. This is consistent with the general English approach to jurisdiction over homicide.[146] What is *not* consistent, however, is the fact that the legislation does not cover harms inflicted outside of the UK that result in death occurring within its borders. It is generally thought that the UK courts would have jurisdiction over homicide committed in such circumstances.[147] That said, the apparent lack of prosecutions on these facts may mean that the difference is purely academic.

When the bill was passing through the Westminster Parliament, the Home Affairs and Work and Pensions Committees raised some concern about its territorial application. It suggested that "in principle it should be possible to prosecute a company for corporate manslaughter when the grossly negligent management failure has occurred in England or Wales irrespective of where a death occurred."[148] That position was rejected by the government.[149]

4.6.3 Rights of the Accused

Third, the question of how human rights protections apply in the context of a corporate body being prosecuted has yet to be considered by the Scottish courts. It has been noted in the context of corporate homicide, however, that "if corporations are to be treated as severely as individuals, they must

[146]Offences Against the Person Act 1861 (24 & 25 Vic. c. 100), s. 10. The Scottish position is not so clear: see CPS Act, s. 11(1) and Gordon 2000, para. 3.47.

[147]Gordon 2000, para. 3.42; Hirst 2003, 199 et seq. However, this conclusion is based on the terminatory theory of jurisdiction, which may not now be part of English law: see *R* v. *Smith (No. 1)* [1996] 2 Cr App R 1; *R* v. *Smith (Wallace Duncan) (No. 4)* [2004] QB 1418; *R (on the application of Purdy)* v. *Director of Public Prosecutions* [2010] 1 AC 345. On the basis of these cases, it seems now to be the rule that English criminal law may be applied "where a substantial measure of the activities constituting a crime take place in England" and that the courts should "restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country": *R* v. *Smith (No. 4)* [2004] QB 1418 at 1434 (Rose LJ). It is not clear how this approach should apply to cases where the result (but the result alone) occurs within the jurisdiction of the English courts.

[148]Parliament 2006, para. 253. The Committee accepted that this might give rise to practical difficulties but felt that jurisdiction could at least be exercised when the death occurred in the European Union: Parliament 2006, para. 254.

[149]Draft Corporate Manslaughter Bill (Cm. 6755, 2006), 24 et seq.

also be entitled to the same protections as individuals."[150] There are, of course, counter-arguments and these are discussed briefly below.[151]

4.6.4 Evidential Matters

Fourth, and connected to the issues discussed above, there is the matter of special *evidential* rules relating to the prosecution of a corporation in Scots law.

4.6.4.1 Admissions by Corporation Officers

Clearly, for the purposes of prosecution, corporations must be able to enter pleas and challenge the charges against them. Express provisions on corporate appearances feature in the CPS Act, which states that:[152]

> (4) A partnership, association, body corporate or body of trustees may, for the purpose of—
>
> (a) stating objections to the competency or relevancy of the complaint or proceedings;
> (b) tendering a plea of guilty or not guilty;
> (c) making a statement in mitigation of sentence,
>
> appear by a representative.

As will be apparent, these provisions are extremely limited and, if a representative does not appear, the court may, in certain circumstances, proceed to trial in the corporation's absence.[153]

An issue connected to this is whether a corporation's officers can be compelled to give evidence against it at trial. This question has never come up before the Scottish courts but it is possible that the position in England and Wales would be replicated (as noted above, the courts have been keen to apply the same law to corporations in both jurisdictions). In *Penn-Texas Corp* v. *Murat Anstalt and Others*, Willmer LJ argued that:[154]

> I do not see how it is possible to take the evidence of a limited company, whether by its proper officer or otherwise. If the proper officer attends for examination, it is he who goes into the witness-box; it is he who takes the oath; it is he who is liable to be prosecuted for perjury; it is he, in short, who is the witness. I do not think it helps to say that when interrogatories are answered by the proper officer

[150] Chalmers 2006, 296.

[151] See below at 4.7.5.

[152] For summary proceedings, see CPS Act, s. 143(4). For solemn cases, see s. 70(4).

[153] CPS Act, ss. 143(7) (summary), 70(5) (solemn).

[154] At 56 (emphasis added).

> of a company, his answers are the company's answers and bind the company. I do not think that touches the question whether an officer can go into the witness-box and give oral evidence which can be said to be that of the company. The answers given by him would be his answers, based upon his own memory and knowledge; and though any admission by him would no doubt be binding on the company, *the evidence would still be his evidence and not that of the company*.

Similarly, in Scotland, admissions by a corporation's senior management can be admissions *of the company*.[155] The corporate officer would not, however, *be the corporation* for the purposes of giving evidence. He/she would, therefore, presumably be a compellable witness for the prosecution. Despite this, it might be possible for the corporate officer to avoid answering questions that might incriminate the corporation (rather than the officer herself). This point was raised, but not decided, before in the House of Lords in *Rio Tinto Zinc Corporation and Others* v. *Westinghouse Electric Corporation*.[156] It has yet to trouble the Scottish courts.

4.6.4.2 Business Documents

A second, separate evidential matter is the use of documentary evidence. Under general principles of evidence law in Scotland, documents are hearsay and so inadmissible to prove the truth of their content. An exception is made for business documents in Schedule 8 of the CPS Act. These will be admissible if the following conditions are met:[157]

> (a) the document was created or received in the course of, or for the purposes of, a business or undertaking or in pursuance of the functions of the holder of a paid or unpaid office;
> (b) the document is, or at any time was, kept by a business or undertaking or by or on behalf of the holder of such an office; and
> (c) the statement was made on the basis of information supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in it.

The exception does not apply to documents that were not received in the course of business[158] and documents that contain statements that concern the accused person and are exculpatory.[159] The latter may be admitted for the limited purposes of proving that the statement was made (i.e., not to prove the truth of its contents) so long as the first and second criteria above are satisfied.

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[155] *Industrial Distributions (Central Scotland) Ltd.* v. *Quinn* 1984 SLT 240.
[156] [1978] AC 547.
[157] CPS Act, Sch. 8, paras. 2(1)(a)–2(1)(c).
[158] CPS Act, Sch. 8, para. 3.
[159] CPS Act, Sch. 8, paras. 2(1), 3(a)–3(c).

As Ross and Chalmers note, a difficulty of admitting business documents arises because there may be no opportunity to cross-examine the maker of the statement.[160] To this end, the CPS Act provides that a number of other pieces of evidence are to be admitted to test the accuracy of statements in documentary evidence.[161]

4.7 Reform

It is submitted that problems with Scotland's approach to corporate criminal liability arise from the outsourcing of certain matters to the courts. Appeals are inevitably rare in a relatively small jurisdiction, such as Scotland[162] and this makes the development of the law time-consuming and piecemeal. The following proposals for reform concentrate on this issue.

4.7.1 Attributing Criminal Liability to a Corporation

Writing in 2000, Mays argued that the area of corporate criminal liability in "Scots law is underdeveloped, at times incoherent, and relatively ineffective. It is a poor base on when prosecutors may so act, which is, accordingly, a matter of prosecutorial discretion. To date, scepticism, as well as inertia, has blocked reform."[163]

Mays' main argument concerns the lack of a clear basis for allocating liability to a corporation,[164] a problem, which has been largely remedied post-*Transco*. Nevertheless, Mays identifies the difficulties inherent in the identification thesis: "[it] can be rejected as an overly restricted basis on which to attempt to limit the corporate personnel through whom liability can flow."[165] Furthermore, by its very nature, the identification thesis makes it most difficult to prosecute the companies that tend to be the

[160] Ross/Chalmers 2009, para. 21.16.3.

[161] CPS Act, Sch. 8, paras. 2(3)(a)–2(3)(b).

[162] See above n. 98.

[163] Mays 2000, 49.

[164] Mays 2000, 51 et seq.

[165] Mays 2000, 57. See, similarly, Wells 2001, 157 et seq. Cf. Ross 1990, 268. It might be argued that the identification doctrine is also too *wide* in the respect that it allows corporations to be convicted of the misdeeds of their directors even when they act contrary to company policy: Gobert 1994, 400.

most apt candidates for public condemnation.[166] These problems are still inherent in the Scottish approach.[167]

Mays therefore proposed that the activities of the corporation be looked at as a whole:[168]

> A body corporate will be held to have exhibited corporate fault where… its policies, procedures, or practices, or systems (or any combination thereof) are considered to have expressly or impliedly authorized or permitted the commission of an offense, or… it has failed to take reasonable precautions or to exercise due diligence to prevent the commission of the offense.

This standard would be applied in both statutory and common law offenses and the corporation would have a "due diligence" defense.[169]

Mays' proposals are perhaps more applicable to large organizations, in which it is often nigh on impossible to establish the culpability of a "directing mind."[170] As a means of overcoming this difficulty, Mays' proposals have much to commend them, though there is more to be said for the argument that the *aggregation* of employees' knowledge as another possible basis for ascribing culpability to a corporation.[171] Furthermore, his proposals also beg the questions "What are 'reasonable precautions'?" and "What constitutes 'due diligence'?"[172]

One way of approaching these questions is to give a jury explicit factors to consider in determining whether a corporation was at fault. This is the approach adopted in the CMCH Act, which provides that:[173]

> An organization to which this section applies is guilty of an offense if the way in which its activities are managed or organized: (a) causes a person's death; and (b) amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.

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[166] Wells 2001, 115; Gobert 1994, 401.

[167] The problem has been identified as being UK-wide, prompting calls for reform. For instance, Drew found that there was "merit" in addressing the corporate liability rules generally: Drew/UNICORN 2005, 3.

[168] Mays 2000, 72. Mays is not the first author to employ this "holistic" approach to corporate criminal liability: see, e.g., Fisse/Braithwaite 1993. See further Wells 2001, 156 et seq. and the sources cited there. The holistic approach has even been made law – and employed alongside the identification thesis – in the federal law of Australia. See the Criminal Code Act 1995, Act No. 12 of 1995 as amended, ss. 12.3(2)(b)–12.3(2)(c) (as amended) and the discussion in: Pieth/Ivory (this volume); Wells 2001, 136 et seq.

[169] Mays 2000, 72 et seq.

[170] Ross 1999, 52.

[171] This form of liability was rejected in *Transco* – see above n. 72.

[172] A similar problem arises if the concept of "management failure" is employed: Chalmers 2006, 294 et seq.; Glazebrook 2002, 410 et seq.

[173] CMCH Act (UK), s. 1.

If a duty of care is found to have existed,[174] the jury must establish whether or not it was "grossly" breached by the corporation.[175] In reaching this conclusion:[176]

> (2) The jury must consider whether the evidence shows that the organization failed to comply with any health and safety legislation that relates to the alleged breach, and if so:
>
> (a) how serious that failure was;
> (b) how much of a risk of death it posed.
>
> (3) The jury may also:
>
> (a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organization that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
> (b) have regard to any health and safety guidance that relates to the alleged breach.
>
> (4) This section does not prevent the jury from having regard to any other matters they consider relevant.
> (5) In this section "health and safety guidance" means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.

Such guidance is useful, as the jury is unlikely to be familiar with the inner workings of corporations, especially large multi-nationals.[177] The 2007 Act does, however, recognize that it cannot provide a complete list of relevant factors. For this reason, it allows the jury (perhaps optimistically) to have "regard to any other matters they consider relevant."[178]

4.7.2 The Range of Offenses That Corporations Can Commit

Nowhere is the problem of piecemeal law-making more apparent than in relation to the question "Which common law offenses might be committed by a corporation?" Mays suggests that legal impossibility should be the only factor that makes a crime incapable of commission by a corporation. He thus excludes (without explaining clearly why) the following offenses from

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[174] This is dealt with in CMCH Act 2007, s. 2.
[175] CMCH Act (UK), s. 8(1)(b).
[176] CMCH Act (UK), s. 8.
[177] Chalmers 2006, 294.
[178] CMCH Act (UK), s. 8(4).

his proposals: perjury, murder, rape, sodomy, bigamy, indecent exposure, incest, assault, clandestine injury to women,[179] and lewd and libidinous conduct.[180]

As already mentioned, some of these offenses (most notably rape) have been put on a statutory footing and the legislature has not seen fit to exempt corporations from liability for their commission.[181] This seems fair. Why should a company not be held liable for rape or murder if its policies endorsed such action?[182] The problem is, of course, what it means to "implicitly" allow an action to take place: if it is a matter of anything which is not prohibited being allowed, the point of corporate liability is lost.[183] Surely the relevant corporate policy's wording must be such so as to *allow* the inference that certain criminal conduct is permissible.

4.7.3 The Types of Corporate Entity That Can Be Convicted of Crimes

It was noted above that it is still unclear which corporate entities can be prosecuted on indictment. This should be remedied to avoid uncertainty. Surely, as trusts and associations are employers and carry out a wide range of activities through their agents and employees, they should be capable of being prosecuted for the same range of crimes as other corporate entities.[184]

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[179] This offense was subsumed within the crime of rape following *Lord Advocate's Reference (No. 1 of 2001)* 2002 SLT 466.

[180] Mays 2000, 73.

[181] See above at 4.3.3.

[182] Cf. the example of a film company orchestrating a rape in Ross 1990, 268.

[183] Cf. the offense of negligent corporate failure to prevent bribery under the Bribery Act 2010 c. 23, s. 7 (discussed, in draft form, in Wells 2009, 483 et seq.). Under s. 7(2), a corporation charged with this offense will have a defense only if it "had in place adequate procedures designed to prevent" bribery being undertaken by an "associated person" (defined in s. 8 as "a person who performs services for or on behalf of" the corporation). The 2010 Bribery Act does require the United Kingdom (not Scottish) Justice Secretary to provide guidance on appropriate procedures (s. 9). At the time of writing, this guidance had not yet been produced (the offense itself is not yet in force) and it is unlikely that this will be especially detailed. For short discussion of the new offense and defense in the Scottish context, see Anwar/Deeprose, (2010), 127.

[184] Cf. Draft Criminal Code for Scotland, s. 16(4)(b) (in: Clive/Ferguson/Gane/McCall Smith 2003), which limits its scope to corporations with separate legal identity.

4.7.4 Punishing Corporations

Imprisonment is not an option for corporations. Nevertheless, as Ross argues, "it should not be impossible to devise an equivalent penalty for a corporation, whether dissolution or suspension from the Register of Companies or confiscation of assets, to deal with those situations where the crime of murder could be brought home to a corporation."[185] In fact, a number of jurisdictions have taken such steps[186] and the Scottish Government should consider seriously their implementation.[187]

There is, however, a need for caution. As Clark and Langsford argue: "[d]espite the fact that [a] company may morally deserve to be punished, heavy financial sanctions may cause bankruptcy. In essence, therefore, society cuts off its nose to spite its face."[188] They note further that a remedial order might, in fact, turn into an opportunity for a corporation to *improve* its image by projecting a picture of corporate social responsibility.[189] In imagining suitable punishments for corporations, these matters should be borne in mind. What is certain is that some sentencing guidance should be given, particularly where the offense provides for a wide range of punishments (e.g., an unlimited fine).

4.7.5 Procedural Matters

Scots law lacks clarity concerning the rights of corporations that are charged with criminal offenses. In particular, Scottish lawmakers are yet to take a clear position on the question of whether the protections accorded to natural persons (e.g., the privilege against self-incrimination, the right to counsel, and the presumption of innocence) are available to corporate actors. As noted above, it appears *logical* to apply the same protections in both instances: the consequences of criminal conviction can be severe. Furthermore, these protections seem particularly important in relation

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[185] Ross 1990, 268.

[186] See the discussion of the approach to punishing corporation taken in the United States and certain civil law jurisdictions in Pieth/Ivory (this volume).

[187] A measure recently rejected by the Scottish Parliament's Justice Committee was the "equity fine", whereby a corporation would have been ordered to issue and hand over additional shares to the court, which would then have been sold. The Justice Committee felt this measure would be outwith the legislative competence of the Scottish Parliament, as it would have altered the law on share capital (which is dealt with at a UK level).

[188] Clark/Langsford 2005, 35.

[189] Clark/Langsford, at 35. Clark and Langsford cite the example of *US* v. *Missouri Valley Construction Company* 741 F. 2d 1542 (8th Cir. 1984), where a corporation was ordered to endow a university chair in ethics. This was overturned on appeal to avoid an association between the company and ethics.

to small corporations, where it might be very difficult to distinguish between the corporation and the agent/employee's interests.[190] Nevertheless, it might be wondered, as Pieth and Ivory note in their chapter, "whether such rights are unnecessary – even inappropriate – in litigation against such potentially powerful inhuman actor[s]."[191]

Additionally, in giving evidence in the trial of a corporation, it is unclear whether, and if so which, corporate officers, agents, and employees may refuse to answer questions that might incriminate the corporation. It appears strange, however, to hold that they might claim a protection for their employer/principal if they are not themselves incriminated by the answer. In other words, if the answer simply does not *incriminate* the witness, then it seems bizarre to grant her immunity from answering the question *on the basis of* the privilege against *self-incrimination*. Nevertheless, the extension of the corporation's rights to its agents and employees has been endorsed elsewhere.[192] Space precludes a more thorough examination of the arguments of principle and policy at stake but it is unlikely – given the widespread public consciousness of corporate wrongdoing and the rise of human rights litigation – that the Scottish courts can avoid direct consideration of this issue for too much longer.

4.8 Conclusions

Alan Norrie has pointed out that the common law did not grow up with the idea of corporate liability in mind.[193] This has resulted in a bifurcated approach in Scotland: where the legislature has been clear about corporate liability, the Crown's task is simple; where statutory wording is ambiguous or the commission of a common law offense is alleged, gaining a conviction is complicated by the "directing mind fiction", which makes it easy to proceed against small corporations but harder large organizations. Where the courts have been allowed to develop the law, the result has been a patchwork of decisions each of which fails to engage earlier authorities or discuss the core matters of principle (and policy) in suitable depth. If uniformity is desirable – which is certainly a defensible thesis – then the Scottish Parliament (and, if necessary, the UK Parliament) would do well to pass legislation to bring coherence to the Scottish approach to corporate criminal liability law.

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[190] See Pieth/Ivory (this volume).

[191] Pieth/Ivory (this volume). See further the sources cited there.

[192] See the description of the procedural law in certain civil law countries in Pieth/Ivory (this volume).

[193] Norrie 2001, 82. See, similarly, *R* v. *P&O European Ferries (Dover) Limited* (1991) 93 Cr App R 72 at 73 (Turner J).

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Chapter 5
Corporate Criminal Liability in France

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Contents

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5.1 Introduction

Since the coming into force of the new Penal Code *(Code pénal)* on March 1, 1994, French law recognizes corporate criminal liability. The very large majority of French legal scholars accept today the necessity and the value of recognizing corporate criminal liability.

The first subsection of art. 121-2 Penal Code provides that "legal persons, with the exclusion of the state, are criminally liable according to the distinctions in arts. 121-4 to 121-7 for offenses committed on their behalf by their organs or by their representatives". The French legislator opted for a relatively wide scope of corporate criminal liability: corporate criminal liability applies, in principle, to all offenses and to all legal persons, thus to companies, but it is required that an organ or representative of the legal person commits the offense "on the behalf of" this entity.

Penalties for legal persons may be of a pecuniary and a non-pecuniary nature. There are penalties that can be incurred only by legal persons. No general principles exist in French criminal law that the judge must respect when deciding the penalties incurred by a convicted legal person. However, it is possible to derive some guiding principles when it comes to sanctioning them.

The French legislator also established specific procedural rules concerning legal persons. However, the majority of the rules of criminal procedure applicable to natural persons also apply, in principle, to legal persons, with the exception of particular statutes, which provide the contrary.

5.2 Forms of Corporate Liability in French Law

Legal persons, and thus companies, can incur three different forms of liability in French law: civil, administrative, and – since 1994 – criminal liability.

5.2.1 Civil Liability

Legal persons, and thus companies, may incur civil liability, a principle affirmed well before 1994. Thus, art. 1123 French Civil Code *(Code civil)* provides that "[e]very person may contract who has not been declared by the law incapable of doing so". The rule assumes that all persons with capacity are capable of contracting. The counterpart of this rule is that each person declared capable of contracting under law is responsible for and must assume the consequences of his/her acts. This principle is applicable to legal persons and thus to companies as well. Hence, a company can be held liable, notably for breach of contract, in French law.

Companies may also be liable in tort. As a legal person, a company may be held responsible under arts. 1382 and 1383 Civil Code for damages caused by one of its representatives who is acting as such.[1] If the legal representative is considered as an organ of the company and he/she committed the tort in the exercise of his/her functions, the tort is considered a tort of the company itself for which the victim may demand compensation. The company's liability is not conditioned on the establishment or implication of the personal liability of the organ.[2] Further, according to art. 1384 Civil Code, a person is responsible, not only for the damage that is caused by that person's own acts, but also for damage caused by others for whom the person must answer. Notably art. 1384(5), provides that masters *(maître)* and principals *(commettant)* are liable for the torts committed by their servants *(domestiques)* and agents *(préposées)* while performing the functions for which they were employed or engaged.

Thus, the company is responsible for the persons it oversees,[3] though the agent at fault must have committed the tort while employed by, and working for, the company. This makes corporate civil liability particular. A company cannot be held civilly liable for a tort committed by one of its agents when acting without the authorization to perform functions outside of those usually attributed to him. The act would be considered as committed outside the scope of the functions for which the agent was employed.[4] However, the company will still be liable if the victim shows that it could have reasonably believed that the agent was acting within the scope of his authority.[5] Lastly, it is important to note the victim does not have to invoke

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[1]Cass. 2e civ., July 17, 1967, Gaz. Pal. 1967. 2e sem., Jur. 235, n. Blaevoet. – Cass. 2e civ., April 27, 1977, Bull. civ. II, No. 108.

[2]Cass. 2e civ., July 17, 1967, see above n. 1.

[3]Cass. ass. plén., March 29, 1991 *(Blieck)*, *D.* 1991, 324, n. Larroumet; JCP éd. G. 1991.II. 21673, n. Ghestin; RTD civ. 1991, 541, n. Jourdain.

[4]Cass. ass. plén., November 15, 1985, Bull., No. 9, 12.

[5]Cass. 2e civ., May 29, 1996, Bull. civ. II, No. 118.

the agent's personal responsibility in order to bring suit against a company under art. 1384(5) Civil Code.[6] At its core, this rule is a type of vicarious liability.

In principle, one cannot sue the directors of a company under art. 1384(5) Civil Code because directors are not considered agents.[7] However, the *Cour de cassation* has sometimes allowed this type of suit.

5.2.2 Administrative Liability

In certain cases, the administrative liability of legal persons, and thus companies, can be invoked. A legal person's administrative liability, unlike its civil liability, depends on the type of the legal person, and, in certain cases, on the qualification of the contract.

5.2.3 Criminal Liability

Finally, companies, and more generally legal persons, have been exposed to criminal liability since 1994. Article 121-2 Penal Code sets out the principle. The first subsection, which was introduced by the Law No. 92-683 of July 22, 1992, concerning reform of the Penal Code's general provisions, provides that "legal persons, with the exclusion of the state, are criminally liable according to the distinctions in arts. 121-4 to 121-7 for offenses committed on their behalf by their organs or by their representatives". The details of this particular type of liability will be examined more closely in this chapter.

5.3 The Introduction of Corporate Criminal Liability

Corporate criminal liability was introduced in France by the New Penal Code, promulgated March 1, 1994.[8] Before the promulgation of the 1994 Penal Code, corporate immunity from criminal liability was the dominant principle in French criminal law. Thus, legal persons were only civilly and,

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[6]Cass. 2^{e} civ., April 21, 1966, Bull. civ. II, No. 454. – Cass. 2^{e} civ., June 17, 1970, Bull. civ. II, No. 212.

[7]Cass. crim., May 20, 2003, Bull. Joly 2003, No. 11, 1166, n. de Massart.

[8]In 1994, art. 121-2 Penal Code provided that "legal persons, with the exclusion of the state, are criminally liable according to the distinctions in articles 121-4 to 121-7, and in the case of instances provided for by law or regulations, offences committed on their behalf by their organs or by their representatives".

in certain cases, administratively liable,[9] several judicial and legislative exceptions notwithstanding.[10] Before the modification of the 1994 Penal Code, legal scholars in France debated the possibility and value of recognizing corporate criminal liability principles.[11] This debate is still relevant today, even if, over time, the majority of French legal academics have come to accept the necessity of corporate criminal liability and to craft arguments to support its introduction into law.[12]

The French legislator introduced corporate criminal liability predominantly for practical reasons.[13] Corporate criminal liability was seen as necessary to improve law enforcement and, in particular, as targeting a real form of criminality. It was also thought to allow a more just imputation of criminal liability than personal liability. Indeed, with the 1994 reform, the French legislator wished to establish more than just limits on the personal responsibility of directors. In so doing, it hoped to ensure greater respect for the general principle of *personnalité des peines* under art. 121-1 Penal Code, according to which a person is only criminally responsible for his/her own conduct.[14]

Nonetheless, certain French legal scholars questioned the constitutionality of corporate criminal liability. More precisely, they asked whether this liability did not itself threaten the principle of *personnalité des peines*, as well as the principle of equality before the law (certain legal persons were excluded from the scope of art. 121-2 Penal Code). The *Conseil constitutionnel* did not hand down a decision on this important question when the law came into force. It first had occasion to consider this matter and hand down a ruling 4 years later when scrutinizing the law of May 11, 1998 concerning the entrance and residency of foreigners into France.[15] The law in question, which penalized the aiding of immigrants who entered and resided illegally in France, granted immunity from prosecution to certain humanitarian associations. The *Conseil constitutionnel* held that this immunity was contrary to the constitution, not only because it only benefitted some associations who were arbitrarily chosen by the Minister of

[9] See, e.g., Cass. crim., March 8, 1883, S. 1885 I, 470; DP 1884, I, 428. – Cass. crim., February 27, 1968, Bull. crim., No. 61, 147.

[10] Desportes, 2002, para. 4.

[11] For a presentation of arguments, see Desportes, 2002, paras. 5 et seq. See also Delmas-Marty 1990, 108 et seq.; Donnedieu de Vabres, 1947, paras. 262 et seq.; Faivre, 1958, 547; Merle/Vitu 1997, paras. 605 et seq.

[12] For a presentation of these arguments, see Desportes, 2000, para. 7. See also Mathey 2008, 205 and Maréchal 2009b, paras. 5 et seq.

[13] Desportes 2002, paras. 10 et seq.

[14] For an analysis of the principle of *personnalité des peines* applied to legal persons, see Serlooten 2010, § 66, 306 et seq.

[15] Decision No. 98-399 DC, May 5, 1998, JO May 12, 1998.

Interior, but also because the objectives of the legislator, in this case regulating immigration, "could justify a system of criminal sanctions applicable to both natural persons and legal persons".[16] The law could, thus, "establish, while still respecting constitutional principles, rules concerning the characterization of felonies and misdemeanours created by the legislator, as well as the applicable sentences".[17] The *Conseil constitutionnel* admitted that certain natural and legal persons could benefit from criminal immunity granted by the legislature provided that the principles of legality and equality were not violated. So, indirectly, the *Conseil constitutionnel* recognized the constitutionality of corporate criminal liability.

5.4 Characterization of the French Concept of Corporate Criminal Liability

Two theories would seem to characterize the concept of corporate criminal liability in France. The first theory recognizes the possibility of such liability and the second defines the nature of the liability.

First, criminal corporate liability owes its existence to the "reality theory" of corporate personality *(théorie de la realité)*,[18] which presents the legal person as a "sociological phenomenon". This conception is defined by French scholars by taking into account two different aspects of legal personality: as a matter of law, the legal person only benefits from legal recognition and protection if several conditions are satisfied; as an institution, legal persons are bodies acting according to a collective will. Second, the reality theory is traditionally juxtaposed to the "fiction theory" *(théorie de la fiction)*, which is based on an opposition between legal persons and natural persons.[19] According to this theory, legal persons are fictions created by the law and thus artificial beings, to which the legislator may grant or deny legal personality at its will.

French case law has recognized the legal personality of certain entities who were not explicitly granted such legal status by statute on several occasions, seemingly due to the *théorie de la realité*.[20] But this line of cases has had only a marginal impact on the granting or removing of such legal personality. However, according to some French academics, it may have implications for criminal law because the principle of corporate

[16] Decision No. 98-399 DC, May 5, 1998, JO May 12, 1998.

[17] Decision No. 98-399 DC, May 5, 1998, JO May 12, 1998.

[18] See, in particular, Mathey 2008, 205.

[19] See, in particular, Mathey 2008, 205.

[20] See, in particular, Cass. ch. req., February 23, 1891, S. 1892.1.72. – Cass. 2e civ., January 28, 1954, D. 1954, 217, n. Levasseur.

criminal immunity was mainly based on the *théorie de la fiction* and the recognition of criminal liability is founded *a priori* on the *théorie de la realité*.

In addition, corporate criminal liability is, according to the *Cour de cassation* in its early decisions[21] and supported by several legal scholars, a representative liability ("indirect" liability[22] or liability *"par ricochet"*[23]), which still retains personal character since it can only be invoked through the intervention of an organ or a representative of the legal person. Indeed, the French legislator has not instituted a mechanism that allows for the direct imputation of criminal acts to legal persons.[24] The judge must therefore establish the existence of an offense committed by a corporate organ or representative; he/she cannot directly impute an offense to a legal person. However, following other scholars[25] and local courts, it is a direct liability, by representation or identification, and it seems that the *Cour de cassation* in its recent decisions has also adhered to this interpretation.[26]

In any case, corporate criminal liability is not a liability for the acts of another person: French criminal law emphasizes the principle of personal criminal responsibility, which applies to legal persons as well as natural persons who are criminally tried.[27] To respect this principle, the French legislature provided that legal persons may only be held liable through their organs and representatives who, from a legal point of view, express the will of the legal person.

5.5 The Entities That May Be Held Criminally Liable

One of the principle questions before the *Assemblée nationale* and the Revision Commission of the Penal Code was which entities should be considered capable of criminal liability.[28] Criminal liability of legal persons with commercial, industrial, or financial objectives was accepted very quickly. However, the classification of nonprofit private law legal persons

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[21] Cass. crim., December 2, 1997, Bull. crim. 1997, No. 408; JCP éd. G 1998, IV, 1820; JCP éd. G 1998, II, 10023, rapp. Desportes; JCP éd. E 1998, 948, n. Salvage; Rev. sc. crim. 1998, 536, n. Bouloc. See also Cass. crim., April 29, 2003, Bull. crim. 2003, No. 91; Dr. pén. 2003, comm. 86, n. Robert; Rev. sc. crim. 2004, 339, Fortis; D. 2004, 167, n. Saint-Pau.

[22] Desportes, 2002, para. 106.

[23] Robert, 2005, 381.

[24] For a critique, see Maréchal 2009a, 249.

[25] See, e.g., Saint-Pau 2006, 1011 et seq.

[26] Cass. crim., June 20, 2006, JurisData No. 2006-034775. – Cass. crim., September 29, 2009, JurisData No. 2009-049707. – Cass. crim. March 9, 2010, No. 09-80.543.

[27] Cass. crim., June 20, 2000, Bull. crim., No. 237, 702.

[28] Desportes 2002, paras. 21 et seq.

and public law entities as legal persons under the Penal Code's corporate liability provisions was hotly debated.[29] Finally, the principle of equality under the law won out.[30] The *Assemblée nationale* thus established a broad concept of "legal persons": art. 121-2 Penal Code states that "legal persons, with the exclusion of the state, are criminally responsible". It therefore applies to all legal persons that have full legal personality with the exception of the state.

5.5.1 Private Law Legal Persons

Private law legal persons may be held criminally liable. In fact, corporate criminal liability was introduced into French law principally with this type of person in mind. It would not seem to matter whether such groups were created voluntarily or came into existence by virtue of legal rules.[31] So, the law would cover voluntarily created for profit and nonprofit groups, such as civil and commercial companies, economic interest groups *(groupement d'intérêt économique)*, associations that regularly declare themselves to the *préfecture*, including religious congregations, foundations, trade associations *(syndicat professionnel)*, and political parties and groups. Groups of legal origin include institutions representing workers, associations of co-property owners, meetings of bondholders, and professional associations *(ordre professionnel)*.

Although all private law legal persons can be held criminally liable, a certain number of them enjoy a privileged status under the law *vis-à-vis* criminal sanctions. These are political parties and groups, trade associations, and, to a lesser extent, institutions representing workers. Indeed, the last subsection of art. 131-39 Penal Code provides that the harshest sanctions do not apply to these types of legal persons or to some of them: political parties and groups as well as trade associations cannot come under judicial surveillance or be forcibly dissolved; and institutions representing workers cannot be forcibly dissolved.

5.5.2 Public Law Legal Persons

Public law legal persons may be held criminally liable for the totality of their activities. However, an exception to this rule exists for the state and

[29] On the question of the criminal legal liability of public law entities, see Caille 2009, paras. 4 et seq.

[30] Picard 1993, 263.

[31] Desportes 2002, para. 50.

a limit is applied to the prosecution of territorial collectives (i.e., local governments).

According to the principle, public law legal persons may be held criminally liable for the totality of their activities.[32] Legal scholars and the courts through case law have placed legal persons of both a private and public law nature, such as companies with a mixed status,[33] nationalized companies,[34] and professional associations into this category.[35] But criminal liability of public law legal persons is limited insofar as certain sanctions cannot be imposed on them according to the last subsection of art. 131-39 Penal Code. In fact, constitutional principles do not permit these entities to come under judicial surveillance or to be forcibly dissolved.

There is one crucial exception to the rules regulating public law legal persons: the state enjoys full immunity. This exception has been justified, in particular, by reference to state sovereignty and the principle of the separation of judicial and administrative authorities:[36] the introduction of state criminal liability would in particular result in administrative activities being regulated and monitored by the judiciary.[37] Another justification for full state immunity in criminal matters was that the state itself is the enforcer: as it has a monopoly on the power to punish, it cannot punish itself.[38] Other scholars have argued, however, that state criminal immunity creates an inequality among public agents.[39]

The criminal liability of public law legal persons has also its limits. Article 121-1(2) Penal Code provides that territorial authorities are criminally responsible for "offenses committed in the course of activities, which can be the subject of an agreement delegating a public service".[40] The purpose of this limitation was to prevent unjustified discrimination in favor of public

[32]For an in-depth study, see, in particular, Caille 2009, paras. 23 et seq.; Gartner 1994, 126; Hermann 1998, 195; Moreau 1995, 620; Moreau 1996, 41; Picard 1993, 261 et seq.

[33]Cass. crim., November 9, 1999 *(Sté SATA)*, Bull. crim., No. 252, 786; Rev. sc. crim. 2000, 600, obs. Bouloc; Dr. pén. 2000, comm. 56, n. Véron; Bull. Joly 2000, § 85, obs. Barbiéri.

[34]E.g., Cass. crim., January 18, 2000 *(SNCF)*, Bull. crim., No. 28, 68; D. 2000, I.R., 109.

[35]Desportes, 2002, para. 48.

[36]Marchand, Rapport sur la réforme du Code pénal, Doc. AN No. 896, 1ère session ordinaire, 1989–1990, 221. However, some legal scholars argue that these principles do not justify the large exception carved out in the statute Caille 2009, paras. 17 et seq.; Desportes 2002, para. 24; Picard 1993, 261 et seq.

[37]Hermann 1998, para. 23.

[38]Gartner 1994, 126; (questioning) Caille 2009, para. 19.

[39]Desportes 2002, para. 25; Rapport du groupe d'étude sur la responsabilité pénale des décideurs publics, presided over by M.-J. Massot 1999.

[40]For a detailed study, see Maréchal 2009b, paras. 21 et seq.

sector entities.[41] Indeed, the French legislator felt that territorial authorities should be criminally liable to the same extent as private law legal persons when they perform private sector activities that are competitive even if they should benefit from a form of immunity when performing their non-competitive activities.[42] In the absence of a definition of "delegating of public services", the provision is difficult to apply.[43] However, it would seem that the real question does not concern the determination of what is a delegation of public services but, rather, what type of activities may be delegated to perform the service at issue.[44]

5.5.3 Foreign Legal Persons

Article 121-2 Penal Code does not make any distinctions between legal persons on the basis of nationality. Therefore, it seems that foreign legal persons also fall within the scope of the statute. French law is clearly applicable to foreign entities that have committed offenses in France under art. 113-2(2) Penal Code or abroad if the conditions contained in arts. 113-1 et seq. Penal Code are met. Certain issues concerning foreign legal persons are debated nonetheless.[45]

5.5.4 Fully-Formed Groups Benefitting From Legal Personality

Article 121-2 Penal Code only covers legal persons; entities and groups that do not possess a legal personality do not come within the purview of the statute.[46] *Sociétés en participation* and *sociétés créées de fait* are therefore excluded from French corporate criminal liability principles: these entities are not registered and thus do not enjoy legal personality according to arts. 1871 and 1873 Civil Code. Affiliated companies are also excluded from

[41] Caille 2009, paras. 4 et seq.

[42] Desportes 2002, para. 26.

[43] Caille 2009, paras. 30 et seq.

[44] Desportes 2002, paras. 28 et seq. See Cass. crim. April 3, 2002, Bull. crim. 2000, No. 77, defining the notion of activities, which may be delegated.

[45] For an in-depth study, see Desportes 2002, paras. 55 et seq. and Maréchal 2009b, paras. 51 et seq.

[46] For a presentation of the reasons for exclusion of groups not having legal personality, see Desportes 2002, paras. 62 et seq.

criminal liability because it is difficult to determine which of the affiliated companies has committed the offense.[47]

Companies and groups that have yet to be constituted or are restructuring, as well as companies that are dissolving or are in the process of winding-up, are special cases.[48]

5.6 Offenses for Which Legal Persons May Be Liable

Since the entry into force of Law No. 2004-294 of March 9, 2004 concerning the adaptation of justice to the changes in criminality (the Perben II Law) on December 31, 2005, corporate criminal liability applies, in principle, to all offenses.[49] Previously, France had adhered to the principle of specialty according to which legal persons could only be held criminally liable if a special provision provided as such.[50] Indeed, art. 121-2(1) of the former Penal Code provided that "legal persons... are criminally liable... in the cases provided for in the law".[51] The legislator was thus given responsibility for determining the scope of corporate criminal liability. It opted for a broad notion of corporate criminal liability by providing that legal persons could be held liable for the majority of offenses found in the Penal Code, as well as a significant number of offenses not found in that code.[52] The principle of specialty and its application by the French legislator were highly debated among scholars in France.[53] However, it was not until Law No. 2004-204 of March 9, 2004, that it removed the specialty principle and

[47] Cass. com., April 2, 1996, Bull. Joly 1996, 510, n. Le Cannu. On this question, see Pariente 1993, 247. See also Segonds 2009, paras. 5 et seq.

[48] For an in-depth analysis, see Desportes 2002, paras. 67 et seq.

[49] Concerning this question: Ducouloux-Favard 2007, para. 5. See also Delage 2005, étude 2.

[50] For a detailed study, see Maréchal 2009b, paras. 57 et seq.

[51] E.g., Cass. crim., October 30, 1995, Bull. crim., No. 334, 966.

[52] Desportes 2002, paras. 82 et seq.

[53] The principle of specialty and its application by the French legislator were heavily criticised by some legal scholars. Others argued that the principle of specialty was necessary in light of the fact that certain offenses could not be imputed to legal persons (Bouloc 1993, 291), though many others remained unconvinced (Desportes 2002, paras. 94 et seq.). Another justification for the principle of specialty was that of prudence. Scholars argued the legislator should only hold companies liable in those cases in which it was the most effective and necessary (Desportes 2002, para. 97). Some scholars agreed with this justification, upon the condition that the offenses specified were limited, which was not the case. It also seemed paradoxical to some scholars that the French legislator neglected to specify criminal corporate liability for offenses, for which corporate accountability would seem natural (Desportes 2002, para. 97). Legal scholars pointed out other drawbacks of the principle of specialty (see, in particular, Desportes 2002, paras. 98 et seq.).

replaced it with a general corporate criminal liability principle, which covers all offenses. Nonetheless, the principle of generality was made subject to exceptions, for example for crimes involving the press.[54] Further, if the offense provision implicates qualities that only a natural person could have, it is up to the judge to decide if such an offense could or could not be imputed to a legal person. Otherwise, all (intentional and unintentional) offenses committed after December 31, 2005, may be committed by a corporation.[55]

5.7 The Persons Who Trigger Corporate Criminal Liability

Corporate criminal liability is a form of personal responsibility meaning that the offense must have been committed through an organ or a representative of the legal person. The principle of personal responsibility is an important pillar of French criminal law and it applies to natural as well as legal persons.[56] To ensure that the principle of personal responsibility is respected in the case of legal persons, the French legislature has provided that criminal liability may only be triggered by actions taken by the organs and representatives who legally express the legal person's will. Its criminal liability will not be triggered by the actions of an agent whether he/she is an employee, a senior manager,[57] or another person.

Thus, the persons who could trigger a company's corporate liability are its organs and representatives.

5.7.1 Organs

An important distinction in French law is between de facto organs and de jure organs.

The notion of de jure organ covers all persons invested, either individually or collectively,[58] by the laws or the by-laws of a legal person with powers of direction.[59] In general partnerships *(société en nom collectif)*

[54]Article 43-1 of the Law of July 29, 1881, on the freedom of the press and art. 93-4 of the Law No. 82-652 of July 29, 1982, on audiovisual communication. For a detailed study of the exceptions, see Maréchal 2009b, paras. 65 et seq.

[55]Note that if the offense committed is unintentional, the legal person's criminal liability is triggered independently of any causal link.

[56]Cass. crim., June 20, 2000, see above n. 27.

[57]For a detailed study, see Desportes 2002, paras. 149 et seq.; and Caille 2009, para. 72.

[58]Maréchal 2009b, para. 77 and Caille 2009, para. 64.

[59]Cass. crim., July 7, 1998 *(Romain R. et Sté Zavagno-Riegel)*, Bull. crim. 1998, No. 216; Rev. sc. crim. 1999, 317, obs. Bouloc, obs. Giudicelli-Delage.

and limited liability companies *(société à responsabilité limitée)*, the organ is the manager *(gérant)*. A public limited company *(société anonyme)* may be established with a board of directors *(conseil d'administration)* or with a management board *(directoire)* and a supervisory board *(conseil de surveillance)*. If a public limited company has been established with a board of directors, then the board is recognized as an organ along with its president and the general directors. If the public limited company's founders have opted for a management board, then its organs are the management board, the president of the board, the directors who are endowed by the supervisory board with the power to represent the company, as well as the supervisory board. The general meeting of shareholders is always considered an organ of the company. In practice, however, it is improbable that a decision made by the general meeting or the supervisory board would trigger the criminal liability of the company as these organs are not responsible for its daily management.

The question remains whether criminal liability may be triggered by the actions of the legal person's de facto organs. The *Cour de cassation* has not yet handed down a decision on this question, though several courts have been prepared to recognize that corporate criminal liability is triggered by an apparent representative[60] or a de facto director.[61] On this question, French legal scholars are divided. A majority is in favor of the possibility of prosecuting legal persons for offenses committed by their de facto organs,[62] and, indeed, there are several arguments in favor of treating de facto directors the same as de jure directors.[63] In practice, however, this question is of little importance:[64] de jure strawmen directors are often accomplices of de facto directors and therefore also commit offenses on behalf of the company so triggering the company's responsibility in criminal law.[65]

5.7.2 Representatives

The term "representative" first appeared in the text of the 1986 draft Penal Code, the 1978 and 1983 drafts only referring to "organs". Neither the parliamentary debates nor the circular clarify the notion of a representative.

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[60] Cass. crim., November 9, 1999, see above n. 33. See also Cass. crim., December 17, 2003, No. 00-87.872 (de facto representative).

[61] T. corr. Strasbourg, February 9, 1996, Les annonces de la Seine 1996, No. 24, 10.

[62] E.g., Delmas-Marty 1990, 119.

[63] Delmas-Marty 1990, 119; Desportes 2002, paras. 119 et seq.; Caille 2009, para. 68.

[64] In this regard, Roujou de Boubée 2004, 539.

[65] Desportes 2002, para. 118.

However, it would seem that the notion of a representative should not be confused with legal representatives – its organs – because it has a specific meaning.[66] Thus, it is necessary to determine who are the representatives of a legal person other than its organs.[67]

It emerges, first, that a person, other than a corporate officer who is designated by law to manage the company is considered a representative of the legal person distinct from its organs. Second, it would seem that someone who has been granted the right to represent the company in certain situations by a judicial decision is recognized as a representative. This category would include provisional administrators of a company or of an association named by a court or a company liquidator.

Third, persons who have been delegated powers from the directing organ of the legal person should be considered as its representatives. In the area of criminal law, the delegation of powers is the act by which a company's director confers on an employee the responsibility of respecting the laws and regulations in a certain sector of the company's activity.[68] However, the scope of this delegation exceeds the scope of delegation of powers in the criminal law's domain of labor law.[69] The delegation of powers must be "specific" and have been given to an agent *(préposé)* who has the competence, the authority, and the means to accomplish the mission he/she was entrusted with.[70] When it is regular, the delegation transfers to the delegate the power to incur criminal liability in association with the exercise of the delegated powers. The delegator is thus exonerated from any criminal liability for offenses committed within the scope of the delegated activities provided that he/she did not participate in the criminal activities him/herself. After a long period of uncertainty and academic debate, the *Cour de cassation* has clarified, first, implicitly[71] and then explicitly,[72] that the delegate also becomes a representative for the purposes of art. 121-2 Penal Code. Hence, he/she is capable of triggering the company's liability for offenses within the scope of his/her delegated powers

[66] Desportes 2002, para. 123.

[67] For a detailed study, see Desportes 2002, paras. 125 et seq.

[68] Rép. min. No. 57171, JOAN Q, January 24, 2006, 756. – Rép. Min. No. 15771, JO Sénat Q, January 26, 2006, 223.

[69] See, in particular, Cass. crim., March 11, 1993, Bull crim., No. 112, p. 270; Bull. Joly 1993, 666, n. Cartier; Rev. sc. crim. 1994, 101; Dr. pén. 1994, comm. No. 39.

[70] Cœuret/Fortis, 2004, paras. 276 et seq.; Batut, 1996, 131, 136 et seq.

[71] Cass. crim., December 1, 1998 *(Sté Mazzotti)*, Bull. crim., No. 328; D. 2000, 34, n. Houtmann; Rev. sc. crim. 1998, obs. Guidicelli-Delage.

[72] Cass. crim., November 9, 1999, see above n. 33 – Cass. crim., 14 déc. 1999 *(Sté Spie-Citra)*, Bull. crim., No. 306; Rev. sc. crim. 2000, 600, obs. Mayaud; Dr. pén. 2000, comm. 26, obs. Véron; Rev. sc. crim. 2000, 600, obs. Bouloc.

and on the behalf of the legal person.[73] Legal scholars have applauded this decision.[74]

Note that in a recent decision, the *Cour de cassation* admitted that criminal liability for a legal person can even be triggered by a third person who is not a salaried employee, provided that person is authorized to carry out material acts in its name and on its behalf.[75] Thus, the court adopted a broad interpretation of the notion "representative".[76]

5.7.3 A More or Less Demanding Condition

Corporate criminal liability in France requires the intervention of an organ or a representative of the legal person. The condition that the offense be committed by an organ or representative applies to all offenses, however, and according to French scholars, it is more or less demanding depending on the nature of the offense. In particular, certain offenses may be imputed to the legal person simply because it was responsible for respecting, and did not respect, certain rules and regulations, such as those designed to protect public health, security, and sanitation. Human intervention is still required in these cases but, due to the nature of the offense, the condition is automatically satisfied.

5.8 Conditions of Liability

5.8.1 The Commission of Offenses "on Behalf of" the Entity

Article 121-2 Penal Code requires that an organ or representative of the legal person commits an offense "on the behalf of" the entity rather than for its benefit.[77]

The notion, an act or omission "on behalf of" the legal person, was interpreted by a circular *(circulaire)* of the Minister of Justice of May 14, 1993, which commented on the provisions of the legislative part of the new Penal

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[73] TGI Bastia, June 3, 1997, Rev. sc. crim. 1998, 99, obs. Mayaud.

[74] This solution is said to be justified as the delegate replaces the organs of the legal person, for which he exercises his/her prerogative on behalf of the legal person. The delegate also benefits from a sort of transfer of power and representation (Desportes 2002, para. 134). It thus makes sense that the delegating body should be exonerated but not the legal person itself. Scholars also contend that an alternative solution would have stripped the reform of its ability to reach its objective to ensure better enforcement of work accident issues (Desportes 2002, para. 134).

[75] Cass. cim., October 13, 2009, Dr. pén. 2009, comm. 154, n. Véron.

[76] Maréchal 2009b, para. 83.

[77] For a detailed study, see Maréchal 2009b, paras. 99 et seq.

Code. The circular clarified that "a legal person will not be held liable for offenses committed by a director in the exercise of his functions, if the director acts on his own behalf and in his own personal interest, sometimes even at the expense of the legal person". This formula is to be understood broadly to mean that a director or representative's act need only "present a link with the organization, the functioning or the accomplishment of the legal person's mission".[78]

According to French scholars, the organ or representative who acts in the name and in the interest of the legal person also acts on behalf of the legal person; this interest can consist in the realization or anticipation of a financial profit. It also seems that the corporate criminal liability of the legal person is triggered when the organ or representative is performing activities that have, as their object, maintaining and securing the organization and functioning of the legal person. This is true even if the offense does not benefit the legal person. In some situations, legal persons will additionally profit from an offense but this is not a requirement for holding the legal person criminally liable.

One issue raised by legal scholars is whether a company should be criminally liable if the offense was only committed in the interest of a minority of the legal person's members. Scholars have argued that this situation is similar to the one in which the agent or director acts on his/her own behalf and in his/her own interest. According to this line of thinking, since several people have acted – by an intermediary member – in their own self-interest and not in the interest of the company, the company cannot be held accountable for their actions.[79]

5.8.2 Conviction of a Natural Person as a Condition for Corporate Liability?

Though an offense must have been committed on behalf of the company by one of its organs or representatives,[80] the prosecution of a natural person for the same offense is not a requirement for bringing criminal charges against a company.[81] This seems to be an appropriate solution given that

[78]Caille 2009, para. 82. See also Cass. crim., April 6, 2004 *(Assistance Publique-Hôpitaux de Paris)*, Bull. crim. 2004, No. 84; Dr. pén. 2004, comm. 108, obs. Robert.

[79]Desportes 2002, para. 187.

[80]Cass. crim., May 23, 2006 *(SNC Norisko Coordination)*, Dr. pén. 2006, comm. 128, n. Véron; D. 2007, 399, obs. Roujou de Boubée; D. 2007, 617, obs. Saint-Pau; D. 2007, 1624, obs. Mascala; Rev. sc. crim. 2006, 825, obs. Mayaud; Rev. sociétés 2007, 1624, obs. Bouloc.

[81]TGI Chambéry, October 11, 1996, cited by Saint-Pau, 2006, 1016. For a detailed study, see Maréchal 2009b, paras. 115 et seq.

one of the legislator's objectives in introducing corporate criminal liability was a more just imputation of liability for offenses committed in a corporate context. This would not be possible if the prosecution was not free to charge, as it deems fit, the company rather than the natural persons who actually committed the offense. This requirement does not imply the conviction of the natural person who committed the offense in order to bring charges against the legal person.[82] There are, moreover, cases in which the conviction of a natural person, organ or representative, is impossible.

Nonetheless, the criminal courts must designate the organ or representative who has triggered the legal person's criminal liability.[83] There are, however, limits to this obligation. Indeed, according to the *Cour de Cassation*, it suffices that the court can establish with certitude that all the elements of an offense were committed by a natural person (i.e., an organ or representative of the legal person).[84] Judges can thus find the legal person criminally liable without identifying the precise perpetrator from the moment that this offense could "only" have been committed by its organ or representative.[85] That said, when intent is an element of the offense, identification of the natural person is often a practical necessity: it is difficult, if not impossible, to prove that the law was violated, with the full knowledge of the organ or representative, if the physical perpetrator was not identified.

5.8.3 Defective Organization, Lack of Supervision, and the Relevance of Corporate Compliance Systems

In French law, corporate criminal liability is not dependent on fault on the part of the legal person. It is thus not necessary to establish fault on the part

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[82]Cass. crim., December 2, 1997 *(Sté Roulement Service)*, Bull. crim. 1997, No. 420; JCP éd. G 1999, I, 112, obs. Véron; D. affaires 1998, 225, 432; Rev. sc. crim. 1998, 536, obs. Bouloc; Rev. sociétés 1998, 148, n. Bouloc; RJDA 1998, obs. Rontchevsky; Bull. Joly 1998, 512, n. Barbiéri; Dr. et patrimoine 1998, No. 2011, obs. Renucci.

[83]Cass. crim., April 29, 2003 *(Assoc. commerçants centre La Thalie)*, Bull. crim. 2003, No. 91; Rev. sc. crim. 2004, 339, obs. Fortis; Dr. pén. 2003, comm. 86, n. Robert; D. 2004, 167, n. Saint-Pau; D. 2004, somm. 319, obs. Roujou de Boubée.

[84]Cass. crim., December 1, 1998, see above n. 65 – Cass. crim., May 24, 2000 *(Sté Mac Donald's France)*, Bull. crim. 2000, No. 203; Rev. sc. crim. 2000, 816, obs. Bouloc. See also the Report for 1998 of the Cour de cassation, 303.

[85]Cass. crim., June 20, 2006, Bull. crim. 2006, No. 188; D. 2007, 617, n. Saint-Pau; JCP éd. G 2006, II, 10199, n. Dreyer; Dr. pén. 2006, comm. 128, n. Véron; D. 2007, 1624, obs. Mascala; Rev. sc. crim. 2006, 825, obs. Mayaud; Rev. sociétés 2006, 895, obs. Bouloc. Cass. crim. June 25, 2008, Bull. crim. 2008, No. 167; Dr. pén. 2008, comm. 140, n. Véron; Rev. sociétés 2008, 873, n. Matsopoulou; Rev. sc. crim. 2009, 89, obs. Fortis; JCP éd. E 2009, 1308, n. Sordino. See also Maréchal 2009b, para. 90 and Caille 2009, para. 77.

of the legal person in addition to the fault of the natural person, whether an organ or a representative of the legal person.

Nonetheless, some legal scholars and certain local courts[86] have preferred the view that corporate criminal liability is subject, not only to the requirement that an offense is committed by an organ or representative with the requisite mental state on behalf of the legal person, but also to the requirement that the fault of the legal person itself be established.[87] This type of fault could be established when the commercial or social policy of the legal person, or its "defective" organization, played a role in the commission of the offense.

This line of reasoning has been criticized for a number of reasons.[88] First, the principle laid down in art. 121-1 Penal Code does not seem to imply that it is necessary to establish fault on the part of the legal person, distinct from the fault of the organs or representatives.[89] Second, and most importantly, the need to establish a separate fault on the part of the legal person has explicitly been rejected by the *Cour de cassation.*[90] And, there are still other arguments that argue against a "double fault" requirement.[91]

In addition, the legal person is not given the means with which to exonerate itself from criminal liability, i.e., a special excuse or defense. Under art. 121-2 Penal Code, the commission of an offense by the organ or representative on behalf of the legal person, i.e., within the framework of the legal person's activities, suffices to trigger corporate criminal liability, whatever the behavior of the legal person itself. The only possibility for the legal person to avoid criminal liability is to demonstrate that the organ or the representative was not acting on its behalf. However, in so doing, the legal person does not really exonerate itself from criminal liability because it is showing that a condition of corporate criminal liability found in the text has not been met. The only real exceptions are provided in arts. 122-1 through 122-8 Penal Code. Yet, in reality, these could only conceivably apply to natural persons and do not include sound corporate governance in any case. It may still be possible for a company to benefit from the immunity of one of its directors.[92]

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[86] See, e.g., T. corr. Versailles, December 18, 1995, Dr. pénal 1996, 71, obs. Robert; JCP 1996, II 22640, n. Robert.

[87] For a presentation of their arguments, see Desportes 2002, para. 165.

[88] Delage 2005, No. 4 et seq.; Desportes 2002, No. 166 et seq.

[89] See Desportes 2002, paras. 166 et seq.

[90] Cass. crim., June, 26, 2001 *(Sté Carrefour)*, Bull. crim. 2001, No. 161; Dr. pén. 2002, comm. 8, n. Robert; *D.* 2002, somm., 1802, n. Roujou de Boubéé; JCP éd. E, February 21–28, 2002, Nos. 8–9, Jurisprudence, 375, n. Ohl.

[91] Desportes 2002, No. 166 et seq.

[92] On this question, Desportes 2002, para. 199.

5.9 Sanctions

French law categorizes criminal acts or omissions as felonies, misdemeanors, and minor offenses, and sanctions as pecuniary or non-pecuniary penalties. Whilst certain sanctions, such as imprisonment, may only be imposed on natural persons, others, which deprive or limit corporate rights or jeopardize proprietary interests, may be imposed on natural persons and legal persons alike. The penalties that can be imposed on a legal person are enumerated in arts. 131-37 through 131-49 Penal Code, the content and conditions of applicability of certain penalties being provided for in arts. 131-45 through 131-49 Penal Code. These provisions distinguish between penalties for felonies and misdemeanors, on the one hand (arts. 131-37 through 131-39 Penal Code),[93] and penalties for minor offenses, on the other (arts. 131-40 through 131-44 Penal Code).[94] A further distinction is made between pecuniary and non-pecuniary penalties.

5.9.1 Pecuniary Penalties

Legal persons principally incur fines whether they commit felonies, misdemeanors, or minor offenses. According to the *Conseil constitutionnel*, in its decision No. 82-143 DC of July 30, 1982, the imposition of a fine on a legal person is not opposed by any constitutional principle. In addition, according to art. 131-39 Penal Code, legal persons may be subject to other pecuniary sanctions. The principal pecuniary penalty incurred by legal persons, for all types of offense, is still the fine, however.

Note that there is no provision in French law that would authorize a legal person to sue its organs or representatives for the amount of the pecuniary penalties, which it had incurred due to that individual's or organ's offense.[95]

5.9.1.1 Fines for Felonies and Misdemeanors

The general and principal penalty for a felony or misdemeanor is the fine. In fact, according to art. 131-37 Penal Code, a fine is always available against

[93] For a detailed study, see Le Gunehec 2001 and Maréchal 2010a.

[94] Maréchal 2010b.

[95] This would also constitute a negation of the legal rule, which identifies legal persons with their organs and representatives. Above all, this possibility seems to be in direct conflict with the French principle of *personnalité des peines* (Le Gunehec 2001, para. 14). Even when the penalty takes the form of a fine, the criminal sanction does not constitute damage that can be sued for in civil court (Cass. crim., October 28, 1997, Bull. crim. 1997, No. 353, 1203; D. 1998, No. 20, 268, n. Mayer and Chassaing).

legal persons, even in the absence of an express provision in the text providing for the criminal liability of the legal person for the offense.[96] Further, though the French legislature has provided for alternative sanctions for most felonies or misdemeanors, there are some misdemeanors for which only a fine may be incurred.

The amount of the fine incurred by a legal person for felonies and misdemeanors is established by art. 131-38 Penal Code, which sets a maximum fine for legal persons of five times the rate provided for natural persons. When the law does not establish a rate for natural persons, the maximum fine is set at €1 000 000 by subsection 2. The quintuple limit is also applicable when the rate for natural persons is proportionate.

Though some French legal scholars heavily criticized these fines as too high,[97] they would seem be to justified by the fact that legal persons may have access to more wealth than natural persons.[98] A proposition to calculate the corporate fine as a multiple of a legal person's turnover was contemplated but rejected during Parliamentary debates. Such a solution would have encountered difficulties in proving a legal person's turnover and would have led to the introduction of several exceptions in the law due to the nature of certain legal persons; this would have been incompatible with the French principle of equality under law.[99]

5.9.1.2 Fines for Minor Offenses

Article 131-40 Penal Code contains the provision on penalties for minor offenses committed by legal persons. It provides for the systematic fining of legal persons even in the absence of an express provision in the regulatory texts specifying corporate criminal liability for such an offense. The fine is the form of penalty, which can be imposed in the first place in case of minor offenses.

The method for calculating the fine is identical to that applied to misdemeanors and felonies: by art. 131-41 Penal Code, a legal person may be required to pay no more than five times the amount applicable to natural persons in the offense provision.

Offenses are divided into five classes according to the maximum fine that could be imposed on a natural person under art. 131-13 Penal Code. Hence, the maximum fine applicable to a legal person for each of the five categories of offenses is €190 (€5 × 38) for the first class of offenses, €750 (€5 × 150) for the second class, €2 250 (€5 × 450) for the third, €3 750 (€5 × 750) for the fourth, and €7 500 (€5 × 1 500) for the fifth.

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[96] Le Gunehec 2001, para. 10.
[97] Boizard 1993, 332.
[98] Le Gunehec 2001, para. 12.
[99] Le Gunehec 2001, para. 12.

These fines are smaller than the fines incurred for felonies and misdemeanors. However, the fines for offense are cumulative according to art. 132-7 Penal Code.

5.9.1.3 Other Pecuniary Penalties for Felonies and Misdemeanors

Pecuniary penalties, other than fines, applicable to felonies and misdemeanors are listed in art. 131-39 Penal Code. This article establishes a non-exhaustive catalogue of penalties that may be imposed on a legal person. The listed penalties include the prohibition, for a term of 5 years at most, on the making of payments by check and the use of credit cards (art. 131-39(1), No. 7, Penal Code), as well as the confiscation of any object used or designated to commit the offense (art. 131-9(1), No. 8, Penal Code). Unlike fines, however, these penalties can only be imposed if the statute establishing corporate criminal liability specifically provides for the sanction.

5.9.1.4 Other Pecuniary Penalties for Minor Offenses

For minor offenses, alternative pecuniary penalties and complementary penalties may replace, or be imposed in addition to, a fine.[100] Thus, when a minor offense in the fifth class has been committed, art. 131-42 Penal Code grants courts the ability to replace the fine with an alternative or substitute penalty including the prohibition on writing checks or using credit cards for a maximum of 5 years and the confiscation of property used or designated to commit the offense or obtained through commission of such an offense. Complementary penalties for minor offenses are an innovation in French criminal law. Only two pecuniary, complementary penalties for minor offences targeting legal persons are provided for in the Penal Code: the confiscation of objects linked to the commission of the offense and, only concerning fifth class offenses, the prohibition against check payments for a period of no more than 3 years (art. 131-43 Penal Code). Under art. 131-44 Penal Code, a criminal court may also impose these as principle penalties when an offense may be sanctioned by one or more complementary penalties provided for in art. 131-43.

Lastly, the court can, in the case of fifth class minor offenses, impose, in lieu of, or in addition to, fines, a *sanction-réparation* according to the modalities set out in art. 131-8-1 Penal Code.[101] In this case, the court determines the amount of the fine, which may not exceed €7 500. In the case the legal person does not fulfill its obligations to remedy, the court can

[100] For an in-depth study, see Maréchal 2010b, paras. 6 et seq.

[101] For a detailed study, see Maréchal 2010b, paras. 27 et seq.

order the execution of such a fine, in toto or in part, according to art. 712-6 Code of Criminal Procedure *(Code de procedure pénale)*.

5.9.2 Non-pecuniary Sanctions

Penalties applied to felonies and misdemeanors incurred by legal persons are listed in art. 131-39 Penal Code. This article establishes a non-exhaustive[102] catalogue of penalties that can be incurred by legal persons. Unlike fines, which are systematically incurred, these penalties can only be imposed on a legal person if the statute providing for the criminal liability of a legal person explicitly provides for the sanction in question.

Penalties for minor offenses are only of a pecuniary nature; however, they can be aggravated by recidivism.

5.9.2.1 Dissolution

The dissolution of the legal person, provided for by art. 131-39(1), No. 1, Penal Code is the harshest non-pecuniary sanction. Due to the gravity of this penalty, the legislator opted to limit its application according to certain conditions and to limit the number of offenses to which this penalty may apply.[103] It also excluded certain legal persons from its scope altogether.

Article 131-39(1), No. 1, Penal Code sets out the conditions for the imposition of dissolution as a penalty: the offense may only be punished with such a penalty if the legal person was created with the purpose of committing the offense or – in the case of a felony or misdemeanor punished with at least 3 years of imprisonment in the case of a natural person – if it was perverted from its purpose in order to commit the offense. Thus, the mere fact that the statute establishing the possibility of corporate criminal liability provides that legal persons may be sanctioned with dissolution is not sufficient for the court to impose such a penalty.

This article foresees two scenarios. In the first scenario, it must be shown that, at the moment of its creation, the legal person's objective was to commit this offense. This requirement raises several questions and challenges of proof.[104] Thus, legal scholars have applauded Law No. 2001-504 of June 12, 2001, which limited its scope. The second scenario applies if the felony and misdemeanor in question could be sanctioned by a term of imprisonment of at least 3 years were the defendant a natural person. In such cases, it is sufficient that the legal person was perverted from its purpose at the time the offense was committed. Some legal scholars argue that this

[102] Le Gunehec 2001, para. 15.

[103] Maréchal 2010a, para. 38 and paras. 44 et seq.

[104] For a detailed analysis, see Le Gunehec 2001, para. 23.

is not a real condition: from the moment that the legal person commits an offense – if it is not established that it was founded to pursue this objective – the purpose of the legal person is necessarily perverted.[105]

In both scenarios, it seems necessary to establish some sort of intention on the part of the legal person to commit the offense. Indeed, the law requires that the legal person was created with the purpose of committing the offense or, when a legal person's purposes are perverted, in order to commit an offense. It implies, according to some scholars,[106] that the sanction of dissolution is reserved for intentional offenses. However, this penalty had also been provided for in relation to certain unintentional offenses.

Further, it would seem that dissolution should be imposed only in the gravest cases or when the offense presents a particular danger; not surprisingly, the majority of cases that end in dissolution are intentional felonies or intentional misdemeanors. That said, dissolution is not provided for in relation to certain grave offenses for which the criminal responsibility of the legal person has been established, such as aggravated theft, criminal theft, and criminal destruction of property, and dissolution may be imposed for offenses of lesser gravity, such as the drafting of an attestation or certificate stating materially inaccurate facts (art. 441-7 Penal Code). This seems incoherent and unjustified.

Finally, dissolution is impermissible in relation to public law legal persons, political parties or groups, trade associations, and institutions representing workers on constitutional grounds (art. 131-39(3) Penal Code).

5.9.2.2 Prohibiting the Direct or Indirect Exercise of One or More Professional or Social Activities

Article 131-39(1), No. 2, Penal Code provides for a further harsh penalty: the "prohibition, permanently, or for a term of 5 years at most, on the performing, directly or indirectly, of one or several professional or social activities". This sanction can have as the indirect consequence the dissolution of the legal person, particularly a company, if the forbidden activity is the objective of the company or if the prohibition renders the company financially untenable. The sanction can be imposed definitely or for a maximum term of 5 years. The court can thus opt for a determinate penalty of no more than 5 years.[107] For certain offenses, however, only a determinate penalty of less than 5 years can be imposed, and thus the court has no choice. This penalty applies, at least in theory, to an important number of offenses.

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[105] Le Gunehec 2001, para. 23.

[106] Le Gunehec 2001, para. 24.

[107] Le Gunehec 2001, para. 33.

The features of this penalty are set out in art. 131-28 Penal Code. The prohibition can target the social or professional activity in the exercise of which or on the occasion of which the offense was committed or any other professional or social activity defined by the law punishing the offense.[108] Certain scholars contend that this leads to ambiguity: the majority of these statutes specify that only the social or professional activity exercised in the commission of the offense may be prohibited, and a small minority remain silent.[109] In the latter cases, scholars contend courts are able to impose whatever penalty they see fit; a different interpretation would render the distinctions found in special criminal law provisions meaningless.[110]

Unlike dissolution (or judicial surveillance, discussed next) there are no exceptions *ratione personae* to the scope of this penalty's application: all legal persons can be stripped of the right to perform these types of activities. Legal scholars have asked if it would not be preferable to exclude public law legal persons: it seems contrary to the principle of continuity of public services that a court may prohibit a territorial authority or an establishment under public law from continuing to perform its functions.[111] Further, we should note that the third subsection of art. 131-27 Penal Code excludes prohibitions for crimes concerning the press, though the exact boundaries of this exception are sometimes difficult to ascertain.

5.9.2.3 Placement of the Entity Under Judicial Surveillance

Judicial surveillance is provided for by art. 131-39(1), No. 3, Penal Code. This penalty is attached to a significant number of offenses. It only applies to legal persons; however, due to its invasiveness, it cannot be imposed on public law entities, political parties or groups, or trade associations (art. 131-39, last subsection, Penal Code). Moreover, the penalty cannot be imposed for more than 5 years. Finally, a number of scholars would prefer that the legislator or, in the default, the executive or judiciary through regulations or case law, further determines the boundaries of this penalty.[112]

The nature of the judicial surveillance as a penalty is elaborated in art. L. 131-46 and art. R. 131-35 Penal Code. Article L. 131-46 Penal Code states that the decision to place a legal person under judicial supervision should permit the appointment of a judicial supervisor whose mission is defined by the court. This supervisory mission is limited to the activity during the exercise of which, or in the course of which, the offense was committed.

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[108] Le Gunehec 2001, para. 34.
[109] Le Gunehec 2001, para. 34.
[110] Le Gunehec 2001, para. 34.
[111] Le Gunehec 2001, para. 35.
[112] Le Gunehec 2001, para. 43.

The mission is also limited to the surveillance of the legal person's activities. Every 6 months, the judicial supervisor must inform and report on the progress of his/her mission to a judge.

Legal scholars often classify this penalty as a substitute suspended sentence in cases where the surveilling judge in the area of the offender's habitual residence lacks jurisdiction. Indeed, this penalty allows the judicial authorities to monitor the future behavior of a legal person that has committed a crime to prevent recidivism.[113]

5.9.2.4 Closing of One or More Establishments

Article 131-39(1), No. 4, Penal Code enables the court to order the closure of one or more establishments operated by the corporation and used to commit the criminal conduct in question. This sanction may be permanent or, if temporary, imposed for a maximum period of 5 years. According to art. 131-33 Penal Code, the closing of one or more establishments is achieved through the prohibition on the exercise, on those premises, of the activity that occasioned the commission of the offense; thus, the code does not call for the closing of the establishment, pure and simple.

5.9.2.5 Exclusion From the Public Marketplace

The sanction of exclusion from the public market for legal persons is provided for by art. 131-39(1), No. 5, Penal Code. This penalty can be imposed indefinitely or for a maximum period of 5 years.

According to art. 131-34 Penal Code, this penalty prohibits the convicted entity from participating, directly or indirectly, in any contract concluded with the state and its public bodies, companies hired or monitored by the state, and territorial authorities, including their associations and public bodies. Depending on their business, this can be a very harsh penalty for companies.

5.9.2.6 The Prohibition Against Public Offerings or Listing of Securities on a Regulated Market

Article 131-39(1), No. 6, Penal Code outlines the penalty by which legal persons are prohibited, permanently or for a maximum of 5 years, from publically offering securities or listing securities on a regulated market.

According to art. 131-47 Penal Code, this prohibition disallows appeals for the placement of securities to any banking institution, financial establishment, or stock market company, as well as any form of advertising for the placement of securities.

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[113] Le Gunehec 2001, para. 38.

5.9.2.7 Notification or Publication of the Decision

Finally, under art. 131-39(1), No. 9, Penal Code, a company may be ordered to post a notice of the sentence pronounced against it or to publicize the sentence in the press or by any means of telecommunication. The content and terms of application of this sanction are stated in art. 131-35 Penal Code.

Notification or publication of the verdict would seem to be an appropriate and efficacious sanction for legal persons, especially companies. For this reason, it is often provided for by the legislator. However, as scholars regularly point out, this penalty may be no less harsh than the other penalties since it may "have fatal consequences for the survival of a company".[114]

5.9.2.8 Penalties Incurred for Specific Offenses

Certain penalties, specific to certain offenses, are not enumerated in art. 131-39 Penal Code but are presented as complementary penalties in the provision of special criminal laws.[115] These are:

- the confiscation of all or a part of the legal person's goods for crimes against humanity, the trafficking of drugs, and acts of terrorism under arts. 213-3, No. 2, 222-49(2), and 422-6 Penal Code;
- the confiscation of all equipment, materials, and goods used to commit the offense, as well as all products resulting from the offense, if the owner could have known of their fraudulent origins and/or uses for the traffic of drugs under art. 222-49(1) Penal Code;
- the confiscation of all goods, other than real estate, used to commit the offense, as well as any products of the offense possessed by a person other than the persons engaged in prostitution in the case of procuring for prostitution under art. 225-24, No. 1 Penal Code;
- the withdrawal of a liquor or restaurant license or the definitive closure for no more than 5 years of an establishment in which the offenses of drugs trafficking or prostitution were committed under arts. 222-50 and 225-22, Nos. 1, and 2, Penal Code;
- the confiscation of commercial funds in the case of procuring for prostitution under art. 225-22, No. 3, Penal Code;
- the reimbursement of the costs of repatriation of the victim(s) in the case of procuring for prostitution under art. 225-24, No. 2, Penal Code; and
- the confiscation of falsified or counterfeited coins or bank notes in the case of counterfeiting under art. 442-14, No. 3, Penal Code.

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[114] T. corr. Versailles, December 18, 1995, see above n. 86.

[115] For a detailed study, see Le Gunehec 2001, para. 71.

5.9.3 Sanctioning Principles

There are no general principles in French criminal law that the judge must respect when deciding the penalties to be applied to a convicted legal person. The French principle of *personnalité des peines*, set forth in art. 132-24 Penal Code, provides that each penalty depends entirely on the circumstances of the case at hand. With this principle in mind, the court determines, *in concreto*, the apposite sanction. The circular concerning the application of the Perben II Law restates this principle, reiterating that each penalty should take into account the circumstances of the offense and the personality of the author; in the case of legal persons, this would be the charges at hand and its economic resources.[116] Hence, it is impossible to identify a set of clear principles that the court would be obliged to respect in sanctioning corporate offenders.

Nonetheless, it is still possible to derive some guidelines from the Penal Code. First, the penalties enumerated in art. 131-39 Penal Code are specific to legal persons, even if certain sanctions could be applied to legal and natural persons. In fact, it is arguable that sanctions for legal persons should adhere to a proper and exclusive regime due to the particular nature of legal persons themselves and the particularity of corporate criminal responsibility.[117] Further, the selection of the penalties that may be imposed reflects preventive objectives.[118] In addition, it is possible to deduce the principle that the sanctions provided for by arts. 131-39 and 131-43 Penal Code are special penalties in that they may only be imposed if specific regulatory or legislative provisions so provide.

5.10 Procedural Issues

The introduction of corporate criminal liability also supposes specific procedural rules as legal persons cannot be treated the same as natural persons during the course of a trial. This is why Title XVIII was introduced into Book IV of the Code of Criminal Procedure by art. 78 of the Law No. 92-1336 of December 16, 1992, concerning the coming into force of the new Penal Code and the necessary adaptations. The procedural rules concerning legal persons can thus be found in arts. 706-41 through 706-46 Code of Criminal Procedure.[119]

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[116] Le Gunehec 2001, para. 83.

[117] Le Gunehec 2001, para. 3.

[118] Le Gunehec 2001, para. 3.

[119] These provisions should be completed by those in arts. 550 et seq., relative to the citations and meaning, which were the object of certain adaptations, and by those found in Penal Code arts. 131-49 and 131-36, requiring that the staff representatives of the charged legal person are informed of the trial date.

Article 706-41 Code of Criminal Procedure indicates that the provisions of this code are normally applicable to the proceeding, the preliminary investigation, and the judgment of offenses committed by legal persons, subject to the specific rules provided for in arts. 706-42 through 706-46 of that code. Thus, the majority of the rules of criminal procedure applicable to natural persons also apply, in principle, to legal persons; particular rules may, however, provide to the contrary.[120]

5.10.1 The Decision to Prosecute

Three points may be made about the discretion of French prosecuting authorities to decide whether to prosecute a legal person, on the one hand, and the differences between its approach to human and corporate suspects, on the other. First, under art. 40 Code of Criminal Procedure, the public prosecutor is free to decide whether to press charges against a legal person just as it is free to decide whether to charge a natural person. That said, in pressing the same charges against a natural and a legal person, the prosecutor may evaluate the case differently. Second, the principle of cumulative liability, found in art. 121-1 Penal Code, allows for proceedings against both the natural person, who is allegedly responsible for the crime, and the legal person; however, the prosecutor is free to decide to only charge one or the other suspect. Third, if it is provided by law, the prosecutor may propose a *procédure de transaction*, which is an exchange similar to a plea bargain, with the legal person.

5.10.2 Jurisdiction

Article 706-42 Code of Criminal Procedure establishes specific rules on jurisdiction for legal persons. The article provides that, when a legal person is investigated or prosecuted, the jurisdiction(s) in which the offense was committed, or in which the legal person's head office is located, has/have jurisdiction. However, the first subsection of art. 706-42 Code of Criminal Procedure specifies that, when a natural person is charged along with the legal person with the same or a connected offense, the courts in which the natural person is prosecuted may also hear the case against the legal person. The latter can thus be brought before the jurisdiction of the place of arrest or residence of one of the natural persons charged. However, the general circular of the *Garde des sceaux* of May 14, 1993 observes that the principle does not apply in reverse: a court does not have jurisdiction over a natural person, just because it has jurisdiction over a legal person. It would

[120] Desportes/Le Gunehec 1995.

seem to follow that a jurisdiction in which the head office of a legal person is situated only has jurisdiction over human suspects if it is also competent regarding these natural persons according to the criteria found in arts. 43, 52, 382, and 522 Code of Criminal Procedure.[121] However, a number of legal scholars contest this interpretation.[122]

In addition, the last subsection of art. 706-42 Code of Criminal Procedure states that the specific dispositions laid out in that article do not exclude the application of the rules of jurisdiction outlined in arts. 705 and 706-17 concerning economic, financial, and terrorist offenses. The same applies for the application of the rules in art. 706-27 Code of Criminal Procedure, which created a special trial court for drug and narcotics trafficking crimes.

5.11 Conclusions

The concept of corporate criminal liability was long and extensively discussed in France before it was recognized in French law on March 1, 1994. The vast large majority of French legal scholars accept today the necessity and the value of corporate criminal liability, even if some of its issues are still hotly debated among them. Nonetheless, legal persons, such as corporations, are rarely punished criminally in practice and, from a comparative perspective, there are a number of important differences between the French law, the scope, conditions, penalties, and procedural aspects of its corporate criminal liability rules, and the laws in other countries where corporate criminal liability has been adopted.

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[121] Desportes/Le Gunehec 1995, no. 61.
[122] Desportes/Le Gunehec 1995, no. 61.

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Chapter 6
Corporate Criminal Liability in the Netherlands

Berend F. Keulen and Erik Gritter

Contents

6.1 Introduction

This chapter will provide a brief overview of the concept of corporate criminal liability in the Netherlands.[1] Following a description of the historic development of this concept, attention will be paid to the substantive law regarding corporate liability – including the concept of secondary liability and defenses – and to specific rules for the trial and the punishment of legal

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[1] See, for a more extensive treatment of the subject, Gritter 2007. For a recent treatise in English, see De Doelder 2008.

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persons.[2] Special attention will also be paid to the position in Dutch criminal law of public law legal persons, such as the provinces. The chapter will be completed with a short evaluation of the concept of corporate criminal liability in the Netherlands.

6.2 Historical Development

At the time the Dutch Penal Code (DPC) came into force in 1886, the legislator was of the opinion that criminal offenses could only be committed by natural persons.[3] This opinion was strongly influenced by the "classical ideas" of German scholars, such as von Feuerbach and von Savigny. There was, of course, an awareness of the fact that corporations existed. To deal with crimes committed in a corporate context, several offenses were designed which addressed the officers of a legal person.[4] This was done under regulatory law and within the DPC.

The next important step in the development of corporate criminal liability was taken *outside* the formal boundaries of criminal law. During the Great Depression, the Dutch legislator was confronted with exceptional circumstances that called for exceptional measures. In order to combat the consequences of the depression effectively, the Dutch legislator developed a special branch of law that was disciplinary in nature and which made it possible, amongst other things, to prosecute and punish corporations. The legislator was of the opinion that the official body of criminal law was not a suitable mechanism with which to combat the economic crisis. An adaptation of the criminal law was deemed inappropriate because it was believed that the special measures would only be temporary: as soon as the depression ended, the special disciplinary law was to be abolished. The depression, however, was followed by the Second World War. The special disciplinary law was maintained during the war in order to regulate, as far as possible, the economy in that period.

After the war, the legislator paid special attention to the enforcement of economic law. With the development of several special measures to address the depression and regulate the economic situation during the war – within and outside the field of criminal law – the rules governing the criminal and quasi-criminal enforcement of economic law had become quite diffuse. The law had become such that, in certain cases, several criminal and quasi-criminal courts were competent. In 1951, a new act was passed

[2] In this chapter, the words "corporation" and "legal person" will be used as synonyms, although not every legal person in Dutch criminal law is necessarily a corporation.

[3] Gritter 2007, 33 et seq.

[4] In particular, *bestuurders* and *commissarissen* (managing directors and supervisory directors).

to unify the rules governing the investigation, prosecution, and punishment of economic crimes. The quasi-criminal, disciplinary branch of the law that had become so important was abolished.

This new act, the Economic Offenses Act (EOA), applied, and continues to apply, to the enforcement of economic offenses. Economic offenses were – and remain – a group of regulatory offenses that are usually, but not always, of an economic nature and labeled as such by the legislator. The legislator was of the opinion that effectively combating these economic crimes would require special substantive and procedural rules. According to the legislator, the special features of economic offenses necessitated a different approach than was appropriate for other, non-economic offenses. One of the special substantive rules for the combating of economic offenses was set out in art. 15 EOA. This article established that economic crimes could be committed by legal persons and that legal persons could be prosecuted and punished. Accordingly, since 1951, the criminal liability of corporations has been accepted in the Netherlands in the field of economic regulatory law. In the explanatory notes to the EOA, the Dutch legislator gave criminal liability, not only a practical basis, but also a more fundamental one. It stated that the acceptance of corporate criminal liability made it possible to apply appropriate sanctions in this field of law, such as the suspension of business activities.[5] In addition, the government expressed the view that corporations should have legal personality in this area of law and were susceptible to punishment: "Corporations also have a name to lose."[6]

Article 15(2) EOA listed a number of factors that a criminal court could take into account when determining whether a particular corporation had committed a particular economic offense. It provided, for instance, that an economic offense is committed by a corporation, if the offense was actually committed by natural persons who acted within the scope of the corporation's activities (e.g., on the basis of their employment), regardless of whether any particular individual committed the offense or whether the offense was committed by a number of individuals acting collectively. In the explanatory notes to the EOA, the government stated that liability could also be established on the basis of other factors, for instance in case the crime was addressed to persons acting in a certain capacity (e.g., as "employer") or in relation to crimes of omission.[7]

Article 15 EOA was repealed in 1976, when a general provision regarding corporate criminal liability came into force: art. 51 DPC. To this day, this article is regarded as the basis for corporate criminal liability in Dutch criminal law in *every* area of the criminal law.

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[5] Official Parliamentary Documents 1947/48, 603.3, 19.

[6] Official Parliamentary Documents 1947/48, 603.3, 19.

[7] Official Parliamentary Documents 1947/48, 603.3, 19.

6.3 The Dutch Concept of Corporate Criminal Liability

6.3.1 The Reforms of the Mid-1970s: Art. 51 DPC

Since 1976, a corporation under Dutch criminal law has been able to commit any offense in principle.[8] Its liability is therefore no longer restricted to the class of "economic offenses". Article 51 DPC states:[9]

1. Offenses can be committed by natural persons and legal persons.
2. If an offense has been committed by a legal person, prosecution can be instituted and the punishments and measures provided by law can be imposed, if applicable, on:

    1. the legal person, or
    2. those who have ordered the offense, as well as on those who have actually controlled the forbidden act, or
    3. the persons mentioned under 1. and 2. together.

3. For the application of the former subsections, equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purpose.

When an offense is committed by a legal person, the prosecution service decides whether the corporate suspect will be prosecuted, or any other natural or legal person for ordering or controlling the offense. Criteria for this decision are not laid down in the DPC.[10] The establishment of corporate criminal liability will be discussed in the following section. We will address the *actus reus* and the *mens rea* of an offense, as well as grounds for defense and justification. However, we will first consider the scope of art. 51 DPC: the legal entities that can commit an offense.

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[8] De Hullu 2009, 163. Some scholars tend to restrict the scope of art. 51 DPC by excluding offenses of a more physical nature, such as rape. In our opinion, a corporation can be criminally liable regardless of the nature of the offense. Whether a corporation in a particular case should be prosecuted for a more physical offense, like rape or battery, is another matter. (Please note that the Dutch prosecution service *[Openbaar Ministerie]* does not operate a system recognizing the principle of mandatory prosecution, meaning that the legality principle does not apply).

[9] The translation is an adaptation of the one used by De Doelder 2008, 566.

[10] In several cases, however, the prosecution service is bound by its own policy rules regarding this decision.

6.3.2 Legal Persons in Criminal Law

According to art. 51 DPC, offenses can be committed by "legal persons". Therefore, in applying art. 51, the first question is whether a particular entity has legal personality. The answer to this question is found primarily in Dutch private law. In arts. 2:1, 2:2, and 2:3 Dutch Civil Code (DCC), legal personality is, for instance, attributed to the *besloten vennootschap* (BV, i.e., a limited company) and to the *naamloze vennootschap* (NV, i.e., a public limited company). Legal personality has also been attributed to state organs, such as the provinces, though special problems surrounding the prosecution of state organs will be discussed separately, at 6.4.

Article 51(3) widens the scope of the criminal law by stating that certain entities without legal personality in civil law can nevertheless commit offenses. Its list includes collective entities such as firms and partnerships but it excludes sole traders. In the case of sole trader enterprises, the owner of the business may, under certain circumstances, be "vicariously liable" for offenses committed within the scope of his/her business.[11]

6.3.3 Secondary Liability

Article 51(2) DPC provides for secondary liability if an offense is committed by a legal person. It covers natural and legal persons who order the commission of an offense and persons who "actually control" the commission of such an offense. This secondary liability is not limited to the "formal" officers of a legal person (e.g., its directors) nor to persons who act as if they hold an official position within the legal person. As a result, employees without any authority may be held criminally liable within the framework of art. 51(2) DPC.[12] In addition, it enables punishment of mere passive involvement in an offense committed by a legal person. The Dutch Supreme Court (DSC) has ruled that "conditional intent" *(dolus eventualis)* suffices, in any event, for this form of secondary liability.[13]

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[11] Usually, the liability of the owner of a business is termed "vicarious liability". In Dutch law, however, the question of liability of the owner always amounts to a question of whether the owner has himself committed the offense. See also below at 6.3.4.1.

[12] See Wolswijk 2007, 86.

[13] See DSC, December 16, 1986, Nederlandse Jurisprudentie (NJ) 1987, 322; DSC, December 16, 1986, NJ 1987, 322 *(Slavenburg)*. See for an extensive analysis of art. 51(2) DPC, Wolswijk 2007, 81 et seq.

6.3.4 Criminal Liability

6.3.4.1 Actus Reus

During the twentieth century, Dutch courts developed several "criteria" or "factors" that were relevant to establishing the criminal liability of a corporation. As the factors and criteria were quite different, the core principles of corporate criminal liability were rather diffuse and elusive. In one case, the fact that the corporation had gained from the offense (made a "profit") was decisive;[14] in another, criminal liability was grounded on a finding that the offense (water pollution) was committed during the "normal conduct of the company's business".[15] The pollutant emerged during the normal, everyday production processes of the company's factory.

Several cases indicated that the "criteria" that had previously been developed to establish the vicarious liability of the owner of a sole-trader enterprise could also be decisive to establishing the criminal liability of a corporation. These criteria originated from a case that raised the question of whether the owner of a business (a natural person) could be held criminally liable for several offenses actually committed by an employee.[16] The employee had illegally exported goods and made untrue statements in export documents. In general terms, the DSC ruled that an owner could be held criminally liable for the conduct of his/her employee if the conduct was at his/her "disposal" (or if the owner could have intervened to prevent the offense), and if, having regard to the course of events, it could be said that the owner had "accepted" the conduct. These criteria – in short, "disposal and acceptance" – were subsequently applied by the DSC in relation to the establishment of corporate criminal liability in several cases.[17] Several authors argued that these criteria ought to be regarded as the main factors for establishing corporate criminal liability.

In 2003, the DSC clarified the law by providing a general ruling on how corporate criminal liability is established.[18] The Supreme Court ruled that the *basis* for criminal liability is, in any event, the "reasonable" attribution of (illegal) conduct. Accordingly, a corporation can only be held criminally liable if there is an (illegal) act or omission that can be "reasonably" imputed to it. To make this more concrete, the DSC provided a guiding principle for "reasonable attribution": the attribution of certain (illegal) conduct to the corporation may under certain circumstances be reasonable if the (illegal) conduct took place within the "scope" of the corporation. The

[14] DSC, January 27, 1948, NJ 1948, 197.

[15] DSC, February 23, 1993, NJ 1993, 605.

[16] DSC, February 23, 1954, NJ 1954, 378 *(IJzerdraad)*.

[17] See DSC, July 1, 1981, NJ 1982, 80; DSC, January 14, 1992, NJ 1992, 413; DSC, November 13, 2001, NJ 2002, 219.

[18] DSC, October 21, 2003, NJ 2006, 328 *(Drijfmest)*.

DSC then summed up with four situations (or "groups of circumstances") in which conduct will, in principle, be carried out "within the scope of a corporation":

- The act or an omission was allegedly committed by someone who works for the corporation, whether under a formal contract of employment or not.
- The impugned act or omission was part of the everyday "normal business" of the corporation.
- The corporation profited from the relevant conduct.
- The allegedly criminal course of conduct was at the "disposal" of the corporation and the corporation "accepted" the conduct, that acceptance including the failure to take reasonable care to prevent the act or omission from being carried out.

The circumstances enumerated can all be traced back to earlier decisions and earlier legislation. However, the decision by the DSC to extend the circumstances or criteria that are of relevance in establishing "vicarious liability" – the criteria of "disposal and acceptance" – was a remarkable innovation. In the 2003 decision, the DSC also ruled that a corporation may be found to have accepted a course of action, if it had failed to take reasonable care to prevent the conduct in the first place. Previously, several authors had argued that the criterion of "acceptance" came down to some form of intent. The 2003 case showed, however, that, while acceptance *can* come down to proof of intent, proof of intent is not necessary. Mere proof of a failure to take appropriate steps to prevent criminal harm may establish acceptance.

The DSC case has clarified the concept of corporate criminal liability, but it has not solved every problem, of course. The exact meaning of the case is still discussed and will probably continue to be debated. The debate focuses on the precise meaning of each criterion, i.e., the scope of each circumstance, the weight accorded to the various circumstances, and the true meaning of "reasonable attribution of (illegal) conduct" as the basis for corporate criminal liability. In our view, the Dutch approach towards corporate criminal liability can be characterized as "open": there is no rigorous theory to turn to for guidance. In particular, Dutch criminal law does not recognize a theory, such as the "identification doctrine", in which senior executives alone can cause the corporation to be liable. In fact, any employee can cause its corporate employer to commit an offense in Dutch criminal law so long as the facts can be construed to show that the corporation ultimately "committed" the offense. As has been shown, other factors may also lead to corporate criminal liability.

The Dutch approach may put some pressure on legal certainty but it has several advantages, in our opinion. The open approach leaves room for "tailor-made" jurisprudence, in which the courts are free to weigh relevant

circumstances and factors. It acknowledges that the possible variation in cases is, in fact, endless. As long as the reasoning in a verdict is sufficient, the jurisprudence will be transparent.

6.3.4.2 Mens Rea

In the 2003 case on corporate criminal liability the DSC limited its considerations explicitly to the *actus reus* of the offense.[19] As the case has no direct relevance to the establishment of the mental element of a crime in relation to a corporation, the law on this point has to be found elsewhere. It should be noted that this section is mainly concerned with offenses that require proof of a mental element: the so-called *misdrijven*. As far as misdemeanors or contraventions (*overtredingen*) are concerned, the prosecuting authority is usually relieved of the burden to prove a mental element. In such cases, proof of a criminal *actus reus* suffices for punishment.[20]

DSC case law shows that there are roughly two approaches to establishing corporate "intention" and "negligence", which are the main subjective elements in Dutch criminal law. A first "indirect" way to establish *mens rea* comes down to the *attribution* of a natural person's mental state to the corporation.[21] A natural person's intention can, thus, in certain circumstances be "ascribed" to the corporation. A second, more "direct", way is to derive corporate *mens rea* from other circumstances closely related to the corporation itself, such as its policies and decisions. By means of its agents, a corporation may make a confession, for example.[22] Alternatively, a corporate representative could state in court that it was known within the corporation that fraudulent acts took place but that management had decided not to take any action. It could, thus, be proved that the *legal person* intended the fraud.

The "direct" way of establishing the *mens rea* of a corporation is particularly suited to cases of gross negligence. In Dutch criminal law, gross negligence can be derived "objectively" from the failure to act according to standards of conduct. If the failure to meet the standards causes death, for instance, manslaughter by gross negligence may be established.

6.3.4.3 Justification and Excuse

Like natural persons, corporations can raise defenses that, if accepted, will justify, or excuse, otherwise unlawful conduct. In theory, a legal person may plead any defense a natural person could raise under Dutch criminal law. Of

[19] The case concerned a misdemeanor that did not require proof of a mental element.

[20] Insofar as grounds for excuse or justification are absent; see below at 6.3.4.3.

[21] See for an example, DSC, October 15, 1996, NJ 1997, 109.

[22] See DSC, March 14, 1950, NJ 1952, 656.

these defenses, the extra-statutory (unwritten) general defense of "lack of sufficient culpability" requires special attention. This exculpatory defense contains several specific important grounds for exculpation, including the exercise of "due diligence". In relation to a corporation, a defense of due diligence, successfully raised, will most probably have the effect of rebutting proof of the *actus reus*. This is, at least in theory, a logical consequence of the 2003 DSC case, in which the "acceptance of conduct performed" (one of the criteria for vicarious liability) was said to include "the taking of reasonable steps to prevent the commission of the offense".[23]

6.3.5 Sanctions

There is no section in the DPC regulating the sanctions that can be applied to a convicted legal person. It must be deduced from the nature of the particular criminal sanction whether it is applicable.

As far as the primary sanctions are concerned, only the fine is relevant. The DPC sets a maximum fine for each criminal offense. There are six categories. The maximum for the first category is €380; the maximum for the sixth category is €740 000. Every criminal offense is assigned to one of the first five categories. However, where a legal person is convicted and the applicable category does not allow for appropriate punishment, a fine from the next higher category may be imposed (art. 23(7) DPC). Therefore, if the criminal offense is assigned to the fifth category (€76 000), a fine of €760 000 may be imposed on a legal person. The question remains whether €760 000 is an appropriate punishment in the most serious cases.

Of course, imprisonment is not an option in sentencing legal persons. Dutch criminal lawyers also generally assume that the same is true of community service since a legal person cannot be imprisoned if it does not carry out the order and the DPC does not provide the option of a subsidiary fine.

Secondary sanctions under the DPC are the forfeiture of certain rights, forfeiture of assets, and publication of the verdict; only the latter two sanctions can be imposed on legal persons. Publication of the verdict can be a very effective sanction but is not often imposed, perhaps because the media attention surrounding the prosecution will usually have damaged the legal person's reputation already.[24]

In addition to these punitive and deterrent sanctions, the DPC also provides for the imposition of "measures". Those which relate to the mental health of the convicted person are clearly irrelevant to legal persons. Another measure concerns the prohibition of the circulation of property

[23] See for this effect of the defense of "lack of sufficient culpability", De Hullu 2009, 169; Gritter 2007, 57.

[24] Court of Rotterdam, June 13, 2000, LJN: AA6189 (www.rechtspraak.nl).

(Article 36c/36d DPC). This measure can also be applied to property belonging to a legal person. Consider, for instance, shirts imported without a permit.[25]

The DPC also provides a measure permitting the imposition of an obligation to pay a specified sum of money corresponding to unlawful profit (art. 36e DPC). This measure can also be imposed on legal persons. The same is true for a compensation measure – an obligation to pay a specified sum to the state on behalf of the victim (art. 36f DPC). The state then hands the money over to the victim.

Looking beyond the DPC, there are specific secondary sanctions which can also be imposed on legal persons. Of particular relevance is the EOA and its offenses relating to the regulation of economic activities, including environmental law.[26] If a legal person is convicted of such a crime, it is possible, not only that the verdict will be published and extended forfeiture ordered, but also that some or all of the activities of the legal person may be suspended for a maximum term of 1 year. This sanction has, for instance, been imposed on a legal person convicted of selling dairy products not fit for human consumption.[27]

If the interests in question are such that action should be taken immediately, the court may order a temporary cessation of all or some of the legal person's activities. Such a temporary measure was imposed, for example, on a shipyard where working conditions were unsafe.[28] Evading such a measure is a criminal offense according to the EOA. The courts may also order the withdrawal of advantages granted to a corporation by public authorities, such as grants or permits, for a maximum term of 2 years under the EOA; however, this sanction is only occasionally imposed.

Where a criminal offense is deemed to be related to the regulation of economic activities, a few specific measures are also available. The court may hand over control of specified economic activities of the convicted person to another person. And, it may oblige the convicted legal person to do whatever it omitted in breach of the law or to undo whatever it did contrary to the law at his/her (at its) expense unless the court decides otherwise. Again, these two measures are also only occasionally imposed.

Finally, a legal person may be dissolved before, during, or after prosecution for a criminal offense. This can affect the options for sanctioning the legal person and the possibility of executing such sanctions. If the legal person is indicted after its dissolution was knowable to a third party, the right to prosecute is lost; however, those responsible for the criminal

[25] DSC, January 10, 1984, NJ 1984, 684.

[26] The EOA is not only applicable to legal persons: depending on the offense in question, a natural person can also commit an "economic offense".

[27] Court of Appeal of Den Bosch, December 12, 2006, LJN: BH9824.

[28] Court of Middelburg, February 9, 2009, LJN: BH2342.

offense committed by the legal person may still be prosecuted. Conversely, if the legal person is indicted before its dissolution was knowable to a third party, the right to prosecute is preserved.[29] If a legal person transfers economic activities connected to a criminal offense to a second legal person, the first legal person can still be prosecuted.[30]

6.4 The Special Position of Public Law Legal Persons

Article 51 DPC states that criminal offenses can be committed by natural and legal persons.[31] The DCC states that the state and any province, municipality, or district water boards are legal persons. The same is true for many other public law organizations. Consequently, public law legal persons can, in principle, commit criminal offenses.

The DSC has indeed acknowledged this possibility. In 1987, for instance, it upheld the conviction of the University of Groningen[32] for excavating a burial mound in Anloo without the requisite permit. The DSC stated that the university could not claim immunity because it was not a public body falling under Chapter 7 Dutch Constitution. Immunity can only be claimed, therefore, by this kind of "constitutional" public body.

Little more than 10 years later, the DSC clarified the circumstances in which a body under Chapter 7 Dutch Constitution may claim immunity from prosecution. Quashing a decision of the Court of Appeal in Leeuwarden to grant immunity to a municipality,[33] the DSC decided that the immunity of public bodies falling under Chapter 7 Dutch Constitution only applies when, as a matter of law, the acts concerned could only, according to the law, be executed by civil servants acting within the framework of the body's assigned tasks. This new criterion reduced the immunity of public bodies under Chapter 7 Dutch Constitution, and, since then, immunity has been rarely accepted. In 2008, for instance, the DSC upheld the conviction of a municipality for tax fraud in connection with a housing project.[34]

The state, however, still enjoys immunity. In 1994, the DSC decided that the state could not be convicted for acts committed by the Ministry of Defense, which allegedly contravened environmental law.[35] It stated that

[29] For instance, DSC, October 2, 2007, NJ 2008, 550.

[30] DSC, April 17, 2007, NJ 2007, 248.

[31] See for a more extensive treatment of the special position of the public law legal person, Roef 2001.

[32] DSC, November 10, 1987, NJ 1988, 303.

[33] DSC, January 6, 1998, NJ 1998, 367.

[34] DSC, April 29, 2008, NJ 2009, 130.

[35] DSC, January 25, 1994, NJ 1994, 598.

acts of the state are considered to further the public interest. To that end, the state can act on all matters, by legislation, government, etc. Ministers are held responsible for acts of the state in Parliament and via a special procedure for prosecuting their malfeasance. It is not compatible with this system to hold the state itself criminally responsible for its actions.

Meanwhile, a bill that would change this state of affairs has been put forward by a number of members of Parliament.[36] The bill would add a subsection to art. 51 DPC, which puts prosecutions of public law and private law legal persons on an equal footing. Punishment would, however, be excluded where the commission of the criminal offense by a civil servant or a public law legal person could reasonably be considered necessary for the execution of a task assigned by law. This bill, if and when enacted, will put an end to the immunity from prosecution enjoyed by the state and all other public law legal persons listed in Chapter 7 Dutch Constitution. The Dutch state will be able to prosecute the Dutch state. It is only to be hoped that the state receives a fair trial, as it is doubtful that it has recourse to the European Court of Human Rights if its trial was not fair.

6.5 Procedural Law

Chapter VI of Book IV Dutch Code of Criminal Procedure (DCCP) is devoted to the prosecution and trial of legal persons.[37] Firstly, the chapter contains a provision on the representation of a legal person in criminal proceedings. In criminal proceedings a legal person is represented by one of its directors (art. 528 DCCP). This article details when a legal person is deemed to be present at a trial and who may be empowered to exercise the rights of the defendant at the trial. These rights include the right to question witnesses and expert witnesses, as well as the right to appeal against the decision of the court on behalf of the legal person.[38]

However, the corporate defendant is not only the beneficiary of procedural rights: it is also treated as a source of information. Article 528 DCCP does not specifically provide that a statement made by a director representing a legal person is to be regarded in a manner comparable to a statement made by a defendant. Nevertheless, in a series of cases concerning the right to remain silent, the DSC seems to have equated the two types of statement to a large extent. When a legal person is prosecuted, the right to silence is possessed by the director who represents the legal person[39] and a representative cannot be called to testify as a witness against the corporation he/she

[36] Official Parliamentary Documents 2007/08, 30 538.

[37] See for a more extensive treatment of the subject, Van Strien 1996.

[38] DSC, May 21, 2002, NJ 2002, 398.

[39] DSC, October 13, 1981, NJ 1982, 17.

represents.[40] Legal persons and their representatives may also enjoy the privilege of non-disclosure.[41]

The legal person is given the choice of which director will represent it. The legal person may also choose to be represented by several directors at the same time.[42] Considered along with the jurisprudence concerning the right to remain silent, this means that a legal person can effectively supply each of its directors with the right to remain silent.

The court can order the appearance in person of a specific director; it can even order the police to bring him/her to court to attend trial (art. 528 DCCP). The court has the same power with regards to the defendant and any witnesses. These orders do not influence the rights and obligations of the director as a representative of the legal person.

The fact that a representative of a legal person has been granted the right to remain silent during the trial can be connected with the human rights recognized in the European Convention on Human Rights (ECHR),[43] especially Art. 6. The DSC has, in some cases, acknowledged that legal persons have human rights that can be violated. One of these rights is the right to be tried without undue delay.[44] Legal persons also benefit from Art. 8 ECHR. However, an attempt to argue that Art. 8 ECHR implies that legal persons cannot be punished for not publishing their annual accounts has failed.[45]

Chapter VI also contains some provisions regarding the communication of court notices. Article 529 DCCP is of crucial importance. It provides that court notices are to be delivered to the address or the office of the legal person, or to the address of one of its directors. Notification can also be effected by sending the court notice by post. A special form of notification, to which additional prescriptions are applicable, is that of service. Service of a court notice is effected by handing the notice to one of the directors or to a person authorized by the legal person to receive the notice. The director of a legal person which is him-/herself a director of a second legal person, is held to be a director of the second legal person.[46] A person does not need a special mandate to be authorized to receive documents on behalf of the legal person. If a person is authorized to collect mail at the post office, he is also authorized to receive a court notice on behalf of the legal person. Furthermore, if a legal person nominates the address of

[40] DSC, June 25, 1991, NJ 1992, 7.

[41] DSC, June 29, 2004, NJ 2005, 273.

[42] DSC, January 26, 1988, NJ 1988, 815.

[43] Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, November 4, 1950, in force September 3, 1953, ETS No. 5.

[44] DSC, June 19, 2001, NJ 2001, 551.

[45] DSC, December 15, 1992, NJ 1993, 550.

[46] DSC, July 8, 2003, NJ 2003, 596.

its legal counsel as its address, the legal counsel and his/her employees are considered authorized.[47]

The service of a court notice to a director or a person authorized by the legal person is to be made at the address of the legal person, at the office of the legal person, or at the address of one of the directors. The mere attempt to serve the notice at the address of the legal person, however, does not suffice. If the notice cannot be served at this address, an attempt has to be made to serve the document at the address of one of the directors.[48] The document can also be served on a director or authorized person at another place. Serving the document on one of these persons is considered as a notification in person. This is of special importance in the service of summons. When notification is effected in person, the period during which the legal person may have recourse to legal remedies ends just 2 weeks after the judgment is pronounced.

A court notice can also be served on an employee of the legal person who declares that he/she is willing to deliver the notice to his/her superiors, though this is not a notification in person. If the judicial notification cannot be served on one of the individuals mentioned above, it will be served at the registrar of the court where the trial will be, or was, held.

6.6 Jurisdiction

The DPC is applicable to anyone who commits a crime on Dutch territory (art. 2 DPC), including a foreign or Dutch legal person. The DPC is also applicable to every Dutch person who commits a crime outside the Netherlands, where this act constitutes a criminal offense according to the law of the state on whose territory the crime is committed. This provision is also arguably applicable to a Dutch legal person: the DSC decided so in a case involving a comparable jurisdiction clause.[49] A Dutch person found responsible for a crime committed abroad by a foreign legal person can also be prosecuted in the Netherlands.[50] Moreover, it is not relevant whether the law of the state where the crime is committed recognizes the criminal responsibility of natural persons for crimes committed by legal persons.[51]

[47] DSC, November 22, 1994, NJ 1995, 188.
[48] DSC, January 25, 2000, NJ 2000, 343.
[49] DSC, December 11, 1990, NJ 1991, 466.
[50] DSC, February 12, 1991, NJ 1991, 528.
[51] DSC, October 18, 1988, NJ 1989, 496.

6.7 Evaluation

In all, the concept of corporate criminal liability is not controversial in the Netherlands. The flexible approach to the matter adopted by the DSC, as demonstrated in its landmark 2003 case, is in line with the views of most leading authors on substantive criminal law. An important remaining contentious issue is the special position of public law legal persons, principally the state. On current indications, this special position will be abolished, or at least diminished, within a few years.

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Chapitre 7
La responsabilité pénale de l'entreprise en droit suisse

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7.1 Introduction

La punissabilité de l'entreprise est régie en droit suisse par l'article 102 du Code pénal (CPS),[1] l'article 102a CPS réglant la question de la représentation de celle-ci devant la juridiction pénale. Lors de l'entrée en vigueur de la partie générale révisée du Code pénal, le 1er janvier 2007, ces deux dispositions ont remplacé, sans modification de fond, les articles 100quater et 100quinquies CPS qui étaient intégrés à l'ordre juridique suisse depuis le 1er octobre 2003.

L'article 102 CPS ("Punissabilité", *"Criminal liability"*) a la teneur suivante[2]:

[1] Un crime ou un délit qui est commis au sein d'une entreprise dans l'exercice d'activités commerciales conformes à ses buts est imputé à l'entreprise s'il ne peut être imputé à aucune personne physique déterminée en raison du manque d'organisation de l'entreprise. Dans ce cas, l'entreprise est punie d'une amende de cinq millions de francs au plus.

[2] En cas d'infraction prévue aux articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies ou 322septies, al. 1, ou encore à l'article 4a, al. 1, let. a, de la loi fédérale du 19 décembre 1986 contre la concurrence déloyale, l'entreprise est punie indépendamment de la punissabilité des personnes physiques s'il doit lui être reproché de ne pas avoir pris toutes les mesures d'organisation raisonnables et nécessaires pour empêcher une telle infraction.

[3] Le juge fixe l'amende en particulier d'après la gravité de l'infraction, du manque d'organisation et du dommage causé, et d'après la capacité économique de l'entreprise.

[1] Recueil systématique du droit fédéral (RS), 311.0.

[2] La traduction en langue anglaise est tirée de: Swiss-American Chamber of Commerce 2008, 60 et seq.

[4] Sont des entreprises au sens du présent titre:

a. les personnes morales de droit privé;
b. les personnes morales de droit public, à l'exception des corporations territoriales;
c. les sociétés;
d. les entreprises en raison individuelle.

[1] A felony or offense shall be attributed to the enterprise if committed while it exercises a business activity within the scope of the enterprise and if, due to the deficient organization of the enterprise, such act cannot be attributed to a natural person. In such case, the enterprise shall be punished with a fine of up to 5 million francs.

[2] In the case of a punishable act according to Articles 260^{ter}, $260^{quinquies}$, 305^{bis}, 322^{ter}, $322^{quinquies}$, or $322^{septies}$, paragraph 1, or a punishable act according to Article 4a, paragraph 1, subpara a, of the Federal Act against Unfair Competition of December 19, 1986, the enterprise shall be punished independently of the criminal liability of natural persons if the enterprise is accused of not having taken all necessary and reasonable organizational measures to prevent such offense.

[3] The judge shall set the fine in particular based upon the seriousness of the offense and the seriousness of the organizational deficiency and the damage caused, as well as upon the economic capability of the enterprise.

[4] Enterprises in the sense of this Title are:

a. legal entities under private law;
b. legal entities under public law with the exception of regional corporations;
c. companies;
d. sole proprietorships.

Dans un premier temps, nous montrerons à quelles conditions le dirigeant d'une entreprise (le "chef d'entreprise") peut engager sa responsabilité pénale personnelle pour un acte commis par l'un de ses subordonnés. Il existe en effet un *continuum* dogmatique entre les règles dégagées par le Tribunal fédéral en la matière et la solution retenue par le législateur helvétique en matière de responsabilité primaire de l'entreprise. Nous rappellerons ensuite comment, après avoir été consacrée depuis longtemps en droits civil et administratif, la responsabilité pénale de la personne morale, et plus globalement celle de l'entreprise, a intégré l'ordre juridique suisse. Nous pourrons ensuite nous plonger au cœur de la problématique en examinant quels sont les modèles qui ont été retenus, qui sont les destinataires de l'article 102 CPS, quelles sont les conditions communes ou spécifiques de la punissabilité et quelles sanctions peuvent frapper l'entreprise. Nous analyserons enfin les enjeux procéduraux avant de formuler quelques remarques relatives aux statistiques des condamnations.

7.2 La responsabilité pénale du "chef d'entreprise"

Toute personne physique qui commet une infraction au sein d'une entreprise répond à titre personnel de son comportement. A côté de cette

responsabilité pénale individuelle classique, il en existe une autre pour le *fait d'autrui* qui concerne l'entreprise et son "chef". Avant d'analyser la problématique de la responsabilité de l'entreprise, qui constitue le cœur de notre rapport, nous allons exposer succinctement les règles qui régissent celle de son dirigeant.

Par "chef d'entreprise",

> on entend généralement les personnes physiques qui tiennent les leviers de commande, qui participent de manière déterminante à la formation de la volonté sociale. La position du chef d'entreprise est généralement caractérisée par la possibilité de donner des instructions à ses subordonnés. … Pour déterminer qui peut répondre *pénalement* du comportement punissable de ses subordonnés, il ne suffit pas de se rapporter à l'organisation de la société telle qu'elle résulte, par exemple, du règlement d'organisation. Au contraire, le droit pénal s'intéresse surtout à la structure *réelle* de la société, telle qu'elle ressort des circonstances. … Dans les sociétés anonymes, sont ainsi susceptibles d'engager leur responsabilité pénale en qualité de chef d'entreprise les dirigeants *formels*, soit les membres du conseil d'administration régulièrement élus par l'assemblée générale, les organes *matériels* et les *organes de fait*, c'est-à-dire toutes les personnes qui, sans faire formellement partie du conseil d'administration, exercent matériellement des fonctions dirigeantes.[3]

En cas d'omission improprement dite, l'auteur n'est punissable pour son abstention que s'il était placé dans une position de *garant* qui l'obligeait à éviter la survenance du résultat dommageable. Si cette condition est remplie, il peut être sanctionné comme coauteur aux côtés de son subordonné qui a commis l'infraction. L'article 11 alinéa 2 CPS fournit une liste, non exhaustive, de sources du devoir de garant, en codifiant la jurisprudence rendue en la matière.[4] Il cite la loi, le contrat, la communauté de risques librement consentie[5] et la création d'un risque.

> Un délit d'omission improprement dit est réalisé lorsque la survenance du résultat par une action est expressément menacée d'une sanction pénale, que l'accusé par son action aurait effectivement pu éviter le résultat et qu'en raison de sa situation juridique particulière il y était à ce point obligé que son omission apparaît comparable au fait de provoquer le résultat par un comportement actif.[6]

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[3] Garbarski 2006, 331 et seq. et références doctrinales citées. L'organe formel est celui qui s'est vu attribuer cette qualité en vertu de la loi ou des statuts de la société. L'organe matériel correspond aux personnes qui remplissent effectivement les tâches dévolues aux organes. L'organe de fait désigne quant à lui un organe matériel qui n'est pas formel.

[4] Voir notamment le Recueil officiel des arrêts du Tribunal fédéral suisse (ATF) 96 IV 155, 174 considérant II. 4a et 113 IV 68, 72–73 considérant 5.

[5] Plusieurs personnes participent volontairement à une entreprise dangereuse et mettent en commun des forces ainsi que des moyens pour surmonter, ou au moins limiter, les risques d'atteinte à un bien juridiquement protégé. Ce sont surtout les activités sportives particulièrement dangereuses, comme les courses en montagne, qui sont visées, Cf. De Haller 2006, 44.

[6] ATF 117 IV 130, 132–133 considérant 2a.

Dans l'ATF 122 IV 103 (arrêt *"Von Roll"*), le fondement dogmatique de la responsabilité du chef d'entreprise se trouve dans le *devoir d'agir en raison du risque spécifique que représente l'entreprise*. Ce risque est inhérent à l'organisation de celle-ci.

> C'est donc la structure défaillante de l'organisation, et non plus les manquements des collaborateurs qui en font partie, qui devient la cause objective à laquelle se rattache la faute de celui qui ne prend pas les mesures adéquates pour empêcher la réalisation d'infractions pénales. … on est dans le domaine du "risk management" qui incombe à l'organisation dans son ensemble. … Dès lors que le reproche relève de l'inadéquation de l'organisation et des structures de contrôle, la responsabilité doit incomber à tous ceux qui assument un rôle dans celles-ci.[7]

Il n'existe pas d'obligation générale pour le chef d'entreprise d'éviter la commission de toute infraction par l'un de ses subordonnés. Sa responsabilité est limitée aux infractions résultant des risques typiquement liés à l'activité exercée par l'entreprise.

> La punissabilité du chef d'entreprise pour le fait d'autrui suppose que son obligation juridique d'agir soit *qualifiée*… une obligation juridique est qualifiée lorsqu'elle constitue un élément essentiel du devoir – légal ou contractuel – d'agir et qu'il existe un rapport étroit entre le garant et le bien juridique protégé. En d'autres termes, il doit exister un devoir tendant à détourner le risque accru, typiquement lié à l'activité exercée par l'entreprise; ce risque doit avoir été concrétisé par le subordonné en violation d'une norme pénale. On signalera d'ailleurs que le devoir de garant ne peut jamais aller au-delà du devoir juridique dont il découle. Le *devoir de garant* du chef d'entreprise est donc subordonné à deux conditions cumulatives. Premièrement, il doit exister un *rapport de subordination* direct ou indirect entre le chef d'entreprise et l'auteur… Deuxièmement, il faut qu'un devoir de contrôle ou de protection du bien juridique menacé ou affecté résulte d'une obligation extrapénale concrétisée. Il doit s'agir d'une *obligation qualifiée* d'empêcher la commission d'infractions par les subordonnés.[8]

Pour être punissable, le chef d'entreprise doit en plus avoir commis une faute qui consiste à être demeuré passif alors qu'il pouvait raisonnablement empêcher la survenance de l'infraction commise par son subordonné. Toutefois,

> seul est pénalement responsable comme (co)auteur d'une infraction le dirigeant qui a connaissance de celle-ci, ou qui prévoit qu'elle va être commise, et qui n'empêche pas sa survenance ou son résultat dans la mesure de ses moyens, parce qu'il veut ce résultat (intention) ou du moins qu'il l'accepte pour le cas où il se produirait (dol éventuel). En conséquence, pour qu'un dirigeant puisse être considéré comme (co)auteur d'une infraction, il faut qu'il en ait effectivement connu et voulu (au moins par dol éventuel) les faits constitutifs.[9]

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[7] Cassani 2002, 69.

[8] Garbarski 2006, 334 et seq. avec les références doctrinales et jurisprudentielles citées.

[9] Arrêt du Tribunal fédéral 6S.448/2001 du 28 novembre 2001 considérant 5b et références citées. Le jugement ajoute qu'"il en va différemment lorsque la norme pénale

Enfin, un lien de causalité – forcément hypothétique – entre la violation du devoir de garant et la commission de l'infraction est nécessaire.[10]

7.3 Du principe *"societas delinquere non potest"* à l'adoption de l'article 102 CPS

En droit suisse, la responsabilité civile de la *personne morale* est une réalité juridique ancienne. L'article 55 alinéa 2 du Code civil (CCS)[11] prévoit qu'elle est engagée par tous les actes juridiques ou illicites accomplis par ses organes, c'est-à-dire par "toute personne physique qui, d'après la loi, les statuts ou l'organisation effective de la personne morale, prend part à l'élaboration de sa volonté et jouit en droit ou en fait du pouvoir de décision correspondant."[12] En droit administratif également, elle peut être appelée à répondre de ses actes depuis longtemps. Par contre, jusqu'à l'entrée en vigueur, le 1er octobre 2003, de l'article 100quater CPS, prédécesseur de l'actuel article 102 CPS, l'ordre juridique suisse considérait que les personnes morales n'avaient pas la capacité d'agir conformément aux normes pénales. Elles n'étaient pas censées pouvoir agir de manière coupable et devaient par conséquent échapper aux sanctions pénales *("societas delinquere non potest")*. Selon la conception qui avait influencé l'élaboration du Code pénal suisse, adopté par le Parlement fédéral le 21 décembre 1937 et entré en vigueur le 1er janvier 1942, seules les personnes physiques pouvaient être tenues pour responsables pénalement. L'ancien article 63 CPS prévoyait qu'il fallait tenir compte de la culpabilité du délinquant pour individualiser la peine. Il en était déduit que celui-ci devait être capable de comprendre le caractère illicite de son acte et de se déterminer selon cette appréciation. Les autres fondements légaux qui justifiaient que la responsabilité pénale ne soit liée qu'au sujet individuel résidaient dans les anciens articles 172 et 326 CPS qui confirmaient, *a contrario*, que les personnes morales ne pouvaient pas être poursuivies pénalement pour des infractions

spécifique en cause sanctionne la négligence. Dans une telle hypothèse en effet, le dirigeant peut engager sa responsabilité pénale par sa seule passivité, en particulier lorsqu'il a fautivement manqué à un devoir de surveillance."

[10] Garbarski 2006, 338 et seq.

[11] RS 210.

[12] ATF 124 III 418, 420–421 considérant 1b. D'autres dispositions spécifiques rappellent ce principe de la responsabilité de la personne morale. Par exemple, pour la société anonyme, l'article 722 du Code des obligations (CO, RS 220) stipule que "la société répond des actes illicites commis dans la gestion de ses affaires par une personne autorisée à la gérer ou à la représenter."

perpétrées dans leur exploitation. Seuls les membres des organes, les collaborateurs ou dirigeants de fait pouvaient répondre sur le plan pénal en leur qualité de personnes physiques.[13]

Le système légal était certes émaillé de quelques exceptions au principe "*societas*". L'ancien article 333 alinéa 1 CPS, toujours en vigueur aujourd'hui, stipulait que les dispositions générales du code étaient applicables aux infractions prévues par d'autres lois fédérales, "à moins que celles-ci ne contiennent des dispositions sur la matière". Par exemple, l'article 181 de la loi fédérale sur l'impôt fédéral direct (LIFD)[14] prévoyait déjà une responsabilité pénale solidaire de la personne morale. La loi sur le droit pénal administratif (DPA),[15] entrée en vigueur le 1er janvier 1975, consacre depuis lors également une dérogation au Code pénal, puisque son article 7 stipule que lorsque l'amende qui entre en ligne de compte ne dépasse pas CHF 5000 et que l'enquête rendrait nécessaire à l'égard des personnes physiques punissables des mesures d'instruction hors de proportion avec la peine encourue, "il est loisible de renoncer à poursuivre ces personnes et de condamner à leur place au paiement de l'amende la personne morale, la société en nom collectif ou en commandite ou l'entreprise individuelle". Toutefois, ce n'est qu'avec l'entrée en vigueur de l'article 100quater CPS que le système suisse va définitivement entrer dans le régime de la responsabilité de la personne morale et, plus globalement, de l'entreprise.

Dès la fin des années quatre-vingt, face à l'importance grandissante de la criminalité organisée, la nécessité d'instaurer une responsabilité pénale de l'entreprise a commencé de s'imposer. Dans son Message relatif à la modification de la Partie générale du Code pénal adressé aux Chambres le 21 septembre 1998, le Conseil fédéral a proposé l'adoption d'un nouvel article 102 CPS dont le premier alinéa avait la teneur suivante: "l'entreprise est punie d'une amende de cinq millions de francs au plus si une infraction est commise par son exploitation et que cet acte ne peut être imputé à aucune personne déterminée en raison d'un manque d'organisation de l'entreprise".[16] Le projet n'envisageait donc qu'une responsabilité subsidiaire de l'entreprise, puisque celle-ci ne serait devenue pénalement punissable qui si l'auteur matériel n'avait pas été identifié. Le Parlement a franchi un pas supplémentaire en introduisant un principe de responsabilité primaire pour les infractions relevant des normes sur l'organisation criminelle (art. 260ter CPS) et le blanchiment d'argent (art. 305bis CPS), ainsi que pour certains actes de corruption (arts. 322ter, 322quinquies et 322septies CPS). Il

[13] Hurtado Pozo 2008, n°1200 et seq., 386.

[14] RS 642.11.

[15] RS 313.0.

[16] 'Message concernant la modification du code pénal suisse (dispositions générales, entrée en vigueur et application du code pénal) et du code pénal militaire ainsi qu'une loi fédérale régissant la condition pénale des mineurs du 21 septembre 1998', Feuille fédérale (FF) 1999, 1787, Ch. 217, 1943 et seq., 2136.

a en outre créé un nouvel article 102a CPS réglant la représentation de l'entreprise devant la juridiction pénale.

L'article 5 de la Convention internationale des Nations Unies pour la répression du financement du terrorisme[17] stipule que les États Parties doivent prendre les mesures nécessaires pour que la responsabilité des personnes morales puisse être engagée en cas de financement d'activités terroristes. Le 26 juin 2002, afin de pouvoir satisfaire aux exigences posées par cette disposition et de ratifier l'accord dans les meilleurs délais, le Conseil fédéral a proposé à l'Assemblée fédérale de promulguer de manière anticipée les modifications prévues aux articles 102 et 102a CPS.[18] Ce sont les articles 100^{quater} et 100^{quinquies} CPS qui ont assumé cette fonction transitoire entre le 1er octobre 2003 et le 31 décembre 2006. Le catalogue des infractions pour lesquelles les entreprises sont considérées comme responsables au premier chef a été complété par l'ajout du nouvel article 260^{quinquies} CPS incriminant le financement du terrorisme. L'article 100^{quater} CPS a pris sa forme définitive le 1er juillet 2006 lorsque l'article 4a alinéa 1 lettre a de la loi contre la concurrence déloyale (LCD),[19] qui incrimine la corruption privée active, est venu enrichir la liste des cas dans lesquels l'entreprise pouvait être rendue responsable indépendamment de la personne physique. Le 1er janvier 2007, lors de l'entrée en vigueur de la Partie générale révisée du Code pénal, les articles 100^{quater} et 100^{quinquies} CPS ont cédé leur place respectivement aux articles 102 et 102a CPS, sans changement sur le plan matériel.

7.4 Les modèles retenus et la nature de la norme

7.4.1 Les responsabilités directe et subsidiaire

Le législateur helvétique a opté pour une *solution mixte*. Deux formes de responsabilité pénale obéissant aux mêmes conditions générales de la punissabilité, mais répondant également à des règles spécifiques, cohabitent. L'article 102 alinéa 1 CPS consacre le modèle de *responsabilité subsidiaire*. L'entreprise ne répond, en raison de son manque d'organisation, que s'il n'a pas été possible d'identifier ou de punir la personne physique auteure de l'infraction. L'article 102 alinéa 2 CPS prévoit quant à lui un modèle de *responsabilité directe (primaire)*. Elle est indépendante ou solidaire de celle des personnes physiques. L'entreprise répond d'un

[17] RS 0.353.22.

[18] 'Message relatif aux Conventions internationales pour la répression du financement du terrorisme et pour la répression des attentats terroristes à l'explosif ainsi qu'à la modification du code pénal et à l'adaptation d'autres lois fédérales du 26 juin 2002', FF 2002 5014, Ch. 4.5.2, 5060–5061.

[19] RS 241.

comportement qui est directement le sien et à raison de sa propre faute. Elle peut se voir sanctionnée "s'il doit lui être reproché de ne pas avoir pris toutes les mesures d'organisation raisonnables et nécessaires" pour empêcher l'une des sept infractions spécifiquement citées. Dans ce cas, si le crime ou le délit a pu être imputé à une personne physique déterminée, l'entreprise peut tout de même être poursuivie et condamnée. Il en va de même si l'auteur n'est pas identifié.[20]

L'article 102 alinéa 2 CPS crée une forme de responsabilité du chef d'entreprise, mais à la charge de cette dernière qui occupe ainsi une position de garant.[21] Alors que dans l'arrêt *Von Roll*,[22] c'était au dirigeant que le défaut d'organisation était reproché, avec l'article 102 alinéa 2 CPS c'est l'entreprise elle-même qui est tenue de prendre les mesures pour éviter que sa responsabilité pénale ne soit engagée.

La responsabilité de l'article 102 alinéa 2 CPS l'emporte sur celle de l'alinéa 1 quand les conditions de l'une et l'autre sont remplies. Quand la première ne peut pas être mise en œuvre, la seconde peut l'être.[23] Plus précisément, si la condition manquante est l'une de celles spécifiques à l'article 102 alinéa 2 CPS, c'est-à-dire celles relatives à la carence d'organisation de l'entreprise et à la relation de cette dernière à l'infraction commise, un transfert vers la responsabilité subsidiaire de l'alinéa 1 est envisageable. Par contre, si la condition manquante est liée à l'impossibilité d'établir, dans les conditions et avec le degré de certitude requis, l'intention de l'auteur physique, c'est alors la responsabilité subsidiaire même de l'entreprise qui est exclue, car celle-ci implique la réalisation de tous les éléments constitutifs, donc y compris subjectifs, de l'infraction.[24]

7.4.2 Norme d'imputation ou nouvelle infraction?

Une partie de la doctrine suisse estime que l'article 102 CPS a créé une *norme d'imputation* fondée sur une *forme singulière de faute pénale*[25] alors que l'autre considère qu'il établit une *nouvelle infraction.*[26] Selon les tenants de la seconde théorie, la loi aurait consacré une infraction de "mauvaise organisation". Si cette conception n'est pas insoutenable, nous

[20] Macaluso 2004, n°915 et seq., 159.

[21] Roth 2002, 98.

[22] ATF 122 IV 103 (voir ci-dessus Ch. 7.2).

[23] Roth 2003, 194.

[24] Macaluso 2004, n°917 et seq., 159.

[25] Geiger 2006, 21 et seq.; Gillard/Macaluso/Moreillon 2008, 24 et seq.; Jeanneret 2004, 919; Lütolf 1997, 297 et seq.; Macaluso 2004, n°508 et seq., 90 et seq.; Roth 2002, 99.

[26] Niggli/Gfeller 2007, n°18 et seq. *ad* art. 102 CPS, 1700 et seq.; Trechsel, 2008, n°7b *ad* art. 102 CPS, 510.

penchons néanmoins en faveur de la première branche de l'alternative, en considérant que la disposition prévoit une forme originale de culpabilité et plus précisément une *condition subjective d'imputabilité* à l'entreprise, nouveau sujet de droit pénal institué par le législateur. Le défaut d'organisation de celle-ci n'est qu'une condition de la mise en œuvre de sa responsabilité pénale. C'est la faute d'organisation particulière retenue à sa charge qui justifie que l'infraction lui soit imputée.[27]

L'un des enjeux de la controverse concerne la question de la prescription de l'action pénale (*statue of limitations on criminal prosecution*, arts. 97–98 CPS). Si l'article 102 CPS est une norme d'imputation, ce sont les délais applicables à l'infraction originaire qui doivent s'appliquer à la poursuite dirigée contre l'entreprise. Par contre, si la disposition consacre une nouvelle infraction, il faut tout d'abord en déterminer la nature. Il serait possible de considérer qu'il s'agit d'une infraction *sui generis*[28] et lui appliquer par conséquent le délai de prescription de sept ans prévu à l'article 97 alinéa 1 lettre c CPS. Cette solution ne serait toutefois guère conforme au principe de la légalité.[29] Les défenseurs de la théorie de la nouvelle infraction considèrent quant à eux que l'article 102 CPS contient une contravention *(misdemeanor)* au sens de l'article 103 CPS.[30] Dans cette hypothèse-là, la conséquence inévitable serait que le délai de prescription ne serait que de trois ans (art. 109 CPS). Or, il ne serait pas cohérent d'avoir des délais différents pour poursuivre l'entreprise et l'auteur physique de l'infraction commise en son sein. En outre, un laps de temps si court représenterait souvent un obstacle très important pour les autorités de poursuite pénale.[31]

L'interprétation historique plaide également en faveur de la théorie de la norme d'imputation. Dans son message adressé aux Chambres fédérales, le Conseil fédéral a souligné que

> la responsabilité pénale de l'entreprise peut uniquement se fonder sur une *accusation d'un type particulier*, sans que l'acception traditionnelle, et toujours indispensable dans le droit pénal individuel, du terme de culpabilité soit dénaturé pour autant. … En faisant fi des contorsions dogmatiques et en admettant que l'accusation pénale envers une entreprise a sa propre acception par rapport à la notion classique de la culpabilité, le présent projet ne prend pas un raccourci inadmissible.[32]

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[27] Macaluso 2004, n°511, 90.

[28] Dans ce sens: Forster 2006, 262 et seq.

[29] Trechsel, 2008, n°7b *ad* art. 102 CPS, 510.

[30] Niggli/Gfeller 2007, n°50 *ad* art. 102 CPS, 1705; Trechsel, 2008, n°7b *ad* art. 102 CPS, 510.

[31] Selon Marcel Alexander Niggli et Diego Gfeller, une solution pour résoudre le problème de la prescription serait de considérer l'infraction, consacrée selon eux par l'article 102 CPS, comme étant continue et prenant donc fin seulement avec la disparition du défaut d'organisation (Niggli/Gfeller 2007, n°45 et seq. *ad* art. 102 CPS, 1704 et seq.).

[32] 'Message concernant la modification du Code pénal suisse' (cité ci-dessus n. 18), Ch. 217.3, 1948.

7.5 Les destinataires de l'article 102 CPS

7.5.1 L'entreprise

La notion d'entreprise *("enterprise")* en droit pénal suisse est plus large que celle de personne morale *("legal entity")*. Selon l'article 102 alinéa 4 CPS, entrent dans cette catégorie:

- les personnes morales de droit privé (let. a);
- les *personnes morales de droit public*, à l'exception des corporations territoriales (let. b);
- les *sociétés* (let. c); et
- les entreprises en raison individuelle (let. d).

Comme nous le montrerons, l'infraction en cause doit avoir été commise dans le cadre des "activités commerciales" de l'entreprise.[33] Cette condition limite la liste des personnes morales concernées et, plus globalement, le cercle des destinataires de la norme.

7.5.2 Les personnes morales

Les personnes morales sont des entités, créées dans un certain but et selon les formes prévues par la loi, en étant dotées par celle-ci de la qualité de sujet de droits et d'obligations. Elles se constituent sous forme soit d'une communauté de personnes (corporations), soit d'un patrimoine affecté à un but déterminé (établissements).[34]

Le catalogue légal des *personnes morales de droit privé* est *exhaustif*. Parmi les corporations figurent l'association (*society*, arts. 60–79 CCS), les sociétés d'allmends, qui sont des corporations de droit privé cantonal réservées par l'article 59 alinéa 3 CCS et ayant pour objet la gestion d'un bien commun à certains propriétaires sur un territoire, la société anonyme (*corporation*, arts. 620–763 CO[35]), la société en commandite par actions (*corporation with unlimited partners*, arts. 764–771 CO), la société à responsabilité limitée (*limited liability company*, arts. 772–827 CO) et la société coopérative (*cooperative*, arts. 828–926 CO). Appartiennent à la catégorie des établissements la fondation, ordinaire, ecclésiastique, de famille et de prévoyance en faveur du personnel (*foundation*, art. 80 ss. CCS, art. 335 CCS et art. 331 CO).

Les *entités publiques* dotées de la personnalité morale tombent aussi sous le coup de l'article 102 CPS. Il peut s'agir d'un établissement, comme

[33] Voir ci-dessous, Ch. 7.6.

[34] Guillod 2009, n°383, 198.

[35] Code des obligations, RS 220.

la Haute école Arc,[36] ou d'une fondation telle que "Pro Helvetia".[37] En retenant le critère de la personnalité morale, le législateur a voulu exclure du champ d'application de la disposition l'État fédéral, les États fédérés (les cantons), qui sont par ailleurs des corporations territoriales, et les administrations centrales. Parmi les corporations territoriales, qui toutes échappent à une responsabilité pénale, nous pouvons encore citer les communes politiques, les syndicats (groupements ou associations) de communes ou les districts qui représentent des subdivisions du territoire cantonal.[38]

7.5.3 Les sociétés

"La société est un contrat par lequel deux ou plusieurs personnes conviennent d'unir leurs efforts ou leurs ressources en vue d'atteindre un but commun" (art. 530 al. 1 CO).[39] Le droit suisse distingue sept formes de sociétés: la société simple (*simple partnership*, arts. 530–551 CO), la société en nom collectif (*general partnership*, arts. 552–593 CO), la société en commandite (*limited partnership*, arts. 594–619 CO), la société anonyme, la société en commandite par actions, la société à responsabilité limitée et la société coopérative. Comme nous l'avons montré, les quatre dernières jouissent de la personnalité juridique. Elles sont donc des entreprises aux sens de l'article 102 alinéa 4 lettres a et c CPS, ce qui ne renforce toutefois bien sûr en rien leur qualification. Les sociétés en formation sont aussi visées par l'article 102 CPS.[40]

La doctrine minoritaire considère que la société simple doit être exclue de la liste des destinataires de l'article 102 CPS.[41] Elle ne peut en effet pas exploiter d'entreprise commerciale. Toutefois, la volonté du législateur était clairement d'inclure ce cas de figure.[42]

7.5.4 Les entreprises en raison individuelle

Dans l'entreprise en raison individuelle, une seule personne, l'entrepreneur, apporte les éléments nécessaires à la création et au fonctionnement

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[36] Art. 6 al. 1 de la Convention concernant la Haute école Arc Berne-Jura-Neuchâtel, Recueil systématique des lois bernoises, 439.32.

[37] Art. 1 de la loi fédérale concernant la fondation Pro Helvetia, RS 447.1.

[38] Macaluso 2004, n°657 et seq., 115 et seq.

[39] La tendance législative récente est d'autoriser la création de sociétés unipersonnelles: art. 625 CO pour la société anonyme, art. 775 CO pour la société à responsabilité limitée.

[40] Macaluso 2004, n°560, 100.

[41] Forster 2006, 125 et seq.

[42] Macaluso 2009, n°16 *ad* art. 102 CPS, 971 et les références doctrinales citées.

de l'entreprise, détient les pouvoirs sur cette dernière et perçoit les résultats. Sur le plan juridique, l'entreprise individuelle n'existe pas en tant qu'organisation. C'est une personne physique qui exerce une activité économique indépendante. La personne physique se confond juridiquement avec son entreprise. Une responsabilité pénale de cette dernière n'est envisageable que si elle occupe des employés et pour des actes commis par quelqu'un d'autre que le chef de maison ou dont il est possible de raisonnablement retenir qu'ils n'ont vraisemblablement pas été commis par lui dans le contexte de l'article 102 alinéa 1 CPS.[43]

7.5.5 L'établissement secondaire, la succursale et la filiale

Une entreprise peut comprendre un seul établissement, plus précisément une unique unité de production de biens ou de services au même endroit. Mais elle peut naturellement en avoir plusieurs. Dans ce cas, la décentralisation peut être purement spatiale (établissement secondaire), spatiale et économique (succursale, *branch office*) ou spatiale et juridique (filiale, *foreign subsidiary*).

L'*établissement secondaire* ne jouit d'une indépendance ni économique ni juridique. Il ne constitue pas en lui-même une entreprise au sens de l'article 102 CPS. Par contre, la disposition s'applique à la *succursale.*[44] Il faut toutefois vérifier si c'est l'entreprise principale qui encourt la responsabilité pénale. "Tel sera en particulier le cas lorsque la succursale ne jouira pas *en pratique* de l'autonomie nécessaire. On raisonnera alors comme en matière de groupe de sociétés."[45]

Un groupe de sociétés englobe les entités juridiquement indépendantes réunies sous une direction unique. Les filiales sont les sociétés soumises à celle-ci. La tête de groupe est la société mère. Pour qu'une infraction commise au sein d'une société du groupe puisse être imputée à une autre, il faut que cette dernière se trouve dans une relation de *garant* à l'égard

[43] Macaluso 2004, n°686, 120.

[44] Une succursale est "tout établissement commercial qui, dans la dépendance d'une entreprise principale dont il fait juridiquement partie, exerce d'une façon durable, dans des locaux séparés, une activité similaire, en jouissant d'une certaine autonomie dans le monde économique et celui des affaires; l'établissement est autonome lorsqu'il pourrait, sans modifications profondes, être exploité de manière indépendante; il n'est pas nécessaire que la succursale puisse accomplir toutes les activités de l'établissement principal; il suffit que l'entreprise locale, grâce à son personnel spécialisé et à son organisation propre, soit à même, sans grande modification, d'exercer d'une façon indépendante son activité d'agence locale; il s'agit d'une autonomie dans les relations externes, qui s'apprécie de cas en cas d'après l'ensemble des circonstances, quelle que soit la subordination ou la centralisation interne" (ATF 108 II 122, 124–125 considérant 1).

[45] Macaluso 2004, n°569, 101.

de la première. Pour admettre une telle position, des conditions objectives et subjectives doivent être réalisées. Du point de vue objectif, le critère de l'unité économique entre les sociétés du groupe permettra de déterminer s'il existe entre elles le lien étroit qui est à la base du devoir de garant. Il est possible de recourir à un faisceau d'indices, notamment l'importance de la participation d'une société au capital d'une autre. Ce critère, qui n'est pas absolu, doit être complété, voire parfois remplacé, par d'autres, comme le pouvoir de donner des instructions, l'intégration des structures de direction, l'identité des dirigeants ou encore la confiance suscitée et les apparences créées. Alain Macaluso plaide, à juste titre, pour une présomption réfragable de l'unité économique entre la société mère et sa filiale.[46]

7.6 Les conditions de la punissabilité applicables communément aux deux modèles de responsabilité

Aussi bien dans le cas de la responsabilité subsidiaire de l'article 102 alinéa 1 CPS que dans celui du modèle direct de l'alinéa 2, un *crime (felony)* ou un *délit (offense)* doit avoir été "commis au sein d'une entreprise dans l'exercice d'activités commerciales conformes à ses buts". L'infraction perpétrée (l'infraction *originaire*, c'est-à-dire *imputée* à l'entreprise) doit donc tout d'abord correspondre à l'une des définitions exposées à l'article 10 CPS. Le droit pénal suisse connaît en effet trois types d'infractions qui sont, par ordre de gravité décroissant, les crimes, les délits et les contraventions. Ils se définissent en fonction de la peine-menace prévue pour chaque incrimination. "Sont des crimes les infractions passibles d'une peine privative de liberté de plus de trois ans" (art. 10 al. 2 CPS) et "sont des délits les infractions passibles d'une peine privative de liberté n'excédant pas trois ans ou d'une peine pécuniaire" (art. 10 al. 3 CPS). L'entreprise ne peut pas engager sa responsabilité pénale pour une contravention, c'est-à-dire une infraction passible d'une amende (art. 102 CPS).

L'auteur physique doit avoir réalisé les éléments constitutifs objectifs et subjectifs de l'infraction originaire. Pour admettre que l'infraction a été "commise" au sein de l'entreprise, il faut à tout le moins qu'il ait atteint le stade de la tentative (*attempt*, arts. 22–23 CPS). Les faits justificatifs[47] – qui excluent par définition qu'un comportement typiquement illégal soit

[46] Macaluso 2004, n°581 et seq., 103. Pour l'ensemble de la question des groupes de sociétés, voir n°570 et seq., 101 et seq.

[47] Actes autorisés par la loi (*acts permitted by law*, art. 14 CPS), légitime défense (*justifiable self-defense*, art. 15 CPS) et état de nécessité licite (*justifiable state of necessity*, art. 17 CPS). Il convient d'ajouter les faits justificatifs extralégaux, comme le consentement de la victime, à certaines conditions.

considéré comme illicite – dont il peut se prévaloir permettent à l'entreprise d'échapper à toute sanction pénale. Le principal écueil réside dans la difficulté de prouver les faits correspondant aux éléments constitutifs lorsque l'auteur demeure inconnu.

> Cela est particulièrement vrai de l'élément subjectif. La question, très disputée, apparaît encore plus délicate si l'on considère que les infractions prévues à l'alinéa 2 de la disposition, qui permettent de rechercher directement la responsabilité pénale de l'entreprise indépendamment de la punissabilité d'une personne physique, sont toutes des infractions intentionnelles. Il faudra sans doute se satisfaire alors, comme c'est le cas en droit français, de la constatation que l'intention *résulte à l'évidence* des faits commis.[48]

Les conditions objectives cumulatives de la punissabilité sont au nombre de trois:[49]

- le crime ou le délit doit être le fait d'une personne entretenant avec l'entreprise un *lien, hiérarchique ou organisationnel, suffisamment étroit* pour qu'il soit possible de considérer que l'infraction a été commise "au sein" de celle-ci;
- l'infraction doit avoir été commise "dans l'exercice d'activités commerciales";
- l'activité dans l'exercice de laquelle l'infraction a été perpétrée doit être *"conforme aux buts de l'entreprise"*.

L'agent de la responsabilité pénale de l'entreprise peut être un membre d'un organe, formel ou de fait, de l'entreprise, un associé, mais également tout employé qui exerce ou non un pouvoir de direction.[50] Par contre, les mandataires de l'entreprise n'appartiennent en principe pas au cercle des agents susceptibles d'engager la responsabilité pénale de celle-ci, en raison du manque de lien hiérarchique ou organisationnel qui les lie à elle.[51] Lors de l'*outsourcing* de certaines fonctions de l'entreprise, la responsabilité de la société mandante s'examine à l'aide de critères économiques:

> sa responsabilité peut en principe être engagée si la société outsourçante et la société d'*outsourcing* apparaissent comme une entreprise unitaire du point de vue économique. Il faut par ailleurs s'interroger sur la nature et l'importance de l'activité déléguée, ainsi que sur les mobiles de l'*outsourcing*, afin d'éviter que l'entreprise concernée ne puisse s'exonérer de sa responsabilité pénale en délégant des fonctions essentielles à son activité commerciale.[52]

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[48] Macaluso 2004, n°714 et seq., 125.
[49] Macaluso 2004, n°702 et seq., 123.
[50] Macaluso 2009, n°28 *ad* art. 102 CPS, 974.
[51] Macaluso 2009, n°29 *ad* art. 102 CPS, 974.
[52] Macaluso 2009, n°30 *ad* art. 102 CPS, 974.

Le caractère essentiel ou non de l'activité externalisée nous semble un critère déterminant.

> Ce sont en effet ces activités et ces fonctions essentielles, parce qu'elles peuvent avoir un effet sur la détermination, la limitation et le contrôle des risques de commission d'une infraction pénale ou parce qu'elles sont liées aux opérations dans l'exécution desquelles de telles infractions sont susceptibles d'être commises qui doivent être placées sous la responsabilité (y compris pénale) de l'entreprise.[53]

Par exemple, nous estimons que lorsqu'un intermédiaire[54] a pour tâche d'aider une entreprise à pénétrer un marché étranger, même s'il jouit d'une grande indépendance dans l'organisation et l'accomplissement de ses activités, il assume une fonction essentielle pour celle-ci et que la qualité de sa sélection est suffisamment déterminante dans la prévention de la corruption pour justifier que l'exigence des mesures d'organisation nécessaires et raisonnables s'applique à lui.[55]

L'infraction doit avoir été commise dans le cadre de la conduite d'activités présentant un rapport, même indirect, avec la vente de biens ou la fourniture de services à des fins lucratives. La notion d'activité commerciale revêt un sens large. Toutes les activités qui sont le préalable, le support ou l'accessoire de la vente ou de la fourniture sont comprises dans la définition. Par exemple, la fabrication, le marketing ou la comptabilité sont concernés. Par contre, ce n'est pas le cas des entreprises qui, par principe, n'exercent pas d'activités commerciales, en particulier les associations culturelles.[56]

Lors de l'examen du critère de l'adéquation entre l'activité dans l'accomplissement de laquelle l'infraction a été commise et les buts de l'entreprise, "déterminant est le fait que l'infraction soit dans un tel rapport aux activités commerciales licites de l'entreprise qu'elle apparaisse comme une manifestation dans le domaine pénal des risques typiquement liés à ces activités concourant à la poursuite du but de l'entreprise."[57] Par exemple, pour une entreprise œuvrant comme intermédiaire financier, le blanchiment d'argent (art. 305bis CPS) doit être considéré comme la concrétisation possible d'un *risque typique*. Le *risque général* inhérent à toute activité commerciale entre aussi en ligne de compte lorsque le lien entre l'infraction qui le concrétise et l'activité commerciale en question apparaît suffisamment fort.

> Ainsi, toute entreprise est susceptible de voir un faux dans les titres commis en son sein. Un faux réalisé par un employé pour cacher les pertes liées à ses

[53] Macaluso 2004, n°737, 129.

[54] Généralement un agent (arts. 418a–418v CO), un commissionnaire (arts. 425–439 CO) ou un courtier (arts. 412–418 CO).

[55] Perrin 2008, 301.

[56] Macaluso 2009, n°32 et seq. *ad* art. 102 CPS, 974.

[57] Macaluso 2009, n°34 *ad* art. 102 CPS, 975.

> malversations répond en principe à l'exigence de connexité. … En revanche, une fausse attestation (supposée titre) destinée à permettre à un employé d'échapper à une période de service militaire manquerait d'un tel lien étroit aux activités commerciales de l'entreprise.[58]

Il n'est pas nécessaire que l'infraction ait été commise dans l'intérêt de l'entreprise. En outre, seul un crime ou un délit dont le lésé n'est pas, ou pas uniquement, l'entreprise concernée permet une mise en œuvre de l'article 102 CPS.[59]

7.7 Les conditions spécifiques de la responsabilité subsidiaire de l'entreprise posée par l'article 102 alinéa 1 CPS

7.7.1 L'impossibilité d'imputer l'infraction à une personne physique en raison d'un défaut d'organisation

Pour que l'entreprise puisse être condamnée, il faut qu'en raison d'une *carence organisationnelle*, il soit *impossible d'imputer l'infraction à une personne physique déterminée*. Tout crime ou délit peut être imputé à l'entreprise. Il n'existe pas de liste particulière dressée par le législateur. Il suffit que le comportement punissable corresponde à la définition de l'article 10 alinéa 2 ou 3 CPS.

Il n'est pas nécessaire que l'auteur individuel ait été condamné ou même poursuivi. La notion d'imputation se comprend en effet dans le sens qu'il est identifié et remplit les éléments constitutifs de l'infraction.[60] Si par exemple il est reconnu irresponsable (*incapacity of guilt*, art. 19 CPS) et qu'il échappe par conséquent à toute culpabilité, il convient de considérer que l'infraction a tout de même pu lui être imputée au sens de l'article 102 alinéa 1 CPS. Pour que ce dernier trouve application, il faut donc que l'auteur demeure inconnu, c'est-à-dire que les autorités pénales ne sachent pas qui il est et que l'enquête ne soit pas en mesure de le déterminer. La norme vise également les situations dans lesquelles il existe un doute raisonnable quand à son identité, en particulier lorsque plusieurs suspects sont en cause et qu'il n'est pas possible, en application du principe *in dubio pro reo*, de déterminer auquel l'infraction doit être attribuée. Il se peut aussi que les circonstances ne permettent pas d'imputer le crime ou le délit à une personne physique précise, "ce dernier cas étant précisément la résultante du morcellement des processus de décision et d'action au sein des

[58] Macaluso 2009, n°35 *ad* art. 102 CPS, 975.
[59] Macaluso 2009, n°37 et seq. *ad* art. 102 CPS, 975.
[60] Macaluso 2009, n°44 *ad* art. 102 CPS, 976.

entreprises qui ont en grande partie motivé l'adoption de règles permettant la répression des collectivités."[61]

Le défaut d'organisation représente la forme de faute retenue à la charge de l'entreprise. Il s'agit d'examiner dans un premier temps ce qui aurait dû être accompli en matière d'organisation de l'entreprise pour qu'une responsabilité individuelle puisse être mise en évidence. Ensuite, ce résultat théorique, s'il apparaît praticable, doit être comparé aux mesures effectivement mises en œuvre au sein de l'entreprise.[62] Les mesures d'organisation sont en particulier celles relatives à la gestion et à la surveillance des ressources humaines. "On pense en particulier à une définition et à une délimitation claires des tâches de chacun; à des procédures bien définies de délégation de compétence; à la mise en place de règles et de procédures en matière de conduite des activités; à des mesures de surveillance efficaces, etc."[63]

7.7.2 Un exemple d'application judiciaire

Le 28 juin 2004, un véhicule fut enregistré, lors d'un contrôle de vitesse sur une autoroute, à 162 km/h, alors que la vitesse était limitée à 100 km/h. Une demande d'identité du conducteur responsable fut adressée à l'entreprise X, propriétaire du véhicule impliqué. Elle répondit à la police qu'il était loué par la société Y SA. Cette dernière a argué que la qualité des photographies prises par le radar ne permettait pas de déterminer avec certitude qui était le conducteur au moment des faits.

Z, directeur général délégué de Y SA, a précisé qu'en raison du nombre important d'employés, il n'était pas en mesure de dire qui conduisait le véhicule au moment de l'excès de vitesse. Il a ajouté que les véhicules de la société n'étaient pas tous attitrés et qu'il n'existait pas de carnet de bord à l'intérieur de ceux-ci.

Le juge d'instruction en charge de l'affaire a estimé que le fait de ne pas pouvoir établir quel employé circule avec le véhicule d'entreprise à une date déterminée constitue un manque d'organisation de l'entreprise au sens de l'article 100^{quater} alinéa 1 CPS. La société fut reconnue coupable de violation grave des règles de la circulation routière et condamnée à une amende de CHF 3 000.[64]

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[61] Macaluso 2004, n°808, 141.

[62] Macaluso 2009, n°47 *ad* art. 102 CPS, 977.

[63] Macaluso 2004, n°839, 146.

[64] Revue fribourgeoise de jurisprudence 2005, 59 et seq.; voir également: Journal des tribunaux 2005, I, 558. Notons que le magistrat qui a décerné l'ordonnance pénale de condamnation a considéré implicitement que l'article 100^{quater} CPS, donc l'actuel art. 102 CPS, constituait une norme d'imputation et pas une nouvelle infraction. L'entreprise

7.8 La responsabilité directe de l'entreprise selon l'article 102 alinéa 2 CPS

7.8.1 L'indépendance des punissabilités de l'entreprise et de l'auteur physique

Une différence importante avec l'article 102 alinéa 1 CPS réside dans *l'indépendance des punissabilités de l'entreprise et de l'auteur physique*. Par conséquent, les éléments qui permettraient d'exclure la culpabilité individuelle, comme l'irresponsabilité ou la contrainte absolue, n'empêchent pas de rechercher l'entreprise. Seules doivent bénéficier à l'entreprise les circonstances réalisées dans la personne de l'auteur physique de l'infraction, telles que les faits justificatifs, qui empêchent de considérer que l'infraction a été commise.[65]

7.8.2 Les infractions pouvant engager la responsabilité primaire de l'entreprise

Alors que pour l'article 102 alinéa 1 CPS, tout crime ou délit peut engager la responsabilité de l'entreprise, l'article 102 alinéa 2 CPS prévoit une *liste exhaustive d'infractions* originaires. Il s'agit de l'organisation criminelle (*criminal organization*, art. 260ter CPS), du financement du terrorisme (*financing of terrorism*, art. 260^{quinquies} CPS), du blanchiment d'argent (*money laundering*, art. 305bis CPS), de la corruption active d'agents publics suisses (*active bribery of Swiss officials*, art. 322ter CPS), de l'octroi d'un avantage (*granting of a benefit*, art. 322^{quinquies} CPS),[66] de la corruption active d'agents publics étrangers (*active bribery of foreign public officials*, art. 322^{septies} al. 1 CPS) et de la corruption active privée (*active private bribery*, art. 4a al. 1 let. a LCD).

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fut en effet condamnée pour violation des règles de la circulation routière et non pas pour défaut d'organisation.

[65] Macaluso 2009, n°51 *ad* art. 102 CPS, 977 et seq.

[66] Dans le cas de l'octroi (ou de l'acceptation) d'un avantage, l'agent public est censé *accomplir les devoirs de sa charge*. Alors que dans les cas de "corruption" au sens strict, le but visé consiste à l'amener à exécuter ou omettre un *acte en relation avec son activité officielle qui soit contraire à ses devoirs ou dépende de son pouvoir d'appréciation*.

7.8.3 Un défaut d'organisation imputable à l'entreprise

7.8.3.1 Les mesures d'organisation "raisonnables et nécessaires" que l'entreprise doit prendre

L'entreprise répond pénalement des infractions limitativement énumérées à l'article 102 alinéa 2 CPS "s'il doit lui être reproché de ne pas avoir pris toutes les mesures d'organisation raisonnables et nécessaires" pour empêcher l'une d'entre elles. Nous avons affaire ici au concept juridique indéterminé par excellence. Pour assurer une sécurité du droit, l'enjeu consiste à déterminer des critères permettant une meilleure concrétisation des obligations légales. D'une part, l'entreprise *a intérêt* à prendre des mesures qui s'avèrent susceptibles de rendre plus difficile, de manière générale, un certain nombre de comportements criminels (mesures d'organisation générales). Par exemple, en matière de dépenses, la séparation des fonctions d'autorisation, d'approbation et de paiement représente une mesure recommandable pour prévenir la commission d'infractions aussi diverses que la corruption *(bribery)*, l'abus de confiance *(embezzlement)* ou la gestion déloyale *(disloyal management)*. D'autre part, des précautions *doivent* être spécifiquement pensées et mises en œuvre pour parer à la perpétration de chacune des infractions figurant à l'article 102 alinéa 2 CPS (mesures d'organisation spécifiques).[67]

Pour se conformer au critère de nécessité, l'entreprise doit prendre les mesures qui paraissent aptes à éviter l'infraction en question. "Est déterminante ici l'adéquation entre l'ensemble des mesures prises (ou qui auraient dû être prises), considérées comme un tout, et la prévention du danger qui s'est réalisé, en ce sens qu'il devait apparaître prévisible qu'en s'abstenant de prendre ces mesures d'organisation particulières, l'infraction en cause devenait susceptible d'être commise."[68] Ici aussi, les mesures d'organisation concernent essentiellement la gestion et la surveillance des ressources humaines. L'entreprise doit bien choisir, instruire et surveiller ses collaborateurs (règle des trois *curae*). En outre, il n'est pas suffisant d'avoir pris un certain nombre de mesures, puisque le texte légal exige qu'elles soient "toutes" prises. Toutefois, cette injonction reste formulée de manière très abstraite, puisqu'elle n'est accompagnée d'aucune énumération exhaustive ou simplement illustrative.

Les mesures "raisonnables" doivent être déterminées à l'aide des règles qui s'appliquent en matière de position de garant. Il convient de privilégier une définition restrictive fondée sur l'adage "à l'impossible nul n'est tenu". L'entreprise ne peut se voir reprocher que de ne pas avoir pris, *in concreto*, les mesures qui, raisonnablement, pouvaient être exigées d'elle.[69]

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[67] Augsburger-Bucheli/Perrin 2006, 59.
[68] Macaluso 2004, n°886, 154.
[69] Macaluso 2004, n°887 et seq., 155.

Le caractère "raisonnable" des mesures exigées par l'article 102 alinéa 2 CPS doit servir de tempérament à la contrainte de la nécessité, compte tenu des circonstances du cas d'espèce. Le juge doit se demander ce qui, raisonnablement, pouvait être exigé de l'entreprise *in casu*. Selon nous, un critère très important est celui de la grandeur de l'entreprise, qui dépend du nombre de travailleurs et du chiffre d'affaires généré. Il est évident qu'une petite entreprise avec dix collaborateurs ne peut pas mettre en place un programme aussi étendu qu'une grande multinationale. Le juge doit tenir compte des contraintes financières qui pèsent sur l'entreprise. Celle-ci ne doit pas être amenée à mettre son existence en péril pour satisfaire aux exigences de l'article 102 CPS. En cas de procès, le magistrat devra se demander si, dans les circonstances du cas d'espèce, il pouvait raisonnablement être exigé qu'elle prît davantage de mesures.

En plus de son aspect objectif relatif aux mesures d'organisation, la faute revêt aussi une composante subjective. Non seulement l'entreprise doit être mal organisée dans le sens que nous avons précisé, mais il faut en outre qu'il soit possible de le lui reprocher en tenant compte des circonstances particulières du cas d'espèce.

> La mise en œuvre et le respect des règles de conduite contenues ou édictées sur la base des délégations figurant dans les différentes normes traitant de la prévention des infractions. . . visées par l'article 100^{quater} al. 2 [a] CP, ou adoptées à l'initiative d'organisations professionnelles, auront une grande importance dans la pratique. La violation de ces règles tout d'abord constituera un indice (voire une présomption de fait) que l'organisation de l'entreprise est défaillante au regard des mesures nécessaires à la prévention de l'infraction en cause. Leur respect en revanche devrait conduire à l'admission d'une présomption inverse: il sera en effet difficile de faire alors le "reproche" à l'entreprise (c'est tout l'intérêt de la condition légale: 's'il doit lui être reproché') de ne pas avoir pris une mesure que les règles de conduite ne prévoyaient pas.[70]

7.8.3.2 Un exemple concret d'application: les mesures d'organisation à prendre pour éviter la commission d'un acte de corruption transnationale au sein d'une entreprise exportatrice

L'article 322^{septies} alinéa 1 CPS, qui sanctionne la corruption active d'agents publics étrangers, c'est-à-dire celle qui s'adresse à des personnes physiques accomplissant une tâche dévolue à un État autre que la Suisse ou à une organisation internationale, est l'une des infractions originaires pouvant entraîner une responsabilité primaire de l'entreprise, en particulier exportatrice. En substance, le comportement punissable consiste à offrir, promettre ou octroyer un avantage à un agent public étranger, alors qu'il

[70] Macaluso 2004, n°911 et seq., 158.

n'y a pas droit, pour qu'il exécute ou omette un acte en relation avec son activité officielle et qui soit contraire à ses devoirs ou dépende de son pouvoir d'appréciation.

En plus des éléments interprétatifs généraux que nous avons définis pour apprécier le caractère nécessaire des mesures que toute entreprise est censée prendre, il sied, pour celle qui se livre à l'exportation et qui peut donc être confrontée à des cas de corruption transnationale, de prendre en compte son secteur d'activité et le pays client. Par exemple, si une entreprise active dans le domaine informatique entretient des relations commerciales avec la Suède, elle devrait pouvoir se contenter d'un système de gestion de l'intégrité plus sommaire que si elle vend de l'armement au Turkménistan.[71] Les indices élaborés par Transparency International représentent une source précieuse pour se forger une première impression. L'entreprise devrait ensuite s'efforcer d'avoir une connaissance suffisante de la situation qui prévaut dans les pays étrangers concernés ainsi que des règles qui y régissent les activités commerciales. Elle peut notamment obtenir des renseignements plus précis auprès d'un avocat à l'étranger ou de l'un de ses confrères en Suisse ayant un correspondant à l'extérieur ou une bonne connaissance du pays en question.

Il convient ensuite de prendre en compte les règles extrapénales édictées pour prévenir spécifiquement chaque infraction figurant à l'article 102 alinéa 2 CPS. En matière de corruption, si la réglementation n'est pas aussi abondante que dans le domaine de la lutte contre le blanchiment d'argent, plusieurs normes définies et proposées par différents organismes existent tout de même. Elles peuvent servir à l'élaboration d'un véritable corpus de règles professionnelles. Sur cette base, l'entreprise peut fixer des règles d'organisation et de gestion du risque auxquelles elle doit se plier pour se prémunir contre une condamnation pénale. La prise en compte de règles de comportement extralégales par le droit pénal dépend avant tout de leur connaissance et reconnaissance dans le milieu concerné. Deux textes pourraient servir de référence générale pour définir ce que devrait constituer une bonne pratique: les *Business Principles for Countering Bribery*[72] (ou, très semblables, les *Partnering Against Corruption Principles for Countering Bribery*[73]) et le manuel élaboré par la Chambre de commerce

[71] L'Indice de perception de la corruption 2009 établi par Transparency International donne un résultat de 9,2 pour la Suède qui occupe ainsi le troisième rang, alors que le Turkménistan occupe la 168e place, avec une note de 1,8 (10: pays considéré comme n'étant pas touché par la corruption; 0: pays perçu comme miné par le phénomène). Les différents secteurs économiques ne présentent en outre pas les mêmes risques. L'Indice des pays exportateurs établis par Transparency International en 2002 montre notamment que le secteur de l'armement et de la défense est particulièrement exposé.

[72] Etablis à l'initiative de Transparency International et de Social Accountability International.

[73] Rédigés à l'initiative du World Economic Forum en collaboration avec Transparency International et le Basel Institute on Governance.

internationale pour lutter contre la corruption.[74] Il serait souhaitable que les organisations professionnelles, sur la base également des propositions formulées par la doctrine, définissent quelles sont les sources qui pourraient servir de référence commune. Sur cette base plus explicite, l'entreprise pourra élaborer des règles d'organisation et de gestion du risque pour se prémunir contre une condamnation pénale.

L'entreprise exportatrice qui se conformerait aux critères que nous venons d'exposer n'aurait certes pas la certitude d'échapper à sa responsabilité pénale. Les limites des exigences légales, dans un cas particulier, ne deviennent claires et précises qu'*a posteriori*, au gré des interprétations imposées par la jurisprudence. Toutefois, dans ce contexte, la prise en compte de l'aspect subjectif de la faute reprochable à l'entreprise peut apporter un tempérament salutaire, tout particulièrement si l'entreprise s'est conformée aux normes extralégales existant en matière de prévention de la corruption.[75]

7.9 Les sanctions applicables à l'entreprise

7.9.1 Le système des sanctions

Le système suisse des sanctions est dualiste. Il comprend des peines *(sentences)* et des mesures *(measures)*. Dans la première catégorie figurent la peine pécuniaire (*monetary penalty*, arts. 34–36 CPS), la peine privative de liberté (*prison sentence*, arts. 40–41 CPS), le travail d'intérêt général (*community service*, arts. 37–39 CPS) et l'amende (*fine*, arts. 102 et 103 CPS). Les mesures sont divisées quant à elles en deux groupes. D'une part, les mesures thérapeutiques et l'internement (arts. 56–65 CPS) qui règlent la prise en charge des délinquants souffrant de troubles mentaux, le traitement des addictions, les mesures applicables aux jeunes adultes et l'internement des délinquants particulièrement dangereux. D'autre part, les "autres mesures" (arts. 66–73 CPS), qui ont pour but de protéger la société contre les actes d'une personne, parmi lesquelles figurent le cautionnement préventif *(preventive security)*, l'interdiction d'exercer une profession *(ban on exercise of a profession)*, l'interdiction de conduire *(driving ban)*, la publication du jugement *(publication of the judgment)*, la confiscation *(confiscation)* et l'allocation au lésé *(use to the benefit of the injured person)*.

[74] Heimann/Vincke 2008.

[75] Pour plus de détails sur la problématique de la responsabilité pénale de l'entreprise en lien avec la corruption transnationale, voir: Perrin 2008, 298 et seq.

7.9.2 La peine-menace de l'article 102 CPS

La seule peine encourue par l'entreprise est l'*amende*, dont le montant maximal prévu par l'article 102 CPS s'élève à CHF 5 000 000. Les auteurs qui affirment que l'article 102 CPS contient une infraction de désorganisation considèrent qu'il s'agit d'une contravention.[76] Pour les autres, la question ne se pose pas puisqu'ils soutiennent que la disposition pénale ne fait qu'instaurer une règle d'imputation.

7.9.3 La fixation de la peine

L'article 47 CPS, règle de principe, prévoit à son alinéa premier que le "juge fixe la peine d'après la culpabilité de l'auteur. Il prend en considération les antécédents et la situation personnelle de ce dernier ainsi que l'effet de la peine sur son avenir." Les critères spécifiques à la fixation de l'amende à l'entreprise, qui doivent être interprétés ou complétés en conformité à cette norme générale, sont les suivants:[77]

- la *gravité de l'infraction*, qui s'examine en fonction de la gravité objective de l'infraction et compte tenu de l'ensemble des circonstances du cas d'espèce;
- la *gravité du manque d'organisation*, qui correspond à la gravité de la faute commise par l'entreprise, celle-ci s'examinant sous l'angle objectif dans les cas d'application de l'article 102 alinéa 1 CPS et également de manière subjective dans le contexte de l'alinéa 2;
- la *gravité du dommage causé* qui correspond à la gravité de la lésion ou de la mise en danger du bien juridique protégé par la norme violée;
- la *capacité économique* de l'entreprise.

7.9.4 Les mesures

Les mesures applicables à l'entreprise sont la *publication du jugement* (art. 68 CPS) et la *confiscation* (arts. 69–76 CPS). "Les autres mesures paraissent en revanche exclues dès lors qu'elles conduiraient à rétablir des sanctions que le législateur a expressément voulu exclure pour les entreprises, telle l'interdiction d'exercer une profession."[78]

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[76] Niggli/Gfeller 2007, n°50 *ad* art. 102 CPS, 1705; Trechsel, 2008, n°7b *ad* art. 102 CPS, 510.

[77] Macaluso 2009, n°80 *ad* art. 102 CPS, 983.

[78] Macaluso 2009, n°84 *ad* art. 102 CPS, 984.

La portée pratique de la publication du jugement est aujourd'hui relativement limitée, notamment en raison de la médiatisation de nombreux procès pénaux. Par contre, la confiscation des valeurs patrimoniales (*confiscation of assets*, art. 70 CPS) en relation avec l'infraction commise par l'auteur physique est tout à fait envisageable. "Le juge prononce la confiscation des valeurs patrimoniales qui sont le résultat d'une infraction ou qui étaient destinées à décider ou à récompenser l'auteur d'une infraction, si elles ne doivent pas être restituées au lésé en rétablissement de ses droits" (art. 70 al. 1 CPS).

L'article 70 alinéa 2 CPS prévoit un régime spécial en faveur du tiers de bonne foi. Il stipule que "la confiscation n'est pas prononcée lorsqu'un tiers a acquis les valeurs dans l'ignorance des faits qui l'auraient justifiée, et cela dans la mesure où il a fourni une contre-prestation adéquate ou si la confiscation se révèle d'une rigueur excessive." Pour une partie de la doctrine, l'entreprise au sein de laquelle une infraction a été commise n'est pas considérée comme un tiers au sens de cette norme. "Cela comporte que l'entreprise qui profite du produit de l'infraction ne peut se prévaloir d'une acquisition de bonne foi selon cette disposition et n'est donc pas protégée contre la confiscation."[79] Pour les tenants de cette conception, aussi bien dans le cas de l'alinéa 1 que dans celui de l'alinéa 2 de l'article 102 CPS, si les conditions sont réunies pour que l'infraction soit imputable à l'entreprise, il convient de considérer que l'entreprise n'est pas un tiers et que, par conséquent, les avantages ayant une valeur économique qu'elle en retire sont confiscables en application de l'article 70 alinéa 1 CPS.[80] D'autres auteurs, auxquels nous nous rallions, considèrent que cette règle doit être modifiée en raison de l'adoption des articles 102 et 102a CPS qui transforment l'entreprise en un sujet de droit pénal à part entière et permettent donc de la considérer, lorsqu'elle n'est pas elle-même punissable, comme un tiers au sens de l'article 70 alinéa 2 CPS.[81]

7.10 La procédure pénale dirigée contre l'entreprise

En matière de procédure pénale, la Suisse vit actuellement une période de grandes transformations. Les 29 codes de procédure (26 codes cantonaux et 3 lois fédérales) ont coexisté jusqu'à l'entrée en vigueur le 1er janvier 2011 du nouveau Code de procédure pénale suisse (CPP). Celui-ci

[79] Macaluso 2004, n°1010, 174.

[80] Bertossa 2009, 382.

[81] Dupuis/Geller/Monnier/Moreillon/Piguet 2008, n°20 *ad* art. 70 CPS, 679 et références doctrinales citées.

constitue le point d'orgue du processus d'unification entamé depuis de nombreuses années.[82]

Les règles de procédure applicables aux personnes physiques valent également pour l'entreprise. Le législateur s'est borné à prévoir une réglementation spéciale relative à la représentation de cette dernière (art. 102a CPS, art. 112 CPP).

7.10.1 Le pouvoir de juridiction, le for et les organes du procès pénal

Le partage de compétences *ratione materiae* entre la Confédération et les cantons se trouve réglementé aux articles 22–28 CPP. La juridiction attribuée aux cantons est la règle, comme le souligne l'article 22 CPP, celle dévolue à la Confédération demeurant l'exception. L'attribution du pouvoir de juridiction est basée sur le critère de l'infraction commise. Par exemple, les infractions visées aux articles 260ter (organisation criminelle), 260^{quinquies} (financement du terrorisme), 305bis (blanchiment d'argent), 305ter (défaut de vigilance en matière d'opérations financières) et 322ter à 322^{septies} (corruption; octroi et acceptation d'un avantage) CPS, ainsi que les crimes qui sont le fait d'une organisation criminelle au sens de l'article 260ter CPS sont soumis à la juridiction fédérale lorsque les actes punissables ont été commis pour une part prépondérante à l'étranger ou dans plusieurs cantons sans qu'il y ait de prédominance évidente dans l'un d'entre eux (art. 24 al. 1 CPP).[83] Dans la législation en vigueur jusqu'au 31 décembre 2010, la problématique était réglée par les articles 336, 337 et 338 CPS. Dans le cadre de leurs sphères de compétence respectives, les autorités cantonales ou fédérales peuvent poursuivre et sanctionner

[82] L'article 123 alinéa 1 de la Constitution fédérale (RS 101) précise que "la législation en matière de droit pénal et de procédure pénale relève de la compétence de la Confédération". Le droit de fond est unifié depuis l'entrée en vigueur du Code pénal le 1er janvier 1942. Une modification constitutionnelle acceptée en votation populaire le 12 mars 2000 a permis d'initier le processus devant mener à l'unité du droit de forme.

[83] Les articles 23 et 24 CPP qui établissent la juridiction fédérale ne citent pas expressément l'article 102 CPS. Si nous admettons que cette dernière n'est qu'une norme d'imputation, cette omission est tout à fait cohérente et il est indéniable que les autorités fédérales qui ont à connaître de l'infraction originaire sont également habilitées à poursuivre et juger l'entreprise au sein de laquelle elle a été commise. Si nous considérons par contre qu'il s'agit d'une nouvelle infraction, comme elle ne figure pas dans la liste des infractions attribuées aux autorités fédérales par le Code de procédure, il faudrait que le Ministère public de la Confédération ordonne une jonction au sens de l'article 26 alinéa 2 CPP pour permettre à ces dernières d'en connaître. La solution serait quelque peu lourde. Elle illustre les problèmes concrets qui peuvent survenir si nous considérons que l'article 102 CPS pose une nouvelle infraction.

les personnes physiques, mais aussi les entreprises sur la base de l'article 102 CPS.

L'article 36 alinéa 2 CPP règle la question du *for de la poursuite des infractions commises au sein d'une entreprise*. Il prévoit que l'autorité du lieu où l'entreprise a son siège est compétente. Elle l'est également lorsque la même procédure, pour le même état de fait, est aussi dirigée contre la personne agissant au nom de l'entreprise.

Les autorités pénales chargées de poursuivre et de juger les infractions sont les mêmes pour les personnes physiques et les entreprises. Les autorités de poursuite pénale sont la *police*, le *ministère public* et les *autorités pénales compétentes en matière de contravention* (art. 12 CPP). Le *tribunal de première instance est chargé de statuer en premier ressort* (art. 19 CPP), ses jugements pouvant faire l'objet d'un recours auprès de la *juridiction d'appel* (art. 21 CPP). La Cour de droit pénal du *Tribunal fédéral* traite des recours en matière pénale en dernière instance nationale.

7.10.2 Le principe de l'opportunité des poursuites et la transaction pénale

7.10.2.1 L'opportunité limitée des poursuites

Le Code de procédure pénale suisse consacre un principe d'*opportunité limitée des poursuites*. L'article 7 alinéa 1 CPP fixe celui de la légalité de la procédure pénale en stipulant que "les autorités pénales sont tenues, dans les limites de leurs compétences, d'ouvrir et de conduire une procédure lorsqu'elles ont connaissance d'infractions ou d'indices permettant de présumer l'existence d'infractions", mais l'article 8 CPP assouplit cette règle en énumérant un certain nombre de circonstances dans lesquelles le ministère public et les tribunaux peuvent ou doivent même renoncer à la poursuite. Ils sont en particulier contraints de choisir cette issue, si aucun intérêt prépondérant de la partie plaignante ne s'y oppose, lorsque "l'infraction n'est pas de nature à influer sensiblement sur la fixation de la peine ou de la mesure encourue par le prévenu en raison des autres infractions mises à sa charge; la peine qui devrait être prononcée en complément d'une peine entrée en force serait vraisemblablement insignifiante; sur la peine encourue pour l'infraction poursuivie, une peine de durée équivalente prononcée à l'étranger devrait être imputée" (art. 8 al. 2 CPP). En outre, l'article 8 alinéa 1 CPP renvoie à l'article 52 CPS qui précise que "si la culpabilité de l'auteur et les conséquences de son acte sont peu importantes, l'autorité compétente renonce à le poursuivre, à le renvoyer devant le juge ou à lui infliger une peine" (*minima non curat praetor*). En tous les cas, la décision ne peut pas être prise pour des motifs d'ordre politique. "Les autorités pénales sont indépendantes dans l'application du droit et ne sont soumises qu'aux règles du droit" (art. 4 al. 1 CPP). Ces normes s'appliquent

aussi bien quand la procédure est dirigée contre une personne physique que lorsqu'elle l'est contre une entreprise.

Précisons que dans le cas de l'article 102 alinéa 1, si l'infraction a pu être imputée à l'auteur, l'une des conditions de la responsabilité de l'entreprise fait défaut et elle ne pourra pas être poursuivie. Peu importe donc, dans cette hypothèse, qu'une ordonnance de non-entrée en matière ou de classement ait été rendue à l'égard de la personne physique. En cas de responsabilité primaire de l'entreprise, comme les punissabilités de l'auteur et de cette dernière sont indépendantes, une non-entrée en matière ou un classement rendu à l'égard de la personne physique ne bénéficie pas *ipso iure* à l'entreprise.

7.10.2.2 La procédure simplifiée

La procédure simplifiée prévue aux articles 358–362 CPP représente une forme de négociation pénale avec reconnaissance préalable de culpabilité (*plea bargain*, mais à des conditions bien précises). Le prévenu peut être une personne physique ou une entreprise. Il peut passer une transaction avec le ministère public pour bénéficier de l'oubli d'une partie de son activité délictueuse, d'un réquisitoire plus clément ou pour que des faits moins graves soient retenus à son encontre.

7.10.3 Les garanties de procédure pénale

L'entreprise étant un sujet pénal à part entière, elle jouit des mêmes prérogatives que les personnes physiques dans la procédure engagée contre elle. Elle bénéficie des droits prévus par la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH),[84] en particulier son article 6 relatif au "droit à un procès équitable", le Pacte international des Nations Unies relatif aux droits civils et politiques (Pacte ONU II),[85] la Constitution fédérale et le Code de procédure pénale.

L'entreprise peut se prévaloir notamment du droit à la notification des charges (droit à la mise en prévention) et de celui de ne pas participer à sa propre incrimination (droit de ne pas témoigner contre soi-même; *nemo tenetur se ipsum accusare*). Dans le premier cas, l'autorité pénale est tenue de procéder à une communication détaillée portant sur la nature et la cause de l'accusation.

> Notifier des charges à une entreprise comporte toutefois des particularités, induites par la nature de sa responsabilité pénale et par les mécanismes de sa mise en œuvre. Il s'agit pour l'autorité à la fois d'exposer à l'entreprise les faits reprochés à l'auteur physique de l'infraction ainsi que leur qualification juridique, et de

[84] RS 0.101.
[85] RS 0.103.2.

> lui faire connaître en quoi et comment sa propre responsabilité pénale pourrait être engagée dans le contexte de CP 102. En d'autres termes, l'autorité pénale doit notifier à l'entreprise, au degré de précision requis, qu'elle considère que celle-ci a présenté un défaut d'organisation pénalement relevant. … [86]

Dans le second cas, sur la base des articles 32 alinéa 1 Cst, 6 chiffre 2 CEDH et 14 alinéa 2 du Pacte ONU II, le fardeau de la preuve incombe à l'accusation. Un renversement de celui-ci n'est pas envisageable. C'est au ministère public qu'il incombe de démontrer le défaut d'organisation. Le représentant de l'entreprise peut choisir de garder le silence et n'est pas tenu à produire des documents.

L'article 265 alinéa 2 lettre c CPP contient une norme spécifiquement destinée à l'entreprise. Elle prévoit que celle-ci n'est pas soumise à l'obligation de dépôt lorsqu'elle est détentrice d'objets ou de valeurs patrimoniales qui doivent être séquestrées si le fait d'opérer ce dépôt est susceptible de la mettre en cause au point qu'elle-même pourrait se voir rendue pénalement responsable ou alors qu'elle pourrait être rendue civilement responsable et que l'intérêt à assurer sa protection l'emporte sur l'intérêt de la procédure pénale.

7.10.4 La représentation de l'entreprise dans la procédure

L'article 102a CPS ("Procédure pénale", *"Penal proceeding"*) stipulait ce qui suit:[87]

> [1] En cas de procédure pénale dirigée contre l'entreprise, cette dernière est représentée par une seule personne, qui doit être autorisée à représenter l'entreprise en matière civile sans aucune restriction. Si, au terme d'un délai raisonnable, l'entreprise n'a pas nommé un tel représentant, l'autorité d'instruction ou le juge désigne celle qui, parmi les personnes ayant la capacité de représenter l'entreprise sur le plan civil, représente cette dernière dans la procédure pénale.
>
> [2] La personne qui représente l'entreprise dans la procédure pénale possède les droits et obligations d'un prévenu. Les autres représentants visés à l'al. 1 n'ont pas l'obligation de déposer en justice.
>
> [3] Si une enquête pénale est ouverte pour les mêmes faits ou pour des faits connexes à l'encontre de la personne qui représente l'entreprise dans la procédure pénale, l'entreprise désigne un autre représentant. Si nécessaire, l'autorité d'instruction ou le juge désigne un autre représentant au sens de l'al. 1 ou, à défaut, un tiers qualifié.
>
> [1] In the case of a penal proceeding against the enterprise, the enterprise shall be represented by a sole person authorized to represent it in civil law matters without any restrictions. If the enterprise fails to appoint such representative within a reasonable time period, the investigating authority or the judge shall decide which

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[86] Macaluso 2009, n°36 *ad* art. 102a CPS, 992 et seq.

[87] La traduction en langue anglaise est tirée de: Swiss-American Chamber of Commerce 2008, 62 et seq.

of the persons authorized to represent the enterprise in civil law matters shall represent it in the penal proceeding.

[2] The person representing the enterprise in the penal proceeding shall have the same rights and duties as a defendant. The other persons mentioned in paragraph 1 are not obligated to testify in the proceeding against the enterprise.

[3] If a penal investigation based upon the same facts or facts related therewith is initiated against the person representing the enterprise in the penal proceeding, the enterprise shall designate another representative. If necessary, the investigating authority or the judge shall designate another person as representative according to paragraph 1, or, in the absence of such person, a qualified third person.

L'article 112 CPP pose pour l'essentiel et substantiellement les mêmes règles, tout en ajoutant un alinéa 4 qui précise que "si une enquête pénale est ouverte pour les mêmes faits ou pour des faits connexes aussi bien à l'encontre d'une personne physique que d'une entreprise, les procédures peuvent être jointes".

Seules les personnes participant à la formation ou à l'expression de la volonté de l'entreprise sur le plan civil peuvent la représenter dans la procédure. Les mandataires, comme les avocats, n'appartiennent pas à cette catégorie. Par contre, certains organes des personnes morales remplissent les conditions nécessaires. Il s'agit notamment des membres du conseil d'administration de la société anonyme ou des directeurs dont les pouvoirs s'étendent à l'ensemble de l'activité de l'entreprise.

A l'égard de l'autorité pénale, l'entreprise est engagée par son représentant. Les déclarations formulées par ce dernier dans la procédure lui sont imputées. L'article 102a alinéa 2 CPP précisait qu'il possède les droits et les obligations d'un prévenu, les autres personnes, détenant un pouvoir de représentation générale de l'entreprise mais n'ayant pas été choisies comme représentants dans la procédure, étant exemptées de l'obligation de déposer en justice. Dans le nouveau droit, il n'y a plus lieu de distinguer les droits et obligations du représentant de l'entreprise de ceux de cette dernière; désormais, il exerce et assume les droits et obligations de la seule entreprise. L'article 178 lettre g CPP prévoit, d'une manière plus générale, que quiconque qui "a été ou pourrait être désigné représentant de l'entreprise dans une procédure dirigée contre celle-ci, ainsi que ses collaborateurs" est entendu en qualité de personne appelée à fournir des renseignements. En vertu de l'article 180 alinéa 1 CPP, ces personnes n'ont pas l'obligation de déposer. Elles ne sont par ailleurs soumises à aucune obligation de participer à la procédure.[88]

7.11 Les statistiques des condamnations

Il n'est malheureusement pas possible de savoir combien de condamnations ont été prononcées sur la base de l'article 102 CPS. En effet, elles ne

[88] Macaluso 2009, n°28, 51 *ad* art. 102a CPS, 991, 996.

sont pour l'instant pas inscrites au casier judiciaire[89] et ne figurent pas non plus dans les statistiques des condamnations pénales publiées par l'Office fédéral de la statistique. Un seul cas, relativement atypique,[90] a fait l'objet d'une condamnation publiée.[91]

7.12 Conclusion et recommandations

La responsabilité pénale de l'entreprise est en Suisse une réalité juridique très récente. Plusieurs controverses doctrinales, que la jurisprudence n'a pas encore eu l'occasion de trancher, animent le débat. Leur importance pratique ne doit toutefois pas être exagérée. La question de l'initiation et de l'aboutissement des procédures pénales est plus fondamentale. Même si des statistiques de condamnations ne sont malheureusement pas disponibles, il semble très vraisemblable que l'article 102 CPS a encore été fort peu appliqué. La jeunesse de la norme explique assurément en partie cette situation et il est par conséquent prématuré de se hasarder à dresser un bilan définitif. Il est toutefois possible de raisonnablement supposer que les garanties de procédure offertes à l'entreprise, en particulier le droit de ne pas témoigner contre elle-même, fournissent une partie de l'explication. Elles peuvent en effet constituer un obstacle très important pour les autorités de poursuite pénale, le représentant de l'entreprise connaissant beaucoup mieux qu'elles les structures de son organisation. Nous ne pensons toutefois pas qu'il faille plaider en faveur d'un renversement du fardeau de la preuve. Une telle mesure législative serait en effet contraire à l'ordre constitutionnel suisse ainsi qu'aux engagements internationaux pris par notre pays.

Les solutions sont à chercher dans les moyens à mettre en œuvre pour garantir une meilleure efficacité de la norme pénale, l'objectif étant de lui permettre de jouer pleinement son rôle de prévention générale. De ce point de vue-là, la responsabilité primaire de l'entreprise nous semble beaucoup plus utile que celle consacrée à l'article 102 alinéa 1 CPS. En effet, dans le premier cas, les mesures d'organisation sont censées empêcher la réalisation de l'infraction, alors que dans le second il est uniquement attendu d'elles qu'elles permettent de désigner l'auteur qui a commis le crime ou le délit.

L'efficacité de la prévention générale dépend de la sévérité de la sanction et du risque perçu par le justiciable de se voir effectivement condamné. La seconde composante dépend de l'efficacité des autorités de poursuite et des moyens mis à leur disposition pour accomplir leur mission. Or, la

[89] L'Office fédéral de la justice envisage de remédier à cette situation.

[90] Voir ci-dessus Ch. 7.7.2.

[91] Il n'est pas exclu que certains magistrats aient appliqué la disposition, sans toutefois que leur décision ait été retranscrite dans une publication officielle ou un écrit de doctrine.

crise économique, qui fragilise les finances publiques, risque de rendre leur tâche plus difficile, les parquets étant tenus de dégager des priorités de politique criminelle sous une contrainte budgétaire qui se resserre. En ce qui concerne le premier aspect, il est légitime de se demander si l'amende de cinq millions de francs prévue comme peine-menace n'est pas beaucoup trop basse. Pour une petite et moyenne entreprise, ce montant maximal peut certes représenter une somme considérable. Toutefois, comme le juge doit fixer la peine en fonction notamment de sa capacité économique, le risque concret de voir une entreprise disparaître en raison d'une sanction trop lourde ne devrait en principe pas se concrétiser. Il semblerait par conséquent opportun de prévoir une peine-menace plus élevée. Malgré tout, nous ne pensons pas que cette solution permettrait d'améliorer considérablement la prévention. En effet, le risque d'être poursuivie, avec la mauvaise publicité que cela implique, représente certainement l'élément le plus incitatif pour l'entreprise. C'est sur cet aspect qu'il convient donc de mettre l'accent.

Nos recommandations sont les suivantes:

- Les organisations professionnelles, dans la perspective de la responsabilité directe de l'entreprise, devraient élaborer un corpus de règles, originales ou par renvoi, pour chacune des infractions prévues à l'article 102 alinéa 2 CPS. Il est essentiel que les milieux concernés se mettent d'accord sur les principes à respecter lors de l'élaboration et la mise en œuvre du système de gestion de l'intégrité dans l'entreprise permettant de prendre les mesures "raisonnables et nécessaires" imposées par la loi.
- Les autorités pénales doivent mettre l'accent sur la formation de leurs membres. Une investigation en entreprise nécessite des compétences et connaissances spécifiques. Outre les moyens mis à disposition en termes d'effectifs, c'est la seule solution pour dépasser l'obstacle représenté par les garanties de procédure.
- Les infractions imputables de l'article 102 alinéa 2 CPS concernent toutes, dans une acception large, des cas de criminalité économique. Le succès dépend de la volonté des ministères publics de lutter contre ce genre de comportements punissables. Il convient donc qu'ils leur accordent la place qu'ils méritent.
- Dans certains cas, les procureurs en charge des affaires auront besoin du concours des autorités étrangères. Il est donc nécessaire, dans ce domaine aussi, de renforcer la coopération internationale.
- Les condamnations des entreprises devraient être inscrites au casier judiciaire et il serait utile que l'Office fédéral de la statistique publie les chiffres des condamnations.

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Chapter 8
Corporate Criminal Liability in Germany

Martin Böse

Contents

8.1 Introduction

In general terms, German law recognizes corporate liability as a consequence of legal personality: contract and tort law provide that corporations are liable for the wrongdoing of their representatives or employees,[1] and special concepts of civil liability (e.g., product liability) can result in

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[1] §§ 31, 278, 831 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (Civil Code in the version promulgated on January 2, 2002),

M. Pieth, R. Ivory (eds.), *Corporate Criminal Liability*, Ius Gentium: Comparative Perspectives on Law and Justice 9, DOI 10.1007/978-94-007-0674-3_8,

the liability of corporations as well.[2] A form of corporate liability can also be found in German administrative law, for example, in provisions dealing with the protection of the environment.[3]

By contrast, the German Penal Code does not provide for the imposition of criminal sanctions on corporations. In drafting the code in 1870, the German legislator adhered to a notion of personal guilt that could not be applied to corporations; following the ancient rule, *societas delinquere non potest*, it limited criminal liability to natural persons.[4] The provisions on forfeiture and confiscation are nonetheless applicable to legal entities. According to § 75 Penal Code, assets of a corporation can be confiscated as *instrumenta vel producta sceleris*[5] if the perpetrator committed the crime as a legal representative of the corporation. If the corporation has benefitted from a crime committed by one of its representatives, the court may order the forfeiture of the benefit.[6]

The provisions on forfeiture do not establish the criminal responsibility of corporations under German law, however, since forfeiture cannot not be regarded as a criminal sanction *stricto sensu*: as forfeiture is supposed to ensure that the corporation is deprived of any illicit profit and does not benefit from the offense, it is not generally regarded as requiring personal guilt.[7] The same applies to the confiscation of objects that endanger the general public or that may be used for the commission of unlawful acts[8] since such confiscations are solely preventive.[9]

Bundesgesetzblatt 2002 I 42, 2909; 2003 I 738. See Wagner 2009, para. 378 and paras. 386 et seq.

[2] § 1 Produkthaftungsgesetz vom 15. Dezember 1989 (Product Liability Act of December 15, 1989), Bundesgesetzblatt 1989 I 2198.

[3] Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) VBlBW 1993, 298 (301); see also §§ 1, 2 Umwelthaftungsgesetz vom 10. Dezember 1990 (Environmental Liability Act of December 10, 1990), Bundesgesetzblatt 1990 I 2634 and the Erwägungsgründe des Umweltschadensgesetz (Explanatory Memorandum to the Avoidance and Remediation of Environmental Damages Act), Bundestagsdrucksache 16/3806, 21.

[4] Brender 1989, 29 et seq.; see also the reluctant position of the Reichsgericht (Imperial Court of Justice) RGSt 16, 121 (123); 28, 103 (105); 33, 261 (264); for the origins of the rule *societas delinquere non potest* see Schmitt 1958, 16 et seq.

[5] § 74 Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (Penal Code in the version promulgated on November 13, 1998), Bundesgesetzblatt 1998 I, 3322.

[6] § 73(3) Penal Code.

[7] See Bundesverfassungsgericht (Federal Constitutional Court) BVerfGE 110, 1 (16 et seq.); Bundesgerichtshof (Federal Court of Justice) BGHSt 47, 369 (373).

[8] § 74(2) No. 2 and §74(3) Penal Code.

[9] Schmidt 2008a, para. 7.

The confiscation of other objects[10] is not merely preventative in purpose but is also intended to punish the offender.[11] Consequently, the confiscation of those objects cannot be ordered without guilt.[12] In that regard, the confiscation is a quasi-criminal sanction *(strafähnliche Maßnahme)*. In the view of the legislator, corporations should not be exempted from such confiscation orders (as third parties are); rather, if the perpetrator committed the crime on behalf of the corporation, confiscation may be ordered on similar conditions as apply to natural persons (i.e., the perpetrator him- /herself).[13] Thus, one could say that German criminal law provides for the criminal liability of corporations under § 75 Penal Code, except for the fact that confiscation is not a criminal sentence *stricto sensu*.[14]

In the place of criminal sanctions, the German legislator provided administrative penalties for corporations. This form of corporate responsibility was introduced gradually over the course of the twentieth century in response to the concern about the growing economic influence of legal persons. In 1929, a German court ruled that, in competition law,[15] a regulatory fine *(Ordnungsstrafe)* may be imposed on corporations as well as on human beings.[16] The decision inspired legislation expressly providing for regulatory fines against corporations.[17] In 1949, the legislator replaced the regulatory (criminal) fine with an administrative fine against legal persons out of deference to the traditional objections to corporate criminal liability.[18] To implement this, the legislator adopted a general provision on corporate fines *(Verbandsgeldbuße)* in the *Ordnungswidrigkeitengesetz*

[10] § 74(1), second sentence, Penal Code.

[11] BGHSt 25, 10 (12); Schmidt 2008a, para. 4.

[12] See § 74(3) Penal Code.

[13] Achenbach 1993, 549 et seq.; Schmidt 2008a, para. 1.

[14] Cf. §§ 38 et seq. Penal Code.

[15] § 17 of Verordnung gegen den Missbrauch wirtschaftlicher Machtstellungen vom 3. November 1923 (Regulation Against the Abuse of Economic Power of November 3, 1923), Reichsgesetzblatt 1923 I, 1067.

[16] Kartellgericht (German Cartel Court), (Decision of February 27, 1929, K. 271/28 101.), Kartell-Rundschau 1929, 213 et seq.

[17] See in this regard Brender (1989), 41 et seq.; see also 30 et seq., with regard to the former § 357 Reichsabgabenordnung vom 13. Dezember 1919 (Imperial Fiscal Code of December 13, 1919), Reichsgesetzblatt 1919, 1993.

[18] §§ 23, 24 Wirtschaftsstrafgesetz vom 26. Juli 1949 (Act on Business Crime of July 26, 1949), Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes 1949, 193. The introduction of a system of corporate criminal responsibility was rejected by academics and practitioners in 1953, see Verhandlungen des 40. Deutschen Juristentages, 1953, vol. 2, E 88; see also Heinitz 1953, 90; Engisch 1953, E 7 et seq., E 41; Hartung 1953, E 43 et seq.

(Regulatory Offenses Act) of 1968 (ROA).[19] According to § 30(1) ROA, an administrative fine *(Geldbuße)* may be imposed on a legal person if an organ, a representative, or a person with functions of control within the legal person has committed a criminal or a regulatory offense *(Ordnungswidrigkeit)*. The provision resolved the conflict between those who opposed corporate criminal responsibility on doctrinal grounds and those who saw a practical need for corporate sanctions in responding appropriately to corporate wrongdoing. In contrast to a criminal sentence, an administrative fine does not imply moral blameworthiness; furthermore, the corporate fine was designed as a "collateral consequence" *(Nebenfolge)* of the offense by a natural person. Therefore, the corporate fine was not considered incompatible with the concept of personal guilt.[20]

However, it still seems doubtful that the legislative compromise has addressed the doctrinal objections to corporate criminal responsibility, insofar as the corporate fine establishes the liability of a corporation for the criminal activities of its representatives.[21] When removing the original designation *(Nebenfolge)* in the Second Act on Combating Economic Crime *(Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität)*[22] the legislator acknowledged the corporate fine as a genuine punitive sanction,[23] though it did not change its position on criminally sanctioning corporations. In 1999, the Federal Ministry of Justice appointed a commission of experts from academia and the legal profession to examine the issue of criminal liability of legal persons. In its final report, the commission rejected the introduction of corporate criminal liability.[24] In the view of most commissioners, the administrative fine in § 30 ROA was sufficient, especially since it did not require the identification of a natural person as

[19] Then § 26 of the Ordnungswidrigkeitengesetz, OWiG, vom 24. Mai 1968 (Regulatory Offenses Act, ROA), Bundesgesetzblatt 1968 I, 481.

[20] See Begründung des Regierungsentwurfes eines Gesetzes über Ordnungswidrigkeiten (Explanatory Memorandum to the Draft of the Federal Government on a Regulatory Offenses Act), Bundestagsdrucksache V/1269, 58 et seq., 61.

[21] See the critical analysis by Ehrhardt 1994, 75 et seq.

[22] Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität (Second Act on Combating Economic Crime), Bundesgesetzblatt 1986 I, 721 (see Begründung zum Zweiten Gesetz zur Bekämpfung der Wirtschaftskriminalität [Explanatory Memorandum to the Second Act on Combating Economic Crime]), Bundestagsdrucksache 10/318, 38 (Bundestag printed paper 10/318, 38).

[23] Ehrhardt 1994, 79 et seq., 82; Tiedemann 1988, 1169, 1171; see also Begründung zur Änderung des § 30 OWiG durch das Zweite Gesetz zur Bekämpfung der Wirtschaftskriminalität (Explanatory Memorandum to the Amendment of § 30 ROA through the Second Act on Combating Economic Crime), Bundestagsdrucksache 10/318, 38 et seq.

[24] See the summary of the final report (Auszug aus dem Abschlussbericht der Kommission: Einführung einer Verbandsstrafe): Heine/König/Möhrenschlag/Möllering/Müller/Spindler 2002, 355.

perpetrator. In addition, corporate criminal liability was deemed incompatible with the concept of personal guilt and the principle *nulla poena sine culpa* since innocent people, such as shareholders, may be forced to suffer the consequences of the corporate penalty along with, or instead of, the persons who were guilty of the offense. Finally, the introduction of corporate criminal liability would have required, in the commission's view, not only the introduction of a new system of substantive criminal law, but also a set of new and different procedural rules.[25] Despite the commission's findings, the debate on corporate criminal liability in Germany continues.[26]

8.2 Responsibility of Corporations (Structural Questions)

Corporate criminal responsibility, as provided for by § 30 ROA, follows the imputation model as the liability of the corporation is based on the criminal conduct of its leading persons, in particular, its legal representatives.[27] In limiting the number of persons whose acts (or omissions) can be attributed to the corporation, as discussed further below, the German approach resembles the identification theory developed in common law jurisdictions such as England and Wales. That said, a corporate fine may be imposed even when the person who committed the offense cannot be identified, provided that it is established that one of the persons representing the corporation has committed the offense.[28]

Furthermore, under § 130 ROA, a corporate fine can be imposed if an ordinary employee has committed an offense on behalf of the legal person and a representative of the corporation has failed to prevent or discourage the commission of that offense through proper supervision. In this scenario, the responsibility of the corporation is based not on the criminal conduct of the employee but on the failure of the representative to comply with his/her duties: since § 130 ROA is an offense that is typically committed by representatives of corporations, it is a provision upon which corporate liability can be based.[29] Thus, according to some authors, a lack of organization and supervision *(Organisationsverschulden)* is the main element of corporate guilt that legitimates a corporate sanction.[30] This does not change the fact

[25] See above n. 24 FOR the summary of the arguments in the final report, 354–355.

[26] Athanassiou 2002; Dannecker 2001, 101 et seq.; Kindler 2007; Kirch-Heim 2007; Mittelsdorf 2007; Quante 2005.

[27] Bohnert 2007, § 30 para. 1; Ehrhardt 1994, 180, 186 et seq.; Ransiek 1996, 111; Rogall 2006, para. 8; Tiedemann 2007, para. 244; for criticism of the imputation model, see Kindler 2007, 154 et seq.

[28] Bundesgerichtshof (Federal Court of Justice), NStZ 1994, 346; Tiedemann 2007, para. 246.

[29] Rogall 2006, para. 75.

[30] Tiedemann 1988, 1172.

that a corporate fine under § 30 ROA may be imposed where there were no defects in corporate organization or supervision.[31] But organizational deficiencies will be more important in determining the amount of the corporate fine in Germany than in systems that adhere to a "pure" imputation model, as the discussion on sanctioning principles shows further below.[32]

8.2.1 Scope of Application

8.2.1.1 Corporations

The corporate fine can be imposed on legal persons,[33] including the stock corporation *(Aktiengesellschaft)*, the limited liability company *(Gesellschaft mit beschränkter Haftung)*, and the incorporated association *(rechtsfähiger Verein)*.[34] According to prevailing academic opinion, § 30 ROA also applies to legal persons established under public law *(Körperschaften des öffentlichen Rechts)*.[35] Further, § 30(1) Nos. 2 and 3 ROA extends corporate criminal liability to entities that do not have full legal personality, such as the non-incorporated association *(nicht rechtsfähiger Verein)*, the commercial company *(Handelsgesellschaft)*, limited partnership *(Kommanditgesellschaft)*, professional partnership *(Partnerschaftsgesellschaft)*, and a company established under the Civil Code *(BGB-Gesellschaft)*.[36] A corporate fine can also be imposed on a company registered in another state if the corporation has an equivalent legal capacity to the German legal persons identified in the § 30 ROA, and a "genuine link" establishes German jurisdiction.[37]

As the catalogue of organizations in § 30(1) shows, § 30 is limited in scope to corporations that enjoy at least partial legal capacity and so can be addressed as entities that are separate from their human representatives. The legislator apparently sought to avoid a conflict with the principle of *nulla poena sine culpa* (no punishment without guilt) since, in the

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[31] Tiedemann 1988, 1173.

[32] Sieber 2008, 467.

[33] § 30(1) No. 1 ROA.

[34] Gürtler 2009c, para. 2; Rogall 2006, para. 31.

[35] Gürtler 2009c, para. 2; Förster 2008, § 30 para. 3; see also Rogall 2006, paras. 32 et seq. (with an exception for the state, i.e., the Federal Republic of Germany and the States of Germany).

[36] Gürtler 2009c, paras. 4 et seq.; Rogall 2006, para. 38.

[37] See, e.g., § 59 Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (Banking Act in the version promulgated on September 9, 1998), Bundesgesetzblatt 1998 I, 2776 with regard to branches of the corporation in Germany. Oberlandesgericht Celle (Higher Regional Court, Celle), wistra 2002, 230; Rogall 2006, para. 30.

case of a sole trading enterprise, the imputation model would amount to establishing criminal responsibility of a natural person (the owner of the enterprise) *ex iniuria tertii* (criminal responsibility for acts committed by another person).[38]

8.2.1.2 Offenses

In general, § 30 ROA applies to all kinds of crimes and regulatory offenses *(Ordnungswidrigkeiten)*, including economic offenses,[39] such as the establishment of illegal trusts,[40] and environmental crimes;[41] a corporation may even be held liable for homicide.[42] However, the responsibility of the corporation presupposes that the perpetrator-representative breached one of the corporation's legal obligations or that the corporation was enriched (or should have been enriched) by the offense. These conditions are alternatives; thus, it is not necessary to show that the corporation violated its obligations if one of the other conditions (enrichment or intended enrichment) is met.

A corporation's legal obligations derive from the laws regulating its activities. For instance, a producer of goods is obliged to remove a product from the market if the product can cause harm to consumers,[43] an employer must comply with workplace safety standards to protect the health of his/her employees,[44] and an operator of power stations must comply with environmental standards imposed by law.[45] § 30 ROA has particular application to offenses that may only be committed by a specific class of perpetrators *(Sonderdelikte)* to which the corporation also belongs. In this way, a fine may be imposed on a corporation as an employer (e.g., for withholding of wages or salaries[46] or as an agent for a breach of trust).[47]

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[38] See above n. 23 for the Explanatory Memorandum to the Amendment of § 30 ROA, 39 et seq.

[39] See the Begründung zu § 30 OWiG (Explanatory Memorandum to § 30 ROA), Bundestagsdrucksache V/1269, 60.

[40] § 81(4) and (5) Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 15. Juli 2005 (Act against Restraints on Competition in the version promulgated on July 15, 2005), Bundesgesetzblatt 2005 I, 2114; 2009 I, 3850.

[41] Scheidler 2008, 195, 198.

[42] Rogall 2006, para. 76.

[43] BGHSt 37, 106 et seq.; Gürtler 2009c, para. 20; Rogall 2006, para. 76.

[44] See above n. 39 for Explanatory Memorandum to § 30 ROA, 60 et seq.; Gürtler 2009c, para. 20; Rogall 2006, para. 76.

[45] Gürtler 2009c, para. 20; see also Explanatory Memorandum to § 30 ROA, n. 39 above (legal obligations of corporations deriving from administrative law).

[46] § 266a Penal Code.

[47] § 266 Penal Code; see also Rogall 2006, paras. 74, 76.

8.2.2 Imputation (Structural Questions)

8.2.2.1 The Representatives of the Corporation

Corporate responsibility supposes a criminal or regulatory offense was committed by a person representing the corporation. § 30 ROA defines the class of persons who engage corporate responsibility:

- the governing body of a legal person or a member of such a body (§ 30(1) No. 1 ROA);
- the president of an unincorporated association or a member of the executive board of such an association (§ 30(1) No. 2 ROA);
- a partner of a company authorized to represent the company (§ 30(1) No. 3 ROA);
- an authorized representative with full power of attorney or a general agent or authorized representative in a management position with a commercial power of attorney (with respect to legal persons, associations or companies) (§ 30(1) No. 4 ROA); and
- other persons responsible for the management of a business entity or an enterprise of a legal person, association, or company, including persons in charge of supervising the management or other tasks involving the exercise of control in an executive position (§ 30(1) No. 5 ROA).

So, § 30 ROA does not restrict the class of persons who may engage corporate responsibility to those who could be considered the "directing mind" or the "senior manager" of an organization; to the contrary, § 30(1) No. 5 includes managing officers at a lower level. This provision was adopted in 2002[48] to implement the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests of June 19, 1997.[49] Accordingly, corporate liability can be based on the conduct of leading company officers authorized to exercise control within the corporation, such as persons responsible for internal financial control and auditing or members of a controlling or supervisory body *(Aufsichtsrat)*.[50]

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[48] Gesetz zur Ausführung des Zweiten Protokolls zum Übereinkommen zum Schutz der finanziellen Interessen der Europäischen Gemeinschaften vom 22. August 2002 (Act for the Implementation of the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests of August 22, 2002), Bundesgesetzblatt 2002 I, 3387.

[49] Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12.

[50] Gürtler 2009c, para. 14a., Begründung zum Entwurf eines Gesetzes zur Ausführung des Zweiten Protokolls vom 19. Juni 1997 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften, der Gemeinsamen Maßnahme betreffend die Bestechung im privaten Sektor vom 22. Dezember 1998 und des

By extending § 30 (1) No. 5 to all persons responsible for the management of the corporation's business or enterprises, the legislator wished to ensure that leading persons were caught by the provision irrespective their formal status within the corporation and, in particular, that corporations could not evade corporate liability by organizational measures.[51]

Further, since the lack of supervision is itself a regulatory offense,[52] "corporate" criminal responsibility may be based (indirectly) on an offense of an employee who is not covered by § 30 (1) ROA but who could have prevented or hindered the commission of the offense through proper supervision.

8.2.2.2 The (Criminal or Regulatory) Offense by the Representative

As mentioned above, the criminal liability of a corporation presupposes that a criminal or regulatory offense was committed by a representative of the corporation. Though § 30 (1) ROA does not require the conviction of that natural person, in principle, the corporate fine is imposed within the framework of the (criminal or administrative) proceedings against the natural person. However, if the competent authorities do not institute or subsequently terminate proceedings with regard to that natural person, the corporation may be fined in a separate procedure.[53] In particular, a corporate fine may be imposed even if the human perpetrator could not be identified, provided that it is established that one of the representatives of the corporation mentioned in § 30 (1) ROA committed the offense.[54]

Rahmenbeschlusses vom 29. Mai 2000 über die Verstärkung des mit strafrechtlichen und anderen Sanktionen bewehrten Schutzes gegen Geldfälschung im Hinblick auf die Einführung des Euro (Explanatory Memorandum to the draft of an act regarding the execution of the Convention on the Protection of the European Communities' Financial Interests of June 19, 1997, the Joint Action on corruption in the private sector of December 22, 1998 and the Council framework Decision of May 29, 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro), Bundestagsdrucksache 14/8998, 10, with reference to the Explanatory Report to the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, OJ No. C91, March 31, 1999, 8, 11, Art. 3 (1).

[51] See above n. 50 for Explanatory Memorandum to the draft of an act regarding the execution of the Convention on the Protection of the European Communities' Financial Interests of June 19, 1997, the Joint Action on corruption in the private sector of December 22, 1998, and the Council framework Decision of May 29, 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, 11.

[52] § 130 ROA.

[53] § 30(4) ROA.

[54] Bundesgerichtshof (Federal Court of Justice), NStZ 1994, 346; Gürtler 2009c, para. 40; Rogall 2006, paras. 102 et seq.; Tiedemann 2007, para. 246.

8.2.2.3 Imputation Criteria (Interest and Obligations of the Corporation)

The corporation is not responsible for just any of its representatives' offenses: a condition for imputation is a specific link between the offense and the corporation. In particular, § 30 ROA requires that the person representing the corporation infringed a legal obligation on the corporation or that the corporation was enriched (or was supposed to have been) enriched by the commission of the offense. These requirements are alternatives, i.e., the offense may be imputed to the corporation by reference to the interest (enrichment or intended enrichment) or by reference to the obligations of the corporation.

These criteria apply in the same way to the question of whether the human perpetrator acted "as" a corporate representative in committing the offense. According to prevailing opinion, the perpetrator must have committed the crime in exercising his/her functions and competences as a representative of the corporation (the so-called "functional approach") and not in his/her capacity as a private person.[55] As a rule, the person acts as a representative if he/she breaches obligations of the corporation in committing the offense.[56] This "functional link" is not necessary if the perpetrator commits the crime in order to enrich the corporation.[57]

Some scholars hold the view that the perpetrator must have committed the crime, at least partially, in the interest of the corporation (the so-called "interest theory").[58] However, this is not a convincing argument with regard to negligent infringements of the corporation's obligations that are committed in the interests neither of the perpetrator nor of the corporation.[59] Therefore, corporate liability should only be excluded when the representative was solely pursuing his/her own (private) interest in committing the offense,[60] particularly if he/she was acting contrary to the corporation's interest.[61] It is submitted that § 30 ROA clearly shows that both facts – corporate interest (enrichment) and the obligations of the

[55] See above n. 39 for Explanatory Memorandum to § 30 ROA; Bundesgerichtshof (Federal Court of Justice), NStZ 1997, 30 et seq. (with regard to § 75 Penal Code); Oberlandesgericht Celle (Higher Regional Court, Celle), wistra 2005, 160; Gürtler 2009c, para. 25.

[56] Oberlandesgericht Celle (Higher Regional Court, Celle), wistra 2005, 160; Gürtler 2009c, para. 25; Ransiek 1996, 114.

[57] Gürtler 2009c, para. 27; Rogall 2006, para. 93.

[58] Brender 1989, 128; Rogall 2006, para. 94.

[59] Ehrhardt 1994, 234; Müller 1985, 78 and Queck 2005, 35.

[60] See above n. 39 for Explanatory Memorandum to § 30 ROA; Bundesgerichtshof (Federal Court of Justice), NStZ 1997, 30 et seq. (with regard to § 75 Penal Code); Gürtler 2009c, para. 24; Müller 1985, 78.

[61] Müller 1985, 77; Rogall 2006, para. 95.

corporation and their violation – are capable of triggering corporate responsibility. Thus, corporate liability may be based on the violation of a corporation's duties even if the perpetrator acted contrary to the corporate interest.[62]

8.3 Sanctions and Sanctioning Principles

8.3.1 Sanctions

8.3.1.1 Financial Sanctions

The main sanction for corporations is the administrative fine, the *Geldbuße* under § 30 ROA. The fine shall amount to no more than €1 million for an intentional crime and no more than €500 000 for an offense of negligence.[63] As to regulatory offenses, the maximum amount of the correspondent offense provision applies.[64] If the regulatory offense does not differentiate between intentional and negligent conduct, the amount of the fine for negligent conduct must not exceed half of the maximum provided in the offense provision itself.[65]

According to the third sentence of § 30(2) ROA, if the conduct attributed to the corporation fulfills the criteria of both a criminal and a regulatory offense, the highest maximum amount applies. This provision was adopted to deal with improper agreements to restrict competition in response to invitations to tender. Such agreements are criminalized under § 298 Penal Code and they are also covered by the general regulatory offense in § 81(1) No. 1 and (2) No. 1 Act against Restraints on Competition (ARC).[66] According to § 81(4), second sentence, No. 1 ARC, the fine against an enterprise or an association of enterprises[67] may exceed the general maximum amount of €1 million[68] but is capped at 10% of the corporation's total turnover for the preceding business year. The provision follows the sanctioning scheme of Art. 23(2), second sentence, Council Regulation (EC) No. 1/2003.[69] It has

[62] Förster 2008, § 30 para. 34.

[63] Per § 30(2) No. 1 ROA.

[64] § 30(2), second sentence, ROA.

[65] § 17(2) ROA.

[66] Achenbach 2008a, 10.

[67] The fine is imposed on the corporation (the legal person) that runs the enterprise, since the European concept of responsibility of economic entities without legal personality is incompatible with the principles of the ROA, see Achenbach 2008b, 175.

[68] § 81(4), first sentence, ARC.

[69] Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ No. L1, January 4, 2003, 1. See Bundestagsdrucksache 15/5049, 50.

been subject to heavy criticism with regard to the principle *nulla poena sine lege* since it does not fix an absolute maximum for the fine.[70]

Furthermore, the maximum amount of the fine may increase taking into account the illicit profits of the corporation. Since the fine must exceed the benefits the corporation has obtained by committing the offense,[71] it may be necessary to impose a fine beyond the regular limit.[72] By depriving the corporation of illicit profits, the fine absorbs the function of forfeiture;[73] consequently, forfeiture may not be ordered if the corporation has already been fined.[74] Thus, with respect to the corporate fine, forfeiture is a subsidiary sanction.[75] By contrast, with regard to competition offenses,[76] the imposition of a fine does not preclude an order of forfeiture[77] or the siphoning off of illicit profits in administrative law.[78]

The forfeiture of illicit profits is supposed to ensure that the company does not benefit from the offense; it is not a punitive sanction and does not require personal guilt.[79] Thus, the conditions of corporate liability for forfeiture in relation to criminal offenses[80] and regulatory offenses[81] are less strict than those in § 30 ROA. An order of forfeiture may be directed at a corporation if the perpetrator acted "for" the corporation and the latter acquired something thereby.[82] On the better view, the forfeiture provision does not demand that an offender represented the corporation within the meaning of § 30(1) ROA; it is sufficient that a natural person (even a lower-ranking employee or third party) acted in the de facto or de jure interests of the corporation.[83] That said, some authors argue that only offenders within the "sphere" (of influence) of the corporation (in particular, employees) may trigger the provision.[84]

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[70] Brettel/Thomas 2009, 29 et seq.; for the contrary view, see Vollmer 2007, 170 et seq.

[71] § 30(3), § 17(4), first sentence, ROA.

[72] § 30(3), § 17(4), second sentence, ROA. See also § 81(5) ARC.

[73] §§ 73, 73a Penal Code; § 29a ROA.

[74] § 30(5) ROA.

[75] Achenbach 2008a, 14; Rogall 2006, para. 106.

[76] § 81(5) ARC.

[77] § 29a ROA.

[78] § 34 ARC. See the Begründung zu § 81 Abs. 5 GWB (Explanatory Memorandum to § 81(5) ARC), Bundestagsdrucksache 15/3640, 42.

[79] BVerfGE 110, 1, (16 et seq.); BGHSt 47, 369 (373).

[80] § 73 Penal Code.

[81] § 29a ROA.

[82] § 73(3) Penal Code; § 29a ROA.

[83] BGHSt 45, 235 (237 et seq., 246); Achenbach 2008a, 14; Gürtler 2009b, para. 21; Rogall 2006, para. 107.

[84] Eser 2006b, para. 37; Ransiek 1996, 123.

Once forfeiture is ordered, it extends to all objects and benefits and surrogate objects the corporation has obtained;[85] if necessary, the object can be replaced by an amount of money corresponding to its value.[86] In case of regulatory offenses, the forfeiture of the value is generally required (§ 29a(1) ROA); however, forfeiture may not be ordered to the extent that a victim of a crime[87] or regulatory offense[88] has claimed compensation. The corporation's costs and expenditures in committing the offense are not detracted from the value of the acquired assets since the gross value is regarded as subject to forfeiture *(Bruttoprinzip)*.[89] As this interpretation has transformed forfeiture from a means to deprive persons of illicit profits into a criminal sanction,[90] it is submitted that the forfeiture of the gross value is to be subject to the same conditions as the corporate fine.[91]

In addition to the provisions on forfeiture,[92] § 34 ARC establishes the competence of the court, in public law, to deprive corporations of illicit profits. In contrast to fines or forfeiture orders, the deprivation of illicit profits can be enforced by private parties.[93] A similar provision is contained in § 10 of the Act against Unfair Competition *(Gesetz gegen den unlauteren Wettbewerb)*.

Finally, a confiscation of the *instrumenta vel producta sceleris* is worth mentioning. Such confiscation order can be directed at a corporation if one of its representatives has committed a crime,[94] the considerations mentioned with regard to § 30 ROA applying accordingly.

8.3.1.2 Non-financial Sanctions

Neither the Penal Code nor the ROA provides for non-financial corporate sanctions, such as supervision orders, probation orders, or orders for the appointment of compliance monitors. However, in certain cases, state

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[85] § 73(1), second sentence, Penal Code.

[86] § 73a Penal Code.

[87] § 73(1), second sentence, Penal Code.

[88] Mitsch 2006b, para. 46, with reference to § 99(2) ROA that hinders the execution of a forfeiture order that disregards a final judicial decision ordering the compensation of the victim.

[89] BGHSt 47, 260 (265); 47, 369, 370 et seq.

[90] Eser 2006a, para. 19; Herzog 2005, paras. 13 et seq.; Ransiek 1996, 122 et seq.

[91] Achenbach 2008a, 16; Eser 2006b, paras. 17a, 37; Mitsch 2006b, para. 45; Rogall 2006, para. 108.

[92] See also §§ 8, 10(2) Wirtschaftsstrafgesetz in der Fassung der Bekanntmachung vom 3. Juni 1975, Bundesgesetzblatt 1975 I (Act on Business Crime of June 3, 1975), 1313. The requirements correspond to those of § 73 Penal Code and § 29a ROA, see Rogall 2006, para. 109. In legal practice, these provisions are not relevant, see Ehrhardt 1994, 37.

[93] § 34a ARC.

[94] § 75 Penal Code; § 29 ROA.

agencies may adopt administrative measures to prevent illegal conduct or social harm. For instance, the federal Financial Services Authority may demand the dismissal of managers responsible for persistent violations of the Banking Act and confer the competences of a corporation's governing body on a state commissioner.[95]

A legal person can be deregistered or dissolved if it engages in illegal conduct that endangers public welfare,[96] though these provisions are so little used as to be almost irrelevant.[97] Since 1945, only one limited liability company has been deregistered pursuant to these provisions and no such case has been reported with regard to stock corporations.[98] The explanation is the principle of proportionality in German law, which requires the executive to impose the mildest remedy to address the risk of future illegal conduct; the imposition of a fine is regarded as sufficiently effective.[99]

In general, German law does not recognize exclusions from public contracting processes as a corporate sanction. Nevertheless, public contracts shall be awarded to reliable enterprises.[100] Therefore, a corporation could be excluded from public tenders if its illegal conduct casts doubt on its reliability.[101] In addition, a corporation must be excluded from public contracts if one of its legal representative has committed an offense related to illegal employment.[102] The prospect of exclusion has a deterrent effect on corporations. However, the exclusion itself is a consequence of the corporation's lack of reliability; thus, it is not a criminal sanction but a preventive measure[103] and does not require a conviction.[104] A similarly preventative initiative for a federal register of corruption offenses has not yet been

[95] § 36 Banking Act.

[96] See, e.g., § 396 Aktiengesetz vom 6. September 1965 (Stock Corporation Act of September 6, 1965), Bundesgesetzblatt 1965 I, 1089; § 62 GmbH-Gesetz vom 20. April 1892, Reichsgesetzblatt 1892, 477, zuletzt geändert durch Art. 5 G vom 31. Juli 2009 (Limited Liability Companies Act of April 20, 1892, Imperial Law Gazette 1892, 477, last amended by Art. 5 G of July 31, 2009) Bundesgesetzblatt 2009 I, 2509, 2511; § 43 Civil Code. The liquidation can also be a consequence of the revocation of a license, see § 38(1) Banking Act.

[97] Rogall 2006, para. 111.

[98] Kirch-Heim 2007, 28; Erhardt 1994, 40.

[99] Hüffer 2008, § 396 para. 5; see also Rogall 2006, para. 111.

[100] § 97(4), first sentence, ARC.

[101] Kirch-Heim 2007, 28 et seq.

[102] § 21 Schwarzarbeitsbekämpfungsgesetz vom 23. Juli 2004 (Act on Combating Illegal Employment of July 23, 2004), Bundesgesetzblatt 2004 I, 1842; § 6 Arbeitnehmer-Entsendegesetz vom 20. April 2009 (Overseas Secondees Act of April 20, 2009), Bundesgesetzblatt 2009 I, 799.

[103] Berwanger 2006, para. 5; Kirch-Heim 2007, 31 et seq.

[104] § 21(1), sentence 2, Act on Combating Illegal Employment.

adopted[105] but several states *(Bundesländer)* have established corruption registers, which help their competent authorities to assess the reliability of the corporations tendering for contracts.[106] In the state of North Rhine-Westphalia,[107] the offenses covered by the register are: the corruption of state officials,[108] money laundering,[109] fraud,[110] subsidy and credit fraud,[111] the breach of trust,[112] the conclusion of agreements restricting competition,[113] private corruption,[114] and tax fraud.[115]

8.3.2 Sanctioning Principles

The amount of the fine is determined according to the general principles that apply to the imposition of an administrative fine.[116] In keeping with its functions, the fine is composed of two elements: punishment (the punitive element) and siphoning off of illegal profits (the profit element).[117]

With regard to the profit element, the fine has the same function as the forfeiture order; however, according to the prevailing view, the economic benefit *(wirtschaftlicher Vorteil)* is calculated by deducting costs and expenditures from the profit that has been earned by committing the offense (net profit principle) *(Nettoprinzip)*.[118] It is therefore different to the acquired object and its value. The application of the *Bruttoprinzip*

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[105] See the draft of the Korruptionsregister-Gesetz (Corruption Register Act), Bundestagsdrucksache 16/9780.

[106] See, e.g., Korruptionsbekämpfungsgesetz des Landes Nordrhein-Westfalen vom 16. Dezember 2004 (Act on Combating Corruption of the State of North Rhine-Westphalia), Gesetz- und Verordnungsblatt des Landes Nordrhein-Westfalen 2005, No. 1; for further acts see Kirch-Heim 2007, 31.

[107] § 5(1) Act on Combating Corruption of the State of North Rhine-Westphalia.

[108] §§ 331 et seq. Penal Code.

[109] § 261 Penal Code.

[110] § 263 Penal Code.

[111] §§ 264, 265b Penal Code.

[112] § 266 Penal Code.

[113] § 298 Penal Code; § 81 ROA.

[114] § 299 Penal Code.

[115] § 370 Abgabenordnung in der Fassung der Bekanntmachung vom 1. Oktober 2002 (Fiscal Code of October 1, 2002), Bundesgesetzblatt 2002 I 3866; 2003 I, 61.

[116] § 17(3) and (4) ROA. See further Rogall 2006, para. 115; Wegner 2000a, 362; without reference to § 17 (3) ROA: Gürtler 2009c, para. 36a.

[117] § 17(4) ROA; Rogall 2006, para. 121.

[118] §§ 73, 73a Penal Code; § 29a ROA. See Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), wistra 1995, 75 (76); Mitsch 2006a, para. 119; Förster 2008, § 17 para. 50; Rogall 2006, para. 122; Wegner 2001, 1982; for the contrary view see Brenner 2004, 259; Gürtler 2009a, para. 38a.

would imply a punitive function which is subject to the second element of the fine.[119] If the authority or the court cannot ascertain the precise amount of illegal profits, then the amount may be estimated.[120] Notably, most commentators are also of the opinion that compensation claims must be considered in imposing fines.[121]

As to the punitive element, the gravity of the offense, the guilt attaching to the offender, and his/her economic situation are all to be taken into account.[122] By extension, the financial situation of the corporation must be considered,[123] and, importantly, the fine should not be such as to put the existence of the corporation at risk.[124] With regard to competition offenses, the fine is related to the annual turnover of the corporation[125] and the Federal Cartel Office has adopted guidelines on the setting of fines[126] that follow the sanctioning scheme of the European Commission: the basic amount of the fine is calculated on the basis of the infringement-related turnover and increased or decreased with regard to aggravating or mitigating factors and the deterrence factor.[127]

Further, in line with the logic of the imputation model, the determination of the corporate fine depends on the offense of its representative; with regard to regulatory offenses the same penalty level correspondingly applies.[128] The gravity of the offense depends, inter alia, on the importance of the protected legal interest, the degree of damage or risk, the duration of the offense,[129] the consequences of the offense, and the manner of its execution.[130]

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[119] Bohnert 2007, para. 42; Rogall 2006, 122.

[120] BGH, NStZ-RR 2008, 13; Gürtler 2009a, para. 45; BVerfGE 81, 228 (242).

[121] For further details and different opinions, see Rogall 2006, paras. 126 et seq.

[122] § 17(3) ROA.

[123] Rogall 2006, para. 119; see also the Bußgeldleitlinien des Bundeskartellamts über die Festsetzung von Geldbußen nach § 81 Abs. 4 Satz 2 GWB (Guidelines of the Federal Cartel Office on imposing fines according to § 81(4), second sentence, ARC), Bekanntmachung Nr. 38/2006 vom 15. September 2006., No. 24.

[124] Dannecker/Biermann 2007, para. 393.

[125] § 81(4), second sentence, ARC.

[126] See above n. 123 for Guidelines of the Federal Cartel Office.

[127] For further details see Vollmer 2007, 168 et seq.

[128] § 31(2), second sentence, ROA. See Gürtler 2009c, para. 36a; Förster 2008, § 30 para. 43; Rogall 2006, para. 115 et seq.

[129] § 81(4), sixth sentence, ARC.

[130] BGH wistra 1991, 268 (269); Bohnert 2007, para. 41; Dannecker/Biermann 2007 paras. 371 et seq.; Gürtler 2009c, para. 36a; Förster 2008, § 30 para. 43; Rogall 2006, para. 117.

In principle, the guilt of the corporation is based on the conduct of its representative. Therefore, serious forms of deliberate intent and gross negligence are aggravating factors.[131] However, the guilt attaching to the corporation is different from the personal guilt of the offender.[132] According to the imputation model, the conduct of the representative must be considered as an emanation of the collective will of the corporation.[133] So, the guilt will be particularly great if the offense was an expression of a general criminal attitude prevailing within the corporation.[134] By contrast, the fine will be lower if the offense of the representative is not in line with the company's general business policy.[135] Correspondingly, a lack of supervision will increase the guilt of the corporation since the responsibility of the corporation is based, not only on the offense committed, but also on the failure of leading persons to carry out their supervisory functions.[136] The same holds true for the concept of corporate guilt that focuses on organizational deficiencies:[137] systematic disorganization is an aggravating factor.[138] For similar reasons, a corporation that repeatedly infringes the law will be sanctioned with a higher fine because it failed to adopt adequate preventive measures as a consequence of its prior conviction(s).[139]

On the other hand, an adequate compliance system should be considered a mitigating factor because the organizational *sufficiencies* mean that the corporation's guilt is less.[140] This approach could be contested on the basis that guilt, in the imputation model, is solely based on the conduct of the representative; in that regard, the institution of a compliance program is irrelevant.[141] However, what this argument does not consider, is that the guilt attaching to the corporation depends on the extent to which the corporation as a whole has infringed its legal obligations. In other words, even

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[131] See above n. 123 for Guidelines of the Federal Cartel Office, No. 16; see, in general, Mitsch 2006a, paras. 60, 82.

[132] For criticism of the inherent contradiction in a concept of corporate guilt founded on two concepts (the wrongdoing of the representative and the corporation itself), see Kindler 2007, 154 et seq.; Mittelsdorf 2007, 198.

[133] Rogall 2006, paras. 116, 118.

[134] Müller 1985, 82; Rogall 2006, para. 118.

[135] Rogall 2006, para. 118.

[136] § 130 ROA. Bohnert 2007, para. 41; Rogall 2006, paras. 115, 118.

[137] Tiedemann 1988, 1172; Sieber 2008, 468.

[138] Gürtler 2009c, para. 36a; Förster 2008, § 30 para. 43.

[139] See above n. 123 for Guidelines of the Federal Cartel Office, No. 16; see, in general, Mitsch 2006a, para. 76; Wegner 2000b, 93.

[140] Sieber 2008, 465; Wegner 2000a, 363.

[141] Pampel 2007, 1639; see also Sieber 2008, 472.

applying the imputation model, the conduct of representatives exercising their duties must be taken into account.[142] By setting up a compliance program, a corporation expresses its general will to prevent offenses and to comply with its obligations under § 130 ROA; (effective) compliance programs must therefore be considered mitigating factors.[143]

On general principles, post-offense conduct may also result in the mitigation of the fine.[144] For instance, the payment of compensation to third parties for their financial losses is considered a mitigating factor,[145] as is the voluntary termination of the illegal conduct and cooperation with the competent authority.[146] In particular, cooperation in uncovering the offense can lead to a reduction of the fine or even to immunity in cartel cases.[147]

Finally, the fine must be high enough to deter the corporation from committing future offenses *(Spezialprävention)*.[148] Under the guidelines of the Federal Cartel Office, the amount of the fine can thus be increased with regard to a "deterrent factor."[149] That said, post-offense conduct of the corporation intended to prevent its representatives from committing similar offenses, such as the introduction or revision of compliance programs, may reduce the need for specific deterrence and, with that, the potential fine.[150]

Finally, it is said that the court should take into account any serious and inappropriate consequences, which the corporate fine might have for shareholders, associates, or partners in the enterprise who did not participate in the offense.[151] At the same time, it must also be considered that corporate fines fulfill a preventive function by making such law-abiding shareholders, associates, and partners police and change the corporation's behavior.[152]

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[142] Böse 2007, 22 et seq.

[143] Bosch/Colbus/Harbusch 2009, 748.

[144] Cf. § 46(1) Penal Code. See further Mitsch 2006a, para. 66.

[145] See above n. 123 for Guidelines of the Federal Cartel Office, No. 17.

[146] Dannecker/Biermann 2007, para. 381.

[147] On the leniency program of the Federal Cartel Office, see Bekanntmachung über den Erlass und die Reduktion von Geldbußen in Kartellsachen – Bonusregelung (Notice on immunity from and reduction of fines in cartel cases – leniency notice), Bekanntmachung Nr. 9/2006 vom 7. März 2006; for further details: Dannecker/Biermann 2007, paras. 416 et seq.

[148] Mitsch 2006a, para. 47; see also BVerfGE 27, 18 (33).

[149] See above n. 123 for Guidelines of the Federal Cartel Office, No. 15; see Vollmer 2007, 178.

[150] Förster 2008, § 30 para. 43.

[151] Förster 2008, § 30 para. 43; Rogall 2006, para. 120.

[152] Dannecker/Biermann 2007, para. 394; Müller 1985, 83; Rogall 2006, para. 120.

8.4 Procedural Issues

8.4.1 Prosecutorial Discretion

A corporation "can" be fined for an offense committed by one of its representatives.[153] Thus, §30 ROA incorporates the "opportunity principle" *(Opportunitätsprinzip)*[154] by which the competent authority has discretion whether or not to impose a corporate fine.[155] For regulatory offenses and their sanction (the administrative fine), this discretion flows from the general rule in § 47 ROA. With regard to the corporate fine under § 30 ROA, the discretion shall enable the authority to take into account the sanction imposed on the natural persons acting on behalf of the corporation and to avoid disproportionate effects of cumulative sanctions against the corporation and its representative.[156] However, this objective can also be achieved by proper adjustments to the different fines.[157]

Since criminal offenses committed by natural persons must be prosecuted in accordance with the legality principle *(Legalitätsprinzip)*,[158] critics argue that there should be an equivalent obligation with regard to corporations that are responsible for crimes.[159] As a consequence of prosecutorial discretion, they say, corporations are rarely fined for crimes.[160]

8.4.2 Jurisdiction

The ROA is limited to offenses committed in German territory.[161] Therefore, German courts have no power to fine German corporations for offenses committed abroad based upon the "active personality" principle. Furthermore, the principle of (passive) personality does not cover legal persons, even in criminal law.[162]

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[153] § 30(1) ROA.

[154] § 47 ROA.

[155] Gürtler 2009c, para. 35; Förster 2008, § 30 para. 42.

[156] Gürtler 2009c, para. 35; Förster 2008, § 30 para. 42; see also Rogall 2006, para. 39.

[157] Kirch-Heim 2007, 93.

[158] § 152(2) CCP.

[159] Kirch-Heim 2007, 94.

[160] Kirch-Heim 2007, 94, see also 244. According to statistical data collected from seventy-four of the 116 public prosecutor's offices (*Staatsanwaltschaften*), an average of seventy-four cases of corporate fines are reported annually.

[161] § 5 ROA.

[162] See with regard to § 7(1) Penal Code: Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart), NStZ 2004, 402 et seq.; Ambos 2003, para. 23.

8.4.3 Procedural Rights of the Corporation

In principle, the sanction on the natural person and the corporate fine shall be imposed in one and the same proceeding.[163] However, if no proceedings against the natural person are instituted, or if those proceedings are terminated, the corporation may be fined in independent proceedings.[164] In cartel cases, the federal or regional cartel office is exclusively competent to impose a corporate fine even if a criminal (rather than a regulatory) offense has been committed.[165] As a consequence, the corporation and the natural person are prosecuted in separate proceedings.

According to the Code of Criminal Procedure (CCP) the provisions on the legal status of a person whose assets shall be confiscated shall apply *mutatis mutandis* to a corporation that is to be fined for a crime;[166] the same applies to corporations held responsible for regulatory offenses.[167] The reference to the provisions on confiscation is explained by the fact that the corporate fine was previously thought to be a collateral consequence of the individual's conviction *(Nebenfolge)*: once the legislator removed this designation, the punitive character of the corporate fine was beyond doubt and the prevailing academic opinion held that the corporation must be awarded the procedural rights of a defendant in criminal proceedings.[168]

Accordingly, the corporation has a right to be heard[169] and must be summoned to the main hearing;[170] further, the corporation may apply for the taking of evidence.[171] The legal status of the corporation under these provisions does not fully correspond with that of a human defendant in criminal proceedings,[172] however (the right to apply for the taking evidence, for instance, is subject to restrictions).[173] Similar problems arise with regard to the privilege against self-incrimination *(nemo tenetur se ipsum accusare)*. According to the Federal Constitutional Court, this principle is inapplicable to corporations because it is an emanation of the guarantee of human dignity under art. 1(1) of the Constitution (*Grundgesetz*, literally Basic Law). Furthermore, the corporate fine differs from a criminal sentence because

[163] § 444(1) CCP; § 88(1) ROA.
[164] § 30(4), first sentence, ROA; § 444(3) CCP; § 88(2) ROA.
[165] § 82 ARC.
[166] §§ 431 et seq. CCP; § 444(1), second sentence, CCP; § 444(2), second sentence, CCP.
[167] § 88(3) ROA; see also § 46(1) ROA.
[168] Biermann/Dannecker 2007, para. 218; Queck 2005, 234; Rogall 2006, para. 175.
[169] § 432(2) CCP.
[170] § 444(2), first sentence, CCP.
[171] § 436(2) CCP.
[172] BGHSt 46, 207 (211).
[173] § 436, second sentence, CCP.

it is intended to skim off illegal profits and does not imply ethical disapproval.[174] This judgment has been heavily criticized as incompatible with the punitive function of the corporate fine and as insufficiently sensitive to the need for basic guarantees in proceedings against natural and legal persons.[175] In any case, legislation now provides the privilege against self-incrimination to corporations as well.[176]

Pursuant to the general rules on representation, the corporation exercises its procedural rights through its legal representatives, in particular, the members of its governing body.[177] Of course, to avoid a conflict of interests, legal representatives charged with the offense for which the corporation is to be fined are excluded from the pool of possible representatives.[178]

The natural persons representing the corporation have the legal status of a defendant if he/she is charged with a criminal or regulatory offense and the corporation is supposed to be fined for that offense in that same proceeding. So, they cannot be summoned and examined as witnesses against themselves or against the company.

A natural person who has not been charged is generally treated as a witness, though the legal status of the corporation must also be taken into account in determining such an individual's status in the proceeding. Since the corporation exercises its procedural rights (in particular, the right to remain silent) through its legal representatives, they cannot be regarded as witnesses against the company.[179] This applies to the governing body and its members, such as the executive director *(Geschäftsführer)*, members of the executive board *(Vorstandsmitglieder)*, and partners of a company authorized to represent that company.[180] By contrast, ordinary employees and other persons representing the company, such as the general agents or authorized representatives referred to in § 30(1) No. 4 ROA, are witnesses.[181] The same applies to former legal

[174] BVerfGE 95, 220 (242).

[175] Böse 2005, 196 et seq.; Dannecker 1999, 285 et seq.; Queck 2005, 214 et seq.; Weiß 1998, 294 et seq.

[176] § 444(2), second sentence, CCP; § 433(2) CCP; § 433(1), first sentence, CCP; § 163a(4), second sentence, CCP; § 136(1), second sentence, CCP; § 243(4), first sentence, CCP. See further Rogall 2006, para. 188.

[177] Rogall 2006, paras. 177 et seq.

[178] Drope 2002, 135; Rogall 2006, para. 179; Schmidt 2008b, para. 7.

[179] BGHSt 9, 250 (251); Müller 1985, 107; Queck 2005, 237 et seq.; Rogall 2006, para. 188; Schlüter 2000, 219 et seq.; Schmidt 2008b, para. 7; Weßlau 2007, para. 8; see also BVerfG BB 1975, 1315.

[180] BGHSt 9, 250 (251); Queck 2005, 238; Schlüter 2000, 219 et seq.

[181] Oberlandesgericht Frankfurt a.M. (Higher Regional Court, Frankfurt a.M.), GA 1969, 124; Queck 2005, 239 et seq.; Schlüter 2000, 228; Schmidt 2008b, para. 7; Weßlau 2007, para. 12.

representatives[182] (except lawyers, see below at 8.4.4) and partners who were not authorized to represent the company.[183] During cross-examination, however, these individuals may refuse to answer questions if their replies would expose them to prosecution for a criminal or regulatory offense.[184] It has been suggested that any person capable of engaging corporate responsibility cannot be a witness.[185] However, others reject such an extensive reading of the provision on the basis that the corporation's capacity to exercise its procedural rights is ensured by its legal representatives.[186] Accordingly, members of the supervisory board[187] are witnesses as well.

8.4.4 Investigation and Evidence

The imposition of a corporate fine follows general procedural rules under German law. As a consequence, there are no special rules for (documentary) evidence and the burden of proof is on the state not the corporation.[188] Further, in principle, all the provisions on coercive measures (e.g., search and seizure and surveillance of telecommunications) apply to corporations, provided that they are not inherently limited to natural persons (e.g., arrest).[189] Also, the investigative powers of the prosecutor or the administrative agency prosecuting the regulatory offense are limited by professional privileges in §§ 53, 53a, 97, 160a CCP, with the result that defense counsel, attorneys, auditors, tax consultants, physicians, pharmacists, and journalists are not required to disclose certain types of information obtained by them in their professional capacities. These provisions also apply to a corporation that exercises one of these professional functions (e.g., by operating a hospital or publishing business. A professional privilege for bankers does not exist in the German law on criminal procedure.[190]) These restrictions do not apply to persons charged with a

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[182] BVerfG BB 1975, 1315; Rogall 2006, para. 189.

[183] Oberlandesgericht Frankfurt a.M. (Higher Regional Court, Frankfurt a.M.), GA 1969, 124; Drope 2002, 145; Schlüter 2000, 229.

[184] § 55 CCP; § 46(1) ROA. Rogall 2006, para. 189; Schmidt 2008b, para. 7; Weßlau 2007, para. 12.

[185] § 75(1) Nos. 1–5 Penal Code; § 30(1) Nos. 1–5 ROA. See further Minoggio 2003, 121, 129; see also Schlüter 2000, 227, with regard to persons representing a separated unit of the corporation (e.g., a branch).

[186] Drope 2002, 145; Queck 2005, 238.

[187] § 30(1)–(5) ROA.

[188] See the suggestions of Heine 1995a, 653 et seq. and the critical remarks of Drope 2002, 334 et seq.

[189] Drope 2002, 269 et seq., 278 et seq.

[190] Meyer-Goßner 2009, § 53 para. 3, § 54 para. 10; Senge 2008, para. 8.

criminal or regulatory offense, however.[191] Nevertheless, a coercive measure may violate the principle of proportionality if it strongly affects the professional activity and the interests of clients, patients, and other third parties.[192]

8.5 Recommendations

The corporate fine under § 30 ROA resulted from the long-standing conflict between supporters and opponents of corporate criminal responsibility. As a compromise, it cannot satisfy both nor can it be regarded as a coherent provision on corporate responsibility in its own right.

On the one hand, an administrative sanction is imposed on the corporation irrespective of the quality of the offense, i.e., the same sanction applies to crimes and regulatory offenses. On the other hand, the sanction (the administrative fine or *Geldbuße*) also applies to natural persons. So, the law neglects the fundamental difference between corporations and individuals and the reason of the latter's capacity for criminal responsibility: a self-conscious mind, which enables the human being to reflect on his/her conduct and to realize his/her fault.[193] This difference notwithstanding, the punitive sanctions against corporations have the same communicative function as criminal sentences against individuals, i.e., condemning the breach of law committed by the offender (the corporation) and reconstituting the binding force of the violated norm *(positive Generalprävention)*.[194]

Thus, the current system does not properly reflect the differences between corporate and individual wrongdoing and criminal sentencing. On the basis of this conclusion, the following remedies should be considered:

First, corporate sanctions should be strictly distinguished from sanctions that are applicable to individuals.[195] Creating a genuinely "corporate" sanction would allow the peculiarity of legal persons to be taken into account, especially with regard to the prerequisites for corporate responsibility (the imputation of wrongful conduct of representatives and organizational failures). At the same time, a specific corporate sanctioning scheme could also avoid negatively affecting the conditions of criminal responsibility for

[191] Meyer-Goßner 2009, § 97 para. 4; Nack 2008, para. 1. See also, with regard to suspected persons, § 97(1), sentences 2, 3, 5, CCP; § 160a(4) CCP.

[192] BVerfGE 117, 244 (262, 265); BVerfG NJW 2008, 2422 (2423). See also, with regard to the freedom of the press, § 97(5), second sentence, CCP.

[193] See Engisch 1953, E 24–25; v. Freier 1998, 179 et seq.

[194] Böse 2007, 16; see also, with regard to the guardianship (*Unternehmenskuratel*) as a preventive measure: Schünemann 2008, 446 et seq.

[195] See, e.g., Kirch-Heim 2007, 197 et seq. (*Sanktionsgeld* instead of *Geldstrafe* or *Geldbuße*, as the case may be).

natural persons,[196] in particular, those which relate to the principle *nulla poena sine culpa.*[197]

Second, different sanctions should be imposed on corporations for criminal and regulatory offenses.[198] A sanction establishing corporate responsibility for a crime might have additional preventive effects in that it would stigmatize the corporation as "criminal".[199] The imposition of such a sanction should not depend on the discretion of the prosecuting authority, however.

Third, the punitive function of sanctions should be clearly distinguished from the objective of siphoning off illegal profits. In that regard, the imposition of two separate sanctions (fine and forfeiture) subject to different conditions seems preferable to the "bifunctional" corporate fine provided for by § 30 ROA; a solely punitive fine, such as exists under § 81(5), second sentence, ARC, facilitates coordination between administrative or civil law measures.[200] Forfeiture should, however, be strictly limited to depriving the offender (or third parties) of illegal profits; in other words, as regards the calculation of profits, the *Nettoprinzip* should be preferred to the *Bruttoprinzip*.

Fourth, the sanctioning scheme for corporations should not be limited to financial sanctions but should also include measures to prevent the corporation from committing crimes in the future.[201] In this regard, it has been suggested that the legal person should be able to be subject to guardianship, i.e., the law amended so that a guardian could be appointed to supervise the corporation's activities.[202] In addition, instructions (e.g., to institute a compliance program) should be considered as suitable preventive sanctions.[203]

However, it has to be stressed that adequate measures against corporate crime can and must also be taken outside the ambit of criminal law and the criminal justice system. Administrative law provides for measures to prevent corporations from engaging in illegal conduct, in particular, the

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[196] See the concerns of König 2002, 65; Weigend 2008, 944.

[197] This applies, in particular, to proposals to establish a corporate responsibility without any kind of corporate "guilt", i.e., strict corporate criminal liability, see Kirch-Heim 2007, 193 et seq. (*schuldgelöste repressive Unternehmenssanktionen*). Heine 1995b, 269.

[198] According to Korte 1991, 220 et seq. the actual provision is incompatible with the fundamental right of equality before the law: art. 3(1) Basic Law.

[199] Ehrhardt 1994, 172; sceptical Kirch-Heim 2007, 73.

[200] §§ 34, 34a ARC.

[201] See, for natural persons the measures of reform and prevention, §§ 61 et seq. Penal Code.

[202] Schmitt 1958, 207 et seq.; Schünemann 1979, 123 et seq.; Schünemann 1999, 296 et seq. These proposals were suggested as alternatives to criminal sanctions but could be introduced as supplementary measures as well: see Kirch-Heim 2007, 213 et seq.

[203] Kirch-Heim 2007, 218 et seq.

exclusion from public contracts, the dismissal of managers, and the appointment of a state commissioner (supervisor). Special attention should be paid to private enforcement mechanisms based on compensation and restitution claims.[204]

These new instruments have been introduced in competition law[205] but have not yet had a significant effect;[206] nonetheless, they could contribute to the prevention of corporate crime if the necessary amendments were adopted.[207]

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[204] In tort law, the victim should have a choice between compensation and deprivation of the illegal profits: see Wagner 2006, A 83 et seq. (*de lege lata* and *de lege ferenda*).

[205] § 10 Act against Unfair Competition and § 34a ARC.

[206] According to Sieme 2009, 915, only eight cases were reported. For the shortcomings of the provisions, see Emmerich 2007, paras. 4, 6; Wagner 2006, A 111 et seq.

[207] See the proposals of Wagner 2006, A 115 et seq.

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Chapter 9
Societas Delinquere Potest? The Italian Solution

Cristina de Maglie

Contents

9.1 Introduction: The Traditional Approach

Only in 2001 did the Italian legislator introduce a model for the *direct responsibility* of collective entities into its legal system. In fact, Italian law has always been shy of the principle of corporate criminal liability. There

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are various and deep-seated reasons for its ambivalence and for its attachment to the principle of *societas delinquere non potest*. These are to be found, in particular, in the Italian Constitution.

"Criminal law is created for man."[1] This objection raises a fundamental principle of criminal policy as a barrier to the criminal responsibility of legal persons. Criminal law, it is said, is aimed at physical persons, at spiritual man, who is in command of a faculty for self-determination, a capacity to choose between good and evil, and a creative and prudent intelligence, which allows him to freely fulfill his potential. Legal persons are legal fictions and so lack these attributes of personhood. Thus, they are not legitimate objects of the criminal law.

The most striking demonstration of this differentiation between natural and legal persons in Italian law is the existence of art. 197 Criminal Code, which establishes only a subsidiary civil responsibility of legal persons for crimes committed by their representatives, executives, or employees whether the offense constitutes a violation of the duties related to the professional qualifications of the offender or has been committed in the interests of the legal person.[2] A more basic objection refers back to art. 27(1) Italian Constitution, which establishes the principle that criminal liability is personal in nature and reflects the view that criminal law has an "undeniably ethical imprint".[3] Even more than the concept of guilt, the concept of the personal nature of criminal liability presupposes a set of physiopsychic factors that can only be identified in physical persons. The imputation of criminal responsibility requires a psychological connection, a guilty intent; "personal" liability is exclusively the liability that is filtered through subjective consciousness. In other words, the imputation of criminal responsibility necessarily presupposes "a person" with an individual "history" who has the capacity to reflect on the commission of a crime. To admit the principle of corporate criminal liability would be to irremediably violate the principle of the personal nature of the criminal act that emerges in art. 27, without taking into account the fact that, by nature, legal persons are incapable of suffering the consequences of the criminal act.

Hence, the lack of a structured personality, such as would permit evaluations of the juristic person's past and a prognosis about its likely future conduct, frustrate the re-educational aspirations of art. 27. That is, the principle of culpability does not allow us to substitute the subject that commits the crime for the one that suffers the criminal consequences. Moreover, applying a criminal sanction to the juristic person would negatively and unjustly impact innocent third parties (e.g., minor partners who were uninvolved in, or even opposed to, the decisions in question) (the spillover

[1] Ramella 1885, 960.

[2] Alessandri 1984, 1 et seq., 107 et seq.

[3] Romano 1995, 1036.

effect).[4] This would undermine the well-accepted principle that each person should suffer the consequences of his/her own actions to a very large extent indeed.

Even recently, art. 27(1) has been considered "an insuperable obstacle" to the legitimization of criminal liability for legal entities[5] and has, in fact, provided aggressive and unscrupulous corporations with a de facto blanket of immunity.

9.2 The 2001 Reform

In Italy, these objections were dealt with in a 2001 program of law reform. Legislative Decree No. 231 of June 8, 2001, on the disciplining of the administrative responsibility of legal persons, corporations, and associations, including those lacking legal personality *(Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalià giuridica)*, introduced into our system a model of direct administrative liability for collective entities. There were international motivations for the introduction of the legislation: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention on Foreign Bribery)[6] and the European Union's convention on the protection of its financial interests (also known as the "PIF Convention"), which entered into force in 1997.[7] At the national level, art. 11 Delegated Law No. 300 of 2000, which deals with the "rules concerning the administrative liability of legal persons, of companies, and associations even without legal status," created its own impulsion for reform.

The 2000 Preliminary Reform Project for the General Part of the Criminal Code (the so-called "Grosso Project") then opened the way for a new corporate liability provision. It dedicated an entire section (section VII) to the liability of legal persons, and its attached report acknowledged that reasons external and internal to the Italian legal system were creating pressure on the legislator to introduce corporate criminal liability rules. Its comparative analysis showed that the criminal liability of legal persons was, so to speak, a "forced decision" due to the need for the harmonization and

[4] Coffee 1981, 401.

[5] Romano 1995, 1036.

[6] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999.

[7] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests – Joint Declaration on Article 13(2) – Commission Declaration on Article 7, July 26, 1995, in force October 17, 2002, OJ No. C 316, November 27, 1995, 49.

coordination of Italian law with other European legal systems.[8] Further, in its view, the criminal liability of legal persons was not incompatible with the basic principles of the rule of law; instead it responded to the need for rationality, equity, transparency, and balance in the system. Hence, by the time of the 2001 decree, reform "could no longer be put off".[9]

However, the leaders of the Grosso Project chose not to define this liability as "criminal" but preferred to introduce a *"tertium genus"* liability regime "anchored to the necessary requisites of criminal law (the commission of a crime) and governed as well by the strong guarantees of criminal law".[10]

The ideological gap left by the Grosso Project provided the impetus for the Legislative Decree No. 231 of 2001, as it called for a timely and multifaceted regulatory framework for the direct liability of legal persons. Legislative Decree No. 231 itself is a truly complex and complete microsystem of rules on corporate liability; its eighty-five articles thoroughly deal with the problems of organizational liability in terms of both substance and procedure. A strong message was thus sent to theorists and legal experts that, on the one hand, the legislator's ideological resistance, as based on the principle of *societas delinquere potest*, was weakening, and, on the other hand, that the foundation had been laid for the construction of a "corporate criminal law", which was independent of, and detached from, the Italian Criminal Code.[11]

In the next section, I outline the framework of the substantive aspects of the laws and regulations in this area.

9.3 Which Form of Liability for Collective Entities?

Crucial to the analysis of Legislative Decree No. 231 of 2001 is the determination of the nature of its concept of corporate liability. The decree plainly speaks of the "administrative liability" of legal persons. But this form of administrative liability differs in several ways from the general system of administrative liability outlined in Law No. 689 of November 24, 1981, concerning modifications to the penal system (Law No. 689 of 1981). The report accompanying the decree refers to a *"tertium genus"* that unites the essential features of the criminal and administrative systems "in the attempt to adapt the reasons behind preventive effectiveness

[8] Department of Justice (2000), para. 7.
[9] Department of Justice (2001), para. 1.
[10] Department of Justice (2000), para. 7.
[11] Paliero 2008, 1516.

(i.e., the capacity of the law to prevent crimes) with those, even more important, behind maximum guarantees (i.e., respect for the basic principles of Criminal Law)".[12]

These labels, which are criticized as being the result of the "fuzzy logic",[13] have profoundly irritated the guardians of traditional legal dogmatic purity. They have become embroiled in long discussions about the "real legal nature" – criminal or administrative – of corporate liability and so sparked a seemingly never-ending debate that tends to equate problems concerning the construction of legal language with dogmatic, substantive problems. There is thus mention of "liability defined as administrative but which in reality is criminal to all extents and purposes";[14] of an "institution that, in its structure and function, is administrative in name only, appearing, with a probability that borders on certainty, to mask the criminal liability of the juristic person";[15] of "labeling fraud";[16] of the "substantially criminal nature of corporate liability";[17] and of "a third track for criminal law alongside punishment and security measures".[18]

How are these debates to be assessed? The supporters of the criminal nature of corporate liability have two strong arguments: the indirect and tenuous link between the liability of the organization and the commission of the crime and, above all, the fact that recognition of this liability is left entirely to the judgment of the criminal court. These are indeed important indications that we are dealing with the categories and guarantees of the criminal law and availing ourselves of all its coercive instruments. It should be noted that the Supreme Court of Cassation recently attempted to definitively resolve the dispute with its statement that, "Notwithstanding the *nomen juris*, the new, nominally administrative liability conceals its substantially criminal nature."[19]

However, one can counter that the system outlined in Legislative Decree No. 231 of 2001 has other and no less important attributes from which the administrative nature of the liability can be deduced with equal certainty. Above all, supporters of the administrative nature of liability argue that the label of "administrative liability" must be taken seriously since it expresses the will of the legislator and important structural considerations, i.e., that it is the name of the sanction that determines the nature of the sanction

[12] Department of Justice (2001), para. 1.1.
[13] Kosko 1993.
[14] Paliero 2001, 86.
[15] Musco 2001, 8.
[16] Musco 2001, 8.
[17] De Simone 2002, 79.
[18] De Vero 2001, 1167.
[19] Corte di Cassazione, Sez. II, January 30, 2006, n. 3615, *Jolly Mediterraneo*.

and not vice-versa. In addition to other arguments that can be made,[20] this argument speaks strongly in favor of the non-criminal nature of corporate liability.

The foregoing analysis stops me from locating the institution established by Legislative Decree No. 231 of 2001 neatly in either penal or administrative law. If we do not wish to accept the ambiguous label of *"tertium genus"* but cannot manage to rid ourselves of the need to classify, we can apply the label "liability for criminal offenses": this formulation identifies the gap in the legal framework, which the new laws seeks to fill; it evokes the prescriptive content of the law; and it makes clear that sanctions are part of the new institution. It therefore represents a dogmatically neutral formula.

9.4 Types of Offenses

Comparative analysis reveals different systematic answers to the question "Which crimes can be imputed to a corporation".[21] In Italy, Legislative Decree No. 231 of 2001 originally applied corporate administrative liability exclusively to the crimes of bribery, corruption, and fraud. This was a declaredly minimalist choice, which strongly diminished the practical impact of the law. After 2001, a series of reforms widened the range of crimes for which corporations could be held liable. Between 2001 and 2005, Law No. 409 of 2001 established liability for fraud involving money, credit cards, and revenue stamps;[22] Law No. 61 of 2002 extended the liability of organizations to financial crimes;[23] Laws Nos. 7 and 228 of 2003[24] did the same (respectively) for the crimes of terrorism and slavery; and Law No. 62 of 2005 provided for liability in cases of market abuse.[25] More recently, Law No. 7 of 2006[26] has provided for the liability of legal persons for female genital mutilation, and Laws Nos. 231[27] and 123 of 2007[28] have dealt (respectively) with the handling of stolen goods and money laundering, and

[20] For example, the statute of limitations in the decree is completely different from that applying to penal mechanisms; the sanctions called for in corporate cases (break-ups, mergers, transformations, etc.) are completely tied to the civil law on changes in the obligations of companies that are the object or subject of modifications.

[21] See, e.g., the contributions by Deckert (France), Keulen/Gritter (the Netherlands), and Nanda (United States of America) (all in this volume).

[22] Law of November 23, 2001, No 409.

[23] Legislative Decree of April 11, 2002, No. 61.

[24] Law of January 14, 2003, No. 7; Law of August 11, 2003, No. 228.

[25] Law of April 18, 2005, No 62.

[26] Law of January 9, 2006, No. 7.

[27] Legislative Decree of November 11, 2007, No. 231.

[28] Law of August 3, 2007, No. 123.

involuntary manslaughter and serious (or very serious) personal injuries sustained due to a violation of workplace safety laws. There are also plans to extend corporate liability to environmental crimes as well.

9.5 The Organizations Subject to Legal Control

Legislative Decree No. 231 of 2001 gives two indications about the legal persons who are its objects: first, art. 11(1) establishes the "administrative liability of legal persons and corporations, associations, or organizations without a legal status that do not carry out functions of constitutional importance"; and, second, art. 11(2) provides that the term "'legal persons' refers to organizations with legal status, except for the state and other public authorities that exercise public powers". In this way, Legislative Decree No. 231 of 2001 has translated the prescriptions of the Delegated Law No. 300 of 2000. It has, above all, provided for the liability of organizations (subjects) that lack legal status, i.e., separate legal personality, and so finally formally eliminated the traditional dichotomization of groups with legal status and groups without legal status in Italian law. Even the latter, as the most recent debates have revealed, are considered to be subjects of the decree.

Article 1(3) deals with the exceptions to the scope of the rule, adopting thereby a technique used in the French Criminal Code. As in the French system, the Italian state and other territorial authorities are exempt from liability, as are organizations that carry out functions of constitutional relevance, i.e., political parties and trade unions. "Non-economic public organizations" are also excluded. The government thus broadened the range of exclusions intended by the Delegated Law No. 300 of 2000.

9.6 Criteria for Ascribing *actus reus* to an Organization

Article 5 sets out the criteria for the ascription of the *actus reus* to an organization so as to result in its administrative liability linked to the commission of an offense.

By identifying the natural persons whose acts and omission can be attributed to the corporation, Legislative Decree No. 231 of 2001 utilizes the organic model, which is in line with art. 27 Italian Constitution. The requirement that the natural person who committed the crime acted "in the interests or to the advantage of the organization" ensures the identification of the author of the crime and the recipient of the sanction, and thereby satisfies the principle of personal responsibility, even in its "minimal" interpretation. In fact, the proof of the existence of a relevant link between the individual and the juristic person is what makes it possible to identify

the organization as the absolute protagonist in all events concerning the social and economic life of the company, and thus also as the source of risk regarding the crime. The administrative sanction directed at the juristic person impacts the same locus of interests, which gave rise to the crime.[29]

As concerns the type of natural persons who may act on behalf of the legal person, the decree makes two key differentiations. First, and most importantly, the decree expressly recognizes that both the so-called "senior managers", who represent or carry out administrative or executive functions for the organization or one of its units, and their subordinates may trigger the organization's liability; ultimately, the legal person is even responsible for the actions of a simple employee. The vast body of federal case law in the United States provides convincing evidence of the effectiveness of this solution, at least if the aim of the law is more corporate convictions. Second, the decree distinguishes between those who formally occupy an executive role and those who exercise these functions de facto. Thus, the government has applied the "functional theory", giving precedence to the actual execution of top-level functions over the conferral of such powers under official organizational documents or acts. Internal auditors remain outside the legal framework in this regard, as it is considered that they "do not exercise pervasive control over the organization".[30]

Article 5(2) establishes two exceptions to the rules on the imputation of liability: a legal person is not liable for an offence if the agent committed the crime solely for his/her own benefit or for that of a third party. Paragraph (2) thus departs from the identification doctrine: in order for the *actus reus* to be attributed to the organization, the agent must have committed it while fully or partially aware of the advantages for the organization. If this does not emerge, at least as a possible aim, then there is no sense in sanctioning the legal person.

9.7 Criteria of Ascription of *mens rea*

Articles 6 and 7 Legislative Decree No. 231 of 2001 couple the liability of the juristic person to requirements that help assess its level of culpability. In so doing, the law adopts a "carrot-and-stick" approach to liability.[31] Thus, if the juristic person has put in place corporate regulatory protocols (compliance and ethics programs familiar from US law), which were designed to prevent the criminal conduct, and if the organization has "adopted and

[29] De Maglie 2002, 331; de Maglie 2001, 1350.

[30] Department of Justice (2001), para. 3.2.

[31] De Maglie 2002, 333; de Maglie 2001, 1351.

effectively enforced" such "organization models" before the commission of the crime, it is not liable; otherwise, it faces heavy and invasive sanctions.[32]

Looking at art. 6 and 7, the legislative decree provides for two forms of "organizational culpability" depending on whether the crime was committed by the organization's high-level personnel or merely by an employee: the different roles of the natural persons within the organization led to the differentiation.[33]

The first scenario in art. 6(1) is of "culpability deriving from the choice of corporate policy". The burden of proof is inverted, according to the report, so that the court starts from an assumption of organizational fault for crimes committed by senior managers. Since, physiologically-speaking, senior managers express corporate policy, they are fully identified with the organization. To rebut this presumption, the legal person must prove the extraneousness of the crime by demonstrating that:

- effective preventive compliance programs had been adopted and applied to prevent crimes from being committed;
- a special control committee, with full supervisory autonomy, had been set up within the organization to guarantee the maximum efficiency of the organizational model;
- the senior manager had committed the crime by "fraudulently evading" the preventive compliance programs; and
- there were no omissions or acts of negligence by the control committee.

The organizational models aimed at senior management must take into account the nature and extent of the activities of the legal person and outline the requirements in the "protocols for the formation and implementation of organizational decisions".

Article 7 then regulates the assumption of "organizational fault" where the human offender was a person in a subordinate position in the organization. Here, too, the crux of the provision is the existence of "effective organizational models" aimed at preventing crimes. In effect, the juristic person is not liable if, before the commission of the crime, it had adopted an effective model of organization, management, and control capable of preventing such crimes.

A further question, which is relevant to both provisions, is what amounts to an effective compliance program. It is clear that the effectiveness does not equate to omnipotence: the compliance program is not expected to always and absolutely prevent stakeholder crime. Instead, it must satisfy the prerequisites of efficiency, practicability, and functionality that are reasonably able to minimize the sources of risk. To maximize efficiency, the model

[32] See Gobert/Mugnai 2002, 619 et seq.
[33] De Maglie 2002, 356, 363.

must be tailored to the particular organization in question and its activities, and to guarantee the proper functioning of the model, periodic controls are called for, as are programmatic changes in response to changes within the organization. Moreover, a disciplinary apparatus must be established to sanction violations of the compliance program's provisions.

9.8 Compliance Programs and Corporate Crime Prevention

Thus, it would seem that the cornerstone of the Italian law for corporations is the establishment of "organizational models" that could prevent corporate crime. Evident here is the influence of the US approach to the "compliance and ethics programs". Hence, the Italian model for the prevention of corporate crimes is also based on the introduction of compliance programs within corporations – such programs consisting of a series of detailed rules, which the legal person sets itself in order to prevent crimes.

This internal apparatus for control is an intermediate structure, which serves as a link and filter between the corporation and the criminal judge and which makes the intervention by the judicial authority less traumatic for the corporation. As an intermediate system of control, it may reduce the intrusiveness and breadth of the criminal justice measures. If they thoroughly penetrate the corporate structure, compliance programs will deactivate and remove the sources of risk for the commission of crimes. Criminal sanctions will be incurred only residually, when the intermediate preventive mechanisms have failed due to the non-observance of the rules of compliance. Once it has been demonstrated that the crime has occurred despite the effective, complete, and diligent observance of self-regulatory rules, the legal person will be exempted from liability.[34]

9.9 The Principle of Autonomy and the Responsibility of the Legal Entity

Article 8 completes the set of criteria for imputation by confirming the principle of "autonomy of organizational liability". This fundamental rule considers how organizational processes are carried out inside post-modern corporations in which decentralization has definitively replaced traditional organizational models based around a rigid bureaucratic framework. In the "new" corporation, decentralization can make it difficult to identify the individual who committed the offense and inhibit the determination of his/her personal responsibility. *Par ricochét* techniques, such as those in

[34]Marinucci 2008, 1477 et seq.

the 1994 French Criminal Code, can impede the effectiveness and flexibility of corporate liability mechanism for they make the identification of the natural person who committed the offense an indispensible condition for the attribution of liability to the organization.[35] The Italian legislator did well to avoid this approach and to specify that the liability of the juristic person is independent of that of the natural person who acts on behalf of the organization.[36]

9.10 The System of Sanctions

The system of sanctions set out in the legislative decree has an "essentially binary"[37] structure since it is centered on fines and disqualification orders. Complementing this pair are forfeiture and the publication of the judgment.

9.10.1 Fines

The Italian system of corporate sentencing is remarkable for its fines. Fines are always applied and levied – and herein lies their great novelty – as shares. The share fine system, successfully trialed in other European countries, permits the punishment to be adjusted to the crime in two steps, thereby abandoning the obsolete system of single-phase sentencing.

In the first step, the judge determines the number of shares to be issued and assigned to the state, linking this to the objective and subjective seriousness of the offense. In the second step, the value of the shares is determined based on the organization's economic capacity. Article 10(2) specifies that the pecuniary sanction is to be levied as no fewer than 100 and no more than 1 000 shares, with the amount of each share ranging from a minimum of €258.22 to a maximum of €1 549.37. Article 11 sets the criteria the court must follow in determining both the number of shares and the amount of the single share. With regard to the number of shares, this will be determined on the basis of the gravity of the crime, the degree of the corporation's responsibility, and its activities to remove or minimize the consequences of the offense and to prevent the commission of future offenses; concerning the amount of the single shares, the court's decision must be based on the economic condition of the corporation.

This kind of sentencing system thus keeps distinct the liability of the juristic person for the crime and its sensitivity to the punishment, allows

[35] See further Deckert (this volume).

[36] De Maglie, 2002, 334.

[37] Department of Justice (2001), para. 5.

for a calculation on the basis of the corporation's economic capabilities, and is more suited to achieving the purposes of general and special prevention.

Article 12 Legislative Decree No. 231 of 2001 regulates the circumstances in which the pecuniary punishment may be reduced. The decree establishes, as a mitigating factor, the "tenuity of the crime". Based on criminological and criminal policy considerations, a crime is "tenuous" if: first, it was committed mainly in the interests of the natural person or a third party without any appreciable advantage to the juristic person; and second, if there have been corporate efforts at reparation, as typified by the adoption and implementation of organizational models capable of preventing crimes before the commencement of the trial.

9.10.2 Disqualification Orders

Article 9(2) Legislative Decree No. 231 of 2001 enumerates the sanctions of disqualification orders, which may be applied to juristic persons. Those disqualifications are: (1) the interdiction of the activity related to the offense; (2) the suspension or revocation of an authorization, license, or concession that aided the commission of the crime; (3) a prohibition on contracting with the public administration; (4) the exclusion of the organization from financing facilities, financing, contributions, or subsidies; and (5) a prohibition on advertising goods and services. These highly restrictive temporary or permanent sanctions can seriously affect the activities of the juristic person or even bring them to a complete halt. These sanctions may be imposed for a term of not less than 3 months and not exceeding 2 years.

According to art. 13(1) Legislative Decree No. 231 of 2001, the disqualification orders enumerated in art. 9(2) apply only if that is the intention of the offense provision, and only when at least one of the following conditions occurs:

- the crime has been committed by subjects in top-level positions and the organization obtained from the crime a considerable profit;
- the crime has been committed by subjects under someone else's direction and the commission of the crime has been determined or facilitated by a serious lack of organization; or
- the offense has been repeated.

It is important to underline that, as provided by art. 13(3), disqualification orders do not apply when the perpetrator has committed the crime for his own or other parties' predominant interest and when the economic damage caused by the crime is particularly small.

Article 14(1) states the court will decide the type and duration of the orders on the basis of the same criteria set in art. 11 on the sentencing

standards for fines, taking into account the suitability of the sanction to prevent offenses of the same kind of the one previously committed.

Finally, art. 15 of the decree merits special attention since it deals with cases in which a disqualification order is applied to a legal person that carries out a public service or operates a public utility. Where the interruption of such activities may cause serious problems to the community, or where the application of the disqualification sanctions may have important negative consequences for employment, given the size of the company and the economic conditions in the territory in which it is located, the court, instead of applying the penalty, may provide for the continuation of the corporate activity under the authority of an officer appointed by the court for a period equal to the length of the disqualification orders that should have been applied. These cases represent a form of probation with a markedly special-preventive significance: the officer – whose powers are set by the judge – is charged with reorganizing the corporate governance of the organization and setting up an effective compliance program.

9.10.3 Forfeiture

Article 19 Legislative Decree No. 231 of 2001 regulates forfeiture, which is conceived of as an obligatory, autonomous, and serious sanction, which aims to more effectively combat economic crimes. In its classic form it involves the forfeiture of the product of, or profit from, the crime, and its modern form, the forfeiture of an equivalent value.

9.10.4 Ancillary Provisions

The sanctioning system is completed by a series of regulations regarding recidivism, complicity in the crime, the statute of limitations, and the violation of the disqualification orders.

9.11 In Defense of Corporate Criminal Liability

Even recently, the principle of corporate criminal liability has been attacked as unnecessary. Critics argue, in sum, that the criminal liability of legal persons is superfluous, other branches of the law effectively achieving the same objectives, particularly with respect to crime prevention.[38]

In response, I think it is worthwhile recalling Lawrence Friedman's important 2000 essay, "In Defense of Corporate Criminal Liability". For

[38]For a recent description of these critiques, see, generally, Beale 2007, 1503 et seq.

Friedman, legal persons are *reactive* to the full range of measures that are connoted by retributive theories of criminal justice because they possess a specific identity, which is manifested autonomously in the social area and which is clearly distinguished from that of the individuals that make it up.[39] This identity differs from company to company and derives from the *culture* that each juristic person possesses, and it reflects the internal customs of the organization, the way *corporate governance* is managed, and its explicit or tacit objectives.[40] According to Friedman, juristic persons have a capacity to express moral judgments in public as well as points of view that are original and independent of those of the component individuals, that designate them as single subjects with integral identities, and that permit them to "participate in a concrete manner in creating and defining social norms."[41]

Friedman's observations lead to an important conclusion: because they have a well-defined community identity to which their behavior can be traced, organizations may *suffer* from *"moral condemnation"*,[42] which is a fundamental and exclusive effect of *criminal law*. Only criminal law is capable of creating a stigma: the other branches of the law have a different language and different social meanings[43] and are not able to communicate moral condemnation. Only the criminal law, through its rules, manages to express the *particular* and *superior* value that certain goods possess: in other words, the nature of liability must underscore that, in this circumstance, the victim or good has a value, which cannot be priced.[44]

In other words, the message of strong censure and solemn moral condemnation inherent in criminal law *cannot* be found in any other legal instrument of social control. Even pecuniary sanctions, stripped of their criminal connotations and applied – with the same financial value – as a *non*-criminal sanction, could be viewed, by both the juristic person that suffers the sanction as well as the collectivity, as merely the price of maneuvering easily and unscrupulously in the business world.

The condemnatory effects of the criminal law are even more important given the general trend in legal doctrine to attribute the modern criminal law with a merely symbolic function (understood in the positive sense). On this view, we live in a society with a paucity of authentic alternative ideologies, characterized by the loss of traditional moral reference points, such as family and religion, and the disintegration of social ethics, understood as an autonomous category of reference for the collectivity. This has had

[39] Friedman 2000, 834, 848.
[40] Friedman 2000, 847 et seq.
[41] Friedman 2000, 848.
[42] Friedman 2000, 852.
[43] Friedman 2000, 854.
[44] Friedman 2000, 855.

the effect of investing criminal law with functions that traditionally do not belong to it and that have, until now, not been considered as pertaining to its exclusive sphere of influence. Today criminal justice policy requires the criminal law not to simply impact the moral code of the community, but rather to shape it completely.

Without going as far as to invest modern criminal law with a merely symbolic function, I would join Friedman in pointing out the risks connected with renouncing recourse to criminal law and its expressive power to combat corporate crime – for reasons of mere effectiveness. Further, the above considerations lead me to conclude that the reaction of the legal system should vary *not* on the basis of the legal "good" that is violated but according to the *type of author* who has committed the crime. As Friedman concludes:

> The value of human health and safety, for example, would be regarded as less sacrosanct when denied by corporations as opposed to individuals. Thus corporate exemption from criminal liability would tend to undermine the condemnatory effect of criminal liability on individuals in respect to similar conduct – and, ultimately, to diminish the moral authority of the criminal law as a guide to rational behavior.[45]

9.12 Conclusions

The regulatory techniques adopted by the Italian legislator in the area of corporate criminal liability law cannot be compared with common law legal systems, such as those in the US and the UK, which have long recognized the principle of corporate criminal liability.[46] Moreover, after almost 10 years, there have been too few cases to give a final judgment on the effectiveness of Italy's laws in this area. Though recent laws have broadened the types of crimes for which corporations may be liable, the list of crimes is still short and does not even reflect the wide range of economic crimes that corporations may be involved in. That said, the great deficiency of the Italian system, and the features that make it a blunt instrument, are the inconsistencies within its sanctioning apparatus. Disqualification sanctions for legal persons are called for only in exceptional cases, and the pecuniary penalties are ridiculously low if compared to some other countries, such as (once again) the US or Great Britain. In any case, the principle of criminal liability for legal persons is a great achievement for "legal" civilization: it is to be hoped that, in future, this principle will become as deeply rooted in Italy as it is elsewhere.

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[45] Friedman 2000, 858.

[46] De Maglie 2005, 565 et seq.

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Capítulo 10
La Responsabilidad de las Personas Jurídicas en el Derecho Penal Español

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Índice

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10.1 Cuestiones Generales

10.1.1 ¿Reconoce la legislación española una responsabilidad corporativa o asociativa en materia penal?

En la legislación española a las personas morales o jurídicas se les puede atribuir, por un lado, una responsabilidad en el ámbito del Derecho civil. Por otro lado, también en el ámbito del Derecho administrativo se reconoce con carácter general la posibilidad de imponer sanciones administrativas a las personas jurídicas. Sin embargo, en relación con el ámbito del Derecho penal en España, a diferencia de lo que ocurre en los sistemas jurídicos anglosajones, ha encontrado tradicionalmente reconocimiento el principio *societas delinquere non potest* o, expresado también de otro modo, *universitas delinquere nequit*. Se ha rechazado en consecuencia la responsabilidad *penal* de las personas jurídicas y se ha considerado que en los casos de comisión de un delito en el seno de una persona jurídica la responsabilidad *criminal* alcanzaba únicamente a las personas físicas que actúan por la jurídica, a través de la previsión de determinadas cláusulas como la contenida en el art. 31.1 del Código penal de 1995, que tiene como finalidad la ampliación del círculo de la autoría de los delitos especiales a determinados *extranei* (personas físicas), que actúen como administrador de hecho o de derecho de una persona jurídica (o en nombre o representación legal o voluntaria de otro). El motivo por el que es necesaria la regulación expresa de las actuaciones en lugar de otro se fundamenta, como ha señalado Gracia, en que sujetos que no poseen el elemento formal de la autoría del delito se encuentran en la misma relación que el sujeto idóneo desde un punto de vista material. El método de la interpretación fáctica puede explicar una ampliación de la autoría con base en una interpretación material de los elementos de la autoría y demuestra que lo injusto típico puede ser realizado por sujetos distintos al descrito por el tipo mediante la adscripción de su *status* personal.[1]

[1] Gracia 1993, 225.

No obstante, en nuestro país la situación legislativa sobre la responsabilidad de las personas jurídicas con relación a hechos delictivos ha evolucionado y actualmente acaba de culminar un profundo proceso de reformas legales. Ya el Código penal de 1995 representó un paso importante respecto a los Códigos penales anteriores al establecer de forma sistemática (y no aislada como hasta entonces) consecuencias jurídicas del delito aplicables a las personas jurídicas, sin la denominación de penas ni el reconocimiento expreso de que las personas jurídicas pueden incurrir en una responsabilidad jurídica de carácter penal. Esta previsión legal supuso además una ampliación de los casos de aplicación de estas medidas. Sin embargo, ese cambio hacia la previsión sistemática de consecuencias jurídicas aplicables a las personas jurídicas se ha transformado sustancialmente al reconocerse expresamente la responsabilidad *penal* de las personas jurídicas. En efecto, recientemente se ha debatido en el Parlamento español una iniciativa legal del Gobierno tendente al reconocimiento de la responsabilidad penal de las personas jurídicas (Boletín Oficial de las Cortes Generales, núm. 52-1, de 27 de noviembre de 2009),[2] que finalmente cristalizó en la Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código penal (Boletín Oficial del Estado, de 23 de junio de 2010), cuya entrada en vigor tuvo lugar el 23 de diciembre de 2010. De modo que vamos a abordar las principales cuestiones que se plantean en este informe, refiriéndonos tanto a la regulación recientemente derogada como a la reforma del Código penal de 2010. Esta última es fruto de varios estudios prelegislativos, que desde 2006 pretenden que el Código penal español establezca de forma explícita el principio de la responsabilidad penal de las personas jurídicas con un catálogo de penas aplicables directamente a las mismas.

10.1.2 ¿Se ha previsto una responsabilidad penal o un equivalente no penal (leyes civiles o administrativas)?

El Código penal prevé desde 1995 unas determinadas consecuencias jurídicas aplicables a las empresas, asociaciones, sociedades y fundaciones cuya naturaleza no es claramente penal, sino más bien de tipo administrativo. Reciben la denominación de *"consecuencias accesorias"* y su regulación está recogida en el art. 129. A través de esta denominación las consecuencias accesorias se delimitan conceptualmente de las penas, las medidas de seguridad y la responsabilidad civil derivada del delito. Su naturaleza no penal no queda desvirtuada, porque consistan en privaciones o restricciones de bienes o derechos, porque se ubiquen en el Código penal,

[2]Disponible en <www.congreso.es>.

porque la competencia para su imposición corresponda a un juez penal o porque su imposición tenga lugar en el fallo de una sentencia penal como consecuencia de la comisión previa de un delito.[3] Sin embargo, un sector minoritario de nuestra doctrina estima que las medidas del art. 129 (conforme a su redacción antes de la reforma de 2010) aplicables a empresas y organizaciones tienen naturaleza penal o sencillamente son penas.[4] Desde luego esta naturaleza no es tan evidente cuando se precisa de una reforma de las características citadas para atribuir a las personas jurídicas una clase de responsabilidad jurídica – la penal – que con anterioridad a la reforma del Código penal de 2010 es evidente que no tenían. Con la indicada modificación legal en el art. 31bis 2. se establece actualmente que la responsabilidad penal de las personas jurídicas será exigible – consecuentemente ahora sí a través de penas – siempre que se constate la comisión de un delito que haya tenido que cometerse por quien ostente los cargos o funciones aludidos en el art. 31bis 1., aun cuando la persona física responsable no haya sido individualizada o no haya sido posible dirigir el procedimiento contra ella.

10.1.3 ¿Cuándo se introdujo dicha responsabilidad?

El sistema de consecuencias accesorias, como instrumento para exigir responsabilidad a las personas jurídicas, procede del Código penal de 1995. Dichas consecuencias accesorias se regulan con carácter general o común en la Parte General del Código penal (Libro I, en el art. 129) y posteriormente están previstas de forma específica en algunos delitos de la Parte Especial del Código penal (Libro II).

La reforma del Código penal de 2010 ha incorporado explícitamente la responsabilidad *penal* de las personas jurídicas también en la Parte General del Código penal, en el art. 31bis. Las consecuencias jurídicas aplicables en tal caso reciben la denominación de penas (art. 33.7). Sin embargo, no por ello desaparecen las consecuencias accesorias, puesto que se seguirán aplicando a empresas, organizaciones, grupos o cualquier otra clase de entidades o agrupaciones cuando las mismas carezcan de personalidad jurídica (art. 129 al que se le dota de nueva redacción).

[3]Gracia 2006, 538. En la ciencia del Derecho Penal español ésta es la doctrina mayoritaria; v., entre otros, Cerezo 1998, 68 ss.; Mir 2009, 196 ss. Una panorámica general sobre esta cuestión puede verse en: Nieto 2008 y Ramón 2009.

[4]Zugaldía 1997, 332 ss.; Bacigalupo 1998, 284 ss.; Rodríguez 1996, 2; García 1999, 327 y Zúñiga 2003, 213.

10.1.4 ¿En qué se concreta la responsabilidad de las personas jurídicas relacionada con la comisión de delitos en el Derecho Español?

Las *consecuencias accesorias* que se podían imponer hasta diciembre de 2010 con arreglo al Código penal de 1995 eran las siguientes:

- clausura de la empresa, sus locales o establecimientos, con carácter temporal o definitivo. La clausura temporal no podía exceder de cinco años;
- disolución de la sociedad, asociación o fundación;
- suspensión de las actividades de la sociedad, empresa, fundación o asociación por un plazo que no podía exceder de cinco años;
- prohibición de realizar en el futuro actividades, operaciones mercantiles o negocios de la clase de aquellos en cuyo ejercicio se haya cometido, favorecido o encubierto el delito. Esta prohibición podía tener carácter temporal o definitivo. Si tenía carácter temporal, el plazo de prohibición no podía exceder de cinco años;
- la intervención de la empresa para salvaguardar los derechos de los trabajadores o de los acreedores por el tiempo necesario y sin que pudiera exceder de un plazo máximo de cinco años.

Por su parte, las *penas* contempladas para las personas jurídicas en el art. 33.7 de la reforma del Código penal de 2010 son las siguientes:

- multa por cuotas o proporcional;
- disolución de la persona jurídica. La disolución producirá la pérdida definitiva de su personalidad jurídica, así como la de su capacidad de actuar de cualquier modo en el tráfico jurídico, o llevar a cabo cualquier clase de actividad, aunque sea lícita;
- suspensión de sus actividades por un plazo que no podrá exceder de cinco años;
- clausura de sus locales y establecimientos por un plazo que no podrá exceder de cinco años;
- prohibición de realizar en el futuro las actividades en cuyo ejercicio se haya cometido, favorecido o encubierto el delito. Esta prohibición podrá ser temporal o definitiva. Si fuere temporal, el plazo no podrá exceder de quince años;
- inhabilitación para obtener subvenciones y ayudas públicas, para contratar con las Administraciones públicas y para gozar de beneficios e incentivos fiscales o de la Seguridad Social, por un plazo que no podrá exceder de quince años;
- intervención judicial para salvaguardar los derechos de los trabajadores o de los acreedores por el tiempo que se estime necesario, que no podrá exceder de cinco años. La pena de intervención judicial podrá afectar a la totalidad de la organización o limitarse a alguna de sus

instalaciones, secciones o unidades de negocio. Las características de dicha intervención se determinarán por el Juez o Tribunal y se podrán modificar o suspender. Se crea además la figura del interventor.

Se trata pues de un elenco de consecuencias jurídicas en forma de penas más amplio que el de las consecuencias accesorias, pero en la mayor parte de los casos coinciden materialmente unas y otras, a excepción de la pena de multa, que aparece como principal novedad. Por otro lado, cabe resaltar que se ha ampliado la duración de alguna de las consecuencias jurídicas, que pasa de cinco a quince años (así la prohibición de realizar en el futuro las actividades en cuyo ejercicio se haya cometido, favorecido o encubierto el delito).

El mismo precepto indicado asigna a todas las penas la consideración de graves, independientemente de que el delito – por sus penas para las personas físicas – sea grave o menos grave. Esta consideración de las penas de las personas jurídicas como graves (que choca con los mecanismos de atenuación específicos previstos para estas penas) puede implicar a su vez una extensión superior de los plazos de prescripción, y en concreto del plazo de prescripción de las penas, que quedaría fijado en todos los casos en diez años, pues es el que atribuye el Código penal a las penas graves. Sin embargo, los plazos de prescripción de los delitos habrán de ser los que correspondan a las penas de las personas físicas, por cuanto no se ha previsto una adaptación de la regulación de los plazos de prescripción de los delitos que contemple la nueva realidad de las penas de las personas jurídicas.

Por otra parte, en la Parte Especial del Código Penal se observa que en alguna figura delictiva se establece como pena la clausura definitiva – y no sólo temporal, única prevista con carácter general en el art. 33.7 – de establecimientos, como sucede en la receptación de bienes del art. 301.1 (clausura temporal o definitiva, aunque a estas consecuencias se las denomina "medidas" en el precepto mencionado).

Esas mismas penas previstas para las personas jurídicas en el art. 33.7, excepto la multa y la disolución, pueden imponerse con el carácter de consecuencias accesorias a las entidades o agrupaciones de personas sin personalidad jurídica a tenor del nuevo art. 129.1. Puede incluso acordarse la prohibición definitiva de llevar a cabo cualquier actividad aunque sea lícita, señala la mencionada disposición.

10.1.5 ¿Cómo caracterizar el concepto de responsabilidad aplicado?

Las consecuencias accesorias están orientadas a prevenir la continuidad en las actividades delictivas y los efectos de la misma (art. 129.3 anterior a la reforma de 2010). De ahí que el fundamento de estas consecuencias

accesorias radique en la "peligrosidad objetiva o de la cosa" y tenga una finalidad preventiva (de aseguramiento frente a cosas, en lugar de disuasoria de voluntades). En cualquier caso su aplicación es vicaria de la existencia de responsabilidad penal por parte de la persona física (heterorresponsabilidad) y tiene carácter facultativo para el juez.

En cambio, en su configuración como penas en la reforma de 2010 el fundamento de la responsabilidad penal de las personas jurídicas parece residir en una supuesta culpabilidad de éstas, basada, por un lado, en el caso de personas con poder de representación o directivos (representantes legales y administradores de hecho o de derecho) en haberse cometido el delito "en nombre o por cuenta de las mismas y en su provecho", y por otro lado, en el supuesto de empleados en que actúen "en el ejercicio de las actividades sociales y por cuenta y en provecho de las personas jurídicas", cuando, estando sometidos a la autoridad de las personas físicas mencionadas anteriormente, hayan podido realizar los hechos "por no haberse ejercido sobre ellos el debido control atendidas las concretas circunstancias del caso."

Por otro lado, la responsabilidad penal de la persona jurídica no es directa, sino que requiere que una persona física haya cometido un delito, pero ya no que sea responsable penalmente del mismo (responsabilidad por hechos ajenos, aun cuando en nombre o por cuenta de la persona jurídica y en su provecho). En este sentido se prevé que la responsabilidad penal de las personas jurídicas será exigible siempre que se constate la comisión de un delito que haya tenido que cometerse por quien ostente los cargos o funciones aludidos en el art. 31bis 1., aun cuando la persona física responsable no haya sido individualizada o no haya sido posible dirigir el procedimiento contra ella (art. 31bis 2.). Es más, la concurrencia, en las personas que materialmente hayan realizado los hechos o en las que los hubiesen hecho posibles por no haber ejercido el debido control, de circunstancias que afecten la culpabilidad del acusado o agraven su responsabilidad, o el hecho de que dichas personas hayan fallecido o se hubieren sustraído a la acción de la justicia, no excluirá ni modificará la responsabilidad penal de las personas jurídicas (art. 31bis 3.). Como consecuencia de ello puede afirmarse la existencia de una accesoriedad restringida o limitada a la tipicidad y a la antijuridicidad de la conducta de la persona física, siendo irrelevantes para la responsabilidad penal de la persona jurídica la culpabilidad, la penalidad y la perseguibilidad de la persona física. Por lo tanto, a la persona jurídica no se le puede atribuir la autoría directa del delito, así como tampoco la autoría mediata ni la coautoría en los términos previstos en la regulación legal actual de estas clases o categorías de autoría, sino a lo sumo una forma *sui generis* de participación (es decir, no realiza una forma autónoma de autoría del delito, sino de participación) en el delito cometido por la persona física. Por otro lado, las penas para las personas jurídicas tienen, a diferencia de las consecuencias accesorias, carácter imperativo.

10.2 Cuestiones estructurales relacionadas con la responsabilidad penal de las personas jurídicas

10.2.1 Ámbito subjetivo de aplicación de la regulación sobre responsabilidad de las personas jurídicas

Las consecuencias accesorias del art. 129 del Código penal hasta la reforma de 2010 alcanzaban *expressis verbis* a empresas, sociedades, asociaciones y fundaciones.

La responsabilidad penal de las personas jurídicas del art. 31bis de la reforma de 2010 no establece expresamente un ámbito subjetivo de aplicación, sino, a la inversa, un ámbito subjetivo de inaplicación. A tenor de su apartado 5:

> Las disposiciones relativas a la responsabilidad penal de las personas jurídicas no serán aplicables al Estado, a las Administraciones Públicas territoriales e institucionales, a los Organismos Reguladores, las Agencias y Entidades Públicas Empresariales, a los partidos políticos y sindicatos, a las organizaciones internacionales de derecho público, ni a aquellas otras que ejerzan potestades públicas de soberanía, administrativas o cuando se trate de Sociedades mercantiles Estatales que ejecuten políticas públicas o presten servicios de interés económico general. En estos supuestos, los órganos jurisdiccionales podrán efectuar declaración de responsabilidad penal en el caso de que aprecien que se trata de una forma jurídica creada por sus promotores, fundadores, administradores o representantes con el propósito de eludir una eventual responsabilidad penal.

En la reforma de 2010 se mantienen las consecuencias accesorias, aunque sólo aplicables para el supuesto de carecer la entidad o agrupación de personas de personalidad jurídica. A tenor del art. 129.1 en caso de delitos o faltas cometidos en el seno, con la colaboración, a través o por medio de empresas, organizaciones, grupos o cualquier otra clase de entidades o agrupaciones de personas que, por carecer de personalidad jurídica, no estén comprendidas en el art. 31bis de este Código, el Juez o Tribunal podrá imponer motivadamente a dichas empresas, organizaciones, grupos, entidades o agrupaciones una o varias consecuencias accesorias a la pena que corresponda al autor del delito, con el contenido previsto en los apartados (c) a (g) del art. 33.7 (es decir, todas las consecuencias jurídicas del catálogo excepto la multa y la disolución de la entidad). No es necesario por tanto para aplicar estas consecuencias accesorias que la actividad delictiva se haya cometido por quienes dirigen o controlen la entidad sin personalidad, ni haya sido ordenada, instigada o permitida por esas mismas personas, sino que basta con que el delito se haya cometido en el seno, con la colaboración, a través o por medio de la entidad, aunque no haya sido en provecho de la misma.

10.2.2 Ámbito de delitos en los que se reconocen consecuencias jurídicas

Las consecuencias jurídicas del delito aplicables a las personas jurídicas se rigen, tanto antes como después de la reforma de 2010, por el principio de legalidad, que a su vez se traduce en una tipificación limitada (ya que la responsabilidad de las personas jurídicas, aunque se regula con carácter general, no es predicable de todos los delitos, sino únicamente de algunos concretos). Por consiguiente, no se puede imponer una consecuencia jurídica (consecuencia accesoria o pena) si no está expresamente prevista para el delito de que se trate. Además ha de tratarse de delito en sentido estricto, y no de falta.

Todas o alguna de las consecuencias accesorias del art. 129 del Código penal vigente hasta finales de 2010 se aplicaban en su mayor parte con carácter potestativo en los siguientes delitos:

- manipulaciones genéticas (art. 162);
- tráfico y posesión de pornografía infantil (art. 189.8);
- alteración de precios en concursos y subastas públicas (art. 262.2);
- delitos relativos al mercado y a los consumidores (art. 288);
- delitos societarios (art. 294);
- receptación y conductas afines (art. 302.2);
- delitos contra los derechos de los trabajadores (art. 318);
- delitos contra los derechos de los ciudadanos extranjeros (art. 318^{bis} 5);
- delitos contra los recursos naturales y el medio ambiente (art. 327);
- delitos de riesgo provocados por explosivos y otros agentes (art. 348.3);
- delitos contra la salud pública (arts. 366 y 369);
- falsificación de moneda y efectos timbrados (art. 386);
- delitos de corrupción en las transacciones comerciales internacionales (art. 445);
- asociaciones ilícitas (art. 520).

Además de estos delitos en los que se hacía mención expresa del art. 129, existían otras figuras delictivas en el Código penal vigente hasta el 22 de diciembre de 2010 en las que se establecían como consecuencias jurídicas, sin mencionar el art. 129, la clausura de establecimientos, la suspensión de actividades y la disolución de la empresa o asociación (en los delitos de prostitución, corrupción de menores, adopciones ilegales, blanqueo de capitales, tráfico de influencias y depósito ilegal de armas, municiones o explosivos).

Por el contrario, en la reforma del Código penal de 2010 se contemplan todas o alguna de las penas establecidas para las personas jurídicas en los siguientes delitos:

- tráfico ilegal de órganos (art. 156bis 3);
- trata de seres humanos (art. 177bis 7);
- tráfico y posesión de pornografía infantil (art. 189bis);
- acceso ilícito a datos o programas informáticos (art. 197.3);
- estafas (art. 251bis);
- insolvencias punibles (art. 261bis);
- daños informáticos (art. 264.4);
- delitos relativos al mercado y a los consumidores (art. 288);
- receptación y conductas afines (art. 302.2);
- delitos contra la Hacienda Pública y contra la Seguridad Social (art. 310bis);
- delitos contra los derechos de los ciudadanos extranjeros (art. 318bis 4);
- delitos contra la ordenación del territorio y el urbanismo (art. 319.4);
- delitos contra los recursos naturales y el medio ambiente (art. 327);
- depósito de sustancias peligrosas para el medio ambiente (art. 328.6);
- contaminación o exposición a radiaciones ionizantes (art. 343.3);
- delitos de riesgo provocados por explosivos y otros agentes (art. 348.3);
- tráfico de drogas (art. 369bis);
- falsificación de tarjetas de crédito y débito y cheques de viaje (art. 399bis 1);
- cohecho (art. 427.2);
- tráfico de influencias (art. 430);
- delitos de corrupción en las transacciones comerciales internacionales (art. 445.2);
- organizaciones y grupos criminales (art. 570^{quáter} 1);
- financiación del terrorismo (art. 576bis 3).

Por lo que respecta a las consecuencias accesorias, desde la reforma de 2010 se pueden aplicar en todos los delitos acabados de mencionar en los que se contemplan penas para las personas jurídicas, pero además en aquellos otros en los que se incorpora expresamente también la posibilidad de aplicar las consecuencias accesorias previstas en el art. 129 (particularmente se mantiene esta previsión en los arts. 162, 262.2, 294, 318, 366, 386 y 520). Es decir, las consecuencias accesorias de las entidades y agrupaciones de personas sin personalidad jurídica tienen un campo de aplicación mayor que el de las penas de las personas jurídicas. Por otro lado, el art. 129 alude a las faltas, sin que en realidad exista ningún supuesto, ni anterior ni tras la reforma del Código penal de 2010, en el que se acuerde expresamente la imposición de consecuencias accesorias en las faltas.

10.2.3 ¿Se exige un beneficio del delito para la persona jurídica?

En la regulación anterior a la reforma del Código penal de 2010, referida a consecuencias accesorias, no se precisaba que el delito hubiera reportado

un beneficio para la persona jurídica (resultado), ni tampoco que se hubiera realizado en su beneficio (tendencia). En cambio se requería una instrumentalización de la persona jurídica para cometer el delito (en ocasiones se especificaba su dedicación a la realización de actividades delictivas), aunque sin una verdadera regulación de este aspecto relativo a un beneficio (suponemos económico) para la persona jurídica.

Desde la reforma de 2010 en el ámbito de la regulación de la responsabilidad penal de las personas jurídicas se requiere expresamente que el delito se haya cometido en nombre o por cuenta de las mismas y en todo caso en su provecho (art. 31bis), sea que lo cometa un directivo o persona con poder de representación, sea que lo cometa un empleado. En cualquier caso la referencia legal alude a una mera tendencia en la persona física que comete el delito, sin necesidad de que la persona jurídica haya obtenido efectivamente dicho beneficio o provecho. Esta circunstancia, sin embargo, sigue sin aparecer mencionada en el ámbito de las consecuencias accesorias tras la reforma de 2010.

10.2.4 ¿Qué representatividad ha de tener la persona física que realiza el delito para que tenga lugar la responsabilidad corporativa?

En el Código penal español, tanto antes como después de la reforma de 2010, no se establecen restricciones en torno a las cualidades de la persona física que han de concurrir para que pueda existir responsabilidad de la persona jurídica en forma de consecuencia accesoria o de pena, respectivamente.

En el texto vigente hasta el 22 de diciembre de 2010 se omitía toda referencia a la cuestión. El texto que entró en vigor un día después de la fecha indicada, en cambio, alude a este aspecto aunque precisamente para no establecer restricciones sobre la responsabilidad de las personas jurídicas vinculadas a la representatividad de las personas físicas que cometen delitos por su cuenta y en su provecho, esto es, autores de los delitos corporativos pueden ser tanto directivos como empleados, aunque en este último caso la responsabilidad penal tendrá que derivar de no haberse ejercido sobre ellos el debido control.

> En relación con las *actuaciones en lugar de otro* y en concreto en los casos de comisión de un delito en el seno de una persona jurídica la responsabilidad *criminal* alcanza a las personas físicas que actúan por la jurídica, a través de la previsión de determinadas cláusulas como la contenida en el artículo 31.1 del Código penal de 1995, que tiene como finalidad la ampliación del círculo de la autoría de los delitos especiales a determinados *extranei* (personas físicas), que actúen como administrador de hecho o de derecho de una persona jurídica. Por tanto se ha distinguido entre el administrador de derecho y de hecho, esto es, entre el concepto formal (*status*) y el concepto material (contenido de las funciones que tiene

atribuidas y que le otorgan unas posibilidades de actuación y de dominio) de administrador, que a veces coinciden aunque no siempre, lo cual nos lleva a afirmar que se ha puesto el acento más que en el cargo (*status*) que se ostenta, en las funciones efectivamente desempeñadas.[5]

10.2.5 Concreción judicial de la penalidad prevista para las personas jurídicas

El Código vigente hasta el 22 de diciembre de 2010 no establecía criterios para determinar o elegir y, en su caso, graduar la imposición de las consecuencias accesorias aunque, al estar orientadas a prevenir la continuidad en las actividades delictivas (art. 129.3), su elección y aplicación no debería guardar relación con el delito cometido por la persona física, sino con los delitos cuya comisión realizada a través de la empresa, sociedad, asociación o fundación pretenda evitarse en el futuro.

La reforma del Código penal de 2010 ha previsto determinadas reglas para la imposición y extensión de las penas aplicables a las personas jurídicas. En primer lugar, se ha introducido como novedad una serie de circunstancias atenuantes específicas aplicables a las personas jurídicas – no así circunstancias agravantes – cuando contraen responsabilidad penal con objeto de concretar la duración o proporción de las penas.

A tenor del apartado 4 del art. 31bis, serán circunstancias atenuantes de la responsabilidad penal de las personas jurídicas haber realizado, con posterioridad a la comisión del delito y a través de sus representantes legales, las siguientes actividades:

- Haber procedido antes de conocer que el procedimiento judicial se dirige contra ella, a confesar la infracción a las autoridades.
- Haber colaborado en la investigación del hecho aportando pruebas, en cualquier momento del proceso, que fueran nuevas y decisivas para esclarecer las responsabilidades penales dimanantes de los hechos.
- Haber procedido en cualquier momento del procedimiento y con anterioridad al juicio oral a reparar o disminuir el daño causado por el delito.
- Haber establecido, antes del comienzo del juicio oral, medidas eficaces para prevenir y descubrir los delitos que en el futuro pudieran cometerse con los medios o bajo la cobertura de la persona jurídica.

En segundo lugar, en el art. 66bis se establece una regulación particular de la medición de las penas aplicables a las personas jurídicas: Por un lado, hay que atender a las reglas generales establecidas para las personas físicas,

[5] V. en este sentido Muñoz y García 2000, 524.

pero en el caso de las penas restrictivas y prohibitivas de derechos debe tenerse en cuenta también:

- su necesidad para prevenir la continuidad de la actividad delictiva o de sus efectos;
- sus consecuencias económicas y sociales, y especialmente los efectos para los trabajadores;
- y el puesto que en la estructura de la persona jurídica ocupa la persona física u órgano que incumplió el deber de control.

Por otro lado, se señala como límite de algunas penas que su duración no exceda la duración máxima de la pena privativa de libertad de la persona física, y se establecen las circunstancias para que la duración de ciertas penas pueda exceder de dos años o se impongan con carácter permanente.

10.3 Algunas cuestiones particulares de la reforma del Código penal de 2010 con respecto a la responsabilidad penal de las personas jurídicas: las penas de multa, el quebrantamiento de la condena, la extinción de la responsabilidad criminal y la responsabilidad civil

10.3.1 Regulación específica de las multas

En el Código penal vigente hasta diciembre de 2010 con carácter general no estaba prevista la imposición de multas a las personas jurídicas, ni como consecuencias accesorias, ni como penas. Sin embargo, el art. 31.2 establecía desde 2003 que si se imponía en sentencia una pena de multa al autor del delito, sería responsable del pago de la misma de manera directa y solidaria la persona jurídica en cuyo nombre o por cuya cuenta actuó, lo que no pasaba de ser una especie de responsabilidad civil de la persona jurídica sobre el pago de la multa. Excepcionalmente, en los delitos de tráfico de drogas disponía la imposición directa de una multa proporcional aplicable, no sólo a personas físicas titulares de establecimientos, sino también a organizaciones o asociaciones que tuvieren como finalidad difundir tales sustancias o productos.

En cambio, en el vigente Código penal se impone a la persona jurídica como pena tanto la multa por cuotas como la multa proporcional. Frente al criterio inicial del proyecto de reforma presentado ante el Congreso se opta definitivamente con carácter general por el sistema claramente predominante en el Derecho comparado y en los textos comunitarios, según el cual la multa es la pena común y general para todos los supuestos de responsabilidad, reservándose la imposición adicional de otras medidas

más severas solo para los supuestos cualificados que se ajusten a las reglas fijadas en el nuevo art. 66bis. Según el último inciso del art. 31bis 2., cuando como consecuencia de los mismos hechos se impusiere a la persona física y a la persona jurídica la pena de multa, los Jueces o tribunales modularán las respectivas cuantías, de modo que la suma resultante no sea desproporcionada en relación con la gravedad de aquéllos.

Las penas de multa por cuotas imponibles a personas jurídicas tendrán una extensión máxima de cinco años (art. 50.3). La cuota diaria tendrá un mínimo de 30€ y un máximo de 5000€ (art. 50.4).

En el art. 52.4 se establece que la pena de multa proporcional (determinada en proporción al beneficio, al perjuicio, al valor del objeto o a la cantidad defraudada), cuando no sea posible su cálculo, se sustituirá por multa de dos a cinco años, de uno a tres años o de seis meses a dos años, según la gravedad de la pena correspondiente a la persona física.

Asimismo está contemplado que pueda ser fraccionado el pago de la multa impuesta a una persona jurídica, durante un período de hasta cinco años, cuando su cuantía ponga probadamente en peligro la supervivencia de aquélla o el mantenimiento de los puestos de trabajo existentes en la misma, o cuando lo aconseje el interés general. Si la persona jurídica condenada no satisficiere, voluntariamente o por vía de apremio, la multa impuesta en el plazo que se hubiere señalado, el Tribunal podrá acordar su intervención hasta el pago total de la misma (art. 53.5).

10.3.2 El quebrantamiento de la condena

Al margen del supuesto de intervención de la persona jurídica en caso de impago de la multa impuesta, no se ha adaptado el tipo de quebrantamiento de condena a la responsabilidad penal de las personas jurídicas, por lo que de producirse quedaría impune, dado que no está expresamente tipificada tal posibilidad en los delitos de los arts. 468 y siguientes, sin que sea posible extender a la persona física la responsabilidad.

10.3.3 Extinción de la responsabilidad criminal

La reforma añadió una nueva regulación en sede de causas de extinción de la responsabilidad criminal del art. 130 del Código penal para evitar el peligro de que la pena pueda resultar ineficaz. En el apartado segundo se dispone: “la transformación, fusión, absorción o escisión de una persona jurídica no extingue su responsabilidad penal”, contrariamente a lo que establece el Código con la muerte de la persona física, evitando su aplicación analógica. Por otra parte, se traslada la responsabilidad criminal de la persona jurídica extinta “a la entidad o entidades en que se transforme, quede fusionada o absorbida y se extenderá a la entidad o entidades que

resulten de la escisión." En tales casos de transformación, fusión, absorción o escisión de una persona jurídica, el Juez o Tribunal podrá moderar el traslado de la pena a la nueva persona jurídica en función de la proporción que la persona jurídica originariamente responsable del delito guarde con ella. En cambio, la disolución de la persona jurídica, aunque no se dice expresamente, sí extingue la responsabilidad penal, puesto que en párrafo aparte del art. 130.2 se indica que

> no extingue la responsabilidad penal la disolución encubierta o meramente aparente de la persona jurídica. Se considerará en todo caso que existe disolución encubierta o meramente aparente de la persona jurídica cuando se continúe su actividad económica y se mantenga la identidad sustancial de clientes, proveedores y empleados, o de la parte más relevante de todos ellos.

Por lo tanto, si la disolución de la persona jurídica no es encubierta ni aparente extingue la responsabilidad pena de la misma.

10.3.4 Responsabilidad civil derivada del delito

El Código penal de 1995 establece una responsabilidad civil subsidiaria para las personas jurídicas en los casos de delitos o faltas cometidos en los establecimientos de los que sean titulares, cuando por parte de los que los dirijan o administren, o de sus dependientes o empleados, se hayan infringido los reglamentos de policía o las disposiciones de la autoridad que estén relacionados, de modo que éste no se hubiera producido sin dicha infracción (art. 120.3.°). Es decir, es una regulación general aplicable a todos los delitos, al margen de la responsabilidad penal de las personas jurídicas, incluso al margen de los supuestos en los que se contemplan las consecuencias accesorias en la Parte Especial del Código penal.

En la reforma de 2010 se añadió un apartado 3 al art. 116, según el cual

> la responsabilidad penal de una persona jurídica llevará consigo su responsabilidad civil en los términos establecidos en el art. 110 de este Código (restitución, reparación del daño o indemnización de perjuicios morales y materiales) de forma solidaria con las personas físicas que fueren condenadas por los mismos hechos,

si bien habrán de serlo en los términos del art. 31^{bis}, no siendo suficiente con que sea cualquier persona condenada por los mismos hechos. Será por tanto aplicable esta responsabilidad civil solidaria únicamente respecto de los delitos en los que se reconozca expresamente la responsabilidad penal de las personas jurídicas.

10.4 Cuestiones de procedimiento

Una reforma del Código penal de tal calado debería ir acompañada de una modificación de la legislación procesal para adaptar los procesos penales al nuevo fenómeno de la responsabilidad penal de las personas jurídicas.

Sin embargo, no se previó semejante modificación procesal. Únicamente se aludía en la redacción del Código penal vigente hasta finales de 2010 a la posibilidad de imponer alguna de las consecuencias accesorias como medidas cautelares, y en la reforma de 2010 se reprodujo la misma previsión respecto de las penas: "la clausura temporal de los locales o establecimientos, la suspensión de las actividades sociales y la intervención judicial podrán ser acordadas también por el Juez Instructor como medida cautelar durante la instrucción de la causa" (art. 33.7 in fine); idéntica regulación encontramos también en la nueva configuración que la reforma de 2010 hace de las consecuencias accesorias (art. 129.3).

10.5 Conclusiones provisionales

En nuestra opinión, no es conveniente reconocer responsabilidad penal a las personas jurídicas. Basta el sistema de consecuencias accesorias para obtener los mismos resultados sin necesidad de trastocar la teoría de la imputación jurídico-penal del delito, según la cual, éste se define como una acción u omisión típica (dolosa o imprudente), antijurídica y culpable. Es completamente imposible hablar de acción, omisión, dolo, imprudencia o culpabilidad en las personas jurídicas, dado que estas categorías tienen un sentido psicológico por estar vinculadas hasta ahora únicamente con el ser humano. Modificar estos conceptos para adaptarlos a las personas jurídicas implicaría una normativización de los mismos que impediría alcanzar un concepto único, válido y común para depurar la responsabilidad penal de las personas físicas y de las personas jurídicas. Esto es, habría que manejar dos conceptos diferentes de acción, omisión, dolo, imprudencia y culpabilidad. Ello es obligado porque, por un lado, al carecer la persona jurídica de facultades psicológicas no puede actuar u omitir, y tendría que construirse un concepto independiente de comportamiento. Por otro lado, el art. 5 del Código penal vigente indica que "no hay pena sin dolo o imprudencia", luego la pena de la persona jurídica debe presuponer la existencia de estos mismos conceptos aplicables a dichas personas jurídicas, pero distintos a los conocidos hasta el momento, dada la ausencia de cualidades psicológicas en éstas.

Además el concepto de culpabilidad incorporado a nuestro Código penal como presupuesto de la penalidad implica la imputabilidad de la persona, definida como capacidad para comprender la ilicitud del hecho o para actuar conforme a esa comprensión (art. 20.1.° y 2.°), y resultaría igualmente de difícil o imposible aplicación a las personas jurídicas.

Por último, en el ámbito de las penas también existen dificultades a la hora de fundamentar su imposición, pues en algunos casos como en la multa su pago puede extenderse tanto a personas físicas responsables como a inocentes (por ejemplo, los accionistas de una sociedad).

Por otro lado, no existe una obligación internacional de incorporar la responsabilidad penal a las personas jurídicas, como señala nuestro legislador en la Exposición de Motivos de la L.O. 5/2010, de 22 de junio. Es cierto únicamente que existe una tendencia internacional favorable a esta teoría, pero no por ello es de obligatoria recepción.

La responsabilidad penal a las personas jurídicas, se configure como se configure, representará siempre una responsabilidad objetiva, por hechos ajenos (por tanto vicaria), acumulativa, de doble incriminación, de doble valoración jurídica (*ne bis in idem*), y por todo ello totalmente contraria a las garantías del Derecho Penal moderno.

Sin embargo, si las mismas consecuencias jurídicas están previstas como consecuencias accesorias y no como penas, ninguna de las anteriores objeciones tendría fundamento, puesto que la responsabilidad sería de carácter no penal (civil o administrativa), y en cualquier caso se alcanzan los mismos objetivos consistentes en sancionar de algún modo la intervención, mediación o participación de las personas jurídicas en los hechos delictivos. Por otro lado, la naturaleza preventiva de las consecuencias accesorias define más adecuadamente tales objetivos sancionadores que si éstos se hacen depender de una culpabilidad corporativa, que atiende al hecho realizado y no a la evitación de posibles futuros hechos delictivos.

Por otra parte, siendo conscientes de la voluntad del legislador español de reconocer responsabilidad penal a las personas jurídicas, habría que formular necesariamente algunas observaciones a la reforma del Código penal de 2010. Su principal defecto en relación con el reconocimiento de la responsabilidad penal a las personas jurídicas es que no establece un criterio propio de imputación del delito a la persona jurídica. Su responsabilidad está basada en hechos ajenos y no se ha logrado formular un criterio autónomo que permita atribuir a ella, y no a la persona física, la imputación jurídico penal. Para ello no basta con que el delito lo cometa la persona física en nombre o por cuenta y en provecho de la persona jurídica, sino que debería estar incorporado el criterio de que el delito se realice en el ejercicio de sus actividades sociales y, que se base en un defecto de organización relevante. Ello se debe a que las actuaciones de las personas jurídicas están sometidas a procedimientos operativos estandarizados *(Standard Operating Procedures)*, es decir, a procedimientos normalizados de distribución de trabajo y toma de decisiones,[6] por lo que su responsabilidad sólo podrá basarse en actuaciones o prácticas que excedan o incumplan los estándares operativos para prevenir la comisión de delitos. Esto no se ha plasmado de forma evidente ni siquiera en los supuestos previstos en el art. 31bis 1., pfo. 2.° del Código penal cuando la responsabilidad de la persona jurídica se basa en actuaciones delictivas de los empleados "por no haberse

[6]V. informe del Consejo General del Poder Judicial al Anteproyecto de reforma del Código penal de 2008.

ejercido sobre los mismos el debido control", dado que no queda claro si la falta de control sobre dichas personas tiene que derivar de la persona jurídica o de la persona física a cuya autoridad el empleado está sometida.

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Chapter 11
Principales Aspectos de la Nueva de Responsabilidad Penal de las Personas Jurídicas en Chile (Ley N°20.393)

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Índice

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11.1 Existencia de legislación que reconoce la responsabilidad de los entes corporativos en Chile

El día 02 de diciembre de 2009 se publicó en el Diario Oficial de Chile la nueva Ley Nº20.393 que establece la responsabilidad penal de las personas jurídicas en los delitos de lavado de activos, financiamiento del terrorismo y delitos de cohecho, tanto a funcionario público nacional como a funcionario público extranjero. De esta forma se ha dado culminación a un proceso que se inició, en cuanto a su tramitación legislativa, en marzo de ese mismo año, con la presentación por parte del Ejecutivo de un proyecto de ley que, aunque con variaciones, presentaba, en cuanto a su estructura, los mismos elementos y principios que la ley que fue posteriormente promulgada.

Aunque en diversos ámbitos del ordenamiento interno chileno se ha contemplado la responsabilidad de las personas jurídicas frente a determinadas infracciones,[1] lo cierto es que no existía, hasta la promulgación de esta normativa, una regulación que estableciera de manera directa la responsabilidad de los entes corporativos frente a la comisión de ilícitos de orden penal. La nueva ley regula, por tanto, la responsabilidad de las personas jurídicas respecto de un catálogo de delitos, aunque restringido, entre los que se encuentran los cohechos tanto a funcionario público nacional como extranjeros, como ya se mencionara.

11.2 Naturaleza de la responsabilidad consagrada en la nueva legislación chilena

Aunque el proyecto de ley que fue presentado por el Ejecutivo no contenía una mención expresa acerca de la naturaleza de la responsabilidad que ella establecía,[2] resultaba claro que el mismo regulaba una

[1] Así, se pueden mencionar, sólo a título meramente ejemplar, algunos casos en que la legislación chilena reconoce diversas sanciones para la corporación en sí misma y no respecto de los miembros que la componen. Ellas, sin embargo, siempre quedan circunscritas a ámbitos de carácter civil, entendidos éstos en un sentido amplio y excluyente de las materias propiamente penales. En este contexto, la Ley Nº 18.046 de Sociedades Anónimas establece en su artículo 103 la sanción de disolución por revocación de la autorización de existencia o por sentencia judicial. Asimismo, el propio Código Civil contempla en su artículo 559 la sanción de disolución por parte de la autoridad que hubiere autorizado su existencia. En el mismo sentido, la Ley Nº 18.302 de Seguridad Nuclear contempla, en su artículo 34, sanciones administrativas a la entidad, referidas a la aplicación de multas, suspensión de actividades o revocación definitiva de la autorización de funcionamiento.

[2] Así, el texto del Título de dicho proyecto, presentado el 16 de marzo de 2009, rezaba: "Mensaje de S.E. la Presidenta de la República con el que se inicia un proyecto de ley que establece la responsabilidad legal de las personas jurídicas en los delitos de lavado de activos, financiamiento del terrorismo y delitos de cohecho que indica." Asimismo, el

responsabilidad de naturaleza penal, al ser entregada la imposición de las sanciones al órgano judicial en sede penal y su investigación al Ministerio Público, órgano de persecución que constitucionalmente sólo ha sido autorizado para perseguir la responsabilidad por la comisión de actos propiamente penales. Los planteamientos de los expertos invitados durante la tramitación parlamentaria, entre otros puntos, se centraron justamente en la necesidad de reconocer la verdadera naturaleza penal de la ley en cuestión.

En este sentido, la sola alusión a una *responsabilidad legal* no resultaba suficiente, en tanto, toda responsabilidad establecida y consagrada en sede legislativa siempre tendrá dicha naturaleza legal. Además, el haberse entregado la función de investigar y perseguir los delitos contemplados en la misma ley al Ministerio Público, eludiendo la mención al tipo de responsabilidad que finalmente sería perseguible, generaba ciertas dudas respecto de la constitucionalidad de dicha atribución.[3]

Por último, la consagración en el proyecto de ley de normas que hicieran compatibles con la naturaleza del sujeto activo de los delitos contemplados en esta nueva normativa, aquellas que clásicamente han sido contempladas en el Código Procesal Penal para las personas físicas, se traducía en un argumento más para confirmar que en realidad estábamos frente a una responsabilidad estrictamente penal.[4]

Atendidos todos los planteamientos señalados anteriormente, durante la tramitación legislativa se adoptó la decisión de señalar expresamente en la ley que la responsabilidad regulada en esta normativa especial sería

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artículo 1° del mismo establecía que "la presente ley regula la responsabilidad legal de las personas jurídicas" respecto de determinados delitos allí señalados.

[3]En efecto, además de lo planteado por algunos penalistas, en el informe de la Comisión de Constitución de la Cámara de Diputados, de fecha 07 de julio de 2009, los representantes del Ministerio Público, manifestaron la existencia de un *"escollo para el accionar del Ministerio Público"*, por cuanto, al ser fijadas sus competencias a nivel constitucional, las mismas habían sido limitadas con exclusividad a la investigación de hechos que fueren constitutivos de delitos y, por ende, al ámbito puramente penal. Lo anterior daba cuenta, por tanto, de una posible actuación fuera de los ámbitos permitidos por la Constitución, si se llegaba a encomendar al órgano de persecución hechos que, aunque se remitían al Código Penal en cuanto a su configuración, daban origen a una responsabilidad que no había sido catalogada, por lo que cabía entenderla como administrativa, en términos similares a los dados en el, n. 231 italiano, respecto de la responsabilidad de los entes corporativos en determinados delitos.

[4]Como ya señaláramos, diversos penalistas plantearon las cuestiones expresadas en el cuerpo de este trabajo, en términos de que cualquier responsabilidad, ya fuera civil, administrativa o penal tiene siempre carácter legal, razón por la cual, la mención resultaba muy insuficiente. Entre ellos, se encontraban, Miguel Soto Piñeiro y Clara Szczaranski, cuyas opiniones constan en el Informe de la Comisión de Constitución de la Cámara de Diputados, de fecha 07 de julio de 2009.

propiamente penal.[5] De esta manera y, consecuencialmente, se zanja un punto importante que podría haber dado lugar a una ardua discusión en la doctrina penal, esto es, la naturaleza de las consecuencias jurídicas derivadas del delito y de la declaración de responsabilidad de las personas jurídicas sujetas a las normas de esta ley.

Esta declaración respecto de la especie de responsabilidad a la que quedaban sujetos los entes corporativos, resulta ser un paso enorme en la regulación de las infracciones cometidas por los mismos, atendido el contexto jurídico regional en el que se inserta Chile, en el que no existen precedentes respecto de la consagración sanciones, propiamente penales para las personas jurídicas. Ello, resulta aún más interesante, si se considera que los compromisos, en general, suscritos por Chile, no le imponían como condición la de asumir legalmente una responsabilidad de tipo penal, sino sólo la de consagrar un sistema que pudiera asegurar, medianamente, sanciones eficaces, proporcionadas y disuasivas respecto de las personas jurídicas responsables de la comisión de determinadas infracciones.[6] Y, aunque tales compromisos, expresados en instrumentos e impuestos por organismos internacionales, no han instado directamente a los países a establecer modelos de imputación propios del ámbito penal, lo cierto es que la tendencia que parece imponerse ha ido justamente en dicha dirección.

En este sentido, Chile, al consagrar este tipo de responsabilidad, asume como cuestión de especial relevancia respecto de los actos realizados por personas morales, la función que en este ámbito puede tener el Derecho penal, la que dice relación con una de índole preventiva, protegiendo intereses respecto de los cuales, son las organizaciones colectivas las que pueden generar mayores daños a la sociedad que aquellos producidos por personas individuales.

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[5]Así puede apreciarse en el Oficio de Ley por el que se comunica el texto aprobado y remitido por la Cámara de Origen a la Cámara Revisora, de fecha 04 de agosto de 2009, al terminar el primer trámite parlamentario de la comentada nueva ley.

[6]Tal es el caso de la Convención para Combatir el Cohecho de Servidores Públicos Extranjeros en Transacciones Comerciales Internacionales de OCDE, el que en sus artículos 2 y 3 insta a establecer sanciones de tipo penal pero, de no reconocerse tal categoría de responsabilidad en el ordenamiento jurídico interno respectivo, insta entonces al establecimiento de sanciones no penales eficaces, proporcionadas y disuasivas. Lo mismo puede señalarse respecto de la Convención de Naciones Unidas contra la Corrupción, también suscrita por Chile y en la que, en su artículo 26, insta a los países a establecer la responsabilidad de las personas jurídicas, pero autoriza a la vez a que ella pueda ser de naturaleza no penal.

11.3 Sistema de imputación aplicado a las personas jurídicas en la nueva ley

Previo a explicar el modelo al que se adscribe el sistema de responsabilidad previsto para las infracciones cometidas por las personas jurídicas, cabe primero precisar cómo se recoge dicha atribución de responsabilidad.

En términos generales, pues este punto será tratado más adelante, el modelo de responsabilidad es recogido en el artículo 3 de la nueva ley[7] estableciéndose en dicha disposición que, para la procedencia de la responsabilidad penal de la entidad deben concurrir los siguientes requisitos: la existencia de un delito de los señalados en el artículo 1°, por una de las personas naturales que en el mismo artículo 3 se señalan; la comisión del delito en interés o provecho de la persona jurídica y, el incumplimiento por parte de ésta de los deberes de dirección y supervisión.

Lo anterior daría cuenta, por tanto, de la consagración de un *sistema mixto* de imputación de responsabilidad penal. Esto, por cuanto, por una parte, se requiere para la procedencia de la responsabilidad de la persona moral, la comisión de un determinado delito por parte de alguna de las personas físicas que se señalan en el mismo artículo 3, consagrándose de esta forma un sistema de *transferencia de responsabilidad*, es decir, uno en el que la responsabilidad de la persona física daría lugar a la de la persona jurídica; pero, por la otra, también consagra un sistema de *culpabilidad propia de la empresa*, en la medida en que se posibilita la exculpación de la misma si logra probar que ha realizado los comportamientos propios de los respectivos deberes de supervisión y vigilancia.

De acuerdo a esto último, junto a la necesidad de que exista un *hecho de referencia* o *conexión*- realizado por una persona física-, también se requiere de una responsabilidad por el hecho propio del ente, basada en la

[7] El artículo 3 de la Ley Nº 20.393 establece que: "Las personas jurídicas serán responsables de los delitos señalados en el artículo 1° que fueren cometidos directa e inmediatamente en su interés o para su provecho, por sus dueños, controladores, responsables, ejecutivos principales, representantes o quienes realicen actividades de administración y supervisión, siempre que la comisión del delito fuere consecuencia del incumplimiento, por parte de ésta, de los deberes de dirección y supervisión. Bajo los mismos presupuestos del inciso anterior, serán también responsables las personas jurídicas por los delitos cometidos por personas naturales que estén bajo la dirección o supervisión directa de alguno de los sujetos mencionados en el inciso anterior. Se considerará que los deberes de dirección y supervisión se han cumplido cuando, con anterioridad a la comisión del delito, la persona jurídica hubiere adoptado e implementado modelos de organización, administración y supervisión para prevenir delitos como el cometido, conforme a lo dispuesto en el artículo siguiente. Las personas jurídicas no serán responsables en los casos que las personas naturales indicadas en los incisos anteriores, hubieren cometido el delito exclusivamente en ventaja propia o a favor de un tercero."

teoría de la *culpabilidad de organización*, por cuanto la empresa podrá eximirse del cumplimiento de la pena, a pesar de haberse demostrado la comisión del delito por parte de un órgano de la dirección o por quienes dependan de los primeros,[8] en la medida en que existan modelos de autoorganización idóneos para la prevención de delitos.[9] De esta manera, se reconoce la concurrencia de una *transferencia* de responsabilidad más una *culpabilidad propia* de la empresa, expresada esta última en los deberes de supervisión y vigilancia que son desarrollados, como más adelante se verá, en la misma ley.

Pero la existencia de este *modelo mixto* genera, desde un punto de visto político criminal, ciertas desventajas pues, aunque se reconoce el gran valor que tiene en términos de constituir, para las empresas sujetas a su regulación, un sistema preventivo de delitos más que uno sancionatorio, lo cierto es que, en determinados supuestos- referidos, especialmente a las llamadas "organizaciones complejas"[10] – será bastante dificultoso determinar el sujeto físico que ha intervenido en la comisión del delito en cuestión.[11] Por ello, en forma paralela al sistema contemplado en el artículo 3 de la ley, se ha previsto un *sistema de responsabilidad autónoma* para la persona jurídica que, en este sentido, se aparta de aquel contenido en dicha norma y que se basaría, por tanto, sólo en la culpabilidad de la empresa, entendiendo la comisión del delito por una persona física como *hecho de conexión*, pero con una accesoriedad mínima, pues sólo se exigirá para la procedencia de la responsabilidad del ente corporativo, la vertiente objetiva del tipo penal.[12]

Así, el artículo 5[13] de la ley prescribe que la responsabilidad de la persona jurídica será autónoma de la responsabilidad penal de la persona

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[8]Así, habiendo el sistema chileno emulado aquel regulado por italiano, que reconoce un sistema de responsabilidad mixto, establece aquél también el mismo sistema, aunque con ciertos matices. Así lo plantearon algunos penalistas invitados durante la discusión parlamentaria, como Jean Pierre Matus o Fernando Londoño, cuyas opiniones pueden ser consultadas en el Informe de la Comisión de Constitución de la Cámara de Diputados de fecha 07 de julio de 2009. Respecto del sistema adoptado por la legislación italiana ver Pulitanò 2007, 25 et seq. y Nieto Martín 2008, 177 et seq.

[9]Respecto de los modelos de organización al interior de la entidad colectiva destinados a la prevención delictiva, véase, Gómez-Jara Diez 2006a, *passim*.

[10]En este sentido ver, Zúñiga Rodríguez 2003, 98.

[11]En este sentido, Heine 2001, 51 et seq.

[12]Ver, en este sentido, Zugaldía Espinar 2008, 273.

[13]"Artículo 5°.- Responsabilidad penal autónoma de la persona jurídica. La responsabilidad de la persona jurídica será autónoma de la responsabilidad penal de las personas naturales y subsistirá cuando, concurriendo los demás requisitos previstos en el artículo 3°, se presente alguna de las siguientes situaciones:

(1) La responsabilidad penal individual se hubiere extinguido conforme a lo dispuesto en los numerales 1° y 6° del artículo 93 del Código Penal.

natural y subsistirá, siempre que concurran los demás requisitos establecidos en el artículo 3, y que dicen relación con el interés o provecho para la empresa y con la inexistente o defectuosa implementación de los deberes de supervisión por parte de la primera.

En términos generales, este sistema excepcional estará destinado a facilitar el enjuiciamiento de la persona jurídica, cuando habiéndose individualizado la misma en el curso de la investigación y del proceso, no pueda llegarse a su condena, por ciertas causales señaladas en la propia ley. Pero también podrá seguirse adelante con el juicio contra el ente moral – y esto es lo que nos parece que se acerca con mayor fuerza a una responsabilidad verdaderamente autónoma – cuando no ha podido ser determinada la persona física que ha cometido la infracción en cuestión, pero existe la certeza de que la actuación antijurídica ha surgido de la cúpula decisional de la persona jurídica. Decimos que esta sería una hipótesis de verdadera *responsabilidad autónoma*, porque en estos casos se prescindirá de la participación y, por tanto, de la culpabilidad de la persona natural, para centrarse en la de la propia entidad corporativa.

Ciertamente el ámbito en que podrá examinarse tal *responsabilidad autónoma* es limitado, por cuanto ella concurrirá sólo cuando el acto delictivo tenga su origen en órdenes que provengan de la cúpula de la empresa, pero también es cierto que a través del mismo se abre la posibilidad concreta de eliminar todos aquellos problemas que se derivan de los *sistemas de transferencia* de responsabilidad,[14] en cuanto a la determinación y condena de la persona física – cuestión que en muchos casos resulta imposible –, pues ellas no son requisitos para hacer procedente la responsabilidad de la propia entidad.

11.4 Ámbito de aplicación de la nueva ley

En cuanto al ámbito de aplicación de la ley, ésta establece un sistema de atribución de responsabilidad penal de la persona jurídica, que no se aplica

(2) En el proceso penal seguido en contra de las personas naturales indicadas en los incisos primero y segundo del artículo 3° se decretare el sobreseimiento temporal de él o los imputados, conforme a las causales de las letras b) y c) del artículo 252 del Código Procesal Penal. También podrá perseguirse dicha responsabilidad cuando, habiéndose acreditado la existencia de alguno de los delitos del artículo 1° y concurriendo los demás requisitos previstos en el artículo 3°, no haya sido posible establecer la participación de el o los responsables individuales, siempre y cuando en el proceso respectivo se demostrare fehacientemente que el delito debió necesariamente ser cometido dentro del ámbito de funciones y atribuciones propias de las personas señaladas en el inciso primero del mencionado artículo 3°."

[14]En este sentido, ver Zúñiga Rodríguez 2003, 126 et seq.; Nieto Martín 2008, 120 et seq.; Gómez-Jara Díez 2006b, 43 et seq.

respecto de todos los delitos contemplados para las personas físicas, sino sólo respecto de algunos de ellos.[15] Estos son:

- delito de lavado de activos, previsto en el artículo 27 de la ley Nº 19.913;
- delito de financiamiento del terrorismo, contemplado en el artículo 8 de la ley Nº 18.314, que determina las conductas terroristas y fija su penalidad; y
- delitos de cohecho a funcionario público nacional y de cohecho a funcionario público extranjero, tipificados en los artículos 250 y 250bis A del Código Penal, respectivamente.

Contar con un catálogo restringido de delitos, descansa en la idea, en primer lugar, de cumplir con las obligaciones internacionales que Chile ha adquirido en lo relativo a cada uno de los tipos penales contemplados[16] y luego, en la convicción de que en grandes reformas jurídicas como ésta, la progresión es el camino más seguro.

Sin embargo, y aunque, como señaláramos, esta premisa adoptada por el Ejecutivo chileno parece acertada atendida la envergadura de una reforma legal como ésta, los efectos sobre la jurisprudencia y doctrina penal chilena y el escaso tiempo que existió para que la iniciativa legal se transformara en ley, no es menos cierto que, dada la naturaleza y entidad de los delitos que son cometidos a partir de las organizaciones, resulta absolutamente necesaria la inclusión de injustos que atenten contra el patrimonio del Estado y el medioambiente, así como la de aquellos que pertenecen clásicamente a la *criminalidad de la empresa.*[17] Sin duda, dichas incorporaciones se realizarán durante el proceso de implementación de la ley, con la constatación de las lagunas de punibilidad que se irán presentando, a propósito de la comisión de aquellos delitos que suelen generarse a partir de las organizaciones empresariales.

También en cuanto a su ámbito de aplicación, la normativa que comentamos cubre, en lo referido a los sujetos activos de los delitos antes mencionados, a las personas jurídicas de derecho privado y a las empresas del Estado creadas por ley.

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[15] Así señala el inciso primero del artículo 1° "La presente ley regula la responsabilidad penal de las personas jurídicas respecto de los delitos previstos en el artículo 27 de la ley N°19.913, en el artículo 8° de la ley N°18.314 y en los artículos 250 y 251bis del Código Penal; el procedimiento para la investigación y establecimiento de dicha responsabilidad penal, la determinación de las sanciones procedentes y la ejecución de éstas".

[16] Y que responden principalmente a los siguientes instrumentos internacionales: la Convención de las Naciones Unidas contra la Corrupción; la Convención de las Naciones Unidas contra la Delincuencia Organizada Transnacional; el Convenio Internacional para la Represión de la Financiación del Terrorismo, de las Naciones Unidas; la Convención para combatir el Cohecho de Servidores Públicos Extranjeros en Transacciones Comerciales Internacionales, de la Organización de Cooperación para el Desarrollo Económico.

[17] Schünemann 1988, 530.

De esta forma la nueva ley ha optado por establecer qué personas jurídicas serán sometidas a sus disposiciones por lo que, siendo una normativa especial, no será aplicable a aquellas personas morales no señaladas en su artículo 2. En este sentido, quedan comprendidas todas las personas jurídicas de Derecho privado, con o sin fines de lucro, es decir, personas de Derecho civil, como las corporaciones y fundaciones, y personas de Derecho mercantil, como las sociedades anónimas y las de responsabilidad limitada. En cuanto a las personas de Derecho público, como el Estado y sus organismos (por ejemplo, las Municipalidades), los Partidos Políticos y otros semejantes, éstas no serán alcanzadas por esta normativa. Sin embargo, por razones de transparencia, se ha decidido que las empresas públicas creadas por ley, aunque parte de la Administración del Estado, sean sometidas a la nueva regulación.[18]

Todo lo anterior supone, por cierto, que todas estas entidades cuenten con personalidad jurídica en conformidad a la ley, por lo que las sociedades en formación o irregulares no quedarían comprendidas en esta normativa.

11.5 Requisitos del sistema de responsabilidad penal de las personas jurídicas

En cuanto a los elementos que se constituyen como requisitos de atribución de responsabilidad a los entes morales, se pueden distinguir tres:

11.5.1 Comisión del delito por personas físicas determinadas

El primero, consiste en la comisión de alguno de los delitos contemplados en el artículo 1° por una persona natural, que ostente el rol de dueño, controlador, responsable, representante o administrador de la persona jurídica,

[18]De acuerdo al inciso segundo del artículo 1° de la Ley Orgánica Constitucional de Bases Generales de la Administración del Estado, N° 18.575, "La Administración del Estado estará constituida por los Ministerios, las Intendencias, las Gobernaciones y los órganos y servicios públicos creados para el cumplimiento de la función administrativa, incluidos la Contraloría General de la República, el Banco Central, las Fuerzas Armadas y las Fuerzas de Orden y Seguridad Pública, los Gobiernos Regionales, las Municipalidades y las empresas públicas creadas por ley." Por lo tanto, a pesar de estar contempladas las empresas públicas dentro de la clasificación de organismos del Estado, se han incluido expresamente por la nueva legislación como sujetos activos de los delitos por ella contemplados. En cuanto al sentido y alcance de la expresión "empresas públicas creadas por ley" utilizada en esta nueva normativa legal, se entiende por ellas a las que han sido creadas por ley de quórum calificado, la que señala su naturaleza de servicio público descentralizado funcionalmente, establece sus objetivos, funciones y estructuras, incluidas sus autoridades y atribuciones, su régimen financiero, de personal etc. Sobre este último punto, cfr. Ojalvo Clavería 2006, 18 et seq.

así como por personas que realizan actividades de administración y supervisión en ellas. También se entenderá cumplido este requisito, cuando el delito sea cometido por personas naturales que estén bajo la dirección o supervisión de alguno de los sujetos mencionados anteriormente.

De acuerdo a lo anterior, cabe hacer dos precisiones. La primera, es que, aunque se exige la comisión del hecho por las personas naturales nombradas precedentemente, lo cierto es que la nueva ley no se limita a aquellas que forman parte de la cúpula de la organización, y que serían la expresión de un control directo de las actividades de la entidad y, por tanto, consideradas su "alter ego".[19] En efecto, la nueva ley se extiende también a las personas que dependen de las ya citadas, es decir, a los empleados que se encuentren sometidos a la autoridad de las personas que ejercen el control de la entidad.[20]

Con lo anterior, se ha pretendido salvar la objeción en cuanto a la necesidad de probar que la decisión delictiva ha provenido de quienes ejercen el control de la empresa cuando, por las características de funcionamiento y de división del trabajo, propias de organizaciones empresariales complejas, las decisiones hayan sido compartimentadas y delegadas en funcionarios de rango inferior. La segunda precisión que cabe hacer respecto de este elemento del sistema es que, a diferencia del proyecto de ley presentado por el Ejecutivo chileno, la ley que finalmente fue aprobada por el Congreso Nacional ha eliminado la mención expresa al "administrador de hecho".[21] Esta cuestión, aunque pudiera dar lugar a debates a nivel jurisprudencial, lo cierto es que debería ser zanjada en el sentido de entender que la nueva frase utilizada en la ley, referida a "quienes realicen actividades de administración", es comprensiva de aquellas situaciones en que la persona natural que ha cometido el delito no cuenta con poderes de administración formales pero, en los hechos, los desarrolla. Lo anterior, primero, porque la norma no prescribe que deba tratarse de una representación legal, sino que se limita a mencionar de manera genérica *labores de administración*

[19] Nieto Martín 2008, 88 et seq.; Zúñiga Rodríguez 2003, 126 et seq.; Bacigalupo Sagesse 1998, 330 et seq.

[20] Así señala el inciso segundo del artículo 3º que "Bajo los mismos presupuestos del inciso anterior, serán también responsables las personas jurídicas por los delitos cometidos por personas naturales que estén bajo la dirección o supervisión directa de alguno de los sujetos mencionados en el inciso anterior." En este sentido el modelo chileno mantiene la misma filosofía en cuanto al ámbito de los sujetos que generan la responsabilidad del ente moral que el artículo 5 del Decreto Legislativo 8 Giugno 2001, n. 231 italiano.

[21] Nótese que el Mensaje presidencial señalaba en su artículo 3º que "Las personas jurídicas serán responsables de los delitos señalados en el artículo 1° cometidos en su interés o para su provecho, por sus … administradores, así como por personas que realizan, inclusive de hecho, actividades de administración y supervisión de dicha persona jurídica …" (la negrita es nuestra). La nueva ley en el mismo artículo, en cambio, ha optado por señalar simplemente… o quienes realicen actividades de administración y supervisión ….

y, segundo, porque el siguiente requisito del modelo, esto es, la actuación de la persona natural encaminada a obtener un *interés* o *provecho* para la propia empresa, viene a dar cuenta, de algún modo, de la existencia de ciertos vínculos o relaciones entre la persona física y el ente moral.

Antes de pasar al siguiente requisito establecido en el artículo 3 de la nueva ley, resulta necesario recordar que, aunque de acuerdo a esta disposición se requerirá una determinación concreta de la responsabilidad de alguna de las personas arriba mencionadas y, por tanto, de una sentencia condenatoria a su respecto, que hará procedente la responsabilidad de la persona jurídica, es decir, una *transferencia de responsabilidad* de una a la otra; lo cierto es que tal exigencia no existirá si nos encontramos frente a alguna de las hipótesis contenidas en el artículo 5, por cuanto en tales supuestos la responsabilidad, como ya se señalara anteriormente en este trabajo, será *autónoma* de la persona jurídica y se basará sólo en la culpabilidad propia de ésta, es decir, los propios comportamientos corporativos.[22]

11.5.2 Exigencia de un interés o provecho para la persona jurídica derivado de la comisión del delito

En cuanto al segundo requisito para la configuración de la responsabilidad penal de la persona jurídica, éste viene dado por el *interés* o *provecho* que debe reportar para la misma, la comisión del delito por parte de la persona natural. Al respecto, cabe señalar que, al igual que lo ocurrido con el requisito anterior, la nueva ley presenta rasgos distintos de la iniciativa presentada por el Ejecutivo, por cuanto ha incorporado ciertas exigencias a este *interés o provecho.* En efecto, la actual norma exige que dicho *provecho* deba ser "directo e inmediato" para la entidad colectiva.

La vinculación exigida entre la actuación de la persona natural y la persona jurídica, por cierto, es mayor para que se configure la responsabilidad de esta última, pero mantiene la idea de que la misma, no debe entenderse en términos de resultado sino de *mera expectativa* para la organización. Lo anterior se ve reforzado por el propio texto de la ley, en la que no exige la concurrencia de un beneficio efectivo para la empresa.[23]

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[22] La norma existente en el sistema chileno de responsabilidad penal de las personas jurídicas si bien se basa en la legislación italiana, difiere en cuanto a su amplitud, por cuanto, como se dijera en el cuerpo de este trabajo, establece un ámbito mucho más restringido para su aplicación, en la medida en que no sólo debe tratarse de una imposibilidad de establecer al autor o partícipe del delito, sino que además agrega la necesidad de que se llegue a probar en juicio que el delito ha tenido su origen en la cúpula de la organización.

[23] En este sentido coincidimos con lo planteado por Nieto Martín 2008, 101, en términos de que se trata más bien de un requisito con una misión procesal en cuanto a que, aunque

11.5.3 Infracción por parte de la persona jurídica de los deberes de dirección y supervisión

Por último, para responsabilizar criminalmente a la organización, ésta debe haber infringido la obligación de implementar un *modelo de prevención de delitos* o, habiéndolo implementado, éste hubiese resultado insuficiente.

Ahora bien, esta *responsabilidad propia* del ente corporativo se desarrolla y expresa, en cuanto a sus lineamientos y requisitos, en el llamado "modelo de prevención de los delitos", contenido en el artículo 4, que será, por tanto, expresión de la *culpa de organización*. En esta norma se establece que existirá al interior de cada persona jurídica un órgano autónomo e independiente que velará por la adopción de todas las medidas tendientes a evitar la comisión de delitos. Excepcionalmente, en el caso de personas jurídicas de menor tamaño, sus propios dueños podrán implementar el sistema para la prevención de hechos punibles.

Para asegurar la adopción de tales modelos por parte de las personas jurídicas, el encargado de prevención de la organización podrá certificar dichos sistemas ante entidades certificadoras que se encuentren registradas en la Superintendencia de Valores y Seguros, de manera que estos organismos acreditarán que se han cumplido todos los requisitos que establece la ley a su respecto y, por tanto, que se trata de sistemas efectivos y oportunos para la prevención de delitos. Para asegurar dicha certificación, las personas que realicen tal labor se entiende que desarrollan una función pública, en los mismos términos que se contienen en el Código Penal pudiendo, por tanto, incurrir en todas las responsabilidades de índole penal que se señalan en tal cuerpo normativo para los funcionarios públicos.

La línea adoptada, por tanto, a través de esta iniciativa legal, ha sido la de un sistema preventivo, por sobre uno sancionatorio o meramente represivo. En efecto, a través del mismo se ha buscado instar a las personas jurídicas a implementar sistemas que le permitan detectar tempranamente conductas que puedan atentar contra el sistema jurídico de una manera que pueda interesar al Derecho penal. Se opta, por tanto, por la prevención, a través de modelos eficientes y efectivos que impidan actos ilícitos, esperando con ello evitar juicios penales basados en la pura sanción.

11.6 Consecuencias por la comisión de delitos por personas jurídicas

Al respecto la nueva ley contempla un sistema especial de sanciones aplicables a las personas jurídicas alejándose, por tanto, del modelo general de penas contenido en el Código Penal chileno para las personas naturales.

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puede no ser el único objetivo del agente, facilita la prueba de que el mismo ha actuado en beneficio de la empresa.

En términos generales, fueron contempladas aquellas sanciones más clásicas y reconocidas a nivel comparado, buscando eso sí, la simplicidad en su consagración, en el entendido de que se trataba ésta de una normativa absolutamente nueva y, por tanto, debía ser de fácil aplicación por los tribunales penales. La misma idea existió en lo referido al control de la ejecución de las mismas. De esta forma, se trata de sanciones que no implicarán una labor exhaustiva a nivel judicial en cuanto al control de su cumplimiento. Por ello, será la práctica en la aplicación de esta ley la que demostrará la necesidad de introducir o modificar las sanciones ahora contempladas.

Las penas para las personas jurídicas pueden ser agrupadas, aunque todas tienen un eminente contenido económico, en sanciones financieras y no financieras.

11.6.1 Consecuencias financieras

Entre las penas financieras se encuentran:

11.6.1.1 Multa

En cuanto a esta sanción, entendiendo que se trata de una de las de mayor utilización en los sistemas comparados,[24] se ha buscado crear una pena que cumpla con dos finalidades fundamentales: por un lado, que exista proporcionalidad entre su cuantía y la gravedad del injusto cometido; y, por otro, que sea lo suficientemente disuasiva, evitando con ello nuevos hechos del mismo carácter generados a partir de la persona moral.

De esta forma se ha contemplado la aplicación de esta sanción pecuniaria en diversos grados, partiendo con un monto de alrededor de diez mil quinientos euros hasta llegar a un límite superior equivalente a un millón de euros. Cada monto se fijará en relación al grado en que se encuentre la pena pecuniaria asignada al delito. De esta forma existirán tres grados en los que pueden dividir los rangos de la multa, partiendo del mínimo, pasando por el medio y terminando con el máximo, el que se encuentra reservado sólo para los crímenes. Este grado máximo oscila entre los quinientos treinta mil y el millón de euros.[25]

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[24] Tal es el caso, en Alemania de la Ley de Contravenciones al Orden (*Gesetz über Ordnungswidrigkeiten*), y en Italia del Decreto Legislativo 8 giugno 2001, n. 231, así como de la mayor parte de las Decisiones Marco de la Unión Europea, en las que tiende a aludirse, entre las sanciones de primer orden, a las sanciones pecuniarias y en especial a la multa.

[25] De esta forma el artículo 12 de la ley señala que "Esta pena se graduará del siguiente modo: (1) En su grado mínimo: desde doscientas a dos mil unidades tributarias mensuales; (2) En su grado medio: desde dos mil una a diez mil unidades tributarias mensuales; (3) En su grado máximo: desde diez mil una a veinte mil unidades tributarias mensuales."

Las cantidades antes mencionadas, si bien están consideradas sólo para los crímenes no incluyendo, por tanto, delitos como la corrupción de funcionarios públicos nacionales o extranjeros, resultan ser muy altas para países con economías pequeñas como es el caso chileno. Aun así, para los simples delitos la pena pecuniaria máxima contemplada en abstracto, es de alrededor de quinientos treinta mil euros, es decir, el límite mínimo de la multa de los crímenes.

Por último, se ha contemplado, de modo similar a lo regulado por el Código Penal respecto de las personas naturales, la posibilidad de fraccionar el pago de la multa en atención a dos factores: el hecho de que la cuantía fijada – obviamente en relación con el tamaño y capacidad de la empresa – pueda poner en riesgo la continuidad del giro de la persona jurídica y, segundo, cuando lo aconseje el interés social. Este concepto, aunque bastante abstracto y difuso, debería atender, por ejemplo, a la utilidad que presta a la sociedad la actividad empresarial en cuestión.

11.6.1.2 Pérdida total o parcial de beneficios fiscales o prohibición absoluta de recepción de los mismos por un período determinado

Trátase ésta de una sanción importante para todas aquellas empresas que pertenecen a áreas de la economía que acostumbran recibir aportes fiscales. Se establece en ella la pérdida de los beneficios a través de subsidios o subvenciones, cuando la persona jurídica en cuestión, ya se encuentra percibiéndolos o bien, la prohibición de percibirlos en el futuro, si se tratara de una organización que pudiera ser acreedora a los mismos. También se ha estratificado la sanción en tres rangos o grados desde el mínimo, pasando por el medio hasta llegar al máximo. De esta forma el piso será el veinte por ciento del beneficio hasta llegar al cien por ciento del mismo.[26]

11.6.1.3 Comiso

Esta sanción es contemplada en la ley como pena accesoria y acompaña, en consecuencia, a todas las penas principales establecidas para las personas jurídicas. Comprende aquellos aspectos que clásicamente han sido cubiertos por esta sanción, como el producto del delito y los instrumentos utilizados para su comisión, pero se extiende también a otro aspecto especialmente relevante en la comisión de delitos a partir de organizaciones empresariales. En efecto, se ha contemplado en la nueva ley, y en todos

[26]El artículo 11 de la ley señala al respecto que "Esta pena se graduará del siguiente modo: (1) En su grado mínimo: pérdida del veinte al cuarenta por ciento del beneficio fiscal; (2) En su grado medio: pérdida del cuarenta y uno al setenta por ciento del beneficio fiscal; (3) En su grado máximo: pérdida del setenta y uno al cien por ciento del beneficio fiscal."

aquellos casos en que la inversión de recursos de la misma sean superiores a los ingresos que la empresa genera, la restitución de una cantidad equivalente a la invertida en las arcas fiscales.

11.6.2 Consecuencias no financieras

En cuanto a las sanciones no financieras la nueva ley, en atención a criterios de simplicidad y facilidad en la aplicación de la pena, así como de su control de ejecución, no ha contemplado sanciones existentes en sistemas comparados, tales como la intervención o el nombramiento de comisarios judiciales. Sin embargo, sí se han contemplado las medidas que, en general, son las más comunes en los distintos ordenamientos comparados. Ellas son:

11.6.2.1 Disolución o cancelación que conlleva la pérdida definitiva de la personalidad jurídica

La disolución o cancelación procederá de acuerdo a si se trata de una persona jurídica con o sin fines de lucro, respectivamente. Para llevar acabo la sanción, la ley prevé la existencia de un liquidador que se encargará del cumplimiento de todas las obligaciones de la persona jurídica hasta su extinción. Así, deberá ocuparse del pago de las deudas de la entidad y de repartir el remanente entre los socios, dueños o propietarios. Resulta interesante la inclusión, durante la tramitación del proyecto de ley, de una norma que autoriza al juez, por razones de interés social, a vender la empresa como unidad económica en pública subasta. La razón de dicha inclusión fue la de atender a ciertos planteamientos expresados durante el debate parlamentario, referidos a la conveniencia de considerar la venta no por parcelas sino como unidad económica, con las consiguientes ventajas a la hora de cumplir las obligaciones económicas y para los intereses de los trabajadores.

Existe una doble limitación en la aplicación de esta sanción. Por un lado, se han excluido las empresas del Estado y las personas jurídicas de derecho privado que presten un servicio de utilidad pública cuya interrupción pueda causar graves consecuencias sociales derivadas de la aplicación de esta pena. Una segunda limitación, viene dada por una cuestión procesal, pues se aplicará sólo a los crímenes y cuando éstos fueren reiterados o se hubiere reincidido en su comisión.[27]

[27] Debe ser aclarado en este punto, las diferencias que existen en el sistema chileno entre reiteración y reincidencia, pues mientras la reincidencia de la persona jurídica es concebida como agravante especial para todos aquellos casos en que ha existido una condena dentro de los cinco años anteriores por el mismo delito, la reiteración en cambio actúa a nivel meramente procesal en aquellos casos en que existe repetición de delitos en un mismo juicio. Sobre el contenido y alcance de la reincidencia señala Cury Urzúa

11.6.2.2 Prohibición de celebrar actos y contratos con organismos del Estado

Esta pena implicará, para el condenado, por tanto, la imposibilidad de actuar como proveedor de bienes y servicios del Estado y se concibe como sanción perpetua o temporal, aplicándose, en este último caso, en los tres grados que se han mencionado para las sanciones anteriores.

11.6.2.3 La publicación del fallo

Esta sanción, al igual que el comiso o confiscación, es concebida en la nueva ley como pena accesoria, con una clara finalidad preventiva general, tendiendo, por tanto, a imponer una reprimenda social por los actos cometidos, logrando con ello que esta censura desincentive la comisión de hechos delictivos futuros a partir de personas jurídicas.

11.6.3 Circunstancias modificativas de la responsabilidad y criterios de determinación judicial de la pena

En cuanto a la consideración de ciertas circunstancias que puedan modificar la responsabilidad de la persona jurídica responsable, se han contemplado especiales *circunstancias atenuantes*, como la de haber denunciado el hecho a las autoridades antes de conocer del inicio del procedimiento judicial en su contra; establecer al interior de la empresa, antes del juicio, medidas para evitar la comisión de esta clase de delitos o colaborar con antecedentes relevantes en la investigación.

Lo anterior se encuentra en consonancia con la opción adoptada de un sistema de *responsabilidad propio* de las personas jurídicas. En efecto, las circunstancias antes señaladas obran sobre la base de un modelo preventivo, es decir, aminorando la responsabilidad, en tanto exista una intención inequívoca de la persona moral en cuanto a evitar la comisión de nuevos ilícitos a través de la misma y, manifestando, por lo mismo, un propósito de corregir las conductas e implementar sistemas apegados a la legalidad, o bien, expresándose en actos tangibles y manifiestos la intención de

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2005, 504: "En términos muy generales, existe reincidencia cuando el sujeto que ha sido condenado por uno o más delitos incurre, después de ello, en otra u otras conductas punibles. La interposición de la sentencia condenatoria entre el o los delitos cometidos antes de ella y el o los que se ejecutan con posterioridad, constituye la diferencia esencial entre la reincidencia y la reiteración o concurso de delitos."

que la justicia pueda conocer todos los alcances de los hechos materia de investigación.[28]

Respecto de la agravante contemplada en el artículo 8, ella se encuentra circunscrita a la reincidencia de actos ilícitos de la misma especie en el ámbito penal. Lo anterior, por cuanto, en consonancia con el sistema adoptado, la reiteración de la conducta antijurídica revela la falta de ánimo, por parte de la empresa, de adoptar medidas que impidan el delito y sus consecuencias.

A lo anterior deben ser agregados los *criterios de determinación judicial de la pena*. En relación con ellos operan factores, algunos relacionados con el propio delito, como la extensión del mal causado y los montos involucrados en la comisión del delito, y otros relacionados con la propia entidad corporativa, como su tamaño y naturaleza, capacidad económica, o el comportamiento que ha demostrado en cuanto a la sujeción a la normativa legal y reglamentaria aplicable a la actividad que desarrolla. Estos factores serán valorados por el juez para determinar específicamente, y luego de haber operado las reglas de determinación legal de la pena, la cuantía y entidad específica de la sanción que corresponda en el caso concreto. De la consideración de estos factores el tribunal deberá dejar expresa y detallada constancia en la sentencia.

11.7 Principales elementos del procedimiento penal concebido para la persona jurídica

En cuanto al procedimiento regulado para determinar la responsabilidad penal de las personas jurídicas, la nueva ley ha optado por sumarse a las virtudes del proceso penal de las personas físicas, que sólo desde el año 2000 se encuentra vigente en Chile. En efecto, la oralidad, la contradictoriedad, la inmediación y la rapidez son también principios rectores en la determinación de la responsabilidad penal de las personas jurídicas. El Ministerio Público, en conjunto con las policías, deberá realizar las diligencias de investigación necesarias para sostener la acusación pública y, en especial, para lograr el convencimiento del tribunal.

Por su parte, los jueces de garantía, al igual como sucede hoy con las personas naturales, deberán articular los intereses de los intervinientes, autorizando las diligencias solicitadas por el Ministerio Público, siempre intentando resguardar, según corresponda, los derechos del imputado. En

[28] Así el sistema de responsabilidad chileno sigue la lógica del Decreto Legislativo 8 giugno 2001, n. 231 italiano, pero en un sentido más genérico que este último, en tanto se conciben las circunstancias atenuantes de manera general y aplicables por el juez a todas las sanciones, y no en relación, como lo hace el sistema italiano, a cada una de las penalidades contempladas en la normativa aplicable a los entes morales.

este contexto, la ley asume que la persona jurídica, en cuanto imputada, comparte – en esencia – la misma naturaleza que una persona natural imputada respecto de un delito y, en consecuencia, ambas tienen derecho a la defensa, a un juicio justo y a una adecuada protección de sus derechos, por ejemplo, de propiedad, privacidad, etc. De allí entonces que el artículo 21 establezca que serán aplicables a las personas jurídicas los conceptos de imputado, acusado y condenado, en aquello que resulte compatible con la especial naturaleza de aquéllas.[29]

Ahora bien, en cuanto al inicio de la investigación para determinar la responsabilidad penal de las personas jurídicas, el sistema ha optado por supeditar el inicio de la persecución a dos circunstancias, a saber, que el Ministerio Público ya hubiera iniciado su investigación por alguno de los delitos que se señalan en el artículo 1° de la ley y, además, que en esa investigación tomare conocimiento de la eventual participación de alguna de las personas indicadas en el artículo 3 de la ley. Lo anterior implica, por tanto, que no existe discrecionalidad para el órgano persecutor para iniciar la investigación contra la persona jurídica pues, en tanto y en cuanto se den los requisitos antes mencionados, el fiscal se verá en la necesidad de dar cumplimiento al mandato legal.[30]

Con esta disposición se pretende además que el Ministerio Público deba, antes de iniciar una investigación penal en contra de una persona jurídica, tener al menos una investigación en curso por estos delitos y que tenga algún antecedente de la participación de algunas de las personas señaladas en el artículo 3. Lo anterior, a fin de utilizar con prudencia y sujeción a principios, como el de economía procesal, los recursos del sistema en la persecución de ilícitos cometidos a través de organizaciones empresariales.

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[29] En términos generales se aprecia en la nueva legislación chilena la adopción de las tendencias observadas en legislaciones comparadas, como por ejemplo la italiana, de regular los aspectos procesales de manera, en lo posible, detallada. Asimismo, se sigue la lógica de tratar a la persona jurídica como un sujeto procesal semejante a la persona natural, como también se asume en sistemas como el francés. Sobre esto último, cfr. Pradel 1997, 94.

[30] Así el artículo 20 de la ley señala que "Si durante la investigación de alguno de los delitos previstos en el artículo 1°, el Ministerio Público tomare conocimiento de la eventual participación de alguna de las personas indicadas en el artículo 3°, ampliará dicha investigación con el fin de determinar la responsabilidad de la persona jurídica correspondiente." En este sentido nos parece que se ha regulado esta materia de una manera similar a la de la normativa que le ha servido de inspiración, esto es el Decreto Legislativo 8 giugno 2001, n. 231 italiano, en tanto se habla en su artículo 38 de consolidación de las investigaciones, y en la legislación chilena de ampliación de la investigación. Aunque claramente, la norma italiana responde en gran medida a la dispar naturaleza de los procedimientos – unos penales y éste administrativo – se produce en la práctica una ampliación de una sola investigación. Todo ello sin perjuicio de la posibilidad que tiene el fiscal chileno de separarlas en cuanto lo estime necesario.

Respecto de la obligación de iniciar una investigación contra la persona jurídica por parte del órgano persecutor, este principio de la nueva ley se encuentra reafirmado por la incorporación en el texto legal de una norma que viene a establecer una importante diferencia entre el sistema procesal de la persona natural y la persona jurídica. Dicha disposición señala la imposibilidad de aplicar respecto de las investigaciones relativas a las personas jurídicas – por la naturaleza de los delitos que se contemplan, como por el interés público en la investigación y sanción de los mismos – del llamado Principio de Oportunidad, es decir, la facultad discrecional con que cuenta el fiscal de no iniciar o abandonar la ya iniciada investigación respecto de un delito.

La dirección asumida en cuanto a la consagración de un estatuto de garantías y derechos de la persona jurídica imputada de un delito similar al de una persona natural, puede observarse también en otras disposiciones de la ley, tal como aquella que regula la formalización de la investigación en contra de una persona jurídica. Como sabemos, la formalización de la investigación es la comunicación que el fiscal efectúa al imputado, en presencia del juez de garantía, de que desarrolla actualmente una investigación en su contra. Respecto de las personas jurídicas, se establece la necesidad de que deba formalizarse la investigación en su contra, como una forma de asegurarle el conocimiento preciso y claro acerca de los hechos atribuidos y el delito del cual se origina su responsabilidad. Obviamente, la formalización ha de realizarse en presencia del representante legal de la persona jurídica quien, para los efectos legales, es el responsable de asegurar los derechos del ente jurídico.

El representante legal de la persona jurídica es quien representa los intereses del ente colectivo y, por lo mismo, la nueva legislación dispone que en todas las audiencias donde se requiera la participación de la persona jurídica, aquél deba comparecer y su presencia, según el caso, será obligatoria. Sin embargo, cuando el representante legal no fuere habido, se designará un defensor penal público, de la misma forma en que se opera respecto de las personas naturales, para representar los intereses de la corporación. Todo ello, sin perjuicio de la facultad de que la entidad designe en cualquier momento un defensor de su confianza.

La nueva ley, además, regula un instituto fundamental en el sistema de responsabilidad penal de las personas jurídicas, a saber, la *suspensión condicional del procedimiento*. Esta institución, ya conocida en el sistema procesal penal general, cumple con dos finalidades. Por una parte, permite focalizar los recursos en los casos más graves, siendo, por tanto, una aplicación del principio de economía procesal; y, por la otra, logra cumplir también una finalidad preventiva, al satisfacer los intereses colectivos, a través del cumplimiento de las condiciones impuestas para que la suspensión proceda. Así, se exige que para que una investigación pueda ser suspendida condicionalmente la persona jurídica no debe haber sido

condenada anteriormente o bien no haber sido objeto de una suspensión condicional anterior aún vigente.

Lo relevante de esta incorporación legal, nos parece, son las condiciones que debe cumplir la persona jurídica durante el período de prueba al que estará sometida. Así, ellas responden, como señaláramos, a las necesidades preventivas, destacando el trabajo a favor de la comunidad, el deber de informar periódicamente el estado financiero de la entidad, y especialmente, la implementación de modelos de prevención de delitos en la forma en que se establece en la propia ley como requisito para la exención de responsabilidad.

En cuanto a la aplicación de las normas procesales referidas a la prueba, cabe señalar que la nueva ley se remite íntegramente al Código Procesal Penal, es decir a las normas propias de las personas naturales. Ello ocurre tanto en esta materia como especialmente en materia de derechos y garantías del imputado. Por tanto, el tratamiento aplicable a la persona jurídica imputada por un delito contemplado en la nueva ley, será regulado conforme a las mismas normas que rigen para las personas naturales imputadas de delito.

Por último, en materia de jurisdicción, cabe señalar que rige el principio de territorialidad de la ley chilena, pero no así el de nacionalidad, aplicable a las personas naturales chilenas que cometen hechos ilícitos fuera de su territorio. Lo anterior pese a que el Ejecutivo en el Mensaje presidencial proponía una norma que regulaba tal aspecto. En efecto, el proyecto presentado al Congreso regulaba entre sus disposiciones la situación en que una parte del delito imputado a la persona jurídica fuera cometido en Chile o bien cuando el delito hubiera sido cometido fuera del territorio nacional pero la persona jurídica imputada tuviera nacionalidad chilena.[31] La propuesta, sin embargo, por el alto quórum que requería para su aprobación, fue suprimida, por lo que el texto que pasó a segundo trámite constitucional ya no contempló tal norma.[32]

Este vacío, sin duda alguna, respecto de todos aquellos hechos delictivos que provengan especialmente de empresas que tienen presencia en distintos países, generará lagunas de punición que deben ser cubiertas a la brevedad en la legislación chilena.

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[31] La norma a que hacemos alusión correspondía al artículo 37 del Mensaje Presidencial, y su texto señalaba: "Artículo 37.- Jurisdicción extraterritorial. Los tribunales chilenos serán competentes para conocer de la responsabilidad legal de las personas jurídicas, cuando todo o parte del delito correspondiente sea cometido en territorio de la República, o cuando las personas jurídicas tengan nacionalidad chilena."

[32] En efecto, aunque la norma fue aprobada durante su primer trámite constitucional y reglamentario en la Comisión encargada de informar sobre su contenido, esto es la Comisión de Constitución, legislación y justicia de la Cámara de Diputados, lo cierto es que llegado el mencionado informe a la Sala de dicha Cámara, esta norma no alcanzó el quórum especial que ella requería y que era más alto que el resto de las normas del texto legal.

11.8 Conclusiones

Desde un punto estrictamente valorativo, la nueva ley resulta ser una muestra de la forma en que nuestro sistema jurídico adopta las más modernas tendencias en el ámbito penal y, si bien este parece ser un salto enorme para sistemas jurídicos como el chileno, en el que principios como el de la culpabilidad personal o *societas delinquere non potest* se han impuesto de manera sostenida y casi sin contrapesos, no es menos cierto que fuera del ámbito latinoamericano, dichas tendencias ya han sido adoptadas desde hace ya bastante tiempo en numerosos países, razón por la cual el debate en cuanto a la existencia de un nuevo modelo de responsabilidad para los entes colectivos no hará otra cosa que seguir a aquéllos que ya se han dado en los países más adelantados en estas materias.

En este sentido, lo cierto es que dicha ley, como muchas otras, no ha sido más que la respuesta a legítimas necesidades de orden político criminal, por lo que siendo ésta una decisión del legislador, surge ahora la necesidad de construir una doctrina que asegure una aplicación acorde con los principios básicos del Derecho penal, resguardando las garantías procesales de los intervinientes, pero también una efectiva y eficiente persecución criminal.

Lo anterior, sin embargo, debe ser complementado en el sentido de estimar que resulta absolutamente imprescindible que se inicie un arduo y profundo debate que, en un corto plazo, pueda nutrir a la jurisprudencia de elementos que le permitan aplicar de manera adecuada la nueva legislación. Así, no sólo aspectos precisos de la nueva ley deben ser llenados de contenido, sino cuestiones de tremenda envergadura, como es la consistente en determinar si el modelo de responsabilidad adoptado es el más adecuado para ordenamientos jurídicos como el chileno. Lo mismo debe ocurrir respecto de determinar si es o no necesario y aconsejable mantener, junto a un *sistema mixto* basado en el hecho de otro y en una culpabilidad propia de la empresa, uno autónomo que se escapa absolutamente del primero, como es el contemplado en el artículo 5 de la nueva ley.

Desde nuestra perspectiva y respecto de este último punto, tal norma debería ser considerada y aplicada con cautela, pues debería siempre primar en la investigación el fin de detectar e individualizar a los responsables físicos, de manera de que las responsabilidades de persona física y moral, sean siempre *acumulativas*, reservando, de este modo, la aplicación de la responsabilidad autónoma sólo para aquellos casos en los que las propias características de la organización, ya sea por la forma de adopción y ejecución de las decisiones o por la alta complejización y delegación de las mismas, hace imposible establecer las responsabilidades individuales.

Dicho lo anterior, cabe señalar que, aunque reconocemos que la nueva ley debe ser probada y aplicada en la práctica, existe una gama de delitos de extremada importancia para la sociedad que no han sido considerados en la nueva ley. Por ello, estimamos aún muy pobre dicho catálogo, razón por la cual nos inclinamos por su complementación, en un plazo prudencial, con

otros delitos, como aquellos que atentan contra el patrimonio del Estado, contra la salud pública, contra el medioambiente (aunque éstos primeramente deben ser sistematizados de manera coherente) y, por supuesto, algunos delitos imprudentes, respecto de los cuales las organizaciones tienden a ser sujetos activos de los mismos, con cierta habitualidad.

Por otro lado, nos parece que las legislaciones que en general regulan la responsabilidad penal de las personas jurídicas, y por supuesto también la chilena, deben partir de ciertos parámetros que digan relación con el tamaño y capacidad de la entidad. En otras palabras, la ley chilena debió partir de la base de que la aplicación de sus normas sólo incumbirá a organizaciones de determinada entidad, por cuanto, cuando se aplican sus disposiciones a empresas muy pequeñas, no sólo se podrá producir un grave daño a la economía de países que se alimentan en gran medida de las mismas, sino que se está sancionando dos veces la misma conducta respecto de un mismo agente. En esos casos los dueños y controladores son claramente individualizables y es más, la empresa se identifica con quienes realizan la actividad.

Esta situación es morigerada en la ley chilena, al contemplar la institución de la *Suspensión Condicional de la Pena*, en la que se atiende a criterios que dicen relación con el tamaño y capacidad de la organización o con el número de trabajadores que se desempeñan en la misma. Sin embargo, la referida institución, por una parte, sólo se refiere a delitos de menor entidad y, por la otra, es aplicada como una facultad discrecional del juez. Ante esto se mantiene la duda respecto de todos aquellos casos en que no sea aplicable tal figura, pues en ellos se estará, en innumerables ocasiones, sancionando dos veces al mismo infractor por una misma conducta.

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Chapter 12
Corporate Criminal Liability in Hungary

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Contents

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12.1 Introduction

The Act CIV of 2001 on Criminal Measures Applicable to Legal Persons (Act CIV 2001)[1] was adopted in 2001 by the Hungarian Parliament and has been effective since May 1, 2004, when Hungary became a member of the European Union (EU). The legislator decided to enact a separate act instead of placing the relevant provisions in Act IV 1978 on the Hungarian Criminal Code (Criminal Code).[2] The relationship between Act CIV 2001 and the Criminal Code is established by s. 70 Criminal Code, which enumerates criminal "measures"[3] in Hungarian law, lists "measures applicable to legal persons", and refers to the separate Act CIV in the footnotes. Act CIV 2001 itself is divided into two parts: the first six articles are entitled "Criminal Law Provisions" and the next twenty are entitled "Provisions on Criminal Procedure" and are followed by some closing provisions. The provisions of Act XIX 1998 on Criminal Procedure (Criminal Procedure Code)[4] are applicable with some differences as defined in Act CIV 2001.

The aim of this chapter is to examine the present criminal liability of legal persons in Hungary. First, the historical background and the codification process of Act CIV 2001 is shortly outlined. Second, a possible theoretical model of Hungarian corporate liability principles and its substantive features are introduced and discussed. Third, the questions of sanctioning and finally the issues of procedure will be analysed with regard to the problems that have arisen in applying this special form of liabilty in practice.

12.2 Background

12.2.1 Traditional Principles

One of the traditional principles of criminal law in Hungary is that only natural persons may incur criminal responsibility as culpability and other

[1]Act CIV 2001 on Measures Applicable to Legal Persons under Criminal Law, in force May 1, 2004.

[2]Act IV 1978 on the Criminal Code, in force July 1, 1979 (Criminal Code).

[3]Hungarian criminal law recognizes two forms of sanction. In the official English version of the Hungarian Criminal Code, one is referred to as "punishment" (e.g., imprisonment or community service) and the other is called a "measure" (e.g., a reprimand or forced medical treatment). The unofficial English text of Act CIV 2001 uses the same terms to translate the name of the sanctions against corporations.

[4]Act XIX 1998 on the Criminal Procedure (Criminal Procedure Code), in force July 1, 2003.

elements of criminal responsibility are only possible in relation to human beings. Consequently, the criminal responsibility of legal persons was unfamiliar to our criminal justice system until the 2001 reforms just discussed.

When the present Hungarian Criminal Code was being prepared (it has been in existence since 1978), the general view was unambiguous: only natural persons could commit crimes because criminal culpability was a blameworthy psychological connection between the offender and his/her offense. In keeping with this traditional principle, Hungarian criminal law rejected the idea of corporate criminal responsibility – right up to the end of the twentieth century. The only (limited) exception in Hungarian legal history was Act XIV 1939 on the Abuse of Legal Currencies, which made it possible for a judge to obligate a corporation to pay financial compensation jointly with an employee or agent who committed a crime on the corporation's behalf.[5]

12.2.2 Law Reform

The adoption of rules providing for corporate criminal liability was part of the harmonization program that was a prerequisite for EU membership. Legal acts of the EU and other international organizations obligate states to take the appropriate measures to ensure that legal persons may be held accountable for criminal offenses committed within their institutional frameworks.[6]

There was no international obligation on Hungary to introduce a form of corporate responsibility for criminal offenses that were specifically *criminal* in nature, however: EU sources stated that sanctions against legal persons should (merely) be effective, proportionate, and dissuasive,[7] and there is no doubt that an administrative sanction, such as a large fine, could also be effective and dissuasive. Moreover, in Hungary, legal persons could already be held liable in other areas of law. Several acts in the area of administrative and civil law contained such provisions and rather severe sanctions. For example, the regulatory fine was introduced by Act LIII 1995 on Environmental Protection[8] and Act CLV 1997 on Consumer Protection,[9] the exclusion of legal persons from public procurement processes and the

[5]In fact, the act established an objective criminal liability for corporations separately from the natural person's culpability. Nevertheless, its sanction was unquestionably criminal because it could be imposed within the framework of a criminal proceeding as a result of the commission of a criminal offense.

[6]See further Pieth/Ivory (this volume).

[7]See, e.g., Council Framework Decision 2002/475/JHA of June 13, 2002 on combating terrorism, OJ No. L 164, June 22, 2002, Art. 8.

[8]Act LIII 1995 on the Environmental Protection, in force December 19, 1995, art. 106.

[9]Act CLV 1997 on the Consumer Protection, in force March 1, 1998, art. 47(1)(i).

publication of sanctioning decisions were possible under Act CXXIX 2003 on Public Procurement,[10] and the winding-up of entities was foreseen by Act II 1989 on the Right of Public Meeting.[11] Consequently, organizational sanctions were not unknown legal institutions in Hungarian law. The Hungarian legislator had the possibility of choosing between two types of sanctions and two types of responsibility. Some experts in Hungary were of the opinion that these administrative and civil sanctions should also have been applied in relation to offenses committed within the framework of legal persons instead of criminal measures. But in December 2001 a (criminal justice) policy decision was taken in Hungary in favor of criminal liability and so Act CIV 2001 was adopted.

12.3 The Hungarian Concept of Corporate Liability

Several theoretical models were developed in connection with the liability and guilt of the legal person in continental European, British, and American criminal law, including the identification theory, the doctrine of *respondeat superior*, other principles of vicarious liability, and theories of collective knowledge (i.e., the "aggregation" and "corporate culture" theories). Common to all these models are explanations of organizational action and fault that are very different to the concepts applied to natural persons. It should be emphasized that all of these models are well-constructed and logical and all have been accepted by national legal systems. But, in Hungary, there are real doubts about the wisdom of mechanically using legal solutions developed abroad, particularly those of common law legal systems. These solutions may be irreconcilably opposed to the traditional principle of Hungarian criminal law that a crime is a human act and culpability is a psychological state: at least on one view of corporate personality, a legal person has no mind and is incapable of acting immorally and committing an offense.

Consequently, in our opinion, the concept of corporate liability in Act CIV 2001 should be explained differently and the act understood as establishing a special category criminal liability for legal persons. As legal persons may be legally "responsible" or "liable", there is nothing to prevent us from accepting that they may be legally responsible in the area of criminal law without invoking the concept of culpability. The form of liability in Act CIV 2001 should be considered within the unified system of criminal law. Its elements, under the provisions of the act, are:

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[10] Act CXXIX 2003 on Public Procurement, in force May 1, 2004, arts. 340(3)(d) and 343(2).

[11] Act II 1989 on the Right of Public Meeting, in force January 24, 1989, art. 16(2)(d).

- an illegal human act (crime) by a leading person of the legal entity, one of its employees or members, or a third party;[12]
- a financial (or other) advantage that results from the commission of the offense and that appears as a profit for the legal person;[13] and
- a blameworthy act on the part of a leading person, including a failure to take necessary steps to prevent criminal conduct by an employee or officer or knowledge of a crime committed by a third party.[14]

This liability is indirect because the offense alleged to have been committed by the legal person must actually have been committed by one or more natural persons within or external to the legal entity. There are two exceptions to this rule; however, these only apply if the defendant dies before the proceeding ends or becomes mentally ill. In such cases, the proceeding may be conducted solely against the legal entity and the application of measures is not based on the criminal responsibility of the natural person. In these circumstances, Hungarian law does recognize the objective liability of legal entities.

Since there is no room in Hungarian law for an organizational criminal guilt for legal entities, in our opinion, the punishment for the legal person is not based on its guilty mental state and the adequate sanctions in this area are criminal measures. This model satisfies Hungary's international obligations and leaves the dogmatic structure of Hungarian criminal law intact.[15]

12.4 Substantive Features of Corporate Liability in Hungarian Law

12.4.1 The Entities that May Be Held Criminally Liable

According to Act CIV 2001, criminal responsibility may be attributed to "legal persons" for which a definition is provided in the Act:

> Legal persons shall be understood to be any organization or organizational units thereof vested with rights of individual representation, which the governing rules of law recognize as legal persons, as well as organizations that may be subject to legal relationship in civil law in their own right and possess assets distinct from that of their member, including companies active prior to registration pursuant to the Act on Economic Associations.[16]

[12] Act CIV 2001, art. 2(1).
[13] Act CIV 2001, art. 1(1).
[14] Act CIV 2001, art. 2(1)(b).
[15] Ligeti 2003, 20.
[16] Act CIV 2001, art. 1(1).

Hence, "legal persons", in this criminal law sense, are almost any kind of legal person that exists in civil law, i.e., share companies and limited liability companies, as well as other legal persons with economic activities and financial rights and obligations, such as foundations and social organizations. Both de jure and de facto legal persons are covered and, as the Act CIV of 2001 does not distinguish between Hungarian and foreign legal persons, foreign legal persons may be subject to Hungary's corporate criminal liability principles as well.

At the same time, it is apparent that states or state organs or representative organizations are not subject to criminal responsibility. Article 1(2) Act CIV of 2001 provides:

> This act shall not apply to the state of Hungary, foreign states, the institutions listed in the Constitution of the Republic of Hungary, the Office of the National Assembly, the Office of the President of the Republic, the Constitutional Court, the Office of the Ombudsmen, and any bodies which are, according to the law, responsible for tasks of governance, public administration, and local government administration, and international organizations established under international agreements.

It is an open question whether public law organizations, such as municipalities, are to be covered by this exclusion. In our submission, this question should be answered in light of the sanctions applicable to corporate offenders: some criminal measures, such as winding-up or the suspension of corporate operations, should not be interpreted to apply to legal persons of this type. This interpretation is supported by the fact that municipalities only have the right to perform business activities indirectly and are legally obliged to create economic enterprises, which could then be subject directly to criminal liability. Therefore, local governments should never be held liable for crimes.

12.4.2 The Offenses for Which Legal Persons May Be Liable

Act CIV 2001 aims to introduce a kind of general criminal liability for legal persons since it does not list the offenses to which it applies: criminal measures against legal persons are applicable in the event that a relevant person in the relevant circumstances commits an intentional crime as defined in the Criminal Code.

12.4.3 The Persons Who Engage Corporate Criminal Liability

Since Hungarian legal theory only recognizes natural persons as able to commit crimes and it is obvious that Act CIV 2001 did not intend to make

radical departures from our traditional principles, organizational responsibility under Act CIV 2001 is an indirect responsibility for the criminal conduct of a natural person. The provisions of Act CIV 2001 that deal with the natural persons who trigger organizational responsibility are rather complicated, however. Under art. 2(1), the organization is liable if the crime was committed:

- within the scope of the legal person's activities by a member or officer of the legal person who was authorized to represent the legal person or belongs to its management (leading officer), or a member or agent of the board of supervisors;
- within the scope of the legal person's activities by a member or employee of the legal person and the omission of a leading officer who has authority to control or supervise it rendered the commission of the crime possible; or
- by any person if a member or officer of the legal person who is authorized to represent the legal person or is part of its management had knowledge of the commission of the crime.

12.4.3.1 Managers and Representatives

In the first case, the offender is (1) a member or officer who is also part of the legal person's management or is its authorized representative; (2) an agent of these persons; or (3) a member and agent of the Board of Supervisors. Read with relevant provision of Hungarian civil and company law, this includes practically any senior officer of a legal entity. Notably, the term "member" includes natural or legal persons who hold a share in the subscribed capital of the legal person. Whatever the position, he/she (or it) must have acted on behalf of the legal person in committing the offense before the organization will be liable.

12.4.3.2 Members and Employees

In the second case, the organization is criminally liable for the act of any member or employee. The commission of the crime within the scope of an organization's activities and for its benefit, as well as an omission by a leading officer of the corporation, are mandatory criteria, however. The crucial element of liability would seem to be the blameworthy act on the part of the leading officer, i.e., a failure to fulfill a duty of control or supervision.

The requirement of an omission must be examined extremely carefully since the very fact that an offense was committed within the framework of the organization may be seen as an indication of defects in that organization. At the same time, it is very important to avoid an approach that would treat the mere fact of the offense as the basis for a presumption of defects

in processes of control and supervision. Therefore, in each case, it is necessary to scrutinize and compare the actual breach of duty on the part of the leading person and its relationship to the crime committed by the member or employee. As to the duties of leading persons, Wiener distinguishes between high-level leaders and other leaders. The tasks of the high-level leaders include developing and operating a system of control and supervision with the aim of preventing the commission of crimes,[17] and (we would add) the duty to control the activities of lower-level leaders. For lower-level leaders, the fulfillment or breach of a personal duty held by that particular leader is to be examined.

If it is established that the leader failed to fulfill his/her duty to control and supervise, it must then be proved that the fulfillment of this duty would have prevented the offense. It seems appropriate to examine whether the leading person accurately determined the offending employee's or member's competences and ensured the performance of his/her functions, as well as whether the flow of information to the employees and members was satisfactory. As far as larger commercial organizations are concerned, it may be necessary to show that they elaborated written internal regulations, orders, and procedures that could have prevented the commission of the crime when followed. Further, it is obviously not enough to merely issue such orders and make regulations. Only the leader who took care to implement these internal rules and procedures and make sure that they were known to lower-level personnel – whether in writing or through on-the-job training – may be able to positively state that he/she could not do anything more to prevent the crime. In our view, if the leader learns in time about the fact that his employee is about to commit an offense, he/she is in most cases responsible because the crime may have been prevented, at least by informing the authorities. In the end, judges will make use of their discretionary powers in deciding on these points and will need to conduct a thorough examination of the evidence.

Finally, it should be noted that the controlling officer's omission may be intentional or negligent.

12.4.3.3 Third Parties

In the third case, the offender is an "outsider", i.e., a person who is not associated with the legal person in any of the ways mentioned in the other provisions. In such cases, a further criterion is knowledge of the commission of the crime by a member or leading officer of the corporation. It may be knowledge, actual or constructive, without anything more, or permission for, or approval of, the crime. In any case, the purpose of this provision is

[17] Wiener 2003, 706.

to prevent the legal person from avoiding criminal liability and gaining a financial advantage by using a third person who has no "visible" contact with the legal person (e.g., a de facto manager) to commit an offense. Thus, if a legal person obtains an advantage through the commission of an offense, the courts may apply sanctions to this legal person, subject, however, to the important condition of awareness by a relevant member or officer.

12.4.4 Further Conditions of Liability

12.4.4.1 Benefit to the Legal Person

Measures can only be ordered against the organization if the crime was aimed at, or resulted in, the legal entity gaining an advantage. Conversely, if the human offender committed the crime for his/her own benefit, the organization is not responsible in criminal law. Advantage is defined in art. 1(1) as "any object, right of pecuniary value, claim, or preference irrespective of whether they have been registered pursuant to the Act on Accounting, as well as cases where the legal entity is exempt from expenditure according to an obligation arising from a rule of law or contract or according to the rules of reasonable business management." The fact that the legal person obtained or retained business, has a financial value and could be qualified as a preference (advantage), whether or not the enterprise was actually the most qualified bidder.[18] However, where the act has been committed by a third party, the advantage must have been actually obtained – and not only sought – by the legal person.

12.4.4.2 The Conviction of a Natural Person

As in other European jurisdictions, Act CIV 2001 provides for both the legal person and the human offender to be prosecuted. Additionally, under Act CIV 2001, the invocation of corporate criminal liability is preconditioned on the sanctioning of a natural person. Article 3(1) Act CIV 2001 states: "if the court has imposed punishment or applied reprimand or probation on the person committing the criminal act defined in [art. 2 Act CIV 2001], it may take the following measures against the legal entity. . .". Thus, if the natural person is not identified or is identified and charged but not convicted and sentenced, no sanction can be ordered against the legal person. There is one exception, which applies if the crime has caused the legal entity to gain a financial advantage and either the perpetrator is not punishable due to his mental illness or death, or the perpetrator became mentally ill after the commission of the offense and the criminal proceeding was

[18] See OECD 2003, 6.

suspended. In such cases, the legal person may still be criminally responsible even though no natural person was convicted and sentenced.[19]

12.4.5 Defenses to Liability

Act CIV 2001 does not provide any express defenses. In other areas of Hungarian criminal law, there are precedents of criminal defenses being established through court practice, though such a process usually takes a long time. Due to the lack of corporate criminal prosecutions, the question of whether corporate governance could be taken into consideration as a mitigating circumstance is unclear. For now, sanctions should be imposed by the court on a corporation if the substantive conditions for liability are fulfilled.[20]

12.5 Sanctions

Three types of criminal "measure" are applicable to legal persons under Act CIV 2001: dissolution (compulsory winding-up), injunctions (restriction of the legal person's activities), and fines. Forfeiture of property, a "traditional measure" in the Criminal Code, may also be applied.

Act CIV 2001 is silent on the question of which principles apply to sanctioning decisions. Presumably, the courts are to develop these principles through practice. In Hungarian legal literature, at least, analysis of sanctioning principles and the possible mitigating and aggravating circumstances has been based on foreign examples and sources; however, the real Hungarian situation is still unclear.

12.5.1 Fines

It is well-known that fines are the traditional sanction against corporate offenders in many legal systems. Hungary is no exception. Fines of between Ft500 000 and an amount which is three times the financial advantage resulting from the offense may be imposed.[21] The court may estimate the rate

[19] It is worth noting that the OECD has recommended the *complete* elimination of the requirement that a natural person be convicted as a prerequisite to the liability of the legal person. See OECD 2005, para. 145.

[20] There is one exception, which applies if the sanction would entail an unreasonable burden to the legal person. In this case, sanctions may be foregone, but this is not a defense. See Act CIV 2001, art. 18(1)(e).

[21] Act CIV 2001, art. 6(1).

of the financial advantage gained or intended to be gained if this amount cannot be established or only established at an unreasonably high cost. Unpaid fines shall be recovered in accordance with the general rules on collection by court order.[22]

In general, an appropriate and fair fine is calculated by careful consideration of sentencing factors. Applying this principle to legal persons, both the highest and lowest extremes should be avoided. The former may affect the financial standing of the legal person and, in the worst case, could induce insolvency, winding-up, and further serious consequences, including for the legal person's employees and customers. However, a low fine could minimize the fact of the crime and undermine the deterrent effect of the sanction. It is an open question whether the Ft500 000 (approximately €2 000) minimum has any deterrent effect; however, if we accept that there are stigmatic effects associated with a criminal conviction, even a relatively low fine, such as this, may cause the legal person considerable disadvantage, especially if it were combined with the publication of the judgment.

12.5.2 Forfeiture and Confiscation of Illicit Gains

Under art. 77B Criminal Code, the court must order the forfeiture of any property that:

- resulted from a criminal offense and was obtained by the perpetrator in the course of, or in connection with, the commission of the offense;
- obtained by the perpetrator when he/she took part in a criminal organization;
- was the subject of a pecuniary advantage; or
- was used to replace the property obtained by the offender in the course of, or in connection with, the commission of a crime.

The forfeiture of property stemming from the commission of a crime must also be ordered if it served to enrich another person. If the "other person" is a "business organization," forfeiture must be ordered against the organization; the *transfer of ownership or dissolution* of the business organization does not prevent the application of this sanction. It should be noted, however, that the term "business organization" is narrower than the definition of "legal person" in Act CIV 2001.

[22] Act CIV 2001, art. 6(3).

12.5.3 Non-financial Sanctions

12.5.3.1 Restriction of a Legal Person's Activities

Under art. 5(2) Act CIV 2001, the court may prohibit a legal person from carrying out certain activities, namely, from participating in a public procurement process, entering into a concession agreement, becoming a non-profit organization, or obtaining subsidies from the EU, the state of Hungary, or any foreign country, and from pursuing any other activity that has been prohibited by the court. The prohibition may last from between 1 and 3 years. Though it does not involve the payment of money or winding-up, a prohibition is not necessarily a "light" sanction. For example, the loss of a subsidy may lead to the closure of a legal person if its operations depended on external budgetary sources.

12.5.3.2 Winding-Up

Winding-up is capital punishment for legal persons, i.e., the most severe sanction for the purpose of defending society. In Hungary, the court must order the winding-up of a legal person that was engaged in an illegal economic activity that was established for the purpose of concealing a crime or the actual activities of which serve the purpose of concealing a crime. In such cases, the court may even wind-up a legal person that also has legal economic activities; however, in this situation, the sanction should not be imposed on organizations that have strategic importance from the point of view of the national economy or national defense, national utility companies, or other legal persons, the dissolution of which would jeopardize the realization of state or local government goals.

12.5.3.3 A New Form of Sanction?

In our opinion, the legal consequences for corporate offenders are different to Hungary's traditional sanctions for human beings and should be considered as a third, new type of criminal sanction. Not only has the Hungarian legislator placed the sanctioning provisions in a separate act, but the aim of corporate sanctions is clearly to promote an attitude of compliance amongst organizations, i.e., to influence the behavior of natural persons working within organizational frameworks to abide by the law. The fact that the sanctions have that effect itself justifies, among other things, the introduction of criminal responsibility. Further, the result or effects of the sanctions include damage to the organization's reputation. In other words, the stigmatic effects of conviction may be very significant.[23]

[23] Santha 2005, 237.

The aims and functions of criminal sanctions can be formulated in various ways, including the defense of society, the re-establishment of a violated legal normative system, and the prevention of future criminality. However, the main function of criminal responsibility and criminal sanctions for legal persons is to promote a *law-abiding attitude in that corporation and other legal entities*.

12.5.4 Publication of the Judgment – A Missing Sanction

Hence, there would seem to be a broad spectrum of criminal sanctions available against legal persons under Hungarian law, the essence of which is not the subsequent reaction to the committed offense but the prevention or deterrence of future occurrences of harmful, criminal conduct.[24] However, of the three sanctions established by the Hungarian Act CIV 2001, publication of the judgment, an ideal sanction against legal entities, is not one. This is regrettable for the main effect of corporate prosecutions would seem to be negative publicity.

Publicity can have various disadvantages for legal persons, from the loss of income and prestige for commercial corporations, to the decrease in public support for foundations. According to a United States survey, corporate managers do not believe that legislation stops crimes but they do believe that publicity has a considerable deterrent effect.[25] In Hungary, the sanction could be defined as an obligation on the legal person to publish, at its own expense, an article in a daily paper or industry magazine, which gives information about the offense committed, the sanctions imposed on the legal person and its managers or employees, and the legal person's efforts to prevent further offenses and rectify the consequences of the past offense. In our view, the publication of the judgment is one of the best responses to corporate criminality, and its introduction as a criminal sanction within the framework of criminal procedure is worth considering.

12.5.5 Sanctioning Principles

As noted above, sanctioning principles will be developed through court practice. In the future, courts would be advised to limit the use of sanctions that could endanger the existence of the legal person (i.e., large fines, harsh prohibitions, publication of sensitive judgments, and compulsory dissolution) to the most serious cases where the fact of the commission of the crime is so symptomatic of the organization's activities and internal operations that other legal consequences would seem insufficient. Courts should

[24] Heine 1999, 238.

[25] Clinard/Yeager 1980, 318. In certain cases, the publication of the judgment could be more effective than the other "traditional" sanctions available to the courts.

be careful since the closure of one company may trigger a chain-reaction in others. Moreover, in relation to winding up, there is nothing, in principle, to prevent the members of the defunct company from reorganizing and continuing their illegal activities in a new structure. For the sake of impeding such a strategy, it would be advisable to sanction the members in such a way as to make the effective reconstitution of the legal person impossible.

12.6 Procedure

12.6.1 Prosecutorial Discretion

In certain cases, a prosecutor in Hungary has discretion whether or not to prosecute a natural person.[26] There are not many reasons for denying prosecution but the Criminal Procedure Code does offer a few (e.g., for covert agents and less serious offenses). Regarding legal entities, prosecutors do not seem to have this same discretion. Article 12(1) Act CIV 2001 states that "if, during the investigation, data is found according to which measures may be applied against a legal entity during the criminal proceeding, the investigative authority shall extend the investigation to the clarification of the relationship between the crime subject to the proceeding and the legal entity." It shall also "notify the prosecutor without delay".[27]

From this provision it is apparent that prosecuting agencies have no such discretion regarding legal entities. The lack of prosecutorial discretion with regard to legal persons was not originally part of corporate criminal liability rules in Hungary, however. Four years after the Hungarian Act CIV 2001 came into force in May 2004, only two prosecutions had been brought against legal persons and only one of these cases (the "red pepper forgery case", which involved the marketing of contaminated spice pepper by a corporation) resulted in a fine. The lack of court practice was apparent to the representatives of the Hungarian criminal justice system and the Organization for Economic Cooperation and Development (OECD).[28] The roots of the problem may be found in the procedural provisions of Act CIV 2001, which provided a great deal of discretion to the prosecutor in initiating and continuing the proceeding against the legal person. It read as follows:

> If any evidence is found in the course of the investigation to the effect that measures may be taken against the legal person in the course of the criminal proceeding, the investigative authority shall immediately notify the prosecutor of the fact. The prosecutor shall decide whether the investigation should extend to exposing connections between the crime investigated and the legal person.

[26] See, generally, Dobrocsi 2006.

[27] Act CIV 2001, art. 12(1).

[28] OECD 2005, para. 145.

This discretion was not problematic in itself but became so because of the legislator's failure to define the conditions of its exercise. Since the office of the prosecutor is usually overburdened in Hungary, it was obvious that individual prosecutors would not extend an investigation to a legal person given a choice.

The problem was recognized by the legislator and a modification of Act CIV 2001 was accepted by Parliament in 2008. According to the new art. 12, if any evidence is found in the course of the investigation that indicates measures could be taken against the legal person, the investigative authority is obliged to extend the investigation to this legal person. This rule should not be taken to mean that the prosecutor loses his/her freedom to decide whether to charge the legal person. Rather, he/she loses the possibility of hindering the prosecution of the legal person in the initial stage of the investigation. Once the prosecutor is in full possession of the information resulting from the investigation, he/she will be able to make a well-informed decision to prosecute or not. The role of the investigative authorities has also become more important as a result of the amendment since they now have a right and an obligation to investigate legal persons.

The positive effects of this modification are already perceptible: in the second half of 2008 and the first half of 2009 twelve indictments contained a motion by the public prosecutor for the application of sanctions to a legal person.

12.6.2 Jurisdiction

Hungary's jurisdiction over corporate offenses, according to Act CIV 2001, is based on the legal person's place of incorporation. So, a Hungarian court may still hear a case against a legal entity that was incorporated in Hungary but is owned, operated, and managed by foreign nationals and performs activities related to foreign countries provided that all other material and formal conditions for criminal proceedings against the legal person are met.

12.6.3 Provisional Measures

Provisional measures may be applied to legal entities, provided that such measures – due to their very nature – are not only applicable to natural persons. So, prosecuting authorities may search an organization's premises and obtain orders for the confiscation and seizure of electronic data against legal entities, amongst other things.

12.6.4 Procedural Rights and Principles

The emergence of basic procedural principles regarding legal entities is a difficult issue in Hungarian law. The main problem is that the legal entity,

when involved in the procedure, lacks a well-defined position: as it is not a defendant, it should not be entitled to the rights of the defendant; but, at the same time, it cannot be put into any other category of participant. The scope of its rights is rather uncertain and awaits clarification.

For now, it would seem that the legal representative of the legal person (not the defendant, of course) exercises the rights of the counsel for the defendant in the Criminal Procedure Code. Other procedural rights, such as the right to a legal remedy and access to information and documents, also give legal entities entitlements. The right to be heard may be interpreted, in relation to legal entities, as the right of representatives of the corporation to make statements and declarations and may enhance the running of the proceeding. The freedom from self-incrimination is not mentioned as a particular right of legal entities, however, and the detailed regulations create the impression that legal entities are not protected in this way; otherwise this concept is generally available to all participants in a criminal proceeding.

Similarly, the rule *nemo tenetur se ipsum accusare*, which applies to all natural persons involved in a criminal proceeding in any way, is not applicable to legal entities. Legal entities may be obliged to provide certain documents and electronic data in the proceeding against the natural person, even if it is also involved in the proceeding and the information could be used to determine its liability. As the fate of the defendant and of the legal entity are linked, in certain cases, the legal entity may be obliged to provide information against itself. From this perspective, it may be said that a human defendant is in a more advantageous position than a legal person in criminal proceedings. Fundamentally, their position is rather similar to that of defendant natural persons since they also face proceedings aimed at establishing liability; however, legal entities have a less well-defined role and so lack most of the guarantees and rights that benefit human beings who are defendants.

12.6.5 Witnesses

It follows that executive officers of the legal entity may be treated as witnesses when they are not involved in criminal proceedings as defendants. It is quite likely, in fact, that a legal person will be involved in a proceeding against one of its executive officers. The main rule in Act CIV 2001 is that a legal entity may be involved in a proceeding if there is a certain link between the human defendant – the main protagonist – and the legal entity. One such link may be the defendant's position within the legal entity; therefore, it should be common for legal entities to be involved in a criminal proceeding in which one of its executive officers is defending charges.

12.6.6 Special Procedures

Notably, special procedures aimed at shortening or speeding up criminal proceedings, such as hearings outside of trial and waivers of rights to hearings, are not to be initiated by the prosecutor or applied in any way to a legal entity that is involved in a criminal proceeding.

12.6.7 Termination of Proceedings Against the Natural Person or Acquittal

If the proceeding against the natural person is terminated or the defendant is acquitted (and therefore the legal entity is not able to be sanctioned), Act CIV 2001 does not require the court to settle the situation of the legal entity as well. From the provisions of Act CIV 2001, it seems that the court is supposed to "forget about" the legal entity since it does not have to declare the procedure against the legal entity at an end. In fact, its decision need not contain a single word about the legal entity. Article 18(2) CIV Act 2001 states that, "if the court terminates the proceedings in relation to the defendant with regard to whom the legal entity is included in the procedure, or acquits the defendant, it is not under obligation to deliver a decision about the termination of proceedings against the legal entity, nor shall it make statement about this in the judgment or final summons." This is a rather remarkable provision. The legal entity may have suffered harm from being part of the criminal proceeding, at the end of which the lack of sanction against it is not mentioned at all. The 2008 amendments to the CIV Act clarified art. 15(2)(b) and concluded that the court's decision on the application of measures or its refusal or exclusion should be included in the operative part of the final decision.[29] Article 18(2), on the other hand, remained unchanged. Therefore, the ambiguity awaits clarification.

12.6.8 Equal Procedural Status Amongst Legal Persons

As noted above, certain legal entities (such as the Hungarian state) are exempt from criminal responsibility. All other entities may be prosecuted and, if they are, they all have the same rights and obligations; none has a particular position.

[29] Act XXVI 2008 on the Amending of Act CIV 2001 on the Application of Measures against Legal Entities in Criminal Proceedings, art. 9.

12.7 Conclusions

The intoduction of corporate criminal liability was one of the most radical changes in the history of Hungarian criminal law. The decisive motive of the codification was the push for legal harmonization within Europe and it required an abandonment or reconceptualization of certain traditional principles. Nevertheless, criminal responsibility of legal persons became a reality in Hungary with the entry into force of Act CIV 2001 in 2004, which made general, effective, and deterrent sanctions against legal persons available. From this point, in our view, three main challenges are (1) the development of a model of corporate criminal liability; (2) the application of the theory and the provisions of the act into (court) practice; and (3) the development of appropriate rules of criminal procedure.

The first problem is seldom considered by scholars of Hungarian criminal law in spite of the fact that, in our view, doctrinal questions of any legal institution should be made clear and the theoretical basis of a new type of liabilty be worked through in a detailed manner. The model implicit in the act is called an "imputation model" in the Explanation to Act CIV 2001 since a natural person's criminal offense is imputed to a legal person. Another essential element of this theory are special corporate criminal measures which are, unlike criminal "punishments", not tied to the element of fault. On the basis of the Explanation to the Act, some scholars argue, that legal person could not be held criminally responsible, only criminal sanctions can be imposed against them,[30] and another rejects the idea that sanctions provided for in the act are "real" criminal sanctions, describing them instead as administrative or civil sanctions imposed by the criminal court.[31] In contrast to these scholars, we are convinced that legal responsibility is a unified system into which corporate criminal liability principles should be integrated. In our view, responsibility or the declaration of somebody's responsiblity is the precondititon for imposing a legal sanction; therefore, sanctions cannot exist without responsibilty. The sanctions established by the act are real criminal sanctions imposed by a criminal court as a result of a criminal procedure. The "Hungarian model" is thus a special type of criminal responsibility and, if we intend to use phrases from common law, it could be defined as a mixture of the identification and vicarious liability models.[32]

Concerning the second issue, the existence of legal rule in itself has a considerable deterrent effect but in Hungary it is expected that new provisions of Act CIV 2001 will be of significant practical relevance. Since

[30] Fantoly 2007, 152.

[31] Sárközi 2002, 452 et seq.

[32] Pieth/Ivory (this volume).

corporate criminal liability constitutes a new legal institution for authorities dealing with criminal cases, the courts will need time to be in a position to apply these new provisions. The major reason for the lack of practice – the original regulation of prosecutorial discretion – was addressed with the modification of the act in 2008. The number of criminal investigations against corporation has risen since then and it is to be hoped that this number will increase in the future as well.

Hence, the third problem is the establishment of appropriate procedural rules. The legislator should define the position of the legal entity in the criminal proceedings and assign rights to it, respectively. The ambiguous rules defining the obligations of authorities and the courts need to be clarified. Some modifications were made in 2008 but more are necessary, for even the best substantive regulations cannot be enforced without efficient procedural rules.

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Chapter 13
Why the Czech Republic Does Not (Yet) Recognize Corporate Criminal Liability: A Description of Unsuccessful Law Reforms

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Contents

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13.1 Introduction

This chapter aims to describe recent efforts to introduce corporate criminal liability rules in the Czech Republic. The structure of the chapter was supposed to follow a questionnaire sent to all national reporters to the 2010 International Congress of Comparative Law on that topic. If we had strictly adhered to the questionnaire, however, our report and this chapter would have contained just one paragraph with the following response: No, Czech law does not recognize corporate criminal or quasi-criminal liability; it is hard to predict whether corporate criminal or quasi-criminal liability legislation will be adopted in the foreseeable future; and, thus, questions about the concept of liability and the structure of liability principles are inapplicable.

Such an approach would have been tempting from an author's point of view, but the reader would not have learnt much. That is why we have chosen to describe attempts at introducing corporate criminal liability rules in the Czech Republic and the legislative proposals that would have effected this change. As the attempts have been unsuccessful so far, this chapter includes many conditional statements. Most of the questions posed by the questionnaire can be answered only from the perspective of what would or could have happened if the law had actually been reformed.

Thoughts about the introduction of corporate criminal liability were given voice at the end of the 1990s when the first expert studies and articles were published (primarily) on corporate criminal liability and future developments in Czech criminal law. Those articles dealt with individuals who could trigger the criminal liability of legal persons, the sanctioning principles for legal persons, the history of unsuccessful legislative projects, and foreign laws on corporate criminal liability. Jiří Jelínek, a co-author of this chapter, published a book in 2007 summarizing the expert discussion about the introduction of corporate criminal liability into the Czech law and discussing similar foreign laws, particularly in continental legal systems.[1]

Apart from describing the legislative efforts in the area of corporate criminal liability, this article should also indicate *why* the efforts to introduce such liability have been unsuccessful to date and how the legislator could possibly solve this matter. The article first deals with the failure

[1] Čečot/Segeš 2001; Čentéš/Palkovič/Štoffová 2001; Čentéš/Palkovič/Štoffová 2002; Čentéš/Štoffová 2001; Doelder de 1994; Huber 2000; Hurdík 1996; Jalč 2005; Janda 2006; Jelínek 2007; Král 2002; Kratochvíl 1999; Kratochvíl 2002; Kratochvíl/Löff 2003; Madliak/Porada/Bruna 2006; Musil 1995; Musil 1998; Musil 2000; Musil/Prášková/Faldyna 2001; Novotný 1997; Pipek 2004; Pipek/Bartošíková 1999; Príbelský 2007; Šámal 2002; Šámal/Púry/Sotolář/Štenglová 2001; Solnař/Fenyk/Císařová 2003; Teryngel 1996a; Teryngel 1996b; Vaníček 2006; Vantuch 2003.

of the Corporate Criminal Liability Bill of 2004,[2] second, with the basic features of corporate criminal liability in the proposed bill, and, third, with the legislative efforts to introduce an administrative or a combined administrative-criminal liability of legal persons into Czech law and the subsequent return to corporate criminal liability.

13.2 The Corporate Criminal Liability Bill

Czech law currently recognizes corporate liability only in the areas of civil and administrative law. Neither of these forms of liability, however, can be regarded as equivalent to the criminal or alternative forms of liability that the Czech Republic is obliged to introduce under international treaties to which it is party.[3] The current administrative liability of legal persons covers areas such as the environment, health, and safety and consists of regulatory offenses, which are distinct from the offenses for which natural persons may be prosecuted within criminal proceedings. Corporate civil liability, for its part, covers only legal disputes between legal persons and private actors.

The lack of corporate criminal liability or comparable administrative liability rules in the Czech Republic prompted the Czech Government to draft and submit to Czech Parliament the Corporate Criminal Liability Bill in 2004 (or CCL Bill). The bill was part of a large re-codification of the substantive rules of Czech criminal law and (to a more limited extent) the rules of Czech criminal procedure. The re-codification included the new Criminal Code, the Corporate Criminal Liability Bill, and a bill amending acts affected by the adoption of the new Criminal Code. The Corporate Criminal Liability Bill reflected the international and European requests

[2]Corporate Criminal Liability Bill 2004 (House Print No. 745), House of Deputies, Parliament of the Czech Republic.

[3]E.g., Criminal Law Convention on Corruption, January 27, 1999, in force July 1, 2002, 173 ETS (COE Criminal Law Convention on Corruption), Art. 18; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999 (OECD Convention on Foreign Bribery), Art. 2; Directive 2007/66/EC of the European Parliament and of the Council of December 11, 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (text with EEA relevance), OJ No. L 335, December 12, 2007, 31 (EU Remedies Directive); Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests – Joint Declaration on Article 13(2) – Commission Declaration on Article 7, July 26, 1995, in force October 17, 2002, OJ No. C 316, November 27, 1995, 49; Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12 (Second Protocol to the EU Convention on the Protection of the ECs' Financial Interest), Art. 3.

for the introduction of corporate criminal liability rules.[4] At that time, only a few countries in Central Europe had adopted such legislation.

The Corporate Criminal Liability Bill was supposed to be *lex specialis* in relation to the Criminal Code and the Code of Criminal Procedure. Had the CCL Bill been passed into law, it would have contained provisions dealing with differences in the criminal liability of legal persons, sanctions for legal persons, and procedures for investigating and prosecuting legal persons. Thus, the Criminal Code and the Code of Criminal Procedure would have been subsidiary legislation.

The House of Deputies of the Czech Parliament debated the bill during its first reading on November 2, 2004. Unlike the other two bills, the Corporate Criminal Liability Bill was heavily criticized by both coalition and opposition members of the Parliament (MPs). Finally, at the end of the first reading, it was rejected by sixty-nine of the 125 MPs present.[5]

The Corporate Criminal Liability Bill was based on the criminal liability of legal persons and the criminal sanctions that tried to introduce were similar to those for natural persons with the exception of imprisonment. The CCL Bill, thus, was not inspired by the current Swedish or (now changing) Spanish models in which the criminal liability of the legal person depends on a breach of the criminal law norm but the corresponding sanctions are not called penalties.[6]

13.2.1 The Bill's Concept of Liability

As regards the liability concept in the Corporate Criminal Liability Bill, it was based on a combination of the vicarious liability model and certain components of the objective liability model.[7] Article 5(1) provided that such acts should be imputed to the legal person as were committed in its name, in its interests, or in the interests of another entity including, but not limited to, statutory or top management bodies (hereafter "statutory bodies"). In addition, acts committed by representatives of the legal person

[4]E.g., OECD Convention on Foreign Bribery (in force for the Czech Republic March 21, 2000); COE Criminal Law Convention on Corruption (in force for the Czech Republic July 1, 2002); International Convention for the Suppression of the Financing of Terrorism, January 10, 2000, in force April 10, 2002, 2178 UNTS 197 (Terrorist Financing Convention); EU Remedies Directive; EU Convention on the Protection of the ECs' Financial Interest.

[5]Only forty-three MPs in fact supported the bill, whereas the total number of MPs in the House of Deputies of the Parliament of the Czech Republic is 200.

[6]Kratochvíl 2002, 366.

[7]Pieth 2007, 7 et seq.

and by those with supervisory or management tasks were to be imputed to the legal person provided, in the latter case, that such acts were part of a chain of causation between the manager's or supervisor's conduct and the subsequent criminal offense.

Thus, had it been passed into law, the bill would have introduced a form of corporate criminal liability so wide as to make legal persons criminally liable even for acts committed by their employees. Article 5(2) Corporate Criminal Liability Bill, nevertheless, partially mitigated this principle by imputing such acts to legal persons only if the legal person or its bodies or officers made a decision to commit a criminal offense, approved or ordered its commission, neglected their supervisory duties, or failed to adopt measures to prevent the criminal offense from being committed.

Article 5(1) of the bill was therefore a typical manifestation of the vicarious liability model since acts committed by natural persons (not only by the directing mind, but also by any individual employee) would have been imputed to the legal person. Article 5(2) contained the components of a form of original liability for legal persons, which would have been triggered only by an accumulation of acts committed by a natural person (an employee of the legal person) and acts of negligence committed by the legal person or its bodies or officers through insufficient supervision or management. Thus, it is apparent that the Corporate Criminal Liability Bill was not based on any form of strict liability from which legal persons would have been unable to exonerate themselves.

13.2.2 The Jurisdictional Scope of the Corporate Criminal Liability Bill

As regards the jurisdictional scope of the Corporate Criminal Liability Bill, the active principle of personality used for natural persons was modified to reflect the fact of incorporation and combined with the territorial principle. If passed into law, the art. 2(1) of the bill would have enabled the prosecution of "criminal offenses committed on Czech territory by any legal person based in the Czech Republic or with a subsidiary or part thereof on the Czech Republic's territory or which conducts business or owns property in the Czech Republic." It called such legal persons "Czech legal persons."

However, the CCL Bill also contained provisions allowing for the prosecution of legal persons for criminal offenses committed or having effects outside the Czech Republic's territory. These so-called "distant offenses" could have been prosecuted in the Czech Republic provided they were committed by a Czech legal person either on Czech territory and their consequences affected the territory of a foreign state or on foreign territory and their consequences affected the Czech Republic. The distant offense provisions of the bill were identical to the Criminal Code's provisions on natural persons.

Article 2(6) of the bill also stipulated that, if an international treaty binding on the Czech Republic so provided, a criminal offense committed on foreign territory by a foreign legal person would be punishable.[8]

13.2.3 The Scope of the Corporate Criminal Liability Bill Ratione Personae

A number of state or state-related entities were exempted from the scope of the bill *ratione personae*. They were the Czech Republic,[9] the Czech administrative regions and municipalities, and the Czech National Bank. These exemptions appear to be fully justified as it can hardly be imagined that a state would prosecute itself or the territorial entities that make it up.[10] These exemptions would not have applied to legal persons established by, or administering the property of, exempted entities.

Though the Corporate Criminal Liability Bill excluded some entities, it nevertheless omitted a definition of "legal person". It would therefore have been necessary to rely on the definitions provided in arts. 18 et seq. Civil Code 1964 (Act No. 40 of 1964) and art. 56 Commercial Code 1991 (Act No. 513 of 1991). The bill even presumed the potential criminal liability of non-entities since its provisions on the imputation of acts committed by natural persons to legal persons would have applied even if a criminal offense had been committed prior to a legal person's creation or registration. The imputation provisions would also have applied when an act creating a legal person or appointing a legal person's representative was later found to be invalid or ineffective.

The bill also contained provisions on the criminal liability of legal successors to legal persons (art. 7): so long as the legal successor was aware of the criminal offense or, in the circumstances, could have been aware of the offense when it became the successor, he/she (or it) would be liable. If there were more than one legal successor, the CCL Bill would have authorized courts to consider "to what extent each of the legal successors benefited from the proceeds, benefits, and other advantages resulting from a committed criminal offense" (art. 7(2)) when deciding the type of sanctions. In addition, the bill explicitly stipulated that a declaration of bankruptcy or the dissolution of a legal person could not rid it of criminal liability. These provisions were supposed to provide a safeguard against attempts to avoid criminal liability through controlled dissolutions.

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[8]Due to its priority in application, an international treaty could also exclude the application of the Czech law on certain legal persons.

[9]Beran 2006a, 255.

[10]See Beran 2006b.

The bill also provided that any person (legal or natural) who organized, participated in, gave instructions for, and/or assisted in the commission of criminal activities would have been punishable under the Criminal Code.

13.2.4 Criminal Offenses Covered by the Corporate Criminal Liability Bill

The Corporate Criminal Liability Bill did not contain any special part with the definitions of the criminal offenses that could have been committed by legal persons; rather, it confined itself to a reference to the Criminal Code and the offenses defined therein. As prepared by the government, the bill contained three alternative references to the Criminal Code and criminal offenses imputable to legal persons. One of them deemed some seventy criminal offenses to be capable of commission by legal persons. This alternative covered only those criminal offenses that the Czech Republic was obliged to prosecute under the international treaties mentioned above. The second alternative contained only a general reference to the Criminal Code and a stipulation that "legal persons are liable for criminal offenses unless the nature of a criminal offense excludes such liability". This alternative would have been advantageous from the point of view of possible future amendments to the Criminal Code as new criminal offenses would have been automatically included in the Corporate Criminal Liability Bill. At the same time, this alternative would have resulted in some uncertainty about the criminal offenses with which legal persons could be charged.

The government, however, finally selected the third and, in fact, broadest alternative, which deemed some 130 criminal offenses as being able to be committed by legal persons. These included rape, sexual assault, and poaching, as well as environmental and economic crimes. The number of criminal offenses that could have been imputed to legal persons thus far exceeded the number of offenses that the Czech Republic was obliged to prosecute under its international commitments in relation to legal persons. The selection of this extensive version turned out to be a mistake when the bill was submitted to, and discussed in, Parliament.

13.2.5 Natural Persons Triggering Corporate Liability, Their Acts, and Imputation

Since a legal person always acts by means of a natural person who creates and demonstrates its will, the Corporate Criminal Liability Bill determined whose acts constituted the acts of a legal person and when such acts would be considered acts or omission of the legal person. The bill would thus have established that acts of a legal person included, not only direct acts

of its statutory bodies or members thereof, but also acts of other corporate representatives, typically authorized employees or third parties with a power-of-attorney. The bill did not distinguish between direct acts of a legal person and acts of its representatives and criminalized both types of acts. As for acts of commission and omission, the bill did not distinguish between these two categories either. Consequently, it was irrelevant whether a criminal offense was actively committed for the benefit of a legal person or whether its commission was made possible by a lack of supervision or management. That said, sound internal rules, an effective supervision and management system, and/or active cooperation in uncovering illegal activities could have been considered mitigating circumstances at sentencing according to the subsidiary legislation. The CCL Bill also reckoned with the possibility that an individual natural person, through whom the legal person had acted, might not be discovered. In such cases, the legal person could have been prosecuted anyway.

Also of importance were the imputation provisions of the bill, particularly those provisions that determined when a legal person could be said to possess the subjective elements of a criminal offense (i.e., the fault or mental elements as opposed to the so-called objective elements of a criminal offense). Only if a criminal act is imputable to a legal person, is it an offense for which the legal person is criminally liable. Article 5(2) Corporate Criminal Liability Bill, therefore stipulated that a criminal offense could be imputed to a legal person:

> (a) If that criminal offense was committed on the basis of a decision, approval, or order of the statutory bodies of the legal person or of persons whose acts are considered to be the acts of that legal person; or
> (b) If the criminal offense was committed because the statutory bodies of the legal person or persons whose acts are considered to be the acts of that legal person failed to adopt such measures as they were obliged to adopt according to the law or as could be justly required of them, particularly if they failed to conduct obligatory or necessary supervision of the activities of their employees or other persons whose superiors they are, or if they failed to adopt the necessary measures to prevent the consequences of a committed criminal offense.

The imputation principle established in para. (a) was analogous to fault in the form of intent – insofar as a decision, order, or approval may be considered to show intent. The form of imputation defined in para. (b) was analogous to negligence since a person creating and demonstrating the will of the legal person would have neglected his/her supervisory duties or his/her duties to prevent the commission of criminal offenses.

Either way, art. 5 confirms that the Corporate Criminal Liability Bill was not based on the principle of so-called "strict liability" since the legal person would only have been liable for criminal offenses committed

with something akin to intent or negligence. The explanatory report, which accompanied the bill, explained that,

> [t]his type of liability based on the imputation of criminal offenses to legal persons should be considered a special kind of fault-based liability [which is] different from the expression of fault as used for natural persons but which is not strict liability. In fact, this kind of liability is similar to the liability for quasi-misdemeanors defined in Article 337 of the Criminal Code Bill on the criminal offense of inebriation or in Article 201a of the current Criminal Code on the same criminal offense. This kind of liability requires a link to the committed criminal offense and the nature of the legal person, the interests of which may differ from those of an individual, is taken into account.

Due to the special nature of criminal offenses committed by legal persons, the Corporate Criminal Liability Bill contained a special definition of the author of, and accomplices in, an offense as well as the forms of participation in criminal activities. Article 6 defined the perpetrator of a criminal offense as the legal person to which the breach of, or threat to, an interest protected by the Criminal Code can be imputed "in a manner defined herein". If a criminal offense had been committed by more than one legal person or by a legal person and a natural person, it would have been committed through complicity. Each of the accomplices would have been liable as if it/he/she had committed the criminal offense itself/himself/herself.

From this provision, it is apparent that the criminal liability of a natural person acting in the name of a legal person would not have been affected by the criminal liability of the legal person. A finding of complicity between the legal and natural person would thus have been the rule rather than the exception in corporate criminal prosecutions, though the concurrent prosecution of legal and natural persons was by no means a precondition to corporate criminal liability under the bill. In other words, a legal person could have been criminally liable even if the natural person acting on its behalf had not been criminally liable. Similarly, the criminal liability of a legal person would not have depended on its benefit from the crime.

13.2.6 The Penalties in the Corporate Criminal Liability Bill

Part III of the Corporate Criminal Liability Bill dealt with penalties and other sanctions. The bill (art. 9) stipulated that courts were required to take into account, inter alia, "the internal as well as external circumstances of the legal person including its activities and financial situation". The expression "external circumstances of the legal person" could mean, for example, its importance for the employment rate in the region where it was based or the fact that certain of its activities were conducted for the public benefit. From this provision, it is apparent that, when determining the sentence,

the court would have had to consider matters that cannot be considered in cases involving natural persons.

The CCL Bill also contained an exhaustive list of penalties, namely: (a) the dissolution of the legal person; (b) the forfeiture of property; (c) financial sanctions; (d) the forfeiture of specific items; (e) prohibitory injunctions on business activities; (f) prohibitory injunctions on participation in public tenders; (g) prohibitory injunctions or restrictions on the acceptance of public assistance or subsidies; and (h) the publication of the guilty verdict.

Penalties (a), (e) to (g), and (h) could only have been ordered against legal persons whilst the other penalties could have been imposed on both legal and natural persons. The forfeiture of property and the forfeiture of individual items of property could, nevertheless, have caused certain problems had they been imposed on a legal person. They would have led to a conflict between the interests of the legal person's creditors and the government's interest in preventing proceeds of crime from being used to pay off a corporate offender's debts. That was why the bill expressly stipulated that, if the legal person had been adjudged bankrupt, only "narcotics or other items which jeopardize the safety of persons or property" could be forfeited as part of a sentence involving the forfeiture of individual items. At the time the Corporate Criminal Liability Bill was drafted, it was also suggested that it could contain a provision preventing the forfeiture of property that was not obtained as a result of criminal activities. So, these could then have been used to satisfy creditors in a bankruptcy proceeding. Finally, however, the Government decided against such a provision.

Financial sanctions could have been awarded on condition that the legal person "[had] financially benefited from the criminal offense or [had] caused property damage to another person." This condition was somewhat curious as it would probably have been the rule rather than the exception for a legal person to financially benefit from criminal activities. At least in the case of commercial enterprises, it is hard to imagine a legal person committing a criminal offense that was not at least potentially profitable. The fine would have been between CZK 1 000 and 1 000 000 per day without any limits as to the length of such a sanction.

The injunction prohibiting business activities would have had much more serious consequences for legal persons. Unlike natural persons, legal persons often need permits or licenses to carry out the activities that justify their existence. For that reason, the bill stipulated that courts were to take into account the position of the relevant state regulatory body that granted licenses or permits for the business activities of banks, insurance companies, reinsurance companies, and other legal persons active on the capital markets, if they intended to award such a sentence against a capital market entity.

The dissolution of a legal person could have been ordered by courts, if the business activities of the legal person were built completely, or to a large extent, on criminal activities. Such provision, nevertheless, could not have been applied to legal persons established under a provision of a statutory instrument.

13.2.7 Criminal Procedure

Like the substantive provisions, the procedural provisions of the Corporate Criminal Liability Bill dealt only with criminal procedural matters specific to legal persons. They stipulated how the corporate defendant should be designated so that it could not be mistaken for another legal person with the same name (art. 20); which court had jurisdiction over the case, if it could not be tried by the court in the jurisdiction where the criminal offense had been committed (art. 21); and how the state was to proceed against legal and natural persons charged with interlinked criminal offenses (art. 22). The joint procedure in such cases would have been mandatory even though the criminal liability of the legal and natural persons in question would have been considered separately. As with natural persons, the prosecuting agencies would have been obliged to prosecute legal persons if they suspected that a legal person had committed a criminal offense (art. 22). The bill contained no special rules on documentary evidence.

The Corporate Criminal Liability Bill also contained detailed provisions about the dissolution and termination of a corporate offender. The dissolution of the legal person would have been possible only with the consent of the public prosecutor in the preliminary procedure or of the judge during trial. The CCL Bill stipulated that "the dissolution, termination, or transformation of the legal person shall be invalid without such consent". The bill made it possible to issue the consent only after the payment into court of bail set at the amount of the expected financial sanction. Additionally, the bill allowed for "the suspension of one or more business activities of the legal person or the restriction of its right to dispose of its property".

As the legal person must always be represented by a natural person before the court, the CCL Bill also specified whom the court should consider the legal person's representative. It stipulated that the public prosecutor or the court should appoint a sole representative on the application of the prosecuted entity. It was not absolutely clear from the text of the bill whether the proposal of the legal person was binding on the public prosecutor or court or whether either could have appointed a different person instead. The natural person who had been accused of the offense and witnesses in the case could not be appointed as the legal person's

representative, save to the extent that the legal person was owned, operated, and managed by only one person.[11]

When representing the accused legal person, the representative was to have had all procedural rights accorded to human defendants under the Code of Criminal Procedure 1961 (Act No. 141 of 1961). The general criminal procedure principle of *nemo tenetur se ipsum accusare* would thus have applied only partially to the legal person itself since it would have applied, in full, to its representatives. Other natural persons through whom the accused legal person acted[12] would only have had the procedural rights of an accused if they had been prosecuted simultaneously as accomplices; normally, they would have been treated as witnesses during trial. This approach was justified by the fact that different approaches would frequently have resulted in a lack of evidence. Czech criminal procedure does not use a formal burden of proof, which transfers – at least partially – the burden of proof to the legal person, and is based on the evidence seeking and *in dubio pro reo* principles.

Apart from the mandatory appointment of a legal person's representative, the bill also entitled the legal person to be represented by defense counsel. The defense counsel would have been selected by the corporation's statutory body. The Corporate Criminal Liability Bill nonetheless stipulated, at art. 26(2), that the provisions of subsidiary legislation that required a defense counsel to participate in all criminal proceedings did not apply to legal persons. Consequently, it would have been possible for courts to convict a legal person that had not been assisted by legal counsel even in the most serious criminal cases.

The bill also determined the processes for serving writs of summons on the legal person and apprehending its representative, as well as the amounts that the representative could be fined for failing to appear before the court. In the case of a joint criminal procedure against legal and natural persons, the CCL Bill determined the order of questioning in the main hearing and of the final speeches; it stipulated that the accused natural person always spoke last.

Finally, the Corporate Criminal Liability Bill also determined the enforcement procedures and focused, in particular, on the penalty of dissolution. Thus, it contained detailed procedures for the appointment of a company liquidator, though, surprisingly, it said nothing about how the appointed company liquidator was to dissolve the legal person. This deficiency could have made the penalty of dissolution an acceptable form of punishment for the legal person concerned as the court-appointed liquidator could have sold the entire convicted company to its shareholders. The

[11] Typically, so-called one-member limited companies.

[12] E.g., members of statutory body members or representatives with powers of attorney, or similar forms of authority.

bill certainly did not prohibit this and it can be presumed that this option would have been used had the CCL Bill become law.

13.2.8 The Defeat of the Corporate Criminal Liability Bill in the House of Deputies

The Czech Government submitted the Corporate Criminal Liability Bill to the Czech Parliament on July 21, 2004. The first reading in the House of Deputies took place on November 2, 2004. At that time, only a third of the EU member states had introduced corporate criminal liability rules into their national law and only Poland and Slovenia had done so in Central Europe. Moreover, imputation rules in the Polish law were much more heavily qualified than the proposed Czech rules; amongst other things, the criminal liability of a legal person in Poland depended on the conviction of the natural person who committed the act or omission.[13]

Eleven members of the Parliament contributed to the debate and most of them called for the rejection of the bill on its first reading. Their arguments against the CCL Bill can be divided into two groups; (1) systematic arguments against the introduction of corporate criminal liability in general; and (2) specific objections to the approach taken in the proposed bill.

The fundamental arguments against the introduction of corporate criminal liability into the Czech law focused on the principal need for the Czech Republic to abandon its traditional system built on individual criminal liability and applying solely to natural persons. Mr. Jiří Pospíšil, MP and future Minister of Justice, argued that there would have to be robust and convincing reasons for the Czech Republic to abandon the existing tried and tested traditional principles. He found those reasons neither in the bill itself nor in its explanatory report. Moreover, he believed that the introduction of corporate criminal liability would, in fact, result in the collective responsibility of company shareholders, who had little, if any, chance to influence the commission of criminal offenses by the legal person but who would be impacted on, in full, by corporate sanctions.[14] This argument was further developed by Mr. David Šeich MP, who insisted that the introduction of corporate criminal liability was "a legalized form of criminalizing business activities", which violated the *ne bis in idem* principle. In short, he believed that if the perpetrator – a natural person – was punished for an act, no legal person could be punished for the same act.[15] Other members of the

[13] See Legal Entity Criminal Liability Act 2002 (Act. No. 197 of 2002), arts. 3 and 4.

[14] See Parliament of the Czech Republic, House of Deputies (4th Electoral Term of the House, 37th Session, November 2, 2004), <www.psp.cz/eknih/2002ps/stenprot/037schuz/s037044.htm>.

[15] Ibid.

Parliament emphasized that European law did not require the introduction of corporate criminal liability and a majority of European states had not introduced it at that time.[16]

The other arguments concerned the CCL Bill as such. A number of MPs criticized the fact that only public corporations making up the state and the Czech National Bank were exempt from the jurisdiction of the bill. They proposed that certain other public legal persons that were closely linked to rights and freedoms guaranteed by the state should also be exempt: e.g., the Czech National Theater, the Czech National Museum, the Czech Philharmonic Orchestra, as well as public hospitals, public universities, and other public service institutions. Many MPs also criticized the bill's long list of criminal offenses. Some MPs believed that 130 criminal offenses was an excessive number for legal persons to be able to commit. In their opinion, it was absurd that a legal person could commit the criminal offense of rape or sexual assault. According to some MPs, like Mrs. Vlasta Parkanová and Mr. Marek Benda, a suitable solution would be to introduce corporate criminal liability only for those criminal offenses that the Czech Republic had international commitments to prosecute in relation to legal persons.[17]

The imputation of criminal offenses to legal persons was of equal concern to MPs who believed that it would have amounted to the introduction of strict corporate criminal liability, which would have barred all defenses to legal persons. For example, according to Mr. Ivan Langer MP, an employee could be planted in a legal person by its competitor and then commit a criminal offense, which would then be imputed to the corporate employer. Another representative, Mrs. Eva Dundáčková MP, thought that legal persons could be held accountable even if an employee committed rape whilst checking the gas meter in a private house or "poached a hare" during an official journey through a forest. It was apparent from the debate that only the imputation of criminal offenses committed by members of corporate statutory bodies or top managers would have been acceptable to the deputies and, even then, only subject to exceptions.[18]

The outcome of the debate was clearly negative and sometimes emotional. Mr. Ivan Langer MP and a number of other MPs insisted that the aim of the bill was "to criminalize legal persons… and found a system of sanctions that will allow access to the property of legal persons". Mrs. Parkanová agreed and said that the CCL Bill was "an easy tool with which to forfeit the property of people who have not committed anything". Mr. Šeich even believed that "this bill would be a superb tool for destroying competitors… and a businessman's whip". Speaker of the House of

[16] Ibid.
[17] Ibid.
[18] Ibid.

Deputies, Mrs. Miroslava Němcová, thought that "the authors of the bill intended to create a poorly concealed tool to hobble the business community rather than a proper law".[19]

Consequently, a majority of MPs shared Mr. Langer's view: "The idea of corporate criminal liability as embodied in this bill is dubious. The quality of the bill is even more doubtful. The bill as such cannot be improved and is completely unnecessary."[20] Thus, the Corporate Criminal Liability Bill was rejected by the House of Deputies already at its first reading, with sixty-nine MPs voting for its rejection, forty-three MPs voting against its rejection, and thirteen MPs abstaining out of the 125 MPs present.[21] Had the House of Deputies voted on the CCL Bill after the adoption of a similar law in Austria, the wave of resistance may have been less robust (the Austrian law makes legal persons criminally liable for all criminal offenses and the extent of imputation is similar to that contained in the Czech bill).[22] However, the rejection of the bill means that the Czech law continues to recognize only a general civil liability of legal persons[23] and an administrative form of liability, which is dispersed amongst a myriad of special laws. Corporate persons and cooperatives have a particular liability insofar as they may be dissolved in some cases, if they commit a serious breach of the law.[24] These forms of corporate liability definitely do not meet the European legislative standard, however, nor do they satisfy the Czech Republic's obligations under international law.[25]

13.3 The Basic Principles of Quasi-Criminal Corporate Liability

Following the Parliamentary defeat of the Corporate Criminal Liability Bill, the introduction of corporate criminal liability was shelved for some time. As a result, corporate criminal liability was not included in the recodification of substantive criminal law: the new Criminal Code,[26] adopted in 2009, does not presume any principles of corporate criminal liability.

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[19] Ibid.

[20] Ibid.

[21] As mentioned above, the House of Deputies of the Parliament of the Czech Republic consists of 200 MPs.

[22] See Legal Entity Liability Act 2005 (Act No. 151 of 2005), arts. 1 and 2.

[23] For caused damage, faults etc.

[24] See Commercial Code 1991 (Act No. 513 of 1991), art. 68(3)(d) and (6) or art. 254(2)(c) and art. 257(1).

[25] See OECD 2009.

[26] New Criminal Code 2009 (Act No. 40 of 2009), in force January 1, 2010.

The Czech Republic's international commitments to adopt effective, proportionate, and dissuasive criminal, administrative, financial, or other sanctions thus remain the main reason for the introduction of corporate criminal liability into the Czech law.

In its Resolution No. 64 dated on January 23, 2008,[27] and entitled "On the Conception of the Fight against Organized Crime", the Government of the Czech Republic imposed on the Minister of the Interior a duty to submit, by December 31, 2008, an outline of the subject of introducing into the Czech legal system an administrative liability of legal entities for wrongful conduct, prosecution of which is required by international treaties on the fight against organized crime. On December 16, 2008, the Ministry of the Interior submitted for interdepartmental comment "The Outline of the Law on the Liability of Legal Entities for Administrative Misdemeanors caused by Conduct Punished as a Crime if Perpetrated by Natural Person and the Punishment of which is Required by International Treaties or the Legislation of the European Communities" (hereafter, "outline"). The outline proposed three methods by which the Czech Republic might fulfill its international commitments and sanction legal persons: (1) corporate criminal liability, (2) corporate administrative liability, and (3) a combination of corporate criminal and administrative liability.[28]

13.3.1 Corporate Criminal Liability

The introduction of corporate criminal liability would undoubtedly satisfy all international commitments of the Czech Republic. However, due to the earlier defeat of the Corporate Criminal Liability Bill, the outline focused on the other two alternatives in the area of administrative law and the combination of administrative and criminal law (so-called "quasi-criminal liability").

13.3.2 Corporate Administrative Liability

To introduce corporate administrative liability, it would be necessary first to define "administrative liability". It is apparent from a document prepared by the Ministry of the Interior that "administrative liability is based upon sanctions awarded by administrative bodies or authorities against

[27] Government Resolution on the Conception of the Fight against Organized Crime (Government Resolution No. 64 of January 23, 2008).

[28] Ministry of the Interior 2008, The Outline of the Law on the Liability of Legal Entities for Administrative Misdemeanors caused by Conduct Punished as a Crime if Perpetrated by Natural Person and the Punishment of which is Required by International Treaties or the Legislation of the European Communities (Outline of December 16, 2008), 2 et seq.

natural and legal persons for illegal acts defined by law as administrative offenses."[29] Prior to the introduction of corporate administrative liability, the following problems would have to be solved:[30]

- What will be legal persons punished for?
- Which administrative body or agency will award sanctions?
- What procedural rules will be applied?

There is currently no single Czech statute that exhaustively describes the administrative liability of legal persons; rather, provisions scattered throughout more than 200 separate instruments define the administrative offenses that a legal person can commit.[31] In addition, the range of administrative offenses currently capable of commission by a legal person[32] is not coextensive with the list of offenses for which legal persons could be sanctioned according to the Ministry of the Interior's outline. Hence, corporate administrative offenses would need to be newly defined in a separate law before they would reflect the Czech Republic's international commitments. The Ministry of the Interior has already warned that the terminology used in international treaties may not be compatible with that used in the Czech law and that offense definitions in one international treaty sometimes overlap with those in other treaties. These problems could be eliminated by making use of those offenses defined in the Criminal Code. The future corporate administrative liability law could then simply refer to a list of criminal offenses to which administrative liability principles would apply; but, this solution would not differ much from the approach taken in the rejected Corporate Criminal Liability Bill.

The current practice on sanctioning legal persons for administrative offenses is likewise inapplicable. The administrative authorities that currently award sanctions for breaches of administrative rules are specialized agencies, which supervise only certain areas of activity and are unable to act generally by awarding sanctions for all corporate contraventions of administrative laws. Moreover, broad procedural rights would be necessary to investigate whether a legal person has committed an illegal act as the administrative body responsible for imposing the sanction would first have to prove that an illegal act has really been committed. To be able to do this, the administrative agency would have to be entitled to safeguard evidence,

[29] Ministry of the Interior 2008, 5.

[30] Ministry of the Interior 2008, 7.

[31] E.g., Misdemeanor Act 1990 (Act No. 200 of 1990); National Payment System Act 2009 (Act No. 284 of 2009); Building Act 2006 (Act No. 183 of 2006); Anti-Money Laundering and Cash Payment Act 2004 (Act No. 254 of 2004).

[32] E.g., offenses relating to fire prevention.

question persons, and use special investigative powers. Apart from the Czech Police Force, only the Customs Office has such procedural powers.

Further, if corporate administrative liability were introduced, it would result in procedural duality in cases in which a natural person was prosecuted for a criminal offense and a legal person for an administrative offense. The police would safeguard evidence for the criminal suit, whereas the administrative agency, e.g., customs, would safeguard evidence for the administrative procedure. This would be highly ineffective.

Mutual legal assistance is another serious problem associated with administrative liability for legal persons. International treaties[33] binding the Czech Republic require Czech legal persons to be liable, not only for acts committed on Czech territory, but also for acts committed abroad. Consequently, the administrative agency in charge of the administrative procedure against legal persons could not carry on such work without legal assistance from foreign states when investigating a case. However, international legal assistance may be limited to procedures in which the case may ultimately be heard by a criminal court. The corporate administrative liability described by the Ministry of the Interior could have no such consequences; that is why international cooperation would be extremely difficult. A provision allowing the sanctioned legal person to appeal against the administrative agency's decision to a criminal court might resolve this procedural problem. But, it would not resolve problems with the recognition and enforcement of rulings within the EU, since most EC/EU legislation requires the ruling to have been issued by a judicial body or even a court. The ruling of an administrative agency could not be considered equivalent to a ruling of a court and therefore would be unrecognizable and unenforceable abroad.

Other problems with the Ministry of the Interior's document include the fact that the rules on imputation of offenses to legal persons and corresponding sanctions are very similar to those in the rejected Corporate Criminal Liability Bill.

13.3.3 A Combination of Corporate Criminal and Administrative Liability

The third option offered by the Ministry of the Interior was inspired by the German approach and combines the criminal and administrative liability of

[33] E.g., COE Criminal Law Convention on Corruption; OECD Convention on Foreign Bribery; a number of framework decisions of the EC/EU, such as the Directive 2008/99/EC of the European Parliament and of the Council of November 19, 2008 on the protection of the environment through criminal law (text with EEA relevance), OJ No. L 328, December 6, 2008, 28.

legal persons. With this quasi-criminal option, legal persons would be subject to administrative sanctions in criminal proceedings and the offenses they could commit would be defined either in the Criminal Code or a separate law. This option would enable international cooperation and differs from the first option in the following ways:

- offense provisions would probably appear in a separate law and would be restricted to those offenses which the Czech Republic is bound to prosecute in relation to legal persons under international treaties;
- the sanctioning procedure would be administrative although the decision to impose sanctions would be made by a criminal court in a criminal procedure;[34] and
- administrative liability and sanctions would not carry those negative connotations associated with criminal liability and would not appear as a previous conviction in the company's record.

13.4 Conclusions and Suggestions

Having analyzed all three options, the Ministry of the Interior came to the conclusion that the third option should be the core of a new corporate liability bill. The Ministry of Finance had also rejected the idea that Customs Office should be the administrative agency dealing with the administrative liability of legal persons (the Ministry thought this would overburden the Customs Office). But other government ministries rejected the idea of a quasi-criminal liability on the basis that the differences between this option and the first corporate criminal liability option are superficial; its selection would have been motivated by fears that the future bill might again be rejected by the Czech Parliament. Instead, they have recommended the first option – corporate criminal liability – as the basis of future reform.[35]

For these reasons, the Czech government decided in November 2009 that the preparatory legislative works should return to the concept of corporate criminal liability. The Minister of Justice was authorized by the Czech Government's Resolution No. 1451 (November 30, 2009) to "prepare and submit" a draft bill no later than by May 31, 2010 (This term was later postponed to December 30, 2010). The first draft of the new bill was actually prepared and the internal ministerial consultations on that draft were

[34] This solution would be similar to the adhesion procedure in which courts decide about compensation for damage caused by a criminal offense.

[35] According to correspondence and comments of the Ministry of the Interior, this view is shared by the Chief Justice of the Supreme Administrative Court; the Chairman of the Criminal Division of the Czech Republic's Supreme Court; the Minister presiding the Legislative Council of the Government; the former Minister for Human Rights and Ethnic Minorities; the Minister of Foreign Affairs; and the Governor of the Czech National Bank.

completed in May 2010. Currently the Ministry of Justice is working on the final version. At this time (beginning of January 2011) it is impossible to comment more concretely on this draft because it will be the object of comments and changes until the end of the year 2011. Generally, it may be said that the current draft of the new bill is substantively very similar to the rejected bill of 2004. The main change is the limitation of the proposed scope of liability to those offenses which the Czech Republic is obliged to prosecute, when committed in a corporate context, under the international treaties and EC/EU legislation.

It is very probable that the Czech government will approve the draft by the end of March 2011. The government is very motivated to approve such a bill in order to reduce international pressure on the Czech Republic. This pressure is, in fact, increasing as other states pass their own corporate criminal liability statutes and leave the Czech Republic as one of the last states in the EU to fulfill its international commitment in this area. As the requirement to introduce corporate liability is set out in EU framework decisions and directives, the possible failure to implement some sort of corporate criminal liability into the Czech law might eventually result in the Czech Republic being fined.

It is to be presumed that the submission of the new Corporate Criminal Liability Bill to the Czech Parliament will occur at the beginning of 2011; however, its fate is absolutely unforeseeable. The general election in May 2010 has not dramatically changed the political landscape in the Czech Republic. From this perspective, it is noteworthy that the previous and current Minister of Justice, Pospíšil MP, was one of the 2004 bill's leading critics and believed it was "unnecessary and detrimental". The question is whether the conservative Parliamentary majority will favor corporate impunity. Conservative politicians most probably fear that the introduction of corporate criminal liability and criminal sanctions for legal persons would worsen the business environment in the Czech Republic by making potential foreign investors reluctant to establish Czech entities and Czech entrepreneurs more likely to transfer their businesses abroad.

Further, even if this bill is passed, it may be incomplete. A general proposal regarding corporate criminal liability is the use of *internal* corporate justice systems to secure future compliance and address past breaches. The idea, as developed by Fisse and Braithwaite,[36] is to find the real perpetrator, i.e., the natural person/s responsible for the commission of the criminal offense. For this to happen it must be in the interest of the legal person, the legal person must be encouraged to actively cooperate in the investigation, or placed in charge of the investigation itself. The legal person is then only punished in a criminal proceeding if the real perpetrator is not found. At

[36] Fisse/Braithwaite 1993, 193.

the time of writing, this suggestion has not been reflected in the new draft the Czech corporate criminal liability bill.

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Chapter 14
The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?

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Contents

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14.1 Introduction: Three Principle Questions

Demonstrating a firm belief in the effectiveness of criminal justice, both domestic lawmakers and international lawmakers are increasingly coming to recognize companies, other private non-natural persons, and even public juristic entities as subjects of criminal liability.[1] A significant question for theory and practice is, therefore: can such private or public juristic entities find direct protection under international fundamental human rights norms when criminal law and criminal procedure are applied against them? If not, the issue of indirect protection of legal persons merits attention: is it possible for individual stakeholders in these entities such as owners, shareholders, employees, and members, to invoke the protection of human rights when the violation is in fact directed against the organization in which they have an interest? The answers to these questions are relevant not only to the legal persons; they also have consequences for the human stakeholders in corporate entities, for democratic society, and the rule of law.

Yet, human rights are not just relevant as protections *for* legal persons: there is a growing awareness that legal persons are responsible for human rights violations. This responsibility concerns, not only large-scale human rights violations by multinational companies in developing countries, but also diverse, and more or less separate, breaches by all sorts of entities in their home states. For example, a public legal entity may seriously discriminate against ethnic or religious groups, a company may use slaves, or produce inferior products, such as medicines, that cause people to die, a newspaper may violate an individual's right to privacy, a political party may propagate hate speech, or an internet provider may host sites that publicize child pornography or incite violence. It is against this background that a third matter arises: do international human rights obligations to criminalize, prosecute, and punish human rights violations by public and private authors apply analogously to public law and private law legal entities who

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[1] On corporate criminal liability in national legal systems, see, e.g., Engle 2003, 288 et seq., with many further references, and the overview of some thirty-five countries in Lex Mundi Business Crimes and Compliance Practice Group 2008. For international law, see, e.g., OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999, Art. 2; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, in force January 18, 2002, 2171 UNTS 227, Art. 3(4); Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, in force February 1, 2008, ETS No. 197, Art. 22.

are responsible for such violations? This question in fact asks whether international human rights law requires states to provide for the possibility that juristic entities may be held criminally responsible.

These three principle questions are dealt with in this contribution at 14.2, 14.3, and 14.5 respectively. These sections analyze and compare the four general international human rights instruments most relevant to criminal law and associated international case law: the United Nations International Covenant on Civil and Political Rights (ICCPR),[2] the European Convention on Human Rights (ECHR),[3] the American Convention on Human Rights (ACHR),[4] and the African Charter on Human and Peoples' Rights (AfCHPR).[5] The assessment of these instruments and related case law should not only result in answers to the questions, it should also point to possible justifications – or the lack thereof – for differences in approach between these four systems. Before dealing at 14.5 with the third question (that of the state's positive obligation to provide for criminal liability of private and public law legal persons), 14.4 explains how some of the most relevant human rights in criminal proceedings are applicable to private law legal persons, i.e., fair trial rights and privacy rights. Section 14.6 presents a synthesis and conclusions. There, I assert that international human rights law should recognize legal persons both as possible victims and as possible perpetrators of human rights violations. I explain why and how the four international human rights systems, approaches could be developed in this regard.

Before continuing, I note that this contribution understands the term "legal person" – or "juridical persons" or "juristic persons" – in a rather broad sense, as including all non-natural entities. Companies are an important type of private law legal persons but the term also embraces other private law organizations, such as associations, foundations, political parties, media organizations, churches, trades unions, and private medical institutions. Furthermore, it refers to public law entities, such as the organs of government, state departments, municipalities, county councils, public conservancies, and other administrative public bodies.

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[2]International Covenant on Civil and Political Rights, December 16, 1966, in force March 23, 1976, 999 UNTS 171.

[3]Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, November 4, 1950, in force September 3, 1953, ETS No. 5.

[4]American Convention on Human Rights "Pact of San José, Costa Rica", November 22, 1969, in force July 18, 1978, 1144 UNTS 143.

[5]African Charter on Human and Peoples' Rights, June 27, 1981, in force October 21, 1986, 1520 UNTS 217.

14.2 Direct Protection of Private and Public Law Legal Persons Under Human Rights Law?

The question that now deserves attention is whether private or public juristic entities can find direct protection under international human rights norms when criminal law and criminal procedure are applied against them. I shall address this issue on the basis of the four treaty-based human rights systems just mentioned.

14.2.1 Direct Protection for Legal Persons Under the ICCPR and in the HRC?

Private and public legal persons or similar entities cannot complain about the violation of their fundamental rights to the Human Rights Committee (HRC), which monitors the ICCPR, nor is it possible under art. 1 of the Optional Protocol[6] for individuals to complain on their behalf.[7] Legal persons thus do not have standing under the ICCPR. What is more, legal persons do not qualify as beneficiaries of the rights recognized in the covenant,[8] even though this does not follow from the procedural restriction on their ability to submit communications to the HRC. Legal persons cannot, therefore, acquire victim status as to the violation of the rights under the covenant. What is more, it is not possible to circumvent this restriction by complaining in the abstract about a law or a practice that affects the legal person, for the committee does not consider *actio popularis* as a complaint.[9]

The exclusion of legal persons from the scope of the ICCPR does not necessarily follow from the covenant's purpose, although it does correspond to the preamble, which asserts that human rights derive from the inherent dignity of the human person, and with the intention of the drafters.[10] The committee, however, has not elaborated on the reasons why companies

[6]Optional Protocol to the International Covenant on Civil and Political Rights, December 19, 1966, in force, March 23, 1976, 999 UNTS 302.

[7]HRC, View of July 14, 1989, *A newspaper publishing company* v. *Trinidad and Tobago*, Comm. 360/1989, para. 3.2 (company); HRC, View of April 6, 1983, *JRT & The WG Party* v. *Canada*, Comm. 104/1981, para. 8(a) (political party); HRC, View of April 9, 1981, *Hartikainen* v. *Finland*, Comm. 40/1978, para. 3 (NGO). However, a number of individuals who each claim to be victim of violation of the ICCPR may collectively submit a complaint to the Committee; see HRC, View of April 8, 1993, *EW* v. *The Netherlands*, Comm. 429/1990, para. 6.3 (6 588 citizens).

[8]HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, March 29, 2004, para. 9.

[9]HRC, View of April 9, 1981, *Mauritian women* v. *Mauritius*, Comm. 35/1978, para. 9.2.

[10]Emberland 2004, 216.

and other legal persons fall outside the protection that the covenant aims to guarantee.

14.2.2 Direct Protection for Legal Persons Under the ECHR and in the ECtHR?

The situation under the ECHR is quite the opposite. Under Art. 34 ECHR, it is possible for legal persons established under private law to summit cases on their own behalf to the European Court of Human Rights (ECtHR).[11] To bring an admissible complaint the plaintiff must qualify as a victim, however. This means that the legal person must be directly affected by the act or omission at issue[12] and that the ECHR does not allow for an *actio popularis*. Although only Art. 1 First Protocol ECHR on the right to property expressly recognizes legal persons as recipients of fundamental rights, several other human rights are granted to them as well, including a number of rights that are relevant to criminal justice (see below at 14.4). The fact that most rights seem to refer to natural persons, since they use language such as "anyone has the right" and "no one shall", has never been regarded as an impediment by the court.[13] The ECHR was always intended to cover corporate entities and other non-natural persons.[14] Referring to its own case law, the ECtHR has repeated that the convention is "a living instrument which must be interpreted in the light of present-day conditions".[15] In so doing, the ECtHR has even managed to expand the protection for juristic persons, most notably companies, under the convention,[16] and, as I will discuss later, might provide protection to private law legal persons caught up in the criminal justice system. Nevertheless, this does not mean that companies and other private law legal persons enjoy

[11] This provision holds that the court may receive applications from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation".

[12] ECtHR, Decision of May 12, 2009, *Ernewein* v. *Germany*, Appl. 14849/08, para. 2(a); ECtHR, Decision of March 23, 2006, *NBTK & Swig Group Inc.* v. *Russia*, Appl. 307/02.

[13] See the former European Commission of Human Rights: ECommHR, Report of October 3, 1968, *NV Televisier* v. *The Netherlands*, Appl. 2690/65, 4; ECommHR, Report of March 21, 1975, *Times Newspaper Ltd, The Sunday Times, Harold Evans* v. *The United Kingdom*, Appl. 6538/74, para. 1. Both cases concern the right to freedom of expression in ECHR, Art. 10.

[14] Emberland 2006, 4 (n. 20), 35 et seq.

[15] ECtHR, Judgment of April 16, 2002, *Société Colas Est* v. *France*, Appl. 37971/97, para. 41 (right to privacy in ECHR, Art. 8).

[16] See, e.g., ECtHR, Judgment of April 16, 2002, *Société Colas Est* v. *France*, Appl. 37971/97, para. 41 (right to privacy in ECHR, Art. 8).

exactly the same protection as individuals under the rights that are applicable to them.

That said, private law legal persons do have standing under the ECHR and they can claim to be victim of many violations of convention rights. This accords well with the aim of the ECHR, the preamble of which emphasizes the value of human rights for maintaining and developing the rule of law, as well as peace, unity, and justice in Europe, rather than the ideals of humanity and the value of human beings and humankind. Further, as the ECtHR has also argued, in many cases it is not possible to draw distinctions between an individual's professional and non-professional activities.[17]

An important qualification is made, however, for public law legal persons: they may neither submit individual complaints to the ECtHR, nor do they enjoy the rights and freedoms embodied in the ECHR and its Protocols.[18]

14.2.3 Direct Protection for Legal Persons Under the ACHR and in the IACommHR or IACtHR?

Yet another regime applies under the ACHR; Art. 44 ACHR offers rather wide possibilities for private law legal persons, including companies,[19] to submit complaints to the Inter-American Commission (IACommHR) though they lack standing before the Inter-American Court (IACtHR), to which only states and the commission may appeal.[20] That private law legal persons have standing to complain to the IACommHR does not mean, however, that the ACHR provides protection for such entities. In fact, it

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[17] Cf., e.g., ECtHR, Judgment of December 16, 1992, *Niemietz* v. *Germany*, Appl. 13710/88, paras. 29, 30 (right to privacy in ECHR, Art. 8). See also ECommHR, Decision of May 5, 1979, *X. & Church of Scientology* v. *Sweden*, Appl. 7805/77, para. 2.

[18] See ECtHR, Judgment of February 1, 2001, *Ayuntamiento de M* v. *Spain*, Appl. 15090/89; ECtHR, Judgment of November 23, 1999, *The Municipal Section of Antilly* v. *France*, Appl. 45129/98; ECommHR, Decision of May 31, 1974, *16 Austrian Communes* v. *Austria*, Appl. 5767/72, at I. In interstate cases, however, the state does have standing, of course; see ECHR, Art. 33. It is, however, not always evident if a legal person should qualify as a governmental or non-governmental organization. For the applicable criteria, see ECtHR, Judgment of December 13, 2007, *Islamic Republic of Iran Shipping Lines* v. *Turkey*, Appl. 40998/98, para. 80. In specific circumstances public law entities are regarded as non-governmental organizations; see ECtHR, Judgment of December 9, 1994, *The Holy Monasteries* v. *Greece*, Appl. 13092/87, paras. 14 et seq. and 48 et seq. Conversely, private law legal persons may rank as governmental organizations: see ECtHR, Decision of January 27, 2009, *State Holding Company Luganksvugillya* v. *Ukraine*, Appl. 23938/05.

[19] IACommHR, Report of March 11, 1999, *Mevopal, SA* v. *Argentina*, Report 39/99, para. 12.

[20] ACHR, Art. 61(1).

follows from the treaty text that it does not: the ACHR only ensures the human rights of "persons", which, according to Art. 1(2) ACHR, means "every human being".[21]

A legal person may consequently only complain to the IACommHR concerning concrete violations of convention rights of natural persons or a group of natural persons; thus it may not complain through an *actio popularis*.[22] It is not possible to lay a complaint of human rights violations that have been committed against private or, for that matter, public legal entities.[23] They are not rights-holders and therefore cannot acquire victim status.[24] As a result, companies and other private law legal persons have no protection against measures taken by states during criminal investigations, prosecutions, and trials under the ACHR. The IACommHR has justified the exclusion by emphasizing that legal persons are legal fictions, which lack a real material existence, while the essential rights of man are based upon "attributes of the human personality" and the need to create conditions that will enable all persons to achieve "the ideal of free men enjoying freedom from fear and want".[25]

14.2.4 Direct Protection for Legal Persons Under the AfCHPR and in the AfCommHPR?

A fourth approach emerges from the African Charter. Under Art. 55 AfCHPR the African Commission on Human and Peoples' Rights (AfCommHPR) may consider complaints submitted by (idealistic or other)[26] non-governmental organizations on behalf of (groups of) individual victims. The AfCHPR contains a very broad standing requirement, insofar as a plaintiff need not

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[21]IACtHR, Judgment of September 7, 2001, *Cantos* v. *Argentina*, paras. 22 et seq.; IACtHR, Judgment of January 28, 2009, *Perozo* v. *Venezuela*, paras. 74, 399.

[22]IACommHR, Report of October 22, 2003, *Metropolitan Nature Reserve* v. *Panama*, Report 88/03, paras. 29 et seq.

[23]Nevertheless, see Lindblom 2005, 182 et seq., in which it is rightly asserted that several provisions in the ACHR (such as Arts. 13, 15, and 16, respectively on the right on expression, assembly, and association) indirectly afford protection to non-governmental organizations, while the wording of this provisions does not necessarily exclude their application to legal persons.

[24]Meanwhile, the IACtHR has ordered provisional measures to protect the perimeter of the head offices of a broadcasting organization: see IACtHR, Order of the then-President of the Inter-American Court of Human Rights of August 3, 2004, *Perozo* v. *Venezuela*.

[25]IACommHR, Report of September 27, 1999, *Bendeck-Cohdinsa* v. *Hunduras*, Report 106/99, para. 17; IACommHR, Report of March 11, 1999, *Mevopal, SA* v. *Argentina*, Report 39/99, para. 17.

[26]Cf. AfCommHPR, Decision of October 23–November 6, 2000, *Union Nationale des Syndicats Autonomes du Sénégal* v. *Sénégal*, Comm. 226/99 (2000).

know, or have any relationship with, the victim.[27] Even complaints that are solely in the public interest (i.e., an *actio popularis*) may be admissible. Consequently, plaintiffs do not need to be victims to bring an admissible complaint.[28] Still, it is another question whether private law legal persons also have standing under the African Charter to complain violations they have suffered on their own behalf. Some cases indicate that they do, at least to some extent:

- *Art. 19* v. *The State of Eritrea*: The AfCommHPR found that a ban on several private newspapers constituted a violation of the right to freedom of expression under Art. 9 AfCHPR.[29] Unfortunately, the AfCommHPR does is not make entirely clear who it regarded as the victim of the violation: the newspaper organization itself, the journalists employed by it, the readers, or democratic society. It nevertheless made it clear that the private newspaper organizations themselves could have complained of the ban, if not on their own then on behalf of others.[30]
- *Civil Liberties Organization* v. *Nigeria (101/93)*:[31] In response to a complaint brought in favor of the Nigerian Bar Association, the AfCommHPR held that the Nigerian Legal Practitioners' Decree interfered with the association's freedom of association and thereby constituted a breach of Art. 10 AfCHPR. The association was thus regarded as the victim of the violation, which implies that it is a rights-holder.
- *Constitutional Rights Project and Others* v. *Nigeria*: Closures of premises of newspaper organizations violated the right to property in Art. 14 AfCHPR. Again, it is not clear whether Nigeria violated the rights of the companies, the owners of the newspapers, or both the owners and the companies,[32] although it seems the newspapers could have complained of the violations.[33]

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[27] Evans/Murray 2008, 102 et seq.

[28] See, e.g., AfCommHPR, Decision of May 16–30, 2007, *Art. 19* v. *The State of Eritrea*, Comm. 275/2003 (2007), under: Decision on admissibility.

[29] AfCommHPR, Decision of May 16–30, 2007, *Art. 19* v. *The State of Eritrea*, Comm. 275/2003 (2007), under: Decision on the merits.

[30] See also AfCommHPR, Decision of November 15, 1999, Constitutional *Rights Project, Civil Liberties Organisation and Media Rights Agenda* v. *Nigeria*, Comm. 140/94, 141/94, 145/95 (1999), para. 37; AfCommHPR, Decision of October 31, 1998, *Media Rights Agenda and Others* v. *Nigeria*, Comm. 105/93, 128/94, 130/94 and 152/96 (1998), paras. 1, 2, 4, 57, 71, 75, 77; AfCommHPR, Decision of October 31, 1998, *Constitutional Rights Project and Civil Liberties Organisation* v. *Nigeria*, Comm. 102/93 (1998).

[31] AfCommHPR, Decision of 1995, *Civil Liberties Organization* v. *Nigeria*, Comm. 101/93 (1995), para. 37.

[32] AfCommHPR, Decision of November 15, 1999, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda* v. *Nigeria*, Comm. 140/94, 141/94, 145/95 (1999), para. 54.

[33] Cf. also AfCommHPR, Decision of October 2–11, 1995, *Free Legal Assistance Group and Others* v. *Zaire*, Comm. 25/89, 47/90, 56/91, 100/93 (1995), paras. 2, 46 (the press); 3, 45 (church property Jehovah's Witnesses); 4, 48 (universities and schools).

- *Civil Liberties Organization* v. *Nigeria (129/94)*: The Nigerian Political Parties (Dissolution) Decree 1993 was found to severely limit the right to be heard under Art. 7 AfCHPR and to amount to an attack on the jurisdiction of the courts. The commission found a violation of these provisions. The implication is that, not only the political parties, which are or which can be likened to private law legal entities, but also judicial bodies, are potential victims of the violation of the right to access to court. This does not mean that public law legal persons in general may derive protection from the AfCHPR, however, for the AfCommHPR also based its decision on Art. 26 charter.[34] This provision sets down the obligation of states to protect the courts.

These and many other cases show that the AfCommHPR considers complaints and finds violations without assessing who the victims of the human rights violation are or might be. In fact, the AfCommHPR usually refrains from precise legal reasoning and so avails itself of the possibility of leaving the "victimhood" question aside altogether. Moreover, in the interests of the advancement of human rights, the AfCommHPR refrains, so far as it can, from raising procedural barriers to complaints.[35] The charter thereby establishes an open system of protection. That said, it is clear that, in all the cases in which the commission found a violation, natural persons were seriously affected by the breach. The cases, therefore, create a strong impression that private law legal persons are admissible in complains on their own behalf, at least when a public human rights interest is involved, or when the violation evidently also directly affects human stakeholders in or behind the legal entity. The AfCommHPR thus does not seem to consider the protection of corporate rights to be a charter objective of its own; it seems merely to provide that protection instrumentally to protecting the rights of human beings.

Nevertheless, legal persons may be able to acquire human rights protection under the AfCHPR when they are the object of criminal investigations or proceedings. What remains uncertain is when this criterion would be fulfilled and exactly which private law legal persons may find protection under which rights in the African Charter. Could, for example, undue delay in a criminal trial against a large corporation result in the finding of a violation of Art. 7(1)(d) AfCHPR? For the time being, it is not possible to establish

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[34] See, however, AfCommHPR, Decision of May 15–29, 2003, *Association Pour la Sauvegarde de la Paix au Burundi* v. *Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Comm. 157/96 (2003), para. 63: complaint admissible, although it appeared "that the authors of the communication were in all respects representing the interests of the military regime of Burundi". The question was whether this communication should rather be considered as a communication from a state; eventually it was regarded as an individual complaint.

[35] Cf. AfCommHPR, Decision of May 15–29, 2003, *Association Pour la Sauvegarde de la Paix au Burundi* v. *Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Comm. 157/96 (2003), para. 63.

the exact extent to which private law legal persons may find protection under the African Charter. But, of all the international human rights systems, the African system may just entail the broadest application of human rights to private and even public law legal persons, as well as the stakeholders in or behind them.[36]

14.3 Indirect Protection of Legal Persons Through the Human Rights of Individuals?

While the fundamental rights guarantees in the ICCPR and the ACHR do not apply to legal persons at all, the ECHR and the AfCHPR do not apply all rights to such entities. It is therefore particularly important to ask whether these entities may find human rights protection through their human stakeholders. The question, in other words, is whether it is possible for individual owners, shareholders, employees, and other natural persons concerned in a legal person to invoke the protection of treaty rights when the government measure is, in fact, against the private law legal person in which they have an interest. As regards the ICCPR, ECHR and ACHR, the answer is that the possibilities are rather limited but not for the same reasons or to the same extent under the three treaties.[37]

As the ICCPR, ECHR, ACHR, and AfCHPR grant rights to natural persons, it is possible for individual stakeholders in a legal person to benefit from treaty-based human rights guarantees in their individual capacities. In this respect, there would seem to be few obstacles to individuals under the African Charter. As for the other treaties, stakeholders may obtain victim status, at least when, in that individual capacity, they are affected directly and personally in their human rights by the state's actions or omissions against the legal person.[38] The HRC and the IACommHR do not readily accept that this criterion has been met. To clarify their positions, and those taken by other supervisory bodies, it is important to distinguish between two concepts by which legal persons may benefit from protections that

[36]Cf. AfCommHPR, Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa (2001), at E: "States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination."

[37]For a detailed inventory and analyses, see Emberland 2004, 264 et seq. (ICCPR, ACHR); Emberland 2006, 65 et seq. (ECHR).

[38]HRC, View of July 26, 1994, *Singer* v. *Canada*, Comm. 455/1991, para. 11.2; IACommHR, Report of June 14, 2001, *Tomás Enrique Carvallo Quintana* v. *Argentina*, Report 67/01, para. 54; ECtHR, Decision of October 5, 2006, *Pokis* v. *Latvia*, Appl. 528/02, at A.

apply to natural persons. Each concept has manifested itself in international human rights case law; nevertheless, these fundamentally different approaches are often confused therein.

14.3.1 Two Concepts

The first concept is that of identification or the lifting of the corporate veil. Identification means that the rights of the legal person and those of the stakeholders are treated as being one and the same. In a human rights context, it means that a state act or omission violates the human rights of the organization and the individual jointly. The "corporate veil" – i.e. the principle that the rights and duties of the legal person are separate from those of its stakeholders because the two are distinct entities – is thus lifted. A further consequence of this might be that the exhaustion of domestic remedies (an admissibility requirement for individual complaints under all four human rights treaties) by one of them counts for both of them.[39]

Under the second concept, it is recognized that an action or omission by the state against a legal person may also constitute a violation of its own of the human rights of natural persons with an interest in the legal person. On this approach, then, the infringement against the company (or similar entity) and the violation of the individual's rights are formally distinguished instead of being seen as one: the individual claims and obtains protection of his/her own rights but the juridical entity benefits indirectly from the order because their interests are closely related. Under this concept, the exhaustion of local remedies by either the legal person or individual would not in principle fulfill the exhaustion requirement for them both.

14.3.1.1 Concept I: Identification or the Lifting of the Corporate Veil

In my view, the HRC, IACtHR, and IACommHR have not yet unambiguously acknowledged the possibility of identification.[40] What they have done, on a few occasions, is apply the second concept. Only the ECtHR truly allows the piercing of the corporate veil, and then only in exceptional circumstances.

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[39] Optional Protocol to the ICCPR, Art. 5(2)(b); ECHR, Art. 35(1); ACHR, Art. 46(1)(a); AfCHPR, Art. 56(5).

[40] Emberland 2004, 267 et seq. (ICCPR, ACHR); Emberland 2006, 99 et seq. (ECHR), in which virtual applications by the supervisory bodies of the second concept (i.e., the infringement of a legal person's rights by a State's measure is formally distinguished from the violation of rights of the individual under the self-same measure) are in my view undeservedly qualified as identification. The point seems to be that, whenever a legal person and an individual are practically conceived as one, this as such certainly does not mean they are also formally identified and that the corporate veil will be lifted.

The ECtHR has repeated that this approach is most appropriate "where it is clearly established that it is impossible for the company to apply to the convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators."[41] Although the ECtHR suggests that identification may also be practicable in other situations, in no case has it regarded the rights of the legal person actually also belonging to the natural person. It therefore seems that the identification doctrine may avail a legal person under the ECHR but only where it is impossible for the company to gain protection through its representative individuals or bodies. In other situations, the interests of a legal person will not be protected through its stakeholders by lifting the corporate veil, nor will natural persons be able to gain protection for their human rights in that way. They might, however, stand a chance with the other concept.

14.3.1.2 Concept II: A Measure Against the Legal Person Directly Affects Human Rights of a Stakeholder

In the case of *Singer* v. *Canada (Singer)*, the HRC found that Canada had violated the plaintiff's right to freedom of expression because the printing company of which he was the main shareholder was summoned by the Quebec authorities to replace commercial advertisements in English with advertisements in French. The committee explained that the right of freedom of expression, is, by its nature, "inalienably linked to the person". Hence, though the company and the individual shareholder could not be identified, the committee considered that the contested advertising regulations personally affected the plaintiff.[42]

Singer is important jurisprudence for it signals that, in exceptional circumstances, legal persons may find indirect protection against infringements of rights under the ICCPR through the individuals closely related to them. It also shows that the availability of the second concept depends very much on the facts of the case and nature of the right at issue. Hence, the specific nature of the right to freedom of expression and the fact that the

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[41] ECtHR, Judgment of October 24, 1995, *Agrotexim* v. *Greece*, Appl. 14807/89, para. 66. See also ECtHR, Decision of October 14, 2008, *Ketko* v. *Ukraine*, Appl. 31223/03; ECtHR, Decision of September 9, 2004, *Capital Bank AD* v. *Bulgaria*, Appl. 49429/99, para. 1; ECtHR, Decision of April 1, 2004, *Camberrow MM5 AD* v. *Bulgaria*, Appl. 50357/99, para. 1.

[42] HRC, View of July 26, 1994, *Singer* v. *Canada*, Comm. 455/1991, para. 11.2. For a similar case, see HRC, View of July 25, 2005, *Hoffman and Simpson* v. *Canada*, Comm. 1220/2003, in which the committee circumvented a confirmation of its view in Singer. The committee did suggest, however, that the plaintiffs in this case could have met the requirement on the exhaustion of domestic remedies through their corporation. That does indeed imply identification, but it is far from certain that the committee actually meant to imply such.

plaintiff was a 90% shareholder in the company appear to have been crucial in *Singer*. In this respect, the case of *Singer* is fairly exceptional. The mere fact that an individual is owner or sole or major shareholder of a legal person is generally insufficient reason for the HRC to accept that the individual was personally affected by measures against a company.[43] Moreover, as the International Covenant does not include a right to property,[44] it will rarely – if ever – be possible for individuals to find protection against actions or omissions by the state that directly infringe the rights inherent in owning stocks or shares.

In much broader terms than the committee, the ECtHR has been willing to recognize that measures relating to a company may be regarded as directly affecting the rights of its individual stakeholders in certain cases. The individual thereby acquires the protection of his/her human rights. This is firstly possible when a natural person is the sole owner or shareholder of a company or effectively carries on his/her business through a company.[45] A measure against the company also personally affects the individual, on these facts, as it would be artificial to draw distinctions between the legal person and its owner.[46] This approach would allow government acts or omissions in criminal investigations or proceedings that infringe the rights of legal persons to also be considered a distinguishable violation of the rights of the natural person to whom the organization belongs. This reasoning has its limits: employees, executive directors, and majority shareholders cannot (as a rule) claim to be victims of such infringements.[47] Exceptions are conceivable, however. First, if the legal person is a media organization and its right to freedom of expression (Art. 10 ECHR) is violated because of broadcasting or publishing restrictions set by criminal law, not

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[43] HRC, View of March 31, 1994, *SM* v. *Barbados*, Comm. 502/1992, para. 6.2 (access to court); HRC, View of April 7, 1999, *Lamagna* v. *Australia*, Comm. 737/1997, para. 6.2 (access to information). Nevertheless, in a general comment the committee states that the ICCPR does not prevent "individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights"; HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, March 29, 2004, para. 9.

[44] HRC, View of October 14, 1996, *GC & OB* v. *Russian Federation*, Comm. 637/1995, para. 6.2.

[45] ECtHR, Judgment of October 11, 2007, *Glas Nadezhda EOOD & Anatoliy Elenkov* v. *Bulgaria*, Appl. 14134/02, para. 40; ECtHR, Judgment of October 26, 2000, *GJ* v. *Luxembourg*, Appl. 21156/93, para. 24. This may also apply if two brothers are the sole co-owners of a family business; see ECtHR, Judgment of November 15, 2007, *Khamidov* v. *Russia*, Appl. 72118/01, paras. 123 et seq.

[46] Cf. ECtHR, Judgment of November 29, 1991, *Pine Valley Developments Ltd.* v. *Ireland*, Appl. 12742/87, para. 42.

[47] ECtHR, Decision of October 14, 2008, *Ketko* v. *Ukraine*, Appl. 31223/03 (property); ECtHR, Decision of February 14, 2006, *Bayramov* v. *Azerbaijan*, Appl. 23055/03 (fair trial, property); ECtHR, Judgment of June 17, 2008, *Meltex Ltd. & Mesrop Movsesyan* v. *Armenia*, Appl. 32283/04, para. 66 (freedom of expression).

only the sole shareholder but also employee journalists who are directly affected may themselves enjoy the protection of the ECHR.[48] Second, the European Convention offers human rights protection to an individual when measures against the company have a direct bearing on the rights inherent in owning stocks or shares.[49] The cancellation of shares or the creation of an obligation to exchange them at a disadvantageous rate would qualify as such violations. By contrast, measures that severely influence the interest of the company (such as indictment) will not. By extension, they would not seriously affect the protected interests of large shareholders, employees, or other interested parties. Even if the company goes into liquidation[50] or is placed in receivership,[51] they will be unable to obtain the ECHR's protection against the measures on their own behalf. As a consequence, the second approach is unavailable when the company is exposed to irregular or oppressive criminal investigations or proceedings.

As for the ACHR, *Cantos* v. *Argentina (Cantos)* is most relevant. In that case, the IACtHR held that, in specific circumstances, an individual may resort to the ACHR's supervisory system to enforce "his fundamental rights", apparently instead of those of the legal person and even if these rights are encompassed in a legal entity.[52] In this case, the legal person was indirectly, i.e. through the sole owner of the company, protected in the fair trial rights of access to court (see Art. 8 ACHR) and of effective remedy (Art. 25 ACHR).[53] Interestingly, the natural person in this case was the sole owner of a business group that comprised eight companies and employed over 700 people.

The IACtHR's approach in *Cantos* is most in line with the case law of the ECtHR in that it offered human rights protection to an individual who was the owner of a company. An important difference, however, is the fact that

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[48]Cf. ECtHR, Judgment of March 28, 1990, *Groppera Radio AG* v. *Switserland*, Appl. 10890/84, paras. 46 et seq.

[49]ECtHR, Decision of November 7, 2002, *Olczak* v. *Poland*, Appl. 30417/96, paras. 57 et seq.

[50]ECtHR, Decision of October 5, 2006, *Pokis* v. *Latvia*, Appl. 528/02, at A.

[51]ECtHR, Judgment of July 31, 2008, *Družstevní Záložna Pria* v. *The Czech Republic*, Appl. 72034/01, paras. 99 et seq.

[52]IACtHR, Judgment of September 7, 2001, *Cantos* v. *Argentina*, para. 29; see also para. 30, in which the court notes that submissions to all relevant national avenues of administrative and legal recourse in the case were done directly by Mr. Cantos in his own name and in the name of his companies (which means that he personally used the national remedies), and in which it speaks of "the alleged violation of the rights of Mr. Cantos". See also IACommHR, Report of June 14, 2001, *Tomás Enrique Carvallo Quintana* v. *Argentina*, Report 67/01, paras. 54, 56, 61; IACommHR, Report of October 16, 1997, *Tabacalera Boqueron SA* v. *Paraguay*, Report 47/97, paras. 27, 32; IACommHR, Report of February 22, 1991, *105 shareholders of the Banco de Lima* v. *Peru*, Report 10/91, paras. 3 et seq.

[53]IACtHR, Judgment of November 28, 2002, *Cantos* v. *Argentina*, para. 65.

the ECHR cases involved rather small companies that were, in reality, little more than vehicles through which their owners operated a business, while the Cantos corporation was a very large entity that, one assumes, operated by itself. What may have persuaded the court that Mr. Cantos' rights had been violated, was the fact that the authorities had very much personalized their dispute with the Cantos company by systematically persecuting and harassing Cantos himself.[54] One cannot therefore conclude from *Cantos* that owners of large companies in general will find broader protection under the ACHR than under the ECHR. To the contrary: the IACommHR is still very reluctant to grant the protection of the ACHR to interested individuals in or behind a legal person, even when they are the sole owners or shareholders.[55] Taken as a whole, the case law of the IACtHR and IACommHR seems to be closer to that of the HRC than that of the ECtHR. There is just one clear exception: like the ECHR and unlike the ICCPR, the ACHR offers owners of stocks or shares human rights protection when measures against the company directly infringe their ownership rights.[56] It is not clear, though, whether the American and European systems provide this protection to the same extent.

14.3.2 Evaluation and Critique

Again, the four international human rights systems under discussion here display four different approaches. The ICCPR completely denies legal persons standing and direct protection, and offers individuals, at most, limited protection against measures directed at legal entities of which they are stakeholders. Usually, therefore, legal persons will not be able to profit from human rights protection under the covenant, even indirectly. The approach under the AfCHPR is not entirely clear but appears to be the most opposed to this at first sight: whenever a violation of the human rights of a legal person obviously affects individuals in or behind that entity, the AfCommHPR intends to guarantee their protection first and foremost. So it seems that at least private law legal persons may find both direct and indirect protection of their rights under the charter. However, the protection of legal persons as such would not seem to be an objective within the African human rights system. Moreover, the rights in the AfCHPR are not entirely well-suited to the protection of legal persons, most certainly not in criminal cases. For

[54]IACtHR, Judgment of September 7, 2001, *Cantos* v. *Argentina*, para. 2.

[55]IACommHR, Report of March 9, 2005, *José Luis Forzanni Ballardo* v. *Peru*, Report 40/05, paras. 35 et seq.; IACommHR, Report of June 14, 2001, *Tomás Enrique Carvallo Quintana* v. *Argentina*, Report 67/01, para. 54; IACommHR, Report of September 27, 1999, *Bernard Merens and Family* v. *Argentina*, Report 103/99, paras. 14 et seq.

[56]IACtHR, Judgment of February 6, 2001, *Ivcher Bronstein* v. *Peru*, paras. 117 et seq.; IACtHR, Judgment of September 7, 2001, *Cantos* v. *Argentina*, para. 29.

example, the AfCHPR does not contain a right to privacy (which is of particular importance during the criminal investigation), while the right to a fair trial is rather limited in scope and otherwise underdeveloped.

The Inter-American system is more limited still than the African mechanism for it offers merely indirect protection to legal persons and then only to a rather limited extent. So, from the perspective of the private law legal persons, the European system is generally the most adequate. Not only does it expressly recognize private law legal persons as entities that deserve direct protection as such, but also that protection is offered in practice, as is discussed further below (at 14.4). In addition, legal persons may enjoy indirect protection through their stakeholders when there appears to be insufficient direct protection.

In my view, the adequacy of the systems should not be assessed only, or at least not principally, from the perspective of the protection they provide to legal persons, however. After all, these systems were not developed, certainly not primarily, with a view to offering such protections. Given the objects and purposes of the international human rights treaties, more obvious criteria are whether the approaches adequately contribute to the protection of the fundamental rights of natural individuals; whether they guarantee and safeguard the democratic state and the rule of law; and whether they enable an efficient application of the supervisory mechanisms that attach to these human rights treaties. Applying these criteria, the approach taken by the ECtHR still appears to be the most adequate and balanced.

Whilst an organization is clearly much more than, and something different to, the sum of its parts – its human stakeholders – state measures targeting organizations may certainly have fundamental consequences for these individuals, their livelihoods, and well-being. Therefore, affording protection to legal persons at the level of fundamental rights may easily have positive collateral consequences for the protection of the human rights of individuals. The protection of individuals' human rights would also profit from the avoidance of rather formalistic approaches, such as those taken by the HRC and the IACommHR. These bodies should review more broadly whether a state act or omission that formally affects only the legal person also indirectly but substantially encroaches upon the human rights of an interested individual. This broad approach is called for, above all, if, as the European and Inter-American courts particularly intend, a natural person is effectively conducting his/her affairs through the legal entity.[57] This is thus not a call for the application of the first concept, i.e., the lifting of the corporate veil. Instead, it is argued that the HRC and IACommHR should, in principle, broaden the application of the second concept. Recognizing the direct effect of corporate regulations and prosecutions on individuals would certainly not require them to start recognizing legal persons as

[57] See, e.g., ECtHR, Judgment of October 26, 2000, *GJ* v. *Luxembourg*, Appl. 21156/93, para. 24; IACtHR, Judgment of September 7, 2001, *Cantos* v. *Argentina*, para. 25.

beneficiaries of rights under the ICCPR and ACHR; at the same time, it would enhance the possibilities for protecting the human rights of individuals. The adoption of such an approach by the ECtHR is much less pressing, since that court already offers fundamental rights protection to legal entities and, moreover, already implements the second concept on a broader scale. The same seems to apply to the AfCommHPR.

Direct, or at least indirect, protection of the fundamental rights of legal persons is also to be favored as a means of guaranteeing and safeguarding the democratic state and the rule of law. Human rights treaties are a reflection of the values that are held to be the most important for the societies that they affect and these treaties aim first of all to limit and control the power of the state through those values. Only a state that proceeds in accordance with human rights standards may qualify as a democratic state based on the rule of law. Much less relevant in this respect is the person (legal or natural) against whom the state acts.

That said, the supervisory bodies are tasked, not only with securing that the international human rights monitoring systems are implemented practically and effectively, they are also supposed to ensure that the systems work efficiently. The protection of human rights will of course be harmed if the system is unnecessarily overburdened. It is therefore understandable that the ECtHR limits the possibilities for natural persons to complain about fundamental rights violations that formally have been committed against legal persons. Since the court can offer protection to legal persons themselves, it would be rather inefficient if the court would have to deal directly with all natural interested parties, too. This argument does not apply to the ICCPR and ACHR for these treaties are not applicable to legal persons. Consequently, there seems to be no obstacle to the HRCs and IACommHR's applying the second concept more broadly than the ECtHR. In fact, considering the foregoing arguments, this would indeed be appropriate. Finally, a word about the AfCommHPR: its willingness to accept a very broad range of complaints is still very useful in enhancing the protection of human rights in Africa; but an increased caseload might eventually force the commission to limit its open approach in the future.

14.4 Fair Trial and Privacy Rights for Legal Persons in Criminal Proceedings

There are a number of human rights that may easily have significance for private law legal persons that are the object of procedures in criminal law. These include, for example, the principle of legality[58] *(nullum crimen,*

[58] Cf. ECtHR, Judgment of November 12, 2002, *Fortum Oil and Gas Oy* v. *Finland*, Appl. 32559/96, para. 3.

nulla poena sine lege), the freedoms of expression,[59/60] religion,[61] association,[62] and peaceful assembly,[63] the right to stand for election,[64] the right to property,[65] the prohibition of discrimination,[66] and the right to redress for fundamental rights violations.[67] Indeed, the ECtHR's case law implies

[59]Cf., e.g., ECtHR, Judgment of April 26, 1979, *Sunday Times* v. *The United Kingdom*, Appl. 6538/74, paras. 44 et seq.; ECtHR, Judgment of February 9, 1995, *Vereniging Weekblad "Bluf!"* v. *The Netherlands*, Appl. 16616/90, paras. 25 et seq.; ECtHR, Decision of December 8, 2005, *Nordisk Film & TV A/S* v. *Denmark*, Appl. 40485/02.

[60]As has been explained, in very specific circumstances legal persons may be indirectly protected in their right to freedom of expression under the ICCPR: see above at 14.3.1.2.

[61]Cf., e.g., ECtHR, Judgment of January 22, 2009, *Holy Synod Bulgarian Orthodox Church* v. *Bulgaria*, Appl. 412/03, para. 103; ECtHR, Judgment of November 6, 2008, *Leela Förderkreis EV* v. *Germany*, Appl. 58911/00, para. 79; ECtHR, Judgment of July 31, 2008, *Religionsgemeinschaft der Zeugen Jehovas* v. *Austria*, Appl. 40825/98, para. 61; ECtHR, Judgment of December 14, 1999, *Serif* v. *Greece*, Appl. 38178/97, paras. 33 et seq.; ECtHR, Judgment of September 26, 1996, *Manoussakis* v. *Greece*, Appl 18748/91, paras. 44 et seq.

[62]Cf., e.g., ECtHR, Grand Chamber Judgment of January 30, 1998, *United Communist Party of Turkey* v. *Turkey*, Appl. 19392/92, paras. 24 et seq.; ECtHR, Judgment of February 14, 2006, *Christian Democratic People's Party* v. *Moldova*, Appl. 28793/02, paras. 62 et seq.; ECtHR, Decision of July 31, 2008, *Religionsgemeinschaft der Zeugen Jehovas* v. *Austria*, Appl. 40825/98, paras. 61 et seq.

[63]Cf. ECommHR, Decision of October 10, 1979, *Rassemblement Jurassien & Unite Jurassienne* v. *Switzerland*, Appl. 8191/78, paras. 1 et seq., and ECtHR, Judgment of February 14, 2006, *Christian Democratic People's Party* v. *Moldova*, Appl. 28793/02, paras. 62 et seq.

[64]Cf. ECtHR, Judgment January 11, 2007, *Russian Conservative Party of Entrepreneurs* v. *Russia*, Appl. 55066/00, paras. 53 et seq.; ECtHR, Judgment of July 8, 2008, *Georgian Labour Party* v. *Georgia*, Appl. 9103/04, paras. 72 et seq.

[65]Cf. ECtHR, Judgment of October 9, 2008, *Forminster Enterprises Limited* v. *The Czech Republic*, Appl. 38238/04, paras. 63 et seq. On the relevance of the right to property to criminal law procedure, cf. also ECtHR, Judgment of July 9, 2009, *Moon* v. *France*, Appl. 39973/03; ECtHR, Judgment of October 24, 1986, *AGOSI* v. *The United Kingdom*, Appl. 9118/80, paras. 47 et seq., and in the same case ECommHR, Report of October 11, 1984, paras. 75, 80 et seq.

[66]Cf. ECtHR, Decision of July 31, 2008, *Religionsgemeinschaft der Zeugen Jehovas* v. *Austria*, Appl. 40825/98, paras. 88, 99; ECommHR, Report of June 25, 1996, *The National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society* v. *The United Kingdom*, Appl. 21319/93, paras. 85 et seq.; ECtHR, Judgment of December 9, 1994, *The Holy Monasteries* v. *Greece*, Appl. 13092/87, para. 92.

[67]Cf. ECtHR, Grand Chamber Judgment of April 6, 2000, *Comingersoll* v. *Portugal*, Appl. 35382/97, paras. 27 et seq. Cf. furthermore, e.g., ECtHR, Judgment of October 6, 2009, *Deservire SRL* v. *Moldova*, Appl. 17328/04, para. 62; ECtHR, Decision of July 31, 2008, *Religionsgemeinschaft der Zeugen Jehovas* v. *Austria*, Appl. 40825/98, para. 129; ECtHR, Judgment of February 12, 2008, *Oferta Plus SRL* v. *Moldova*, Appl. 14385/04, paras. 72 et seq.; ECtHR, Judgment of December 20, 2007, *Paykar Yev Haghtanak Ltd.* v. *Armenia*, Appl. 21638/03, para. 56; ECtHR, Grand Chamber Judgment of December 8, 1999, *Freedom and Democracy Party (ÖZDEP)* v. *Turkey*, Appl. 23885/94,

that these and other human rights accrue to legal persons but not necessarily under the same conditions as they apply to human beings.[68] I shall focus on two categories of human rights that are most relevant to legal persons in criminal procedures: fair trial rights and privacy rights. The limited number of ECtHR cases concerning legal persons and criminal law nevertheless creates the impression that criminal prosecution of legal persons is not (yet) common in Europe or is, at least, unproblematic from a human rights point of view.

14.4.1 Fair Trial Rights

Companies and other private law legal persons charged with criminal offenses enjoy the protection of the right to a fair trial in Art. 6 ECHR.[69] When assessing a criminal case against the fair trial requirements, the ECtHR does not appear to take into consideration whether the claimant is an individual or a legal person. For instance, in the case of *Fortum Oil and Gas Oy* v. *Finland*, the court assumed that Art. 6 applies to legal persons charged with criminal offenses in the same way as it does to charged individuals.[70] Interestingly, Fortum Oil and Gas Oy is a multinational company specializing, inter alia, in the wholesale of petrochemical products.

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para. 57; ECtHR, Judgment of December 9, 1994, *The Holy Monasteries* v. *Greece*, Appl. 13092/87, paras. 95 et seq.; ECtHR, Judgment of May 22, 1990, *Autronic AG* v. *Switzerland*, Appl. 12726/87, para. 65; EHRM, Judgment of November 6, 1980, *Sunday Times* v. *The United Kingdom*, Appl. 6538/74, para. 13.

[68] Since the ICCPR and ACHR do not apply to legal persons at all, while there is hardly any case law under the AfCHPR regarding such entities, this section is about the jurisprudence of the ECtHR and, infrequently, of the former ECommHR. Although their jurisprudence in criminal cases is the first point of attention here, the references in this section also regard judgments and decisions in civil and administrative cases because convention cases that concern legal persons and criminal justice are fairly scarce. When considering non-criminal cases it is important to realize that the ECHR in such cases often poses less strict requirements and leaves the national authorities greater latitude than in the criminal sphere (cf. ECtHR, Judgment of March 27, 2008, *LB Interfinanz AG* v. *Croatia*, Appl. 29549/04, para. 32, with further references). Consequently, when a fundamental right applies to legal persons under civil or administrative law, they are usually *a fortiori* protected by that right in criminal cases.

[69] ECtHR, Judgment of December 20, 2007, *Paykar Yev Haghtanak Ltd.* v. *Armenia*, Appl. 21638/03, para. 37 (criminal/fiscal); ECtHR, Decision of June 21, 2005, *Sträg Datatjänster AB* v. *Sweden*, Appl. 50664/99 (criminal/fiscal). Cf. ECtHR, Judgment of July 16, 2009, *Baroul Partner-A* v. *Moldova*, Appl. 39815/07, paras. 36 et seq. (civil).

[70] ECtHR, Judgment of November 12, 2002, *Fortum Oil and Gas Oy* v. *Finland*, Appl. 32559/96, para. 2 (de facto criminal). See also ECtHR, Decision of January 25, 2000, *Aannemersbedrijf Gebroeders Van Leeuwen BV* v. *The Netherlands*, Appl. 32602/96, paras. 1, 2 (civil/criminal).

So, it would seem that the fair trial requirement applies equally to natural persons, one-person private enterprises, and multinational corporations.[71]

According to the case law, Art. 6(1) ECHR affords legal persons at least the following fundamental guarantees:

- the right of access to a court in criminal cases;[72]
- the right to protection against state intervention as regards the outcome of court proceedings;[73]
- the right to have an impartial and independent tribunal conduct their trial;[74]
- the prohibition of undue delay (i.e., the principle that the time between the criminal charge and the final determination of the case should be reasonable), which seems to apply equally to individuals and legal persons;[75]
- the right to interpretations by domestic courts of national (procedural) law that are compatible with the fair trial principle of legal certainty to the same extent as for natural persons;[76] and
- the right to an adequate statement of reasons from the domestic court explaining the basis for a decision with regard to the legal person.[77]

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[71] Cf. ECtHR, Judgment of December 20, 2007, *Paykar Yev Haghtanak Ltd.* v. *Armenia*, Appl. 21638/03, para. 45 (criminal/fiscal).

[72] ECtHR, Judgment of December 20, 2007, *Paykar Yev Haghtanak Ltd.* v. *Armenia*, Appl. 21638/03, paras. 37, 50 (criminal/fiscal). See also ECtHR, Decision of June 17, 2008, *Synnelius & Edsbergs Taxi AB* v. *Sweden*, Appl. 44298/02, para. 1 (criminal/fiscal); ECtHR, Decision February 28, 2006, *MAC-STRO SRL* v. *Moldova*, Appl. 35779/03 (criminal/customs). Cf. ECtHR, Judgment of July 15, 2006, *Zlínsat, spol. s r.o.* v. *Bulgaria*, Appl. 57785/00, paras. 58 et seq., 70 et seq. (civil). Legal persons may be indirectly protected under the ACHR's right to access to court; see above at 14.3.1.2.

[73] ECtHR, Judgment of October 23, 1997, *The National & Provincial Building Society, The Leeds Permanent Building Society & The Yorkshire Building Society* v. *The United Kingdom*, Appl. 21319/93, paras. 99, 105 et seq. (civil/administrative), and in the same case ECommHR, Report of June 25, 1996, paras. 85 et seq., 103, 106.

[74] Cf. ECommHR, Decision of February 22, 1995, *MB & TMS AB* v. *Sweden*, Appl. 21831/93 (civil).

[75] ECtHR, Judgment of September 24, 1997, *Garyfallou AEBE* v. *Greece*, Appl. 18996/91, paras. 36 et seq. (criminal). See, furthermore, ECtHR, Decision February 28, 2006, *MAC-STRO SRL* v. *Moldova*, Appl. 35779/03 (criminal/customs); ECtHR, Decision of September 15, 1997, *Mantel & Mantel Holland Beheer BV* v. *The Netherlands*, Appl. 22531/93, which is a confirmation of ECommHR, Report of April 9, 1997, *Mantel & Mantel Holland Beheer BV* v. *The Netherlands*, Appl. 22531/93 (criminal). Cf. ECtHR, Judgment of July 31, 2008, *Religionsgemeinschaft der Zeugen Jehovas* v. *Austria*, Appl. 40825/98, paras. 106 et seq. (civil); ECtHR, Judgment of December 19, 2006, *Klemeco Nord AB* v. *Sweden*, Appl. 73841/01, paras. 29 et seq. (civil).

[76] ECtHR, Judgment of July 16, 2009, *Baroul Partner-A* v. *Moldova*, Appl. 39815/07, paras. 36 et seq. (civil); ECtHR, Judgment of March 18, 2008, *Dacia SRL* v. *Moldova*, Appl. 3052/04, paras. 72 et seq. (civil).

[77] ECtHR, Judgment of December 19, 2006, *Klemeco Nord AB* v. *Sweden*, Appl. 73841/01, para. 39 (civil).

The principle of the presumption of innocence in Art. 6(2) ECHR is also applicable to legal persons,[78] as are the fair trial rights guaranteed by Art. 6(3) ECHR. Based on that provision, private law legal entities have the right to be informed promptly, in a language that they understand and in detail, of the nature and cause of the accusation against them.[79] No less important, legal persons must have adequate time and facilities for the preparation of their defense and access to evidence (the right to disclosure of evidence).[80] Legal persons also have the right to defend themselves, naturally with legal counsel of their own choosing.[81] The case law on Art. 6(3) ECHR furthermore holds that legal persons have the right to call witnesses and experts in criminal cases.[82]

Another fair trial right that deserves attention here is the right to freedom from self-incrimination, which is grounded in Art. 6(1) and (2) ECHR. The right aims primarily to protect the defendant against having to give evidence that has no existence outside of his/her will. So, it involves, firstly, the right to remain silent. Additionally, it is a warrant against improper compulsion, including efforts by authorities to obtain evidence that exists independently of the will of the defendant, such as documents. Obtaining documents from a suspect legal (or natural) person by using compulsory powers under criminal procedure laws will not normally violate the right against self-incrimination. As regards natural persons, "improper compulsion", may take the form of a threat or the imposition of a criminal sanction to compel the individual to produce documents or other material evidence or to make a statement.[83] Does the right to freedom from self-incrimination protect legal persons in a similar fashion? Naturally, a legal person cannot actually hand over documents or speak for itself; it can only act through

[78] ECtHR, Decision of June 17, 2008, *Synnelius & Edsbergs Taxi AB* v. *Sweden*, Appl. 44298/02, para. 1 (criminal); ECtHR, Decision of March 23, 2000, *Haralambidis, Y. Haralambidis-Liberpa SA & Liberpa Ltd.* v. *Greece*, Appl. 36706/97, para. 4 (criminal/administrative); ECommHR, Report of September 9, 1998, *Zegwaard & Zegwaard BV* v. *The Netherlands*, Appl. 26493/95, paras. 34 et seq.

[79] ECtHR, Judgment of November 12, 2002, *Fortum Oil and Gas Oy* v. *Finland*, Appl. 32559/96, paras. 1, 2 (de facto criminal).

[80] ECtHR, Decision of March 23, 2000, *Haralambidis, Y. Haralambidis-Liberpa SA & Liberpa Ltd.* v. *Greece*, Appl. 36706/97, paras. 10 and 6 respectively (criminal/administrative); ECtHR, Judgment of November 12, 2002, *Fortum Oil and Gas Oy* v. *Finland*, Appl. 32559/96, paras. 1, 2 (de facto criminal).

[81] ECtHR, Decision of January 25, 2000, *Aannemersbedrijf Gebroeders Van Leeuwen BV* v. *The Netherlands*, Appl. 32602/96 (civil/criminal).

[82] ECtHR, Decision of March 23, 2000, *Haralambidis, Y. Haralambidis-Liberpa SA & Liberpa Ltd.* v. *Greece*, Appl. 36706/97, para. 5 (criminal/administrative).

[83] ECtHR, Judgment of February 23, 1993, *Funke* v. *France*, Appl. 10828/84, para. 44; ECtHR, Judgment of November 29, 1996, *Saunders* v. *The United Kingdom*, Appl. 19187/91, paras. 70 et seq.; ECtHR, Judgment of April 21, 2009, *Marttinen* v. *Finland*, Appl. 19235/03, paras. 67 et seq.

natural persons, such as directors, board members, or employees. The question, thus, is whether the ECtHR would regard as acceptable efforts by national law enforcement authorities to compel such individuals to produce documents or offer witness statements against the company they are employed by or represent.

As far as I have been able to tell, the ECtHR has not yet had to deal with this question. However, as the court applies all fair trial rights equally to individuals and legal persons, in my view, it would most probably hold that the right to freedom from self-incrimination applies equally to natural and legal persons. If I am correct, this would mean, first, that the authorities would have to respect the legal person's right to remain silent; this would, in turn, imply that they must recognize that the natural representatives and employees have the right to remain silent as regards confidential corporate information. Second, it would imply that the state may not use "improper compulsion" against the legal person or its representatives and employees to encourage them to procure documents or other material evidence.

Where appeal procedures are available, states are required to ensure that natural and legal persons within their jurisdictions continue to enjoy the same fundamental guarantees under Art. 6 before the appellate courts as they do before the courts of first instance.[84] Article 2 Seventh Protocol ECHR is also relevant in this regard. This provision guarantees, to both natural and legal persons, the right to review of a criminal conviction or sentence by a higher tribunal.[85] Two other provisions also need mentioning in this connection: first, Art. 13 ECHR provides that everyone whose rights and freedoms as set forth in the convention are violated shall have an effective remedy before a national authority – it also applies to legal persons in criminal cases;[86] second, Art. 4 Seventh Protocol ECHR guarantees the principle of *ne bis in idem* (i.e., the prohibition on double jeopardy); it also applies to legal persons as well as natural persons.[87]

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[84] ECtHR, Judgment of December 20, 2007, *Paykar Yev Haghtanak Ltd.* v. *Armenia*, Appl. 21638/03, para. 45 (criminal/fiscal).

[85] ECtHR, Judgment of November 12, 2002, *Fortum Oil and Gas Oy* v. *Finland*, Appl. 32559/96, para. 2 (de facto criminal).

[86] ECtHR, Judgment of June 28, 2007, *Association for European Integration and Human Rights and Ekimdzhiev* v. *Bulgaria*, Appl. 62540/00, paras. 95 et seq. (criminal/administrative). Cf. ECtHR, Judgment of September 27, 2005, *Amat-G Ltd. and Mebaghishvili* v. *Georgia*, Appl. 2507/03, paras. 42, 51 et seq. (civil); ECtHR, Judgment of September 27, 2005, *Iza Ltd. and Makrakhidze* v. *Georgia*, Appl. 28537/02, paras. 36, 46 et seq. (civil). Under the ACHR, legal persons may be indirectly protected in the right or an effective remedy; see above at 14.3.1.2.

[87] ECtHR, Decision of March 23, 2000, *Haralambidis, Y. Haralambidis-Liberpa SA & Liberpa Ltd.* v. *Greece*, Appl. 36706/97, paras. 4 (criminal/administrative).

14.4.2 Privacy Rights

In criminal justice matters, the authorities' respect for a person's private life, family life, home, and correspondence is particularly relevant during the investigation. Article 8 ECHR offers protection for each of these four interests. Hence, it is an important guarantee against unlawful or unnecessary searches, secret surveillance, telephone tapping, examination or seizure of written correspondence and other documents or electronic data, the interception of e-mail, the monitoring of internet usage, and so forth, as well as the application of such powers without a legitimate aim. The protection under Art. 8 ECHR also concerns companies and other private law legal persons, though not in respect of all the interests covered, and less extensively and intensively than with respect to individuals.

Though the notion of "family life" is without relevance to legal persons, the ECtHR has recognized that the "private life" guarantees are, at the very least, indirectly significant to them. The ECtHR has held that the notion of private life does not exclude activities of a professional or business nature.[88] So, for instance, tapping an individual's business calls or the calls he/she makes from business premises and searches to obtain information solely about a natural person's business activities may infringe the right to privacy.[89] That does not, however, mean that legal persons themselves are granted the right to privacy; it is the natural person who is protected here. It is uncertain that a legal person has a private life within the meaning of Art. 8 ECHR, insofar as the court has expressly avoided making a decision on this point.[90] However, at the very least, it is clear that legal persons and individuals are not "equal" with respect to the right to privacy.

The ECtHR takes a different stance on the notions of "home" and "correspondence" under Art. 8: these are of relevance to legal entities. In *Niemietz* v. *Germany (Niemietz)*, which involved the search of a lawyer's office, the ECtHR held that the right to respect for one's home extends to a professional person's office, and that correspondence of a professional nature also falls within the scope of Art. 8.[91] Whilst *Niemietz* only involved the protection of the individual professional, in the case of *Colas Est* v. *France*, the ECtHR considered the search and seizure of documents at the premises

[88] ECtHR, Judgment of November 16, 1992, *Niemietz* v. *Germany*, Appl. 13710/88, para. 29 (criminal).

[89] ECtHR, Judgment of November 16, 1992, *Niemietz* v. *Germany*, Appl. 13710/88, para. 29 (criminal).

[90] See, e.g., ECtHR, Judgment of June 28, 2007, *Association for European Integration and Human Rights & Ekimdzhiev* v. *Bulgaria*, Appl. 62540/00, para. 60 (criminal/administrative); ECtHR, Judgment of October 16, 2007, *Wieser & Bicos Beteiligungen GmbH* v. *Austria*, Appl. 74336/01, para. 45 (criminal).

[91] ECtHR, Judgment of November 16, 1992, *Niemietz* v. *Germany*, Appl. 13710/88, para. 30 (criminal).

of the head and branch offices of three public limited companies. The court extended the right to respect for one's home to the legal entity itself[92] and did the same for the right to respect of one's correspondence.[93] So, large-scale private organizations also have a certain right to respect for their "homes" (offices, branches, and other business premises) and for their correspondence (letters, documents, electronic data, telephone communication, e-mail, etc.) under Art. 8 ECHR.

That said, legal persons carrying on business activities enjoy more limited protection under Art. 8 than individuals or legal entities not involved in commercial and business matters, especially as far as the right to respect for one's home is concerned. For example, the ECtHR does not consider a farm specializing in pig production and housing several hundred pigs as a "home", or even as business premises; it would perhaps make an exception if the farm could be regarded as a company's head office or branch.[94] The same may also apply to plots of land.[95] Moreover, the court has held that premises that are apparently the "home" of a commercial or business organization but in fact constitute a cover for criminal activities, fall outside the notion of "home" in Art. 8 ECHR.[96] This approach is, at least in my view, problematic. Only after the application of criminal investigative powers, will it usually be possible to ascertain whether the organization under investigation is perfectly legitimate, is legitimate but has offended, or is truly "criminal". In any case, the true nature of the entity is irrelevant to the rule of law, which requires that the authorities comply with fundamental rights requirements when applying criminal investigative powers. The court's approach means, de facto, that the application of such powers in violation of Art. 8 ECHR might suddenly be acceptable – if and only if – it is ascertained that the organization is, in fact, a criminal organization whose offices thus fall outside the scope of this provision. Reasoning of this kind

[92] ECtHR, Judgment of April 16, 2002, *Société Colas Est* v. *France*, Appl. 37971/97, paras. 41 et seq. (criminal). Confirmed in, e.g, ECtHR, Judgment of April 28, 2005, *Buck* v. *Germany*, Appl. 41604/98, para. 31 (criminal); ECtHR, Decision of October 11, 2005, *Kent Pharmaceuticals Limited* v. *The United Kingdom*, Appl. 9355/03, para. 1 (criminal); ECtHR, Judgment of November 15, 2007, *Khamidov* v. *Russia*, Appl. 72118/01, para. 131 (administrative/civil).

[93] ECtHR, Judgment of October 16, 2007, *Wieser & Bicos Beteiligungen GmbH* v. *Austria*, Appl. 74336/01, para. 45 (criminal); and furthermore ECtHR, Judgment of June 28, 2007, *Association for European Integration and Human Rights & Ekimdzhiev* v. *Bulgaria*, Appl. 62540/00, paras. 60 et seq. (criminal/administrative); ECtHR, Judgment of July 1, 2008, *Liberty* v. *The United Kingdom*, Appl. 58243/00, paras. 55 et seq. (criminal/administrative).

[94] ECtHR, Decision of September 6, 2005, *Leveau & Fillon* v. *France*, Appl. 63512/00.

[95] Cf. ECtHR, Judgment of November 15, 2007, *Khamidov* v. *Russia*, Appl. 72118/01, para. 131 (administrative/civil; complainant is an individual).

[96] ECtHR, Judgment of July 28, 2009, *Lee Davies* v. *Belgium*, Appl. 18704/05, paras. 55 et seq.

opens up the possibility that states may circumvent human rights norms altogether when "criminal" legal persons – or, for that matter, "criminal" individuals – are the subject of criminal justice procedures.

Finally, a legal person's "home" might be entitled to a lower level of protection than an individual's home. It seems that the government authorities enjoy a broader margin of appreciation under Art. 8(2) ECHR with respect to the home of such entities than with respect to the home of a natural person.[97] The European case law, suggests, however, that the court takes a different approach to respect for one's correspondence.[98] The reason for this difference in approach is not made clear and is difficult to grasp.

14.5 Human Rights Obligations to Hold Public and Private Law Legal Persons Criminally Liable

The supervisory bodies that monitor the human rights treaties under discussion here all hold that certain human rights positively oblige states to apply the criminal law when that right has been violated. So, the question arises: do these positive obligations also entail duties on states to criminalize, criminally investigate, prosecute, try, and punish legal persons that are responsible for breaching the human rights? In other words, does international human rights law require states to provide for the possibility of corporate criminal liability?

In this respect, it is important to note, first, that not a single provision in the ICCPR, the ECHR, the ACHR, or the AfCHPR explicitly formulates a positive obligation on states to apply the substantive criminal law to legal persons nor does any provision expressly require states to use the criminal justice system against those entities. In fact, there is hardly a provision in these treaties that propounds an express obligation to utilize criminal law if the right addressed in that provision is violated. Exceptionally, Art. 13(5) ACHR maintains that propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitements to lawless violence or to similar action on discriminatory grounds "shall be considered as offenses punishable by law". Other than that, some treaty provisions – particularly

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[97] ECtHR, Judgment of November 16, 1992, *Niemietz* v. *Germany*, Appl. 13710/88, para. 31 (criminal); and with more reservation, ECtHR, Judgment of April 16, 2002, *Société Colas Est* v. *France*, Appl. 37971/97, para. 49 (criminal). See also ECtHR, Judgment of April 28, 2005, *Buck* v. *Germany*, Appl. 41604/98, paras. 34 et seq., a (criminal) case in which the court considers the intrusion on private residential premises to be of a more serious nature than a similar intrusion on business premises.

[98] ECtHR, Judgment of October 16, 2007, *Wieser & Bicos Beteiligungen GmbH* v. *Austria*, Appl. 74336/01, para. 45 (and paras. 53 et seq.) (criminal): "the Court sees no reason to distinguish between the first applicant, who is a natural person, and the second applicant, which is a legal person, as regards the notion of 'correspondence'."

the ICCPR and ACHR – contain more generally formulated obligations that certain conduct shall be "prohibited by law" or – vaguer still – that the human right shall be "protected by law".[99] Though it is not specified, the supervisory bodies have come up with quite an extensive set of positive obligations to apply criminal law based on these formulations and other provisions in the conventions. Naturally, these obligations mostly attach to civil and political rights, which are, after all, the rights that are principally protected in the ICCPR, ECHR, and ACHR; only the AfCHPR contains a substantial number of economic, social, and cultural rights as well.

In a general comment on the ICCPR, the HRC emphasized that the state has the obligation to protect individuals, not just against violations by state agents, but also against acts committed by "private persons or entities" that breach human rights, insofar as the rights are amenable to application between private persons or entities:[100] states may need to investigate or punish such private persons or entities. By way of illustration, the committee pointed out that states must ensure that private persons or entities do not discriminate or inflict torture or cruel, inhuman, or degrading treatment or punishment on others within their power. Interestingly, as regards torture and ill-treatment (including rape and female genital mutilation), killing, and enforced disappearance, the committee holds that adequate protection may entail a positive obligation to criminalize such violations and to criminally investigate, prosecute, convict, and adequately punish those responsible.[101] The phrase "those responsible" at least refers to natural persons, including natural persons who serve as directors, managers, or employees of legal persons. The committee does not state in so many words that this also applies when the responsible party is a company or other legal

[99] Prohibitions by law are required for slavery and the slave trade (ICCPR, Art. 8; ACHR, Arts. 6 and 21; AfCHPR, Art. 5), propaganda for war (ICCPR, Art. 20), national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence (ICCPR, Art. 20), discrimination (ICCPR, Art. 26), and torture, cruel, inhuman, or degrading punishment and treatment (AfCHPR, Art. 5). Protection by law is primarily demanded for the individual's life (ICCPR, Art. 6; ECHR, Art. 2; ACHR, Art. 4), privacy, correspondence, honor, and reputation (ICCPR, Art. 17; ACHR, Art. 11), family (ICCPR, Arts. 17 and 23; ACHR, Arts. 11 and 17; AfCHPR, Art. 18), children (ICCPR, Arts. 23 and 24; ACHR, Art. 19; AfCHPR, Art. 18), and women and different forms of equality (ICCPR, Arts. 23 and 26; ACHR, Arts. 17 and 24; AfCHPR, Arts. 3 and 18).

[100] HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, March 29, 2004, para. 8.

[101] See also, e.g., HRC, General Comment No. 6, The right to life, March 30, 1982, para. 3; HRC, View of March 29, 1982, *Bleier* v. *Uruguay*, Comm. 30/1978, paras. 11 et seq.; HRC, View of November 13, 1995, *Bautista* v. *Colombia*, Comm. 563/1993, paras. 8.6, 10; HRC, View of July 29, 1997, *Arhuaco* v. *Colombia*, Comm. 612/1995, para. 8.2; and furthermore HRC, Concluding Observations, *Senegal*, CCPR A/53/40 vol. I (1998), para. 61; HRC, Concluding Observations, *Libyan Arab Jamahiriya*, CCPR A/54/40 vol. I (1999), para. 130; HRC, Concluding Observations, *Suriname*, CCPR A/59/40 vol. I (2004), para. 69 (11–12).

entity. Yet, considering that states have a duty to protect individuals against legal entities and that adequate protection may require the application of criminal law, it seems that states are also obligated to apply criminal law against private entities that are responsible for such violations. That said, the HRC itself neither finds nor implies that states have obligations to apply criminal justice to public law legal persons that are responsible for human rights violations.

At this point, the concept that states have a positive obligation to protect human rights through the criminal law is most developed in the case law of the ECtHR. In order to protect the right to life, the ECtHR holds that the state has a primary duty to put in place effective criminal law provisions to deter the commission of offenses against the person, to criminally investigate breaches of the right, and to prosecute, convict, and punish perpetrators.[102] Furthermore, these obligations are relevant to (certain) violations of the prohibition on torture and ill-treatment (including rape and domestic violence), prohibition on slavery, the right to privacy, and the freedoms of expression, religion, and assembly, amongst others.[103] It is clear from the case law that these positive obligations apply if the perpetrator is a state official, a private individual (including, of course, individuals who are also directors, managers, and employees of legal entities) and if it is "a state body".[104]

The ECtHR thus seems to require that states enable public law legal persons to be held criminally responsible for violations of, inter alia, the right to life. This conclusion finds support in the decision in *Oneryildiz* v. *Turkey*, in which the court ruled: "Where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness... the fact that those responsible for endangering life have not been charged with a criminal offense

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[102]ECtHR, Grand Chamber Judgment of October 28, 1998, *Osman* v. *The United Kingdom*, Appl. 23452/94, para. 115.

[103]See, e.g., ECtHR, Judgment of April 12, 2007, *Ivan Vasilev* v. *Bulgaria*, Appl. 48130/99, para. 58 (ill-treatment by police); ECtHR, Judgment of December 4, 2003, *MC* v. *Bulgaria*, Appl. 39272/98, paras. 148 et seq., 185 et seq. (rape by private individuals); ECtHR, Judgment of July 26, 2005, *Siliadin* v. *France*, Appl. 73316/01, paras. 89, 143 et seq. (slavery by private individuals); ECtHR, Judgment of May 3, 2007, *Gldani Congregation of Jehovah's Witnesses* v. *Georgia*, paras. 133 et seq. (private violence against religious community).

[104]See, e.g., ECtHR, Judgment of May 4, 2001, *McKerr* v. *The United Kingdom*, Appl. 28883/95, para. 111; ECtHR, Judgment of March 14, 2002, *Paul & Audrey Edwards* v. *The United Kingdom*, Appl. 46477/99, para. 69; ECtHR, Grand Chamber Judgment of April 8, 2004, *Tahsin Acar* v. *Turkey*, Appl. 26307/95, paras. 221, 223; ECtHR, Decision of May 10, 2005, *Hackett* v. *The United Kingdom*, Appl. 34698/04, para. 1; ECtHR, Judgment of December 20, 2007, *Nikolova & Velichkova/Bulgarije*, Appl. 7888/03, para. 57.

or prosecuted may amount to a violation of Art. 2."[105] It is not absolutely certain that the phrase "those responsible" is also meant to include state "bodies" but such a reading of the sentence is most obvious. Further confirmation may be found in the case of *Rowley* v. *The United Kingdom*, which concerned the death of a boy in a residential care home due to negligence of a public corporation[106] and his mother's complaint to the ECHR about the UK's failure to prosecute for corporate manslaughter. The ECtHR rejected her complaint but not on the grounds that the prosecution would concern a public legal entity; this fact was not considered to be relevant by the court at all. The conclusion would thus seem to be warranted that the ECHR probably requires states to hold public law legal persons criminally liable if they commit certain human rights violations. As the obligations are framed in very general terms, it is not yet clear whether they would be equally relevant to central governmental bodies, municipalities and other lower public offices, or both types of public entity.

If public entities should be held criminal liable for human rights abuses, it seems only a small step to require such liability for private law legal persons. Although the ECtHR has not yet have expressly confirmed that there is such a duty, its case law strongly suggests that application of criminal law to private entities may indeed be required in certain situations. On several occasions, the court has stated that these positive obligations apply in any context "whether public or not".[107] More importantly, when framing positive obligations in relation to criminal law, the court has taken a pragmatic approach based on the obligations of the state, the idea that the protection of human rights must be effective, and the principle that violations should be deterred and repressed. With this in mind, it seems implausible that the court would not also demand that private law legal persons be held criminal liable if this emerged as vital to the protection of human rights.

From its first judgment on the American Convention, the IACtHR has acknowledged that states have an obligation to criminally investigate, prosecute, and punish those responsible for human rights violations and thus to criminalize such breaches.[108] The obligation has been emphasized in

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[105] ECtHR, Grand Chamber Judgment of November 30, 2004, *Oneryildiz* v. *Turkije*, Appl. 48939/99, para. 93; see this paragraph also in relation to paras. 91 et seq. See also ECtHR, Judgment of March 24, 2009, *Mojsiejew* v. *Poland*, Appl. 11818/02, para. 53(c), in which the court points to the need "in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility".

[106] ECtHR, Decision of February 22, 2005, *Rowley* v. *The United Kingdom*, Appl. 31914/03, para. 1.

[107] ECtHR, Grand Chamber Judgment of November 30, 2004, *Oneryildiz* v. *Turkije*, Appl. 48939/99, para. 71; ECtHR, Decision of December 2, 2008, *Milan Furdík* v. *Slovakia*, Appl. 42994/05, para. 1.

[108] See IACtHR, Judgment of July 29, 1988, *Velásquez Rodríguez* v. *Hunduras*, paras. 166, 169, 174 et seq.; and, furthermore, for example, IACtHR, Order of January 27, 2009, *Bámaca Velásquez* v. *Guatemala*, paras. 15 et seq., 23, 26, 31; IACtHR, Judgment

relation to, e.g., the right of life, the right to liberty, the prohibition of torture and ill-treatment, the right to a fair trial, and the freedom of expression. In respect of the prohibition on forced disappearances, the court has even held that these duties "have attained the status of *jus cogens*."[109] Ultimately, these duties may be relevant in respect of all human rights in the ACHR, since, in its formulations, the court has not limited the obligations to particular human rights, as the ECtHR has done. Rather, it has attached them to "the rights protected by the American Convention" in general.[110] The IACtHR has stated: "Criminal proceedings should be resorted to where fundamental legal rights must be protected from conducts which imply a serious infringement thereof and where they are proportionate to the seriousness of the damage caused."[111] It is evident from the case law that the duty to criminalize human rights violations, as well as the duty to investigate, prosecute, try, convict, and punish the perpetrators, apply with respect to violations by natural persons who are agents of the state and private individuals (including, obviously, people who also happen to be directors, managers, and employees of legal entities).[112]

There is, however, no indication that the IACtHR requires states to provide for corporate criminal liability. In some cases, the court speaks of "the authors of the violations" and "those responsible for violations" to which criminal law should be applied, terms which could be taken to refer to legal entities.[113] However, in other instances, it uses phrases such as "the people responsible", "individuals", and "private persons or groups" when formulating the general framework on positive obligations.[114] The Inter-American supervisory bodies do nonetheless emphasize the need for effective deterrence and repression of human rights violations. It is reasonably conceivable, therefore, that the IACtHR or IACommHR would formulate a positive obligation to apply criminal laws to private law – and

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of November 20, 2007, *García-Prieto* v. *El Salvador*, paras. 99 et seq.; IACtHR, Judgment of November 26, 2008, *Tiu Tojín* v. *Guatemala*, paras. 68 et seq.

[109]IACtHR, Order of January 27, 2009, *Bámaca Velásquez* v. *Guatemala*, para. 26; IACtHR, Judgment of September 22, 2006, *Goiburú* v. *Paraguay*, para. 84.

[110]With further references, see, e.g., IACtHR, Judgment of February 6, 2001, *Ivcher Bronstein* v. *Peru*, para. 186.

[111]IACtHR, Judgment of January 28, 2009, *Perozo* v. *Venezuela*, para. 300, quoting Judgment of May 2, 2008, *Case of Kimel* v. *Argentina*, para. 77.

[112]See, e.g., IACtHR, Judgment of January 28, 2009, *Perozo* v. *Venezuela*, paras. 64, 118 et seq., 141; IACtHR, Order of January 27, 2009, *Bámaca Velásquez* v. *Guatemala*, para. 28; IACtHR, Order of September 4, 2004, *Matter of "Globovisión" Television Station* v. *Venezuela*, paras. 11, 22.

[113]See, e.g., IACtHR, Order of May 31, 2001, *Cesti-Hurtado* v. *Peru*, paras. 60, 63.

[114]See, e.g., IACtHR, Judgment of January 28, 2009, *Perozo* v. *Venezuela*, paras. 118; IACtHR, Order of January 27, 2009, *Luis Uzcátegui* v. *Venezuela*, para. 30; IACtHR, Judgment of November 26, 2008, *Tiu Tojín* v. *Guatemala*, para. 69; IACtHR, Judgment of July 29, 1988, *Velásquez Rodríguez* v. *Hunduras*, paras. 173, 176, 181.

maybe even public law – legal persons if a specific case merited their doing so.

Finally, the AfCommHPR has affirmed that "some perpetrators of human rights abuses are organizations, companies, or other structures of business and finance".[115] In addition, the commission has acknowledged that there is a positive obligation on states to exercise due diligence to prevent the harmful acts of others, to impose sanctions on private violations of human rights, and to take the necessary steps to provide victims with reparations.[116] In accordance with this obligation, states must investigate, prosecute, and punish acts that impair any of the rights recognized under international human rights law.[117] The scope of these positive obligations may depend on the kind of human right involved, however. The AfCommHPR assumes that the obligation will be more extensive for non-derogable human rights and it is clear that the duties, as such, are first and foremost relevant to perpetrators who are state officials.[118] In case of so-called "non-state actors", a term which refers to individuals, organizations, institutions, and other bodies acting outside the state and its organs, the state may be obligated to offer protection against human rights violations through the application of substantive and procedural criminal law.[119] Nonetheless, in its most important decision on this issue to date, the commission seemed to adopt a much narrower approach than (particularly) the ECtHR and IACtHR for it was only really willing to accept the obligations insofar as there was collusion by the state in either aiding or abetting the non-state actor.[120] So, de facto, the rather imprecise case law of the AfCommHPR establishes only a very weak requirement on states to hold

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[115] AfCommHPR, Report of May 11–25, 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, para. 136.

[116] AfCommHPR, Report of May 11–25, 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, para. 143.

[117] AfCommHPR, Report of May 11–25, 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, paras. 146, 153, 160; see also paras. 204 et seq.

[118] See, furthermore, AfCommHPR, Decision of May 16–30, 2007, *Art. 19* v. *The State of Eritrea*, Comm. 275/2003 (2007), under: Decision on admissibility; AfCommHPR, Report of May 11, 2000, *Malawi African Association and Others* v. *Mauritania*, Comm. 54/91, para. 134; AfCommHPR, Report of November 1–15, 1999, *Amnesty International and Others* v. *Sudan*, Comm. 48/90, paras. 50, 51, 56; AfCommHPR, Report of October 2–11, 1995, *Commission Nationale des Droits de l'Homme et des Libertes* v. *Chad*, Comm. 74/92, paras. 20 et seq. See also AfCommHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, principles F(4)(b), N(e); AfCommHPR, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 2002, principle 16.

[119] See AfCommHPR, Report of May 11–25, 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, para. 136 in relation to paras. 142 et seq.

[120] See AfCommHPR, Report of May 11–25, 2006, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, Comm. 245/2002, paras. 162 et seq., 187 (however, for a somewhat

private legal entities criminally liable for human rights violations. As for public law legal persons, the commission in no way appears to indicate that states must provide for criminal liability of such authorities within their legal systems.

Criminal liability of public and private law legal persons may be an important means of securing human rights[121] and it may contribute importantly to the development of international human rights obligations for multinational corporations.[122] This, however, does not seem to be the principle reason why international human rights supervisory bodies have required states to provide for criminal liability of legal persons. As far as these bodies do indeed require the imposition of such liability – and this is almost certain with regard to the HRC, probable with regard to the ECtHR, possible in relation to the IACtHR, and quite unlikely with regard to the AfCommHPR – they will do so with a view to deterrence, which is, after all, the general rationale of the positive obligation on states to utilize criminal law to protect human rights. Further, although some of these bodies differentiate between public entities and private law legal persons, it is unlikely that they will want to categorize further between, e.g., multinational corporations and small organizations. Since, in principle, every human right can be violated by, or under the mantle of, any sort of legal entity, a general approach, requiring criminal liability for such entities, might be most effective in securing human rights. In addition, the international human rights supervisory bodies that are likely to require corporate criminal liability do not put forward or even imply a specific theory by which such liability should be constructed. This leaves states at complete liberty to choose and implement a model of corporate criminal liability.[123]

If states provide for corporate criminal liability, they are not at liberty to give effect to that liability through adequate investigations, prosecutions, trials, convictions, and punishments. So, if a criminal investigation determines that a legal person committed a human rights violation, the prosecuting agencies, in principle, have no discretion in deciding whether to prosecute the entity or not (presuming that there is a positive obligation to prosecute with respect to that violation to begin with). Since the obligation is triggered by the occurrence of a violation of a human right, it is irrelevant whether the violation was supposed to benefit the legal entity. Furthermore, the absence of benefit is probably not a valid reason for not convicting a legal person for violating a human right. By contrast, the fact that the violation did not result from a defect in the organization

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broader approach, see paras. 188–215). Deservedly critical of this (but not principally in relation to criminal law) is Amao 2008, 769 et seq.

[121] Cf. Ratner 2002, 464 et seq.; Engle 2003, 311 et seq.; Slye 2008, 959 et seq.

[122] See, for example, Kinley/Chambers 2006, 447 et seq.

[123] On the variety of models, see, e.g., Pieth 2007, 177 et seq.

of the entity, a lack of supervision of employees, or systemic disorganization would seem to be permissible reasons to reject a conviction. Such factors, as well as national requirements for finding the culpability of the legal person, may be taken into consideration when assessing whether the legal person is guilty of an offense or what sanction would be adequate – so long as such factors are not abused to unacceptably shelter entities from liability. As for the sanction to be imposed on the entity, state authorities benefit from a wider margin of appreciation. None of the supervisory bodies prescribes sanctioning principles nor do they require particular sanctions for particular human rights violations. However, the ECtHR, which has the most advanced case law in this regard, has demanded appropriate sanctions and will intervene in cases where the punishment imposed is manifestly disproportionate to the gravity of the act.[124]

14.6 Conclusion: Towards Full Recognition of Legal Persons Under Human Rights Law

The ICCPR, ECHR, IACHR, and AfCHRP establish four different regimes in respect of how human rights relate to the application of criminal law to legal persons. The ICCPR does not recognize legal persons as beneficiaries of human rights and it only offers such entities very restricted, indirect protection through their individual stakeholders. Nonetheless, it does require that private law legal persons can be held responsible for certain human rights violations under criminal law. On any view, the ECHR accords legal persons the widest recognition as relevant entities for human rights law. It grants them a wide range of human rights and it offers them a fair degree of indirect protection through their human owners, shareholders, and otherwise. At the same time, it requires states to ensure that public law legal persons may be held criminally responsible for certain human rights violations; in all probability, this obligation applies in relation to private entities as well. The ACHR's regime may be basically similar to that of the ICCPR but it differs significantly in its degree of detail and clarity. The status of legal persons is least clear under the AfCHPR. Through its open system, it seems to be able to both directly and indirectly protect legal entities but it appears only to require that such entities be held criminally liable for human rights breaches if the state has in some way colluded in the violation.

How should these differences be judged? Providing human rights protections to legal persons would seem to serve at least three interests. First, it

[124] ECtHR, Judgment of December 20, 2002, *Nikolova & Velichkova* v. *Bulgaria*, Appl. 7888/03, paras. 57, 60, 62.

serves the non-natural entity itself. This may be a serious factual advantage for a particular entity but it is only marginally relevant to assessing the approaches taken by the treaty bodies since international human rights treaties do not generally aim to protect entities as such. Second, a violation of a legal person's human rights can cause considerable inconvenience, uncertainty, and financial distress (amongst other difficulties) to directors, owners, shareholders, employees, members, or others who represent it. This, it would seem, is the key point. The second interest can therefore be phrased as follows: protecting the human rights of legal entities may considerably advance the protection and well-being of natural persons. Does this second interest justify protections for public law legal persons? Of course, one could argue that this applies both to private law legal persons and to public entities, but this cannot be ultimately decisive. The extension of international human rights regimes to governmental bodies and other public law legal persons would weaken those systems for it is exactly the power of those authorities, which human rights systems aims to limit and control.

Moreover, protections for private law legal persons are much more likely to secure progress with regard to the third interest – maintaining the rule of law and democratic society – than protections for public entities. The rule of law is a safeguard against arbitrary governance. It requires that authorities act and decide within the law. The rule applies regardless of whom the state deals with outside its own organization, be they individuals, groups, or non-governmental organizations. Since human rights are the most fundamental principles of the democratic state of justice (the *Rechtsstaat*), it truly serves the rule of law to obligate states to comply with human rights when they subject legal persons to criminal justice. Another aspect of the third interest is that legal persons contribute significantly to the democratic state. This contribution is most obvious with respect to media, political, and non-profit organizations but is also apparent with respect to companies for history has shown that economic prosperity is an important condition for the development of human rights protections.

The practical approach of the ECtHR, which recognizes legal persons both as possible victims and as potential perpetrators of human rights violations, serves these several interests rather well. The same cannot be said of the ICCPR and ACHR: in refusing protection to legal persons, their drafters seem to have reasoned that human rights derive from the inherent dignity of the human person, that legal persons are legal fictions and lack real material existence, and, therefore, that human rights cannot and should not apply to such entities. At a profoundly theoretical level this reasoning might be a sufficient justification for the approach taken in these systems but it completely ignores the important benefits that human rights protections for private law legal persons provide to their individual stakeholders and society at large. I am therefore of the opinion that legal persons should be offered protection under each human right that can reasonably be applied to them. Such protection does not have to involve a complete

equation of individuals and juristic entities as rights-holders. The case law of the ECtHR illustrates that it is quite possible to adjust the protection to reflect the different nature of each entity and to focus on the interests that individuals and society have in legal persons. In fact, several rights, such as the right to a criminal trial within a reasonable time, do, in my eyes, require a somewhat different approach for entities and individuals.

In a given context, there may be compelling reasons to bear the specifically "artificial" and "collective" nature of (most) legal persons in mind when offering them human rights protection. This is especially true of the relationship between developing countries and powerful multinational companies, which may be able to abuse human rights protections to impede the efforts of local authorities to enforce the law or even to interfere with the host state's democratic or fundamental legal structures. In such situations, it is desirable to offer authorities a wide margin of appreciation in deciding whether infringements of the entity's human rights are necessary to maintain law and order and protect individuals – even if such restrictions would not be appropriate if an individual were involved. Ultimately, it may prove impossible to extend human rights to the legal person in such situations. In fact, states could apply the principle of international law that prevents totalitarian regimes, groups, or individuals from invoking human rights protection for activities that result in the destruction or unacceptable restriction of human rights.[125]

The recognition of legal persons within the four treaty-based systems for protecting human rights seems, moreover, to be essential as a reflection of the reality that such entities are responsible for many human rights violations. So, once it is found necessary to strengthen the protection of human rights by obliging states to apply criminal law against the perpetrators of certain human rights violations, it seems hard to argue that such positive obligations need not to apply when these perpetrators are private law legal entities. In this respect, all the international human rights systems discussed here could do with some improvement. None of the systems is sufficiently clear on whether the duty of states to provide for the possibility in domestic law of criminal liability concerns either public or private non-natural entities or both. They would also do well to provide a general definition of "legal persons" to which the positive obligations are relevant. Insofar as the obligations concern both public and private entities, it could be useful to specify the obligations in respect of each of them because they need not be the same in every case. For example, it seems that positive obligations with regard to the former could and should be more lenient than what is applied to the latter. When a public body commits a human rights violation, that violation could result in the body's

[125]This principle is enshrined in ICCPR, Art. 5; ECHR, Art. 17; ECHR, Art. 29; see, for the African system, AfCHPR, Art. 27, which does not as such entail this principle but provides duties for private parties that may be relevant and useful here.

international liability through the state, for the state is responsible for all of its organs. Consequently, international human rights law has more options at its disposal for controlling public than private entities. Hence, there may be less need to require states to apply criminal law to public law legal persons than to entities in private law.

In addition, states are still very reluctant to provide for criminal liability of public entities. This, in my view at least, signifies that such liability should not be required from states that oppose such liability, while they actively employ alternative means that are also sufficiently effective to prevent public bodies from violating human rights. In addition, it would help states to know more specifically what sort of criminal punishments may be adequate for legal entities that seriously violate human rights. Criminal law will only be able to prevent the violation of human rights if it is clear to states and legal persons what kind of abuses, will entail criminal liability and under which conditions, according to the supervisory bodies.

It is, nevertheless, obvious that international human rights law offers compelling reasons for states that do not recognize criminal liability of legal persons to amend their criminal laws. The human rights rationale may be an additional cause for the increasing recognition of legal persons as subjects of criminal law and criminal procedure. That, in turn, is an additional ground for offering them human rights protection against the power of the state within the criminal justice system.

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Part III
Conclusions

Chapter 15
Final Remarks: Criminal Liability and Compliance Programs

Mark Pieth

In our introductory chapter we identified a worldwide trend towards a "due diligence" model of corporate liability: corporations are now, not only held liable for the misdeeds of their most senior corporate officers; offenses committed by more junior employees or agents may also be imputed to them – if those offenses were the expression of high-level mismanagement. We observed this development in the conditions and defenses to CCL, as well as in national corporate prosecution and sanctioning guidelines.

"Due diligence" thinking and the related concepts of corporate culture and (dis)organization are also emerging as international standards. The Organization for Economic Cooperation and Development's Working Group on Bribery in International Business Transactions has recently enacted a "Good Practice Guidance" on corruption.[1] It foresees the following option as an alternative to strict vicarious liability and liability triggered by the misconduct of senior corporate decision-makers:

> A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics, and compliance programs or measures.[2]

The broad notion of corporate fault is intimately linked to the OECD's "Good Practice Guidance on Internal Controls, Ethics, and Compliance".[3] It clarifies what adequate internal controls, ethics, and compliance mean, in

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[1] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, November 26, 2009, Paris (OECD 2009 Recommendation), Annex I.

[2] OECD 2009 Recommendation, Annex I, para. B(b), third indent.

[3] OECD 2009 Recommendation, Annex II.

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particular, in preventing and responding to corruption at the level of the individual corporation. The guidance contains three pages of details that have emerged from the practice of the United States Department of Justice in applying the federal guidelines on sentencing and corporate prosecutions, as well as in the cases pursued and decided by the US Security and Exchange Commission. The text also reflects the international standards elaborated by the International Chamber of Commerce and other private bodies active in this area, such as the World Economic Forum and Transparency International.

Although state parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions are the primary addressees of the Good Practice Guidance, corporations around the world have reason to heed the "due diligence" message in relation to all sorts of corporate risk. This new notion of corporate fault is apparent in international responses to other economic crimes[4] and to other types of "corporate" risk altogether.[5] Moreover, compliance systems also obviously touch on corporate involvement in illegal trusts, environmental hazards, illegal or unsafe employment practices, and breaches of embargos and export restrictions.

But, if notions of "corporate social responsibility", corporate criminal liability, and corporate compliance are increasingly generic, the duties and risk profiles of particular corporate actors are not. In practice, the nature of a corporation's activities and "culture", in conjunction with its susceptibility to regulation by different states, determines which crimes it could commit and how, and the preventative measures it should take. So, whilst regional banks may concentrate on preventing money laundering and participation in the financing of terrorism, international chemical companies and mining conglomerates need to focus on protecting the environment and the health and safety of their employees and host communities in any one of a number of jurisdictions.

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[4]Criminal Law Convention on Corruption, January 27, 1999, in force July 1, 2002, 173 ETS, Arts. 18, 19(2); Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12, Arts. 3, 4(1); Council Framework Decision 2003/568/JHA of July 22, 2003 on combating corruption in the private sector, in force July 31, 2003, OJ No. L 192, July 22, 2003, 54, Art. 5(1). See also FATF 40 Recommendations, adopted June 20, 2003, as amended October 22, 2004, Paris, Recommendation 5 et seq.; FATF, Interpretative Note to Special Recommendation VIII: Non-profit organizations, Paris.

[5]John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/8/5, April 7, 2008, paras. 29 et seq.

According to the emerging liability model, there is a direct link between risk and compliance system, and between compliance system and CCL. To "keep out of trouble", in effect, every company has to define its particular regulatory risk profile and determine its tailor-made compliance system to meet the needs it has identified.