

Distribution of Criminal Liability between the Legal and Physical Entity at EU Level

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Abstract: At legislative level, a crucial question looking for the answer regards the distribution of the liability between the physical and legal entity and structuring the relation between the liabilities of their obligations. On a practical level, in the case of a crime committed as a result of faulty organizational policy, the question looks for an answer to whom should be held accountable: the individual whose actions has caused directly the breaking of the law, the employer or legal entity that has issued policies or indications based on which the individual acted, both individual and legal entity, or none. The EU jurisdictions still face these questions when putting into practice the institution of criminal liability of legal entities. (Mongilo, 2012) The judicial practice, however, is still poor or non-existent in most states. This paper aims at providing answers as close to harmonize the legislation with practice, and also the reason for which the legislator has established the criminal liability of the two entities.

Keywords: the distribution of liability between the physical and legal entity; institution of criminal liability of legal entities; EU; faulty organizational policy

1. Introduction

The theoretical models for substantiating criminal liability acknowledge the principle of cumulating the criminal liability of the legal and physical entity who committed the unlawful act (Brodowski, Espinoza de los Monteros de la Parra, & Tiedeman, 2014); in other words, the criminal proceedings conducted against the legal entity does not exclude the possibility of starting proceedings against the physical entity – the author, instigator or accomplice in committing the crime. On the contrary, the physical and legal entity may be held liable simultaneously.

Some jurisdictions prioritize the investigation of the legal person before the physical person, while other jurisdictions require *sine qua non*, the identification of the perpetrator for engaging the liability of the legal entity. Furthermore, there are countries where the legal person's liability is subsidiary, limiting its liability in cases where the physical entity cannot be identified. Other jurisdictions promote the principle of separation of legal liability, namely the freedom of the courts to

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punish only the legal or physical entity, based on the criteria established by law, such as the criterion of “the one with the severe guilt”.

At procedural level, certain jurisdictions grant to the prosecutor discretion powers on investigating a possible offense for which there are indications, which often result in a non-uniform practice regardless of the provisions of the substantive law.

Another important aspect is the structural relationship between the liability of legal and physical entity for committing a crime. Thus, we wonder if engaging the liability of the legal entity is depending on finding the guilt of the physical entity who committed the act. Most jurisdictions provide for the need of finding the commission of the offense by an individual and the possibility of making him accountable, but not its identification. In this context, we will see that the liability of the legal entity is fully independent.

2. The Non-cumulative Liability

An analysis of European jurisdictions indicates the adoption of the model of non-cumulative liability, under the form of alternative, exclusivity or subsidiary liability for legal entities. Furthermore, certain systems analyze separately, under the form of autonomous liability or even independent of the legal entity.

3. The Alternative Liability

The alternative liability appears as a significant derogation from the principle of cumulative liability, enabling the court, sometimes requiring convicting either of the legal or physical entity.

The Belgian Criminal Code recognizes as rule the principle of excluding the cumulative liability. Moreover, the preparatory papers of the law can easily identify with the legislator’s indignation against engaging the criminal liability of a physical entity being the manager, based at some shortcomings or deficiencies of surveillance, in the case of offenses whose incrimination is required by the form of intent. (Thiebaut)

In article 5(2) it shows the structure relationship between the physical and legal entity “*when the liability of the legal entity is engaged solely on the motive of intervention of an identified physical entity, only the person who committed the act with the most severe guilt may be convicted*”¹. In other words, the alternative liability becomes a defense for the one who, although he is obviously guilty of committing an illegal act, can invoke the exemption from liability by proving the less severe guilt.

¹ The Belgian Criminal Code, available at www.legislationline.org/documents/section/criminal-codes. 386

4. The Exclusive Liability

Unlike administrative law, where the exclusive liability is well known both in national legislation and in the EU instruments, the criminal law only allows such liability with exceptional character. Even in cases where the law allows the exclusive liability of the corporation for a particular act, the physical entities can and are held accountable for related acts. The French law introduced a restricted scope, for the exclusive liability of legal entities, in cases of slight negligence of the physical entity.¹

5. The Subsidiary Liability

According to the principle of subsidiary for the liability of the legal entity, it can only be engaged in the case where the physical entity's conviction is impossible for various reasons. The Swiss Criminal Code enshrines the subsidiary liability as rule in the matter. Art. 102 (1) provides that an "*offense committed within a company in carrying out commercial activities as object of activity will be imputed to the company, if it cannot be attributable to a specific individual as a result of the lack of organization of the company.*"² Therefore, a legal entity becomes responsible in the scenario where the organizational structure is not transparent enough to allow the identification of the individual responsible for committing the crime. In other words, the corporation is punished for the lack of transparency, and as such, proving the link between organizational failures and committing the illegal act is not required. What it is needed, however, is **proving the existence of an offense, with all the associated elements, including the form of guilt. Moreover, for engaging the corporation liability, it is not necessary the conviction of the perpetrator.**³

In the doctrine and practice, we have observed the same result of the accountability of the legal entity when the physical entity cannot be identified, it is ensured also by the legal systems applying the principle of accumulation, while keeping the autonomy of corporate liability.⁴

5.1. Procedural Discretion

The scope of cumulative liability can be significantly reduced through the systems that allow discretion to prosecutors, in certain legal systems, unlike those requiring mandatorily the beginning of criminal proceedings once it was notified committing

¹ Law 647 of 10 July 2000 decriminalized acts committed at minor fault.

² Art. 102, Swiss Criminal Code.

³ Perrin, B., *La responsabilité pénale de l'entreprise en droit Suisse/The criminal liability of the company in Swiss law* in (Pieth & Ivory, 2011, p. 201)

⁴ Mongilo, V., *The Allocation of criminal responsibility between individuals and legal entities in Europe*, in (Fiorella, 2012, p. 139)

an illegal act, so that it can eventually lead to exclusive or alternative liability of legal or physical entities. Of course, the choice of the prosecutor is usually influenced by a number of factors; in the systems that allow *plea bargain*, the prosecutor decides to prosecute a legal entity.

A comparative study shows however that the possibility of derogation practice from the principle of cumulating by exercising the principle of opportunity¹ is often the most efficient and close to factual reality.

The French Code of Criminal Procedure allows prosecutors to focus the punishment on either the physical entity, or on the corporate.²

The Austrian law provides different systems for initiating criminal proceedings against physical and legal entities; the beginning of prosecution of legal entities is limited to the situations in which it is “adequate”. The German legislation scenario, indicate similar directions in the sense of initiating criminal proceedings against legal entities, optionally, by the prosecutor. From this perspective, the Anti-Corruption Working Group of the OECD has asked the German authorities for drafting a guideline on the discretionary power of prosecutors.³

While, the Hungarian legislation adopted an opposite position, namely the obligation of criminal proceedings against legal entities once authorities were notified and the freedom of prosecutors on whether it was appropriate the prosecution of physical entities (Karsai & Szomora, 2010), while the Dutch system establishes the prosecutors’ capacity of appreciating for both types of entities. (Gobert & Pascal, 2011)

Denmark granted to the authorities the same choice to hold accountable only the legal or physical entity; and in 1999, the Attorney General's office issued a set of principles that underpin the exercise of prosecutor’s discretion, including the principle of corporate liability for the acts committed within specific commercial activities and they are related to its functioning. The heads of the corporate are held responsible only when they have acted with intent or at severe fault, while the subordinates who committed the act in itself are not subject to liability.⁴

In Finland, the law grants discretion to the prosecutors regarding the non-beginning of criminal proceedings/removal from surveillance/termination of prosecution/ranking, regarding the legal entity, also foreseeing the factors likely to influence the investigation; so prosecutors are requested to take into consideration

¹ Among the EU countries that do not fall into this category we mention: Luxembourg, Spain, Portugal, Slovakia.

² Art. 40, the French Code of Criminal Procedure.

³ OCDE, *Phase 2 Report for Germany*, p. 45, 2011.

⁴ Clifford Chance, *Corporate Liability in Europe*, available at http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf, p. 24.

the corporate's efforts to prevent the perpetration of other crimes by taking concrete preventive measures. (Alvesalo-Kuusi & Lähteenmäki, 2015)

In the UK, there have been adopted recently special rules in the matter, the Crown Prosecution issuing instructions on avoiding the equivalence of individual liability of directors and shareholders, with corporate responsibility, since their conviction represents a deterrent effect for the future. Also, the prosecutors are required to assess the potential of liability of the corporate when certain individuals are under investigation for acts that relate to the activity of the Corporation.¹

6. The Relationship between Individual Liability and Engaging the Liability of the Legal Entity

As it can be seen from previous examination, the liability of the legal entity does not exclude the liability of the physical entity for the same act (Goga, 2010), but in an effective regime, a principle imposes as being essential: **holding accountable a physical entity does not represent a prerequisite for engaging the liability of the legal person. This principle has gradually become a standard of international law, and it is now recognized by most regimes of legal entities' liability.** Incidentally, fulfilling commitments to build an effective sanctioning regime against corporate crime under international legal instruments would be quasi-impossible if the corporate liability is conditioned by sentencing the physical entity.

The OECD Good Practice Guide on the liability of legal entities provided that their liability should not be restricted to cases where the individuals who committed the act are prosecuted or convicted.²

The Working Group on Anti-Corruption of the same organization concludes in the monitoring reports that a regime requiring punishment of a physical entity as a pre-condition for prosecution or punishment of a legal person, or proceed to duplication of liability for both entities, ***“it does not respond efficiently to the corporate structures increasingly complex, often characterized by a decentralized system of decision-making”***.³

Also, since 1988, the Council of Europe Recommendation on the liability of the legal entity shows that **holding accountable the companies may be achieved without being related to the simultaneous identification of the individual who**

¹ The Crown Prosecution Service, Corporate Prosecutions, available http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/.

² OECD, *Good Practice Guidance on implementing specific articles of the Convention on Combating Bribery of Foreign Officials in International Foreign Transactions*, 2009.

³ OECD, *Liability of legal persons for corruption in Eastern Europe and Central Asia*, 2015.

committed the crime.¹ Moreover, GRECO expressed the concern over the fact that the physical entity must be identified before beginning the legal proceedings against the legal entity, as in large corporations, the possibility for the physical entities to be identified is extremely limited; this, along with collective decision-making procedures, which translates into legal impunity.²

In the law and practice of states, the rule usually translates into three scenarios regarding the liability of the legal entity: (A) dependence of committing an individual act and identifying the individual, (B) the dependency of committing an individual act, but independence on identifying the individual, and (C) independence.

The Dependence on Committing Individual Acts and the Identification of the Individual

In relatively moderate jurisdictions due to the patterns that allow the criminal liability of legal entities **only** based on the assumption of an individual guilt of a physical entity who has committed the act, the corporation liability is limited to situations where it is found the commission of a crime and identifying the guilty physical entity (derivative liability)³.

In the context of identification theory, this requirement imposes practically identifying a responsible individual in a leadership position. Also, the offense must be established also in the systems where the legal entity's liability derives from the lack of supervision of subordinates. Moreover, this dependence must be satisfied in cases where the legal entity is responsible for the omission of a sufficient organization, in order to prevent crime⁴; otherwise, this latter type of liability must be triggered by the commission of an individual act. However, this paradigm of liability leaves unsolved one of the main issues that is punishing the legal entities, which are trying to solve, especially in cases involving complex corporations.

A variation of the principle of corporate liability dependence also in establishing the act and in identifying the individual, states the need of his conviction. Among the EU States, the Bulgarian law, at least until 2013, requires the beginning of the process against the physical entity, except the case where he is criminally irresponsible due to the statute of limitation, an amnesty, death or mental disorder. The Hungarian system provisions in the matter also require the beginning of criminal proceedings in personam, unless the individual died or suffers from a mental disorder. Under the pressure of OECD critics, by the reports of Anti-Corruption Working Group both legislative jurisdictions have brought

¹ Recommendation R (88) 18 of 1988.

² GRECO, *Addendum to the Compliance Report on Latvia*, February 2009

³ OECD, *Liability of legal persons for corruption in Eastern Europe and Central Asia*, 2015.

⁴ The lack of a policy of preventing crimes is characterized in the doctrine as an illegal act of the legal entity by its autonomous failure to prevent crimes.

modifications, so as the requirements of the law stop at the need to identify the person responsible, without being required also his conviction.¹

The Dependence of Committing an Individual Act, but Independent of Identifying Individual (Autonomous Liability)

The autonomous liability, semi-dependent or semi-independent reconciles the extremes of the paradigms relating the two entities' liability. This model assumes the perpetration of an illegal act that meets all the constitutive elements of an offense. So unlike the previous model, it is not necessary to identify the perpetrator, which considerably facilitates the work of the authorities in a number of scenarios, such as meeting the deadline for prescription for the right of the individual, his death, mental disorder, etc.

This approach allows holding accountable the legal entity in cases where a crime is proved in someone's interest, but the authorities fail discerning the entire criminal path, or assigning an individual guilt. Such a situation can occur often in practice, for example, when the ruling on committing the illegal act was taken at a meeting of the Board of Trustees where it cannot be determined which members participated actively. Moreover, in certain situations, it is possible for any individual to not fully qualify as guilty for committing the offense in terms of criminal provisions.

So, the benefits of this approach are at least twofold: eases the task of investigating authorities and it allows holding accountable complex corporate structures². The best example is currently given by the legal practice of the courts in the US. As a legal entity is perceived as a combination of several physical entities, one or other identification is not required for its liability, so authorities must only prove the crime. In these latter cases, it can be observed that several individuals had intellect representation of criminal resolution, moreover, a necessary and sufficient element for the criminal liability of legal entities. Of European jurisdictions, a considerable number devotes to the autonomous liability of legal entities, thus emphasizing its importance: Belgium, Italy, Finland, Sweden, Estonia, Bulgaria, Slovakia, Spain and others.³

Independent Liability

According to the model of direct liability, the liability of legal entity can sometimes be engaged completely independent of the identification of a physical entity who

¹ OECD, *Liability of legal persons for corruption in Eastern Europe and Central Asia*, 2015.

² Even more so since some corporations have established internal systems precisely in the direction of protecting against any individual liability.

³ Clifford Chance, *Corporate Liability in Europe*, available at http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf, p. 79.

committed the criminal act or relating to its culpability, this act triggering an objective liability. Such liability exists, for example, in the UK.¹

7. Conclusions

The legislative incoherence at international level has as results the inconsistency of judicial practices in matters of criminal liability. Analyzing the mentioned procedural systems, we consider necessary to make clear the demarcation between **impunity, criminal liability duplication and the identification of all constitutive elements of the offense**, which are the responsibility of each person, a distinction which we believe it would be accepted by most states. **In fact, it is about finding the truth and avoiding doubled criminal liability**. One can use subsidiary or cumulative liability, **when determining without denial and in conjunction, the dependence between the actions of physical and legal entities (as a precondition of the latter)**. Thus, there will be detrimental with priority the uniqueness principle of personal criminal liability.

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¹ UK Anti-bribery Act, 2010, Sect. 7.

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