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Working Group on Bribery in International Business Transactions (CIME)

CORPORATE LIABILITY RULES IN CIVIL LAW JURISDICTIONS

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Corporate Liability Rules in Civil Law Jurisdictions[1]

OECD Working Group on Bribery in International Business Transactions

I. Introduction

The legal situation sanctioning legal persons has changed a lot in the last years, mostly due to EC-initiatives and the OECD-Convention. A large group of countries established corporate criminal liability (among others the Netherlands [1976], Norway [1991], Iceland [1993], France [1994], Finland [1995], Belgium [1999], draft law of the Slovak Republic [2000], draft law of Turkey [2000]), incorporated corporate sanctions *sui generis* (Spain [1995], Sweden [1986], draft law of Switzerland [1998], Korea, Japan) or enacted non-criminal corporate sanctions (Germany, Portugal, draft law of Italy 2000, draft law of Poland 2000, draft law of Bulgaria [2000]). The out-dated civil co-liability for fines is still the legal status in Austria and Greece.

Despite different theoretical issues it seems worthwhile with respect to assessing effectiveness to structure the conditions under which criminal sanctions can be imposed. However, in some countries different approaches do exist imposing corporate liability. Furthermore, in some countries courts have taken the initiative extending or restricting liability of enterprises, in other countries new acts have not been interpreted by courts or are still in the status of *nascendi*. Therefore, the following survey will focus on some key questions of corporate liability (II). In the concluding sections some remarks will be made to the sanctions (III).

II. Models of corporate liability

The diversity of the different international approaches can be summarised using the following three models. In the first group, an act of management respectively a specific business person, is viewed as the enterprise's misconduct (model 1 below). Here, the axiom is the classical identification theory, by virtue of which the legal person must identify itself with its management. In the second group, in contrast to the first group, it is not fundamentally necessary to establish an individual act of management. An offence is associated with a deficient corporation, especially organisational deficiencies in the enterprise (model 2 below). In the third group the imputation of sanctions is based on a kind of causation, i.e. strict liability-principle (model 3 below), thus obviating the need to prove any errors or deficiencies. The boundaries between the models are fluid. They constitute a graduated scale in which different levels of corporate liability are represented.

1. Model 1: An Act of Management as the Enterprise's Own Misconduct

Most countries, also the draft texts of laws of most east-European countries, stick to the idea of identifying the enterprise with leading persons respectively imputing responsibility of persons in charge to the legal person.

a) The first problem concerns the question what kind of status, respectively function of individual persons, can trigger the enterprise's liability. The anthropomorphic approach of the UK-jurisdiction (the state of mind of the board of directors and other superior officers, s. Tesco v. Nattrass [1972] is the state of mind of the company), however, has found no followers on the continent. At least the 2nd protocol for the protection of the financial interests of the EC has stressed many countries integrating persons of lower levels (Ireland)

1 . In Continental European Countries.

or generally possessing control powers and imputing their wrong behaviour to the corporation. In France, Germany and Sweden, for example, violation of supervisorial duties is sufficient, even on lower levels. Therefore a legal discussion whether the director was informed about corruptive payments cannot hinder corporation's liability. Corporate liability can be triggered by illegal payments of subordinate employees, so long as their misdeeds could only have been avoided by careful selection. The requirement of quasi-causality (strict demand in Sweden), however, often prevents a sanction against the enterprise. The German legislator, for example, has lowered this nexus between violation of supervisorial duties and the criminal act: the liability of the corporation is thus triggered by acts of any of its members, insofar as the risk of a corruptive act has been lessened by better supervision (§ 130 OwiG), a prerequisite which even has been abandoned on the principle of "responsabilité du fait d'autrui" in France and in Japan, however limited to persons in charge. And - as a rule - mens rea in respect of the offence of corruption must not be proved on the supervisorial level, the offence is mostly a pure objective-external condition of punishability.

Denmark, and the draft legislation of Lithuania, have gone one step further: the corruptive act of any person, irrespective of violation of supervisorial duties of persons in charge, can trigger corporate liability. This extensive liability of enterprises is functioning only on the basis of a broad discretion of the judge.

b) The second problem refers to the relationship between the offence and the enterprise. The new feature in Italy seems to follow the Portuguese idea by establishing non-criminal sanctions only in the case of specific infractions such as bribery. Other countries, such as Finland and France, have incorporated enterprise's liability into the General Part of their Criminal Code. However the application is ruled by the concrete offence in the Special Part, for example in the context of bribery. Problems arise when a general section establishing corporate liability requires a specific nexus between offence and corporation. In many countries further requirements are that the offence was committed in the interest of the enterprise, that is the corporation was enriched or a violation of business-related duties has occurred. Actually bribing must not of necessity violate business-related duties and more or less significant profit could be difficult to detect in practice (think of the reasons of the legislators to establish offences requiring only abstract endangerment). Therefore, some countries, such as the Netherlands, attempt to avoid such limitations and prefer a functional context: the legal person should be liable because it delegated power and competence to individuals and thereby increased risks of bribery in the economic sphere.

c) One of the main barriers for efficiency is the question whether a natural person whose wrong conduct could be imputed to the company must be detected, or more precisely whether a person in charge committed a bribe or an agent violated supervisorial duties. Each organisation enables the creation of a bulk of possibilities to obstruct prosecutors detecting the responsible person. One reason is the discontinuity of natural persons over a period of time in an enterprise' climate promulgating bribery. Another reason are complex structures of the organisation: the less hierarchically linear and the more functionally differentiated the organisation of an enterprise is, the less one will be able to localise the perpetrator of a crime. A large modern enterprise does not act through a single executive decision on a meeting each Monday morning with the conclusion:" let's bribe tomorrow". Rather its actions are taken through the co-ordination of different, more or less independent responsibilities of its numerous economic departments. Even when an individual agent can be identified, in many countries, as we have seen, the required violation of supervisorial duties can not be justified because there was either a general organisational lack of control or a single omission that would support an indictment of the high managerial agent cannot honestly be testified. Therefore some legislators and courts are lowering the legal standards: in Korea, Finland and Norway punishment of a legal entity is possible for factual reasons; the individual is beyond the reach of the Criminal Law. And in Germany, according to a decision of the Federal Court, a kind of general actorship is accepted, meaning dispensing the prosecutor from the requirement to identify a single person in charge; however it must be proved that anyone of the responsible circle had committed the offence. The same is true with minor offences in Denmark, and a similar result brings with it the rule in Japan, namely the presumption that a supervisorial duty has been violated within a certain circle of persons

in charge. However, up to now it is an open question in all these countries how to detect mens rea, meaning intent etc., in cases when no individual person is available.

Actually some legislators and courts have abandoned step by step the classical identification theory, respondeat superior. Indeed French courts have pointed out the weakness of principles of imputing single acts of natural persons to the corporation, it is both too narrow and too extensive. On the one hand this approach is too narrow as concerns the requirement of detecting a single liable person (or as concerns dispensing with the difficulties of proving mens rea). On the other hand it can be too extensive because liability of the enterprise is quasi automatically established by detecting an offence of a managerial agent - with the legal consequence of establishing corporate liability on the basis of a kind of strict liability (think of the difficulties of detecting mens rea).

According to the French courts (i.e. Tribunal Corr. Lyon 9th Oct. 1997) there is a need for special criteria differentiating between responsibility of natural persons and liability of the enterprise. These criteria stem from the organisational structures of the enterprise, its business- policy and -strategy, as these courts have pointed out.

2. Model 2: Deficient corporation, esp. Defective Organisation of the Enterprise

The concept of this second model is as follows: an incident, such as a bribery in entrepreneurial matters, is linked with deficiencies of the corporation. Sometimes, i.e. in Australia, the law is focussed on a deficient corporate culture, stimulating commission of specific offences (Art. 12.2 Criminal Code Act 1995). In the European context the special liability of enterprises is more and more based on a defective organisation of the corporation. With these forms of corporate liability it is no longer a question of responsibility for the misconduct of subordinates, but rather a type of organisational blame of the entity as such for neglecting its organisational duty to concern itself with the adequate balancing of endangerment potentialities which arise with the opening and operation of a complex system. This approach emphasises that criminal liability of an enterprise means a special liability of the legal person as such which is not congruent to the responsibility of natural persons.

Up to now, French courts as well some other legislators and courts have cautiously adopted this approach. It encompasses all legal approaches on which identifying a single person who acted within the scope of his authority and on behalf of the corporation is dispensable (see II 1.c, above).

In Switzerland a 1998 draft law provides specifically for liability of an enterprise when an act is committed in furtherance of corporate interests and no potentially liable individual can be identified, as long as the criminal offence was the result of organisational deficiencies. Therefore the Swiss draft law is principally in line with these new tendencies establishing an original corporate liability of the enterprise as such. However the decisive drawback is the legal accessory of corporate liability upon the fact that a liable agent cannot be identified. A calculating enterprise will supply a "breakfast executive"[2] claiming personal responsibility for neglecting supervisorial duties. The magnitude of fine imposed on him and reimbursed by the legal entity will be tiny compared to a corporate fine.

The most extensive experience with this new approach has been in the EU-Commission and the EU-Court in the field of antitrust decisions, though there is not always a specific advocacy of the second model. The standard of care is not assessed with reference to the capabilities of an individual, but to the concrete enterprise, its size, market position, economic activity and the type of criminal offence imputed to the company. It is consequently no longer a question of the acts, the purpose or negligence of a single member of the company, but the collective control of an organisation and the collective knowledge or negligence of

2. A person carrying out no real function within the enterprise, i.e. "man of straw".

the enterprise as such. A precautious adoption of this collective approach can be observed in court decisions, especially in France, Germany and the Netherlands.

3. Model 3: Strict liability (the causation principle)

According to this concept of liability, prove of actual deficits in corporate organisations causing or facilitating offences is completely dispensed with. The creation of an organisation with complex operational structures which carries out intrinsically dangerous processes is rather deemed to be per se sufficient to impute dangerous consequences to the enterprise which business activities are the source of.

In Europe, this approach was limited to technical law and the non-compliance with administrative standards (quasi-criminal law in Poland, Portugal, Sweden). The aim is to use a monetary sanction, rather than a fee, to prevent financially powerful enterprises from buying their way out of social responsibility and paying to breach standards without this being in any way viewed as criminal.

An example in the field of bribery is the new Art. 129 Spanish Penal Code (1995). Art. 129 allowing the imposition of a broad range of sanctions on the enterprise, inspired by the recommendations of the Committee of Ministers of the European Council 1988. However, the conditions of imposing these so-called accessory consequences are rather unclear. The legislator merely supplied the sanctions and indicated the goal, namely these corporate sanctions "shall aim to prevent criminal activity and the effects of the criminal activity from continuing", without laying down the legal prerequisites imposing these sanctions. In any case unclear legal conditions enhance the risk of non-implementation or implementation under arbitrary circumstances.

III. Survey on sanctions

As a rule the most prominent corporate sanction is the fine. From the standpoint of the enterprises involved it should not make a real difference whether this fine is entitled as criminal, non-criminal (Germany, draft law of Poland, draft law of Bulgaria, draft law of Italy) or sui generis hybrid (Switzerland, Spain), but rather the effective magnitude of this fine. The legal amount varies from about EURO 500.000 to EURO 1,5 Mio. (Italy) or from three times the illegal profits (Germany) to no maximum limit (Denmark).

Forfeiture and skimming-off of extra profits are standard, even in countries which have not up to now established a corporate liability.

However, it is very doubtful whether merely financial sanctions can guarantee complying with the law in future. Nevertheless, only some countries, such as France, the Netherlands and Spain, have incorporated sanctions aiming to influence corporate behaviour directly or indirectly through disincentives, such as suspension of certain rights, prohibition of certain activities, regulating or influencing the organisational structure.

IV. Final remarks

1. In general, anthropomorphic approaches to corporate liability are on the retreat. This is especially true for the identification theory, identifying the enterprise with its boards of directors and other superior officers. In many countries corporate liability has been established on the principle of imputation, i.e. imputing a wrong act/offence of specific persons to the enterprise. However, in comparison the sphere of natural persons which can trigger liability of the enterprise differs quite a lot. The same is true for other conditions of imputation, such as the nexus between offence and the corporation etc.

2. As a rule, a cautious shift can be observed from an approach imputing individual behaviour to the corporation to an original liability of the enterprise as such, which attaches through faulty organisational

structures or deficiencies laid down in the business matters of the legal person. Indeed the imputation model presumes an enterprise which is managed by a small number of identifiable executives. This approach is limited when dealing with large decentralised enterprises, the decisions of which are spread over time and therefore offences can hardly be traced to individual decisions. For these reasons this shift adequately integrates the actual needs and seems to improve efficiency, last but not least, by separating responsibility of individuals from more extensive liability of large scale enterprises. However corporate sanctions must not only be effective but as well calculable. Yet, for the time being, clear and agreed criteria are still as rare as fuel in the filling-stations in September.

3. The common sanction is a corporate fine supported by measures skimming-off extra profits. However the amount of the fine differs quite a lot. The same is true with enforcement measures influencing enterprises' business matters or organisational structures.

4. The legal prerequisites of corporate liability are only the one side of the coin, the other is the implementation. It must be kept in mind that until now corporate liability has not played a dominant role in combating bribery. Additional supporting measures will have to be taken in order that the new provisions, which still play a rather symbolic role, be effectively enforced.