

CONTRIBUTION TO THE LEGALINK NEWSLETTER OF FEBRUARY 2009	
CORPORATE CRIMINAL LIABILITY IN BELGIUM	
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ANNEXURES	:

CONTENTS

1.	THE PRINCIPLE OF CORPORATE CRIMINAL LIABILITY	1
1.1.	In general	1
1.2.	In Belgium	2
2.	CRIMINAL REMEDIES APPLICABLE TO CORPORATE BODIES	3
2.1.	Criminal remedies	3
2.2.	Non criminal remedies	3
3.	ALTERNATIVE CRIMINAL LIABILITY	4
4.	CONDITIONS FOR APPLYING ALTERNATIVE CRIMINAL LIABILITY	4
4.1.	Identical offenses	4
4.2.	An identified natural person.....	4
4.3.	Exclusive intervention of an identified natural person.....	4
4.4.	Not the most serious fault	5
4.5.	Non voluntary intervention in order to commit the offense.....	5
5.	CORPORATE BODY AS A MANAGER OR DIRECTOR	6

1. THE PRINCIPLE OF CORPORATE CRIMINAL LIABILITY

1.1. In general

In Western Europe, the principle of corporate criminal liability first emerged in the seventies and has continued to develop ever since.

Originally, the adage "*societas delinquere non potest*" was predominant: the corporate body was considered as having no consistency, no intellect and no will to be handled in a reprehensive manner. Only natural persons were considered as being able to commit a reprehensive act.

Subsequently, the jurisprudence adopted another adage, "*societas delinquere potest, sed puniri non potest*": the corporate body was recognized as having consistency and its own purposes, and therefore able to commit an offense. However, no punishment was attributed, this being reserved for the identified, natural persons having acted for the corporate body.

As from the seventies, the movement in Western European countries is to adopt legislation with respect to corporate criminal liability, introducing actual punishment for corporate bodies. However, at the European level (European Union, Council of Europe) there is no tendency to impose the development of corporate criminal liability in the Member States legislation.

1.2. In Belgium

Article 5 (1) of the Belgian Criminal Code aligns corporate criminal liability with the criminal liability of natural persons:

"Every corporate body is criminally liable for the offenses which are intrinsically linked to the realization of its objects or to the protection of its interests ; or [for] those [offenses], the concrete facts of which show that they were committed on its behalf."

The legislator explicitly mentions that "every corporate body" can be criminally liable, including e.g. a foreign corporate body acting in Belgium, or a Belgian corporate acting abroad. The legislator also includes:

- temporary associations and joint ownership;
- companies in course of incorporation;
- companies who do not engage in commercial transactions and are not incorporated as a trading company. Therefore, nonprofit organizations are clearly included.

The Belgian legislator provides for an exhaustive list of public bodies that are excluded from the scope of the article 5 of the Belgian Criminal Code: including the federal state and local authorities.

However, the exhaustive nature of this list means that all public bodies not figuring in this list may be criminally liable, f.i. the National Railway Company, the National Telecom Company.

There are three situations in which a corporate body may be criminally liable under the said article 5:

- The offense is intrinsically linked to the realization of its objects;
- The offense is intrinsically linked to the protection of its interests;
- The facts show that the offense was committed on its behalf.

Therefore, the corporate body will not have to answer for acts of employees or agents having taken advantage of the corporate body and having acted for their own interests.

2. CRIMINAL REMEDIES APPLICABLE TO CORPORATE BODIES

2.1. Criminal remedies

Article 7bis of the Belgian Criminal Code provides an exhaustive list of statutory criminal penalties applicable to corporate bodies.

For crimes, misdemeanors and offenses, a fine or a special forfeiture can be pronounced. However, for public corporations, the forfeiture is limited to forfeitable goods.

For offenses, the fines applicable to natural persons also apply to corporate bodies.

Furthermore, for crimes and misdemeanors, the following penalties can be pronounced:

- dissolution (cannot be applied to public corporations)
- prohibition of practices linked to the company's object (except for activities linked to the public service);
- closing of one or more places of business, except for establishments where public services are performed;
- publication or release of the Court decision.

It is understood that a corporate body cannot be sentenced to imprisonment. Article 41bis of the Belgian Penal Code therefore provides a conversion mechanism between the prison sentence applicable to natural persons (in criminal cases) and corresponding fines applicable to the corporate bodies:

Criminal penalties established for natural persons	Conversion for corporate bodies
a life imprisonment	from 240 000 € to 700 000 €
imprisonment <u>and / or</u> a fine	<ul style="list-style-type: none">- minimum 500 €. The sum is to be multiplied by the amount of months corresponding to the minimum of the imprisonment.- maximum 2000 €. The sum is to be multiplied by the amount of months corresponding to the maximum of the imprisonment
a fine	a fine

2.2. Non criminal remedies

It is useful to remind that several non criminal measures may be applied to corporate bodies:

- *sui generis* penalties created by the European legislator for violation of several rules established at the European level (e.g. penalties for the non respect of the principle of free competition);
- administrative transactions and fines;

- conservative measures, in case of violation of safety regulations on the work floor, of food regulations...

3. ALTERNATIVE CRIMINAL LIABILITY

In practice, the committing of an offense by a corporate body is due to the acts of one of more natural persons (employee or agents of the company). Mostly, both the corporate and the natural persons are prosecuted for the same offense. In this case, the principle of the alternative criminal liability, established by the article 5 (2) of the Belgian Penal Code, introduces the possibility that only one of them will be punished:

"If the criminal liability of the corporate body is exclusively due to the intervention of an identified natural person, only the person who has committed the most serious fault can be convicted. If the identified natural person has knowingly and voluntarily committed the fault, he can be convicted at the same time as the liable corporate body."

According to this principle, only the person (the natural or the corporate one) who has committed "the most serious fault" will be sentenced. The other person will be recognized as criminally liable, but no punishment will be pronounced.

The principle of the alternative criminal liability may therefore be advantageous for the director or the agent of the corporate body, who did not commit the most serious fault:

- he will not be punished and
- he will keep his criminal record blank.

4. CONDITIONS FOR APPLYING ALTERNATIVE CRIMINAL LIABILITY

4.1. Identical offenses

Practice shows that Article 5(2) applies only in cases where faults of the corporate body and the identified natural person have occurred by the same act, i.e. the act of the natural person.

4.2. An identified natural person

In practice, it is sometimes difficult to identify the natural person who has committed a fault. This is especially the case for large companies with a complex organization where the responsibilities of each agent / employee are diluted. In such cases, the principle of the alternative criminal liability would not be applied, and the prosecution would be concentrated on the liability of the company only.

In some cases, several natural persons are identified who have committed the same offense. In such cases, the principle of the alternative criminal liability will be applied, and the judge would exempt from punishment the person(s) having committed "the less serious fault".

4.3. Exclusive intervention of an identified natural person

The criminal liability of the corporate body must be exclusively due to the intervention of one or more identified persons. It would lead too far if this MEMO into details of the controversial situation observed in the doctrine and the jurisprudence.

4.4. Not the most serious fault

The determination of “the most serious fault” is a factual question, left to the appreciation of the judge. The legislator does not provide a definition.

The “gravity” of the fault should be appreciated using causal criteria: the most serious fault will be the fault with the highest impact on the committing of the offense. Thus, criteria for the comparison of faults must highlight the causal link between the fault and the committing of the offense.

In practice, several criteria are used in order to evaluate the fault which has the most important causal link :

- **the assignment of the natural person:** it is considered that the person who is on the top of the hierarchy commits the most decisive fault, such as the managing director and/or the manager, as having the most important authority for the accomplishment of any acts of management. If the natural person is merely implementing tasks for the company, and does not have any influence on its organization, he will be judged as having committed the less serious fault;
- **the influence of the corporate body:** the fault of the company will be appreciated taking into account its degree of influence on the natural person, e.g. by means of a general policy;
- **default of coordination and supervision by the corporate body:** this is considered as the most serious fault comparing to the fault of the natural person, more specifically when the corporate body was aware or should have been aware of the risk and neglected to intervene.

4.5. Non voluntary intervention in order to commit the offense

According to the article 5(2) of the Belgian Penal Code, “*if the identified natural person has knowingly and voluntarily committed the fault, he can be convicted at the same time as the liable corporate body.*” Consequently, in order to benefit from the alternative criminal liability principle, the prosecuted natural person has to show that he has not acted “*knowingly and voluntarily*” in order to avoid a conviction.

For some judges, the expression « *voluntarily and knowingly* » aims at fraud (or deceit). It means that the natural person cannot be convicted for non intentional offenses on the basis of the article 5.

However, le Conseil d’Etat/ Raad van State [the Belgian Council of State] pointed out the fact that it is difficult to know if article 5(2) applies to only intentional offenses or also to all offenses where the intention of the author was to commit it.

Therefore, it is not the statutory qualification which determines the intentional character of the offense, but the state of mind of the author of this offense. The *Cour de cassation / Hof van Cassatie* has confirmed this point of view.

The state of mind has to be determined in accordance with factual concrete circumstances of the case. The jurisprudence provides the following (non exhaustive) criterions:

- **several warnings from authorities;**

jurisprudence considers that if there were several warnings from the public authorities about the faulty behavior and the natural person has done nothing to

comply with these warnings, then it can be considered that the natural person has committed the offense voluntarily;

- **experience of the natural person;**

generally, the experience of the natural person is taken into consideration: if the person has a great experience in a particular field, he may not have acted involuntary and negligently;

- **interest of the natural person to commit the offense;**

Even in cases where it is recognized that the natural person has acted voluntary, the legislator does not require the automatic application of the second sentence. Article 5(2) says that « *he can be convinced at the same time than the liable corporate body* » and not « *shall be convinced ...* ». It is up to the judge to appreciate if the natural person shall or not be punished.

As conclusion, it can be said that the principle of the alternative liability is difficult to put in practice. Indeed, a lot of conditions have to be fulfilled in order to win and most of them are left to the appreciation of the judge, which creates insecurity.

Another disadvantage of this principle is that it does not allows to avoid criminal liability, but only the punishment. This situation may be damaging for persons taking on high functions in a company. Indeed, in several countries and also in Articles of Associations of companies, there is a prohibition to take on high functions in case of criminal prosecutions or establishment of criminal liability.

5. CORPORATE BODY AS A MANAGER OR DIRECTOR

In Belgium, article 61 of the Companies Code allows a corporate body to be a manager or a member of the Board of Directors of a company.

This provision creates the obligation to assign a natural person in charge of the performance of the activities of the corporate person and who acts on its behalf.

The same provision points out that this assigned natural person assumes the same criminal and civil liability as if he was performing the same activity on his own behalf.

Provisions on criminal liability of managers, administrators and members of the Board of Directors are thus directly applicable to the assigned natural person.