

Tilburg University

The liability of corporations in cases of fraud

Fijnaut, C.J.C.F.; Scarlett, D.

Published in:
EC fraud

Publication date:
1993

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Fijnaut, C. J. C. F., & Scarlett, D. (1993). The liability of corporations in cases of fraud. In J. W. van der Hulst (Ed.), *EC fraud* (pp. 113-116). Kluwer.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

The Liability of Corporations in Cases of Fraud

1. Introduction

On conclusion of the seminars presented at the conference a number of working groups were assembled to discuss areas of particular interest, the subject under discussion in this workgroup being the liability of corporations in cases of fraud. Indeed one of the issues that the speakers had been invited to treat was if, and how, their national legal system deals with fraud offences involving corporations. The discussion started with a summary of interesting points of comparison drawn from the lectures.

2. A Comparative Analysis of Fraud Offences by Corporations

The first and most fundamental question is whether corporations can be prosecuted in fraud cases. Here it is interesting to compare those countries where such prosecution is an established practice, such as The Netherlands and the United Kingdom with those States where this option is not available and has traditionally been rejected, for instance France and Belgium.

Where such liability is excluded, exclusion may be implicit or explicit. However, exclusion doesn't preclude that corporations may be sanctioned indirectly. That's to say that they can be sentenced to pay the criminal fine imposed on a member of their staff. This is for example the case in Belgium.

Where corporate liability is a possibility offered to the prosecutor, it may be incorporated into a States legal system in a variety of ways:

- in special laws relating specifically to the matter, or;
- as an integral part of general codes or statutes, or;
- at the level of common law.

Assuming that liability exists, in a number of EC Member States this does not extend to all offences. In Germany for example liability of corporations exists but only in respect of those offences which can be committed negligently but not intentionally and corporations can only be prosecuted under administrative law not criminal law. In other States whilst in theory corporations may be

* Prof. C.J.C.F. Fijnaut is Professor of Criminology and Criminal Law at the Institute of Criminal Law of the University of Leuven; D. Scarlett LLM is a consultant with the European Commission.

prosecuted for all offences, the nature of the offence itself or the requisite mental state, limit the types of offences for which they can be prosecuted.

In addition it is interesting to question whether where liability exists, it does so in relation to all types of corporations (private and public, limited and unlimited) or whether the nature or the structure of the organisation renders it immune from prosecution. The reports show that the named distinctions are most of the time irrelevant from the viewpoint of criminal law and criminal procedure.

If a corporation is potentially liable for prosecution it is interesting to ask what conditions must exist before prosecution can be commenced. For example what links must exist between the natural persons and corporations involved in the offence? It is necessary that the corporation benefits from the fraud in order to be prosecuted. For in some States this is not a pre-requisite, for example in the United Kingdom and Germany.

Also in relation to necessary connections between the natural person and a corporation, the behaviour of the individual in bearing with the instructions he received may be of vital importance to the case against the corporation. If an officer of a corporation acts counter to his directions it may be well that the corporation is no longer liable.

Related to these questions is the interesting point that whilst some States offer the possibility to bring both natural persons and corporations before a court for the same offence - cumulative liability, like for example in the United Kingdom -, other systems tolerate only substitutionary liability.

With respect to the sanctions which may be imposed on those corporations successfully prosecuted in a fraud case, it comes as no surprise that the number, the nature and the severity of the sanctions differ greatly from State to State. Perhaps more interesting is a comparison of the varying approaches that have been adopted.

In some EC Member States for instance both natural persons and corporations may be prosecuted for the same offence and, if convicted, are liable to the same sanctions. This is the case in Ireland and the United Kingdom.

Some States however may charge both with the same offence but on conviction apply a different system of sanctions, for example The Netherlands, whilst others try and sanction corporations and natural persons under different regimes (for instance in Denmark).

3. A Summary of the Discussion

In spite of the potential within the reports for an extensive comparative exchange, it would not be untrue to say that the interest of the participants in the workgroup lay predominantly in future developments and law reform. There are two reasons for this. Firstly in a number of States no corporate liability in fraud cases exists as of yet, but is the subject of much debate.

Secondly in those States where it is possible to bring corporations before a

court the present law may mean that the prosecuting of corporations is more theoretical than actual. And, thirdly, as all lawyers know: even the 'best' system leaves room for improvement.

The interest of the workgroup turned first to the question of whether it is really necessary to introduce laws permitting corporations to be prosecuted in fraud cases. Opinions varied.

Contributors from France stated that whilst their legal system has long rejected liability of corporations it is to form a part of the new Criminal Code to be introduced. The turnabout in opinion is the result of societal development which has seen corporations increasingly taking on those characteristics normally attributed to natural persons, for example financial independence. Prevailing opinion is that if corporations may enjoy benefits afforded to individuals then they must also be subject to the more negative aspects of individual existence, one example being liability to prosecution.

In Belgium however whilst there has been much discussion of the subject in academic and political circles, reform does not seem any nearer. It is doubted by the majority here that the introduction of liability for corporations is a necessary development in the legal system, which, they maintain, deals with the problem in an indirect but adequate fashion; for instance by rendering corporations civilly liable for fines imposed on natural persons in fraud cases. It is a tradition and an established doctrine, as has been the case in France too, that criminal law applies only to individuals as it involves a moral judgment. To extend it to encompass corporations would be a perversion of the very foundations of the system. It was observed that this was the dilemma in The Netherlands some twenty years ago too, but that, at least as far as economic crime is concerned, corporations can now be prosecuted. Without such liability, it was suggested, isn't impossible to deal with (EC) fraud?

In conjunction with these considerations it was remarked that the European Commission isn't looking to introduce criminal liability into Member States. Their concern lies not with the gender of the provisions or sanctions employed by Member States but with the results they achieve. In accordance with the Court of Justice ruling in the Greek Maize Case the Commission requires that the measures employed by national legislators be analogous with those which apply to infringements of national law and that they be effective, proportionate and dissuasive. Whether the criteria are implemented through administrative or penal provisions is at the discretion of the States themselves.

The Commission harbours no desire or plan to criminalize the law, merely to ensure the effective protection of their finances. It was pointed out at this moment in the discussion that the borders between criminal and administrative law for the rest are fluid and whilst definition is important for procedural rules, the effects of the sanctions carried by both categories are more often than not the same, for example financial loss or suspension from trading.

This having been said it is interesting to note that whilst opinion is swinging in favour of culpability for corporations, there is in fact a tendency to-

wards decriminalisation of sanctions. The prevailing opinion in the French Ministry of Justice is that whilst criminal liability has its place in the general scheme of the penal law, one must look to other possible sanctions and not immediately opt for criminal sanctions, they being not the only and not always the best available option.

Comments on measures currently being considered for the betterment of the Italian system, to form part of the new Criminal Code currently being worked out by the Ministry of Justice, indicated that whilst the importance of prosecution and sanctioning of corporations is recognized, it is considered equally important to introduce preventive measures. The question whether the American RICO-legislation had perhaps been a factor in influencing the Italian debate was answered affirmatively. Because of the common interest in organized crime problems, Italian legislators are interested in the success of preventive measures adopted in the USA. Also in Italy there is a significant push towards the criminalization of fraudulent behaviour of corporations, whilst at the same time other avenues are being explored on the question of sanctions.

Also in relation to sanctions, concern was expressed by a number of participants, especially those from Italy, about the possible detrimental consequences for the economy that harsh sanctioning of corporations, for example closure, may have. It was suggested that laws must also be introduced to protect innocent employees and associates of convicted corporations who may find themselves being penalized. Dutch lawyers in the workgroup acknowledged this and said that such protection exists in The Netherlands where penalties have never been so severe as to totally destroy a convicted corporation.

For the system to be effective but at the same time ensure the least possible impact on the economy a compromise must be found. It was conceded that the right balance is no doubt harder to achieve in Italy where problems with organized crime far exceed those faced in other parts of Europe.

4. Conclusion

The most interesting reports as well as the very lively discussion illustrate the great variety of legal systems, actual practices, current opinions and policy developments in the Member States of the European Community.

Within the framework of a comparative study it not only would be important to study all those differences in detail but also to detect valid explanations for this kaleidoscopic picture. In terms of European or, more strictly, Community policy the existing situation above all means that any attempt to unify or harmonize the law concerned in the Member States can only yield success in the long(er) run.

In the meantime only institutional cooperation and legal 'compatibilization' seem to be realistic goals of political discussions.