Criminal Responsibilities of Legal and Collective Entities: Developments in Belgium
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1. History

Traditional Belgian criminal law did not recognise the criminal liability of the corporation. *Societas delinquere non potest* was the traditional saying. This has been amended by a decision of the Cour de Cassation of 1946, which held that legal entities can commit crimes, but cannot be punished: *societas delinquere po-test, sed non puniri potest*. The reason was that punishment required the personal guilt of the wrongdoer, a trait impossible to ascribe to a corporation. This doctrine remained in existence for almost 50 years. The practical consequence was that, when a crime was committed within a corporate entity, it became the task of the judge to identify who, within or outside the corporation had in fact acted on its behalf. Accordingly, this was referred to as the doctrine of "judicial imputation". In this respect, the Belgian system resembles that of France before the introduction of criminal responsibility of legal persons in the *Nouveau Code Pénal* in 1992.

This system led to an elaborate legal doctrine and case law, establishing criteria for determining to whom the responsibility for a certain crime could be imputed. Some general lines of thought emerged from this case law. Judges held that managers of a corporation had a general responsibility for major policy areas within the firm, such as ensuring that a firm possesses the necessary environmental permits before commencing an operation, and were also expected to ensure that the corporation can comply with all the conditions of the regulations, although some of these matters could be delegated to other employees. In turn, lower-ranked individuals, who have no power to make decisions, for instance, with re-

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1 A term invented by Legros, who also referred to contractual imputation or statutory imputation, when the imputation would have been laid down by contract or by statute (Robert Legros, Imputabilité pénale et entreprise économique, Revue de Droit Pénal et de Criminologie, 1968-69, 372-385).

2 An overview of these criteria is among others presented by Michael Faure, De strafrechtelijke toerekening van milieudelicten, Antwerp 1992.
spect to investments, were normally only liable for fulfilling their duties correctly and adequately informing the management. This was typically the case for the environmental coordinator within a firm. While unable to make such decisions as the purchase of a costly water treatment plant, a coordinator can, however, inform the management that such a purchase is necessary in order to comply with regulations.3

Although these jurisprudential criteria largely clarified what could be expected from various partners in the firm based on the corporate division of responsibility, this system had various drawbacks for both the prosecution and defence. Understandably, the prosecution could sometimes find it difficult to establish who was responsible for a particular decision. For example who decided, within a company of 1,000 employees, not to invest in a water treatment plant. In some cases the courts held that no individual could be identified, since the crime was in fact the result of a collective decision of a board of managers or trustees. As a result, a number of rather spectacular environmental cases where, clear and almost undisputed violations of the regulations had occurred nevertheless ended in acquittals by the Antwerp Court of Appeals.4

In order to avoid these kinds of uncertainties, the public prosecution sometimes chose to prosecute almost everyone who had some competence within the firm, however remote. The effect was that in some major environmental cases, ten or more corporate directors or other agents of the firm were prosecuted, while the court was merely required to ascertain each individual's actual contribution to the crime. This is highly unsatisfactory from a rule of law perspective. Thus, despite the fact that their contribution to the crime may have been minimal, individual defendants were faced with recurrent court appearances and unwanted newspaper publicity. In addition, the outcome was often highly uncertain, since courts tended to accept the idea that everyone with a certain capacity within the corporation was criminally responsible5 and hence could be convicted. The lack of any formal cor-


4 As an example see the well-known AMOCO-FINA case (Court of Appeals of Antwerp, 26 March 1993, Tijdschrift voor Milieurecht 1993, 239) and the Petrochim case (Court of Appeals of Antwerp, 24 April 1992, Tijdschrift voor Milieurecht 1992, 17-27).

5 Although this was contrary to the criteria developed by the Cour de Cassation, since the Court had decided that it should be examined how the defendant contributed to the criminal behaviour of the corporation (Cour de Cassation, 9 October 1984, Parlerain Belge 1985, 1, 194 and Arresten van het Hof van Cassatie, 1984-85, 225) there could, hence, not be an "automatic" imputation, merely because someone had a certain capacity within the firm.
porate liability scheme in Belgium also placed managers at risk. This is still the current regime in Belgian law today.

2. Legal Doctrine

The main proposals to introduce criminal responsibility of legal persons were not advanced by the corporate world even if it could arguably have been in its interest to do so, but on the basis of legal doctrine as well as by the public prosecution. A major role has been played in this respect by scholars such as Jules D'Haeens,6 who argued in favour of corporate criminality. These views have been followed by younger Belgian scholars, whose ideas were influenced by the Dutch experience. In this respect, we should refer to the doctoral dissertation of Filip Deruyck.7

3. Various Proposals

These views did indeed lead to a variety of proposals, including some suggested amendments to the Belgian penal code.8 One such proposal put forward in 1976 by a commission on which Jules D'Haeens had exerted much influence, suggested the introduction of the criminal liability of corporations.9 Yet, a subsequent position, Avant-propos du Code Pénal, proposed ten years later by Robert Legros, firmly rejected the same concept.10 Legros relied on the traditional argument according to which assigning a criminal responsibility to corporations violates long-held views that the criminal law should be based on guilt. He also argued that criminal liability was unnecessary.11 Nothing came out of Legros' proposal for a

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7  Filip Deruyck, De rechtspersoon in het strafrecht, Gent 1996. Pleas in this respect have also been formulated by Faure (note 2), 115-116 and by Michael Faure/David Koef, Naar een wettelijke formulering van de strafrechtelijke aansprakelijkheid van de rechtspersoon, Rechtshandig Weekblad 1995-96, 417-432.
8  Unfortunately, not all of them can be mentioned within the scope of this report.
9  See Commissie voor de Herziening van het Strafwetboek, Verslag over de voornaamste grondslagen voor de hervorming, Brussels, Ministry of Justice, juni 1979, and for a discussion of this proposal Francis Van Remortere, La question de la responsabilité pénales des personnes morales en droit de l'environnement, Revue de Droit Pénal 1991, 314-315. For details concerning this proposal, see also Faure/Koef (note 7), 418.
11  These proposals are also discussed by Faure/Koef (note 7), 418-419.
penal code, but his firm position against introducing criminal responsibility for legal entities did little to advance the debate on this issue.

The first proposal to introduce corporate liability was formulated by the Inter-University Commission for the Reform of Environmental Law in Belgium. Art. 7.3.19 provided for environmental crimes which have been committed within a corporation. Although limited to the environmental field, this proposal contained the first formula to determine the responsibility of legal entities, including specific criminal sanctions for companies.

At the federal level, the first proposal to introduce corporate criminal liability was introduced on November 29th 1994, but it contained many shortcomings. While introducing the principle of criminal liability of the corporation, it was limited to crimes committed by so-called "organs" of the corporation.


Recently, a formal proposal was put forward by the Department of Justice with the aid of a small group of scholars, and was endorsed by the Federal Council of Ministers on July 25th 1997. This draft provides that every legal entity will be criminally responsible for the crimes which have been committed in pursuance of the goals, interests and financial gain of the corporation. Based on these criteria, corporate liability precludes personal liability, except in case of a personal and

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13 Art. 7.3.19 § 3 provides:

"An indiciатель offence shall be deemed to have been committed by a legal person where the offence was committed in order to achieve its purpose or of furthering its interests, and

1) the indiciatable offence was committed by someone representing the legal person, or

2) the indiciatable offence was ordered, led or authorised by someone who has a leading function in the legal person." See Bocken/Ryckboon (note 12), 94.

14 Some of which are discussed in Faure/Reef (note 7), 417-432.

15 Their influence on the actual contents of the proposal has been minimal.

16 For further details, see Fiep Dermijck, Naar een strafrechtelijke aansprakelijkheid van de rechtpersoon in België, in: Michael Faure/Kid Schwarz (eds.), De civielrechtelijke en strafrechtelijke aansprakelijkheid van de rechtpersoon en zijn bestuurders, Antwerp 1998 (forbromming).

17 "Toute personne morale est pénalement responsable des infractions commises en vue de la réalisation de son objet, de promouvoir son intérêt ou pour son compte."
intentional fault of the natural person. The proposal also provides for a number of new sanctions which could specifically be applied to legal entities. Further, it explicitly excludes federal, regional, provincial and municipal governmental bodies, hence most of the public legal entities.

5. Critical Remarks

Compared to the previous draft proposal of 1994, the present formulation expands upon the kind of crimes which can be imputed to the corporation. Like the French model, the 1994 draft only imputed to corporations those crimes which would have been committed by the managers or representatives of the company. This formulation had been criticized because it only allowed corporations to be held liable vicariously through its representatives. The new scheme recognizes that the corporation itself is capable of committing the crime. As such, the criteria which are now proposed to impute blame to a corporation (serving its end, being in its interest or acting on its account) could be discussed as well, but seem largely to correspond with the proposals made in the literature.

There are, however, two major points of criticism. One is that the proposal apparently does not accept cumulative criminal responsibility of legal entities and natural persons. This would only be possible in cases of personal wilful misconduct (faute personelle commise a clemment et volontairement). This seems strange, since the concept of personal wilful misconduct is as such not found in the criteria for subjective criminal liability under Belgian criminal law. In addition, one fears that such personal wilful misconduct will be very hard to prove. As a result, a situation may arise in which only the legal entity can be prosecuted, thus excluding the liability of individuals in such areas as negligent behaviour. To my under-

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18 "Lorsque la responsabilité de la personne morale est engagée à raison de l'intervention d'une personne physique identifiée, la personne physique et la personne morale ne pourront être condamnées pour les mêmes faits, sauf ce cas de faute personelle commise a clemment et volontairement par la personne physique."

19 "Ne sont pas considérées comme des personnes morales pour les besoins de cette loi: l'état fédéral, les régions, les communautés, les provinces, l'agglomération bruxelloise, les communes, la commission communautaire française, la commission communautaire flamande, la commission communautaire flamande et les centres publics d'aide sociale."

20 See art. 121-2 Nouveau Code Pénal, which provides:

"Les personnes morales, à l'exclusion de l'État, sont responsables pénalement, selon les distinctions des articles 121-4a, 121-7 et dans les cas prévus par la loi ou le règlement, des infractions commises pour leur compte, par leur organes ou représentants."

21 See for instance Fauré/Roey (note 7), 423.
standing, this would seriously limit the reach of the criminal law in cases when crimes have been committed in the corporation. Presumably, this was the price to be paid for the endorsement of the Belgian business world. Its support for the proposal to obtain the criminal liability of legal entities was conditioned on creating a guarantee of immunity for managers, with the exception of illegal acts personally and wilfully committed.

Another criticism concerns a proposed immunity clause for most of the public legal entities. This has been heavily criticized in the literature, notably by David Roef. Roef has advanced several powerful arguments for the inclusion of public legal entities under the corporate criminal regime. He argued that some of the dangers of criminal prosecution (for instance, the endangerment of the continuity of public service) can instead be remedied by accepting specific grounds of excuse or justification for public legal entities rather than criminal immunity. One advantage of holding public corporations criminally liable is that, even if their behaviour is deemed to be justified or excused, they will still have to defend their actions in a public criminal trial.

6. Epilogue

In short, the proposed scheme is undoubtedly useful and important. For more than 30 years, legal doctrine has advocated the criminal liability of the corporation. At last there is now a serious proposal by the Belgian Federal Department of Justice to introduce such a solution. Belgium finally seems to be following the international trend towards criminal liability of corporate entities.

The fact that it has taken so long to introduce criminal liability for the corporation in Belgium can undoubtedly be attributed to heavy lobbying by the business world, although the current system may not really be in its best interest. As far as the current proposal is concerned, it too appears to have been influenced by corpo-

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rate lobbying. According to that proposal, corporations would only be held criminally liable if the individuals involved get "off the hook". That was apparently the price to be paid to obtain the support of the business world.

Since 1996, some serious discussion concerning the necessity to introduce the concept of the criminal liability of corporations into Belgian criminal law has taken place at the level of the Ministry of Justice. However, since 1997 the country has been unfortunately side-tracked by the criminal activities of Mr. Marc Dutroux, who apparently monopolized the attention of the legal community. This, combined with the fact that Stefan Declerk, the only Minister of Justice who had dared to introduce a proposal to make corporations criminally liable, had to step down from office in the Spring of 1998 because of the escape of Dutroux, should not lead to optimism. The criminal liability of legal entities is an issue which is unlikely to receive high political priority in Belgium in the coming months, and as a consequence, any such proposal may be shelved for a while.

After the final version of the text had been handed in to the publisher, the draft of the statute to introduce the criminal responsibility of legal entities in Belgian law was - rather unexpectedly - excepted by the Belgian parliament and turned into a formal statute to introduce this criminal responsibility of legal entities on 4 May 1999. The statute was published in the Moniteur Belge on 22 June 1999. The main principles remain largely the same as explained above: the legal entity is considered criminally liable for crimes which are connected to the purpose of the legal entity or which have been committed in its interest or for its account. The criminal liability of the legal entity in principle excludes the liability of the individual person, unless the latter knowingly committed a fault.

In sum: after many years of debate in legal doctrine, the Belgian legislator apparently chose to introduce the criminal liability of the legal entity through the Act of 4 May 1999. The main principles have been incorporated into the Belgian penal code. Many practical aspects remain, however, unclear and will have to be resolved through case law. This considers, for instance, the important point of the possibility of a cumulation of the criminal responsibility of the legal person with the liability of individuals."
References


- De strafrechtelijke aansprakelijkheid van publiekrechtelijke rechtspersonen voor milieuvverontreiniging. Tijdschrift voor Milieurecht 1997, 87-103.