

# Are There Any Suitable Sanctions for New Forms of Corporate Offences?

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**Abstract** It is a fact that a corporation lacks mental and moral capacity to engage in wrongful conduct or to suffer punishment but on the other hand, corporations have legal capacity in the majority of areas of law. It is acknowledged today that apart from their legal, financial and administrative liabilities, corporations can also bear liability in terms of criminal law. A corporation facing criminal liability does not mean that corporations can be punished like natural persons. It is possible to subject a corporation to criminal sanctions which are suitable for the nature of the corporations. The aim of this contribution is to discuss the responsibility of corporations and suitable sanctions for corporal crimes.

## 1 Introduction

Corporate criminal liability is one of the most debated topics of criminal law. There has been an ongoing debate among jurists who argue that corporations can bear criminal liability as well as individuals and those who do not find this right.<sup>1</sup> According to those who support possibility of holding corporations liable within the scope of criminal law, criminal sanctions against corporations are in compliance with the nature and aims of criminal law. For those who argue that corporations cannot have criminal liability, deterrence, prevention, reproach and rehabilitation—which are traditional aims of substantive criminal law—can only be possible for natural persons.

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<sup>1</sup> See Brickey (1982), pp. 393ff. See also Diskant (2008), pp. 134ff.

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Alterations in socio-economic life, social relations and law cause amendments in criminal law and criminal sanctions. The fact that corporations are more influential and determinative in economic and social life rather than humans and the fact that there are legal persons which exist for longer periods of time than natural persons enabled the idea that corporations can and should also be subject to criminal sanctions. Extensive environmental catastrophes, worker deaths, bribery and tender frauds caused by activities of corporations strengthened the idea that they should also be liable in terms of criminal law. The view that apart from their executives, the corporations themselves can be punished with some criminal sanctions which are suitable for their legal nature is not utopic anymore.

Corporations have emerged due to various necessities in legal and economic life. A natural result of this development has been the acknowledgement of some rights and liabilities of corporations. Today, there is no doubt as to the fact that corporations which are recognized as legal person by law, possess the capacity to have rights. As much as they are capable of acquiring rights and undertaking debts, corporations have legal capacity in the majority of areas of law, they own real property and goods and they have their own rights and obligations. However, corporations are not capable of acquiring some rights such as marriage and divorce, which are only peculiar to natural persons. Corporations' capacity to have rights and to act is confined to the purpose stated in their establishment status such as its by-laws, partnership contract and articles of foundation. This means that for a procedure conducted on a matter which is not mentioned in the status of a corporation, the corporation will be deemed incapable and this procedure will not bind the corporation. Organs of the corporation are the natural person or groups of people entitled to perform functions of the corporation in accordance with the law and its establishment status.

Corporations are divided into two main categories as "public law corporations" and "private law corporations" depending on the law they are subjected to and their functions.<sup>2</sup> Public corporations draw their existence and organization from state sovereignty. Public corporations operate in line with rules of public law and their liabilities are within the scope of state sovereignty and state responsibility. On the other hand, private law corporations are those that are established in accordance with rules of private law and those that do not represent public authority. Depending on the aims they pursue, private law corporations are divided into two main groups as commercial corporations and non-commercial corporations. Commercial corporations aim to share gains and generate monetary profit while non-commercial corporations do not. Especially holding-companies and joint venture companies carry out extensive economic activities. The intense competition among them sometimes cause illegal procedures to emerge in such fields as intellectual and industrial rights, brand and patent rights and business secrets.

It is seen that corporations are liable for private law, and sometimes also in terms of administrative and financial legislation. In this case, no doubt exists as to a

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<sup>2</sup>Quaid (1988), p. 75.

liability of the corporation to compensate the damage they created. For example, a company engaged in mining has to pay compensation due to worker deaths and to environmental damage resulting from the failure to take the necessary measures.<sup>3</sup>

## 2 Debates on Criminal Liability of Corporations

The principle of individual criminal responsibility was adopted with the French revolution.<sup>4</sup> The concept of this principle is that only the individual committing the crime may be punished therefore communities and corporations may not be punished. As a result of the increasing role corporations play in social and economic life, some started to argue in the twentieth century that for the purposes of controlling misconduct of corporations they can and should bear liability in terms of penal law apart from any compensation liability in terms of private law.<sup>5</sup> However pondering to introduce a criminal liability of corporations—besides their legal and financial liabilities—leads to debates due to concerns that it contradicts some fundamental principles of criminal law.<sup>6</sup> Those who argue that crime can only be committed by natural persons and that corporations cannot commit crime suggest that only individuals are capable of forming criminal ability such as *mens rea* and the will to act in *propria persona* which are required to crime.<sup>7</sup>

It is a fundamental rule of criminal law that a person committing a crime must act negligently or intentionally, i.e. that a psychological bond should exist between the act and the perpetrator. However, it is not possible for corporations to think and act like a human and therefore to act negligently or intentionally. According to those scholars who suggest that corporations cannot face criminal liability, innocent stakeholders who are not related to the crime will be affected by punishment of the corporation.<sup>8</sup> Although according to the “*reality theory*” of corporate personality, corporations have different personalities and a different will than the natural persons that form them.<sup>9</sup> According to this theory, corporations, which have the capacity to have rights and to act and which are liable for their illegal acts in terms of private law, can be perpetrators of a set of crimes that comply with their nature.

There are three different systems of how to determine for which crimes a corporation can be held liable for.<sup>10</sup> Under the general liability or plenary liability system adopted by England, Netherlands, Belgium, Canada, and Australia, the legal

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<sup>3</sup> See Brickey (1987), p. 616.

<sup>4</sup> See Stessens (1994), pp. 493f.

<sup>5</sup> See Weissmann (2007), pp. 1319ff. See also, Stessens (1994), p. 494.

<sup>6</sup> See Weigend (2008), pp. 927ff.

<sup>7</sup> Weigend (2008), pp. 936ff.

<sup>8</sup> Quaid (1988), pp. 82ff.

<sup>9</sup> See Stern (1987), p. 676.

<sup>10</sup> De Maglie (2005), p. 552.

persons' liability is similar to that of individuals; therefore corporations are considered capable of committing any crime. The second system, implemented in France, requires that the legislator should mention for each crime whether corporate criminal liability is possible.<sup>11</sup> The third system consists of listing all crimes for which collective entities can be held liable. This system which is reflected in American law is much more logical because it is not possible to hold corporations responsible for any crime.<sup>12</sup> A part of the crimes contained in criminal codes can only be committed by natural persons. It is also not possible for crimes of such nature to be committed within the scope of the activities of a corporation or to the benefits of a corporation.<sup>13</sup> Crimes such as rape, homicide, injury, perjury and looting are of such nature. On the other hand, such crimes as those against the environment, human trafficking, bribery and fraud can be committed within the scope of activities of a corporation.<sup>14</sup> Some of the crimes that can be committed in favour of a corporation are white collar crimes while some others are new types of crimes such as money laundry, stock exchange speculation and market manipulation, fraudulent bankruptcy, drug trafficking, financing of terrorism, and environmental crimes.

### 3 Suitable Sanctions for the Legal Nature of Corporations

The problem of what kind of sanctions could be applied to corporations for a crime has constituted the basis of rejecting criminal liability of corporations; additionally it has caused many legal debates.<sup>15</sup> The fact that crime and punishment are built on human character lies underneath the opinion held by some that corporations cannot be punished at all. For example, it was argued that in the event that a fine is imposed on a corporation, all innocent partners are affected by it, in violation of the principle of individuality of punishments. On the other hand, when a person is punished, the punishment can also create social effects on other people even if it is directly oriented at the perpetrator of the crime. When a father, who provides for his family and is a successful surgeon, is convicted of homicide, he will not be able to provide for his family any longer; his children will be away from him for a long time and perhaps treatment of the surgeon's patients will be prolonged for this reason. His punishment is not annulled because of its economic and social effects on innocent children or because his patients' treatment will be delayed. The criminal law policy determines the punishment by taking into consideration its direct effects on the

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<sup>11</sup> See Deekert (2011), pp. 147ff.

<sup>12</sup> See Nanda (2011), pp. 63ff.

<sup>13</sup> See Harlow (2011), pp. 123ff.

<sup>14</sup> De Maglie (2005), p. 547.

<sup>15</sup> See Jefferson (2001), pp. 235ff. See also, de Maglie (2005), p. 553.

perpetrator and does not drop the punishment because of its indirect effects on people other than the perpetrator.

In the event that a crime is committed in favour of a corporation or within the scope of activities of a corporation, sanctions suitable to the nature of a corporation should also be considered.<sup>16</sup> The sanctions that can be imposed in these cases have a different nature than traditional punishments. In the event that a crime is committed to the benefit of a corporation, the most important sanction to be imposed on the corporation is a fine.<sup>17</sup> Fines are the only common sanction that can be applied to people and corporations. In addition to this, there are also sanctions which can be applied as security measures on corporations. However, application conditions of each of these sanctions and the problems they can create are different from each other.

## 4 Punishments for Assets of Corporations

### 4.1 *Fines*

Punishments such as capital punishment and banishment are not contained in modern criminal law. The most fundamental punishments are imprisonment and fines; these are directed at freedom and asset values of individuals. Implementation of imprisonment on a corporation is impossible. While imprisonment, which deprives them of freedom, is the most important punishment for people, fines are the most effective punishment that can be imposed on a corporation.<sup>18</sup> In legal systems that embrace a criminal liability of corporations, fines are the punishment which is applied most commonly to corporations. As the pecuniary sanction has the advantages of directly affecting the corporation but as it will also affect the reputation of the corporation in the society, the corporation will be encouraged to behave more respectfully towards the laws. Fines can be imposed on many corporations, but it will have its best impact on commercial companies. This sanction can be executed in a short time with minimum costs.

There are various applications in determining the amount of the fine. While the maximum amount that can be imposed on corporations is specified by laws in some countries, this authority is granted to courts in some others. It could be right to leave the designation of the amount to the court handling the case. However, a very high

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<sup>16</sup> Stessens (1994), p. 493.

<sup>17</sup> If a crime is committed in favour of a corporation, the sanctions to be imposed on the corporation will be determined by the criminal court. However, as is the case in Germany, administrative authorities can also decide on imposing sanctions on corporations in case of activities that are in violation of administrative penal law. See Weigend (2008), pp. 930ff. See also Diskant (2008), p. 142.

<sup>18</sup> Drew and Kyle (2005), p. 293. See also Gobert (1998), p. 3.

fine can lead to economical hardships or perhaps bankruptcy on the side of the corporation, on the other hand, a very low fine may not have any effect.<sup>19</sup> When implementing fines as a sanction for corporate crimes, care should be taken that corporations should not make customers to pay for the fine, and should not use the fine paid as a reason for tax reduction.

## **4.2 Confiscation**

Whether confiscation of the fruits of a crime is a punishment or a security measure has been debated among jurists. However, despite this debate, one of the most effective sanctions that can be imposed on corporations is confiscation. The purpose of imposing this sanction is passing the ownership of a property and profit gained in the crime to the public.

Confiscation also aims to take over ownership of harmful or hazardous property kept without permission or obtained by crime. For example, unpermitted explosives and drugs owned by corporations can be confiscated. On the other hand, a ship owned by a corporation and used in migrant smuggling and human trafficking activities can be confiscated as it is a property used in crime. Therefore, deprivation of the proceeds of the crime is imposed by different systems as a punishment or as a security measure.

## **5 Punishments for Activities of Corporations**

### **5.1 Suspension or Retraction of Licenses**

This sanction consist in restraining the corporation from the performance of some activities, by denial, suspension or retraction of licenses, by loss of rights like tax breaks, by prohibition of advertising or selling on specific markets, etc.<sup>20</sup> When the activities of a corporation are restrained, the entity is forbidden to carry out such kinds of activities despite maintaining its legal existence. In this case, the prohibited operations can both be any of its commercial operations or its operations directly related to a crime. For example, according to French Penal Law, operations that are related to crime can be prohibited. The operations prohibited can be old activities related to the crime or they can be future oriented (new ones that may not be undertaken). Prohibition to operate can be temporary or permanent. For example the operation permission of a mining company that caused large damage to the

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<sup>19</sup> Drew and Kyle (2005), p. 295. See also Gobert (1998), p. 6.

<sup>20</sup> Gobert (1998), pp. 10f.

environment can be ceased or cancelled. Instead of imposing fine, ceasing broadcasts of a media company that incites violence by spreading hatred, racism and ethnic discrimination would be more logical and effective. Moreover prohibition to operate is directed at corporations; in contrast the prohibition cannot be applied to the managers, stakeholders or to the members of the corporation. If these people have not been convicted of their personal offenses, they can establish a different corporation engaged in the same activity.

## ***5.2 Suspension of Corporate Activities***

When the corporation is suspended, the corporation maintains its legal existence but one or more facilities that belong to the corporation will be suspended. The purpose of this sanction is to end crime-related operations of a corporation that operate in more than one field. However, this sanction can only be justified for serious violations of labor or environmental laws or for international crimes. For example, if a corporation which operates in the fields of trade, tourism and shipment carries out migrant smuggling in disguise of tourism and finances some terrorist groups, it is possible to suspend its hotels or facilities that organize boat trips. This sanction could be permanent or continuous. If the corporation is suspended, its managers and members can continue to work within the body of another corporation that carries out these activities, if they have not been convicted of personal offenses.

## ***5.3 Operation Under Judicial Supervision***

This sanction, which is contained in French Penal Law, aims to ensure that operations of a corporation continue under the supervision of a third person or body which is a guardian for a certain period of time. Term of office and authorities of this guardian should be specified by the court presiding over the criminal procedures and renderings a verdict on the crime. The wage of the guardian should be paid by the corporation. By its nature, this sanction can only be imposed on profit-oriented corporations that carry out commercial activities. This sanction cannot be imposed on public law corporations, unions or political parties.

## ***5.4 Exclusion from Public Contracts***

In this type of sanction, corporations are kept outside of public contracts. In this way, they are prevented from providing goods and services to the public or carrying out public works for a certain period of time. Being banned from public contracts will lead to the inability to sign contracts with local administrations, other public bodies, and the state. While one of the purposes of this sanction is to punish the

corporation, the other purpose is to restore reputation of public works and public contracts that provide public service.

## **6 Punishments Directed at the Existence of the Corporation**

Dissolution is considered as capital punishment for corporations. In case of dissolution, the legal existence of the corporation will be terminated. The sanction of dissolution should be applied only when the corporation committed very serious crimes, or when the corporation was created for illegal purposes.<sup>21</sup> As it is the heaviest penalty, there are two important conditions in rendering a verdict of termination: The first condition is that operations of the corporation should be directed at committing the crime. The second condition is that operations of the corporation should deviate from purpose of establishment. The most significant result of termination punishment is that directors, partners and employees of the corporation terminated lose their functions. On the other hand, termination of a corporation which has large amounts of turnover will obviously lead to both economic consequences and tax loss. However, as this sanction is also directed at the corporation, directors and partners not convicted of a personal offense can continue to work by establishing another corporation.

## **7 Punishments Directed at the Reputation of the Corporation**

Publication of the sentence may also be an effective sanction for corporate criminal activities.<sup>22</sup> In this type of sanction, the conviction imposed on the corporation is spread to the public through the media. The declaration and broadcast can include all or a part of the verdict. Declaration and broadcast expenditure will be borne by the corporation. This sanction only has a complementary function and thus is supplemental to the other sanctions described above.

## **8 Conclusion**

Although there are different theoretical approaches about the legal nature of corporations, they are considered as a legal union today. It is acknowledged today that apart from their legal, financial and administrative liabilities, corporations can

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<sup>21</sup> Gobert (1998), p. 11.

<sup>22</sup> Gobert (1998), p. 9.



also bear liability in terms of criminal law. International conventions also acknowledge that corporations can have liabilities primarily directed at the prevention of terrorism, money laundry and corruption. Undoubtedly, corporations facing criminal liability does not mean that corporations can be punished like natural persons and are affected by punishment like people. For example, a corporation which has rights and liabilities cannot get married and divorced like an individual, but can only invest and engage in purchasing, sale and trade like a person. A corporation cannot claim the right to education, but it can claim the right to work and to set up businesses like a person. For this reason, a corporation cannot be punished like any individual. Instead, criminal sanctions that are suitable for the nature of corporations must be in question. Primary among these are fines, limitations of operations or even the termination of the corporation. However, implementation conditions, advantages and disadvantages of each punishment are different.

Although systems that recognize administrative liability of corporations instead of criminal liabilities are wide-spread, systems that acknowledge corporate criminal liability are also available. However, legal, administrative and financial sanctions demonstrate many common features with sanctions of criminal law. In terms of a general theory of law, a fundamental feature of sanction is to force—or at least to encourage—someone who has behaved against the law to obey the law. Then it is possible to subject a corporation to criminal sanctions which are suitable for the nature of the corporations. Opinions that corporations cannot have criminal liabilities are based on penal law dogma, while the opposite views are based on pragmatism. In this case, criminal liability of corporations can be solved by harmonizing dogmatism with pragmatism. This can be possible if corporations are held liable for some crimes that are suitable for their legal nature. It is therefore advantageous if the crimes for which corporations can be liable are listed clearly in the law.

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