

Liability of legal persons for offences in the EU

Liability of legal persons for offences in the EU

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Executive summary

Background to the Study

Discussions on the possibility to attribute liability to legal persons for committing offences are far from new. The Romans already had a clear position on this and were opposed to the idea that a *persona* could be anything else than a natural person. Even though this default position evolved and despite the consequent lenience towards accepting forms of liability (including criminal liability) of legal persons, the classical idea that legal persons could not be criminally punished prevailed. This resulted in the adagium *societas non delinquere potest, nec puniri*.

Even though during the Middle Ages the concept remained somewhat controversial, the balance shifted in favour of accepting criminal liability of legal persons. However, this evolution was inhibited in the aftermath of the French Revolution. It was not until 1992 that the French Criminal Code officially reinstalled the criminal liability of legal persons. As to the former Soviet republics and Soviet satellite states, the State did not feel it necessary to install such criminal liability, considering that all undertakings were owned by the state and the autonomous powers of the managers was thus very limited. By contrast, the climate in the Anglo-Saxon countries provided incentives to recognize the legal persons' criminal liability.

As a result, in today's European Union, the landscape is scattered. Although there is a clear tendency in favour of corporate criminal liability, it is not generally accepted. Because of the remaining diversity, it is important to identify the main commonalities and differences in order to correctly reflect these differences in cross-national policy initiatives.

Liability of legal persons for offences is an issue which has been coming and going on the EU's political agenda, but has never been subject of a full-fledged EU policy. Nowadays the issue is again becoming more and more prominent, and in this context the European Commission published a tender for a Study (European Commission, 2010), which was awarded to IRCP (*Institute for International Research on Criminal Policy*) and is conducted by the authors of this contribution. Considerable differences exist in the approach with respect to the liability of legal persons for offences, which is partially due to the fact that there are still significant remaining outstanding issues in theoretical debate. Opponents of criminal liability of legal persons argue that the latter does not have its proper mind and is therefore unable to have a criminal intent (*societas delinquere non potest*). Proponents however, regard legal persons as more than mere legal fictions: given their existence and their predominant position in our society they must be liable for the offences they commit (European Commission, 2004).

The study conducted for the European Commission aimed at gathering factual information on the legal framework that governed the liability of legal persons for offences in each of the 27 member states. To that end, the team drew up a questionnaire comprising of questions targeting solely the existing national liability approach. Based on the results of a preliminary desk-top study, the team divided the questionnaire into two main parts, preceded by some introductory questions. The first part dealt with the criminal liability of legal persons for offences, whereas the second part dealt with the administrative liability of legal persons for offences. Those two parts reflect the large majority of liability approaches in the member states though it showed from the preliminary analysis that also civil liability mechanisms were put in place in some member states.

Diversity in the member states

Despite a tendency towards the introduction of criminal liability of legal persons for offences, significant differences still exist in the approach developed in the member states. Differences in competent authorities were identified, differences based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons. Firstly, with respect to the differences related to the competent authorities involved, the analysis presented an overview of the choice for criminal, administrative and/or civil liability of legal persons. The mapping exercise lead to the conclusion that 5 member states have not introduced a form of criminal liability in their national law and 8 member states have not introduced a form of administrative liability in their national law. This diversity is also relevant in relation to the other diversities regarding liability of legal persons in that the varieties based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons.

Secondly, with respect to the differences related to the type of persons involved, it must be noted that the concept of a legal person is sometimes used as an umbrella concept to include both natural and fictitious persons. For a proper analysis and comparison, it is important to clearly define a legal person as an entity (as opposed to a human being) recognized by the law as having legal personality, without excluding states and other public bodies and organizations from its scope. The latter nuance was added because the legal person concept is rarely limited to private legal persons. Nonetheless, awareness of the (rare) limitation is necessary, especially when examined in light of differences regarding criminal vs. administrative liability: in relation to criminal

liability of legal persons there tends to be more limits on liability of public legal persons than is the case for administrative liability of legal persons.

Thirdly, with respect to the differences in attribution mechanisms, three theoretical schools were used as a basis to map the attribution techniques introduced in the member states. A distinction can be made between:

- the *vicarious liability/respondeat superior* theory which opts for an almost civil law like attribution by stating that ‘any’ misconduct by the legal persons’ employees will lead to legal person responsibility;
- the *alter ego/identification model*. stating that only managers and employees endowed with certain responsibilities may cause criminal liability for the legal person;
- the *aggregation model* theory, aimed at identifying a collective responsibility of individuals within the legal person, rather than identifying an individual perpetrator, aggregation could therefore involve matching the conduct of one individual with the state of mind or culpability of another individual to achieve liability.

A fourth model, the organisational model/self-identity-doctrine was also included. It is based on the assumption that legal persons have a mechanism for expressing their substance and self-identity, and can thus be held liable for crimes, without necessarily having to be linked to the behaviour of individuals.

The identification model is the model used in the EU’s approximation instruments. Different elements of the several attribution models apply in many MS, but in relation to criminal liability, an overwhelming majority applies elements of both the vicarious liability and the identification model. Parallel prosecution of natural and legal persons is possible in a wide majority of the member states; whereas concurrent liability occurs in – on average – 55% of the member states.

Fourthly, with respect to the differences in offences which can give rise to liability of legal persons, analysis revealed that only few member states have introduced an *all* inclusive liability for legal persons. Most member states have opted for an enumeration strategy selecting either *families* of offences or *single* offences for which a legal person can be held liable.

Fifthly and finally, with respect to the differences in sanctions which can be imposed on legal persons, analysis revealed that the sanction arsenal is very diverse, though some member states have not included separate sanctions in their legal system and/or included a conversion mechanism to convert inoperable sanction types to a financial sanction.

Recommendations for a coherent and consistent policy with respect to the liability of legal persons for offences

With respect to approximation

Since the introduction in the Amsterdam Treaty of the possibility to approximate the constituent elements of offences and sanctions, a significant number of approximating framework decisions and, since the Lisbon Treaty, directives, has been adopted. Examples can be found in relation to fraud and counterfeiting of non-cash means of payment, the fight against terrorism, trafficking in human beings, the facilitation of unauthorized entry, transit and residence within the EU, corruption in the private sector, the sexual exploitation of children and child pornography, illicit drug trafficking, and attacks against information systems.

Recommendation 1 – Continue general approach

It is important to continue the general approach with respect to the introduction of provisions related to the liability of legal persons for offences included in approximation instruments. Considering the existence of structures such as accessories or instigators it should be kept as a baseline that legal persons can be involved in any type of offence.

Recommendation 2 – Complement non-EU instruments where necessary

Though it is a good practice to take account of existing approximation efforts in non-EU instruments and refer to those instruments for the definition of the constituent elements of offences, it is important to thoroughly assess to what extent it is necessary to complement the provisions with respect to the liability of legal persons included in the concerned non-EU instrument.

Recommendation 3 – Avoid terminology with ‘criminal law’ connotation

Especially because the EU has continuously accepted the diversity in the member states and has decided not to introduce the obligation to introduce a criminal liability for legal persons, the use of the term *sanctions* should have preferences over *penalty* which has a criminal law connotation.

Recommendation 4 – Reconsider the scope of a ‘legal person’

In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of member states include one or more types of public legal persons within the scope of their national liability approach, the EU can consider extending its scope accordingly. It is advised to delete the current limitation regarding the

scope of legal persons, usually phrased as “ [...] *States or other public bodies in the exercise of State authority and [...] public international organizations*”.

Recommendation 5 – Consider the introduction of ‘strict liability’

The introduction of a system of strict liability as is done in some member states can significantly reduce the burden of proof when prosecuting those offences. The introduction of this type of liability in the EU instrumentarium would entail that it is no longer necessary to prove the commitment of an offence by a specific natural person with the legal person.

Recommendation 6 – Rephrase the currently suggested sanctions

Some of the sanctions currently included in the list of suggestions can be better phrased. The recommendation can be made to rephrase the suggested ‘exclusion from entitlement to public benefits or aid’ in a way to clearly encompass the exclusion from participation in a public tender procedure in its scope, especially since that suggestion is included in some other EU instruments.

Recommendation 7 – Develop a standard set of suggested sanctions

Though the suggested sanctions are to a large extent consistently included in all approximation instruments, there seems to be no tangible explanation why some are not included in a small number of approximation instruments. It is therefore recommended to develop a clear and transparent standard set of suggested sanctions for legal persons.

Recommendation 8 – Complement standard set with additional sanctions

Besides the standard set of suggested sanctions, additional (suggested) sanctions can be included reflecting the specificity of the offence.

Recommendation 9 – Look into need for specific ‘legal person’-offences

Based on the current formulation of the constituent elements of the offences, it is not always clear whether specific situations fall within its scope. Especially subcontracting constructions raise a lot of questions. It should therefore be looked into whether or not it is desirable to criminalise the situations linked to e.g. subcontracting and subsequently look into the necessity to either rephrase the constituent elements of the current offences or to develop a new set of specific ‘legal person’-offences.

Recommendation 10 – Increase follow-up of the implementation process

Analysis has revealed that the implementation of the current set of approximation instruments is far from flawless. The implementation process in the member states should be followed more closely. In the event the current instruments need to be amended, the opportunity should be seized to introduce

directives the poor implementation of which can give rise to the start of an infringement procedure.

With respect to mutual recognition

Mutual recognition of judicial decisions and judgements would facilitate co-operation between authorities and the judicial protection of individual rights. At the Tampere summit, the European Council therefore endorsed the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. In order to implement the principle, a programme of measures was adopted in January 2001. Because mutual recognition is now enshrined in the Lisbon Treaty as a basic principle for judicial cooperation in criminal matters, a consistent interpretation and application becomes all the more important. The programme of measures remains an interesting guideline, but more gaps can be identified and should be filled to ensure a consistent European criminal policy with respect to the application of the principle of mutual recognition.

Recommendation 11 – Extend mutual recognition instrumentarium

The current instrumentarium regulating the mutual recognition of sentences and governing their cross-border execution is largely focused on the sanctions typically imposed against natural persons. A comprehensive and consistent policy with respect to the liability of legal persons would need to contain instruments regulating the mutual recognition of the sanctions typically imposed against legal persons.

Recommendation 12 – Develop general approach with respect to refusal grounds related to the differences

In the current instrumentarium, nor the differences in administrative vs. criminal liability, nor the differences based on the type of involved legal persons, nor the variety in attribution mechanisms, nor the differences in offences leading to liability of legal persons, nor the sanctions which can be imposed are considered as eligible grounds to refuse execution of judicial decisions imposing a financial penalty or confiscation measure upon a legal person. The question arises whether that will become a general approach when extending the mutual recognition instrumentarium to encompass also cross-border execution of other sanctions.

With respect to the information exchange policy

If the EU wants to ensure that convictions handed down against legal persons with respect to the offences it has identified in the approximation instruments have effect, it is important to ensure that such information effectively flows from one member state to another. Within the EU, taking account of prior convictions is an inherent part of the fight against crime. First, there is the taking account of previous convictions in the course of a new criminal proceeding which is regulated by a framework decision that introduces an obligation thereto. Second, there is the policy option to introduce the taking account of prior convictions in the context of disqualifications in the sense that convictions for certain offences must on the one hand automatically lead to disqualifications and on the other hand be allowed to be used as a basis for disqualifications. The existing obligations and the future policy options warrant a critical assessment of the EU's data exchange policy.

Recommendation 13 – Introduce the obligation to keep records

Analysis has revealed that not all member states keep (complete and comprehensive) records in relation to the liability of legal persons for offence. With a view to extending the information exchange with respect to the liability of legal persons for offences in the EU, the first step would be to introduce an obligation to keep records in order to be able to provide information upon request.

Recommendation 14 – Introduce exchange and storage obligations

Analogous to the exchange and storage obligations that have been introduced with respect to the criminal records of natural persons, similar exchange and storage obligations should be introduced with respect to the liability (criminal or other) of legal persons for offences. It would significantly facilitate the taking account of prior convictions in the course of criminal or non-criminal procedures.

With respect to the procedural safeguards policy

For many years, the European Union, did not have any explicit jurisdiction as far as the human rights aspects of criminal proceedings were concerned. In December 2000, the European Commission, the Council and the Parliament jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union which covers the whole range of civil, political, economic and social rights of European citizens, by synthesizing the constitutional traditions and international obligations common to the member states, divided into six sections: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and

Justice. Having increasingly gained importance the procedural safeguards policy has worked its way up to the top of the political agenda where the completion of the Road map on procedural safeguards can be found.

Recommendation 15 – Ensure equivalent protection outside criminal liability context

Especially because the EU has continuously accepted the EU-wide diversity regarding the criminal vs. administrative liability of legal persons in the member states and has decided not to introduce the obligation to introduce a criminal liability for legal persons, it is important to complement that policy choice with a policy that ensures a procedural protection in relation to offences administrative and civil liability for offences that is equivalent to the procedural protection foreseen in the context of a criminal liability mechanism.

Recommendation 16 – Ensure equivalent protection for natural and legal persons

The development of the policy line to enhance the level of protection provided by procedural safeguards in the EU, is mainly focused on the procedural safeguards natural persons need. It is important to look into the specificity of the situation in which a legal person finds itself and ensure equivalent protection for natural and legal persons.

Abbreviations

| | |
|----------------------|---|
| AT | Austria |
| BE | Belgium |
| BU | Bulgaria |
| CoE | Council of Europe |
| COM | European Commission |
| CY | Cyprus |
| CZ | Czech Republic |
| DE | Germany |
| DK | Denmark |
| ECHR | European Convention on Human Rights |
| ECJ | European Court of Justice |
| ECMA | European Convention on Mutual Assistance |
| ECRIS | European Criminal Records Information System |
| ECtHR | European Court of Human Rights |
| EE | Estonia |
| EL | Greece |
| ES | Spain |
| EU | European Union |
| FD Confiscation | Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders |
| FD Crim Rec | Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States |
| FD Fin Pen | Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties |
| FD Prior Convictions | Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings |
| FD | Framework Decision |
| FI | Finland |
| FR | France |
| HU | Hungary |
| IE | Ireland |
| IRCP | Institute for International Research on Criminal Policy |
| IT | Italy |
| JHA | Justice and Home Affairs |

ABBREVIATIONS

| | |
|----------------|---|
| LP | Legal person |
| LT | Lithuania |
| LU | Luxembourg |
| LV | Latvia |
| MPC | Model Penal Code |
| MT | Malta |
| NL | The Netherlands |
| NP | Natural person |
| PIF Convention | Convention on the protection of the European Communities' financial interests |
| PL | Poland |
| PT | Portugal |
| RO | Romania |
| SE | Sweden |
| SK | Slovakia |
| SNCB | Société Nationale des Chemins de fer Belges |
| SPOC | Single Point of Contact |
| SV | Slovenia |
| UK | United Kingdom |
| WP | Work Package |

1 Introduction

Liability of legal persons for offences is an issue which has been coming and going on the EU's political agenda, but which has so far not yet been the object of a clear and full-fledged EU policy. In the context of recent increasing importance of the subject – evidenced for example by the recent introduction of criminal liability of legal persons in some member states, the European Commission published the tender for this Study,¹ and awarded the contract to the IRCP (*Institute for International Research on Criminal Policy*). The main purpose of this Study is to, for the entirety of the European Union, map the variety between the member states in relation to both the very concept of liability of legal persons for offences, and its different manifestations. In addition thereto, the project team has formulated a set of recommendations providing their academic opinion on the implications those differences (should) have on EU policy making.

Considerable differences exist regarding the very concept of a legal person on the one hand, and the concept of liability of legal persons for offences on the other. The introductory chapter contains a brief theoretical introduction of the main elements of the Study, as well as the methodological working method. The structure of this report is built starting from the realisation that when analysing the impact of the national diversity in attributing liability to legal persons, two separate yet undeniably linked interests are involved.

First, from a member state perspective, concerns can be raised regarding the level of legal certainty in relation to the liability of legal persons throughout the Union. In its determination to contribute to increasing legal certainty in this field, the project team thoroughly analysed the variety on five different levels, namely differences in competent authorities, differences based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons. Given the existing variety criminal justice, administrative and civil liability, the reality in the member states is consistently analysed from particularly the first two perspectives. While doing so, care was taken to carefully preserve the scope of the Study: given that it concerns an analysis of the liability for *offences*, administrative liability regimes are only relevant in as far as they have any ties with offences touching upon the criminal justice sphere.

Second, from an EU perspective it is important that the diversity is accepted only to the extent that it would not undermine the effectiveness of other policies,

¹ EUROPEAN COMMISSION (2010), DG Justice, Invitation to tender, JLS/2010/JPEN/PR/0009/E4, "Study on the liability of legal persons for offences in the national legal systems of the Member States".

especially given the increase in cross-border corporate crime, which has been facilitated amongst others by the removal of internal borders. The existing policies will be scanned in order to evaluate whether the identified diversity in liability of legal persons is adequately reflected: not only does Chapter 3 scrutinize the EU's own policy making relevant to the liability of legal persons, Chapter 4 contains an analysis of the member states' experience and the EU instruments in relation to cross-border cooperation in criminal matters which are relevant to liability of legal persons.

1.1 Concept of a legal person

For the purposes of law the conception of "person" is a legal conception. In other words, the definition of what is a person is determined by what the law considers a person to be. As DEWEY suggests, given that the law determines what constitutes a person, a person might be used simply as a synonym for a right-and-duty-bearing unit.² However, of course, obvious differences exist between what is known to be natural persons and the 'rest-category', which would then be called legal persons. Despite having been subject to debate in the past,³ currently, a natural person is any person which can be deemed human, that is to say a human being.

The above notion of a natural person is not free from critique, because such terminology entails the risk of being interpreted in a way that only nature and not law confers the quality of a person. Therefore, it is sometimes suggested (and in some countries this is indeed the practice) to use the term 'legal person' as an umbrella term, to then distinguish two different sets of persons within that group, being natural persons vs. legal entities. Consequently, the wordings 'legal person' (or their literal translation) could be interpreted to mean any 'person' which is recognized by law, meaning what is called legal persons in this Study *plus* natural persons. The project team dismisses this reasoning due to its inherent risk of confusion on the one hand and – more importantly – due to inconsistency with the existing European legislative framework. Indeed, when European (be it Council of Europe or EU) laws and regulations refer to what in this latter approach is called "a legal entity" the terminology "legal person" is used. Therefore, this Study examines "legal persons" in the sense of an entity recognized as such by law and thus represents a 'subgroup' of the broad meaning given to a legal person in some member states (and outside the Union). It is advised to raise awareness of the different meanings in the member states

² J. DEWEY, "The historic background of corporate legal personality", *Yale law Journal*, April 1926, 655-673.

³ AUSTIN, J., CAMPBELL, R., AUSTIN, S. (eds.), *Lectures on jurisprudence, or, The philosophy of positive law*, 1911, London, J. Murray.

(all the more so considering the language differences) and to make a clear distinction between the national terminology and the terminology as used in cross-border context. It be noted that not only variations of “legal person” as opposed to “legal entity” occur: often, the terms used in national law are simply different words than the literal translation of legal person or entity. In France for example, the correct legal person as used in this Study “*personne morale*”. In yet other cases, native English speaking countries simply do not employ the term “legal person”, such as Ireland.

For the definition of a “legal person”⁴ this Study departs from *the first part of* the definition offered in the Second Protocol to the PIF Convention:⁵ “*a legal person shall mean any entity having such status under the applicable national law*”. Not only is this the same definition as the one being used in the Council of Europe Convention on Corruption,⁶ it is also the definition used in the several EU instruments approximating rules in relation to criminal corporate liability. The definition entails that a person having the status of legal person under the national law, was recognised by law to be a legal person, as opposed to a natural person. Recognition by law refers to the concept of legal personality. After all, even though many differences occur, throughout the Union most member states use varieties of the definition of a legal person which is for example used in Portugal: “*A legal person is an association of people or a special fund, established for social or collective purposes, which is recognized by law as having legal personality.*”⁷ Key concept is legal personality and whether or not such personality is attributed to the concerned person. Entities having legal personality are “*certain groupings with the ability of being the holders of rights and obligations [...] attributing to them the quality of subject of law*” (free translation).⁸ It be noted that in some member states groupings without legal personality can still be held criminally liable;⁹ these will not be closely examined in this Study given that they do not fall within the scope of the definition of a legal person, the subject of this Study.

As mentioned, the definition used by the project team to determine what qualifies as a legal person is based on the first part of the definition used in the majority used in the relevant European legislation. It was a conscious choice not to include the second part of that definition, namely the part excluding public legal persons: according to the relevant EU instruments, the following do not

⁴ As explained elsewhere, this contribution is limited to ‘private’ legal persons.

⁵ COUNCIL OF THE EUROPEAN UNION (1997), “Act of 19 June 1997 drawing up the second protocol of the Convention on the protection the European Communities’ financial interests”, OJ C 221 of 19.7.1997, Art. 1(d).

⁶ COUNCIL OF EUROPE (1999), 27 January 1999, “Criminal law Convention on Corruption”, Strasbourg, CETS 173, Art. 1(d).

⁷ J.d.C. MENDES, *Teoria Geral do Direito Civil*, Vol. I., Lisboa, A.A.F.D.L., reeimpresão, 1998.

⁸ SIMONART, *La personnalité morale en droit privé comparé*, Brussels, Bruylant, 1995, 7.

⁹ *Cfr. infra* 2.2.2.

qualify as legal persons as meant in those instruments: “[...] *States or other public bodies in the exercise of State authority and [...] public international organizations*”. The project team does not wish to copy this limitation: the survey contained questions regarding the distinction between private and public legal persons, an aspect which could not be left out when conducting a study on the liability of legal persons. As will be seen below, a considerable amount of member states applies criminal liability to their public legal persons.¹⁰ Therefore, it is recommended that the EU would take these data into account in the future policy making related to liability of legal persons, at the very least in relation to cooperation in criminal matters.

Even though we can try to avoid confusion in relation to the *term* (legal person as opposed to a natural person instead of the umbrella term comprising natural persons plus legal entities), the fact that its *meaning* differs according to the national applicable law should be stressed. The differences exist in relation to different aspects and on different levels, dealt with below in 2.

1.2 Concept of liability of legal persons

Discussions on the possibility to attribute liability to legal persons for committing offences are far from new. The Romans already had a clear position on this and were opposed to the idea that a *persona* could be anything else than a natural person.¹¹ Even though this default position evolved and despite the consequent lenience towards accepting forms of liability (including criminal liability) of legal persons, the classical idea that legal persons could not be criminally punished prevailed. This resulted in the adagium *societas non delinquere potest, nec puniri*.

Even though during the Middle Ages the concept remained somewhat controversial, the balance shifted in favour of accepting criminal liability of legal persons. However, this evolution was inhibited in the aftermath of the French Revolution, and except for the Netherlands – the first member state to introduce the concept of criminal liability of legal persons, in 1976 – it was not until the last decade of the 20th century that the concept was (re)established in some EU member states’ national systems.¹² In 1992 the French Criminal Code officially

¹⁰ Or, when criminal liability is not applied to these types of legal persons, often a system of administrative liability is applicable.

¹¹ This resulted from an antique philosophy based on the principle according to which *universi consentire non possunt*: R. VALEUR, *La responsabilité pénale des personnes morales dans les droits français et anglo-américains*, Giard, Paris, 1931.

¹² This holds true for the continental member states only. The United Kingdom introduced certain forms of criminal liability of legal persons already in the first half of the 20th century.

reinstalled the criminal liability of legal persons.¹³ In Belgium, it was not before the law of 1999 that legal persons could be held liable *and* punished. Before that, the adagium *societas non delinquere potest, nec puniri* prevented legal persons from being punished. In other member states, criminal liability for legal persons does not exist. In Germany for example, according to the traditional opinion, a legal entity is not capable of guilt. Today still, this implies that no criminal liability for legal persons exist in Germany, but in 1968, with the German Administrative Offences Act (*Ordnungswidrigkeitengesetz*), the general possibility of imposing administrative fines on associations was introduced (par. 30 *Ordnungswidrigkeitengesetz*). In yet other cases, it is currently in the process of being introduced in national law.

However, even when no criminal liability of legal persons exists, systems were created to fill this gap: in Malta, where an offence is “committed by” a legal person every person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of such legal person or was purporting to act in such capacity shall be guilty of that offence (committed by the legal person) unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.¹⁴

As to the former Soviet republics and Soviet satellite states, the State did not feel it necessary to install such criminal liability, considering that all undertakings were owned by the state and the autonomous powers of the managers was thus very limited. By contrast, the climate in the Anglo-Saxon countries provided incentives to recognize the legal persons’ criminal liability.¹⁵

As a result, in today’s European Union, the landscape is shattered.

Criminal liability of legal persons is not accepted in all member states (below: *differences in competent authorities, see 2.1*). Opponents of criminal liability of legal persons argue that the latter does not have its proper mind and is therefore unable to have a criminal intent (*societas delinquere non potest*). The idea is that when a person has decided to act unlawfully – where he had the option to decide on the opposite – the capability for such decisions presupposes the

¹³ For more details: S. ADAM, G. VERMEULEN, W. DE BONDT, “Corporate criminal liability and the EC/EU: bridging sovereignty paradigms for the sake of an area of justice, freedom and security” in ADAM, S., N. COLETTE-BASECQZ e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (373) 374-379.

¹⁴ Note that Maltese law recently introduced the concept of criminal liability for legal persons in relation to specific offences including *inter alia* money laundering, terrorism, abuse of public authority, certain crimes against the peace and honour of families and morals, traffic of persons, incitement to racial hatred, fraud and computer misuse.

¹⁵ M., WAGNER, “Corporate Criminal Liability National and International Responses”, 1999, paper presented at the Thirteenth International conference of the International Society for the Reform of Criminal law on Commercial and Financial Fraud, Malta, <http://www.icclr.law.ubc.ca/Publications/Reports/CorporateCriminal.pdf>.

possession of moral self-determination and the consequent capability of deciding on what is lawful or not, which in turn necessitates a certain moral maturity.¹⁶ According to this theory, the notion of guilt cannot be transferred to legal persons.¹⁷ In the same token, the punishment, which is a consequence of the guilty party's actions, cannot be imposed on legal persons.¹⁸ This rejection has ever since been the prevailing opinion in Germany,¹⁹ and often its protection was voiced using blunt terminology. STRATENWERTH considered any revision of the established opinion as "*obviously senseless*".²⁰ Until this day, case-law and legislation have indeed refused to apply any criminal liability to legal persons. Only acts of individual persons are punishable, not the organisation to which these persons belong when they act.²¹

Proponents of liability of legal persons view the latter as more than mere legal fictions: given their existence and their predominant position in our society they must be liable for the offences they commit.²² According to some, the prevailing opinion is that the application of criminal liability to legal persons is "*fair*"²³: in Denmark for example, applying ethical judgments to undertakings is not perceived as problematic given that also in everyday life, such entities are increasingly treated as suitable subjects for moral judgments.²⁴

The consequences of a legal system qualifying as either of the above positions are tremendous; after all, the choice for one or the other position determines whether or not a State applies criminal liability to its legal persons. When no

¹⁶ R. SCHMITT, *Strafrechtliche Massnahmen gegen Verbände. Gleichzeitig ein Beitrag zur Lehre von den strafrechtlichen Unrechtsfolgen*, Stuttgart, 1958, 187.

¹⁷ G. STRATENWERTH, "Strafrechtliche Unternehmenshaftung?" in K. GEPPERT, J. BOHNERT and R. RENGIER (eds.), *Festschrift für Rudolf Schmitt zum 70. Geburtstag*, Tübingen, 1992.

¹⁸ H.-H. JESCHECK, "Die strafrechtliche Verantwortlichkeit der Personenverbände", 65 *Zeitschrift für die gesamte Strafwissenschaft* [1953] 213.

¹⁹ DÖLLING, D. and LAUE, C., "Corporate criminal liability in Germany: a never ending story?" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, 28.

²⁰ G. STRATENWERTH, "Strafrechtliche Unternehmenshaftung?" in K. GEPPERT, J. BOHNERT and R. RENGIER (eds.), *Festschrift für Rudolf Schmitt zum 70. Geburtstag*, Tübingen, 1992, 302.

²¹ D. DÖLLING and C. LAUE, "Corporate criminal liability in Germany: a never ending story?" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, 29.

²² EUROPEAN COMMISSION (2004), "Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union". COM (2004) 334 final of 30.04.2004, point 3.1.6.

²³ V. GREVE, *Det strafferetlige ansvar*, Jurist- og Økonomforbundets Forlag, Copenhagen, 2004, 174.

²⁴ TOFTEGAARD NIELSEN, G., "Criminal liability of companies in Denmark. Eighty years of experience" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (105) 108.

criminal liability for offences exists, some member states employ an alternative kind of liability: administrative liability *for offences*, as opposed to any form of liability that under national law qualifies as such. There is a considerable difference between an administrative liability system whereby legal persons can be held liable for the commitments of ‘criminal offence – like offences’, situated in the criminal justice sphere, and administrative liability for purely administrative matters.

Although there is a clear tendency in favour of corporate criminal liability, it is not generally accepted. In the Chapter on the member states’ diversity the practical reality throughout the EU will be analysed. The developed distinction between criminal and administrative liability for offence will be integrated in all following facets of the MS analysis.

1.3 Methodology and time-frame

The MS legal persons’ liability regimes differ throughout the European Union. The need to carefully examine the extent of these differences warranted a methodological focus on the acquisition of empirical data at member states level.

In order to ensure a targeted approach the Study mainly built on two separate approaches which were made as inter-independent as possible: desktop review on the one hand, and member states data gathering on the other.

The project team has phased the project and divided the work into a series of work packages, consisting of first, preparatory desktop research, second, the member states analysis and third, an extensive assessment of the implications of the acquired data in light of the conducted desktop research.

WP 1 – Preparatory desktop review

WP 2 – MS level analysis

WP 3 – Assessment of implications

Consultation with the European Commission shaped certain aspects of these work packages. The project team and the European Commission held several meetings aimed at consultation and preliminary feedback.

First, on 16 December 2010, a kick-off meeting was held. The European Commission explicitly requested that the member states questionnaire would not contain any questions on EU policy, neither on EU approximation policy, nor on the EU policy in relation to international cooperation in criminal matters in the EU. The questionnaire should solely aim at mapping the existing diversity. The project team submitted a Progress Report to the European Commission with a view to validating the questionnaire before sending it to the member states. On 17 February 2011 a progress meeting was held in order to discuss the Inception Report. Based on the Commission’s recommendations the

progress report was adjusted and reformed into the Inception Report. Upon approval, the questionnaire was sent to the member states. Lastly, after the deadline for the completion of the member states' questionnaire had passed, the project team and the European Commission held an intermediary meeting on 27 July 2011 with a view to discussing the approach for analysis and reporting.

Based on the preliminary analysis of the empirical results, the decision was made to present some member states with additional clarification questions. By mid December 2011 the member states consultation was closed and the final analysis started. The final report was submitted on 17 January 2012.

The following paragraphs aim at summarising the different steps taken in each of the identified work packages.

1.3.1 WP 1 Preparatory desktop review

The first work package consisted of the preparatory desktop research and had a twofold objective. Firstly, it aimed at updating the existing in-house knowledge and in doing so obtaining a more complete and updated understanding of the criminal liability regimes regarding legal persons. The theoretical background regarding liability of legal persons was thoroughly analysed. Secondly, it served as the basis for the development of the member states questionnaire which forms the basis of this Study.

In this phase of the Study, the project team has identified the three main subjects around which the member states' questionnaire should be built. First, from the desktop review the need had surfaced to clearly establish the definitions and different possible forms of the concept of a legal person in the different member states, focusing on both terminological and content differences. Secondly, detailed questions concerning criminal liability regimes regarding legal persons were developed. From the research followed that some member states only apply an administrative liability regime, whereas other legal systems do not comprise this type of liability and only contain an administrative liability regime (others combine both systems).

1.3.2 WP 2 MS level analysis

The second work package and the main part of the study consists of the MS level analysis, which aims at collecting information on the existence, and application of one or more liability regimes of legal persons in the member states, and at the analysis of the obtained information.

This phase of the Study served two main objectives: first, the identification of suited member states' contacts and secondly, the actual consultation round of those experts.

Work Package 2.1 – Building a SPOC network

Work Package 2.2 – Building the questionnaire

Work Package 2.3 – Data-analysis

Work Package 2.1 – Building a SPOC network

Within each of the member states, a single point of contact (SPOC) was nominated. The SPOCs were in charge of completing the member states questionnaires and are ideally placed to collecting and providing the relevant information for the analysis to the project team, as well as, when necessary, make contact with the relevant stakeholders in their country. The project team was able to draw on an extensive network of contacts and on its experience from several studies conducted in the past. The selection of SPOCs participating in the member states' consultation rounds was a very important milestone in the study.

The input of the SPOCs is crucial to ensure the quality of the outcome of the Study. The SPOCs are familiar with the academic and practical status of and challenges at hand concerning the liability of legal persons for offences in his country of origin. At the kick-off meeting with the European Commission it was agreed *not* to include policy makers or experts with a practitioner background in the expert group, but to only include academics focussing on mapping the diversity in the member states' legislation.

The project team highly appreciates the valuable contributions of the following SPOCs.

| Single Points of Contact | | |
|--------------------------|--------------------|-------------------|
| MS | Name | Function |
| AT | Marianne Hilf | Professor |
| BE | Stanislas Adam | PhD |
| BU | Rumen Vladimirov | Professor |
| CY | Eleni Droussioti | Lawyer (attorney) |
| CZ | Jaroslav Fenyk | Professor |
| DE | Gerhard Dannecker | Professor |
| DK | Jørn Vestergaard | Professor |
| EE | Jaani Ginter | Professor |
| EL | Gregoris Troufakos | Lawyer (attorney) |

| Single Points of Contact | | |
|--------------------------|-------------------------------|-----------------------------|
| MS | Name | Function |
| ES | Javier Gómez Lanz | Professor |
| FI | Petri Taivalkoski | Lawyer (attorney) |
| FR | Jean-Claude Planque | PhD |
| HU | Kóhalmi László | PhD |
| IE | Niamh Howlin | PhD/P.G.C.H.E.T |
| IT | Grazia Mannozi | Professor |
| LT | Deividas Soloveicikas | Lawyer (attorney) |
| LU | Stefan Braum | Professor |
| LV | Lawin Klavins & Slaidins | Law Firm |
| MT | Andrew Muscat | Professor/lawyer (attorney) |
| NL | David Roef | PhD |
| PL | Barbara Namysłowska-Gabrysiak | PhD |
| PT | Maria Paula Ribeiro de Faria | PhD |
| RO | Florin Streteanu | PhD |
| SE | Christoffer Wong | Professor |
| SK | Lydia Tobiasova | JUDr., PhD |
| SV | Sabina Zgaga | PhD |
| UK | Celia Wells | Professor |

Work Package 2.2 – Building the questionnaire

As said above, based on the desktop review, the questionnaire consisted of three main different parts. At the end of the survey, in the General Part, open questions of a general character in relation to their national legislation concerning the liability of legal persons were presented to the experts.

- Part 1 – The concept of a legal person
- Part 2 – Criminal liability of legal persons
- Part 3 – Administrative liability of legal persons
- Part 4 – General Part

In the first three parts the project team had developed detailed questions which were mostly presented through the format of multiple choice questions. However, considering that it was important obtain as many details as possible, experts were encouraged to comment on the formulation of the multiple choice questions and the predefined answering categories, and to provide with more detail.

Questionnaires have been sent to each of the member states in April 2011. A copy of the questionnaire is annexed to this report.

Work Package 2.3 – Data-analysis

The aim of this data-analysis was the mapping of the differences and diversity of the member states' liability regimes.

During the analysis of the results the team has had contact with some of the experts for further clarification.

As agreed prior to the start of the member state consultation, the project team drew both on country-specific information from the member states, and made an analysis on the total of information. Country-specific information only concerned factual information, however: when opinions or future policy options were concerned the anonymity of the concerned countries was guaranteed. Findings and recommendations were listed based on this analysis.

When presenting the integrated results, the project team has included tables and diagrams as a quantitative reflection of the member state replies. It should be noted that the sequence of the topics as included in the member state questionnaire does not perfectly match the sequence of the topics in this final report. The project team has frequently worked with percentages referring only to the member states for which the question is relevant to avoid any misunderstanding.

1.3.3 WP 3 Assessment of implications

Chapter 3 and Chapter 4 of this Final Report do not stem directly from the questionnaire, in the sense that no explicit questions with regard to the matters analysed in those chapters were included. It was the Commission's explicit request not to do so.

The overall finding from the consultation round was the vast variety between different national liability regimes. These differences were identified on several levels: differences in competent authorities, differences based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons.

INTRODUCTION

The project team assessed the implications at an EU level of the established variety through several methods:

- existing in-house knowledge;
- fine-tuning of the preparatory desktop review;
- complementing empirical data obtained through other recent studies carried out for the European Commission.²⁵

The implications of the information obtained through the survey – and what it means for the future EU policy making – were examined mainly at two levels: first, the implications for the EU's own policy making, and secondly, implications for the EU cooperation practice of the member states. The first mainly examines the implications of the findings for the existing approximation *acquis* as well as non-EU approximating instruments; additionally, the criminal records policy as well as the procedural rights policy in relation to legal persons are examined. The second mainly deals with the existing instruments within the field of EU cooperation in criminal matters, as well as the experience of the member states in relation to cooperation. In both chapters, policy recommendations are developed.

²⁵ VERMEULEN, G., DE BONDT W. and RYCKMAN, C. (eds.) *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerpen-Apeldoorn, Maklu, 2012, forthcoming.

2 Diversity in the member states

This part contains the theoretical background and empirical data serving the main purpose of the Study, namely mapping the diversity in liability of legal persons for offences throughout the European Union.

This is done at different levels, with the understanding that the distinction described at the first level, namely the distinction *regarding competent authorities*, is included in the analysis of the other identified levels of diversity. Indeed, the different kinds of liability (criminal, administrative, and – to a lesser extent – civil) are discussed separately throughout this chapter, identifying the (lack of) relevance of differences based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons

2.1 Variety in competent authorities

Findings

- **In 5 member states criminal liability of legal persons for offences is not foreseen in national law: Bulgaria,²⁶ Germany, Greece, Latvia and Sweden.**
- **The most recent introductions of criminal liability of legal persons took place in the Czech Republic (2012) and Spain (2010).**
- **In 8 member states administrative liability of legal persons for offences²⁷ is not foreseen in national law: Austria, France, Hungary, Ireland, Italy,²⁸ Poland, Slovenia and Slovakia.**

²⁶ However, for Bulgaria, it must be added that in 2005 their legislation introduced a specific “administrative-criminal liability” for legal persons.

²⁷ For the exact meaning of the wording ‘offences’, see below.

²⁸ Liability for legal persons is formally defined by the Italian legislator as administrative (see Act 231/2001 which is titled ‘Disciplina della responsabilita’ amministrativa delle persone giuridiche, delle societa’ e delle associazioni anche prive di personalita’ giuridica, a norma dell’ art. 11 della legge 29 settembre 2000 n. 300’) but actually it is a criminal liability.

Recommendations

- **Without obliging them to use one or the other liability system, the European Union should encourage the member states to make sure that a form of liability for the legal person *itself* is possible. At least one of following options should exist: attribution of the criminal behaviour of the natural person to the legal person instead of solely vice versa; or a well-developed system of administrative liability of legal persons for offences.**

A first fundamental aspect of legal persons' liability which varies considerably throughout the member states relates to the scope the competent authorities involved in the liability. No common approach exists with respect to the authorities that are competent to deal with the liability of legal persons.

Before embarking on a discussion related to the differences *following the involved authorities*, a clarification of the exact meaning of this criterion is warranted. What is aimed at in this context is the difference between *types of liability* for offences, namely criminal, administrative and even civil liability. It be stressed that what is meant here is administrative liability *for offences*, as opposed to any form of liability that qualifies as such under national law. There is a considerable difference between an administrative liability system whereby legal persons can be held liable for the commitments of 'criminal offence – like offences', situated in the criminal justice sphere, and administrative liability for purely administrative matters.²⁹

The empirical examination of this study focuses mostly on the criminal and administrative liability for offences, although the civil liability was also included in some of the questions featuring in the survey.

In general, courts competent in criminal matters will be dealing with liability for criminal offences, those competent in administrative matters with liability for breaches of administrative law and, finally, the courts competent in civil matters will decide on liability for violations of the provisions of civil law.

However, this distinction does not always stand: an example is the situation where legal persons can incur civil liability for offences for which their employees were criminally convicted:³⁰ although the liability is situated in civil law, the offence which originally was originally committed is of a criminal justice nature. For the purpose of this Study, the authority competent to deal with the liability related issue is assumed to be the same as the type of liability

²⁹ *Cfr. infra* 2.4.

³⁰ C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht. In hoofdlijnen*, Antwerpen/Apeldoorn, Maklu, 2011, 136.

involved, even though certain aspects of the case at hand might (mostly in a different stage) be of a different nature. This method, however, is not ideal given that sometimes a certain type of authority is competent to deal with a liability of a different type. In Spain, for example, the civil liability is assessed in the same criminal proceedings (in order to spare the injured party from the inconvenience of having to separately initiate criminal proceedings).³¹ Consequently, when 'civil liability' is used in the context of this Study, in principle this refers to liability dealt with by courts competent in civil matters, *with the crucial nuance* that in some member states courts competent in criminal matters are competent to deal with this type of liability, when incurred following the criminally punishable behaviour of an employee or member of staff.

It be remembered that a small amount of member states does not apply criminal liability of legal persons in their national law systems. As shown on the map inserted below Bulgaria,³² Germany, Greece, Latvia and Sweden have not introduced criminal liability for legal persons in their national law.

³¹ ASTARLOA, E., "Criminal liability of legal persons in Spain. An evolving hot topic" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, 131 (134).

³² However, it must be added that Bulgarian law in 2005 introduced a specific "administrative-criminal liability" for legal persons.



For many member states which apply criminal liability to legal persons, this concept is a (relatively) recent phenomenon, the very last one being the Czech Republic where the criminal liability of legal persons entered into force on 1 January 2012. In Spain, the first legal provisions installing criminal liability of legal persons were installed in 2010; the same goes for Slovakia and Luxembourg; in Portugal it was installed in 2007;³³ in Poland in 2002; Belgium in 1999; in France in 1994. Even though 22 member states have included criminal liability for offences in their national systems, 6 of those have indicated to have

³³ Although sector-specific legislation had already included criminal liability for legal persons in some instances.

very limited experience with this type of liability – if not none at all (Finland, Italy, Latvia, Portugal, Slovenia, and Romania; these six are mentioned on top of Spain, the Czech Republic, Luxembourg, and Slovakia, where given the entry into force it is not surprising that the practice is limited).

Similarly, it be remembered that almost one third of member states does not apply administrative liability of legal persons for offences in their national law systems. It is important to specify what is meant by administrative liability *for offences*. On the one hand, naturally, administrative sanctioning for purely criminal offences is meant (as is the case in Germany). On the other hand, administrative yet ‘pseudo criminal’ offences are still considered to be “criminal law” according to the European Court of Justice.³⁴ Therefore, national systems where administrative sanctioning is possible for offences which are as such administrative but could be situated in the criminal justice sphere are also considered as administrative liability for offences in this context. In the Netherlands for example, some offences were decriminalised with the introduction of the system of administrative liability of legal persons, but they are still an application of what is called administrative liability for offences in this contribution.³⁵ As shown on the map inserted below Austria, France, Hungary, Ireland, Italy, Poland, Slovenia and Slovakia have not introduced administrative liability of legal persons for offences in their national law.³⁶

³⁴ ECtHR, 21 February 1984, Nr. 8544/79, *Öztürk v. Germany*.

³⁵ On this issue, see specifically the part on “bestuurlijke boetes” in D. ROEF, “Strafrechelijke verantwoordelijkheid van overheden: een stand van zaken”, *Verkeersrecht* 2011, 7/8, 218-221.

³⁶ The concept of administrative liability for legal persons remains confusing, even based on the questionnaire developed by the project team. The empirical data used to make this assertion with respect to the absence of administrative liability for offences is based on question 9.1



The combination of those two maps reveals that several member states that have introduced criminal liability have combined this with another type of liability.

Arguably, including other types of liability than purely repressive liability regimes has particular advantages. Civil liability allows potential damages to be compensated swiftly (be it through a purely civil or combination of criminal and civil system); as to administrative liability: in member states where this has been the prevailing system care must be taken to avoid that the introduction of a criminal liability mechanism would undermine the efficiency of the well-developed administrative liability system, or that it would blur the demarcation

between administrative and criminal offences regarding legal persons.³⁷ Mechanisms concerning the relationship between different types of sanctions must be developed. In Spain for example, a legal system where the criminal liability of legal persons was introduced only recently, the *ne bis in idem* principle plays in this regard: pursuant to law 30/1992 and the decisions of the Spanish Constitutional Court the criminal penalty takes precedence over the administrative sanction.

Summarizing, the mechanisms used in the member states are rarely confined to one type of liability for the legal person.

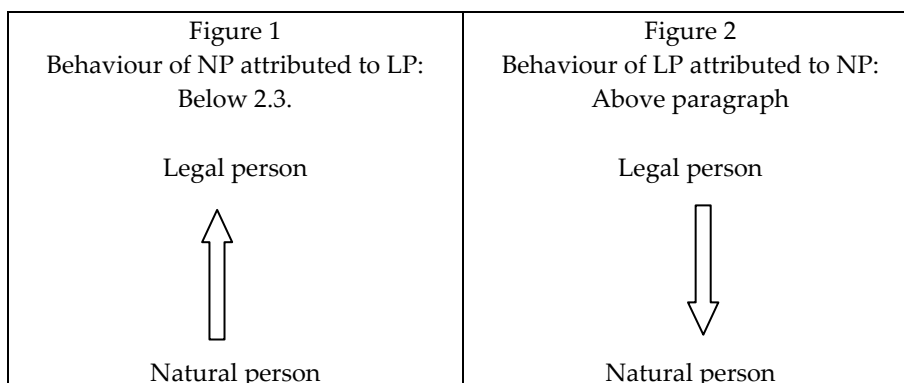
Even in member states where the situation regarding *the legal person itself* is clear-cut in that no criminal liability of legal persons exists, criminal law can still play an important role in relation to criminal liability and *the activities of legal persons*. An example can clarify this:³⁸ the German Criminal Code deals with the liability of representatives in the case of special statutory offences. In this regard, when an employer does not deduct and pass on social insurance contributions, the natural person concerned will be criminally punishable even though technically, the legal rather than the natural person is the employer. This type of rule was developed as a counterweight for the lack of criminal liability of legal persons. Thus, liability of individual persons for the actual entity to which the legislation applies was created; the importance of such an evolution is not to be underestimated in view of the modern forms of business organisation and the extensive division of labour within a company.

In case of Germany, this type of liability *combined with* their well-developed system of administrative liability of legal persons leads to a relatively conclusive system of protection. Caution is warranted, however, with systems which *only* use the first mechanism: in other words where no liability is foreseen for the legal person as such (be it administrative or criminal or civil), but where the natural persons are susceptible to criminal liability for the acts of the legal person. Below in 2.3, attribution techniques will be discussed.

³⁷ BRAUM, S., "Le principe de culpabilité et la responsabilité pénale des personnes morales. Remarques relatives au projet de loi luxembourgeois" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, 238-239.

³⁸ DÖLLING, D. and LAUE, C., "Corporate criminal liability in Germany: a never ending story?" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (25) 30.

There, it concerns the attribution of the behaviour of the natural person to the legal person, resulting in liability of the legal person (Figure 1). Here, however, the attribution takes place in the opposite direction, namely from the legal person to the natural person (Figure 2).



In Belgium, attribution in the direction shown in Figure 2 was the only way in which acts of legal persons could be punished (be it indirectly) until 1999, and all too often led to impunity.³⁹ Offences committed by legal persons often remained unpunished, either because the guilt of the concerned natural person could not be sufficiently established, or because the complex structures of the legal person made the attribution legally impossible.⁴⁰ Additionally, in case of collegial but anonymous vote one countervote sufficed for all involved natural persons to hide behind that particular vote⁴¹.

Consequently, without obliging them to use one or the other liability system, the European Union should encourage the member states to make sure that a form of liability for the legal person *itself* is possible. At least one of following

³⁹ D. PACQUEE, "De "strafrechtspersoon": bespiegelingen omtrent het moreel element in de wet strafrechtelijke verantwoordelijkheid van rechtspersonen", *Jura Falconis*, vol. 44, 2007-2009, nr. 3, 477-504. This statement needs to be nuanced in light of the fact that administrative and civil liability regimes do exist for legal persons. However, far from all misconduct is covered through these mechanisms, which is different than a system as existing in Germany given that in the latter the liability system for legal persons is regulated solely through the administrative liability mechanism, which necessarily implies that it covers more types of behaviour than the Belgian counterpart; for attribution in the other direction (from natural person to legal person): see below 2.3.

⁴⁰ WAETERINCKX, P., "De strafrechtelijke verantwoordelijkheid van de rechtspersoon, een kritische analyse van enkele capita selecta uit de eerste rechtspraak" in X, *Strafrecht van nu en straks*, Brugge, Die Keure, 2003, 183-187.

⁴¹ DE SWAEF, M., note concerning judgment Brussels 24 April 1985, *Rechtskundig weekblad*, 1985-1986, 882.

options should exist: attribution of the criminal behaviour of the natural person to the legal person instead of solely vice versa; or a well-developed system of administrative liability of legal persons for offences. In Sweden for example, there is no criminal liability of legal persons. As such, this need not to be problematic, if compensated by an elaborate system of administrative liability for offences, as is the case in Germany. In Sweden, however, the corporate fine as a non-criminal sanction to be imposed on a legal person for offences is limited to max 10,000,000 SEK (about 1 million euro), and it has been questioned whether this sanction has a sufficiently deterrent effect.⁴²

Apart from criminal and administrative liability systems, naturally a third type of liability exists, namely the civil liability regime, a system which was created several decades (if not longer) ago in some member states. In Denmark for example, the liability system of legal persons has its present form since 1900.⁴³ The reform in 1996 merely involved the enactment of general statutes in the Penal Code; but the very principle had thus existed for a very long time before that, following various specific pieces of legislation. The system meant in this Danish example however, is virtually exclusively linked to a purely civil law context.

As mentioned, it is difficult if not impossible to give a set description of what is meant by civil liability, given the different meanings in member states: sometimes, it refers solely to the nature of the law that was violated; sometimes it refers to the authorities competent to rule on liability for the violation of any type of law; sometimes civil liability can only exist in relation to violations of civil law which are ruled on by courts competent in civil matters.

This Study focuses mainly on systems of criminal and administrative liability for offences. However, where appropriate – namely when the civil liability can somehow be connected to the commitment of an offence or when it can at least be brought in the criminal justice sphere⁴⁴ – the link to measures of civil liability.

⁴² It should be added however, that certain other types of administrative fines exist in Sweden.

⁴³ TOFTEGAARD NIELSEN, G., "Criminal liability of companies in Denmark. Eighty years of experience" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Chartre, 2008, 105.

⁴⁴ For example, when a civil liability regime applies in implementation of framework decisions (or (future) directives) issued in the context of Justice and Home Affairs, see below 3.3 (procedural safeguards).

2.2 Variety in types of persons involved

Findings

- All member states recognize the legal concept of ‘a legal person’, which implies the possession of legal personality. The method and moment of acquiring such personality differs throughout the EU.
- In 82% of the member states both public and private bodies can qualify as legal persons.
- 27% of the respondents do not recognize any type of criminal liability of public legal persons. In the majority of the member states, restrictions of different nature exist regarding the criminal liability of public legal persons. The State, acting in its public capacity, is excluded from liability in most member states.
- Merely 25% of the respondents indicated that *restrictions* (hence, not exclusions) apply to the administrative liability of public legal persons.

Recommendations

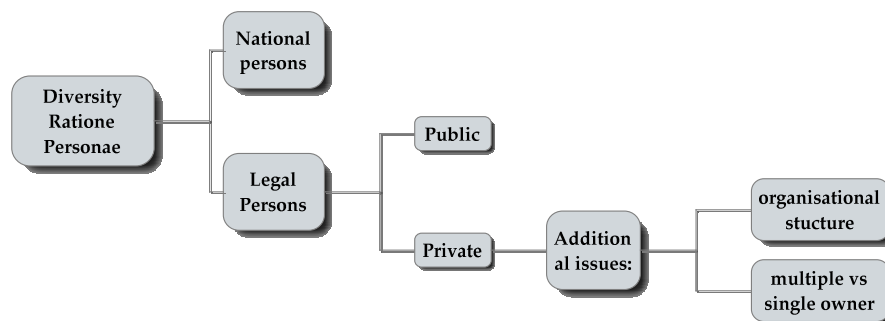
- It is recommended that the European Union changes the current state of affairs in which definitions of legal persons throughout the EU instrumentarium (e.g. PIF Convention) are limited to private legal persons.

A second fundamental aspect of legal persons’ liability which varies considerably throughout the member states relates to the type of person on which liability can be imposed. Such diversities exist on three different levels, with several varieties within those levels. First, regardless of any potential applicable liability rules, differences exist concerning the distinction between legal and natural person, regarding whether or not public entities are considered to be legal persons, concerning multiple or single ownership and concerning whether or not parent-daughter structures exist (2.2.1). Thirdly, differences exist regarding whether or not public entities can be held criminally liable and within the sphere of criminal liability differences concerning multiple or single ownership need be examined (2.2.2). Fourthly, the same exercise will be made in the sphere of administrative liability (2.2.3).

2.2.1 General differences, regardless of liability

Regardless of any potential applicable liability rules, differences exist concerning the difference between a natural and a legal person, regarding whether or not public entities are considered to be legal persons, concerning multiple or single ownership and concerning whether or not parent-daughter structures exist.

This subsection examines these different questions, which can be structured as follows:



2.2.1.1 Natural vs. legal persons

As said above, even though many differences occur, throughout the Union most member states use varieties of the definition of a legal person which is for example used in Portugal: “A legal person is an association of people or a special fund, established for social or collective purposes, which is recognized by law as having legal personality.”⁴⁵ Key concept is legal personality and whether or not such personality is conferred upon the concerned entities.⁴⁶ It be noted that the way which and the moment that entities can acquire legal personality differ throughout the member states. In Luxembourg for example, the legal person exists from the moment that the founding act is finalised, whereas in France, it is only acquired either from the moment that it is enlisted in the “Régistre du

⁴⁵ J.d.C. MENDES, *Teoria Geral do Direito Civil*, Vol. I., Lisboa, *A.A.F.D.L.*, reimpresão, 1998.

⁴⁶ For more details on this concept, see above 1.1.1.

commerce" (the trade register) for companies or from the moment of declaration of existence in the concerned prefecture for other organisations.⁴⁷

2.2.1.2 *Private vs. public*

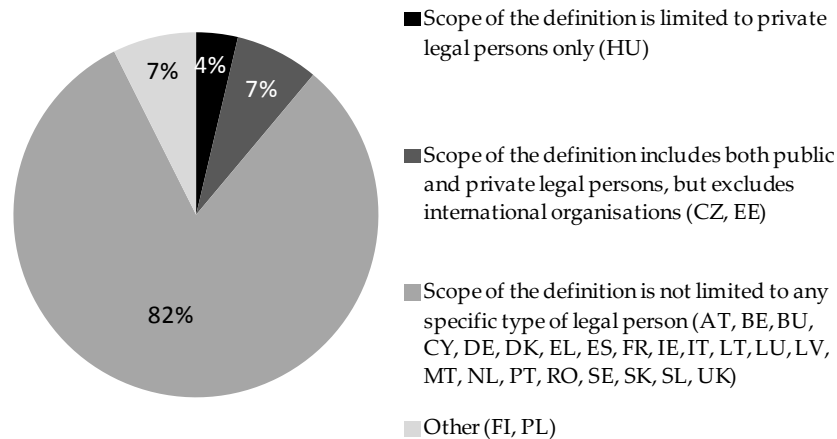
The differences between so-called "public legal persons" and "private legal persons" should be emphasized. On rare occasions member states limit the concept of a legal person to private law artificial persons, and in the majority of the cases it entails both (see figure below).

In Latvia for example, the government, the municipalities, associations of persons, institutions, foundations, and such aggregations of property as have been granted the rights of a legal person shall be considered to be legal persons. Sweden on the other hand, recognizes three main types of public legal persons, namely 'municipalities' (kommuner), 'county councils' (landsting) and the State. In Slovenia, public legal persons are established by a law or other public legal act.

Even though differences exist regarding applicable liability rules etc. (see below 2.2.2.), the results of the survey show that a large majority of the member states have indicated not to limit the scope definition of a legal person a specific type of legal person (public or private), which entails that in general, the majority of the member states confer legal personality to their public entities.

⁴⁷ ADAM, S., BLAISE, N., COLETTE-BASECQZ, N., "Conclusions" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, 448.

1.2 What is the scope of the definition used to determine a legal person under your Member State's national law or legal regime?



Having established that public entities are granted public personality in virtually all member states (with the important note that that does not necessarily concern all public entities in the said member states), the following two main types of distinctions amongst public legal persons can be perceived.⁴⁸

First, there is the distinction between centralised and decentralised legal persons, in other words between the State – in federal states: the federal state and the federal public entities – and the decentral level, whether the latter is regional or local. As mentioned, the State has immunity from criminal liability in several member states, amongst others in Belgium, Estonia, France, Italy, Poland and Romania. In Denmark and Finland on the other hand, the State can be held criminally liable, but only in relation to those acts which they have not carried out in the exercise of their public authority.

Second, the distinction between the acts carried out *de jure gestionis* and *de jure imperii*, respectively the acts carried out as a private actor versus in the exercise of public authority: the previous example of Denmark and Sweden shows that the rules can cover a combination of the first and second distinction. Austria is another example where the criminal liability is limited to acts *jure gestionis*. Within the latter reasoning, more variations are possible: in France for example, the assessment of the act being carried out *de jure gestionis* is an *in*

⁴⁸ ADAM, S., BLAISE, N., COLETTE-BASECQZ, N., "Conclusions" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (433) 450-451.

concreto assessment, whereas in Romania the establishment of an *in abstracto* ability to act *de juri gestionis* suffices.

The mere existence of the concept of a public legal person should not be confused with the criminal liability of public legal persons. Indeed, a qualification as a public legal person does not imply the criminal liability of those persons (see below 2.2.2) and vice versa. After all, in certain countries certain groupings which do not qualify as a legal person because they do not have legal personality, can still be held criminally liable.⁴⁹

2.2.1.3 *Distinctions within private legal persons*

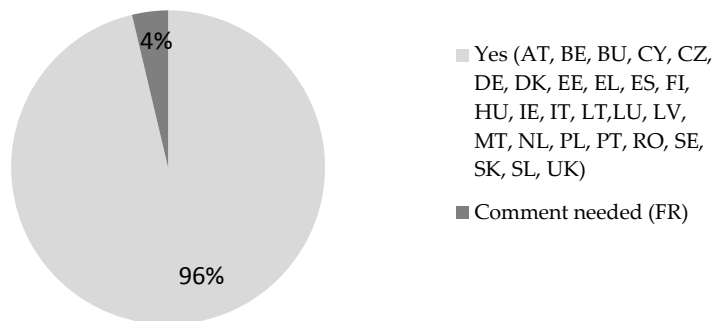
Regarding single and multiple ownership of legal persons, both forms exist relatively consistently throughout the Union: all member states have indicated that their legal system indeed comprises both forms of ownership of legal persons.

Regarding the existence of parent-subsidiary structures, a very small minority of the member states does not recognise parent-subsidiary structures in their national law.

⁴⁹ An example is Belgium: see C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht. In hoofdlijnen*, Antwerpen/Apeldoorn, Maklu, 2011, 127.

One member state did not wish to plainly reply yes, and added some additional explanations: France clarified that the parent company (in the meaning of the overall corporation structure comprising different legal persons) as such is not entitled to hold legal personality of its own – and consequently, it cannot be held criminally liable. However, certain specific areas of law do take the existence of the ‘parent-company’ into account and, accordingly, have developed specific rules to alleviate the lack of legal personality.

1.4 Does your Member State’s law or legal regime recognize parent-subsidiary legal person relations?



2.2.2 Differences in relation to criminal liability

2.2.2.1 Natural versus legal

The first element which surfaces in this context is the distinction between a national and a legal person. As said above, a legal person, generally, can be described as an entity with legal personality. Consequently, groups or ‘associations’ of people to whom no legal personality was attributed do not qualify as a legal person. This does not necessarily mean that these groupings cannot be held criminally liable, however; an example being Art. 5 of the Belgian Criminal Code.⁵⁰ Indeed, this member state made a choice not to set the possession of legal personality as an absolute condition for incurring criminal liability. Other examples are Italy, Poland, Germany and Sweden.⁵¹ On the other

⁵⁰ C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht. In hoofdlijnen*, Antwerpen/Apeldoorn, Maklu, 2011, 127.

⁵¹ For the latter two it does not concern *criminal* liability, see above 2.1 and below 2.4.

hand, there are several member states where entities without legal personality can never be held criminally liable: Austria, Estonia, France, Denmark, Luxembourg and Romania. Important differences concerning whether or not liability (be it criminal or administrative) is possible exist with regard to unions and political parties.

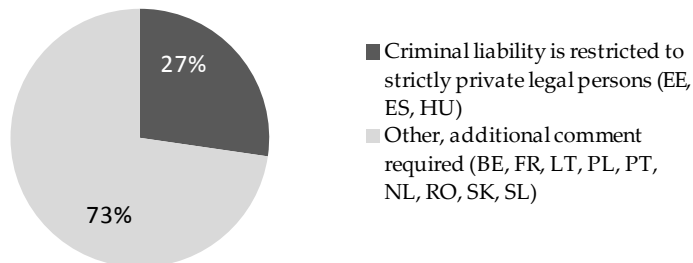
Linking back to the data above relating to the existence of parent-subsidiary legal persons' relations it should be pointed out that in this regard too, considerable differences exist: even though most countries recognize the existence of such relations, far from all member states have the legal possibility to hold the parent companies criminally liable for the activities of the subsidiary. Examples of countries that do not are Portugal and France.

The broader discussion in relation to the liability of natural versus legal persons cannot be analysed separately from attribution techniques, however, and will consequently be dealt with below in 2.3.

2.2.2.2 *Private versus public*

Several member states indicated that some restrictions applied based on the type of legal person involved, but only three answered that they do not foresee the criminal liability of public entities all together.

2.3. Is restriction based on the type of legal person concerned?



Yielding to inconsistencies following the type of person involved means that in cooperation relations, executing member states accept the delineation of the legal person subject to criminal liability, even if that type of legal person would not be criminally liable in their own domestic regulations. Whether or not this is the case and whether it should be the case will be discussed elsewhere⁵², but the above results show that some member states do not include criminal liability of

⁵² Chapter 4.

legal persons in their national law. Granted, the number is small (four member states), however the differences do go beyond that: amongst those member states who apply criminal liability to legal persons, the majority still imposes restrictions to such liability and the content of these restrictions differ considerably.

In Belgium for example, following bodies are excluded from criminal liability: the Federal State, regions, communities, provinces, the agglomeration of Brussels, municipalities, territorial intra-municipal organs, the French Community Commission, the Flemish Community Commission, the Common Community Commission and public centres of social assistance. This diversity reflects the complexity of the Belgian federal State. The rationale behind this exclusion relates to the fear that criminal liability for legal persons would be used as a vehicle to launch political disputes. However, several other public bodies such as certain state-owned corporations, certain associations of professions (e.g. the association of lawyers), public institutions such as the Banking, Financing and Insurance Association, can be held liable.

In Spain, the situation is slightly different in that amongst the public legal persons *only* state-owned corporations that do not pursue public policy objectives can be held criminally liable. There is an important exception to that principle however: the concept of *fraus legis*. This occurs when the public legal person is set up with the purpose of avoiding the attribution of criminal liability. In those cases and in those cases only political parties can be held criminally liable.

France applies another nuance: the Criminal Code excludes the criminal liability of the State and limits the liability of the public authorities (at local, departmental and regional levels) to activities that could have been sub-contracted to a private person or to another public person.

Under Polish law, companies in which the State Treasury, a unit or units of local government participate can be held criminally liable; only the State Treasury, local government units and their associations and local government agencies are excluded from the definition.

Under Portuguese law, in principle, the State, public legal persons with public authority and international public organizations are excluded from criminal liability (art. 11^o, n^o 3, of the Penal Code). However, it is not obvious whether this restriction applies to the existent special schemes, for instance, to the crimes committed within the scope of the Law n^o 24/84, of 20th January 2011, which does not exclude public legal persons from the definition of art. 3^o (criminal responsibility of the legal persons), or within the scope of the Law 52/2003, of 22th August (law against terrorism), which also makes no distinction between legal persons in order to ascertain their criminal responsibility.

In Slovakia on the other hand, in terms of criminal liability there are hardly any differences between private and public legal persons: the Criminal Code

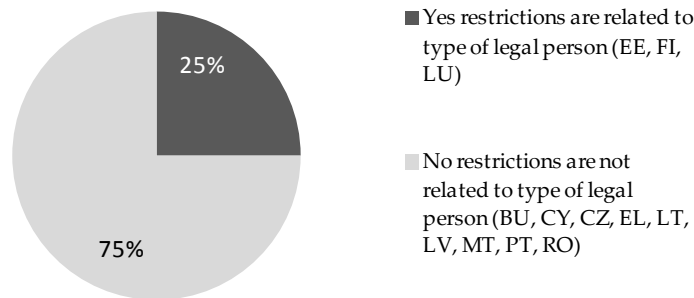
does not set down any restrictions to criminal liability of legal persons in the General Part but in relation to legal persons, provisions regulating the imposition of confiscation of a sum of money (sec. 83a of Criminal Code) and confiscation of property (sec. 83b of Criminal Code) exclude certain types of legal person on which those protective measures may not be implied in certain cases.

In some member states, the criminal liability of public legal persons is foreseen in the legislation on the one hand, but is not applied in practice or liability is made impossible through the jurisprudence, on the other. In the Netherlands for example, Art. 51 of the Dutch Criminal Code foresees that a legal person can be held criminally liable, without differentiating based on the 'type' of legal person. However, following established jurisprudence, the State as a public legal person enjoys immunity from prosecution, and other public legal persons such as municipalities and provinces are immune when the offence has been committed in the furtherance of an exclusive governmental task that can only be executed by civil servants (e.g. issuing permits). The Penal Code of Denmark contains a provision on criminal liability for legal persons which encompasses any legal person, including any type of private corporation [da: 'aktie-, anparts og andelsselskaber'], legal partnership [da: 'interessantskab'], legal associations [da: 'foreninger'], foundations and trusts [da: 'fonde'], estates [da: 'bo'], municipalities and regions [da: 'kommuner'] and government authorities and institutions [da: 'statslige myndigheder'].

2.2.3 Differences in relation to administrative liability

In the context of administrative liability the differences between private and public legal persons are smaller. In the survey the member states were asked to indicate whether they applied restrictions to their administrative liability systems, and amongst those who indicated to indeed apply some restrictions to administrative liability, a very small majority indicated that the restrictions were linked to the distinction between private and public legal persons.

7.2 Is the restriction based on the type of legal person concerned?



The figure shows that nine member states have indicated not to apply restrictions based on the private or public character of the legal person involved. It be remembered that these results should be interpreted in light of the fact that only nineteen member states indicated to, as such, apply administrative liability for offences to legal persons. Even among the states who indicated to apply this liability system, some did not give a reply to the question dealing with the type of legal person, because the situation is of such nuanced nature that it proved difficult to tick on or another box.

In Spain, for example, pursuant to the applicable law,⁵³ a public legal person can, in principle, be held administratively liable. However, in practice, one restriction applies: the prohibition of an administrative self-sanction (i.e., a public administration cannot impose an administrative penalty on itself).

In relation to the Netherlands, it is noteworthy that recent jurisprudence has not accepted to copy the immunity from prosecution for public legal persons, applicable in the criminal liability sphere, to the administrative liability sphere. This implies that these legal persons cannot incur a criminal sanction, but they can be subject to considerable administrative fines. The development has triggered an intense debate in this member state.

It thus appears that more states than the ones listed in the figure, do not apply restrictions based on the public character of the legal person. As to those who do apply restrictions, further research reveals that public legal persons are not automatically and fully excluded from liability: in Finland for example, this depends on which of the several heterogeneous laws dealing with administrative liability, applies. Similarly, in Luxembourg, there is no general rule regarding the administrative liability of either private or public legal

⁵³ Law 30/1992 of 26th November 1992 on the Legal System applicable to Public Administrations and the Common Administrative Procedure, Article 130.1.

persons: the rules of attribution, the scope and sanctions vary from one field to another.

Given that public legal persons are included in the concept of a legal person in the majority of the member states, that in a majority of the member states applying criminal liability to legal persons, public legal persons can to some extent be held criminally liable – albeit with important restrictions – and that in the majority of the member states administrative liability is applied similarly to public legal persons as it is to private legal persons, it is recommended that the European Union lets go of its limitation to private legal persons in definitions of legal persons throughout the EU instrumentarium (e.g. PIF Convention)⁵⁴.

2.3 Variety in attribution mechanisms

Findings

- The *mens rea* requirement is not literally prescribed by law in all member states.
- 5% of the respondents indicate to as a rule use an objectified liability system for legal persons; 14% indicates that the national law does not require *mens rea* as a rule; in 38% identification of the physical perpetrator is necessary, and in 29% no division is made between a natural and a legal person for the establishment of *mens rea*. These results are far more divided in the administrative liability sphere.
- Four attribution models occur throughout the EU: vicarious liability, identification model, aggregation model, and the organisational model.
- The identification model is the model used in the EU's approximation instruments.
- Different elements of the several attribution models apply in many MS; consequently, precise percentages regarding one or the other model cannot be provided; in terms of criminal liability, an overwhelming majority applies elements of both the vicarious liability and the identification model.

⁵⁴ COUNCIL OF THE EUROPEAN UNION (1997), "Act of 19 June 1997 drawing up the second protocol of the Convention on the protection the European Communities' financial interests", OJ C 221 of 19.7.1997, Art. 1(d).

- In the context of criminal liability, prosecution of the legal person excludes parallel prosecution of the natural person – or vice versa – in only 5% of the member states. In the context of administrative liability, prosecution of the legal person excludes parallel prosecution of the natural person in 11% of the respondent member states; vice versa, in 6% of the member states prosecution of the natural person will lead to an exclusion of a parallel prosecution of the legal person.
- In the context of criminal liability concurring liability (between the natural and legal person) is possible in 60% of the member states. In the context of administrative liability concurring liability is possible in 50% of the member states.

2.3.1 Attribution mechanisms and criminal liability

A third distinction stems from the different views regarding in which instances culpability can be attributed to legal persons.

2.3.1.1 Mens rea requirement

As is the case with the very concept of a legal person (*cfr.* 1.1.1), here too the terminology differs. Several terms are used to indicate that a moral element needs to be established before a person can be held criminally liable. Some examples are ‘guilt’, ‘criminal intent’, ‘culpability’ or ‘*mens rea*’. This concept implies the establishment of a certain level of ‘guilt’ as a condition for the existence of the criminal liability.

The requirement of a moral element in order to be held criminally liable is arguably one of the most delicate matters linked to the application of a criminal liability regime, both for natural⁵⁵ and – all the more so – for legal persons.

The *mens rea* requirement is not always literally prescribed by law. In Belgium for example, despite not being legally prescribed, it is accepted that Belgian penal law is a system based on guilt rather than ‘bad luck’: purely material (as opposed to moral) behaviour which entails a violation of the penal law but where the concerned person is not ‘guilty’ of that behaviour cannot lead

⁵⁵ ADAM, S., BLAISE, N., COLETTE-BASECQZ, N., “Conclusions” in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (433) 445.

to punishment.⁵⁶ However, the definition of what the guilt concept precisely entails is subject to – increasing⁵⁷ – debate. In a narrow sense, the concept refers to the psychological relationship between the act and the offender. Linguistically, only in this interpretation the guilt requirement and the moral element requirement are synonyms. In a broader sense, the concept of guilt refers to the question whether or not a behaviour can be attributed to the offender: when the behaviour took place with the necessary moral element of the crime (e.g. on purpose or due to negligence depending on the crime involved) this will still not necessarily lead to criminal liability: indeed, the established guilt will be reversed when there are circumstances which make that the behaviour cannot be reproached to the offender. An example is when the behaviour was coerced; naturally this will only reverse the guilt when certain conditions are met.

The *mens rea* requirement in the debate on liability of legal persons refers to the former, narrow interpretation, namely the psychological relationship between act and offender.

Common arguments against criminal liability stem from the idea that *mens rea* requirement is cannot be fulfilled by the legal person. In some countries it is assumed that it can *never* be fulfilled by legal persons: as said above, in Germany the notion of guilt is required in order to be criminally punishable, and according to German law this concept cannot be transferred to legal persons.⁵⁸ The reasoning behind this default position is that, when a person has decided to act unlawfully, the capability for such a decision presupposes the possession of moral self-determination and the consequent capability of deciding on what is lawful or not, which in turn necessitates a certain moral maturity.⁵⁹ In other countries, such as Belgium, the opposite is true: there, a full assimilation between natural and legal persons has taken place and a general criminal responsibility of legal persons applies. The same goes for Denmark: an undertaking, together with its owner and the employees, are seen as a unit.⁶⁰

⁵⁶ C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht. In hoofdlijnen*, Antwerpen/Apeldoorn, Maklu, 2011, 286.

⁵⁷ For extensive arguments In favour of criminal liability of legal persons, see A.J. SEPINWALL, "Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime", 63 *Hastings Law Journal*, 2011, 411-454.

⁵⁸ G. STRATENWERTH, "Strafrechliche Unternehmenshaftung?" in K. GEPPERT, J. BOHNERT and R. RENGIER (eds.), *Festschrift für Rudolf Schmitt zum 70. Geburtstag*, Tübingen, 1992.

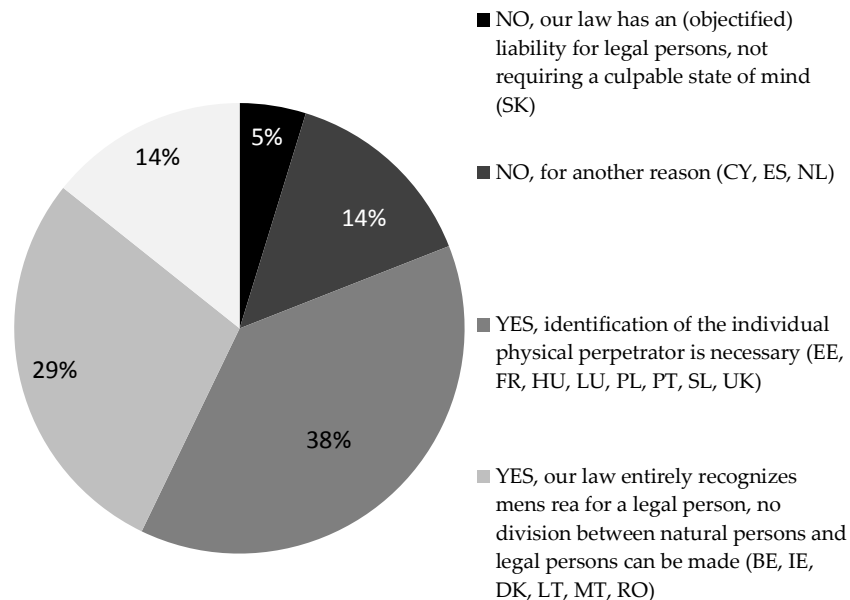
⁵⁹ R. SCHMITT, *Strafrechtliche Massnahmen gegen Verbände. Gleichzeitig ein Beitrag zur Lehre von den strafrechtlichen Unrechtsfolgen*, Stuttgart, 1958, 187.

⁶⁰ TOFTEGAARD NIELSEN, G., "Criminal liability of companies in Denmark. Eighty years of experience" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Chartre, 2008, (105) 105-109.

The assessment of whether or not legal persons can be held criminally liable varies depending on the internal functioning of the legal person. In practice a legal person will usually function through a decision of a certain body/organ which forms part of that legal person. Often, this decision is the result of an anonymous vote. Therefore, except in cases of unanimity, it is impossible to determine which natural persons took the decision.⁶¹ In Finland for example, this difficulty is anticipated in the relevant legislation. As a basic rule, the *mens rea* is a prerequisite for criminal liability. Criminal liability for legal persons requires as a general rule that the perpetrator has committed a crime, thus implying an intentional or neglectful act. Two exceptions exist, however, the first one being related to the anonymous vote problem: criminal liability can be confined to a legal person based on so called anonymous guilt, which means that the perpetrator is not identified. Looking at the other member states' results it seems that the *mens rea* requirement is essential in a majority of the member states. Only a small minority indicated not require its establishment. As explained below, caution is warranted with the interpretation of this chart, considering that the question was phrased such that member states were required to indicate whether, in their national law, the requirement exists *as a rule*.

⁶¹ C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht. In hoofdlijnen*, Antwerpen/Apeldoorn, Maklu, 2011, 122.

3.3 Does your Member State's law or legal regime -as a rule- require the establishment of 'mens rea' for a legal person?



A common phenomenon providing a (partial) answer to difficulties with the *mens rea* requirement the inclusion of specific offences in the legislation whereby no moral element is required for the establishment of legal persons' criminal liability; in other words, where the mere violation of the law implies criminal liability.⁶² Only one member state (Slovakia) has indicated to *only* use this technique: only one member state ticked the box "*our law has created specific type of (objectified) liability for legal persons, not requiring a culpable state of mind*". It be noted, however, that in countries where the criminal liability of legal persons is not accepted, such solutions are also put forward as a means to introduce this concept without having to apply the concept of 'guilt' to legal persons. In Germany for example, the suggestion of a renunciation of penalties dependent on guilt in favour of the establishment of rules which, irrespective of guilt of the person concerned, are intended to restrict the danger that person poses, are gaining terrain.⁶³

⁶² More on liability for specific offences: see below 2.5.

⁶³ STRATENWERTH, G., "Strafrechliche Unternehmenshaftung?" in K. GEPPERT, J. BOHNERT and R. RENGIER (eds.), *Festschrift für Rudolf Schmitt zum 70. Geburtstag*, Tübingen, 1992, 303-305.

The figure above also shows that the “*mens rea* requirement” needs to be nuanced: indeed, a majority of the member states have ticked replies starting with “yes”, but 30% has indicated that their law applies the *mens rea* requirement to legal persons, and that no division between natural persons and legal persons can be made. This means that these member states do not assume the *mens rea* to be an objection to applying criminal liability to legal persons: after all, in this context those member states deem the *mens rea* requirement equal for natural persons and for legal persons.

The variety and nuances concerning the application of the *mens rea* requirement again indicate the considerable differences throughout the member states: where countries like Germany bluntly exclude any possibility of criminal liability because the *mens rea* can never apply to legal persons, others do apply it to those entities, and, even stronger, they use the same assessment of the requirement for natural and for legal persons. In Denmark, the jurisprudence regarding criminal liability for legal persons applies equivalent *mens rea* requirements as for physical persons, i.e. intent or negligence, depending on the specific type of offence. The prosecutor does not have to prove that culpability can be attributed to individual physical persons. If it can be stipulated that the offence occurred due to the fact that the legal person as such did not in a sufficiently responsible manner perform its duties to select, train and supervise staff members or to organize and structure work processes, such failure or malpractice might under an overall assessment be considered the requisite ground for liability. Even though the *mens rea* cannot always easily be established, the reasoning in Belgium is *grosso modo* the same as in Denmark. It follows that, as long as the material and moral element are proven, those countries apply a general criminal liability of legal persons.⁶⁴ Similarly, in the Netherlands, the differences in attribution of guilt stem from the involved offences, rather than the natural vs. legal character of the person involved. Indeed, the very principle of *mens rea* is equal for natural and for legal persons. Yet, the last box was not ticked by this member state, the reason being that *mens rea* is not required as a rule, unless the legal offence definition has incorporated a specific subjective element like intention or negligence: indeed, for some offences, “objectified” liability applies: consequently, in those cases, no *mens rea* element is required either for natural or for legal persons. Therefore, even

⁶⁴ General in the sense of the *mens rea* requirement, that is. The criminal liability of legal persons cannot be called ‘general’ in all its facets, given that there is a certain limitation *ratione materiae*. The Danish Penal Code’s general provisions on criminal liability for legal persons (PC Chapter 5, i.e. §§ 25- 27) apply in all instances *where provisions on specific offences provide for such liability*. However, such liability is authorized for all Penal Code offences, cf. PC § 306, and for a vast number of offences covered by special legislation outside the realm of the Penal Code (business law, environmental law, etc.). The fact that liability is allowed for all Penal Code offences implies that, at the moment, the liability can, apart from being ‘general’ concerning the material vs. moral element, also be called ‘general’ *ratione materiae*.

though the system does not differ based on whether natural or legal persons are involved, it would also be incorrect to assume that the *mens rea* requirement applies *as a rule*. Cyprus also uses the rule that the *mens rea* requirement is applied in the same manner to both natural and legal persons; this member state also ticked the “no” reply given that the requirement is not set *as a rule*: its application depends on the involved offence.

In some member states, the approach differs depending on which natural person committed the offence: in Austria, the *mens rea* requirements can differ based on whether a person holds a high or low position in within the legal person. Such reasoning is closely intertwined with the very existence of different attribution models, and will therefore be elaborated on in the section below.

In Spain, the combination of the novelty introduced in the Organic Law 5/2010 of 22nd June (which entered into force on 23rd December, 2010) and the vague wording of Article 31 bis.1 of the Spanish Penal Code contributes to the complexity of the moral element requirement. There is a distinction based on which natural person committed the violation. On the one hand, a legal person can only be held liable for offences committed by an employee when the commission of said offence was made possible by the lack of due supervision or control over the employee’s activities. This provision does imply the necessity of a “culpable state of mind” of the legal person for the attribution of criminal liability, but it has been construed as an assertion that a certain “organizational guilt” of the legal person is needed. On the other hand, given that Spanish law criminal liability of the legal person for an offence committed by a representative or director does not legally depend on a lack of organization, it could be argued that in that case the law has established an objectified criminal liability for legal persons. Even so, given that in accordance with the so-called culpability principle objective liability is constitutionally forbidden in Spanish criminal law it is foreseeable that the Spanish courts will require some degree of blameworthiness (e.g. a lack of a satisfactory organisation) in order to attribute criminal liability to a legal person for an offence committed by a representative or a director. Therefore, it can be argued that in Spain a certain type of organizational guilt will be required for the attribution of criminal liability to a legal person. This type of guilt, however, clearly differs from the idea of *mens rea* applied to the criminal liability of natural persons, which in Spain is based on the evidence of criminal intent or gross negligence. This system seems to hold the middle between the alter *ego/identification theory* and the *aggregation model* (see below 2.3.1.2).

It be noted that in some member states, like France, even though the requirement is set by law, the jurisprudence tends to be rather flexible when it comes to assessing the fulfilment of the moral element. In this regard, the immense variety between systems throughout the member states surfaces again: when comparing France to Poland, both member states have given the same

reply (see figure above). Yet, the *mens rea* requirement is entirely in both member states. In the former, it lies with the natural person: when the requirement is fulfilled and the act can be attributed to the legal person, no moral intent requirement is prescribed at the level of the legal person. In the latter, the *mens rea* requirement also lies with the legal person.

Concluding, the member states' rules regarding the *mens rea* requirement in relation to criminal liability of legal persons can be divided in two main groups. First, those countries whose law does not include criminal liability of legal persons based on the consideration that the moral element can never be fulfilled in relation to legal persons. Secondly, those member states whose law allows criminal liability of legal persons, with the crucial note that considerable differences exist amongst the latter. Roughly, three main approaches occur.⁶⁵ First, a regulatory model, in which the fulfilment of the *mens rea* requirement is assumed in relation to legal persons; second, the attribution of the fault of the natural person to the legal person; third, the identification of a separate fault of the legal person which could, for example, follow from a deficiency in its organisation.

⁶⁵ ADAM, S., BLAISE, N., COLETTE-BASECQZ, N., "Conclusions" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (433) 446.

2.3.1.2 *Different attribution models*

Theoretical framework

Turning to the existing attribution models, as argued elsewhere⁶⁶ a threefold distinction can be made, but as will be elaborated below, it is useful to also mention the development of a fourth model. Firstly, the vicarious liability/respondeat superior theory; secondly, the identification model theory; thirdly, the aggregation model theory; finally, the organisational model/self-identity model.

Firstly, the *vicarious liability/respondeat superior* theory opts for an almost civil law like attribution by stating that ‘any’ misconduct by the legal persons’ employees will lead to legal person responsibility, the only condition being that the acts took place for the company’s benefits and/or within its activities. Generally speaking, the deed is attributed to the employer, in a two-stage process. First, it is examined whether or not the elements of the offense were established in the conduct of the employee. Second, these elements are copied and ascribed to the employer as well, based on the relationship of employment that exists between them. Naturally, varieties exist. In Anglo-American law, this model was copied to the realm of penal law in order to enable criminal liability on a principal or an employer for the deeds of an agent or an employee.⁶⁷ Under federal US criminal law for example, a corporation can be found criminally liable for any criminal act undertaken by an employee, so long as the act was (a) within the scope of the employee’s agency and (b) to the benefit of the corporation. This was then, through a decision of the Supreme Court,⁶⁸ broadened to legal persons (in US terminology: legal entity). In some jurisdictions it is even possible to establish liability for offences committed by persons who legally speaking, are not employees. In this liability mechanism,

⁶⁶ S. ADAM, G. VERMEULEN, W. DE BONDT, “Corporate criminal liability and the EC/EU: bridging sovereignty paradigms for the sake of an area of justice, freedom and security” in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (373) 387-390.

⁶⁷ LEDERMAN, E., “Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity”, 4 *Buffalo Criminal law review*, 2001, (640) 652. For the principles and scope of the criminal vicarious liability doctrine in English law and traditional American law, see L.H. LEIGH, *Strict and Vicarious Liability: A Study in Administrative Criminal Law*, Sweet & Maxwell, 1982. 121p.

⁶⁸ US Supreme Court, *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909).

the company takes entire responsibility for its employees' misconduct. This system is used in Ireland,⁶⁹ amongst others.

Secondly, the *alter egoidentification model* states that only managers and employees endowed with certain responsibilities may cause criminal liability for the legal person. This is especially true for the offences requiring *mens rea*.⁷⁰ The rationale behind the fact that, compared to the *vicarious liability* model, the *alter ego* model occurs especially in relation to *mens rea* requiring offences,⁷¹ is that in the former, the law does not claim that the principle or employer actually acted or actually knew, no assimilation between the employee and employer occurs, in other words, it is a mere matter of technical attribution of the former's behaviour to the latter. In the *alter ego* model on the other hand, the highest placed members of the personnel act as the company itself rather than on behalf of it: a high degree of assimilation between the company and the natural person takes place, setting the right context for sentencing corporations for offences requiring a moral element of intent, recklessness or negligence.⁷² Indeed, this theory, designed to compensate the shortcomings of the vicarious liability doctrine (which in many instances was mainly applied to objectified liability), "*relies on the notion of personification of the legal body*,"⁷³ hence its name. The difference with the vicarious liability doctrine is that the behaviour and thoughts of certain individuals may be identified as the actions and thoughts of the legal body itself: after all, according to the supporters of this attribution model, in the absence of natural internal capabilities to take action, the corporation must act, directly or indirectly, through human representatives. The current approximation instruments dealing with liability on legal persons (discussed below in section 3) can be linked to this model. The MPC (Model Penal Code, US) also requires a corporate official's involvement in the crime before the crime can be attributed to the corporation. More specifically, a corporation will be held criminally liable for an act of its employee only if "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of

⁶⁹ However, it was indicated that the law Irish law remains unclear in several respects. It was reported that a lot of guesswork is involved when determining whether criminal liability can be attached to a legal person.

⁷⁰ "Frequent limitation to offenses of absolute or strict liability: LEDERMAN, E., "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity", 4 Buffalo Criminal law review, 2001, (640) 654.

⁷¹ Even though, not seldomly, a link exists between the attribution models and the *mens rea* requirement, both concepts should be viewed separately. Indeed, sometimes the need for *mens rea* can explain why a certain model is not – or less – applied to those offences, but within the different models, the attribution criteria are one specific set of rules, and the *mens rea*, another.

⁷² WELLS, C., "Corporate criminal responsibility" in TULLY, S. (ed.), *Research handbook on corporate legal responsibility*, Cheltenham/Northampton, Elgar, 2005, fn. 72 at 151.

⁷³ LEDERMAN, E., "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity", 4 Buffalo Criminal law review, 2001, (640) 655.

directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. There is no unanimity regarding the extent to which this last requirement, the toleration by the board of directors, forms an integral part of the identification doctrine. It is a criterion which refers to the legal person itself; consequently, it is a consideration in the last model, the self-identity doctrine, as well. Both in the vicarious liability doctrine, and in the identification doctrine, the natural person taking the action must be identified (in the former, this can be any employee, in the latter, this should be representative of the legal person). Here lies the difference with the next model, the aggregation model.

Thirdly, scholars⁷⁴ developed an alternative system, because it was felt that there was a need for identifying a collective responsibility of individuals within the legal person, rather than identifying an individual perpetrator, given that this latter technique was unable to reflect the complexity of decision-making within modern companies.⁷⁵ According to the new theory, the *aggregation model theory*, aggregation focuses on the combined and cumulative behaviour that ultimately lead to the offence. In this model, the thoughts of different agents/employees of the legal body can be linked, thus creating the required mental element. It is possible that under this model, innocent activities of agents/employees turn into corporate acts or omissions of a criminal character. It be noted that the 'mental element' that is established through the aggregation model is not necessarily synonymous to the criminal intent required in *mens rea* offences. Indeed, valid considerations are thinkable according to which proving knowledge does not imply the presence of the mental element required for conviction on this offence. After all, the rational element is concerned with cognition, while the intent can be perceived as an emotional element, which is often uniquely attributed to human beings.⁷⁶ Consequently, in some interpretations, the aggregation model, necessitates the identification of a certain 'corporate culture' that made possible, tolerated, or encouraged the offence. Another important element is then whether or not the company took sufficient organisational measures to avoid the offence. However, such considerations can also be found in yet another attribution model, namely the self-identity doctrine, also referred to as the organisational model.⁷⁷

⁷⁴ I.a. B. FISSE and J. BRAITHWAITE, *Corporations, Crime and Accountability*, Cambridge, Cambridge University Press, 1993.

⁷⁵ C. WALSH and A. PYRICH, "Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?", 47 Rutgers L. Rev. 605, 1995, 625.

⁷⁶ LEDERMAN, E., "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity", 4 Buffalo Criminal law review, 2001, (640) 665-669.

⁷⁷ E. COLVIN, "Corporate Personality and Criminal liability", *Criminal law forum*, 1995, 1-44.

Fourthly, the *self-identity doctrine (or organisational model)* is based on the assumption that legal persons have a mechanism for expressing their substance and self-identity, and can thus be held liable for crimes, without necessarily having to be linked to the behaviour of individuals. After all, it is far from easy to reduce large and complex corporations to a sum of individuals.⁷⁸ The self-identity theory relies on a realist approach, whereas the three previous ones are nominalist: indeed, in these theories, the legal person is seen as a mere collection of individuals, be it without having to identify them in the aggregation doctrine. Here, in contrast, the legal entity exists in and of itself and can thus commit crimes, regardless of the involvement of individuals. The self-identity doctrine is heavily debated: opponents dismiss it because of its apparent breadth and uncertainty,⁷⁹ whereas its proponents consider that this model reflects the nature of corporate responsibility and corporate decision-making more accurately⁸⁰ than the other three models, which are in essence nominalist, based on the behaviour of (an) individual(s).⁸¹ The choice for either of them is more than mere theory, and can have far-reaching consequences. One of the most recent and groundbreaking examples of the impact a choice for the organisational model can have is the UK Corporate and Man Slaughter Act of 2007.⁸² Over 25 years after the Herald of Free enterprise disaster, this act now allows for a more realistic approach (but only for corporate manslaughter) in comparison with their conservative identification doctrine. However, this Act is still a little bit attached to the latter doctrine by demanding a substantial link with a failing senior management (but again without the need of finding an individual). This nuance is symbolic for the very debate which exists about this attribution model. Indeed, there are two main possibilities to define the relationship between the organisational model and the previous three.⁸³ According to the first view, it can

⁷⁸ D. ROEF, and T. DE ROOS, "De strafrechtelijke aansprakelijkheid van de rechtspersoon in Nederland: rechtstheoretische beschouwingen bij enkele praktische knelpunten" in M. FAURE, K. SCHWARZ, *De strafrechtelijke en civielrechtelijke aansprakelijkheid van de rechtspersoon en zijn bestuurders*, Antwerp, Intersentia, 1998, 91.

⁷⁹ STRATENWERTH, G., *Schweizerisches Strafrecht, Allgemeiner Teil I*, Bern, § 5 N 21, 2005.

⁸⁰ A. PINTO and M. EVANS, *Corporate Criminal Liability*, Sweet & Maxwell, 2003, 432; C. WELLS, "Corporate criminal responsibility" in TULLY, S. (ed.), *Research handbook on corporate legal responsibility*, Cheltenham/Northampton, Elgar, 2005, 147-159.

⁸¹ The individual needs to be identified in the vicarious liability and in the identification theory; the identification of the particular individual or of the several individuals is not necessary under the aggregation theory. Nonetheless, all three models still depart from the (combined) behaviour of (several) individual(s), which is not the case in the organisational/self-identity model.

⁸² SCHNEIDER, A., "Corporate Liability for Manslaughter – A comparison between English and German Law", *Zeitschrift für Internationale Strafrechtsdogmatik*, 22-43.

⁸³ LEDERMAN, E., "Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity", 4 *Buffalo Criminal law review*, 2001, (640) 665-669.

be seen as a continuation of the other models, and particularly as a far-reaching development of the aggregation idea. The theoretical line of the development of the liability models begins with the ideas of adaptation and imitation (vicarious, resp. identification), continues through the aggregation approach, and culminates in the self-identity model. The second view, in contrast, emphasises how the self-identity model, in contrast to the other three, focuses on the liability of the corporation itself, rather than liability following the attribution of offences committed by individuals. There is thus considerable debate about the organisational model. Crucial elements of the model, such as the 'corporate culture' and the extent to which this plays in determining liability, were examined in the questionnaire (*cf. infra* in this subsection, regarding justification grounds). However, the questionnaire did not put the organisational model forward as being a separate attribution.

In practice: application of the vicarious liability and identification model

Questions constructed against the backdrop of these four options provide with valuable information regarding the employed attribution techniques. The self-identification model was not put forward explicitly in the member states questionnaire. Instead, considerations and questions related to the corporate culture of the concerned legal person, were included as one of the aspects of liability attribution, without necessarily tying them to a specific liability doctrine. In doing so, the project team intended to prevent that member states would be reluctant to indicate that the corporate culture is indeed a consideration when assessing liability of a legal person, if such indication would automatically lead to the categorization of that member state's liability regime as a self-identity model.

This approach led to some interesting results; an example being the Netherlands. In this member state, especially in light of a Supreme Court decision from 2003, there is a very broad set of non-cumulative criteria which can lead to liability.⁸⁴ Indeed, as long as the behaviour has a link with the 'sphere' of the concerned legal person. Following criteria are said to be alternative criteria:

- The offence has been committed by an employee (regardless of position);
- The offence benefited the interests of the legal persons;
- The offence was part of the legal person's normal activities or tasks;
- The offence was of such nature that the legal person had control over its occurrence and accepted it, or accepted a similar offence. This last requirement can hint towards a *mens rea* element (see above 2.3.1.1), but is no synonym: indeed, for *mens rea* offences, proof of the moral element is

⁸⁴ HR 21 oktober 2003, NJ 2006, 328 (Drijfmest).

necessary. Fulfilment of the fourth criterion (which is in essence merely a criterion for the attribution, not for the establishment of the offence as such) does not necessarily provide with sufficient proof. Nonetheless, it will of course be an important indicator of *mens rea*.

Leaving the discussion regarding the potential moral element aside (after all, many offences, especially economic offences, do not require the establishment of a moral element), these criteria listed in Dutch law show how an attribution model does not necessarily qualify as a 'pure' application of one of the models above. Indeed, several elements which are drawn from several models can (be it as isolated criteria or their combination) lead to liability of the legal person. The last criteria, referring to the corporate culture, shows how elements of the self-identity model are combined with vicarious/identification models.⁸⁵

The following table contains an overview of which member states' systems are based on a vicarious liability versus an identification model. It cannot, however, be interpreted as an overview of applicable attribution theories: after all, in some member states, such as the Netherlands, the 'corporate culture' plays an important role, implying that their attribution models are on the crossroads of the organisational model on the one hand and the vicarious and/or identification model on the other hand. It thus appears that many member states apply a combination of several models, not only of the organisational model and others, but also of the vicarious liability and the identification doctrine. This is apparent from the table in which several member states indicated to apply elements of both these models. The left column contains the country codes of those countries applying liability to legal persons following the behaviour of their employees. This technique reflects (elements of)⁸⁶ the vicarious liability/respondeat superior theory. The right column contains the country codes of those countries applying liability to legal persons following the behaviour of their staff. As it was put in the questionnaire, these are people who (as opposed to employees) possess managerial and or representative responsibility, thus reflecting (elements of)⁸⁷ the alter ego/identification model.

When a member state is included in italics, this means that the consulted member state expert had originally not ticked the concerned box in the survey, but that the project team adjusted that reply, considering the information obtained through comments or other replies in the survey and follow up questions after the preliminary analysis of the data gathered.

⁸⁵ See in that respect also below, where the justification grounds for liability, based on the legal person's organisation, are discussed.

⁸⁶ The replies do not automatically imply that the concerned countries apply this model fully, without a combination with elements from other attribution models; see below.

⁸⁷ The replies do not automatically imply that the concerned countries apply this model fully, without a combination with elements from other attribution models; see below.

In the analysis of the gathered data reflected in the table, these specificities will be explained.

| Attribution of criminal liability to legal persons | | | | |
|--|--|-------------------|---|-------------------|
| Conditions | Acts by <i>employees</i> | | Acts by <i>staff</i> | |
| | MS | Nr. ⁸⁸ | MS | Nr. ⁸⁹ |
| For the benefit of the LP | AT BE CY FI HU IT MT LT PL PT SL RO UK IE DK | 13 +2 | AT EE ES FI HU IT LU PL PT SK UK IE DK RO LT | 11 +4 |
| Within activities LP | AT BE CY DK IE FI LT MT NL RO UK | 11 | AT FI FR SK IE DK RO LT | 4 +4 |
| Other | BE ES FR PL NL RO | 6 | BE CY ES FR | 4 |

First, the difference between the *employees* or the *staff* being able to give rise to the criminal liability of the legal person needs to be discussed.⁹⁰

Originally, only eighteen member states had ticked a box pertaining to the question targeted in the left column. Hence, nine member states did not indicate that their member state employs (elements of)⁹¹ the vicarious liability/respondeat superior theory. For six of those, this is undoubtedly correct: at the time of the completion of the questionnaire, the Czech Republic did not yet apply criminal liability to legal persons and the experts replied accordingly. For five others, notably Bulgaria, Germany, Latvia, Sweden and Greece, the absence of reply is easily explained, given that their national legislations do not apply criminal liability to legal persons. The three remaining member states, Estonia, Luxembourg and Slovakia, did not indicate to attach potential criminal liability to the acts of employees, and no comment provided in the survey contradicted this statement. These member states did, however, indicate to apply criminal liability for acts of the staff of legal persons in some instances (right column). Consequently, it can be concluded that amongst those member states applying

⁸⁸ The numbers should be read considering that there is a considerable overlap between the replies: in each row, a very small number of MS ticked *only* the box of that row: "acts for the benefit of the legal person": four MS, "acts within the activities of the legal person": two, and "other": two.

⁸⁹ Here too, the numbers should be read considering that there is a considerable overlap between the replies: in each row, a very small number of MS ticked *only* the box of that row: "acts for the benefit of the legal person": four MS, "acts within the activities of the legal person": two, and "other": two.

⁹⁰ It be noted that they need not necessarily be seen as alternatives: the considerable overlap shows that in many member states acts of both groups can give rise to liability. However, even when not both columns are ticked, the reality in certain member states shows that it is sometimes not one or the other: in the Netherlands for example, the (combination of) the criteria listed above will be determining, rather than whether the natural person is an employee of a member of staff.

⁹¹ The replies do not automatically imply that the concerned countries apply this model fully, without a combination with elements from other attribution models; see below.

criminal liability to legal persons, only three do not apply (elements of) the vicarious liability/respondeat superior theory, but use (elements of)⁹² the alter ego/identification model instead.

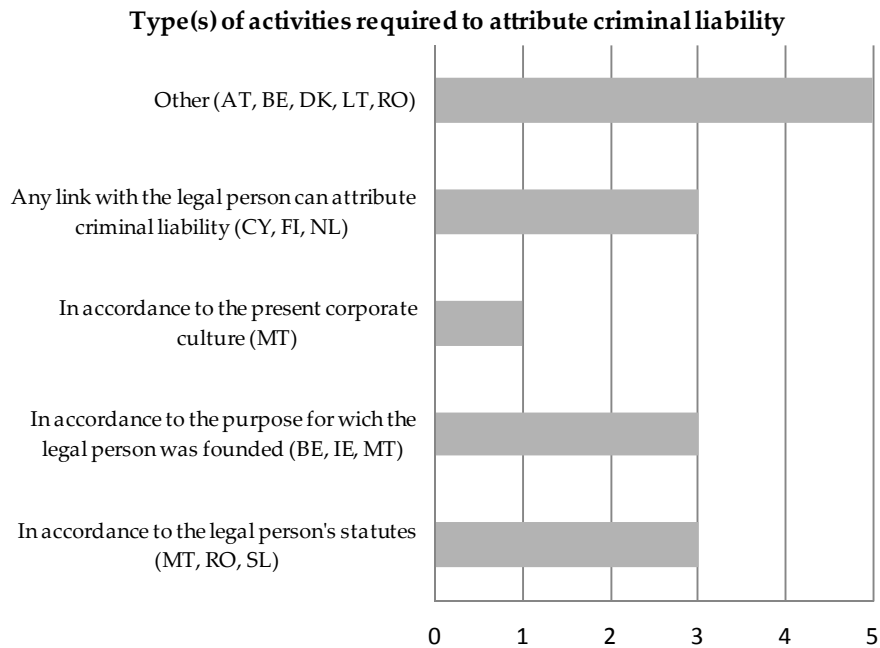
In relation to the *alter ego/identification model*, originally only fourteen member states indicated to use this liability model (after elimination of the overlap in replies). Again, the six member states who do not apply criminal liability did most logically not tick any boxes of the replies pertaining to the question targeted in the right column, namely Bulgaria, Germany, Latvia, Sweden, Greece and the Czech Republic (it be noted that as of January 2012 the latter does apply this type of liability). Yet, still seven more member states did not indicate to apply criminal liability for the behaviour of staff of the legal person. However, for four member states the comments in the questionnaire have indicated that staff also qualifies as those persons being able to give rise to criminal liability of the legal person; it concerns Denmark, Ireland, Lithuania and Romania. It thus appears that only three member states do not apply (elements of) the alter ego/identification model but use (elements of) the vicarious liability/respondeat superior theory instead; it concerns Malta, the Netherlands and Slovenia. It be remembered that several member state combine the elements of either the vicarious liability model or the identification model, with elements pertaining to the identification model (those elements usually referring to the corporate culture of the involved legal person).

Secondly, turning to the distinction between acts “for the benefit of the legal person” and acts “within the activities of the legal person”, it is striking that both for the column containing staff and employee, more member states have indicated the former condition.

A close examination of the comments reveals that these results are not entirely precise. Regarding the questions from the left column, it appears that both in Ireland and in Denmark there is virtually no difference between the liability rules in relation to acts for the benefit of the legal person or within the activities of the legal person.

⁹² The replies do not automatically imply that the concerned countries apply this model fully, without a combination with elements from other attribution models; see below.

Another level of variety occurs regarding the meaning of ‘within the activities of the legal person’. Following figure summarizes the results.



Following examples make the variety in liability regimes even more tangible. According to the Spanish Penal Code, criminal liability is attributed to a legal person for offences committed by its employees only when such offences are committed for the benefit of the legal person and also within the legal person’s activities. Though the Penal Code does not define the extent of the phrase “within the legal person’s activities”, the Spanish Supreme Court has applied a very broad scope of this concept when dealing with the civil consequences of a criminal offence.

In Belgium on the other hand, the material element⁹³ needed to incur liability establishes a physical connection between the offence and the legal person. Article 5, 1 Criminal Code enumerates in a limitative way three cases where such connection can be demonstrated: legal persons can be held liable for offences which are ‘intrinsically bound to the realization of their social object’, which are ‘intrinsically bound to the defence of their interests’, or which, on grounds of a concrete facts-pattern, are committed ‘for its account’. How these are interpreted is left to the judge on a case by case basis, and the legislator did

⁹³ As opposed to the moral element, see above 2.3.1.1.

not specify which persons' behaviour can give rise to liability of the legal person.⁹⁴

In French Criminal Law, an 'ordinary' employee, i.e. who has no executive power and/or representative authority of the legal person, can never engage the criminal liability of the latter. However, jurisprudence has established that an employee possessing a valid delegation of authority, in particular regarding the respect of the employment hygiene and safety regulations, is regarded as a representative authority.

The Romanian Criminal Code, besides 'within the activities' and 'for the benefit', includes a third category – 'offences committed on behalf of the legal person'. The offences perpetrated on behalf of the legal person are those offences perpetrated within the process of organizing the activity and operation of the legal person without being directly connected to its object and without requirement to bring a benefit to the legal person (for example, discriminations, harassments etc.).

From the survey it is clear that several member states apply a relatively broad definition of what "hierarchy of the legal person's staff" entails. In concrete terms, a relatively broad definition implies that the scope of the hierarchy of company staff is can cover (based on the facts) a person who has a leading position within the legal person based on a power of representation of the legal person, or based on an authority to take decisions on behalf of the legal person or based on an authority to exercise control within the legal person.

Justification grounds for the legal person, linked to its organisation and 'blameworthiness'

Even though many member states' legal systems indeed foresee the possibility for legal persons to be criminally liable for offences committed by their employees, several indicated that legal persons can escape such liability if they can prove that sufficient organization, due instructions and reasonable care and control were applied, both when the condition for liability is commitment of the offences within the legal person's activities and when the condition is commitment for the benefit of the legal person.

This reasoning is linked to the attribution model listed above, namely the aggregation model, and the fourth mentioned model, being the organisational model/self-identity doctrine. However, even though they are clearly *linked*, the above models of attribution and the here mentioned possibility to escape the liability are not the *same* mechanisms, given that they both apply very different logics: in the aggregation model the default position is that only a collective responsibility of individuals within the legal person, rather than (an)identified individual perpetrator(s), can lead to liability of the legal person. It focuses on

⁹⁴ Please note that under the Belgian law system the legal person can also incur responsibility as an entity on its own. C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht*. In hoofdlijnen, Antwerpen/Apeldoorn, Maklu, 2011, 125.

the combined and cumulative behaviour that ultimately lead to the offence. The organisational model refers to the establishment of the liability of the legal person as a separate entity, regardless of the individuals involved. The mechanism discussed here however, starts from a liability of the legal person following the behaviour of one individual. Only after that has been established, the behaviour of the legal person as a 'self-identity' comes into play: when sufficient proof is given that the organisational structure and/or the legal person's instructions were not responsible (read cannot be blamed) for the individual's behaviour, there is a possibility for the legal person to escape the liability for the behaviour of the individual natural person. In other words, the mechanism whereby the organisational structure of the legal person leads to the latter escaping its responsibility combines elements of the 'collective responsibility' of individuals with the legal entity as a 'self-entity', without being a full application of one of these attribution models.

The latter is very similar to the Slovenian situation, where lack of organisational care and control is only one alternative condition for criminal responsibility of legal persons, together with the fact that the perpetrator committed the criminal offence in the name of, on behalf of or in favour of the legal person. In Cyprus on the other hand, the different elements of the offence charged need to be proven on a case by case basis. The burden of proof lies with the prosecution. The fact that a legal person is sufficiently organized, it has duly instructed its directors, managers or employees and has taken reasonable care to exert control on its directors, managers or employees, could be factors to be taken into account. It should be remembered that in the Spanish situation a variation of the 'pure' aggregation model occurs, in the sense that the default position is that only a collective responsibility of individuals within the legal person, rather than identifying an individual perpetrator, can lead to liability of the legal person: in Spain, this is indeed a necessary (as opposed to alternative in Slovenia) condition, at least regarding the liability for acts of employees.⁹⁵

Concluding, considering the high number of member states which indicated to employ one of the mechanisms listed in the question regarding the liability for offences committed by employees and/or in the question dealing with liability for offences committed by certain hierarchy of company staff, many EU member states use variations on (and combinations of) the *vicarious liability/respondeat superior* theory and the *alter ego/identification* model, be it with corrections which can be linked to the *aggregation model theory*⁹⁶ and the *organisational model*.

⁹⁵ For more details see above 2.3.1.1.

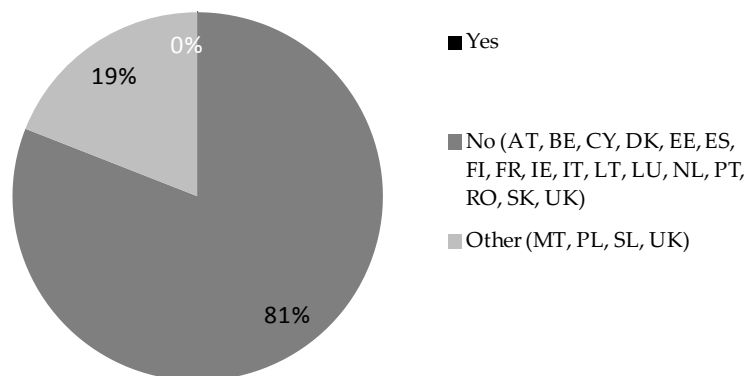
⁹⁶ The latter is also linked to the *mens rea* debate, see in particular the explanation concerning the Spanish situation.

2.3.1.3 *Parallel prosecution and concurring liability*

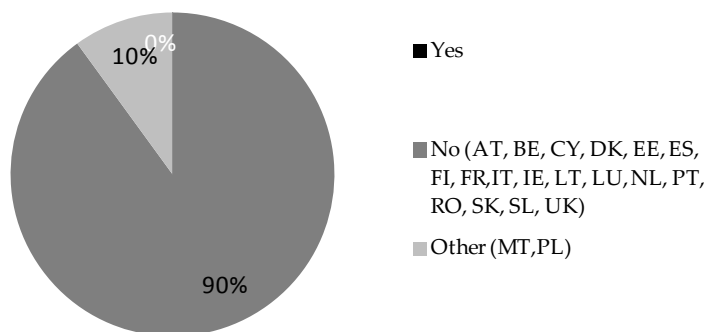
Other questions arising when examining attribution mechanisms are whether parallel prosecution of both the legal person and the concerned natural person is possible for the same (or, depending, related) offence and whether or not both the natural and the legal person can be held criminally liable for the same (or, depending, related) offence.

Regarding parallel prosecution, in a clear majority of the member states the prosecution of the legal person does not exclude the prosecution of the concerned natural person. An even bigger majority applies this to the reversed situation: prosecution of the natural person rarely excludes the prosecution of the legal person. Both results are comprised, respectively, in the tables below.

5.5 Does criminal prosecution of the liable legal person exclude parallel prosecution for the natural person/perpetrator?



5.6 Does criminal prosecution of the liable natural person/perpetrator exclude parallel prosecution for the liable legal person?



In the context of the latter figure, the example of Finland shows that in that member state the default position is that both the legal person and the natural person are prosecuted at the same time. This follows from the fact that it is explicitly stated in which cases liability of the legal person is still possible, despite the natural person not being prosecuted: criminal liability can be confined to a legal person if the perpetrator is identified but is not prosecuted e.g. because the perpetrator cannot be reached, the perpetrator has died,⁹⁷ or the crime is time barred in regard of the perpetrator but not the legal person. This is listed as one of the two Finnish exceptions to the *mens rea* requirement. In France, the possibility for parallel prosecution is explicitly included in the legislation. In several member states amongst which Slovenia, the natural and legal person will as a rule be subject to parallel proceedings. In others such as Italy, the prosecution or the trial against the natural person/perpetrator and the prosecution or the trial against the legal person may be carry out separately or jointly (Art. 38 Act 231/2001).

Sometimes the situation is less black and white, as is the case in Poland: in this member state, the judgment of the natural person is a precondition for the criminal liability of a legal person: in other words, parallel prosecution is not possible, yet the criminal liability of the legal person without the criminal liability of the natural person is no possible. Indeed, there are two separate proceedings. First against the natural person (where the sanction can be imposed only on the natural person), and after valid judgments regulated, the second proceedings against legal entities. The collective entity is liable if the

⁹⁷ Many member states contain rules concerning the death of the natural person and the consequence for the liability of the legal person.

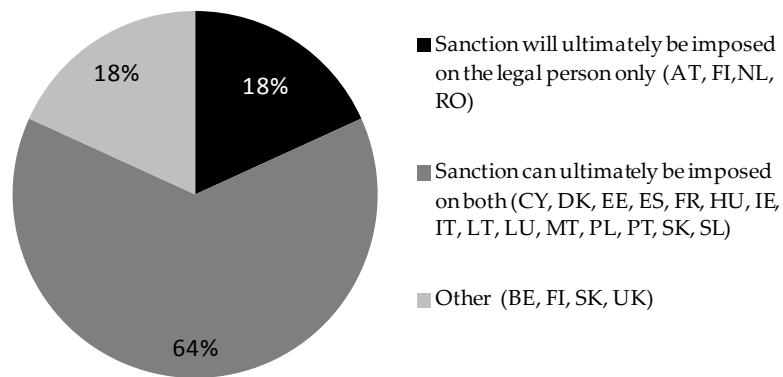
commitment of an offence by a natural person has been confirmed with a valid convicting judgment, a judgment conditionally discontinuing penal proceedings, or proceedings in a fiscal offence case, a valid decision to leave voluntary submission to liability, or a court's decision to discontinue the proceedings for circumstances excluding the penalisation of the perpetrator.

Regarding concurring liability, several systems exist. In Belgian law⁹⁸ for example, there is a cascade system. The first question is whether or not the natural person acted intentionally. 'Intent' in this context is the intent as apparent from the concrete circumstances of the case. This was added to avoid that in case of 'objectified' liability (*cfr. supra*) the intent requirement would automatically be met, resulting in the legal person consistently avoiding its liability. That would indeed have happened frequently if for the assessment of intent the legal qualification of an offence would have been the criterion. When it is concluded that in the specific circumstances of the case the natural person acted intentionally, a concurring system of liability applies in that both the legal and the natural person can (but do not necessarily have to) be held liable. If the natural person did not act intentionally, this possibility for concurring liability is lost: in this case, only one of both will be held liable: the decisive factor then becomes who committed the "worst" violation: the natural or the legal person. This is a factual matter which is assessed by the judge.

The figure below shows that four member states have indicated not to have a clear-cut system, in that it is not possible to say as a rule that a sanction will be imposed on either the natural person, or the legal person, or on both. One of those member states is Belgium and three more indicate to have such a nuanced system.

⁹⁸ For more details see C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht*. In *hoofdpijnen*, Antwerpen/Apeldoorn, Maklu, 2011, 132-134.

5.4 Under your Member State's national law or legal regime, on who will the sanction ultimately be imposed?



Another example of a nuanced system is Finland: when a natural person is personally liable for the company debts, the sanction is normally imposed on the legal person unless in case of insolvency: then, the sanction is imposed on the natural person.

Despite these differences, the figure shows that amongst the member states which apply criminal liability to legal persons, in the majority of the cases, sanctions can be imposed on both.

2.3.2 *Attribution mechanisms and administrative liability*

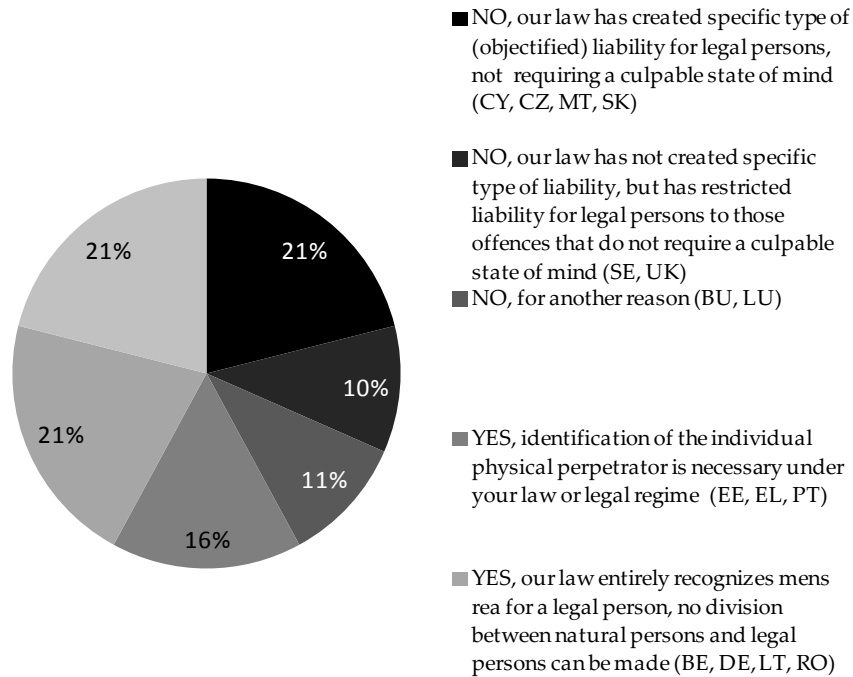
In this context, next to the attribution mechanisms and the matters of parallel prosecution and concurring liability are examined, the moral element is looked into as well, even though this aspect might at first sight be perceived as typical for the criminal liability context.

2.3.2.1 *Mens rea*

This requirement is not exclusive to the criminal liability sphere. For example, the Spanish Constitutional Court has explicitly stated that even administrative liability can only be attributed to a legal person if there is some degree of blameworthiness in the commission of the offence (SSTC December 19, 1991/246, and June 30, 2003/129). The term 'blameworthiness' is no synonym to the term '*mens rea*', but it indicates that the complete absence of a moral element in the administrative sphere should not be readily assumed.

Looking at the replies from the member states in this regard, Spain indicated *not* to require a *mens rea* element; as said above, given that the term 'blameworthiness' is no synonym to the term '*mens rea*', it can indeed be seen why this reply was given. However, it is a mere matter of interpretation. The matter of Spain being as it may, the fact remains that several member states indeed still require the *mens rea* element in the context of administrative liability for offences. This is visualized in the following figure.

8.3 Does your Member State’s national law or legal regime – as a rule – require the establishment of ‘mens rea’ for a legal person in the sphere of administrative liability for offences?



Amongst the member states whose legal system comprises of a mechanism of administrative liability for offences,⁹⁹ a small majority of the member states indeed replied that the *mens rea* requirement is a condition for the application of administrative liability of legal persons for offences. Again, this supports the statement that the complete absence of a moral element in the administrative sphere should not be readily assumed. However, naturally there is a considerable difference with the criminal liability sphere: the figure above (in 2.3.1.1) shows how in the latter, no less than 85% of the member states require the fulfilment of this moral element in order to establish criminal liability.

⁹⁹ With the exception of Slovakia: the replies to the survey contain an inconsistency in that on the one hand, Slovakia did not indicate to apply administrative liability for any of the listed offences (see 2.4.2), thus indicating that its national law does not comprise a mechanism for administrative liability for offences. On the other hand, it did reply to the question dealing with *mens rea* in relation to administrative liability for offences (a possible explanation is that the reply given was negative).

2.3.2.2 Different attribution models

As was done in the context of criminal liability, regarding administrative liability for offences it is verified if, and if so, which attribution mechanism is used by the member states who apply the administrative liability of legal persons. The left column contains the country codes of those countries applying liability to legal persons following the behaviour of their employees. This technique reflects the application of (elements of)¹⁰⁰ the vicarious liability/*respondeat superior* theory. The right column the country codes of those countries applying liability to legal persons following the behaviour of their staff. As it was put in the questionnaire, these are people who (as opposed to employees) possess managerial and or representative responsibility, thus reflecting (elements of) the alter ego/identification model.

| Attribution of administrative liability for offences to legal persons | | | | |
|---|-------------------------------|------------|----------------------|--------------------|
| Conditions | Acts by <i>employees</i> | | Acts by <i>staff</i> | |
| | MS | Nr. 101 | MS | Nr. ¹⁰² |
| For the benefit of the LP | BE CY MT LT LV PT SE SK | 8 | BE DE EE EL LV SE SK | 7 |
| Within activities LP | BE BU CY LT LV MT NL RO SE SK | 10 | BE CZ DE LV PT SE SK | 7 |
| Other | ES FI NL LT LV | 5 | BE CY ES FI LU LV | 6 |

A total of thirteen member states (after elimination of overlap) has indicated to apply administrative liability for offences to legal persons following certain acts of their employees. Of the fourteen member states who indicated not to apply this *vicarious liability/respondeat superior* theory, this was to be expected for seven of them,¹⁰³ given that their national law does not comprise of a mechanism of administrative liability of legal persons for offences.¹⁰⁴

¹⁰⁰ The replies do not automatically imply that the concerned countries apply this model fully, without a combination with elements from other attribution models; see below.

¹⁰¹ The numbers should be read considering that there is a considerable overlap between the replies: in each row, a very small number of MS ticked *only* the box of that row: "acts for the benefit of the legal person": no MS, "acts within the activities of the legal person": two, and "other": two.

¹⁰² Here too, the numbers should be read considering that there is a considerable overlap between the replies: in each row, a very small number of MS ticked *only* the box of that row: "acts for the benefit of the legal person": three MS, "acts within the activities of the legal person": one, and "other": two.

¹⁰³ AT DK FR HU IT PL IE.

¹⁰⁴ Regarding The Netherlands and Slovakia the replies to the survey contain an inconsistency in that on the one hand, The Netherlands and Slovakia did not indicate to apply administrative liability for any of the listed offences (see 2.4.2), thus indicating that their national law does not

Regarding acts of their staff, also total of thirteen member states (after elimination of overlap) replied to apply administrative liability for offences to legal persons following certain of their staff's acts. Of the fourteen member states who indicated not to apply this *alter ego/identification model*, this was to be expected for eight of them,¹⁰⁵ given that their national law does not comprise of a mechanism of administrative liability of legal persons for offences.¹⁰⁶

Comparing these results to the outcome of similar questions in the criminal liability sphere, less member states have indicated to apply administrative liability to actions of subordinates than in the sphere of criminal liability. This fits the given that a higher degree of *mens rea* is required in the latter sphere. After all, several member states who demand the establishment of a *mens rea* requirement in the context of criminal liability only acknowledge its potential existence with physical persons. Consequently, in those cases criminal liability of the legal person can only be established via liability for acts of employees and/or staff. This consideration plays to a lesser extent in the administrative liability context.

2.3.2.3 *Parallel prosecution and concurring liability*

Other questions arising when examining attribution mechanisms are whether parallel prosecution of both the legal person and the concerned natural person is possible for the same (or, depending, related) offence and whether or not both the natural and the legal person can be held administratively liable for the same (or, depending, related) offence.

Regarding parallel prosecution, the situation is perfectly comparable to the situation regarding criminal liability of legal persons. In a clear majority of the member states the prosecution of the legal person does not exclude the prosecution of the concerned natural person. An even bigger majority applies this to the reversed situation: prosecution of the natural person rarely excludes the prosecution of the legal person. Both results are comprised, respectively, in the tables below.¹⁰⁷

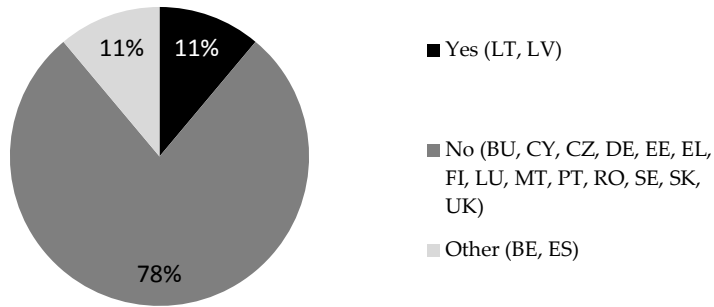
comprise a mechanism for administrative liability for offences and on the other, they indicated to apply such liability to legal persons for the acts of the latter's employees.

¹⁰⁵ AT DK FR HU IT NL PL IE.

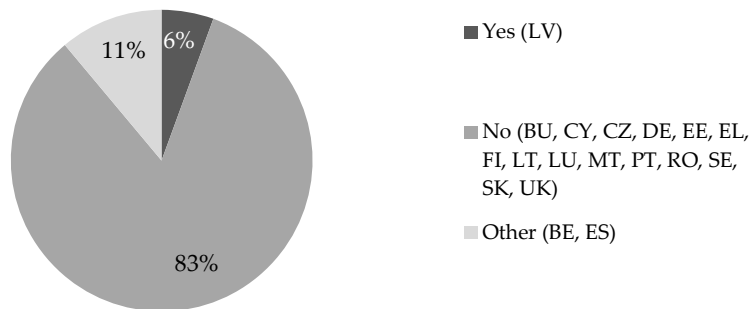
¹⁰⁶ Regarding Slovakia the replies to the survey contain an inconsistency in that on the one hand, Slovakia did not indicate to apply administrative liability for any of the listed offences (see 2.4.2), thus indicating that its national law does not comprise a mechanism for administrative liability for offences and on the other, it indicated to apply such liability to legal persons for the acts of the latter's staff.

¹⁰⁷ For both tables, the following consideration applies: Regarding Slovakia the replies to the survey contain an inconsistency in that on the one hand, Slovakia did not indicate to apply administrative liability for any of the listed offences (see 2.4.2), thus indicating that its national law does not comprise a mechanism for administrative liability for offences and on the other, it

10.4 Does administrative prosecution of the liable legal person exclude parallel prosecution for the natural person/perpetrator?



10.5 Does administrative prosecution of the liable natural person/perpetrator exclude parallel prosecution for the liable legal person?

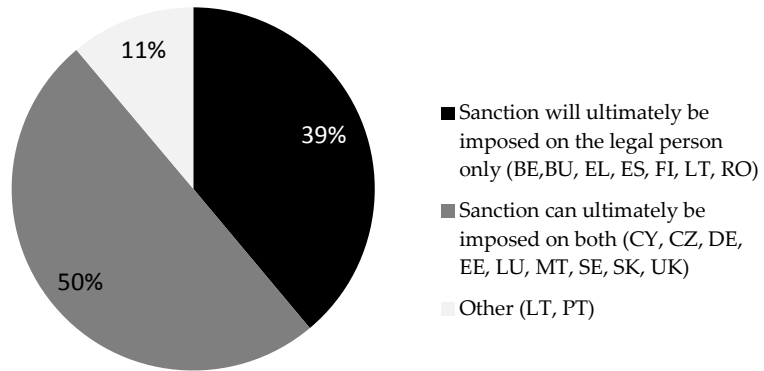


Regarding concurrent liability, the picture is divided. In merely half of the member states the sanctions can be imposed on both the natural and the legal person; a smaller percentage than the outcome of the survey in the context of criminal liability of legal persons. The results are comprised in the table below.¹⁰⁸

replied to the parallel prosecution questions in the context of administrative liability for offences.

¹⁰⁸ For this, the following consideration applies: Regarding Slovakia the replies to the survey contain an inconsistency in that on the one hand, Slovakia did not indicate to apply administrative liability for any of the listed offences (see 2.4.2), thus indicating that its national

10.3 Under your Member State's national law or legal regime, on who will the sanction ultimately be imposed?



law does not comprise a mechanism for administrative liability for offences and on the other, it replied to the concurrent liability question in the context of administrative liability for offences.

2.4 Variety in offences leading to liability of legal persons

Findings

- 50% of the member states introduced a general criminal liability whereas the others limit the liability to specific offence types (41%) or categories (9%).
- 39% of the member states introduced a general administrative liability whereas the others limit liability to specific offence types (33%) or categories (28%).

Recommendations

- Because not all member states introduced a general liability mechanism, it is important for the EU to consistently regulate the liability of legal persons for the offences that are subject to approximation.

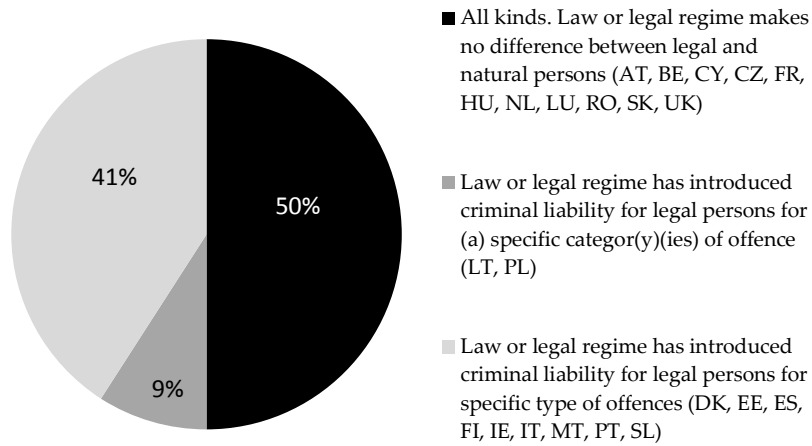
2.4.1 *General, family or single offence approach*

A fourth fundamental aspect of legal persons' liability where variations exist among the member states relates to the offences that are brought in relation to the liability of the legal persons.

Member states accepting liability of legal persons – be it criminal or administrative – do not necessarily share the same view as to the offences that can be committed by a legal person. Some member states have opted to extend the liability of legal persons to their entire criminal code. By contrast, other member states have adopted specific clauses that limit the liability of legal persons to specific offences.

From the replies to questions 4.1 it becomes clear that around 39% (with respect to criminal liability) of the member states have introduced a general liability of legal persons for offences, meaning that no distinction is made in the offences that can be committed by natural or legal persons. An abstract indication of the offence categories or families is least favoured approach when seeking to introduce liability only with respect to a selection of offences.

4.1 For what kind of offences can a legal person be held criminally liable under your Members State's national law or legal regime?



Considering the differences between the approach in relation to criminal liability when compared to the approach in relation to administrative liability, it becomes interesting to see how that diversity is spread over the member states. The table inserted below provides an overview of the offences connected to liability per member state, presenting both the approach in relation to criminal liability and administrative liability.

The columns distinguish between the introduction of liability for *all* known offences, for a selection of offence *families* or for a selection of *single* expressly identified offences. In the event the member state has indicated not to have introduced either criminal or administrative liability, the row is filled with a light grey colour.

| Offences for which a legal person can be held liable | | | | | | |
|--|--------------------|--------|--------|--------------------------|--------|--------|
| MS | Criminal liability | | | Administrative liability | | |
| | All | Family | Single | All | Family | Single |
| AT | X | | | | | |
| BE | X | | | X | | |
| BU | | | | | | X |
| CY | X | | | | X | |
| CZ | ? ¹⁰⁹ | | | | | X |
| DE | | | | X | | |
| DK | | | X | | | |
| EE | | | X | | | X |
| EL | | | | | | X |
| ES | | | X | X | | |
| FI | | | X | X | | |
| FR | X | | | | | |
| HU | X | | | | | |
| IE | | | X | | | |
| IT | | | X | | | |
| LU | X | | | | X | |
| LT | | X | | | X | |
| LV | | | | | X | |
| MT | | | X | | | X |
| NL | X | | | | | |
| PL | | X | | | | |
| PT | | | X | X | | |
| RO | X | | | | X | |
| SE | | | | X | | |
| SL | | | X | | | |
| SK | X | | | | | |
| UK | X | | | | | X |

¹⁰⁹ In the Czech Republic, criminal liability for legal persons has only been introduced from January 2012. The replies included in the questionnaire related to the situation at the time of its completion. The information gathered is inconclusive on the *ratione materiae* with respect to criminal liability.

The table shows that only Belgium, Estonia, Lithuania and Malta have introduced parallel approaches for criminal and administrative liability of legal persons.

For all other member states, the approach differs. Examples exist on the one hand of member states that have introduced a broad *all* inclusive criminal liability complemented with a category approach identifying the *families* for which administrative liability is introduced (e.g. Cyprus); and on the other hand of member states that have introduced a broad *all* inclusive criminal liability complemented with an approach identifying each and every *single* offence for which administrative liability is introduced (e.g. UK); Finally, the table shows that where a *single* offence approach is introduced in relation to criminal liability of offences, an *all* inclusive approach can be found with respect to administrative liability (e.g. Spain).

2.4.2 *Typology of the offences singled out*

Member states that have not introduced an *all* inclusive liability for legal persons tend to have a rather traditional view with respect to the offences that can be committed by legal persons. Though there are a number of offences for which the architecture of the constituent elements precludes the commission by a legal person, the examples are limited. France justly refers to infanticide which presupposes consanguinity between the perpetrator and the victim, which cannot be established for a legal person. When a legal person would be involved in the commission of an infanticide, the offence would be re-qualified to murder or manslaughter with respect to the legal person. Similarly, Cyprus has explicitly referred to bigamy and perjury as examples of offences that can never be committed by a legal person. France also refers in its comments to the fact that offences in the press (e.g. libel and insults)¹¹⁰ are excluded from the application of liability of legal persons.

The table inserted below provides the overview of the empirical data gathered in the member states with respect to the identification of offences for which legal persons can be held liable.

¹¹⁰ Though at first sight press offences need to be committed by natural persons, it is not unimaginable that a Legal person launches a advertisement campaign with is insulting for a particular group and could therefore fall within the scope of insult as a press offence.

The data with respect to criminal liability (CL) reflects the replies of 9 member states and is presented together with the data with respect to administrative liability (AL) which in its turn reflects the replies of 6 member states.

| Liability of legal persons for identified offences | | |
|--|----------|--|
| CL /9 | AL /6 | Offence type |
| 7 | 2 | Participation in a criminal organization |
| 8 | 2 | Terrorism |
| 9 | 1 | Trafficking in human beings |
| 9 | 2 | Sexual exploitation of children and child pornography |
| 8 | 2 | Illicit trafficking in narcotic drugs and psychotropic substances |
| 7 | 1 | Illicit trafficking in weapons, munitions and explosives |
| 9 | 3 | Corruption |
| 9 | 2 | Fraud |
| 9 | 4 | Laundering of the proceeds of crime |
| 7 | 0 | Counterfeiting currency, including of the euro |
| 9 | 1 | Computer-related crime |
| 7 | 3 | Environmental crime, including illicit trafficking in endangered animal species and endangered plant species and varieties |
| 5 | 2 | Facilitation of unauthorized entry and residence |
| 3 | 0 | Murder, grievous bodily injury |
| 3 | 0 | Manslaughter |
| 5 | 1 | Illicit trade in human organs and tissue |
| 4 | 0 | Kidnapping, illegal restraint and hostage-taking |
| 7 | 3 | Racism and xenophobia |
| 3 | 0 | Organized or armed robbery |
| 4 | 1 | Illicit trafficking in cultural goods, including antiques and works of art |
| 5 | 1 | Swindling |
| 4 | 2 | Racketeering and extortion |
| 6 | 2 | Counterfeiting and piracy of products |
| 7 | 1 | Forgery of administrative documents and trafficking therein |
| 8 | 1 | Forgery of means of payment |
| 3 | 1 | Illicit trafficking in hormonal substances and other growth promoters |
| 6 | 2 | Illicit trafficking in nuclear or radioactive materials |
| 5 | 1 | Trafficking in stolen vehicles |
| 2 | 0 | Rape |

| Liability of legal persons for identified offences | | |
|--|-------|--|
| CL /9 | AL /6 | Offence type |
| 5 | 0 | Arson |
| 3 | 1 | Crimes within the jurisdiction of the international criminal court |
| 3 | 0 | Unlawful seizure of aircraft/ships |
| 3 | 0 | Sabotage |
| 3 | 2 | Conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulation on hazardous goods |
| 4 | 2 | Smuggling of goods |
| 8 | 3 | Infringements of intellectual property rights |
| 2 | 0 | Threats and acts of violence against persons, including violence during sport events |
| 6 | 1 | Criminal damage |
| 2 | 1 | Theft |
| 6 | 2 | Offences against workplaces health and safety |

Analysis reveals that with respect to criminal liability of legal persons for the offences under review, the number of member states that have introduced liability drops below 50% for offences that are traditionally said to be excluded from the scope of liability of legal persons. Examples are murder, manslaughter, kidnapping and rape. However, it be noted that also with respect to offences that can clearly be brought in relation to legal persons, the number of member states that have introduced criminal liability is remarkably low. Conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulation on hazardous goods can be used as an example. Especially legal persons active in the transport sector can be brought in relation to that kind of conduct.

With respect administrative liability of legal persons, the number of offences included in its scope is even more restricted. Even offences such as corruption and fraud are not automatically included in the scope of the liability.¹¹¹

¹¹¹ Though the table might suggest otherwise, the limited administrative liability of legal persons for offences such corruption and fraud are not covered by the introduction of criminal liability because the numbers in the tables are not necessarily linked to the same member states.

2.5 Variety in sanctions which can be imposed on legal persons

Findings

- A large majority of member states has extended their sanction arsenal to encompass a number of sanctions specifically designed for legal persons, sometimes linked to the typology of the offence committed
- The sanction arsenal is more diverse than the suggestions found in the approximation instruments

Recommendations

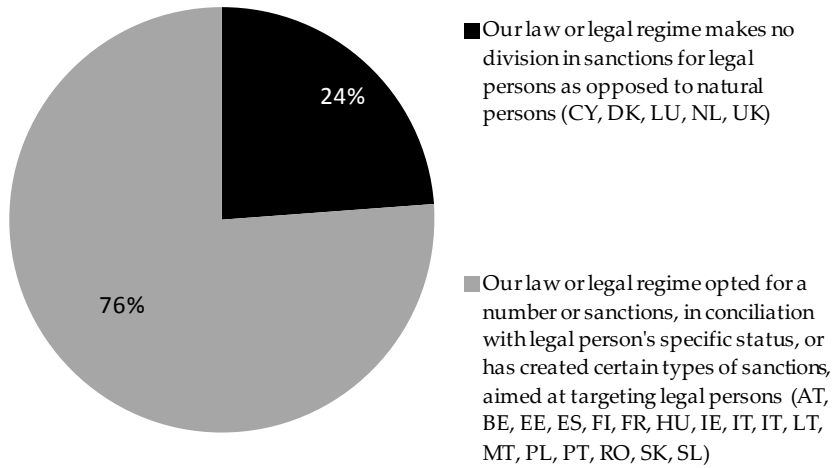
- The EU should look into including more mandatory and suggested sanctions in its approximation instruments

A fifth fundamental aspect of legal persons' liability where variations exist among the member states relates to the sanctions that can be imposed on the legal persons. The introduction of liability for legal persons for (certain) offences supposes that the sanction applicable is also valid for legal persons. As a preliminary remark, it is important to point to the influences the differences regarding competent authorities (*differences between criminal vs. administrative liability*) have on the terminology used. Member states have introduced different regimes in their national law, including criminal, administrative and or civil liability for legal persons. From that perspective it can be advised not to use the concept of *penalties* in relation to the *sanctions* that should/can be imposed on legal persons. Considering the criminal connotation that is often attached to penalties, preference should be given to *sanctions for legal persons*.

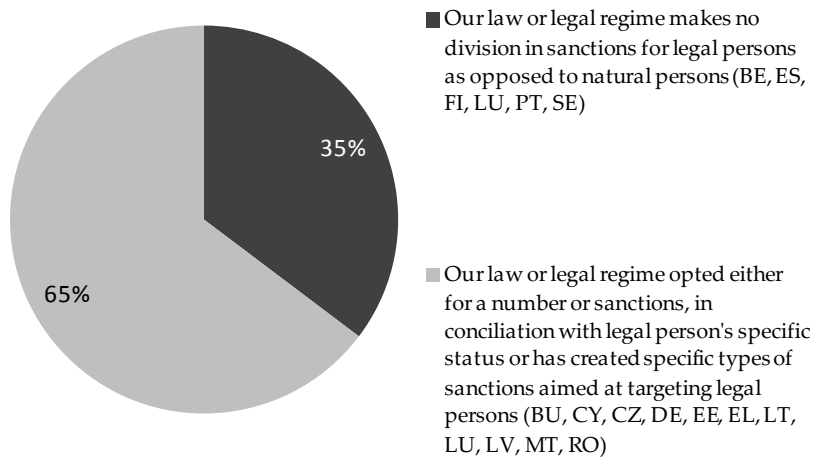
2.5.1 Need for specific sanctions

It is evident that no sanctions involving deprivation of liberty can be imposed on a legal person. Because a legal person is essentially different from a natural person, the sanctions differ too. Therefore, we have asked the member states whether the existing sanction arsenal was sufficient or additional sanctions needed to be introduced specifically aimed at targeting legal persons.

5.2 What types of sanctions are used under your Member State's national law or legal regime to sanction a criminally liable legal person?



10.1 What types of (administrative) sanctions are used under your Member State's national law or legal regime to sanction administrative offences attributed to a legal person?



Analysis reveals that between 24% (with respect to criminal liability) and 35% (with respect to administrative liability) of the member states have not changed their sanction arsenal. Luxembourg has expressly indicated that the introduction of the criminal liability of legal persons was not associated with a distinction between the sanctions imposed to natural and legal persons. This is remarkable taking account of the difference in the way sanctions will be perceived and the differences in the way legal persons can be targeted. The commercial and financial purposes of (particularly private) legal persons, opens an entirely new perspective on possible sanctions. However, most of those member states have introduced an elaborate conversion mechanism to convert inoperable sanctions into sanctions that are valid for legal persons. However, some penalties specifically aimed at targeting the legal persons (that already existed) are now classified as criminal sanctions. To convert a sanction involving deprivation of liberty into a financial sanction, the Belgian criminal law system has introduced a mechanism that first converts the deprivation of liberty into months and subsequently multiplies the months by a coefficient to determine the amount of the financial sanction.¹¹² A similar conversion mechanism was mentioned by Luxembourg.

2.5.2 *Typology of sanctions*

The fact that the replies to questions 5.2 and 10.1 revealed that most of the member states have extended their sanction arsenal, warrants an analysis of the typology to the sanctions that can be handed down against legal persons.

The table inserted below provides a high level overview of the sanctions that appear in the national legislation of the member states. With respect to criminal liability, 16 member states have provided information on sanctions specifically (designed) for legal persons; with respect to administrative liability only 3 member states have provided further information on the sanctions available for legal persons.

| CL /16 | AL /3 | Specific types of sanctions, specifically aimed at targeting legal persons |
|-----------|----------|--|
| 8 | 2 | Closing down of -affected- branches |
| 3 | 0 | Loss of legal personality |
| 9 | 0 | Public pronouncement of the conviction |
| 9 | 1 | Prohibition to participate in public tenders |
| 2 | 0 | Prohibition to advertise goods or services |
| 1 | 0 | Prohibition of any specific patrimonial operations that may entail the |

¹¹² C, VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht IN HOOFDLIJNEN*, Antwerpen/Apeldoorn, Maklu, 2011, 125-136.

DIVERSITY IN THE MEMBER STATES

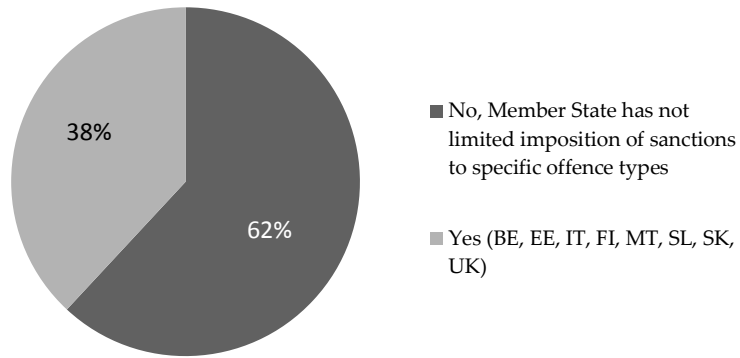
| CL /16 | AL /3 | Specific types of sanctions, specifically aimed at targeting legal persons |
|--------|-------|--|
| | | significant reduction of the patrimonial assets or the legal person's insolvency |
| 1 | 1 | (Public) admonition |
| 13 | 3 | Financial sanctions |
| 7 | 0 | Winding-up of the legal person |
| 0 | 0 | Obligation to file various information to the authorities within certain time limits |
| 5 | 0 | Dissolution of the legal person |
| 3 | 0 | Placement of the legal person under judicial administration in order to safeguard the rights of employees or creditors |
| 0 | 0 | Obligation to fulfil certain organizational measures |
| 5 | 0 | Liquidation |
| 1 | 1 | Prohibition of entering into certain agreements |
| 4 | 1 | Prohibition to the right to receive subsidies |
| 2 | 0 | Prohibition to trade with financial instruments |
| 1 | 1 | Prohibition of acquisition of licenses, authorizations or concessions |
| 0 | 0 | Prohibition of the legal person's merger, division or reduction of the share capital |
| 10 | 2 | Prohibition of doing business |

Analysis reveals that the sanction arsenal is more extended and divers with respect to the criminal liability of legal persons, when compared to the sanctions available with respect to administrative liability of legal persons. This diversity cannot be completely attributed to the diversity *in criminal vs. Administrative liability* in the member states and thus the fact that some member states have opted to introduce criminal liability and/or administrative liability for legal persons. In member states that have introduced both a system of criminal as well as a system of administrative liability for legal persons, diversity in the sanctions exists.

2.5.3 Relation between sanctions and offences

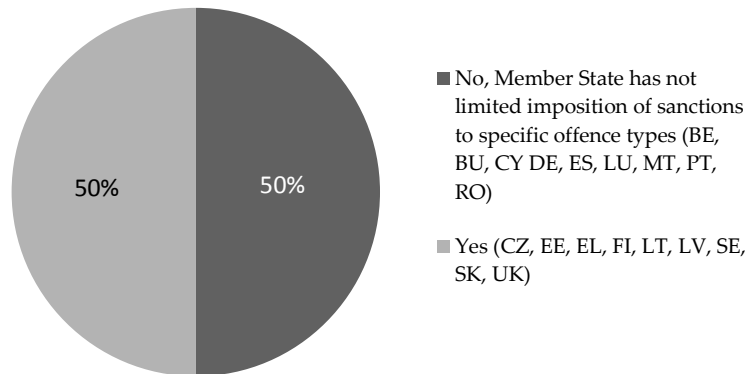
Finally, the analysis looked into the relation between the typology of the sanction and the typology of the offences they relate to. With respect to criminal liability, the replies to question 5.3 reveal that 38% of the member states indicate that there is a relation between the sanctions and the offences in that some sanctions are only imposed with respect to some offences.

5.3 Is the possibility to impose certain types of sanctions confined to certain types of offences?



Similarly, with respect to the administrative liability of legal persons, half of the member states indicate that there is a relation between the sanctions and the offences in that some sanctions are only imposed with respect to some offences.

10.2 Is the possibility to impose certain types of sanctions confined to certain types of offences?



DIVERSITY IN THE MEMBER STATES

As summarised in the table below, further analysis of the comments of the member states revealed that there are two main reasons for the links between sanctions and offences. These comments are valid both in the context of criminal as well as administrative liability for offences. First, the severe nature of some sanctions results in being brought in relation to severe offences. Second, some sanctions are linked to a constituent element of the offence or a specific concurrence of facts. Spain, as well as Latvia¹¹³ and Belgium have highlighted this in their comments, stating e.g. that dissolution of the legal person is imposed when the legal person was established with the intend of committing offences; or e.g. prohibition to engage in commercial activities is imposed following the unlawful operation of commercial activities.

| Relation between sanctions and offences | | | |
|---|----|---|-------------------|
| In the context of criminal liability | | In the context of administrative liability | |
| Some sanctions are reserved for the most serious offences | BE | Sanctions are linked to the seriousness of the offence | LV |
| Sanctions are linked to the scenario of the event, not necessarily to the typology / severity of the offence | ES | Each time the legislator has to decide on the sanction of a specific offence, this is done in an ad hoc fashion | CZ |
| Some sanctions are linked to the intend of the offence (e.g. dissolution of the legal person is imposed when the legal person was established with the intend of committing offences) | BE | Some sanctions are specific to the act (e.g. prohibition to engage in commercial activities is imposed following the unlawful operation of commercial activities) | LV ¹¹⁴ |

¹¹³ It be noted that in the future, in Latvia, the administrative sanction of deprivation of rights in respect to certain or all forms of commercial activities will be excluded from the Latvian Administrative Violations Code because such deprivation of rights is planned to be included in the Latvian Criminal Code as a coercive measure. In this regard, it will be possible to apply an administrative sanction - deprivation of rights to hold certain positions (e.g., member of the board, procura holder etc.) in an enterprise, but such sanction could only be attributed to a natural, not legal person.

¹¹⁴ *Ibid.*

3 Implications for the EU's own policy making

The diversity in the member states' approach with respect to the liability of legal persons inevitably has implications for the EU's own policy making. It is of utmost importance that the EU takes due account of the national differences and ensure that recognition of those differences would not undermine the effectiveness of its own policy making. Four policy domains were singled out for analysis:

- The EU's approximation policy;
- The EU's mutual recognition policy;
- The EU's data exchange policy;
- The EU's procedural rights policy.

3.1 Implications for the EU's approximation policy

Recommendations

- **Take due account of complexity surrounding liability of legal persons when evaluating non-EU approximation instrument.**
- **Avoid terminology with 'criminal law' connotation**
- **Reconsider the scope of a 'legal person'**
- **Consider the introduction of 'strict liability'**
- **Rephrase current sanction suggestions**
- **Develop a standard set of suggested sanctions**
- **Complement the standard set of suggested sanctions**
- **Look into need for specific 'legal person'-offences**
- **Increase follow up of implementation process**

Approximation consists of the adoption of minimum rules with respect to the constituent elements of offences and sanctions. Specifically to that end, the framework decision was introduced as a new instrument in the Treaty of Amsterdam. With the Treaty of Lisbon, approximation will now be pursued via the adoption of directives.

However, elsewhere we have already argued, that 'approximation' is also pursued via other instruments, even non-EU instruments. Limiting the concept of approximation to EU instruments only, fails to take into account that substantive criminal law provisions can also originate from instruments adopted at other cooperation levels, amongst which the Council of Europe and the

United Nations are the most significant.¹¹⁵ Therefore, the evaluation first looks into framework decisions and directives, and continues with other EU and even non-EU instruments. Finally, the evaluation looks into the implications of the specificities of legal person constructions for the definition of the constituent elements of offences. Today, it is not always clear whether behaviour or a legal person falls within the scope of the approximated offence.

3.1.1 *Framework Decision or Directive based approximation*

Ever since the possibility introduced in the Amsterdam Treaty to approximate the constituent elements of offences and sanctions, the Union has adopted several approximation instruments. The following table provides an overview of the adopted framework decisions and directives.

| Offence label | as been defined in |
|--|--|
| Euro counterfeiting | Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro <i>as amended by</i> the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro |
| Fraud and counterfeiting non-cash means of payment | Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment |
| Money laundering | Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime <i>repealed and replaced by</i> the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime |
| Terrorism | Council Framework Decision of 13 June 2002 on combating terrorism <i>as amended by</i> Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism |

¹¹⁵ W. DE BONDT and G. VERMEULEN "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp-Apeldoorn-Portland, Maklu, 2010, 4, p 15-40

| Offence label | as been defined in |
|--|---|
| Trafficking in human beings | Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children <i>repealed and replaced by</i> Council Framework Decision of 19 July 2002 on combating trafficking in human beings <i>repealed and replaced by</i> Directive Of The European Parliament And Of The Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA |
| Illegal (im)migration | Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, <i>as complemented by</i> the Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence |
| Environmental offences | Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution <i>annulled and replaced by</i> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law |
| Corruption | Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector <i>repealed and replaced by</i> the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector |
| Sexual exploitation of a child and child pornography | Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children <i>repealed and replaced by</i> the Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography <i>repealed and replaced by</i> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, |

POLICY IMPLICATIONS FOR THE EU

| Offence label | as been defined in |
|--|---|
| Drug trafficking | Joint Action of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking <i>replaced by</i> the Council Framework Decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking |
| Offences against information systems | Council Framework Decision of 21 February 2005 on attacks against information systems |
| Participation in a criminal organisation | Joint action (98/733/JHA) of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union <i>repealed and replaced by</i> the Council Framework Decision of 24 October 2008 on the fight against organised crime |
| Racism and xenophobia | Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia <i>repealed and replaced by</i> the Council Framework Decision of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law |

The following table provides an overview of the legal person related provisions in the approximation instruments.

| Approach in approximation instruments | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering ¹¹⁶ | Terrorism | Trafficking in human beings | Illegal (im)migration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Racism and xenophobia |
|---|--|-----------------------------------|---------------------------------|-----------|-----------------------------|-----------------------|------------------------|------------|---|------------------|--------------------------------------|--|-----------------------|
| | Legal persons can be held liable for ... referred to above | | | | | | | | | | | | |
| Offences | X | | X | X | X | | X | X | X | X | X | X | |
| Conduct | | X | | | | | | | | | | | X |
| Infringements | | | | | | X | | | | | | | |
| When committed | | | | | | | | | | | | | |
| For their benefit | X | X | X | X | X | X | X | X | X | X | X | X | X |
| By any person who has a leading position | X | X | X | X | X | X | X | X | X | X | X | X | X |
| – a power of representation of the legal person | X | X | X | X | X | X | X | X | X | X | X | X | X |
| – an authority to take decisions on behalf of the legal person | X | X | X | X | X | X | X | X | X | X | X | X | X |
| – an authority to exercise control within the legal person | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Acting either individually or as part of an organ of the legal person | X | X | X | X | X | X | X | X | X | X | X | X | X |
| As well as for involvement as accessories or instigators | X | X | X | | | | | | | | | | |
| Or the attempted commission | X | | X | | | | | | | | | | |

¹¹⁶ The liability of Legal persons for money laundering is not regulated in the approximation instruments, but finds its legal basis in the second protocol to the PIF convention, OJ C 221 of 19.7.1997

POLICY IMPLICATIONS FOR THE EU

| Approach in approximation instruments | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering ¹⁶ | Terrorism | Trafficking in human beings | Illegal (im)migration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Racism and xenophobia |
|--|---------------------|-----------------------------------|--------------------------------|-----------|-----------------------------|-----------------------|------------------------|------------|---|------------------|--------------------------------------|--|-----------------------|
| Where the lack of supervision or control by a leading person has rendered it possible | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Concurring with natural person | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Effective, proportionate and dissuasive | | | | | | | | | | | | | |
| Sanctions | X | X | X | | X | X | | | X | X | | | |
| Penalties | | | | X | | | X | X | | | X | X | X |
| Which shall include criminal or non-criminal fines & which may include: | X | X | X | X | X | X | | X | X | X | X | X | X |
| (a) exclusion from entitlement to public benefits or aid; | X | X | X | X | X | X | | X | X | X | X | X | X |
| (b) temporary or permanent disqualification from the practice of commercial activities; | X | X | X | X | X | X | | X | X | X | X | X | X |
| (c) placing under judicial supervision; | X | X | X | X | X | X | | X | X | X | X | X | X |
| (d) a judicial winding-up order | X | X | X | X | X | X | | X | X | X | X | X | X |
| (e) temporary or permanent closure of establishments which have been used for committing the offence | | | | X | X | | | | X | X | | | |
| (f) the confiscation of substances which are the object of offences | | | X | | | | | | X | X | | | |

| Approach in approximation instruments | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering ¹¹⁶ | Terrorism | Trafficking in human beings | Illegal (im)migration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Racism and xenophobia |
|--|---------------------|-----------------------------------|---------------------------------|-----------|-----------------------------|-----------------------|------------------------|------------|---|------------------|--------------------------------------|--|-----------------------|
| Which shall only be punishable by effective, proportionate and dissuasive sanctions or measures as far as the lack of control and supervision is concerned, without further suggestions or reference to fines. | X | X | | | | X | | X | X | X | X | X | X |

Further evaluation of the approximation instruments is relatively positive, though a few remarks must be made.

First, the integration of non-EU instruments in the EU acquis via references thereto in approximation instruments should be done with care and attention for the implications for the liability of legal persons. If the policy choice is to include the offence definition of a non-EU instrument into the EU acquis, it is better to refer to the mother document rather than to copy past the definition, not only to clearly point to the origin of the definition but also to ensure compatibility for the future. If the offence definition in the non-EU instrument is updated, a reference to the definition in the EU instrument will ensure simultaneous 'updating' of the EU definition. The framework decision related to money laundering is a good example thereof. Instead of copy pasting the existing Council of Europe description of the money laundering offences into the EU instrument, or worse, coming up with an entirely different EU level money laundering offence concept, the framework decision refers to the definition included in the 1990 Council of Europe Money Laundering Convention. However, when doing so, due account must be paid to the position taken with respect to legal persons. Analysis reveals that the 1990 Council of Europe instrument remains silent on the liability of legal persons for those offences. No provision is included which stipulates that member states must ensure the

liability of legal persons for those offences.¹¹⁷ From that perspective, the EU has failed to guarantee that its approximation with respect to money laundering – an offence type that is traditionally strongly linked to legal persons – also covers the liability of legal persons. However, when read together with the second protocol to the PIF convention, in which the liability of legal persons is included following the critique on the absence thereof in the original PIF convention, the liability of legal persons is included also for money laundering offences. Nevertheless, it remains advised that provisions regulating the liability of legal persons are included in all approximation instruments.

Second, the approximation instruments acknowledge the differences between criminal vs. administrative liability, in that no obligation is included to introduce criminal liability of legal persons. The wording of the provisions indicate that all different member state approaches are compatible with the EU policy under the sole condition that legal persons can be held liable, in whatever regime upheld in the national law of the member states. It is left to the discretion of the member states to introduce a criminal, administrative and or civil liability for legal persons. From that perspective it can be advised not to use the concept of *penalties* in relation to the *sanctions* that should/can be imposed on legal persons. As shown from the table included above, half the framework decisions/directives refer in the article titles to *penalties for legal persons*¹¹⁸ and half refer to *sanctions for legal persons*.¹¹⁹ Considering the criminal connotation that is often attached to penalties, preference should be given to *sanctions for legal persons*.

Third, the differences related to the type of persons who can incur liability are not subject to any regulation in the approximation instruments. The European policy maker has not intervened on the basis of differences between public and private legal persons, differences in the liability consequences of a parent-subsidiary construction or the recognition of single or only multiple owner legal persons. The discussions surrounding the inclusion of certain types of public legal persons are avoided and the only reference that can be found in the instruments is a description of a ‘legal person’ as entailing any entity having

¹¹⁷ The only reference to Legal persons included in the 1990 Council of Europe Money Laundering Convention can be found in its Art. 18.8 related to cooperation in criminal matters. It is foreseen that member states cannot refuse cooperation in criminal matters solely because the order relates to a legal person. This cooperation obligation entails a form of mutual respect for the choices made by the other member states, but cannot be read as to mean that liability of Legal persons is to be ensured.

¹¹⁸ i.e. approximation instruments related to terrorism, environmental offences, corruption, offences against information systems, participation in a criminal organisation and finally racism and xenophobia.

¹¹⁹ i.e. approximation instruments related to euro counterfeiting, fraud and counterfeiting of non-cash means of payment, trafficking in human beings, illegal (im)migration, child sexual exploitation and child pornography and finally drug trafficking.

such status under the applicable national law, except for States or other public bodies in the exercise of state authority and for public international organizations.

Fourth, considering the differences in attribution mechanisms and the implications this third concept has for the effectiveness of the introduction of a liability of legal persons, it is commendable that member states are obliged to make those offences punishable, when committed by any person, either individually or as a member of an organ of the legal person in question, who has a leading position within the legal person. The meaning of a leading position is consistently defined¹²⁰, referring to (i) a power of representation of the legal person, (ii) an authority to take decisions on behalf of the legal person or (iii) an authority to exercise control within the legal person. Furthermore, member states are to ensure that legal persons can also be held liable where lack of supervision or control by a leading person has rendered the offence possible. It should be noted though that a lot of member states have introduced a so-called 'strict liability'-regime, which no longer requires that the commission of the offences was rendered possible due to a lack of supervision or control. This strict liability approach significantly facilitates the burden of proof when prosecuting these crimes. Unfortunately, the provisions with respect to attempted commission of offences¹²¹ as well as liability for involvement as accessories or instigators¹²², are not copied into all approximation instruments.

Fifth, considering that the main objective of the approximation instruments consists of ensuring that certain types of behaviour are considered criminal in the national jurisdictions of the member states and that both natural and legal persons can be held liable for them, it is important to take due account of the differences relating to offences which can give rise to liability of legal persons. *Grosso modo*, three different approaches can be distinguished, being (i) the introduction of liability of legal persons, regardless of the offence type, (ii) the limitation of the liability of legal persons for a specifically identified categories or families of offences and (iii) the enumeration technique in which the offences for which legal persons can be held liable are individually identified. Even though the EU does not wish to intervene in that diversity, it is important that it sees to the compliance with the minimum standards in its approximation instruments. Analysis reveals that the instruments have not been (correctly) implemented (yet) and the liability of legal persons for the approximated offences is not guaranteed.

¹²⁰ With the exception of the approximation instrument relating to money laundering that does not hold any provisions with respect to the liability of legal persons.

¹²¹ This can only be found in the framework decision related to euro counterfeiting

¹²² This can only be found in the framework decision related to euro counterfeiting and in the framework decision related to fraud and counterfeiting of non-cash means of payment.

The table inserted below shows that for 8 out of 15 instruments, liability of legal persons for the approximated offences is not foreseen in national legislation.

| Status questions of the liability of legal persons for offences that have been subject to approximation | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering | Terrorism | Trafficking in human beings | Illegal (im)migration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Racism and xenophobia |
|---|---------------------|-----------------------------------|------------------|-----------|-----------------------------|-----------------------|------------------------|------------|---|------------------|--------------------------------------|--|-----------------------|
| | Foreseen | 24 | 24 | 27 | 27 | 26 | 26 | 24 | 27 | 27 | 26 | 27 | 26 |
| Not foreseen | 3 | 3 | | | 1 | 1 | 3 | | | 1 | | 1 | 1 |

It is most unfortunate that no infringement procedure exists with respect to the approximating framework decisions. Fortunately the possibility to start an infringement procedure against member states that have not (correctly) implemented EU instruments is now – following the introduction of the Lisbon Treaty – extended to approximating directives. With a view to being able to ensure the introduction of national provisions regulating the liability of legal persons for the approximated offences, it is advised to include those provisions in a directive to allow close follow up of the member states' implementation processes.

Sixth and final, the analysis of the national approaches to ensure the liability of legal persons has pointed to the diversity in sanctions which can be imposed on legal persons. That diversity is partially linked to the diversity in criminal vs. administrative liability. Member states that have opted to introduce the liability of legal persons within the scope of an authority competent in criminal matters have introduced criminal sanctions, whereas member states that have opted to introduce the liability of legal persons within the scope of an authority competent in administrative or civil matters have introduced administrative or civil sanctions. Because the EU does not wish to intervene in that diversity, it is only logical to transfer that leniency also to the required and suggested

sanctions. For the reasons mentioned above, it is advised to use the term sanction as opposed to the term penalty, which holds a criminal connotation. Member states must take measures to ensure that a legal person found liable is punished by effective, proportionate and dissuasive sanctions, which *shall include criminal or non-criminal fines*. Additionally, possible other sanctions are listed, in general comprising four possible types of sanctions, namely (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order. In relation to some offences an additional (e) is included related to temporary or permanent closure of establishments which have been used for committing the offence¹²³ and/or (f) confiscation of the (substances which are the) objects of the offences¹²⁴ are added as possible sanctions.

Three recommendations can be made in this respect. Firstly, with respect to suggestion (a) it can be advised to rephrase it so that it refers to exclusion from entitlement to public benefits or aid and from entering in a public procurement proceeding,¹²⁵ based on the inclusion in other instruments of mandatory exclusion grounds in the context of a public procurement proceeding.¹²⁶ Directive 2004/18/EC includes a provision clarifying that candidates who have been convicted for either participation in a criminal organization, fraud, money laundering or corruption are excluded from participating in a public tender procedure. Because this exclusion is mandatory, it would enhance internal consistency between the EU instruments if a reference to the mandatory exclusion grounds would be introduced in the corresponding approximation instruments. Secondly, with respect to suggestions (e) and (f) it is not clear why they are not generally included in all approximation instruments. Suggestion (e) relates to the closure of establishments used for committing the offence which can be brought in relation to almost any offence. The same is true for suggestion (f) which relates to confiscation which can undoubtedly be brought in relation to counterfeiting of the euro and/or other non-cash means of payment. Similarly, confiscation of the computer material used to commit an offence against the integrity of an information system seems evident. Remarkably though, confiscation obligations are not included among the sanctions to be foreseen, not in relation to natural persons nor in relation to legal persons. Thirdly, an

¹²³ This suggestion is included in the approximation instruments related to terrorism, trafficking in human beings, sexual exploitation of children and child pornography and drug trafficking.

¹²⁴ This suggestion is included in the approximation instruments related to money laundering, trafficking in human beings, sexual exploitation of children and child pornography and drug trafficking.

¹²⁵ See more in detail: DE BOND T. W. Curing Procurement. Rethinking conviction related exclusion grounds, forthcoming.

¹²⁶ This obligation is included in the context of four offences being: participation in a criminal organisation, corruption, fraud and money laundering (see Directive 2004/18/EC)

additional suggestion (g) can be considered, including at least other types of disqualifications.¹²⁷

3.1.2 *Approximation based on other EU or even non-EU instruments*

Approximation can also be pursued via other EU and even non-EU instruments.

First, analysis has revealed the pursuit of approximation in other EU instruments.

The Union can adopt Conventions that possibly contain substantive criminal law provisions. The 1995 Convention on the Protection of the Communities' Financial Interests (PIF Convention)¹²⁸ and the 1997 Convention on the fight against corruption involving Community Officials (Corruption Convention).¹²⁹ When attempting to develop criminalisation obligations, it is important to ensure that the liability of legal persons is sufficiently covered in all these instruments. Art. 3 PIF convention refers to the criminal liability of heads of businesses, stipulating that each member state shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud by a person under their authority acting on behalf of the business. Similarly Art. 6 Corruption Convention stipulates that each member state shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law for cases of corruption by a person under their authority acting on behalf of the business. Though it ensures the liability of a person for acts committed on behalf of a legal person, it cannot be regarded as a provision introducing the liability of legal persons as such. The critiques raised with respect to this provision lead to the adoption of the second protocol to the PIF Convention¹³⁰ that includes provisions

¹²⁷ Regarding disqualifications, see VERMEULEN, G., DE BONDT, RYCKMAN, C., PERŠAK, N., *The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence.* Antwerpen-Apeldoorn, Maklu, 2012, forthcoming.

¹²⁸ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ C 316 of 27.11.1995.

¹²⁹ Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25.6.1997.

¹³⁰ Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests, OJ C 221, 19.7.1997.

regulating the liability of legal persons as can be found in all approximation instruments.

Second, when the decision is taken that it would be better to include a non-EU instrument into the EU acquis rather than to establish a new EU instrument, it is important to ensure that the requirements for the liability of legal persons are included. Reference can be made to both Council or Europe as well as United Nations instruments. Some Council of Europe instruments hold provisions that are very specific in imposing a system of liability for legal persons. Following Art. 12 Cybercrime Convention¹³¹ for example, countries are to adopt measures to ensure that legal persons can be held liable for a criminal offence established in accordance with the Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it. It goes on to specify who/what can be qualified as the persons or organs being in a leading position. According to the Explanatory Report, such obligation “*is consistent with the current legal trend to recognise corporate liability*”.¹³² The convention imposes relatively specific details regarding the instances in which liability should be made possible (par. 1 and 2), but is leaves it up to the member states to decide whether this liability (albeit concerning liability for criminal offences) takes a civil, administrative or criminal form (par. 3). However, not all non-EU instruments, include provisions relating to the liability of legal persons.¹³³

Concluding, it is important that the EU not only remains actively seized on ensuring the inclusion of provisions on the liability of legal persons, it is of equal importance that the EU sees to the correct implementation of those provisions.

¹³¹ COUNCIL OF EUROPE (2001), 23 November 2001, “Convention on Cybercrime”, Budapest, CETS 185. The FD Deprivation of Liberty (2008/909/JHA; OJ L 327/27) replaces part of this Convention, namely the corresponding provisions (Art. 26 FD Deprivation of Liberty). The very nature of the FD however (dealing with measures involving deprivation of liberty and custodial sentences) means that the provisions concerning legal persons contained in the Convention apply fully.

¹³² COUNCIL OF EUROPE (2001), 23 November 2001, “Convention on Cybercrime, Explanatory report”, Budapest, CETS 185, nr. 123.

¹³³ E.g. UNITED NATIONS (1949) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; UNITED NATIONS (1988) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

3.1.3 *Study the need for specific offences*

A final implication for the EUs approximation policy relates to the recommendation to study the need for specific offences tailored to the specificities of the liability of legal persons.

From the efforts put into the development of an approximation policy, it has become clear that it is the EUs intention to formulate common offence definitions for a selection of priority domains. Drug trafficking, trafficking in human beings, terrorism and some other offences have grown to become true EU priorities. A detailed definition has been introduced in an approximation instrument and is now the basis for further EU criminal policy making. For each of those offences, the liability of legal persons is made mandatory via specific provisions in the approximation instruments, though it is left to the member states to decide what type of liability is foreseen.

However, a such provision regulating the liability of legal persons may not be sufficient to be able to tackle all the behaviour of a legal person. Considering the specificities related to the legal construction of a legal person, it is not always clear whether or not behaviour is included within the scope of the definition. Most of the concerns can be accommodated via the introduction of provisions regulating the liability of accessories or instigators. However, the table inserted above providing an overview of the provisions in the approximation instruments has clarified that not all approximation instruments include those provisions. Furthermore, even when liability of accessories or instigators is regulated, situations remain for which it is unclear whether they can be brought within the scope of the approximated offence. The exploitation of victims of trafficking in human beings in relation to subcontracting structures used by legal persons can be used as an example. Recently, the National Society of Belgian Railways (SNCB) featured in news paper headlines in relation to the economic exploitation of the cleaning staff working the night shifts in the Belgian Railway Stations. The SNCB immediately communicated it could not be held liable in any way because the persons referred to were employed by one of its subcontractors. Specifically in this context, it is not clear whether liability of the SNCB is desirable in the first place, and if so whether the existing mechanisms of inciting, aiding and abetting are sufficient or a new offence should be created specifically incriminating the said situation under a chain approach introducing a due diligence obligation to ensure that subcontractors do not commit any economic exploitation (of victims of trafficking in human beings) offences.

Therefore it should be recommended to look into the EUs priority offences, and review them using the specific structures set up by legal persons (such as subcontracting) as a baseline to decide whether or not it is necessary to extent the scope of the incrimination.

3.2 Implications for the EU's mutual recognition policy

Recommendations

- Introduce a notification obligation upon conviction of a foreign legal person
- Introduce a storage obligation in spite of lacking national recognition of criminal liability for legal persons
- Develop a general approach to deal with the differences in competent authorities, differences based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons

3.2.1 *Background of mutual recognition*

The issue of mutual recognition in criminal matters was raised at the Cardiff European Council on 15 and 16 June 1998.

Point 45(f) of the action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, adopted on 3 December 1998, provides that within two years of entry into force of the Treaty a process should be initiated with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters.

The idea was discussed again at the Tampere European Council in October 1999, which concluded that mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. Though it has been cited at countless occasions, the importance of the corresponding part in the Tampere Presidency conclusions cannot be overestimated and justify it being cited once more:

Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities (European Council, 15-16 October 1999).

In order to implement the principle, a programme of measures was adopted in January 2001. That programme was clearly drawn up from the perspective of ensuring the recognition of sentences imposed to natural persons. In the preamble, it is emphasized that mutual recognition is linked to the transfer of persons from one member state to another and that the main purpose of transferring sentenced persons as provided for in the Council of Europe Convention of 21 March 1983 is to help towards their rehabilitation and stems from humanitarian considerations. It necessarily implies recognition by the administering State of the decision taken by the sentencing State's court.

As a result, the measures included in the programme are mostly linked to the sentences imposed to natural persons. However, when elaborating on a type of sanction that can also be imposed to a legal person, the debate with respect to the differences related to the liability of legal persons for offences is taken into account. When introducing measure 17 and 18, it is clearly stated that the aim thereof is enabling fines imposed on natural and legal persons in one Member State to be levied in another Member State. Surprisingly no specific reference is made to the complexity related to the liability of legal persons for offences when introducing measure 19 with respect to confiscation, another sanction that can typically also be imposed on a legal person.

However, already in the preamble, it is clarified that the programme should not be seen as a definitive programme, but rather as an open way to demonstrate the approach to be used. The open character from the programme is also apparent from the formulation of measure 20. Because it is not all that self-evident to map all the existing disqualifications, prohibitions and incapacities possibly handed down against either natural or legal persons, a such list should be drawn up. Therefore, even though written from the perspective of the sanctions typically imposed to natural persons, the sanctions imposed to legal persons are not excluded from the scope of mutual recognition, and the door is left open for further supplementation of the plan.

From the narrow content of the programme of measures to implement the principle of mutual recognition, it should come as no surprise, that the current instruments governing the mutual recognition of sentences are primarily focussed on the sanctions handed down against natural persons. In 2005 a framework decision was adopted on the mutual recognition of financial penalties, followed in 2006 by a framework decision on confiscation. In 2008 instruments governing the mutual recognition of custodial sentences and non-custodial alternative sanctions followed. Whenever the instruments were relevant for legal persons, the discussions on the differences in the national approach with respect to the liability of legal persons for offences was duly taken into account in the sense that the diversity was not accepted as a refusal ground. Even a member state that does not recognise the criminal liability of a

legal person is obliged to execute a foreign sentence that involves such criminal liability.

3.2.2 *Way ahead to ensure a consistent MR policy*

Because mutual recognition (MR) is now enshrined in the Lisbon Treaty as a basic principle for judicial cooperation in criminal matters, a consistent interpretation and application becomes all the more important. The programme of measures remains an interesting guideline, but more gaps can be identified and should be filled to ensure a consistent European criminal policy with respect to the application of the principle of mutual recognition. The central concern expressed in this study is the gap with respect to the sanctions typically imposed to legal persons.

As shown from the table inserted below, the approximation instruments hold a consistent suggestion with respect to the sanctions that could possibly be imposed to legal persons. Besides the comments related thereto made above in the section on approximation, it should be noted that no mutual recognition instruments exist to ensure the cross-border execution of those suggested sanctions.

| Approach in approximation instruments | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering ¹³⁴ | Terrorism | Trafficking in human beings | Illegal (im)migration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Racism and xenophobia |
|---|---|-----------------------------------|---------------------------------|-----------|-----------------------------|-----------------------|------------------------|------------|---|------------------|--------------------------------------|--|-----------------------|
| | Effective, proportionate and dissuasive | | | | | | | | | | | | |
| Sanctions | X | X | X | | X | X | | | X | X | | | |
| Penalties | | | | X | | | X | X | | | X | X | X |
| Which shall include criminal or non-criminal fines & which may include: | X | X | X | X | X | X | | X | X | X | X | X | X |

¹³⁴ The liability of Legal persons for money laundering is not regulated in the approximation instruments, but finds its legal basis in the second protocol to the PIF convention, OJ C 221 of 19.7.1997

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| Approach in approximation instruments | Euro counterfeiting | Non-cash Fraud and counterfeiting | Money laundering ³⁴ | Terrorism | Trafficking in human beings | Illegal (im)migration | Environmental offences | Corruption | Child Sexual exploitation and pornography | Drug trafficking | Offences against information systems | Participation in a criminal organisation | Racism and xenophobia |
|--|---------------------|-----------------------------------|--------------------------------|-----------|-----------------------------|-----------------------|------------------------|------------|---|------------------|--------------------------------------|--|-----------------------|
| (a) exclusion from entitlement to public benefits or aid; | X | X | X | X | X | X | | X | X | X | X | X | X |
| (b) temporary or permanent disqualification from the practice of commercial activities; | X | X | X | X | X | X | | X | X | X | X | X | X |
| (c) placing under judicial supervision; | X | X | X | X | X | X | | X | X | X | X | X | X |
| (d) a judicial winding-up order | X | X | X | X | X | X | | X | X | X | X | X | X |
| (e) temporary or permanent closure of establishments which have been used for committing the offence | | | | X | X | | | | X | X | | | |
| (f) the confiscation of substances which are the object of offences | | | X | | | | | | X | X | | | |

Only with respect to financial penalties (included as a mandatory sanction in the approximation instruments) and confiscation (occasionally included as an suggested sanction in the approximation instruments), a legal basis is provided to engage in the cross-border execution thereof. For any of the other suggested sanctions, no mutual recognition instrument exists, nor is under development. It should be recommended to extent the mutual recognition policy in accordance to the policy lines set out in the approximation instruments and ensure a legal basis for mutual recognition of (at least) the suggested sanctions.

3.3 Implications for the EU's data exchange policy

Recommendations

- **Introduce a notification obligation upon conviction of a foreign legal person**
- **Introduce a storage obligation in spite of lacking national recognition of criminal liability for legal persons**

If the EU wants to ensure that convictions handed down against legal persons with respect to the offences it has identified in the approximation instruments have effect, it is important to ensure that such information effectively flows from one member state to another. Within the EU, taking account of prior convictions is an inherent part of the fight against crime. First, there is the taking account of previous convictions in the course of a new criminal proceeding which is regulated by a framework decision that introduces an obligation thereto. Second, there is the policy option to introduce the taking account of prior convictions in the context of disqualifications in the sense that convictions for certain offences must on the one hand automatically lead to disqualifications and on the other hand be allowed to be used as a basis for disqualifications. The existing obligations and the future policy options warrant a critical assessment of the EU's data exchange policy.

Analysis reveals that there is an important gap in the EU information exchange policy with respect to offences committed by legal persons. With the introduction of the FD Crim Records¹³⁵ and – in execution thereof – the ECRIS Decision,¹³⁶ an EU criminal records exchange information system was set up. In the FD Crim Records, the member state of the person's nationality is notified of criminal records information regarding convictions handed down elsewhere in the EU (Art. 4). The central authority of the member state in which a private or public entity wishes to obtain information may submit a request to the central authority of another member state for information to be extracted from the criminal record (Art. 6, par. 1 FD Crim Records). Art. 11, par. 3 and 4 refer to the standardised format which states should use for their information exchange. The implementation of that article came to being with ECRIS.

¹³⁵ COUNCIL OF THE EUROPEAN UNION (2009), "Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member states" OJ L 93/23, 7.4.2009.

¹³⁶ COUNCIL OF THE EUROPEAN UNION (2009), "Framework Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA" OJ L 93/33, 7.4.2009.

Unfortunately, Art 2.a FD Crim Rec limits the scope of information exchange to natural persons. Whereas it might be understandable that the European Commission argues following its conclusion in the 2005 White Paper¹³⁷ that states who do not accept the criminal liability of legal persons may have difficulties in the storing of information on foreign criminal convictions, not tackling the consequences of the differences between criminal and administrative liability has a significant impact on the effectiveness of the EU policy. Two comments are in order with respect to upholding that argumentation in the final version of the 2009 FD Crim Records.

First, it is important that the European policy maker maintains a cross-policy consistency. This means that similar situations need to be dealt with similarly and similar problems need to receive a similar solution. From this perspective the choice to limit the scope of information exchange to natural persons seems to be outdated when compared to the position on legal persons taken in other more recent instruments in European cooperation in criminal matters and in the approximation instruments listed above. Undeniably, the *recognition and execution* of a decision imposing a financial penalty to a legal person, is more far intrusive for a member state that does not recognize the criminal liability of a legal person, than the *mere storing* of criminal record information on that same financial penalty. A credible and consistent criminal policy cannot have the one without the other; it cannot have the obligation to *recognise and execute* a decision and at the same time hesitate to introduce the obligation to *merely store* information on that decision. Additionally, the framework decision on taking account of prior convictions¹³⁸ has not introduced a limitation *on the types of persons eligible to incurring liability*. Art. 3.1 FD Prior Convictions stipulates that the EU track record of a person shall be taken into account in the course of a new criminal proceeding. This means that any prior EU conviction on any person is included in the scope of the FDs obligation, both natural and legal persons, both nationals and foreigners.

Second, the existing *acquis* should not be torn down. The commitment the 47 Council of Europe states made in Art. 22 ECMA¹³⁹ was not explicitly limited to natural persons. Even though based on the era in which it was adopted, it is only fair to say that the initial intention cannot but have been to introduce the obligation to exchange criminal records information for natural persons only, an acceptable evolutionary interpretation of the scope of the article suggests that

¹³⁷ EUROPEAN COMMISSION, White Paper on exchanges of information on convictions and the effect of such convictions in the European Union. COM (2005) 10 final of 25.1.2005, §6.

¹³⁸ COUNCIL OF THE EUROPEAN UNION (2008), "Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member states of the European Union in the course of new criminal proceedings." OJ L 220, 15.08.2008.

¹³⁹ COUNCIL OF EUROPE (1959), 20 April 1959, "European Convention on Mutual Assistance in Criminal Matters", Strasbourg, CETS 030.

due to the changes in the notion of criminal liability, Art. 22 now also holds the obligation to inform one and other of convictions handed down against a legal person who has its seat in another state. That would be the evolved equivalent of a conviction against a persons with the nationality of another state. Unfortunately, because the 27 EU member states decided that the FD Crim Records replaces Art. 22 ECMA between the member states, it is now no longer possible to use that article as a legal basis to require the exchange of information on legal persons. This is most regrettable because the introduction of EU framework decisions always has the intention to facilitate and further elaborate on cooperation between the member states and not to negatively impact on the *acquis* that already exists in other instruments.

It should be recommended that the obligation to exchange information extends also to convictions handed down against legal persons. The counterargument that the member states will not be able to use that information in a criminal proceeding in accordance to national law anyway is not valid, because Art. 7 FD Crim Rec explains that the storing of information is motivated by the possibility to share that information with any other member state that does conduct a criminal proceeding with respect to that legal person.¹⁴⁰

It should come as no surprise that in absence of an exchange obligation, conviction related information on legal persons is rarely exchanged.

Both member states that have introduced a criminal liability for legal persons as well as the member states that have introduced an administrative liability for legal persons rarely exchange the convictions nor store foreign convictions. Non of the member states indicated to fully notify their counterparts when convicting a legal person established in other member state. Based on the comments summarized in the table inserted below, it becomes that there are not only legal technical problems with respect to notification, but the most important issue remains the lack of a all inclusive legal basis for information exchange.

| Current notification practice | | | | |
|-------------------------------|---|----|---|----|
| | MS with criminal liability | | MS with administrative liability | |
| | Comment | MS | Comment | MS |
| No notification | Due to a legal technicality, no criminal records are held with respect to legal persons; hence no communication thereof takes place | BE | There is no automatic notification practice | SE |
| | There is no obligation but a possibility for the authorities | MT | | |
| | This also creates problems with respect to the execution of the sanctions imposed by Belgian authorities | BE | | |

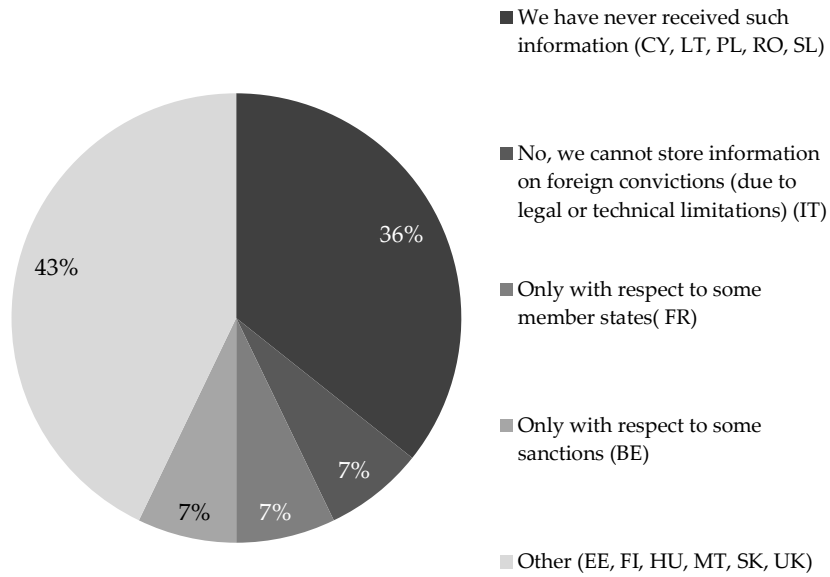
¹⁴⁰ See also recital 9 and 16 FD Crim Rec.

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| Current notification practice | | | | |
|-------------------------------|---|----|---|----|
| MS with criminal liability | | | MS with administrative liability | |
| (partial) notification | Only with respect to some MS | RO | There is a legal obligation to do so | LV |
| | For financial penalties notification is brought in relation to the mutual recognition obligations that have been introduced | FI | For financial penalties notification is brought in relation to the mutual recognition obligations that have been introduced | FI |
| | It is not clear whether the current treaties can be used as a legal basis for information exchange | SK | Following the internal market directive, there is an obligation to provide information on service providers | SV |
| | There is no obligation but a possibility for the authorities | MT | | |
| | Even if there is no tangible legal basis, information can be exchanged on the basis of reciprocity | PL | It is possible that there are agreements between the authorities but it is difficult to present a complete picture | FI |

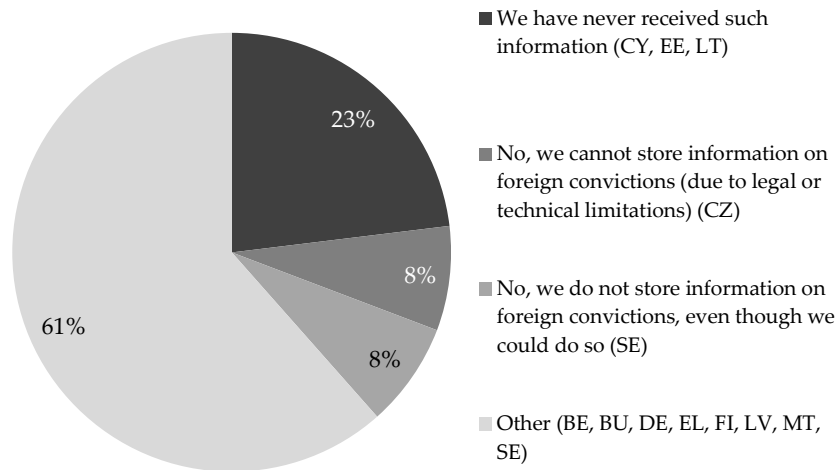
Based on the current poor notification practice, it can only be expected that storing foreign conviction information is not widespread. The replies to question 6.5. with respect to the member states that have introduced criminal liability for legal persons in their legal system, 57% of the member states do not store information on foreign convictions because they have either never received such information, have technical difficulties to do so or only store information with respect to some member states or some sanctions. When asking that same set of member states whether they notify other member states when having handed down a conviction against a legal person established in that other member state, only 1 member state indicates to do so.

6.5 Do you store information on convictions handed down by other member states upon a legal person established/incorporated in your member state?



With respect to the member states that have introduced an administrative liability for legal persons, the situation is slightly better though far from good. Still 39% of the member states do not store information on foreign convictions because they have either never received such information, have technical difficulties to do so or do not store because they fail to see the added value thereof.

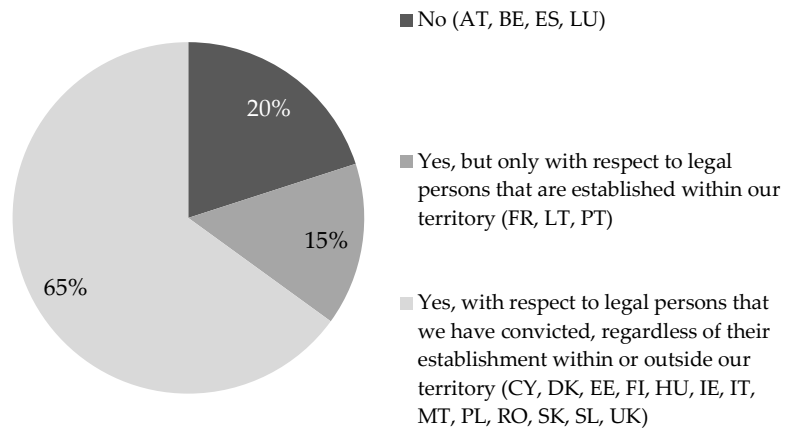
11.5 Do you store information on convictions handed down by other member states upon a legal person established/incorporated in your member state?



If the Union wishes to include the exchange of conviction related information of legal persons within the scope of the mandatory exchange mechanism, it is vital for the member states to not only foresee the technical ability to include foreign information in their national records system, it is important that they include information on national convictions handed down against legal persons in their records system in the first place. The analysis of the current situation in the member states revealed that a lot of progress can still be made. Even member states that have introduced a criminal liability for legal persons indicate that information is only partially included in the criminal records system.

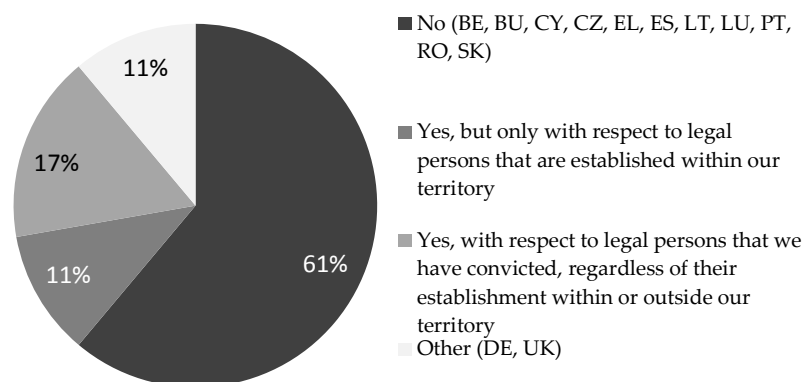
The replies to question 6.1. reveal that for 33% of the member states, the information included in the criminal record is incomplete, either because information on legal persons is not included altogether, or because information on convictions handed down against a legal person established outside their territory is not included. Two member states, i.e. Belgium and Spain have explicitly stated that the lack of criminal records for legal persons is due to an inconsistency in the national law. Though criminal liability is foreseen, the consequences thereof for the architecture of the criminal records databases are not or insufficiently taken into account. Combined with the replies to question 6.5. which have pointed to a limited exchange of criminal records information with respect to legal persons, there is a huge risk that conviction information gets lost along the way.

6.1 Does your country keep criminal records for legal persons?



With respect to member states that have introduced a system of administrative liability for legal persons, the storage of conviction related information is even far less guaranteed. The replies to question 11.1 reveal that for no less than 71% of the member states, the information included in the criminal record is incomplete, either because information on legal persons is not included altogether, or because information on convictions handed down against a legal person established outside their territory is not included. Only in 17% of the member states, complete information is guaranteed.

11.1 Does your country keep administrative records for legal persons?



Finally, it is important to look into the kind of information that is stored on legal persons to assess whether that information is sufficiently detailed to comply with exchange obligations that are introduced with a view to ensuring that the information can actually be used outside the convicting member state.

The table introduced below provides an overview of the information that is stored on legal persons. The numbers in column # MS CL represent the number of member states that have introduced criminal liability and store this kind of information. The numbers in column # MS AL represent the number of member states that have introduced administrative liability and store this kind of information.

| Kind of information stored on legal persons | | | |
|---|--|----------|---------|
| Type of information | | 15 MS CL | 5 MS AL |
| the legal person | Legal name | 14 | 3 |
| | Shortened name | 5 | 0 |
| | Country of incorporation/establishment | 10 | 1 |
| | Register and number of incorporation | 14 | 3 |
| | Address of registered office | 12 | 3 |
| | Name of legal representative | 6 | 1 |
| | Other | 4 | 4 |
| the | Legal definition | 11 | 0 |
| | Legal provision | 8 | 3 |
| | Date (or period) of facts | 9 | 2 |
| | Place(s) of facts | 4 | 2 |

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| | | | |
|---------------|---------------------------------|------------------|------------------|
| | Number of acts committed | 4 | 1 |
| | Other | 6 ¹⁴¹ | 4 ¹⁴² |
| | Completed | 10 | 2 |
| | Attempt | 6 | 1 |
| | Other form of completion | 1 ¹⁴³ | 3 |
| participation | Perpetrator | 6 | 2 |
| | Accomplice | 6 | 1 |
| | Accessory (aiding and abetting) | 6 | 1 |
| | Instigator | 5 | 1 |
| | Other | 1 | 4 |
| sanction | Type of sanction | 10 | 3 |
| | Duration / height | 12 | 3 |
| | Enforcement status | 5 | 2 |
| | Erasure / deletion date | 7 | 1 |
| | Other | 3 ¹⁴⁴ | 4 |

¹⁴¹ E.g. whether or not it is a repeat offence (indicated by France), the identity of the court that has established the liability for the offence (indicated by France, Lithuania and Poland)

¹⁴² E.g. government authority (official) that has drawn up the administrative violation report, and the report number (indicated by Latvia)

¹⁴³ E.g. a further differentiation between preparation and attempt as indicated by Slovakia

¹⁴⁴ E.g. information on the modality of the sanction (suspended sentences) (indicated by France)

3.4 Procedural safeguards

Recommendations

- Ensure equivalent protection between natural and legal persons¹⁴⁵
- Ensure equivalent protection outside the criminal justice sphere

The third EU policy reviewed relates to procedural safeguards which have gained a position on top of the political agenda and are subject to intense debate and rapid evolution.

Two types of procedural rights related problems can be identified. First, within criminal liability systems, there is the concern that procedural rights should be guaranteed to legal persons as they are to natural persons. Secondly, considering the existence of other kinds of liability than criminal liability, in that context too, a sufficient level of protection through procedural safeguards should exist.

3.4.1 *Within criminal liability context*

Art. 6 ECHR reads:¹⁴⁶

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing [...]

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

¹⁴⁵ In some member states, concerns are raised regarding the procedural safeguards of the legal persons. In Spain for example, the implementation of the new system of criminal liability of legal persons for offences was not accompanied by an amendment of Spanish procedural law, despite clear warnings of the Chief Prosecutor of Spain in this regard; In Latvia, uncertainty regarding the rights of the representative to appeal the judgment was reported.

¹⁴⁶ COUNCIL OF EUROPE (1950), 4 November 1950, “European Convention on Human Rights”.

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]”.

The second and third paragraph are confined to situations where one is charged with a criminal offence. Therefore, the following only deals with the criminal liability context; other forms of liability are dealt with below.

A specific type of procedural safeguards which might cause problems in relation to criminal liability of legal persons is the right to remain silent, which is a part of the rights of defence and a corollary of the presumption of innocence (Art. 6, par. 2 ECHR).¹⁴⁷ The latter is violated when – even in the absence of a formal finding¹⁴⁸ – the decision of a judicial authority reflects the assumption that he is guilty.¹⁴⁹

Certain practices could be decried for being at odds with the right against self-incrimination, for example the fact that sometimes the legal person is obliged to produce certain documents based on which the prosecution could found its accusation, as happens for example in Spain.¹⁵⁰

Other problems than problems with the right against self-incrimination arise in the context of the rights of defence. One of those is the right of a defendant to be tried in their presence (Art. 6, par. 3, (c) ECHR): in principle, the accused has the right to be present at hearings and to participate actively in the process.¹⁵¹

An example of tensions between a criminal liability regime for legal persons and this particular right can be found in a case which was decided upon by the Polish constitutional court.¹⁵² The initial legislation concerning liability of legal persons installed a two phase procedure: in the first, the liability of the natural person was examined to then, in the second phase, analyse the repercussions such liability had for the legal person. The legal person did not have any means

¹⁴⁷ ECtHR, Application No. 19187/91, *Saunders v. the United Kingdom*, par. 68 ; COISNE, S. and WAETERINCKX, P., “La sauvegarde des droits de la défense d’une personne morale, son droit au silence et le mandataire ad hoc comme garant de ces droits” in NIHOUL, M. (dir.), *La responsabilité pénale des personnes morales en Belgique*, Bruges, La Charte, 2005, 313.

¹⁴⁸ E., CAPE, Z., NAMORADZE, R., SMITH and T. SPRONKEN, *Effective Criminal Defense in Europe*, Antwerp, Intersentia, 2010, 27.

¹⁴⁹ ECtHR, Application nos. 10588/83, 10589/83, 10590/83, 6 December 1988, *Barbera, Messugue and Jarbardo v. Spain*, par. 77.

¹⁵⁰ ADAM, S., BLAISE, N., COLETTE-BASECQZ, N., “Conclusions” in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (433)

¹⁵¹ ECtHR, Application no. 18114/02, 18 October 2006, *Hermi v. Italy*, par. 58-67.

¹⁵² Polish Constitutional Court, 3 November 2004, K. 18/3, available at www.trybunal.gov.pl; see B. NAMYSLOWSKA-GABRYSIAK, “Criminal liability of legal persons in Poland. Present in law, absent in practice”, ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Charte, 2008, (241) 246-254.

to participate in the legal proceedings against the natural person even though the judgment resulting of such proceedings constituted the basis for its own liability. Consequently, the Constitutional court declared this double mechanism invalid. The Polish law was adjusted and since, the legal person has the right to be represented in the first phase proceedings through the presence of a natural person with a mandate to act on its behalf.

Linked to the issue that arose in the Polish case is the fact that a legal person is necessarily represented through natural persons, a given which becomes problematic especially when the natural person is himself subject of proceedings related to the questioned behaviour. *“The problem of the legal person is that it is not command its own words given that it can only express itself through the bias of physical persons. Thus the question arises whether the right to silence can efficiently be guaranteed for the legal person who, per definition, fully depends on physical persons for its defence”*.¹⁵³ In Belgium, this problem is addressed through the appointment of an *ad hoc* agent charged only with the representation of the legal person – not with its defence.

Concluding, the above problems show the necessity to take legal persons into consideration when developing a fundamental rights policy. It is important that legal person are not a priori excluded from relevant instruments. In the Procedural Rights Roadmap for example¹⁵⁴, the used terminology is consistently ‘a person’: the project team highlights the importance of interpreting such wordings in a way that they also cover legal persons. The same goes for provisions such as Art. 47 EU Charter fundamental rights.

3.4.2 *Administrative and civil liability context*

In addition to Art. 6(1) ECHR (cited above), which contains guarantees in relation to civil rights and criminal proceedings, the latter have to comply with additional guarantees spelled out in the second and third paragraphs of article 6 ECHR.¹⁵⁵ This distinction between civil and criminal proceedings has several implications in terms of procedural rights.¹⁵⁶ Concerning the provisions which

¹⁵³ COISNE, S. and WAETERINCKX, P., “La sauvegarde des droits de la défense d’une personne morale, son droit au silence et le mandataire ad hoc comme garant de ces droits” in NIHOUL, M. (dir.), *La responsabilité pénale des personnes morales en Belgique*, Bruges, La Charte, 2005, 325.

¹⁵⁴ COUNCIL OF THE EUROPEAN UNION (2009), “Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings”, OJ C 295/1, 4.12.2009.

¹⁵⁵ MAHONEY, P., “Right to a Fair Trial in Criminal Matters under article 6 ECHR”, 4 *Judicial Studies Institute Journal*, nr. 2, 2004, 107.

¹⁵⁶ For an analysis of such implications in the context of Competition procedures, see A. ANDREANGELI, “Toward an EU Competition Court: “Article-6-Proofing”

explicitly apply to criminal offences, considering the “*prominent place held in a democratic society by the right to a fair trial*”, the ECtHR, “*compelled to look behind the appearances and investigate the realities of the procedure in question*” has been prompted to give an autonomous meaning to the concept of criminal charge and to prefer a substantive rather than a formal conception of the charge contemplated by Article 6 ECHR.¹⁵⁷

3.4.2.1 Administrative liability

In its approximation *acquis* (discussed above in chapter 3) the EU accepted the national diversity in the liability of legal persons for offences: it is left to the member states to decide whether a criminal, administrative or civil mechanism (or a combination) applies. In doing so, the EU takes account of and accepts the differences in the recognition and application of criminal liability of legal persons in the member states. The reality is indeed that variations occur throughout the EU (above chapter 2); this reality must be taken into account when designing the EU’s procedural rights policy.

The ECtHR’s case-law giving the concept of “criminal offence” from Art. 6 ECHR an autonomous meaning was developed to avoid that the application of this provision could be circumvented by parties to the Convention, simply by their domestic classification of penalties.¹⁵⁸ Considering the explicit recognition that legal persons can be holders of the fair trial rights contained in Art. 6 ECHR and the variety of criminal, administrative (and civil¹⁵⁹) liability regimes, this case-law is of undeniable importance.

In the case *Air Canada v. the UK*¹⁶⁰ the Strasbourg Court considered that even though the applicable national rules were to be situated primarily in administrative law, “*the result is that the [concerned authorities] are given the power to prosecute and punish [the concerned legal persons].*”¹⁶¹ The Court refers to its case-law¹⁶² where it is held that such practices are compatible with Art. 6 “*provided that the [legal person] can bring any such decision affecting him before a court that affords the safeguards of that provision*”.¹⁶³

Both the acceptance of the diversity in national approaches and the requirement that administrative procedures which are in practice very close if

Antitrust Proceedings before the Commission?”, *World Competition* 30 (4), 595-622.

¹⁵⁷ ECtHR, Application no. 6903/75, 27 February 1980, *Deweert v. Belgium*, par. 44.

¹⁵⁸ ECtHR, Application no. 11598/85, 27 February 1992, *Société Stenuit v. France*.

¹⁵⁹ This will be discussed further in this subsection.

¹⁶⁰ ECtHR, Application no. 18465/91, 5 May 1995, *Air Canada v. UK*.

¹⁶¹ ECtHR, Application no. 18465/91, 5 May 1995, *Air Canada v. UK*, par. 33.

¹⁶² ECtHR, Application no. 12547/86, 24 February 1994, *Bendenoun v. France*, par. 46.

¹⁶³ ECtHR, Application no. 12547/86, 24 February 1994, *Bendenoun v. France*, par. 46.

not similar to the prosecution and punishment offences, provide with procedural safeguards that apply to criminal proceedings, are reflected in the majority of the cooperation in criminal matters *acquis*. It fits the argumentation upheld elsewhere which essentially entails that not the name tags of the authorities taking the decisions are relevant, but the finality with which those authorities act.¹⁶⁴ In the same vein, it should not matter whether the sanction was imposed by an authority competent in criminal or administrative. Actions taken with a criminal justice finality were defined as actions taken “*in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence [...] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.*” (Art. 20 EU MLA¹⁶⁵). In the context of cooperation in criminal matters, this criminal justice finality definition was broadened to infringements of the national rules of law, provided that “*the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters*” (e.g. Art. 3, par. 1 EU MLA, Art. 1,a,i and ii FD Fin Pen).¹⁶⁶ The link with investigations into offences (or infringements of the rules of law) is decisive, over the link with the acting authority. However, when brought within the criminal justice sphere care was taken not to allow a loss of procedural safeguards which usually come with the application of criminal procedures: therefore, the condition of the availability of a court having jurisdiction in criminal matters was attached.

The Strasbourg case-law combined with the broadening of the scope of EU cooperation instruments in criminal matters warrants a similar reasoning in the EU’s approximation *acquis* related to legal persons. In 3.1.2. the content of the relevant Justice and Home affairs instruments was examined. No reference to procedural safeguards was included in any of those.

It is advised to change this by introducing an obligation for the member states to guarantee that the necessary procedural safeguards are upheld in the liability regimes for legal persons, even when the liability regime is administrative in nature. Such a provision is necessary considering the fact that, as was stated in the ECtHR’s jurisprudence, the result of the involved rules is decisive: when the result is that authorities are given the power to prosecute and punish legal persons, sufficiently conclusive safeguards must apply. It be noted that this result applies per definition in relation to the administrative liability of

¹⁶⁴ On the criminal justice finality, extensively: VERMEULEN, G., DE BOND T W. and RYCKMAN, C. (eds.) *Rethinking international cooperation in criminal matters in the EU*. Moving beyond actors, bringing logic back, footed in reality, Antwerpen-Apeldoorn, Maklu, 2012, forthcoming.

¹⁶⁵ COUNCIL OF THE EUROPEAN UNION (2000), “Convention of 29 May 2000 on Mutual Legal Assistance between member states of the European Union”, OJ C 197/1, 12.7.2000.

¹⁶⁶ Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties”, OJ L 76/16, 22.3.2005.

legal persons for offences, as targeted in this Study, particularly the administrative liability in execution of the JHA approximation *acquis*. The proposal for inclusion of procedural safeguard considerations in the approximation *acquis* is the necessary counterweight to balance the flexible approach regarding the type of liability member states are allowed to use in the context of the applicable approximation instruments. In concrete terms, this would entail that the mechanism imposed in the Strasbourg Court's, whereby Art. 6 ECHR, including its par. 2 and 3 are made applicable to national administrative liability regimes such as targeted in the approximation *acquis*.

3.4.2.2 *Civil liability*

In relation to civil liability, Art. 6(1) ECHR applies. Hence, when applying civil liability regimes to legal persons, this article needs to be respected. It is advised to make this explicit in the relevant approximation *acquis*. Granted, the obligation to respect Art. 6(1) ECHR clearly stems from the wordings of the provision and the utility of an explicit reference in the concerned approximation instruments might therefore be debated. However, this is different with regards to Art. 6, par. 2 and 3. For these provisions, no case-law or related practice in the Union exists the way it does concerning administrative liability (above 3.3.2.1). Here too, however, the same reasoning applies: the flexibility of the EU in its acceptance of the diversity in the national liability approaches should not be a justification for a loss of procedural safeguards.

Granted, an analogy with the rules regarding administrative authorities in the context of cooperation in criminal matters, being the possibility of recourse to an authority also competent in criminal matters, is undesirable. However, an alternative must be introduced. After all, as shown through the survey in this Study, several member states apply a combined criminal/civil liability regime.

It is strongly recommended that the EU would explicitly include the obligation for member states to, when dealing with liability of legal persons, apply safeguards equivalent to those applicable in criminal procedures. The same argument as was used in the context of administrative liability applies: given that the approximation instruments examined in this Study are per definition of a criminal justice nature (they are JHA instruments), the implementing national measures will in practice have as a result that legal persons can be 'prosecuted' and 'punished', regardless of whether this result is obtained through a criminal, administrative or civil liability system. Coherence in the EU's (criminal) policy requires that the leniency showed with respect to the national choices in relation to the attribution of liability to legal persons has a counterpart in the EU's procedural safeguards policy.

4 Implications for the MS's cooperation practice

For several decades, the common desire of European states to undertake a joint effort to fight crime at the international level was expressed in the EU's and – more commonly – in Council of Europe's legal texts. That joint effort also includes the fight against crimes committed by legal persons inevitably the diversity in the member states' approaches with respect to the liability of legal persons for offences impacts on the design of the joint effort to fight crime. This final chapter looks into the position of legal persons in the instruments regulating international cooperation in criminal matters. However, before looking into the technicality of the cooperation instruments, empirical data with respect to the experiences of the member states in relation to cooperation is presented. This empirical data was gathered in the context of the recent Study on the international cooperation in criminal matters.¹⁶⁷ Because the picture is expected to be different according to the type of cooperation involved, a distinction is made between providing mutual legal assistance and executing a foreign decision.

4.1 Providing mutual legal assistance

Findings

- When asked from their experience as issuing member state, 32% of the member states experience problems with mutual legal assistance requests due to the (un)acceptability of criminal liability of legal persons.
- When asked from their experience as executing member state, 21% of the member states experience problems with mutual legal assistance requests due to the (un)acceptability of criminal liability of legal persons.
- Prohibitions to call on refusal grounds based on the lack of liability of the legal person for the underlying offence are not consistently copied throughout the instruments regarding EU cooperation in criminal matters; such prohibition is part of the framework decision regarding confiscation, but not regarding freezing.

¹⁶⁷ VERMEULEN, G., DE BONDT W. and RYCKMAN, C. (eds.) *Rethinking international cooperation in criminal matters in the EU*. Moving beyond actors, bringing logic back, footed in reality, Antwerpen-Apeldoorn, Maklu, 2012, forthcoming.

Recommendations

- **The lack of consistency between the framework decision on confiscations (mutual recognition) and the framework decision on freezing orders (mutual legal assistance) should be remedied.**
- **Considering that within the context of mutual legal assistance, the intrusion in the national legal systems is relatively low, it is advised not to allow the member states to refuse cooperation based on the lack of liability of the legal person for the underlying offence; it is thus recommended to include this prohibition in the framework decision on freezing orders.**

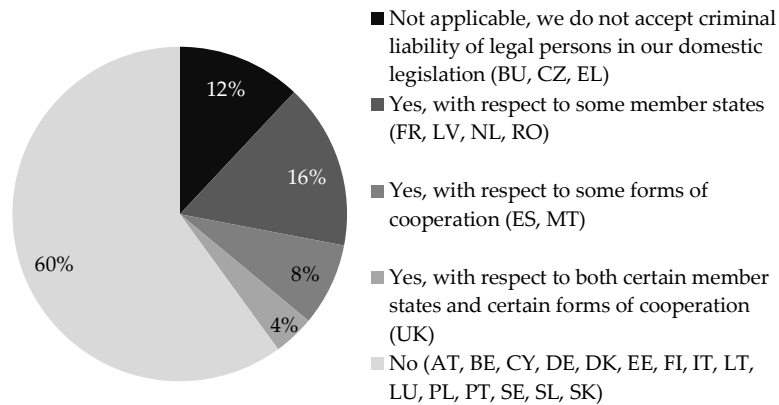
Even though only a small minority of the member states indicates not to have the concept of criminal liability of legal persons in their legislation it can be expected that the existing diversity in the national approaches with respect to the liability of legal persons for offences may have significant implications for the member states' cooperation practice. The analysis first looks into the experiences of the member states with respect to cooperation before evaluating the legal instruments that form the basis for cooperation.

4.1.1 Experiences

The empirical results gathered in the context of a previous study regarding cooperation in criminal matters come to testify that opinions on the current practice are diverse. It may be expected that few problems are experienced regarding mutual legal assistance. After all, in this secondary form of cooperation, the 'ownership' of the procedure stays entirely with the requesting member state given that mere assistance (rather than cross-border execution) is requested. The intervention requested from the cooperating member state is thus less intrusive on its own legal system in the context of mutual legal assistance than in the context of cross-border execution.

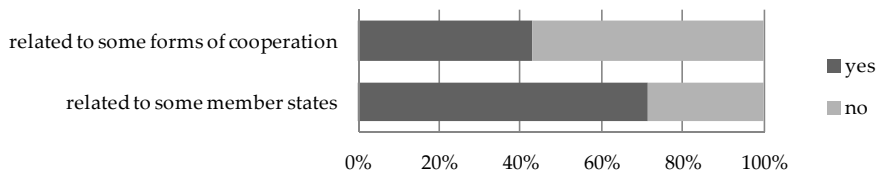
Member states were asked to share their experiences, both acting as the issuing as well as acting as the executing member state. The replies to question 4.1.20 reveal that 32% of the member states experience problems with respect to the mutual legal assistance requests it sends as an issuing member state.

4.1.20 Do you experience problems with your mutual legal assistance requests due to (un)acceptability of criminal liability of legal persons when you are the issuing member state?



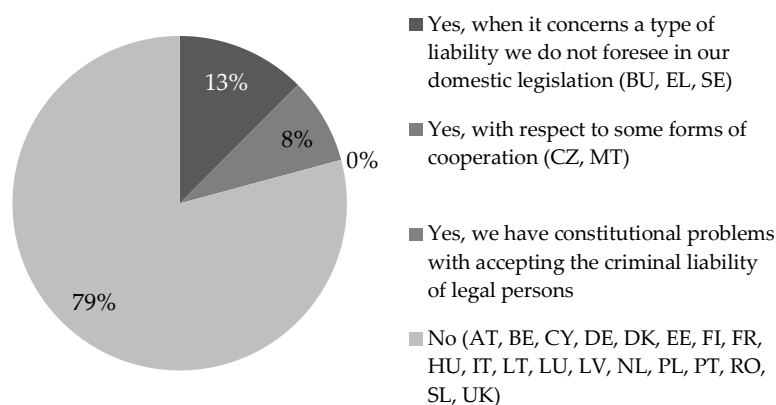
When asked to elaborate on the nature of the problems experienced, 42% of the member states refer to the type of cooperation and no less than 71% of the member states to the requested member state.

What is the nature/type of the problems you experience with your mutual legal assistance requests due to (in)acceptability of criminal liability of legal persons when you are the issuing member state?



When asked the same question when being at the receiving end and being approached as the executing member state, 30% of the member states indicate to experience problems. This number is relatively high.

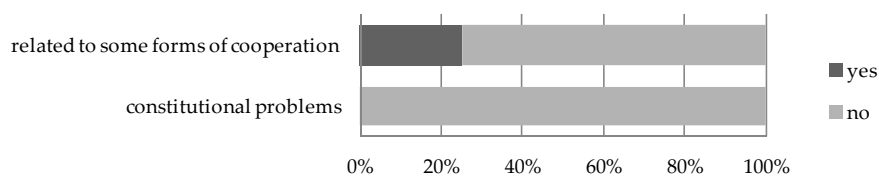
4.1.22 Do you experience problems with mutual legal assistance requests due to (un)acceptability of criminal liability of legal persons when you are the executing member state?



One would have expected at least 18% of the member states to indicate that they experience problems, considering that 18% of the member states have not introduced criminal liability of legal persons in their national law. However, an additional 12% of the member state also indicate to experience problems with the execution of mutual legal assistance requests relating to the criminal liability of legal persons. This means that the difficulties in cooperation find their origin not solely in the fact that liability is criminal, but have an origin in one or more of the other differences identified in the second chapter of this report. In other words, not only the difficulties relating to criminal vs. administrative liability can be a cause of cross-border difficulties; this is also the case for differences based on the involvement of private or public legal persons (*supra* 2.2), differences in attribution mechanisms (*supra* 2.3), differences in the offences which can be brought in relation to liability of legal persons (*supra* 2.4), and the sanctions which can be imposed on legal persons (*supra* 2.5).

What is interesting though, is the nature of the problems. None of the member states indicate that they have constitutional issues rendering cooperation impossible, which is important to assess to feasibility of mutual recognition in this sphere.

What is the nature/type of the problems you experience with your mutual legal assistance requests due to (in)acceptability of criminal liability of legal persons when you are the executing member state?



4.1.2 Position of legal persons in cooperation instruments

Because difficulties still hinder smooth cooperation with respect to legal persons, the question arises to what extent the diversity in the national approaches can be used as a refusal ground in the context of mutual legal assistance. Therefore, the current legal framework is analysed with a view to identifying the position of legal persons therein.

Relevant provisions can be found in the 2000 Convention on mutual legal assistance in criminal matters¹⁶⁸ [hereafter EU MLA]. It explicitly stipulates that mutual assistance shall be afforded even when it concerns criminal proceedings in connection to offences/infringements for which a legal person may be liable in the requesting state (Art. 3, par. 2 EU MLA). The provision inflicts on the many different fields that are covered by the EU MLA, for example the placing of articles obtained by criminal means at the disposal of the requesting state with a view to their return to the rightful owners, making the impact of these rules quite far reaching.¹⁶⁹ Art. 3, par. 2 EU MLA fits the evolution that the EU MLA makes from *locus* to *forum regit actum*, meaning that instead of applying the law of the requested member state, the law of the requesting member state applies: in principle, the assumption is made that the request for mutual assistance is

¹⁶⁸ COUNCIL OF THE EUROPEAN UNION (2000), "Convention of 29 May 2000 on Mutual Legal Assistance between member states of the European Union", OJ C 197/1, 12.7.2000.

¹⁶⁹ S. ADAM, G. VERMEULEN, W. DE BONDT, "Corporate criminal liability and the EC/EU: bridging sovereignty paradigms for the sake of an area of justice, freedom and security" in ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Chartre, 2008, (373)

compatible with the legal system of the requested state.¹⁷⁰ Only with a selected number of investigative measures for which cooperation is still governed by the *locus regit actum* principle, questions related to differences in the liability of legal persons can arise. As a baseline however, *forum regit actum* precludes the use of diversity in the liability of legal persons as a refusal ground.

Unfortunately, this trend is not explicitly included in more recent instruments on mutual recognition. No reference to legal persons is made whatsoever in the Framework decision on the freezing of evidence [hereafter FD Freezing]¹⁷¹. Following the policy line that can be identified within the existing legal framework and considering that confiscation cannot be refused based on unacceptability of the liability of legal persons for the underlying conviction, this caveat is remarkable considering that a freezing order can precede a confiscation order. It is only logical that no refusal ground should be allowed in a freezing context. This caveat comes to testify that provisions including an obligation to cooperate even if a legal person cannot be held liable in the requested/executing member state, are not consistently copied into all cooperation instruments. Especially for legal assistances which involves only minor intrusion in the legal order of the cooperating member state, differences related to the liability of legal persons should not be used as a ground to refuse cooperation.

¹⁷⁰ VERMEULEN, G., "EU Conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters", *Revue International de Droit Pénal* 2006, 77 (1-2), (59) 82-83.

¹⁷¹ COUNCIL OF THE EUROPEAN UNION (2003), "Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence" OJ L 196/45, 2.8.2003.

4.2 Execution of foreign sentences

Findings

- When asked from their experience as issuing member state, 28% of the member states experience problems with the international validity of their decisions due to the (un)acceptability of criminal liability of legal persons.
- When asked from their experience as executing member state, 24% of the member states experience problems with the international validity of their decisions due to the (un)acceptability of criminal liability of legal persons.
- As opposed to the relevant Council of Europe instruments, EU mutual recognition instruments (esp. regarding financial penalties and confiscations) explicitly state that considerations regarding liability of legal persons cannot serve as a refusal ground.

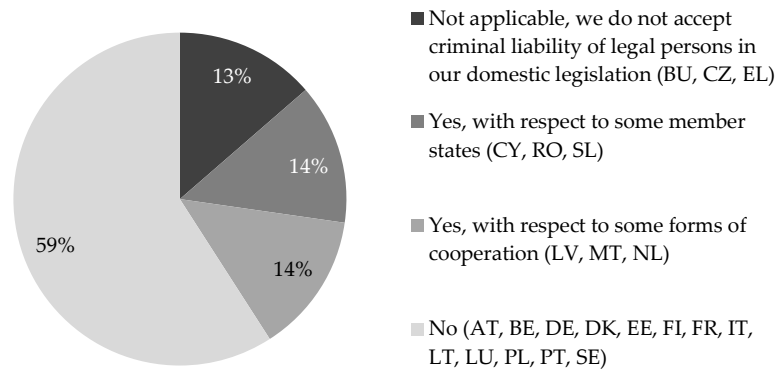
Recommendations

- The lack of consistency between the framework decision on confiscations (mutual recognition) and the framework decision on freezing orders (mutual legal assistance) should be remedied.
- Considering that within the context of mutual recognition, the intrusion in the national legal systems is higher than in the sphere of mutual legal assistance, it is advised to include the prohibition for refusal based on lack of liability of the legal person in the framework decision on freezing orders.

4.2.1 Experiences

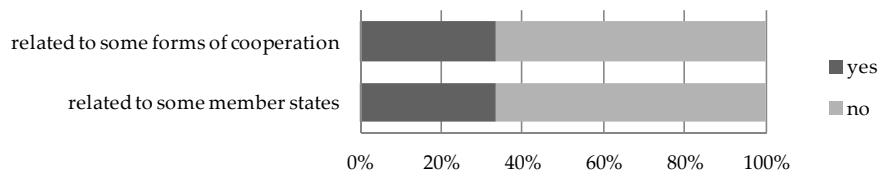
Because execution of a foreign sentence entails the taking over of an essential part of the criminal procedure, it can be expected that member states are more reluctant to cooperate with respect to the legal persons. Here too, the empirical data gathered in the context of a previous study on international cooperation in criminal matters is used as a basis to provide insight into the experiences of the member states. The replies to question 4.1.21 show a slight increase of the member states that indicate to have experience problems, when compared to the problems identified with respect to mutual legal assistance. 41% of the member states have indicated to have experienced problems with respect to the international validity of their decisions due to the unacceptability of criminal liability of legal persons when they were the issuing member state.

4.1.21 Do you experience problems with the international validity of your decisions due to (un)acceptability of criminal liability of legal persons when you are the issuing member state?



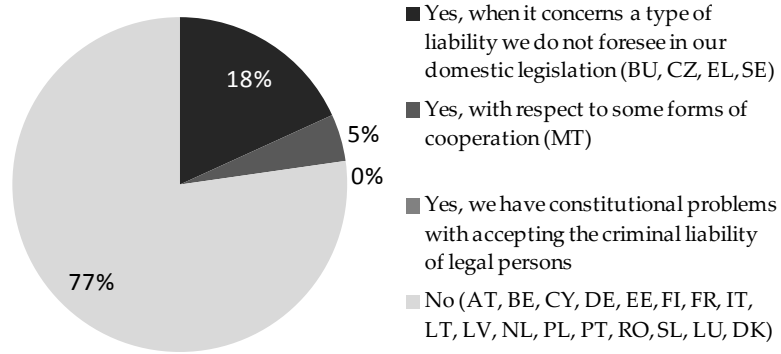
When encouraging the member states that have indicated to experience problems to further elaborate on the nature of those problems, reference is made to the forms of cooperation and the member state of which cooperation is requested, though neither can be very significant and no specific form of cooperation or member state is identified as the main problem.

What is the nature of the problems you experience with the international validity of your decisions due to (in)acceptability of criminal liability of legal persons when you are the issuing member state?



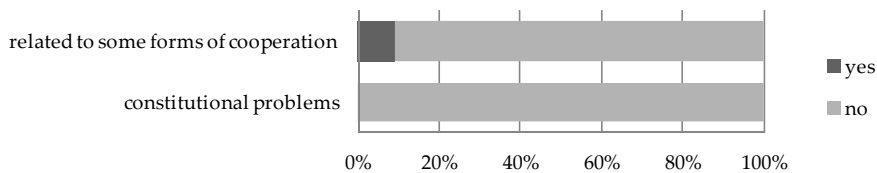
When acting as an executing member state, a similar trend can be found. A slight increase can be identified in the member states that indicate to experience problems with respect to the criminal liability of legal persons when they are at the receiving/executing end of the cooperation. 41% of the member states indicate to experience problems with the execution of a foreign conviction related to the criminal liability of legal persons.

4.1.23 Do you experience problems with the international validity of foreign decisions due to (in)acceptability of criminal liability of legal persons when you are the executing member state?



Again, this number is relatively high. One would have expected at least 18% of the member states to indicate that they experience problems, considering that 18% of the member states have not introduced criminal liability of legal persons in their national law. However, 23% of the member state also indicate to experience problems, which means that the difficulties find their origin not solely in the fact that liability is criminal, but have an origin in any of the other differences identified in the second chapter of this report. In other words, not only the difficulties following from and administrative vs. criminal justice system can be a cause of cross-border difficulties; this is also the case for differences based on the involvement of private or public legal persons (*supra* 2.2), differences in attribution mechanisms (*supra* 2.3), differences in the offences which can be brought in relation to liability of legal persons (*supra* 2.4), and the sanctions which can be imposed on legal persons (*supra* 2.5).

What is the nature of the problems you experience with the international validity of your decisions due to (in)acceptability of criminal liability of legal persons when you are the executing member state?



When compared to the experiences drawn up with respect to mutual legal assistance requests, even less member states indicate that the difficulties relate to the form of cooperation, which supports the presumption that cooperation is difficult due to one or more of the other differences identified in the second chapter of this report.

4.2.2 Position of legal persons in cooperation instruments

Because the differences in the liability of legal persons hinder smooth cooperation with respect to offences committed by / attributed to legal persons, the question arises to what extent those differences can be used as a ground for refusal. Therefore, the current legal framework is analysed with a view to identifying the current position if legal persons therein.

First, at Council of Europe level, it is the Convention on the International Validity of Criminal Judgments¹⁷² which deals with the cross-border enforcement of sentences and contains the early steps towards executing foreign decisions. An important provision in the context of this contribution is Art. 4, which reads:

“The sanction shall not be enforced by another Contracting State unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed liable to punishment if he had committed the act there”. Even though legal persons are not mentioned explicitly, from this provision it follows that requested states shall be exempt from the obligation to execute a foreign sentence when the latter was imposed on a legal person and the requested state does not recognize the principle of criminal liability of legal persons. Because of its very low ratification until the nineties however, the cited provision did not resort much practical relevance.

Significant progress is made at EU level. The framework decisions dealing with the execution of criminal judgments which can be imposed on legal persons are the framework decision regarding mutual recognition of financial penalties¹⁷³ [hereafter FD Fin Pen] and the framework decision regarding mutual recognition of confiscation orders [hereafter FD Confiscation]¹⁷⁴, which both

¹⁷² COUNCIL OF EUROPE (1970), 28 May 1970, “European Convention on the international validity of criminal judgments”, The Hague, *CETS* 070.

¹⁷³ COUNCIL OF THE EUROPEAN UNION (2005), “Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties”, OJ L 76/16, 22.3.2005.

¹⁷⁴ COUNCIL OF THE EUROPEAN UNION (2006), “Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders”, OJ L 328, 24.11.2006.

stipulate that the national differences the liability of legal persons are no basis to refuse cooperation.

The basis for this EU policy can be found in the 2000 Programme of Measures implementing mutual recognition¹⁷⁵ which explicitly refers to the matter of liability of legal persons. In measure 18, which urges member states to prepare measures for cross-border execution of financial penalties, it is said that account will be taken of *“the differences between EU member states on the issue of liability of legal persons”*.¹⁷⁶

The proposal for the FD Fin Pen made the enforcement subject to the law of the executing state, but required enforcement against legal persons *“even when the executing state does not recognize the principle of criminal liability of legal persons”*.¹⁷⁷ An optional transition period is included: Art. 20, par. 2, b provides that member states may (until maximum 22 March 2010)¹⁷⁸ limit the enforcement of a foreign decision sentencing a legal person to those offences for which a European instrument provides for the application of the principle of corporate liability. The FD Confiscation also applies the default position of the FD Fin Pen. However, it does not foresee in a transitional period.

Especially because execution of a sentence is far more intrusive than mere cooperation it is important that also with respect to mutual legal assistance the diversity with respect to the liability of legal persons is recognised and no longer regarded as a legitimate obstacle to cooperation.

¹⁷⁵ COUNCIL OF THE EUROPEAN UNION (2000), “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001.

¹⁷⁶After all, because of the low ratification level of the abovementioned Council of Europe Convention on the Validity of Judgments, fines imposed by criminal courts (or administrative authorities) could not be enforced in other member states unless there was a bilateral agreement concluded to that aim: K. LIGETI, “Mutual recognition of financial penalties in the European Union” *Revue Internationale de Droit Pénal* 2006, 77, (145) 146.

¹⁷⁷ COUNCIL OF THE EUROPEAN UNION (2001), Explanatory note on the Initiative from the French republic, the Kingdom of Sweden and the United Kingdom for the adoption by the Council on a draft framework decision on the application of the principle of mutual recognition to financial penalties (10710/01), <http://register.consilium.europa.eu/pdf/en/01/st10/st10710-ad01.en01.pdf>.

¹⁷⁸ Art. 20 j.° 21 FD Fin Pen: transition period of five years after entry into force; entered into force on the date of publication in the Official Journal, which was 22.03.2005.

4.3 Need for the EU to safeguard its own approximation policy

Findings

- In certain legislation, the EU temporarily allowed refusal grounds based on considerations related to liability of legal persons; an exception was included, however, in that such refusals were not allowed in relation to offences which had been subject to approximation and introduction of the obligation to foresee liability for legal persons; such transitional period was not foreseen in the framework decision on confiscations.

Recommendations

- If and when the EU would (temporarily) allow refusal grounds based on considerations related to liability of legal persons, it should see to it that allow such refusal grounds does not undermine its approximation *acquis* (as it did in the framework decision on financial penalties).
- When assuring the compatibility with the approximation *acquis*, which can be accomplished by not allowing the refusal in relation to offences which had been subject to approximation and introduction of the obligation to foresee liability for legal persons, it is advised to develop an instrument comprising the concerned approximated offences.

In the margin of the discussion on whether or not the differences in the liability of legal persons ought to be accepted/recognised, it is important for the EU to ensure that the compromise reached by the member states does not undermine the progress made in and consistency of its own policy making.

In situations where member states introduce a transition period of 5 years to adjust to having to execute sanctions handed down against legal persons, it is important for the EU to see to it that such – be it temporary – refusal grounds are no threat for its approximation policy and should do what is possible to facilitate the identification of obligations that spring from its approximation policy.

With respect to the transitional period found in Art. 20, 2, b FD Fin Pen, respect for the EUs approximation efforts is safeguarded in that the possibility to wait with the recognition and execution of sanctions handed down against legal persons may not be introduced with respect to just any offences. The scope is limited to offences that have not been subject to approximation and introduction of the obligation to foresee liability for legal persons. Differently put, the provision stipulates that at least for the offences that have been subject to approximation, recognition and execution is mandatory from the initial entry into force of the instrument.

Obviously, the formulation of the provision could have been more concrete on the specific offences it relates to. A practitioner is now expected to either know by heart which offences have been subject to approximation or check the legislation. It would have been more user-friendly if the EU would make a consolidated list of those offences available for practical use. Significant first steps towards the introduction of such a consolidated list that can be used for these kinds of purposes have been made via the development of EULOCS, short for the EU level offence classification system that has amongst others the ambition to visualise the existing acquis.¹⁷⁹

¹⁷⁹ VERMEULEN, G. and DE BONDT, W. EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy. Antwerp - Apeldoorn - Portland, Maklu, 2009, 212p

5 Conclusion

The conclusion to this study comprises two main parts. First, the main conclusions will be drawn from the diversity in the member states deduced from the comparative analysis conducted on the information gathered. The questionnaire only encompassed questions aiming to describe the current approach found in the member states with respect to the liability of legal persons for offences. Second, though no questions related thereto could be included in the questionnaire, the team has formulated a set of operational recommendations based on the EU level analysis it conducted, in addition to the comparative analysis conducted on the information gathered. In doing so, the team provides insight into its opinion on the way forward and the policy lines the European Commission should set out – in its opinion – to ensure a comprehensive and consistent policy with respect to the liability of legal persons.

5.1 Diversity in the member states

Differences in competent authorities were identified, differences based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons. Firstly, with respect to the differences related to the competent authorities involved, the analysis presented an overview of the choice for either criminal, administrative and/or civil liability of legal persons. The mapping exercise lead to the conclusion that 5 member states have not introduced a form of criminal liability in their national law and 8 member states have not introduced a form of administrative liability in their national law. This diversity is also relevant in relation to the other diversities regarding liability of legal persons in that the varieties based on the involvement of private or public legal persons, differences in attribution mechanisms, differences in the offences which can be brought in relation to liability of legal persons, and the sanctions which can be imposed on legal persons.

Secondly, with respect to the differences related to the type of persons involved, it must be noted that the concept of a legal person is sometimes used as an umbrella concept to include both natural and fictitious persons. For a proper analysis and comparison, it is important to clearly define a legal person as an entity (as opposed to a human being) recognised by the law as having legal personality, without excluding States and other public bodies and organisations from its scope. The latter nuance was added because the legal person concept is rarely limited to private legal persons. Nonetheless, awareness of the (rare)

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limitation is necessary, especially when examined in light of differences regarding criminal vs. administrative liability: in relation to criminal liability of legal persons there tends to be more limits on liability of public legal persons than is the case for administrative liability of legal persons.

Thirdly, with respect to the differences in attribution mechanisms, three theoretical schools were used as a basis to map the attribution techniques introduced in the member states. A distinction can be made between

- the *vicarious liability/respondeat superior* theory which opts for an almost civil law like attribution by stating that ‘any’ misconduct by the legal persons’ employees will lead to legal person responsibility;
- the *alter ego/identification model*. stating that only managers and employees endowed with certain responsibilities may cause criminal liability for the legal person;
- the *aggregation model* theory, aimed at identifying a collective responsibility of individuals within the legal person, rather than identifying an individual perpetrator, aggregation could therefore involve matching the conduct of one individual with the state of mind or culpability of another individual to achieve liability.

A fourth model, the organisational model/self-identity doctrine, was also included. It is based on the assumption that legal persons have a mechanism for expressing their substance and self-identity, and can thus be held liable for crimes, without necessarily having to be linked to the behaviour of individuals.

The identification model is the model used in the EU’s approximation instruments. Different elements of the several attribution models apply in many MS, but in relation to criminal liability, an overwhelming majority applies elements of both the vicarious liability and the identification model. Parallel prosecution of natural and legal persons is possible in a wide majority of the member states; whereas concurrent liability occurs in – on average – 55% of the member states.

Fourthly, with respect to the differences in offences which can give rise to liability of legal persons, analysis revealed that only few member states have introduced an *all* inclusive liability for legal persons. Most member states have opted for an enumeration strategy selecting either *families* of offences or *single* offences for which a legal person can be held liable.

Fifthly and finally, with respect to the differences in sanctions which can be imposed on legal persons, analysis revealed that the sanction arsenal is very diverse, though some member states have not included separate sanctions in their legal system and/or included a conversion mechanism to convert inoperable sanction types to a financial sanction.

5.2 Recommendations for a coherent and consistent policy with respect to the liability of legal persons for offences

5.2.1 *With respect to approximation*

Recommendation 1 – Continue general approach

It is important to continue the general approach with respect to the introduction of provisions related to the liability of legal persons for offences included in approximation instruments. Considering the existence of structures such as accessories or instigators it should be kept as a baseline that legal persons can be involved in any type of offence.

Recommendation 2 – Complement non-EU instruments where necessary

Though it is a good practice to take account of existing approximation efforts in non-EU instruments and refer to those instruments for the definition of the constituent elements of offences, it is important to thoroughly assess to what extent it is necessary to complement the provisions with respect to the liability of legal persons included in the concerned non-EU instrument.

Recommendation 3 – Avoid terminology with ‘criminal law’ connotation

Especially because the EU has continuously accepted the diversity in the member states and has decided not to introduce the obligation to introduce a criminal liability for legal persons, the use of the term *sanctions* should have preferences over *penalty* which has a criminal law connotation.

Recommendation 4 – Reconsider the scope of a ‘legal person’

In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of member states include one or more types of public legal persons within the scope of their national liability approach, the EU can consider extending its scope accordingly.

Recommendation 5 – Consider the introduction of ‘strict liability’

The introduction of a system of strict liability as is done in some member states can significantly reduce the burden of proof when prosecuting those offences.

Recommendation 6 – Rephrase the currently suggested sanctions

Some of the sanctions currently included in the list of suggestions can be better phrased. The recommendation can be made to rephrase the suggested ‘exclusion from entitlement to public benefits or aid’ in a way to clearly

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encompass the exclusion from participation in a public tender procedure in its scope, especially since that suggestion is included in some other EU instruments.

Recommendation 7 – Develop a standard set of suggested sanctions

Though the suggested sanctions are to a large extent consistently included in all approximation instruments, there seems to be no tangible explanation why some are not included in a small number of approximation instruments. It is therefore recommended to develop a clear and transparent standard set of suggested sanctions for legal persons.

Recommendation 8 – Complement standard set with additional sanctions

Besides the standard set of suggested sanctions, additional (suggested) sanctions can be included reflecting the specificity of the offence.

Recommendation 9 – Look into need for specific ‘legal person’-offences

Based on the current formulation of the constituent elements of the offences, it is not always clear whether specific situations fall within its scope. Especially subcontracting constructions raise a lot of questions. It should therefore be looked into whether or not it is desirable to criminalise the situations linked to e.g. subcontracting and subsequently look into the necessity to either rephrase the constituent elements of the current offences or to develop a new set of specific ‘legal person’-offences.

Recommendation 10 – Increase follow-up of the implementation process

Analysis has revealed that the implementation of the current set of approximation instruments is far from flawless. The implementation process in the member states should be followed more closely. In the event the current instruments need to be amended, the opportunity should be seized to introduce directives whose poor implementation can give rise to the start of an infringement procedure.

5.2.2 With respect to mutual recognition

Recommendation 11 – Extend mutual recognition instrumentarium

The current instrumentarium regulating the mutual recognition of sentences and governing their cross-border execution is largely focused on the sanctions typically imposed against natural persons. A comprehensive and consistent policy with respect to the liability of legal persons would need to contain instruments regulating the mutual recognition of the sanctions typically imposed against legal persons.

Recommendation 12 – Develop general approach with respect to refusal grounds related to the differences

In the current instrumentarium, nor the differences in administrative vs. criminal liability, nor the differences based on the type of involved legal persons, nor the variety in attribution mechanisms, nor the differences in offences leading to liability of legal persons, nor the sanctions which can be imposed are considered as eligible grounds to refuse execution of judicial decisions imposing a financial penalty or confiscation measure upon a legal person. The question arises whether that will become a general approach when extending the mutual recognition instrumentarium to encompass also cross-border execution of other sanctions.

5.2.3 With respect to the information exchange policy

Recommendation 13 – Introduce the obligation to keep records

Analysis has revealed that not all member states keep (complete and comprehensive) records in relation to the liability of legal persons for offence. With a view to extending the information exchange with respect to the liability of legal persons for offences in the EU, the first step would be to introduce an obligation to keep records in order to be able to provide information upon request.

Recommendation 14 – Introduce exchange and storage obligations

Analogous to the exchange and storage obligations that have been introduced with respect to the criminal records of natural persons, similar exchange and storage obligations should be introduced with respect to the liability (criminal or other) of legal persons for offences. It would significantly facilitate the taking account of prior convictions in the course of criminal or non-criminal procedures.

5.2.4 With respect to the procedural safeguards policy

Recommendation 15 – Ensure equivalent protection outside criminal liability context

Especially because the EU has continuously accepted the EU-wide diversity regarding the criminal vs. administrative liability of legal persons in the member states and has decided not to introduce the obligation to introduce a criminal liability for legal persons, it is important to complement that policy choice with a policy that ensures a procedural protection in relation to offences administrative and civil liability for offences that is equivalent to the procedural protection foreseen in the context of a criminal liability mechanism.

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Recommendation 16 – Ensure equivalent protection for natural and legal persons

The development of the policy line to enhance the level of protection provided by procedural safeguards in the EU, is mainly focused on the procedural safeguards natural persons need. It is important to look into the specificity of the situation in which a legal person finds itself and ensure equivalent protection for natural and legal persons.

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7 Annex: questionnaire

PART 1 – An introduction to the concept of a legal person

1 Definition of a legal person

- 1.1 Does your national law or legal regime acknowledge the existence of a legal person?
- No, the concept of legal person is not acknowledged under our national law or legal regime
 - Yes, our national law or legal regime acknowledges the concept of a legal person

Additional comment box:

Feel free to insert a comment with respect to this question:

- 1.2 If yes, what is the scope of the definition used to determine a legal person under your Member State's national law or legal regime?

The project team has anticipated to differences between the national justice systems and allows you to make a distinction between private and public legal persons, and the position of international organizations.

- Scope of the definition is limited to private legal persons only
- Scope of the definition is limited to public legal persons only

We would like to know what is meant by a 'public legal person' according to your national law. Please define the scope of the definition used to determine public legal persons. Is it limited according to the specific type of legal person?

- Scope is not limited to any specific type of public legal person
- Scope is limited to specific type of public legal person

If so, please further define the specific scope for public legal persons:

- Public legal person scope is limited to state authorities
- Public legal person scope is limited to state controlled bodies
- Other (please explain) :

Insert your explanation

ANNEX: QUESTIONNAIRE

- Scope of the definition includes both public and private legal persons, but excludes international organisations
Is the scope of the definition used to determine public legal persons confined to a specific type of public legal person?
- No, scope is not limited to any specific type of public legal person
- Yes, scope is limited to specific type of public legal person

Please further define the specific scope:

- Public legal person scope is limited to state authorities
 - Public legal person scope is limited to state controlled bodies
 - Other (please explain) :
Insert your explanation
- Scope of the definition is not limited to any specific type of legal person
 - Other (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

1.3 Does your Member State's law or legal regime acknowledge the existence of both multiple person and single owner legal persons?

- No, there is a selection. Our law or legal regime is limited to :
 - Only acknowledging the existence of multiple person legal persons
 - Only acknowledging the existence of single person legal persons
- Yes, our law or legal regime acknowledges the existence of both
- Other (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

1.4 Does your Member State's law or legal regime recognize parent-subsi-
diary legal person relations?

A parent company is a company that has control over the management and operations of another company by influencing or electing its board of directors; the second company being deemed as a subsidiary of the parent company.

- No, our law or legal regime does not comprehend
- Yes, our law or legal regime does comprehend
- Other (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

PART 2 – Criminal liability of legal persons

2 Type and scope of criminal liability for legal persons

2.1 Does your Member State's national law or legal regime acknowledge
criminal liability for legal persons?

Please indicate which of the following liability regimes is applicable in your Member State. If your Member State applies a combination of liability regimes (E.g. criminal/administrative or criminal/civil etc.) please indicate below, you will be redirected to the appropriate chapters of the questionnaire.

- No, our law does not acknowledge criminal liability for legal persons

Please specify legal persons liability regime:

- Our legal system applies administrative liability regime
- Our legal system applies civil liability regime
- Our legal system applies a combination of administrative and civil liability for legal persons
- Other (please explain) :
Insert your explanation

- Yes, our law acknowledges criminal liability for legal persons

Additional comment box:

Feel free to insert a comment with respect to this question:

2.2 What is the scope of the criminal liability regime for legal persons utilized under your Member State's law or legal regime?

- A legal person can be held criminally liable under our national legislation or legal regime, without any restrictions
- Criminal liability for legal persons is restricted under our national legislation or legal regime

2.3 If you have ticked the second button, what the basis for such restriction?

We have anticipated restrictions based on the type of legal person, the offences involved and whether an individual perpetrator has to be identified to confine criminal liability of legal persons. Additionally, we have included a free text field for you to elaborate on any other bases for restrictions.

- Restriction is based on the type of legal person concerned:

Please further specify:

- Criminal liability is restricted to strictly private legal persons
- Criminal liability is restricted to strictly public legal persons

Please further specify:

- Criminal liability is restricted to State authority
- Criminal liability is restricted to State controlled bodies
- Other (please explain) :

Besides restrictions based on the legal persons being either a private or public legal person, other restrictions are possible.

- Criminal liability is restricted to multiple person legal persons
- Criminal liability is restricted to single person legal persons
- Criminal liability is restricted to parent-corporation-type legal persons
- Criminal liability is restricted to subsidiary-corporation-type legal persons

- Restriction is based on specific type of offence
The legal person's criminal liability depends on whether specific type of offence was committed and can be attributed to the legal person concerned

Please further specify:

- Our legislator has created specific offences to which criminal liability is confined
- Our legislator has opted to confine criminal liability to specific offence types under its National Penal Code
- Restriction is based on whether an individual perpetrator has to be identified to confine criminal liability of legal persons
- Other (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

2.4 Does your Member State combine criminal liability with another type of liability for legal persons?

- Our law applies a combination of criminal and civil liability for legal persons
When combination option is indicated, please continue to fill out the chapter on criminal liability as stated below.
- Our law applies a combination of administrative and criminal liability for legal persons
When this combination option is indicated, please fill out firstly the part on criminal liability as stated below, at the end you will reach the administrative liability chapter where you can fill out the appropriate administrative liability regime utilized by your Member State.
- Our law applies a combination of administrative, civil and criminal liability for legal
When this combination option is indicated, please fill out firstly the part on criminal liability as stated below, at the end you will reach the administrative liability chapter where you can fill out the appropriate administrative liability regime utilized by your Member State.

Additional comment box:

Feel free to insert a comment with respect to this question:

3 Attribution techniques and scope

In the context of this questionnaire, four main attribution theories are distinguished:

Firstly, the vicarious liability/respondeat superior theory, opting for an almost civil law like attribution by stating that ‘any’ misconduct by the legal persons’ employees will lead to legal person responsibility.

Secondly, the identification model theory, stating that only managers and employees endowed with certain responsibilities may cause criminal liability for the legal person.

Thirdly, the aggregation model theory, aimed at identifying a collective responsibility of individuals within the legal person, rather than identifying an individual perpetrator, aggregation could therefore involve matching the conduct of one individual with the state of mind or culpability of another individual to achieve liability.

Fourthly and finally, we will try to review specifically about organizational responsibility of the legal person concerned, both when the offences were committed for its benefit and otherwise.

In the following questions, the project team will try to identify in which of these theories your national law or legal regime fits best.

To anticipate to any differences in your legal order based on the status of the offender, this section makes a distinction between first offences committed by the legal person’s employees and second offences committed by the legal person’s hierarchy.

3.1 Offences by its employees

3.1.1 How will criminal liability be attributed to a legal person under your Member State’s national law or legal regime for offences committed by its employees?

We have anticipated a potential difference in your reply for offences committed

- either for the benefit of the legal person

- or within the legal person’s activities.

For each of these two techniques we will ask you a set of additional questions.

Additionally, we have foreseen a free text field should the attribution be regulated in a third manner in your member state.

- The legal person can incur liability for offences committed by its employees, even when they are deprived of any managerial or representative responsibility, when the offences are committed for the benefit of the legal person

If this explains the attribution in your country:

3.1.1.1 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly

instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

3.1.1.2 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

- The legal person can incur liability for offences committed by its employees, even when they are deprived of any managerial or representative responsibility, when the offences are committed within the legal person's activities.

This means without the need to prove any advantage or benefit achieved by the legal person.

If this explains the attribution in your country:

3.1.1.3 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

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3.1.1.4 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

3.1.1.5 How does your National Member State's law or legal regime define the concept of 'within the legal person's activities'?

- Our law applies the broadest scope of this concept: any link with the legal person can attribute criminal liability
- Our law applies a restricted scope of this concept: specific type(s) of activities are required to attribute criminal liability

Please further specify:

- Legal person's activities are defined in accordance to the legal person's statutes
- Legal person's activities are defined in accordance to the purpose for which the legal person was founded
This implies the de facto purpose of the legal person rather than the construed purpose in the statutes
- Legal Person's activities are defined in accordance to the present corporate culture
This implies the current purpose/mentality/structure/.. of the legal person
- Other (please explain) :
Insert your explanation
- Other (please explain) :
Insert your explanation
- Other besides 'for the benefit' and/or 'within the activities' (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

3.2 Offences by hierarchy of the legal person's staff

3.2.1 How will criminal liability be attributed to a legal person under your Member State's national law or legal regime for offences committed by hierarchy of the legal person's staff?

We have anticipated a potential difference in your reply for offences committed

- either for the benefit of the legal person

- or within the legal person's activities.

For each of these two techniques we will ask you a set of additional questions.

Additionally, we have foreseen a free text field should the attribution be regulated in a third manner in your member state.

- The legal person's liability is confined to offences committed by certain hierarchy of company staff and for the benefit of the legal person

If this explains the attribution in your country:

3.2.1.1 Please further specify the scope of the definition of hierarchy of company staff:

Please indicate how large the 'inner circle' of hierarchy company staff that will lead to attribution exactly is:

- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on a power of representation of the legal person
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to take decisions on behalf of the legal person
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to exercise control within the legal person
- All of the above are considered within the scope of the hierarchy of company staff
- Other (please explain) :
Insert your explanation

3.2.1.2 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

3.2.1.3 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

- The legal person's liability is confined to offences committed by certain hierarchy of company staff when they are committed within the legal person's activities

Without the need to prove any advantage or benefit achieved by the legal person

If this explains the attribution in your country:

3.2.1.4 Please further specify the scope of the definition of hierarchy of company staff:

- Please indicate how large the 'inner circle' of hierarchy company staff that will lead to attribution exactly is, by indicating the following:
 - The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on a power of representation of the legal person
 - The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person

based on an authority to take decisions on behalf of the legal person

- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to exercise control within the legal person
- All of the above are considered within the scope of the hierarchy of company staff
- Other (please explain) :
Insert your explanation

3.2.1.5 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

3.2.1.6 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

3.2.1.7 Please indicate further: How does your National Member State's law or legal regime defines the concept of 'within the legal person's activities'?

- Our law applies the broadest scope of this concept: any link with the legal person can attribute criminal liability
- Our law applies a restricted scope of this concept: specific type(s) of activities are required to attribute criminal liability

Please further specify:

- Legal person's activities are defined in accordance to the legal person's statutes
- Legal person's activities are defined in accordance to the purpose for which the legal person was founded
This implies the de facto purpose of the legal person, rather than the construed purpose in the statutes
- Legal Person's activities are defined in accordance to the present corporate culture
This implies the current purpose/mentality/structure.. of the legal person
- Other (please explain) :
Insert your explanation

Other (please explain) :
Insert your explanation

- Other besides 'for the benefit' and/or 'within the activities' (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

3.3 Does your Member State's law or legal regime -as a rule- require the establishment of 'mens rea' for a legal person?

This question is specifically aimed at retrieving whether and how the 'mens rea' idea (where a culpable state of mind – or less implicitly: 'guilt'- is required for a certain offence to attribute criminal liability) is incorporated in your law or legal regime legal persons

- NO, our law has created specific type of (objectified) liability for legal persons, not requiring a culpable state of mind
- NO, our law has not created specific type of liability, but has restricted liability for legal persons to those offences that do not require a culpable state of mind

Here, mens rea is to be considered in the broad sense; not so much as guilt directly linked to the perpetration of an offense, but as a general requirement for liability for offences.

- NO, for another reason (please explain) :
Insert your explanation
- YES, identification of the individual physical perpetrator is necessary under your law or legal regime
This means a direct link has to be made between the individual connected with the legal person who has committed the offence to attribute a culpable state of mind to the legal person
- YES, our law entirely recognizes mens rea for a legal person, no division between natural persons and legal persons can be made
- YES, for another reason (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

4 Criminal offences

4.1 For what kind of offences can a legal person be held criminally liable under your Members State's national law or legal regime?

- All kinds. Law or legal regime makes no difference between legal and natural persons
- Law or legal regime has introduced criminal liability for legal persons for (a) specific categor(y)(ies) of offences:

If you have ticked this second button, please indicate for what specific category or categories criminal liability is applied:

- Liability is restricted to economic offences
- Liability is restricted to tax offences
- Liability is restricted to environmental offences
- Liability is restricted to illicit trafficking related offences
- Liability is restricted to fraud offence types
- Liability is restricted to theft and dishonesty offence types
- Liability is restricted to offences not requiring commission by a natural person
With this box a type of offences is targeted where corpus reus (an actual physical body to commit a certain crime with) is inevitable for criminal liability. E.g. rape, sexual aggression, manslaughter, etc.
- Other (please explain) :
Insert your explanation

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- Law or legal regime has introduced criminal liability for legal persons for specific type of offences

This means your national law or legal regime has not opted for a specific category of offences, but chose to introduce liability for specific types of offences. Please use the table on the following page to provide an overview of the scope of the criminal liability of legal persons.

| If you have ticked the third button, please indicate for what specific type of offence criminal liability is applied: | Please indicate when criminal liability for a legal person was introduced in national law or legal regime for the offence type | Please wait to fill in this tick box on sanctions until you have reached sanction chapter, you will be redirected |
|---|--|---|
| Participation in a criminal organization | | |
| Terrorism | | |
| Trafficking in human beings | | |
| Sexual exploitation of children and child pornography | | |
| Illicit trafficking in narcotic drugs and psychotropic substances | | |
| Illicit trafficking in weapons, munitions and explosives | | |
| Corruption | | |
| Fraud | | |
| Laundering of the proceeds of crime | | |
| Counterfeiting currency, including of the euro | | |
| Computer-related crime | | |

| | | |
|--|--|--|
| Environmental crime, including illicit trafficking in endangered animal species and endangered plant species and varieties | | |
| Facilitation of unauthorized entry and residence | | |
| Murder, grievous bodily injury | | |
| Manslaughter | | |
| Illicit trade in human organs and tissue | | |
| Kidnapping, illegal restraint and hostage taking | | |
| Racism and xenophobia | | |
| Organized or armed robbery | | |
| Illicit trafficking in cultural goods, including antiques and works of art | | |
| Swindling | | |
| Racketeering and extortion | | |
| Counterfeiting and piracy of products | | |
| Forgery of administrative documents and trafficking therein | | |
| Forgery of means of payment | | |
| Illicit trafficking in hormonal substances and other growth promotors | | |
| Illicit trafficking in nuclear or radioactive materials | | |
| Trafficking in stolen vehicles | | |
| Rape | | |

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| | | |
|--|--|--|
| Arson | | |
| Crimes within the jurisdiction of the international criminal court | | |
| Unlawful seizure of aircraft/ships | | |
| Sabotage | | |
| Conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulation on hazardous goods | | |
| Smuggling of goods Infringements of intellectual property | | |
| Threats and acts of violence against persons, including violence during sport events | | |
| Criminal damage | | |
| Theft | | |
| Offences against workplaces health and safety | | |
| Other (please explain) | | |

Additional comment box:

Feel free to insert a comment with respect to this question:

5 Applicable sanctions

5.1 Does your national law hold preventive measures that can be imposed on legal persons?

Firstly, the project team would like to gain some insight into the preventive measures that can be imposed on legal persons during the trial. If specific types of preventive measures exist under national law or legal regime, please elaborate:

Insert your reply

5.2 What types of sanctions are used under your Member State's national law or legal regime to sanction a criminally liable legal person?

- Member State's law or legal regime makes no division in sanctions for legal persons as opposed to physical persons: when a certain sanction is not manageable, conversion is applied
- Member State's law or legal regime makes a division in sanctions for legal persons as opposed to natural persons

Please further specify, using the tick boxes and tables on the following pages

- Our law or legal regime opted for a number of existing sanctions to be applied, in conciliation with legal person's specific status

This means that your law or legal regime has not created any specific type of sanction, but has simply indicated which available sanctions can be applied to a convicted legal person.

| If you have ticked this first box, please further specify the type of sanction: | Please indicate when specific sanction was introduced in national law or legal regime | Please elaborate (if applicable) on the minima and/or maxima that apply |
|---|---|---|
| Loss of legal personality | | |
| Public pronouncement of the conviction | | |
| Prohibition to participate in public tenders | | |
| Prohibition to advertise goods or services | | |
| Public) admonition | | |
| Financial penalties | | |

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| | | |
|--|--|--|
| Obligation to file various information to the authorities within certain time limits | | |
| Placement of the legal person under judicial administration in order to safeguard the rights of employees or creditors | | |
| Obligation to fulfil certain organizational measures | | |
| Liquidation | | |
| Prohibition of entering into certain Agreements | | |
| Prohibition of doing business | | |
| Other (please explain) | | |

- Our law or legal regime has created specific types of sanctions, specifically aimed at targeting legal persons

This means that your law or legal regime has created specific sanctions for legal persons

| Please further specify the type of sanction: | Please indicate when specific sanction was introduced in national law or legal regime | Please elaborate (if applicable) on the minima and/or maxima that apply |
|--|---|---|
| Closing down of -affected-branches | | |
| Loss of legal personality | | |
| Public pronouncement of the conviction | | |
| Prohibition to participate in public tenders | | |
| Prohibition to advertise goods or services | | |

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| | | |
|---|--|--|
| Prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency | | |
| (Public) admonition | | |
| Financial penalties | | |
| Winding-up of the legal person | | |
| Obligation to file various information to the authorities within certain time limits | | |
| Dissolution of the legal person | | |
| Placement of the legal person under judicial administration in order to safeguard the rights of employees or creditors | | |
| Obligation to fulfill certain organizational measures | | |
| Liquidation | | |
| Prohibition of entering into certain agreements | | |
| Prohibition to the right to receive subsidies | | |
| Prohibition to trade with financial instruments | | |
| Prohibition of acquisition of licenses, authorizations or concessions | | |
| Prohibition of the legal person's merger, division or reduction of the share capital | | |
| Prohibition of doing business | | |
| Other (please explain | | |

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- Other (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

5.3 Is the possibility to impose certain types of sanctions confined to certain types of offences?

- No, Member State has not limited imposition of sanctions to specific offence types
- Yes
*Please specify which sanction is related to which offence type.
To specify the relation, please write the applicable sanction's name in the tick box which conforms with the offence the sanction is related with. Use Ctrl+Click here.*

5.4 Under your Member State's national law or legal regime, on who will the sanction ultimately be imposed?

- Sanction will ultimately be imposed on the legal person only
- Sanction will ultimately be imposed on the natural person only
- Sanction can ultimately be imposed on both
- Other (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

5.5 Does criminal prosecution of the liable legal person exclude parallel prosecution for the natural person/perpetrator?

- Yes
- No
- Other (please explain) :
Insert your explanation

5.6 Does criminal prosecution of the liable natural person/perpetrator exclude parallel prosecution for the liable legal person?

- Yes
- No
- Other (please explain) :

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

6 Criminal records policy

6.1 Does your country keep criminal records for legal persons?

- No
- Yes, but only with respect to legal persons that are established within our territory
- Yes, with respect to legal persons that we have convicted, regardless of their establishment within or outside our territory

Additional comment box:

Feel free to insert a comment with respect to this question:

6.2 What kind of information do you store in your criminal records with respect to convictions of legal persons?

6.2.1 With respect to the legal person

- Legal name
- Shortened name, commonly used name or trading name, if applicable
- Country of incorporation/establishment
- Register and number of incorporation
- Address of registered office
- Name of legal representative
- Other (please explain)

Insert your explanation

6.2.2 With respect to the offence

- Legal definition
- Legal provision
- Date (or period) of facts
- Place(s) of facts
- Number of acts committed
- Other (please explain)

Insert your explanation

6.2.3 With respect to the level of completion

- Completed
- Attempted
- Other (please explain)
- Insert your explanation

6.2.4 With respect to the level of participation

- Perpetrator
- Accomplice
- Accessory (aiding and abetting)
- Instigator
- Other (please explain)
- Insert your explanation

6.2.5 With respect to the sanction

- Type of Sanction
 - Duration / height
 - Enforcement Status
 - Erasure / deletion date
 - Other (please explain)
- Insert your explanation*

Additional comment box:

Feel free to insert a comment with respect to this question:

6.3 Do you have separate erase and deletion rules for convictions handed down against legal persons?

From a theoretical perspective, a legal person can live forever. Therefore the question arises to what extent a legal person should be confronted with the consequences of offences committed in the past, knowing that the staff of the legal person may have been completely replaced.

With erasing rules, we intend to refer to the situation where a conviction is no longer mentioned on the criminal record extract issued in the convicting state, but remains included in the criminal record. This means that the conviction information can still be used for specific purposes.

With deletion rules, we intend to refer to the situation where a person's criminal record itself is expunged and any data on the conviction is deleted from all records so that it cannot be used any longer in the future.

- Erasure or deletion does not exist in our national law
- One single system applies to all convictions, regardless of whether the conviction was handed down against a natural or legal person

Please briefly elaborate on the basic principles

- Additional rules - on top of the system developed for natural persons - that applies to convictions handed down against legal persons
- A completely separate system applies to convictions handed down to a legal person

Please briefly elaborate on the basic principles and summarize the differences with respect to the rules that apply to convictions handed down against natural persons.

Additional comment box:

Feel free to insert a comment with respect to this question:

6.4 Do you notify other member states if you have imposed a criminal sanction upon a legal person established/incorporated in another member state?

At EU level, obligations to exchange criminal records information are currently limited to convictions handed down against natural persons. Convictions against legal persons are not included. Nevertheless, it remains interesting to gain insight into the flow of criminal records information with respect to legal persons, beyond EU obligations.

- Only with respect to some member states
Insert your explanation here
- Only with respect to some types of legal persons
Insert your explanation here
- Only with respect to some offences
Insert your explanation here
- Only with respect to some sanctions
Insert your explanation here
- Other (please explain)
Insert your explanation here

Additional comment box:

Feel free to insert a comment with respect to this question:

6.5 Do you store information on convictions handed down by other member states upon a legal person established/incorporated in your member state?

- We have never received information on a foreign conviction handed down against a legal person established/incorporated in our member state

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- No, we cannot store information on foreign convictions (due to legal or technical limitations)
- No, we cannot store information on foreign convictions (due to legal or technical limitations)
Insert your explanation here
- Only with respect to some member states
Insert your explanation here
- Only with respect to some types of legal persons
Insert your explanation here
- Only with respect to some offences
Insert your explanation here
- Only with respect to some sanctions
Insert your explanation here
- Other (please explain)
Insert your explanation here

Additional comment box:

Feel free to insert a comment with respect to this question:

At the end of the questionnaire, an open-opinion chapter is foreseen for the respondents. If the administrative liability chapter is not applicable in your Member State, please click here and you will be immediately directed to this final chapter.

PART 3 – Administrative liability of legal persons

7 Type and scope of administrative liability for legal persons

7.1 What is the scope of the administrative liability regime for legal persons utilized under your Member State's law or legal regime?

- A legal person can be held administratively liable under our national law or legal regime, without any restrictions
- Administrative liability for legal persons is restricted under our national law or legal regime

7.2 If you have ticked this second button, what is the basis for such restriction?

- Restriction is based on the type of legal person concerned

Please further specify:

- Administrative liability is restricted to strictly private legal persons

- Administrative liability is restricted to strictly public legal persons

Please further specify:

- Administrative liability is restricted to State authority
- Administrative liability is restricted to State controlled bodies
- Other (please explain) :

Insert your explanation

Other possible restrictions:

- Administrative liability is restricted to multiple person legal persons
- Administrative liability is restricted to single person legal persons
- Administrative liability is restricted to parent-corporation type legal persons
- Administrative liability is restricted to subsidiary-corporation type legal persons

- Restriction is based on specific type of offence

A legal person's administrative liability depends on whether specific type of offence was committed and can be attributed to the legal person concerned

Please further specify:

- Our legislator has created specific offences to which administrative liability is confined
- Our legislator has opted to confine criminal liability to specific offence types under its National Penal Code
- Restriction is based on whether an individual perpetrator has to be identified to confine criminal liability of legal persons
- Other (please explain) :

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

8 Attribution techniques and scope

In the context of this questionnaire, four main attribution theories are distinguished: Firstly, the vicarious liability/respondeat superior theory, opting for an almost civil law like attribution by stating that 'any' misconduct by the legal persons' employees will lead to legal person responsibility.

Secondly, the identification model theory, stating that only managers and employees endowed with certain responsibilities may cause criminal liability for the legal person.

Thirdly, the aggregation model theory, aimed at identifying a collective responsibility of individuals within the legal person, rather than identifying an individual perpetrator, aggregation could therefore involve matching the conduct of one individual with the state of mind or culpability of another individual to achieve liability.

Fourthly and finally, we will try to review specifically about organizational responsibility of the legal person concerned, both when the offences were committed for its benefit and otherwise.

In the following questions, the project team will try to identify in which of these theories your national law or legal regime fits best.

To anticipate to any differences in your legal order based on the status of the offender, this section makes a distinction between first offences committed by the legal person's employees and second offences committed by the legal person's hierarchy.

8.1 Offences by its employees

8.1.1 How will administrative liability be attributed to a legal person under your Member State's national law or legal regime for offences committed by its employees?

- The legal person can incur liability for offences committed by its employees, even when they are deprived of any managerial or representative responsibility, when the offences are committed for the benefit of the legal person

If this explains the attribution in your country:

8.1.1.1 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

8.1.1.2 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

- The legal person can incur liability for offences committed by its employees, even when they are deprived of any managerial or representative responsibility, when the offences are committed within the legal person's activities.

This means without the need to prove any advantage or benefit achieved by the legal person.

If this explains the attribution in your country:

8.1.1.3 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

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8.1.1.4 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

8.1.1.5 How does your National Member State's law or legal regime define the concept of 'within the legal person's activities'?

- Our law applies the broadest scope of this concept: any link with the legal person can attribute criminal liability
- Our law applies a restricted scope of this concept: specific type(s) of activities are required to attribute criminal liability

Please further specify:

- Legal person's activities are defined in accordance to the legal person's statutes
- Legal person's activities are defined in accordance to the purpose for which the legal person was founded
This implies the de facto purpose of the legal person rather than the construed purpose in the statutes
- Legal Person's activities are defined in accordance to the present corporate culture
This implies the current purpose/mentality/structure/.. of the legal person
- Other (please explain) :
Insert your explanation
- Other (please explain) :
Insert your explanation
- Other besides 'for the benefit' and/or 'within the activities' (please explain) :
Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

8.2 Offences by hierarchy of the legal person's staff

8.2.1 How will administrative liability be attributed to a legal person under your Member State's national law or legal regime for offences committed by hierarchy of the legal person's staff?

- The legal person's liability is confined to offences committed by certain hierarchy of company staff and for the benefit of the legal person

If this explains the attribution in your country:

8.2.1.1 Please further specify the scope of the definition of hierarchy of company staff:

Please indicate how large the 'inner circle' of hierarchy company staff that will lead to attribution exactly is:

- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on a power of representation of the legal person
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to take decisions on behalf of the legal person
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to exercise control within the legal person
- All of the above are considered within the scope of the hierarchy of company staff
- Other (please explain) :
Insert your explanation

8.2.1.2 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

8.2.1.3 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
 - Yes, legal person can restrict liability attribution when the above stated care can be proven
 - Other (please explain) :
Insert your explanation
- The legal person's liability is confined to offences committed by certain hierarchy of company staff when they are committed within the legal person's activities

Without the need to prove any advantage or benefit achieved by the legal person

If this explains the attribution in your country:

8.2.1.4 Please further specify the scope of the definition of hierarchy of company staff:

- Please indicate how large the 'inner circle' of hierarchy company staff that will lead to attribution exactly is, by indicating the following:
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on a power of representation of the legal person
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to take decisions on behalf of the legal person
- The scope of the hierarchy of company staff is limited to a person who has a leading position within the legal person based on an authority to exercise control within the legal person
- All of the above are considered within the scope of the hierarchy of company staff
- Other (please explain) :
Insert your explanation

8.2.1.5 Please further specify: Can the legal person avoid its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational exception for liability is not recognised
- Yes, legal person can avoid liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

8.2.1.6 Please further specify: Can the legal person restrict its liability as stated above, when it can prove that sufficient organization, duly instructions and reasonable care and control were applied to avoid the commitment of the offence?

- No, organisational motive for restriction of liability is not recognised
- Yes, legal person can restrict liability attribution when the above stated care can be proven
- Other (please explain) :
Insert your explanation

8.2.1.7 Please indicate further: How does your National Member State's law or legal regime defines the concept of 'within the legal person's activities'?

- Our law applies the broadest scope of this concept: any link with the legal person can attribute criminal liability
- Our law applies a restricted scope of this concept: specific type(s) of activities are required to attribute criminal liability

Please further specify:

- Legal person's activities are defined in accordance to the legal person's statutes
- Legal person's activities are defined in accordance to the purpose for which the legal person was founded
This implies the de facto purpose of the legal person, rather than the construed purpose in the statutes
- Legal Person's activities are defined in accordance to the present corporate culture

This implies the current purpose/mentality/structure.. of the legal person

Other (please explain) :

Insert your explanation

Other (please explain) :

Insert your explanation

Other besides 'for the benefit' and/or 'within the activities' (please explain) :

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

8.3. Does your Member State's national law or legal regime – as a rule – require the establishment of 'mens rea' for a legal person?

The project team aims at retrieving whether and how the 'mens rea' idea (where a culpable state of mind – or less implicitly: 'guilt'- is required for a certain offence to attribute administrative liability) is incorporated in your national law or legal regime concerning legal persons

NO, our law has created specific type of (objectified) liability for legal persons, not requiring a culpable state of mind

NO, our law has not created specific type of liability, but has restricted liability for legal persons to those offences that do not require a culpable state of mind

Here, mens rea is to be considered in the broad sense; not so much as guilt directly linked to the perpetration of an offense, but as a general requirement for liability for offences.

NO, for another reason (please explain) :

Insert your explanation

YES, identification of the individual physical perpetrator is necessary under your law or legal regime

This means a direct link has to be made between the individual connected with the legal person who has committed the offence to attribute a culpable state of mind to the legal person

YES, our law entirely recognizes mens rea for a legal person, no division between natural persons and legal persons can be made

YES, for another reason (please explain) :

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

9 Administrative offences

9.1 For what kind of offences can a legal person be held administratively liable under your Member State's national law or legal regime?

Offences are meant here as an administrative offence, meaning a breach of a binding administrative regulation. When we review the specific categories of offences (economical, environmental etc.) it is still under this administrative definition, only further specified.

- All kinds. Law or legal regime makes no difference between legal and natural persons
- Law or legal regime has introduced administrative liability for legal persons for (a) specific category(ies) of offences:

If you have ticked this second button, please indicate for what specific category or categories administrative liability is applied:

- Liability is restricted to economic offences
- Liability is restricted to tax offences
- Liability is restricted to environmental offences
- Liability is restricted to illicit trafficking related offences
- Liability is restricted to fraud offence types
- Liability is restricted to theft and dishonesty offence types
- Liability is restricted to offences not requiring commission by a natural person

With this box a type of offences is targeted where corpus reus (an actual physical body to commit a certain crime with) is inevitable for administrative liability. E.g. rape, sexual aggression, manslaughter, etc.

- Other (please explain) :
Insert your explanation
- Law or legal regime has introduced administrative liability for legal persons for specific type of offences

This means your national law or legal regime has not opted for a specific category of offences, but chose to introduce liability for specific types of offences. Please use

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the table on the following page to provide an overview of the scope of the administrative liability of legal persons.

| If you have ticked the third button, please indicate for what specific type of offence administrative liability is applied: | Please indicate when administrative liability for a legal person was introduced in national law or legal regime for the offence type | Please wait to fill in this tick box on sanctions until you have reached sanction chapter, you will be redirected |
|---|--|---|
| Participation in a criminal organization | | |
| Terrorism | | |
| Trafficking in human beings | | |
| Sexual exploitation of children and child pornography | | |
| Illicit trafficking in narcotic drugs and psychotropic substances | | |
| Illicit trafficking in weapons, munitions and explosives | | |
| Corruption | | |
| Fraud | | |
| Laundering of the proceeds of crime | | |
| Counterfeiting currency, including of the euro | | |
| Computer-related crime | | |
| Environmental crime, including illicit trafficking in endangered animal species and endangered plant species and varieties | | |

| | | |
|--|--|--|
| Facilitation of unauthorized entry and residence | | |
| Murder, grievous bodily injury | | |
| Manslaughter | | |
| Illicit trade in human organs and tissue | | |
| Kidnapping, illegal restraint and hostage taking | | |
| Racism and xenophobia | | |
| Organized or armed robbery | | |
| Illicit trafficking in cultural goods, including antiques and works of art | | |
| Swindling | | |
| Racketeering and extortion | | |
| Counterfeiting and piracy of products | | |
| Forgery of administrative documents and trafficking therein | | |
| Forgery of means of payment | | |
| Illicit trafficking in hormonal substances and other growth promoters | | |
| Illicit trafficking in nuclear or radioactive materials | | |
| Trafficking in stolen vehicles | | |
| Rape | | |
| Arson | | |
| Crimes within the jurisdiction of the international criminal court | | |
| Unlawful seizure of aircraft/ships | | |
| Sabotage | | |

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| | | |
|--|--|--|
| Conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulation on hazardous goods | | |
| Smuggling of goods Infringements of intellectual property | | |
| Threats and acts of violence against persons, including violence during sport events | | |
| Criminal damage | | |
| Theft | | |
| Offences against workplaces health and safety | | |
| Other (please explain) | | |

Additional comment box:

Feel free to insert a comment with respect to this question:

10 Applicable sanctions

10.1 What types of (administrative) sanctions are used under your Member State's national law or legal regime to sanction administrative offences attributed to a legal person?

Sanctions are addressed as administrative sanctions. However, given the possible divergence of ideology and/or approach of the administrative liability of legal persons in the Member States, further specification is required.

- Our law or legal regime makes no division in sanctions for legal persons as opposed to physical persons: when a certain sanction is not manageable, conversion is applied
- Our law or legal regime opted for a number or sanctions to be applied, in conciliation with legal person's specific status

This means that your law or legal regime has not created any specific type of sanction, but has simply indicated which available sanctions under administrative law can be applied to a convicted legal person.

Please further specify the type of sanction:

| If you have ticked this first box, please further specify the type of sanction: | Please indicate when specific sanction was introduced in national law or legal regime | Please elaborate (if applicable) on the minima and/or maxima that apply |
|--|---|---|
| Loss of legal personality | | |
| Public pronouncement of the conviction | | |
| Prohibition to participate in public tenders | | |
| Prohibition to advertise goods or services | | |
| Public) admonition | | |
| Financial penalties | | |
| Obligation to file various information to the authorities within certain time limits | | |
| Placement of the legal person under judicial administration in order to safeguard the rights of employees or creditors | | |
| Obligation to fulfil certain organizational measures | | |
| Liquidation | | |
| Prohibition of entering into certain Agreements | | |
| Prohibition of doing business | | |
| Other (please explain) | | |

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- Member State's law or legal regime has created specific types of sanctions, specifically aimed at targeting legal persons

This means your law or legal regime has created specific sanctions for legal persons.

| Please further specify the type of sanction: | Please indicate when specific sanction was introduced in national law or legal regime | Please elaborate (if applicable) on the minima and/or maxima that apply |
|---|---|---|
| Closing down of -affected-branches | | |
| Loss of legal personality | | |
| Public pronouncement of the conviction | | |
| Prohibition to participate in public tenders | | |
| Prohibition to advertise goods or services | | |
| Prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency | | |
| (Public) admonition | | |
| Financial penalties | | |
| Winding-up of the legal person | | |
| Obligation to file various information to the authorities within certain time limits | | |
| Dissolution of the legal person | | |
| Placement of the legal person under judicial administration in order to safeguard the rights of employees or creditors | | |

| | | |
|--|--|--|
| Obligation to fulfill certain organizational measures | | |
| Liquidation | | |
| Prohibition of entering into certain agreements | | |
| Prohibition to the right to receive subsidies | | |
| Prohibition to trade with financial instruments | | |
| Prohibition of acquisition of licenses, authorizations or concessions | | |
| Prohibition of the legal person's merger, division or reduction of the share capital | | |
| Prohibition of doing business | | |
| Other (please explain | | |

10.2 Is the possibility to impose certain types of sanctions confined to certain types of offences?

- No, Member State has not limited imposition of sanctions to specific offence types
- Yes
*Please specify which sanction is related to which offence type
To specify the relation, please write the applicable sanction's name in the tick box which conforms with the offence the sanction is related with. Press ctrl.+click here*

Additional comment box:

Feel free to insert a comment with respect to this question:

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10.3 Under your Member State's national law or legal regime, on who will the sanction ultimately be imposed?

- Sanction will ultimately be imposed on the legal person only
- Sanction will ultimately be imposed on the natural person only
- Sanction can ultimately be imposed on both
- Other (please explain) :

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

10.4 Does administrative prosecution of the liable legal person exclude parallel prosecution for the natural person/perpetrator?

- Yes
- No
- Other (please explain) :

Insert your explanation

10.5 Does administrative prosecution of the liable natural person/perpetrator exclude parallel prosecution for the liable legal person?

- Yes
- No
- Other (please explain) :

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

11 Administrative records policy

11.1 Does your country keep administrative records for legal persons?

- No
- Yes, but only with respect to legal persons that are established within our territory
- Yes, with respect to legal persons that we have convicted, regardless of their establishment within or outside our territory

Additional comment box:

Feel free to insert a comment with respect to this question:

11.2 What kind of information do you store in your administrative records with respect to convictions of legal persons?

11.2.1 With respect to the legal person

- Legal name
- Shortened name, commonly used name or trading name, if applicable
- Country of incorporation/establishment
- Register and number of incorporation
- Address of registered office
- Name of legal representative
- Other (please explain)

Insert your explanation

11.2.2 With respect to the offence

- Legal definition
- Legal provision
- Date (or period) of facts
- Place(s) of facts
- Number of acts committed
- Other (please explain)

Insert your explanation

11.2.3 With respect to the level of completion

- Completed
- Attempted
- Other (please explain)
- Insert your explanation

11.2.4 With respect to the level of participation

- Perpetrator
- Accomplice
- Accessory (aiding and abetting)
- Instigator
- Other (please explain)
- Insert your explanation

11.2.5 With respect to the sanction

- Type of Sanction
- Duration / height
- Enforcement Status
- Erasure / deletion date
- Other (please explain)

Insert your explanation

Additional comment box:

Feel free to insert a comment with respect to this question:

11.3 Do you have separate erase and deletion rules for convictions handed down against legal persons?

From a theoretical perspective, a legal person can live forever. Therefore the question arises to what extent a legal person should be confronted with the consequences of offences committed in the past, knowing that the staff of the legal person may have been completely replaced.

With erasing rules, we intend to refer to the situation where a conviction is no longer mentioned on the criminal record extract issued in the convicting state, but remains included in the criminal record. This means that the conviction information can still be used for specific purposes.

With deletion rules, we intend to refer to the situation where a person's criminal record itself is expunged and any data on the conviction is deleted from all records so that it cannot be used any longer in the future.

- Erasure or deletion does not exist in our national law
- One single system applies to all convictions, regardless of whether the conviction was handed down against a natural or legal person
Please briefly elaborate on the basic principles
- Additional rules - on top of the system developed for natural persons - that applies to convictions handed down against legal persons
- A completely separate system applies to convictions handed down to a legal person
Please briefly elaborate on the basic principles and summarize the differences with respect to the rules that apply to convictions handed down against natural persons.

Additional comment box:

Feel free to insert a comment with respect to this question:

11.4 Do you notify other member states if you have imposed a administrative sanction upon a legal person established/incorporated in another member state?

- Only with respect to some member states
Insert your explanation here
- Only with respect to some types of legal persons
Insert your explanation here
- Only with respect to some offences
Insert your explanation here
- Only with respect to some sanctions
Insert your explanation here

- Other (please explain)
Insert your explanation here

Additional comment box:

Feel free to insert a comment with respect to this question:

11.5 Do you store information on convictions handed down by other member states upon a legal person established/incorporated in your member state?

- We have never received information on a foreign conviction handed down against a legal person established/incorporated in our member state
- No, we cannot store information on foreign convictions (due to legal or technical limitations)
- No, we cannot store information on foreign convictions (due to legal or technical limitations)
Insert your explanation here
- Only with respect to some member states
Insert your explanation here
- Only with respect to some types of legal persons
Insert your explanation here
- Only with respect to some offences
Insert your explanation here
- Only with respect to some sanctions
Insert your explanation here
- Other (please explain)
Insert your explanation here

Additional comment box:

Feel free to insert a comment with respect to this question:

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PART 4 – General appreciation of the national approach

12 Final questions

12.1 How would you assess the effectiveness of the current approach of your National Member State on the liability of legal persons?

Insert your reply

12.2 Are there future legislative initiatives scheduled on this subject? Could you provide your critical reflections on these initiatives, if any?

Insert your reply

12.3 Are there any specificities with respect to your national legislation with respect to the liability of legal persons you would like to elaborate on?

Insert your reply

The project team highly appreciates the time and effort you have put into the completion of the questionnaire. Without the input from national experts, it would be impossible to gather the necessary information in a such short timeframe. We will keep you updated on the developments in the project and the release of the final report.

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