

Corporate liability *ex crimine*: EU standards, national solutions and “new” chapters of liability



Dr. Athina Sachoulidou, LL.M, MSc
Assistant Professor in Criminal Law, NOVA School of Law, Lisbon, Portugal

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From white collar crime to **corporate** crime

Towards defining financial criminality

‘**White collar crime** may be defined approximately as a crime committed by **a person of respectability and high social status** in the course of his occupation’

(Sutherland, White Collar Crime: The uncut version, 1983, p.3)

- **Occupational crime:** committed by **corporate officers** in the exercise of their professional tasks, against the interests of the corporation
- **Corporate crime:** committed by corporate officers in the interest of the corporation or **by the corporation itself**

(Clinard and Quinney, Criminal Behavior Systems: A typology, 1973, p.132)



I. Introduction

Corporations and criminal law

- corporation as a **victim**, namely a passive subject of criminal law (e.g., business defamation, counterfeiting of corporate products)
- corporation as a **criminal tool** (e.g., money launders establishing extensive networks of mule accounts and shell companies across the world to obscure the destination of illicitly obtained funds)
- corporation as a **criminal**, namely an **active** subject of criminal law?
 - lengthy and partially still ongoing doctrinal debate; significantly different approaches at national level; a flexible solution adopted at EU level



The **EU approach** to corporate liability for criminal conduct (corporate liability *ex crimine*)

The EU reaction to corporate criminality

- EU legislator incentivized by the increase of (often transnational) illicit corporate activities, **particularly those of economic nature**
- creation of a uniform system of protection against criminal corporate conduct across a great array of EU areas of regulation, including but not limited to the **protection of the EU financial interests**
 - Second Protocol drawn up on the basis of Art. K.3 of the Treaty on EU to the PIF Convention
 - Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive)
- trend progressing alongside the evolution of the EU competencies in criminal law matters (Art. 83 TFEU)



Main axes of the EU model of corporate liability *ex crimine*

- ***Rationae personae* scope**: an entity having legal personality under the applicable law, **except for** States or public bodies in the exercise of State authority and for public international organisations
- **Material scope**: offences committed **for the benefit of the legal person**; objective relation between the individual unlawful conduct and corporate interests
- **Parallel liability** of the legal person and the natural persons involved



1st mode for ascribing liability to a legal person for criminal conduct



- focusing on the **prominence of the actual offender**, who is acting as an individual or as part of one of the entity's organs; prominence resulting from:
 - the power to represent the legal person
 - the authority to reach decisions on behalf of it (and, thus, to form the will thereof)
 - the authority to exercise control within it
 - leading (or at least considerable) function in the corporate body



2nd mode for ascribing liability to a legal person for criminal conduct



- supplementing the 1st one (usually regarded as an alternative)
- focusing on the **causal nexus between the commission of an offence and surveillance/control** (exercised by the individuals holding a leading position) **related defaults**
- offences possibly committed by employees of the lower-levels of hierarchy



Sanctions



- **effective, proportionate and dissuasive sanctions** (so-called minimum triad) incl.:
 - pecuniary sanctions (to be imposed **mandatorily**);
 - and other (non-mandatory) sanctions, **such as**: the exclusion from entitlement to public benefits or aid, the temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision, judicial winding-up order, the temporary or permanent closure of establishments which have been used for committing the criminal offence
- **discretionary power of the national legislator** in choosing the kind of the sanctions



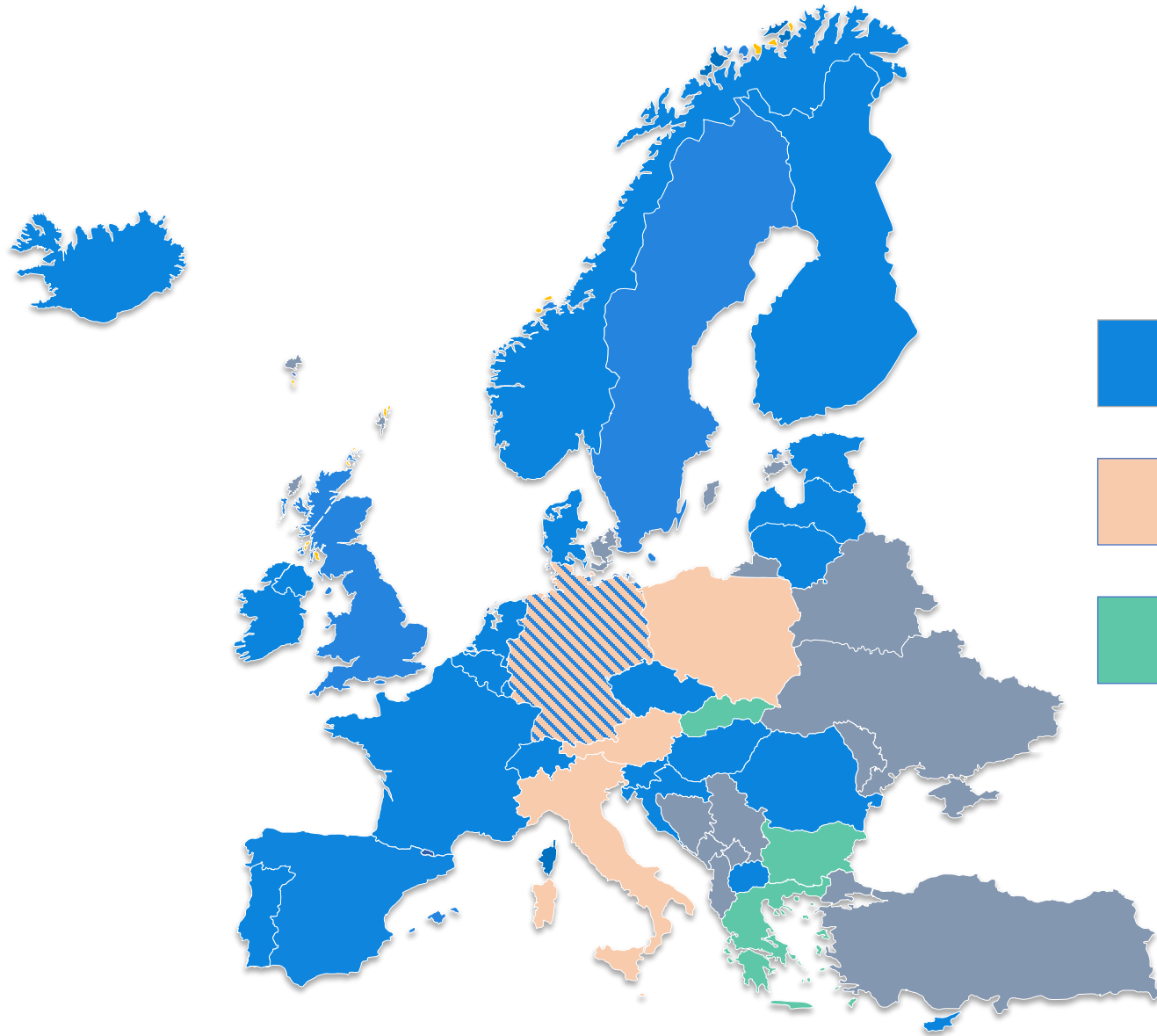
The rationale behind this scheme



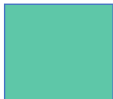
- acknowledging that criminal law is the most intrusive means of social control
- recognizing that the apparatus of sanctions being closely tied to national cultural, social and historical roots of the different EU jurisdictions, namely the national identity of the MSs (cf. Art. 4(2) TEU)
- implying for a MS to ‘choose, among sanctions which may be applied to collective entities, those correspondent to the highest afflictive level’ (Salvaggi, EuCLR 2014: 51) → **not necessarily, criminal sanctions**



Solutions adopted at **national** level

a. The European map of corporate liability *ex crimine*



-  Criminal-law solutions
-  Quasi-criminal-law solutions (hybrid models)
-  Administrative-law solutions



Categorisation of the existing models based on the nature of the corporate sanctions



- **“guilt”-based sanctions**, that is, sanctions designed to meet both retribution and prevention related requirements and purposes
- **non-“guilt”-based sanctions**, that is, sanctions designed to meet crime prevention related requirements and purposes; embedded into:
 - administrative law
 - or distinct legal tools resembling criminal laws in terms of structure



Categorisation of the existing models based on the material scope of corporate liability



- **all-crime-approach** (corporations to be held liable for **any** crime that can be committed by and attributed to individuals)
- **list-based-approach** with a focus on financial and economic crime (e.g., in Italy, the Czech Republic, Poland, Portugal, Spain)
- **dual approach** (adopted by the Swiss legislator; distinction between economic crimes addressed in international instruments and the remaining domestic offences)



Solutions adopted at **national** level

b. The **Spanish** example of a criminal-law solution

An overview based on Art. 31 bis-31 quinquies & Art. 33 Spanish Criminal Code

Modes for establishing the liability of the legal person



- designed on the basis of the EU model outlined above (similarly, as regards the personal scope of liability)
- Spanish law providing for grounds upon which liability **shall** be excluded depending on whether the offence in question was committed by an individual holding a leading position (Art. 31 *bis* (2)) or can be ascribed to the latter on the basis of an organisational fault (Art. 31 *bis* (4))



Art. 31 *bis* (2) and (4) – Grounds upon which the liability of the legal person shall be **excluded**

1. adoption and effective implementation of **organisational and management models*** incl. measures suitable to prevent similar offences or to reduce the risk of their commission – **prior to the commission of the offence at stake**

applying irrespective of how the liability of the legal person may be established

2. entrusting the supervision of the function of the compliance with the prevention model to a legal person's organ with autonomous power of initiative and control or which is legally entrusted with the task of supervising the effectiveness of the internal controls of the legal person

3. fraudulent circumvention of the organisational and preventive measures on behalf of the individual offender

4. the body referred to under 2 has exercised sufficiently its supervisory, monitoring and control tasks



Organisational and management models* (Art. 31 *bis* (6) Spanish Criminal Code)



- identification of the activities in the context of which the offences to be prevented may be committed
- establishment of protocols or procedures specifying how decisions are made and executed within the legal person;
- provision of a model of appropriate financial resources management models
- duty of reporting possible risks and non-compliance to the body in charge of overseeing the operation of the prevention model;
- disciplinary system that sanctions adequately non-compliance with the measures established in the model; and
- periodical verification of the model and the need for amendments



A model of **parallel** responsibility (Art. 31 *ter*) where the criminal liability of the legal person cannot be waived, mitigated or aggravated for reasons relating exclusively to the person of the individual offender, **unless** the legal representatives of the legal person have (I):

1. **confessed** the offence to the authorities before becoming aware of the initiation of the criminal proceedings against the legal person;
2. **collaborated** during the investigation of the facts in question by providing new and decisive evidence at any stage of the criminal proceedings



A model of **parallel** responsibility (Art. 31 *ter*) where the criminal liability of the legal person cannot be waived, mitigated or aggravated for reasons relating exclusively to the person of the individual offender, **unless** the legal representatives of the legal person have (II):

3. **repaired or reduced the damage** caused by the crime at any stage of the criminal proceedings and prior to the oral hearing; or
4. established –prior to the commencement of the oral hearing– **effective measures to prevent and detect the crimes** that may be committed in the future within the legal person



Sanctions (Art. 33)

- **fines**
- dissolution of the legal person
- suspension of its activities (up to 5 years)
- closure of its premises and establishments (up to 5 years)
- temporary or permanent prohibition to carry out those activities in the exercise of which the offence in question was committed, favored or concealed (up to 15 years)
- disqualification from obtaining public subsidies and aid, contracting with the public sector and enjoying tax or social security benefits and incentives (up to 15 years)
- judicial intervention to safeguard the rights of the workers or creditors as long as it is necessary and for up to 5 years



A “**new**” chapter of corporate liability *ex
crimine*: Corporate liability for **international
crimes?**

Why?

- increasing involvement of corporations in human rights violations that amount to international crimes (cf. Lafarge case)
- ranging from violating directly International Human Law's mandates on the part of companies operating on the battleground to funding governments or militia that may be used for criminal purposes

Is **International Criminal Law** the right forum to deal with this type of conduct?



An 'old new' chapter of corporate liability

- Nuremberg International Military Tribunal established 'for the trial and punishment of the major war criminals of the European Axis countries [...] **whether as individuals or as members of organisations**' (Art. 6)
- '[...] crimes against international law are committed by men, **not by abstract entities**, and only by punishing individuals who commit such crimes can the provisions of international law be enforced', Nürnberg Trial, 6 F.R.D. 69, 110 (IMT 1946)
- post-Nuremberg trials have not led to the conviction of any corporation as such



The rationae personae jurisdiction of the International Criminal Court (ICC)

- ‘The Court shall have jurisdiction over **natural persons**.’ (Art. 25 (1) Rome Statute (RS))
- mixed messages when looking back at the drafting history of the RS (cf. the **proposal of the French delegation** in favour of the criminal liability of legal persons – except for the State - when the crime in question was committed on behalf of them or by their agencies or representatives)
 - rejection due to practical difficulties; normative-political issues; and moral reasons



Should the ICC adjudicate cases relating to criminal corporate conduct?



- a well-equipped mechanism for investigation and evidence collection
- an accessible prosecutor to victims of international crimes
- increased publicity and strong educational messages
- a high level of due process and, thus, increased protection of the rights of suspects and accused persons



What kind of **amendments** would be required for this purpose?

- referring expressly to legal persons in Art. 25 (1) RS
- distinguishing between natural and legal persons for a variety of purposes: evidence production; the exercise of due process rights; the defendant's physical presence and/or representation before court; State cooperation requirements; and penalties
 - approval by two-thirds of the State Parties (Art. 121 (3) RS) required
 - for the changes to enter into force for all State-Parties, ratification or acceptance by seven-eighths of the State-Parties (Art. 121 (4) RS) required



Is International Criminal Law (ICL) a good forum to address corporate human rights harms?



- ICL's subject matter considerably narrower compared to possible human rights harms; encompassing genocide, crimes against humanity, war crimes and the crime of aggression (Art. 5 RS)
- ICC function shaped on the basis of principle of complementarity (Art. 17 RS); ICC being **a court of last resort**
- prioritization of national courts' jurisdiction < respect for State sovereignty + practical considerations (States enjoying better access to evidence and better resources to carry out proceedings)



Alternative priorities

- holding **individual corporate officers** accountable before the ICC for the crimes falling into its jurisdiction (making use of, for instance, the mechanism of superior responsibility scheme; Art. 28 lit. b RS)
- **furthering national corporate liability schemes** to ensure that international crimes fall into their scope (where this is not already the case)



Instead of a conclusion: **Re-assessment** of an “old-new” debate

Pro-Arguments

- dynamic relation between individual and organizational dimensions of corporate crime;
- corporations to be also perceived as an autonomous actor capable of responsible conduct
- corporate structure, organisation and culture appearing as component parts of corporate criminal liability

- fundamental tenets of criminal liability (e.g., principle of guilt) shaped with human actors in mind
- human-centered (?) principle of guilt rooted in national constitutions
- corporate criminal liability legislation violating both the ultima ratio doctrine and the fragmentary character of criminal law

Contra-arguments



The (sad) reality behind holding accountable those involved in corporate crime

- the prosecution of corporate crime being problematic not only with respect to corporations, **but also** in the case of the involved individuals
- **low price of “loyal” employees**, who are willing to break the law for the benefit of the corporation and serve as scapegoats so that institutional liability can be avoided
- **strong incentives among high-level-managers** to engage in illegal corporate activities (not even subject to the expected disqualification from future employment in the (same) industry)
- some corporations still perceived as **‘too big to fine’**



When/If properly applied, are corporate *criminal liability* schemes the silver bullet we are looking for?

- empirical proof largely **missing** as regards the so-called criminal-law solution
- in the case of violations against anti-trust legislation – despite the increasing fines imposed against corporations – the goal of deterrence appearing **far from view**
- ... while, at the same time, the doctrinal debate on how to re-organise corporate liability, whether criminal or not, leading to a **vicious circle** of argumentation



The way to the ‘best of all words’

- ... that is, the way to have not only corporations but the **actual wrongdoers** in general bearing the consequences of their actions
- prioritizing the compensation of **victims** and the protection of the weaker party to corporate transactions in general
- enhancing **transparency** in corporate settings (ownership, transactions, business organisation and business relationships), so that criminals will not be able to hide their identity behind a corporate structure



**Salamat po! / Σας ευχαριστώ! / Thank
you! / Obrigada!**



Contact me at: athina.sachoulidou@novalaw.unl.pt

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