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Liability of enterprises for offences

Recommendation No. R (88) 18
adopted by the Committee of Ministers
of the Council of Europe
on 20 October 1988
and
explanatory memorandum

Strasbourg 1990

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1. Recommendation No. R (88) 18, adopted by the Committee of Ministers of the Council of Europe on 20 October 1988, was prepared by the Select Committee of Experts on the Criminal Liability of Corporate Bodies (PC-R-CL), set up under the authority of the European Committee on Crime Problems (CDPC). The text of the Recommendation is reproduced hereafter.

2. This publication also contains the explanatory memorandum on Recommendation No. R (88) 18 as prepared by the select committee and adopted by the CDPC.

RECOMMENDATION No. R (88) 18 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING LIABILITY OF ENTERPRISES HAVING LEGAL PERSONALITY FOR OFFENCES COMMITTED IN THE EXERCISE OF THEIR ACTIVITIES[1]

(Adopted by the Committee of Ministers on 20 October 1988 at the 420th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community;

Considering the desirability of placing the responsibility where the benefit derived from the illegal activity is obtained;

Considering the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence;

Considering the difficulty, rooted in the legal traditions of many European states, of rendering enterprises which are corporate bodies criminally liable;

Desirous of overcoming these difficulties, with a view to making enterprises as such answerable, without exonerating from liability natural persons implicated in the offence, and to providing appropriate sanctions and measures to apply to enterprises, so as to achieve the due punishment of illegal activities, the prevention of further offences and the reparation of the damage caused;

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1. When this Recommendation was adopted, the Representatives of the Federal Republic of Germany and of Greece, in application of Article 10.2.*c* of the Rules of Procedure for the meetings of the Ministers' Deputies, reserved the right of their Governments to comply with it or not.

Considering that the introduction in national law of the principle of criminal liability of enterprises having legal personality is not the only means of solving these difficulties and does not exclude the adoption of other solutions serving the same purpose;

Having regard to Resolution (77) 28 on the contribution of criminal law to the protection of the environment, Recommendation No. R (81) 12 on economic crime and Recommendation No. R (82) 15 on the role of criminal law in consumer protection,

Recommends that the governments of member states be guided in their law and practice by the principles set out in the appendix to this Recommendation.

Appendix to Recommendation No. R (88) 18

The following recommendations are designed to promote measures for rendering enterprises liable for offences committed in the exercise of their activities, beyond existing regimes of civil liability of enterprises to which these recommendations do not apply.

They apply to enterprises, whether private or public, provided they have legal personality and to the extent that they pursue economic activities.

I. *Liability*

1. Enterprises should be able to be made liable for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise.

2. The enterprise should be so liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not.

3. To render enterprises liable, consideration should be given in particular to:

a. applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require;

b. applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control, in particular for illicit behaviour which does not require treating the offender as a criminal.

4. The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission.

5. The imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence. In particular, persons performing managerial functions should be made liable for breaches of duties which conduce to the commission of an offence.

II. *Sanctions*

6. In providing for the appropriate sanctions which might be imposed against enterprises, special attention should be paid to objectives other than punishment such as the prevention of further offences and the reparation of damage suffered by victims of the offence.

7. Consideration should be given to the introduction of sanctions and measures particularly suited to apply to enterprises. These may include the following:

— warning, reprimand, recognisance;

— a decision declaratory of responsibility, but no sanction;

— fine or other pecuniary sanction;

— confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;

— prohibition of certain activities, in particular exclusion from doing business with public authorities;

— exclusion from fiscal advantages and subsidies;

— prohibition upon advertising goods or services;

— annulment of licences;

— removal of managers;

— appointment of a provisional caretaker management by the judicial authority;

— closure of the enterprise;

— winding-up of the enterprise;

— compensation and/or restitution to the victim;

— restoration of the former state;

— publication of the decision imposing a sanction or measure.

These sanctions and measures may be taken alone or in combination, with or without suspensive effect, as main or as subsidiary orders.

8. When determining what sanctions or measures to apply in a given case, in particular those of a pecuniary nature, account should be taken of the economic benefit the enterprise derived from its illegal activities, to be assessed, where necessary, by estimation.

9. Where this is necessary for preventing the continuance of an offence or the commission of further offences, or for securing the enforcement of a sanction or measure, the competent authority should consider the application of interim measures.

10. To enable the competent authority to take its decision with full knowledge of any sanctions or measures previously imposed against the enterprise, consideration should be given to their inclusion in the criminal records or to the establishment of a register in which all such sanctions or measures are recorded.

EXPLANATORY MEMORANDUM

Introduction

1. Recommendation No. R (88) 18 which is the subject of this explanatory memorandum was prepared by the Select Committee of Experts on the Criminal Liability of Corporate Bodies (PC-R-CL), created in 1982 to examine the possibility and advisability of introducing the principle of criminal liability of corporate bodies, or other institutions serving the same purpose, in the legislation of member states.

2. The select committee was composed of experts from seven Council of Europe member states (Cyprus, Denmark, Italy, Liechtenstein, Portugal, Spain and Sweden). Finland and the International Association of Penal Law were represented by observers. In addition, the following scientific experts assisted the committee at different stages of its proceedings: Professor G. Kellens (Belgium), Professor L.H. Leigh (United Kingdom), Professor K. Tiedemann (Federal Republic of Germany) and Judge R.A. Torringa (Netherlands).

3. The select committee, which was chaired by Mr H. J. Stotter (Liechtenstein), held seven meetings (2-4 November 1983, 9-11 May 1984, 7-9 November 1984, 29-31 May 1985, 26-28 November 1986, 3-5 June 1987 and 2-4 December 1987).

4. The draft recommendation which it had prepared during these meetings was approved by the European Committee on Crime Problems (CDPC) at its 37th plenary session in June 1988 and adopted by the Committee of Ministers at the 420th meeting of their Deputies on 20 October 1988.

General considerations

5. The increase in economic crime has accentuated the problem of bringing to justice those responsible for committing offences in connection

with economic activities. A large number of these offences are committed in the course of activities pursued by enterprises. The often complex management structure of enterprises frequently makes it difficult, if not impossible, to identify the persons who are truly responsible for the commission of offences. Even where it is possible to identify an officer of an enterprise as the actual author of an offence, it may not be possible to prove directly that higher management is implicated in the offence. Furthermore, each offence may be the result of separate decisions, acts and omissions by different persons, albeit corresponding to a general ethos, generated by management, in the enterprise. In such cases, it may well be impossible to hold any one person liable, and even if this is possible, true responsibility may be more diffused. A sanction imposed on an individual person may, in such cases, be neither deterrent enough to prevent the enterprise from committing further offences, nor induce the management or members of the enterprise to reorganise its supervisory structure. To overcome these difficulties, legislators in many European countries have sought to render the enterprise itself criminally liable.

6. In this context, a major problem arises concerning the attribution of guilt to an enterprise having legal personality: how can guilt — *mens rea* or negligence — be attributed to a corporate body? In many legal systems the notion of culpability includes an element of blame which, in classical penal theory, is necessarily addressed to a physical person.

7. When ascertaining the position in Council of Europe member states, the select committee noted that in the common law countries the problem does not exist in relation to corporate bodies: the general rule is that a corporate body can be criminally liable in the same way as a natural person. The rule is based on the theory that the directors or high managerial agents acting for the corporation are — legally speaking — the corporation: they are, so to speak, the corporation's *alter ego*, with the result that their fault is attributed to the corporation rendering it criminally liable. Several European legal systems, however, do not provide, or do not fully provide for the criminal liability of legal persons: they adhere to the traditional rule that only physical persons can be guilty of an offence.

8. But the select committee also noted a trend in several countries towards departing from this traditional concept of guilt and rendering the legal person as such liable: by creating offences which do not require proof of guilt, or by deducing the corporation's guilt from the guilt of the individuals responsible for the criminal activity, or by providing for accessory liability of the enterprise, or by establishing a special liability

for certain offences which carry only a pecuniary sanction such as a fine, a *Geldbuße* (Germany), a *coima* (Portugal) or a *företagsbot* (Sweden) — a system which is not based on the traditional concept of guilt and is therefore applicable to legal persons.

9. Recommendation No. R (88) 18 seeks to encourage this development. It is based on the conviction that the control of economic crime requires the imposition of liability on the enterprise itself if offences committed in the exercise of its activities are not to remain unpunished.

The Recommendation does not deal with questions of procedure. It is for each member state to establish the procedures best suited to its legal system, it being understood that enterprises should enjoy rights and guarantees equivalent to those accorded to physical persons accused of an offence.

10. To that end, it sets out, in an appendix, ten principles grouped in two chapters, one dealing with the principle of liability, the other with the sanctions and measures to be applied to enterprises.

11. It is recommended that the governments of member states be guided by these principles in their law and practice. The expression "to be guided by" has been used in order to leave governments as much freedom as possible in choosing the means for ensuring that enterprises are made answerable for offences committed in the course of their activities. For that same reason, the term "principle" has been preferred to the term "rule" since the aim of the Recommendation is not to achieve the adoption of uniform rules but rather to promote general recognition, in the law and practice of member states, of the concept of liability underlying the different recommendations.

Comments on the appendix

12. The principles set out in the appendix are preceded by an introductory note which delineates the Recommendation's scope of application.

13. The first paragraph of the introductory note states the Recommendation's objective, which is to promote measures for rendering enterprises liable for offences committed in the course of their activities, and it makes it clear that the principles set out in the appendix leave existing regimes of civil liability unaffected.

14. According to the second paragraph of the introductory note, the Recommendation only applies to enterprises which are corporate bodies, that is entities on which domestic law has conferred legal personality.

15. It was not considered either appropriate or necessary to define the term "enterprise". Its meaning is that normally given to the term in the domestic law of member states as well as in international treaties (for instance, in Articles 85 and 86 of the EEC Treaty).

16. The distinction which is made between private and public enterprises is meant to refer to the law of those member states where the constitution and the activities of enterprises may be governed by either private law or public law provisions. It is therefore not to be confused with the term used, for instance, in English law where the notion "public limited company" describes a company whose shares may be traded at a stock exchange. In so far as the Recommendation applies to public enterprises, member states might find it necessary to implement it under certain conditions, particularly with regard to the sanctions which might be imposed against such enterprises.

17. The principles apply only to enterprises pursuing economic activities. Bodies exercising governmental functions or vested with sovereign powers *de iure imperii* are outside the Recommendation's scope of application.

I. Liability

I.1

18. Recommendation I.1 sets out the general objective: enterprises should be made liable for offences committed in the exercise of their activities. It applies irrespective of whether the activity constituting the offence has been pursued in furtherance of the enterprise's purposes or whether it is alien to these purposes. It therefore applies where the activities of an enterprise are used as a cover for the commission of offences. It is to be read in conjunction with recommendation I.4 which deals with exoneration from liability.

I.2

19. According to recommendation I.2, the enterprise's liability should be established regardless of whether a natural person can be identified as the perpetrator of the acts or omissions constituting the offence. The absence of any personal guilt does not necessarily exclude holding the

enterprise liable. Where identification is possible, recommendation I.5 applies: the enterprise's liability should be cumulative; it should not exonerate the individual person responsible for the offence.

I.3

20. Extending criminal liability to enterprises is but one of the means for achieving the Recommendation's aim. There are others, outside the application of criminal law, as for instance a non-criminal — or quasi-criminal — liability along the lines of the German *Ordnungswidrigkeiten* or the EEC cartel offences, or liability based on a system of sanctions not dependent on the traditional concept of guilt. Recommendation I.3 mentions two which the select committee considered particularly appropriate. They are mentioned by way of example, thus leaving member states the widest possible freedom to choose the type of liability best suited to their legal system.

21. Sub-paragraph *a* refers to the application of criminal liability and sanctions. It is recommended for cases where the nature of the offence, the nature and degree of fault, the consequences for society and the need to prevent further offences require the imposition of criminal sanctions. It might be necessary to depart from traditional concepts of fault or guilt and to approach a regime of liability based on social fault.

22. Sub-paragraph *b* has been modelled on the German system of *Ordnungswidrigkeiten*, that is a system of quasi-criminal liability and sanctions imposed by administrative authorities and subject to judicial control. Its application is recommended in particular for illicit behaviour which, irrespective of its seriousness, does not require the imposition of criminal sanctions.

I.4

23. Recommendation I.4 should be read in conjunction with that in I.1: in principle, an enterprise should incur liability even where the offence is alien to its purposes. Only where it would be manifestly unjust to hold the enterprise liable should it be exonerated from liability. An enterprise may be exonerated provided that two minimum conditions are made out: the first is that management, either the management as a whole or one or several of its members, was not implicated in the offence. The term "implicated" should be understood in a wide sense so as to include cases where the management, while not itself directly involved in the commission of the offence, knowingly accepts the profits made as a

result of it. The second is that management has taken all the necessary steps to prevent the commission of the offence (for example where an employee pursues an illegal activity in violation of instructions given and effectively enforced by management with a view to preventing the illegal activity in question).

I.5

24. Recommendation I.5 deals with the relationship between the enterprise's liability and that of any individual implicated in the offence. Both are, in principle, liable for the offence: thus, if a natural person can be identified as the perpetrator of the offence, that person remains criminally liable, irrespective of any liability which the enterprise might incur.

25. Individual liability should be provided in particular for persons performing managerial functions such as managers, directors and executives: in particular, they should be made liable for breaches of supervisory duties which conduce to the commission of an offence. The wording chosen is intended to allow legislatures a choice whether to establish a requirement of causality or not.

II. Sanctions

II.6

26. With regard to the sanctions which might be imposed against enterprises, recommendation II.6 states that retribution should not necessarily be the main objective; special attention should be paid to other objectives such as the prevention of further offences and the reparation of damage suffered by victims of the offence. This recommendation is the consequence of that made under I.3: the application of criminal liability and sanctions to enterprises is but one of the options open to governments to give effect to the Recommendation.

II.7

27. Recommendation II.7 gives examples of sanctions and measures particularly suited to apply to enterprises. In drawing up this list, the select committee endeavoured to attain a large degree of flexibility enabling states to adopt the sanctions best suited to the system of liability chosen.

28. Among the traditional criminal sanctions, only fines and the confiscation of property can be applied to enterprises. It appears doubtful, however, whether pecuniary sanctions — be they criminal or quasi-criminal — are sufficiently effective to produce the desired deterrent

effect. The list therefore contains a number of other sanctions and measures which are specifically designed to apply to enterprises: they affect either their assets, or the exercise of their activities, or even their very existence. The select committee considered in fact that measures other than pecuniary sanctions — such as compensation to victims, the prohibition or suspension of certain activities, the annulment of licences, or the closure of the enterprise — could be more effective, provided that the interests of others, for instance the workforce or creditors, are adequately safeguarded. The compensation of victims was considered a particularly appropriate sanction as it would relieve persons having suffered damage of the necessity of pursuing their claims in a separate procedure. Another particularly appropriate measure is the order for *restitutio in integrum*.

29. Two of the recommended measures — removal of managers and appointment of caretaker managements — are directed against the management responsible for the offence rather than the enterprise in whose name the offence was committed. Such orders may be applied as an alternative to prosecuting the enterprise which may itself be a victim of the management's illegal activity. The appointment of a caretaker management would enable the enterprise to carry on its activities, thus ensuring that employees, shareholders and creditors are not penalised.

30. None of the recommended sanctions and measures are meant to be mutually exclusive; they may be taken alone or in combination. Moreover, they may be the subject of a main or of a subsidiary order. Where, for instance, the authority considers it appropriate to take a measure other than a pecuniary sanction, it may impose that measure either as an alternative to a fine or as a complementary sanction in addition to a fine, and it may impose that measure with suspensive effect.

II.8

31. Recommendation II.8 seeks to provide guidance on the appropriate sanction or measure to be imposed in a given case, emphasising that account should be taken of the economic benefit the enterprise derived from its illegal activities. This applies particularly to fines and other pecuniary sanctions: they should be fixed having regard to any economic benefit and not only according to the seriousness of the offence. In order to overcome procedural difficulties, the benefit could, where necessary, be assessed by estimation.

II.9

32. In order to prevent the continuation of an offence or the commission of further offences, or to prevent the enterprise from taking action which would make the enforcement of a sanction or measure difficult or impossible, the authority should consider ordering appropriate interim measures, pending its decision on the sanction or measure to be imposed. It might, for instance by an injunction, prevent the enterprise from disposing of the assets necessary to pay a fine or to compensate the victim for the damage caused by the offence.

II.10

33. Criminal records are intended to provide the authorities responsible for criminal justice with information on the defendant's antecedents, to enable them to "individualise" the punishment. Knowledge of such antecedents is equally essential with regard to sanctions imposed against enterprises, irrespective of the criminal or non-criminal nature of the sanctions. It is therefore suggested that governments consider including these in the criminal records or establishing registers in which all such sanctions and measures are recorded.