

BIG COMPANIES, BIG FAULTS: CORPORATE CORRUPTION AND CRIMINAL RESPONSIBILITY

By Vanja-Ivan Savić, University of Zagreb, Faculty of Law

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Many times when I present topics which are connected with criminal liability of companies I start with dramatic case of Transco from Scotland. In 1999 gas exploded in a house in the village of Larkhall in Scotland which resulted with killing of 4 family members-parents and two children. Although everyone in Scottish Legal Circles agreed that Scots Law recognize criminal liability for juristic persons at the same time no one knew what would be the right mechanism for prosecuting the Company. Scottish Common Law allows prosecution of Legal Entities for criminal acts, but the rules of establishing the link between criminal act of the physical offender and corporate body are demanding and with lack of clarity. Scottish courts accepted theoretical criminal liability of Transco, but in reality necessary link was not established. Therefore judges allowed an action against Transco on the ground of *Health and Safety Act (UK) 1974*, which actually means that Transco was prosecuted for misdemeanor. There are still arguments about that. Problem was connected with non possibility to attach criminal behavior to any of Company's high officials and on that guilt build corporate one. The issue here is that Scots Law needs to establish liability of one or many natural persons within the company and at the same time that person has to be a member of management of the same.

What I just have described here is called *Identification Doctrine*. This means that corporation can be liable only and just only when it is possible to prove responsibility and guilt of at least one senior official of the company (CEO, member of the board, department director, executive etc.). This is predominant system in England and Scotland as well in some jurisdictions based on English Common Law. On the other hand there are many countries which use so-called *Vicarious Doctrine* in which any employee can produce liability of corporate entity and even so if senior members of management do not have any knowledge of the act. Parallel to this, another Doctrine evolved from the common law: *Collective Knowledge Doctrine* which evolved from US case *United States v. Bank of New England*. It basically means that company is liable as an organism. If any of its parts are "infected" organism is "infected" too. That practically means that each employee is potential threat to the security of the company as a whole. This doctrine is used in United States and to some extent in Canada, although Canadian courts developed more balanced regime in approaching to corporate criminal liability which search for middle solution between Identification and Vicarious doctrine and Collective knowledge doctrine on the other side

which is based on aggregation of factors which connect company as a complete mechanism. To go to the case from the beginning: in US or Canada Transco could be liable for criminal offence since prosecution would not ask to find responsible director but only an employee.

Criminal liability of corporation is stretched to large extent and now it exist in almost all European countries and very soon it will spread on Asia and Africa. The gap between criminal liability of an individual and criminal behavior of the company which was caused by the perception that only natural persons can be criminally liable was filled with this new models of attribution.

Identification Doctrine --- Director

Vicarious Doctrine --- Every Employee

Collective knowledge Doctrine (Aggregation) --- Every Employee and “Bad” Structure

On the second level now we can talk about **corruption and criminal liability of corporations**. All those theoretical doctrines and models can be used in discussion on corruption and criminal liability of corporations. Many other will talk about corruption trough pure criminal law. Here I want to raise the question is it true that corruption is especially adequate to be treated trough criminal liability of juristic persons (legal entities or corporations)? On which levels corruption is done and what we actually perceive as a corruption? If we take identification doctrine or model as a role model, in my opinion, perception on the real offender and corporate body will match. It is special question would it be just to treat in the same way small limited liability businesses and big corporations which then can make big faults.

Why I used term big faults? I look at it in two ways: If we take that big corporation trough collective knowledge doctrine, if is not twin brother than is at least sister of vicarious liability, responsibility and therefore liability of big companies will be enormous in quantitative sense. On the other hand when we perceive corporate corruption we do it trough behavior of big corporate entities. In the minds of people, corruption of small company or business enterprise is not regarded as corruption on the big scale and is considered as “petty crime” which have to be sanctioned but with mechanisms reserved for natural persons. Is it so? Economic aspect of the problem pushes us towards the perception that corruption is nested in big and powerful organizations which should therefore be thoroughly examined and controlled. If so, and let’s assume that it is complete fact, big companies will be under **double pressure**: first they will be more exposed to attachment of crime since they have more employees and secondly they will be presumed guilty or at least dangerous in advance. When one might say that small enterprises are more exposed it is just

conditionally true. While in jurisdictions which adopt identification model it is easier to detect the responsible person in the top management since those companies have less layers a but control over employees is stronger and that means that in systems which adopt vicarious liability those (small) companies will profit. Also if we take collective knowledge doctrine into effect, small companies will be in easier control over its work and assets.

What happens with **big (more complex) companies** in same situation? In first case it would be hard to detect company as a criminal since it would be extremely hard to prove responsibility of top management personnel, but in application of vicarious model those companies will be devastated. Therefore and once again it seems that Canadian model, which tend to find a balance between reasonable expected behavior of employees and result of reasonable and effective control of senior and middle positioned professionals look just and fair. In big companies collective knowledge doctrine produces serious problems for companies although that idea has moral grounds. If company want to be treated as powerful and successful and homogenous body on the market, consequences are connected with its perception as (one) organism which have to be responsible for actions of its parts.

Reasonable question which arise here is that if we gave *quasi* conscience to corporations as artificial bodies in order to make them liable for crime, are we obliged to give them mechanisms in which they will be able to treat themselves as persons with conscience? That is provocation of course! In United States US legislator imposed so-called **Thompson Memorandum** which imposes obligations to companies to treat themselves with **self-control** and **self-punishing mechanisms**. If they do not cooperate they will be fined.

Questions:

1. Is it perception of corruption something what is happening in higher layers of corporate entity? And therefore it is appropriate for Identification?
2. Can you justify applying of the 5th Amendment of US Constitution in the prosecution of the Company and if so, who will be entitled to give petition for that?
3. Is it fair to have Thompson Memorandum within the system? Is it self-discrimination?
4. How corruption looks on the lower levels and what would be prerequisite that we consider it as a base for criminal liability of corporation?
5. What the punishment should be? What collateral consequences do you see? (Enron)/Is it "real" corporate corruption?
6. What would be just mechanism to prosecute and to punish smaller and bigger corporation, or should they be treated equally?

Task:

Employee is giving his/her own money to win a procurement offer. His boss doesn't know anything about the activities of his employee, but the company profits from that activity in last three years. Employee gets new and better job within the company as a result of his criminal conduct. Do you think the company is liable for corruption and can you see few possible scenarios?

Thank you!

Please mail to:

vsavic@pravo.hr

viszglaw75@yahoo.com