

Paper on corporate crime and the principle “societas non potest delinquere”

**Question 1: What substantive and procedural defences are available to each of the directors?**

Procedural: The part of the indictment related to acts committed abroad, i.e. in countries A and C should be dismissed. The Norwegian criminal code does not, in principle, apply to acts committed abroad. There are a few exceptions when the defendant is a Norwegian citizen, but fewer when the defendant is a foreigner.

Substantive: In order to punish a physical person, the person concerned must objectively infringe the penal provision, but the person concerned must also do so with the necessary culpability. There is a question whether Dr. Peter Anton, the CEO of the Double X, personally has been involved in the alleged criminal activities. It is unclear whether he was hired after the criminal acts were planned and committed.

**Question 2: May the companies invoke the principal “societas non potest delinquere”?**

The answer is no, because Norwegian law practice the opposite principle, «societas potest delinquere». Companies may be subject to punishment.

The legal basis for this principle is found in the Norwegian general civil penal code section 48a to section 48b which has the following wording:

Section 48 a. When a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty. This applies even if no individual person may be punished for the contravention.

Enterprises here means a company, society or other association, one-man enterprise, foundation, estate or public activity.

The penalty shall be a fine. The enterprise may also by a court judgement be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms, cf. section 29.

Sections 48 b. In deciding whether a penalty shall be imposed on an enterprise pursuant to section 48 a, and in assessing the penalty vis-à-vis the enterprise, particular consideration shall be paid to

- a) the preventive effect of the penalty,
- b) the seriousness of the offence,
- c) whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence,
- d) whether the offence has been committed in order to promote the interest of the enterprise,
- e) whether the enterprise has had or could have obtained any advantage by the offence,
- f) the enterprise’s economic capacity,
- g) whether other sanctions have as a consequence of the offence been imposed on the enterprise or on any person who has acted on its behalf, including whether a penalty has been imposed on any individual person.

However, the principle is subject to certain modifications:

If the defendant is a physical person and all the conditions in order to subject him to punishment is fulfilled, he will be convicted. The court does not have a choice. But this is not the rule when the defendant is a company. Even if all the prerequisites for conviction is

present, it is up to the court whether or not the company is convicted. The central factors in this consideration are cited in section 48 b.

The Supreme Court has stated that there is no presumption for conviction even if all the prerequisites for punishment is present, see Rt-2013-1025. This is however opposite in cases concerning environmental crimes, see Rt-2013-684 paragraph 43.

**Question 3: If not, what substantive and procedural defences are available to each of the companies?**

Procedural: The same procedural questions arise with companies as with physical persons regarding the application of the penal code on actions committed abroad.

Substantive: The company may, based on the circumstances, state that the actions are not executed “on behalf of” (“på vegne av”) the company. The law does not require the identification of a single person within the company who has committed the act in question. The law does not even require that anyone in the company is subject to punishment. It is sufficient to cumulate the errors made by different persons to consider whether the company as such has acted with sufficient culpability, given that the penal provision in question does not require more than negligence.

It may be asserted that the actions by the subsidiary company are not committed on behalf of the parent company. And the subsidiary companies may contend that the actions committed in the parent company, are not committed on behalf of the subsidiary companies.

Whether punishment will be imposed is dependent on an overall evaluation. The factors against punishment could be that there are individuals within the companies who may be held responsible and who it is even subject to criminal prosecution. It is also a small factor that the company seemingly has a failing economy, even though this is of greater importance when the court decides on the size of the fine imposed. There are several factors for punishment of the company: There is a presumption for conviction of companies in cases regarding environmental crimes if the conditions are met, secondly the gravity of the offence, thirdly one must presume that the offence is committed in order to promote the company’s interests and that the company got an actual advantage by the offence, and fourthly the level of the representatives involved in the decision-making process attached to the offence. It is here the involvement of the corporate management which is a factor for conviction.

**Question 4: Would the group companies and/or the directors be immune from prosecution or sentencing or benefit in any other way if they fully compensate the victims?**

A few provisions in the Norwegian criminal code require a request for prosecution by the aggrieved party if public criminal prosecution is to take place. Whether or not this request is put forward or withdrawn may of course depend on whether or not the aggrieved party is fully compensated for the offence. The penal provisions regarding environmental criminality are however not included in this category.

Whether or not the damage has been restored or compensated is not one of the factors cited in section 48 b in the penal code as relevant to the evaluation regarding whether or not the company should be subject to punishment.

In other words, also here the answer is «no».