

KEMMLERS
Brussels

ECBA SPRING CONFERENCE 2015

BUCHAREST

PANEL ON CORPORATE CRIME

Introduction

Method

The panel discussion will be based on a fictitious case, described below. This method has been chosen for a number of persuasive reasons. First it focusses the mind. Second it ensures that all panellists are addressing the same problem. Third it encourages comments that are practical and not academic or theoretical. Fourth it facilitates audience participation. Fifth it makes preparation simpler for the panellists. Sixth it makes it easier to replace any panellist who might be unable to attend. Seventh, it will, hopefully, have a more lasting impact than an abstract discussion.

Societas non potest delinquere ?

By way of explanation, we know that the principle - "*societas non potest delinquere*" - is now honoured almost as much in the breach as in the observance, because it is either disregarded entirely or is circumvented by using rules which are administrative by name but criminal by nature and which are applied by the criminal courts. In other words many jurisdictions now accept that the opposite principle – "*societas potest delinquere*" - is applicable and so there seems little point discussing this further; limited companies can and do infringe the criminal law (which includes parts of competition law) and this is nowadays no more controversial than recognising that state crime is a reality and takes place. The question in any given case is who is to be prosecuted – the company, its leading personnel or both.

So, that said, each panellist will address the problem for a maximum of ten (10) minutes and in so doing will attempt to advise the client whose problem as follows:

The Problem

The Client

The client, Dr Peter Anton, is the CEO of Double X a company, based in Member State A with subsidiaries in Member States B and C. Dr Anton became CEO of Double X on 1 January 2015 and he is new to the company, having been drafted in from outside to restore its ailing fortunes.

He, the main board directors in A and the directors of the subsidiaries in B and C have all been indicted by the prosecutor of B for environmental crimes allegedly planned in A and committed mainly in B but also in C. In addition, there is an indictment against Double X in A, the "mother"

company, and against each of the subsidiaries in B and C. All indictments are dated 1 April 2015.

Dr Anton wishes to organise the defence.

The indictments

The directors of the main company and each of the subsidiaries are, on the basis of evidence collected in A, B and C by the authorities of each country, accused of planning and executing through a criminal organisation, Golden Hand, the dumping of toxic waste, from Double X production plants, in the border area between B and C and in the river dividing the two countries and having endangered human life in both countries by poisoning the soil, the ground water and the river. Persons have been hospitalised and some have suffered irreparable damage to their health. The long term effects of the dumping are as yet unknown. According to the indictment the directors each face a maximum of 15 years imprisonment if convicted. The indictment does not apportion responsibility among the directors but holds them each equally liable, subject to distinguishing factors emerging during the proceedings.

In addition, Double X in A and the subsidiaries in B and C are indicted of the same offence as the directors on the basis of the same evidence. The maximum penalty to which the group is exposed is 40% of group turnover in the product to which the waste is related. If the maximum penalty is imposed the Double X group will have to be liquidated. All the companies are said to be equally liable, subject to distinguishing factors emerging in the proceedings.

The Questions

The CEO is understandably anxious.

His questions are:

- i) What substantive and procedural defences are available to (each of) the directors?
- ii) May the companies invoke the principle ‘societas non potest delinquere’?
- iii) If not, what substantive and procedural defences are available to (each of) the companies?
- iv) Would the group companies and/or the directors be immune from prosecution or sentencing or benefit in any other way if they fully compensated the victims?

Brussels, 13 January 2015
Scott Crosby