

## Criminal liability of directors – the blind spot



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In addition to the specific criminal liability that directors incur for certain acts that they themselves commit in this capacity, they are increasingly at risk of being prosecuted as participants in offences committed by or within the company. This risk is the blind spot of directors' criminal liability.

This practical Q&A will offer you more clarity on the topic.

### **Can directors be held criminally liable for criminal offences committed by or within the company?**

As a rule, individuals incur criminal liability only when their own conduct meets the test for the criminal provision infringed. Accordingly, directors face criminal liability in cases where they act as the author of an offence that criminalizes the perpetration of certain acts by an individual acting in his/her capacity of director of a company (e.g. misappropriation of corporate assets, private bribery, failure to report bankruptcy on time, infringements of the Code of Economic Law that are criminally sanctioned, etc.).

Along with the criminal liability specifically attributed to them by virtue of their position, directors may also incur a more insidious form of criminal liability, which is the criminal liability for offences committed by or within the company. In such cases, directors are not held criminally liable as the author of the offence but are at risk of being held criminally liable as participant to the offence, i.e. as accomplice or co-author. Participation to a criminal offence (as co-author or accomplice) does not require that the co-author or accomplice actively participates to the offence. The Belgian Court of Cassation indeed rules that passively assisting in the execution of a criminal offence may constitute punishable participation when the absence of any reaction reflects an intention to cooperate directly in the execution by helping to make the offence possible or to facilitate it.

## **Can the company and its directors both be held criminally liable for the same facts?**

Yes. This is especially true since Article 5 of the Belgian Criminal Code – which deals with situation where both the legal and the natural person can be held liable – was modified by an Act which entered into force on 30 July 2018.

Under the old regime (which remains applicable to offences committed before that date), when the legal person was criminally liable solely for the intervention of an identified natural person (eg, director or manager), only the person who committed the most severe misdemeanor could be convicted (the so-called “decumulation rule”). In the case the identified director, however, committed the misdemeanor knowingly and willingly, the director could be convicted together with the legal person.

In view of the practical difficulties to which the application of the old regime gave rise, the Belgian legislature decided to abolish the “decumulation rule” and to come back to the principles generally applicable to participation to a criminal offence. Consequently, directors lost the possibility to escape criminal liability by arguing that the most severe misdemeanor was committed by the legal person.

Although there are no guidelines addressing when to seek individual and/or corporate liability, prosecutions are often brought against both individuals and corporations.

How can directors mitigate their criminal liability? What is the impact of criminal prosecutions / convictions on the “fit & proper” qualities of directors?

## **How can directors mitigate their criminal liability?**

Corporate directors should first ensure that structures and policies designed to prevent the commission of offences within the company do not only exist on paper but are effectively implemented within the company. A director who regularly inquires about the concrete implementation of such policies and receive answers to his questions (including through internal investigations and audit) should not be at risk of facing criminal prosecution due to allegations of “willful blindness”.

It is essential that directors address questionable behaviors or decisions of which they become aware. Such attitude protects them against allegations that they would have facilitated offences committed by or within the company.

Similarly, directors should vote against decisions that they suspect may lead to commission of an offence and ensure that their negative vote is recorded in minutes of the board meeting. If a director wants to abstain from voting, he/she should at least state his/her doubts about the legality of the decision, and ensure that his/her statement is recorded in the minutes of the board meeting.

**What is the impact of criminal prosecutions / convictions on the “fit & proper” qualities of directors?**

Directors of regulated businesses must comply with the “fit and proper” requirements imposed by regulatory bodies. It stems from the guidelines provided by the EBA, the FSMA and the NBB that, in case of criminal prosecution (i.e. even before any conviction), they are at risk of not being considered as “proper” anymore.

In addition, in case of criminal conviction, courts may ban directors from pursuing their professional activity as director.