

A person in a dark suit is seen from behind, standing in a modern office with large windows. The view outside shows a city skyline with several tall buildings. The scene is brightly lit, suggesting daytime. The person is looking out the window.

Corporate Criminal- and Administrative Liability

- Culpability requirement under Norwegian law

- Presentation Norwegian Center for European Law
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- 28th January 2022

Context

The doctrine of strict corporate liability

G.I.E.M vs. Italy (2018)

HR-2021-797-A (Louis Pizza)

Report to the Ministry of Justice (2021)

The doctrine of strict corporate criminal liability

Penal Code Section 27. *Penalties for enterprises*

When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise can be liable to punishment. This applies **even if no single person meets the culpability or the accountability requirement**, see section 20.

Penal Code Section 28. *Factors in determining whether a penalty shall be imposed on an enterprise*

In determining whether an enterprise shall be penalised pursuant to section 27, and in assessing the penalty, considerations shall include:

[...]

b) the severity of the offence, **and whether a person acting on behalf of the enterprise has acted culpably**,

[...]

- General provision
- Liability for violations by all «in house» persons
- Anonymous and collective violations covered
- No mandatory culpability requirement
- Liability is subject to discretionary assessment

The doctrine of strict corporate administrative liability

Public Administration Act Section 43. (Scope)

[...]

By administrative sanction is meant a negative reaction that may be applied by an administrative agency in response to an actual breach of a statute, regulation or individual decision, and which is **deemed to be a criminal sanction pursuant to the European Convention on Human Rights**

Section 46. (Administrative corporate sanctions)

*When a statute prescribes that administrative sanctions may be imposed against an enterprise, such sanction may be prescribed **even if no individual person is at fault.***

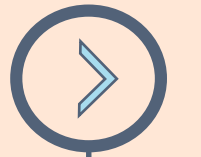
When deciding whether an administrative sanction shall be imposed on an enterprise [...] regard may be had, among other things, to: [...]

b) the severity of the offence, **and whether a person acting on behalf of the enterprise has acted culpably,**

[...]

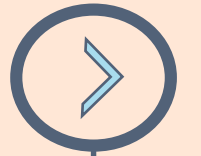
- Scope: deemed criminal sanction under ECHR
- Liability requires specific legal basis in a statute
- No mandatory culpability requirement
- Culpability relevant in the discretionary assessment

G.I.E.M. vs. Italy Case 1828/06 (2018)



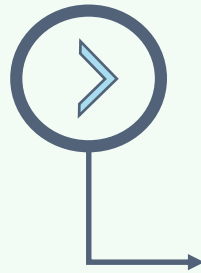
Main Questions

1. Is forfeiture of property without any culpability requirement compliant with Article 7 of the ECHR?
2. Is forfeiture against a company on the basis of acts by individual leaders a liability for a criminal offence committed by another?



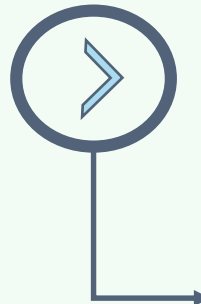
Ruling

1. Article 7 requires a “mental link” through which an element of liability may be detected in the conduct of the person who physically committed the offence.
2. Yes, because the leaders acted as private persons and the company was not party to the criminal proceedings.



Main Questions

1. Is the doctrine of strict corporate criminal liability under Section 27 of the Penal Code compliant with Article 7 of the ECHR?
2. What culpability condition is required under Article 7?



Ruling

1. No, Section 27 of the Penal Code can not be practiced in accordance with wording and legislative intent.
2. Negligence can fulfill the “mental link” requirement stated in G.I.E.M. ECHR does not require fulfillment of the specific culpability requirement for the criminal offence in question.

Report to the Ministry of Justice (2021)



Assessment

1. Subscribe to the Supreme Court's view on the doctrine of strict corporate criminal liability vs. ECHR.
2. The same will apply to the doctrine of strict corporate administrative liability.
3. Practical implications for culpability requirement in general and cumulative breach in particular.
4. Existing corporate liability doctrine is not a breach of prohibition against liability for another.



Proposals

1. Penal Code Section 27: the culpability requirement for the criminal offence in question must be fulfilled by the persons who committed the offence.
2. Public Administration Act Section 46: Corporate liability requires negligence unless otherwise stated in the statute.
3. Strict corporate liability requirements in administrative statutes must be amended.