



Criminal Law: overview of recent case law

Arendt Case Law Forum

Seminar

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Criminal Law: overview of recent case law



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Overview

- 1. Fraud and money-laundering**
- 2. Misuse of corporate assets**
- 3. Fraudulent Bankruptcy**
- 4. Forgery and use of forged documents**

1. Fraud and money-laundering

Money laundering

Reminder of the basic principles

- **Money laundering offence**
 - Goods or benefits deriving from primary offence
 - Theft, fraud, cybercrime, tax fraud, ...
 - Facilitate false justification of the origin; assist in concealment, conversion, investment; hold, acquire or use
 - Sanction : imprisonment 5 years & fine 1.250.000+ EUR

- **Anti-Money Laundering Act 2004**
 - Professional obligations
 - Risk assessment, KYC, KYT, cooperation with CRF, suspicious operations report
 - Sanctions
 - Administrative fine (supervising authority)
 - Criminal fine, 5.000.000 EUR

Money laundering

The facts of the case

■ Court of appeal, 12 July 2022, n° 214/22

- *First instance : TA Lux., 8 March 2021, n° 523/2021*

■ Who ?

- Banker in charge of the private banking department
- Elderly client with +/- 3,6M EUR in assets

■ Preparation phase

- Violation of instructions : money not invested
- Creating doubt about the bank's solvency
- Bank accounts opened in Switzerland

Money laundering

The facts of the case

■ The fraud

- An unexpected dismissal



immediatley release employees from work

- Three days left to act

- Falsified transfer instruction

- Employee stays in contact with the client after dismissal



avoid private communication with clients

■ Evidence

- Numerous hearings, international cooperation

- Tracing phone calls



for criminals only : don't use standard phone services

- Employee finally admits, but argues that

- he only executed a plan imagined by this two directors

- his share was limited to 500K EUR

- Difficult cooperation between the bank and the police

- Unable to deliver information

- Deficient internal organization



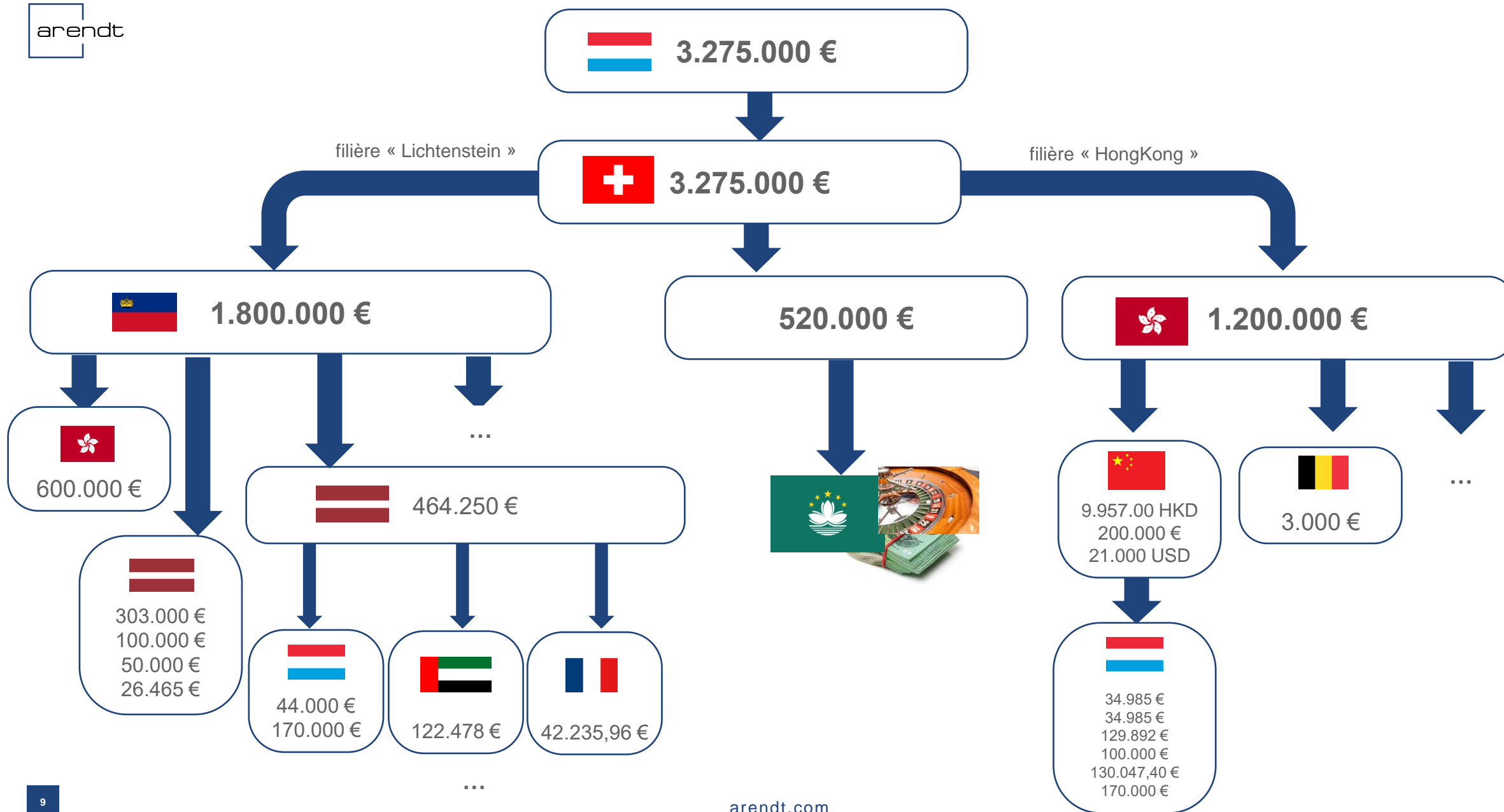
know your data & be prepared for dawn raids

Money laundering

The facts of the case

- 7 other persons prosecuted
 - mostly close friends
 - arguing that they couldn't know the illicit origin of the funds
 - various explanations, e.g. diamond trades

- Retracing the money



Money laundering

Procedural issues

■ Territorial jurisdiction

- Primary offences in Luxembourg
- Money laundering acts all abroad

■ “principe de connexité”

- Facts originated in Luxembourg & money found its way back



Nowhere on earth are you safe from the Luxembourg judge

■ Non bis in idem

- 1 person already convicted in France, another one under prosecution
- French prosecution much broader but includes the Luxembourg facts

■ Reasonable length of proceedings ?

- 
- A vertical timeline bar on the left side of the slide, composed of several colored segments: teal, red, yellow, teal, yellow, and teal. A green virus-like icon is positioned to the left of the bar, overlapping the yellow and teal segments.
- **September 2011** : primary offences
 - **September - November 2011** : money laundering
 - **March 2012 - May 2013** : first police hearings
 - **November 2014** : judicial investigation closed
 - **July 2017** : Public Prosecutor files « réquisitoire »
 - **January 2018**: Hearing at the « chambre du conseil »
 - **October 2018**: Appeal decision, « chambre du conseil »
 - **October 2020**: First public hearing

Money laundering

Infringements

■ Primary offences

- Forgery of bank documents
- Fraud (*escroquerie*) for 3.527.000 EUR

■ Money laundering

- Must have known the illicit origin of the funds



Money laundering

Civil damages

■ Who is the victim?

the bank

or

the client

?

■ Who is civilly liable?

- ☐ The primary offender
- ☐ The money launderers?
 - Yes, but limited to their part

■ How much?

- ☐ Material loss : amount of the fraud – confiscated money
- ☐ Moral damage?

Money laundering

Criminal sentence

	First instance			Appeal	
Primary offender	2 + 2* years	500.000 €	↗	3 + 1* years	500.000 €
Launderers					
1	2 years*	200.000 €	↗	2 years	200.000 €
2	18 months	150.000 €	↗	2 years	200.000 €
3	1 year*	60.000 €	➡	1 year*	60.000 €
4	6 months*	30.000 €	↗	9 months	45.000 €
5	2 years*	200.000	↘	acquittal	
6	Not admissible (<i>non bis in idem</i>)				
7	Suspended (<i>non bis in idem</i>)				

* suspension (sursis)



Appeal or not appeal? That's the question.
The answer might come when it's too late

2. Misuse of corporate assets

Court of appeal, decision nr. 227/22 X of 13 July 2022

*First instance : TA lux., 4
March 2021, n° 487/2021*

■ Facts of the case:

- Between 2004 and 2009, purchase of 842 luxury watches for a total of nearly 18 million euros
- Invoices paid by companies of which the perpetrator was the director and BO
- Denunciation by the tax authority
- 3 different operating modes:

Purchases entered in
the balance sheet as
“expenses”

Purchases entered in
the balance sheet under
the partner's current
account

Purchases entered in
the balance sheet under
"other securities"

► Prosecution for **misuse of corporate assets** and **money laundering**

■ Prosecution time barred?

- Misdemeanors: prosecution is time barred **5 years** after the offence is committed
- BUT: in case of **clandestine offences**, starting point is delayed to the point where the offence became apparent
- When did the offences become apparent?
 - Date of approval of the accounts?
 - No, because the companies were solely owned by the perpetrator and his family
 - Date of denunciation by the tax authority (28/09/2010)
 - Prosecution is launched and leads to the initial judgement of 4 March 2021
- ▶ Prosecution is not time barred

■ Analysis: Misuse of corporate assets

- de jure or de facto **directors** who, **in bad faith**, “*have made **use of the company's assets or credit** in a way that they knew to be **contrary to the company's interests**, for **personal purposes** or to favour another company or enterprise in which they were directly or indirectly interested*” (**art. 1500-11, 1° L. 1915**)

- Perpetrator must be a director
- A use of the assets or the credit of the company
- Which is contrary to the interests (≠ corporate purpose) of the company
- For the personal benefit of the director
- Acting in bad faith (“knowingly”)

- Re. the purchases entered as “expenses”
 - The perpetrator was a director and he had the companies pay for the watches purchased for his personal use
 - ≠ valid “expenses” made in the companies’ interest
 - The companies had no interest to finance such personal acquisitions
- ▶ Misuse of corporate assets is given

- Re. the purchases entered under the partner's current account:
 - = considered a credit granted by the company to its director
 - Arguments of the defense
 - Annual interest rate of 5% (≠ contrary to company's interests)
 - Partial reimbursements occurred and he always had the intention to reimburse the remainder
 - Transparency in the companies' books and the perpetrator's tax returns
 - Decision of the Court:
 - Reimbursements entirely at the discretion of the perpetrator, no specific reimbursement plan
 - Companies' liquidities (cash) had been replaced by non-liquid claims towards the director with uncertain reimbursement conditions
 - The perspective of a 5% interest does not justify the risk the companies have been exposed to
- ▶ Misuse of corporate assets is given

- Re. the purchases entered under "other securities":
 - Arguments of the defense
 - The watches are collectables whose value is likely to increase
 - To be considered "investments" by the company
 - Decision of the Court:
 - No concrete strategy or investment plan, watches selected solely based on the perpetrator's personal preferences
 - Watches were stored together with all other watches at perpetrator's home with no distinction re. their owner
 - Perpetrator was free to use the watches as he pleased
 - Watches were clearly destined for the perpetrator's personal use
- ▶ Misuse of corporate assets is given

■ Analysis: (Money) laundering (“self-laundering”)

- “[...] *those who have **acquired, possessed or used** property [...] which is the **object or proceeds**, directly or indirectly, of the offences listed in point (1) [...], or which constitutes any pecuniary advantage **derived from** one or more of those **offences**, **knowing**, at the time they received it, **that it was derived from** one or more of the **offences** referred to in point (1) or from participation in one or more of those offences” (art. 506-1, 3 Crim. Code)*

- “*The offences referred to in Article 506-1 are **also punishable where the perpetrator is also the perpetrator or accomplice of the primary offence**” (art. 506-4 Crim. Code)*
 - Existence of a primary offence
 - Misuse of corporate assets ✓
 - Acquisition, possession or use of the proceeds of the primary offence
 - Possession of the watches ✓
 - Knowledge of the illegal origin (≠ knowledge of the exact nature of the offence)
 - As the perpetrator of the primary offence, he necessarily had knowledge of the illegal origin of the watches ✓

- Arguments of the defense:
 - Violation of *non bis in idem* principle
 - EU directive 2018/1673 only aims at self-laundering where there is a conversion, transfer or a dissimulation (i.e. a distinct act from the primary offence)
 - The Court should file a preliminary question with the Constitutional Court because self-laundering by simple possession is disproportionate

- Decision of the Court:
 - No violation of *non bis in idem* principle:
 - cumulation of sanctions for primary offence and laundering is legally foreseen
 - only the most severe sanction is being pronounced
 - No double and consecutive sanction for the same illegal behavior
 - The directive does not preclude national legislators from going further than what the directive foresees
 - The Constitutional Court has no competence to evaluate political choices of the legislator

- ▶ Money laundering is given

■ Sanctions

- 1 year of imprisonment (entirely suspended)
 - Vs. 2 years (entirely suspended) in the first instance
- Confirmation of fine of 250.000,- € from first instance
- Confiscation of all the watches (total value +/- 18 million euros)
 - Vs. in the first instances, watches entered under “other securities” were not confiscated

3. Fraudulent bankruptcy

Fraudulent bankruptcy – preliminary conditions

■ The accused must be a trader

- *Société en nom collectif* (unlimited company);
- *Société en commandite simple* (common limited partnership);
- *Société anonyme* (public limited company) and *société par actions simplifiée* (simplified limited company);
- *Société en commandite par actions* (partnership limited by shares);
- *Société à responsabilité limitée* (private limited company);
- *Société coopérative* (cooperative);
- *Société européenne* (SE) (European company (SE)).

■ The trader must be insolvent

- Cessation of payments
- Credit impairment

Principle of autonomy of criminal law

Court of Appeal (corr.), 12 January 2022, n° 8/22 X:

- An investigation for fraudulent and simple bankruptcy may be opened by the Public Prosecutor independently of any declaration of insolvency in commercial matters.
- The criminal court is not bound by a judgement of the commercial court.
- It is thus up to the criminal court to verify whether the conditions for insolvency are met, namely whether the accused person is a trader and whether there has been cessation of payments and inability to refinance.

Fraudulent bankruptcy

A material element:

Any insolvent trader who is in one of the following situations shall be declared a fraudulent bankrupt:

- if he has concealed in whole or in part the books or accounting documents, or if he has fraudulently removed, erased or altered the contents thereof;
- if he has misappropriated or concealed part of its assets;
- if, in his writings, either by public acts or commitments under private signature, or by his balance sheet, he has fraudulently acknowledged himself as the debtor of sums which he did not owe.

Fraudulent bankruptcy

A moral element:

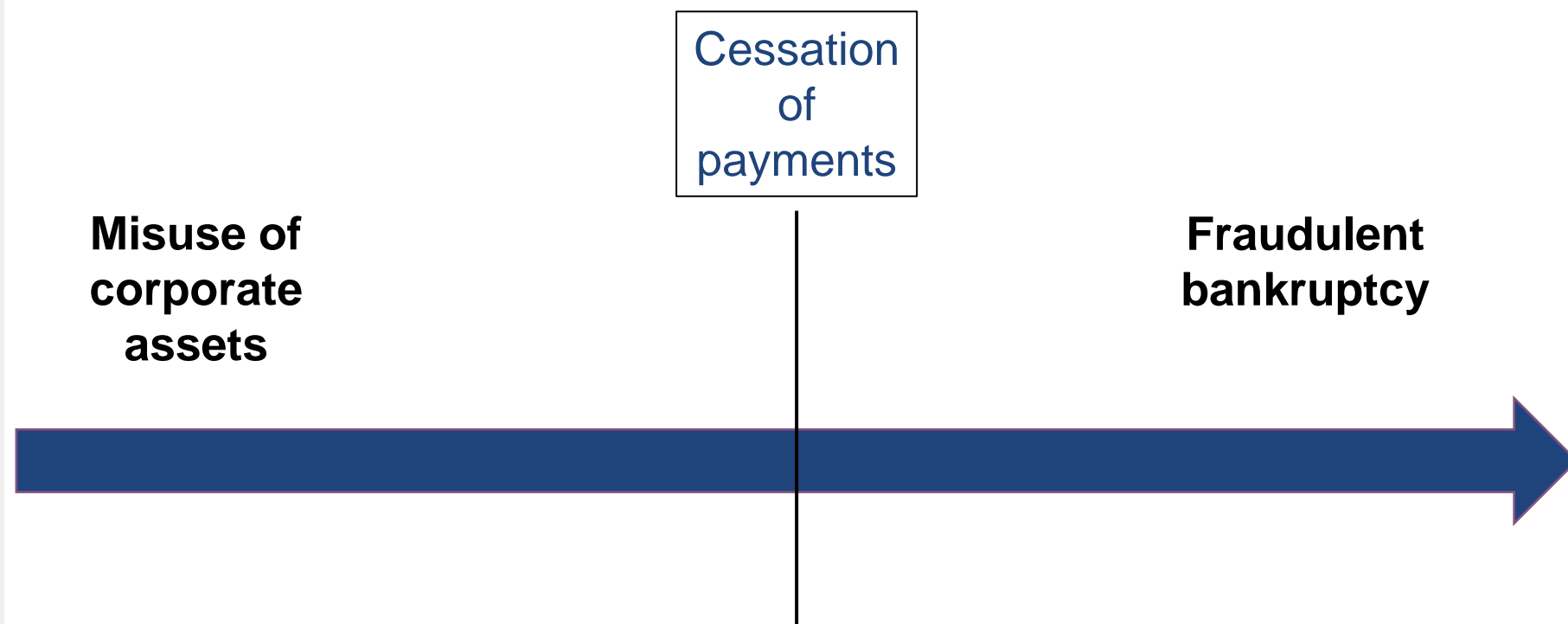
- A clear intention to commit fraud - special intent;
- Regarding the misappropriation and concealment of assets -> presumption of fraudulent intent ;
- In this case, if the accused person denies the misappropriation, he must to prove that he has allocated these funds to the realisation of the company's object.

Sentence:

Art. 489 of the Criminal Code: imprisonment of 5 to 10 years

Draft bill n°6539A: 6 months to 5 years and a fine of 500 to 50,000 euros

Difference with misuse of corporate assets



Court of Appeal (corr.), 6 June 2018, n°213/18 X

- The defendant was day-to-day manager (*administrateur-délégué*) of a public limited company (*société anonyme*);
- Corporate purpose of the company: the realisation of real estate projects, as well as all industrial, commercial or financial transactions, directly or indirectly related to its corporate purpose or likely to facilitate its extension or development.
- Cessation of payments:
 - Court sitting in commercial matters: 11 January 2007
 - Criminal Court: 22 November 2005
- The managing director was accused of fraudulent bankruptcy for having embezzled and concealed the assets of the company by debiting the account of the company by making several bank transfers.

**Court of Appeal
(corr.), 6 June 2018,
n°213/18 X**

The most important of those transactions were the following :

- A bank transfer of 100,000 euros to the account of a company as an alleged provision for architectural work carried out by this company, allegedly in connection with the above-mentioned project.
- A series of bank transfers of approximately 850,000 euros from the company's account to the defendant's private bank account allegedly corresponding to reimbursements of funds that he personally contributed to the company.
- A series of bank transfers for more than 1.1 million euros made to a construction company allegedly corresponding to structural work, electrical installations, heating, plastering, painting and door installation, carried out this work on the building site of the residence.

**Court of Appeal
(corr.), 6 June 2018,
n°213/18 X**

- Misappropriation of funds gives rise to a presumption of fraudulent intent.
- If the accused denies the misappropriation, he must prove that he has allocated these funds to the realisation of the company's object.
- District Court: the defendant failed to prove that he used all these funds to achieve the company's corporate purpose.
- Court of Appeal: the defendant provided sufficient elements of evidence that these amounts have been used in the interest of the company.
 - ▶ no conviction for fraudulent bankruptcy

4. Forgery and use of forged documents

Forgery and use of forged documents

Reminder of the basic principles

□ Production of forged documents (art. 196 CC)

■ Constitutive elements of the offence

□ Material elements (actus reus)

➤ Alteration of the truth by means as defined by law

✓ *Faux matériel*

✓ *Faux intellectuel*

➤ Documents protected by law

➤ Potential for prejudice

□ Mental element (mens rea)

➤ Fraudulent intent or intent to cause damage

■ Sanctions

□ Natural persons

➤ Criminal imprisonment of 5 to 10 years

□ Legal entities

➤ Criminal fine of a maximum of EUR 750.000,-

Forgery and use of forged documents

Reminder of the basic principles

- **Use of forged documents (art. 197 CC)**
 - **Separate offence**
 - Consequences
 - **Constitutive elements of the offence**
 - Material elements (*actus reus*)
 - Use must have been made of a forged document
 - Document must be protected by law (see above)
 - Potential for prejudice
 - Mental element (*mens rea*)
 - Fraudulent intent or intent to cause damage
 - **Sanctions**
 - Same as for production of forged documents

Forgery and use of forged documents

The facts of the case

- **Court of Cassation, 28 April 2022, n° 60/2022**

- *Appeal: CA Lux., 4 May 2021, n° 141/21 V*

- Conviction in appeal of a person for offences of corruption, forgery use of forged documents and money laundering in relation to the acquisition of a plot of land.
- Confirmation by the Court of Cassation that the offence of production of forged documents exists once there is a possibility that by way of use of such document an infringement could have been caused to a legal right or a prejudice could have been caused to legal property.
- The potential of prejudice must be assessed as of the moment the forgery was committed.

Forgery and use of forged documents

The facts of the case

- **District Court of Luxembourg (18^e), 6 january 2022, n° 14/2022**
- Fraudulent intent is not defined by the goal pursued, but by the means employed in order to reach such goal.
- Intentions of the author of the offence are indifferent and in particular there is no requirement of a goal of personal enrichment being sought.
- This principle even applies in cases where the advantage sought was legitimate and could have been legally obtained by other means.

Forgery and use of forged documents

■ Impact of Article 140 CC

- Any person who becomes aware of a crime of which the consequences can be prevented or mitigated or if the authors of such crime are likely to commit further crimes which could be prevented must report such crime to the authorities.
- Production of forged documents and the use of forged documents is a crime.
- Sanctions: imprisonment of 1 to 3 years and fine of up to EUR 45.000,-.
- Limited exceptions exist for family members of the author and persons subject to professional secrecy within the meaning of article 458 CC.

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