Joint liability of legal persons in labour trafficking cases – court decision example (belgium)

INTERNATIONAL TRADE UNION CONFEDERATION

December 1, 2013

JOINT LIABILITY OF LEGAL PERSONS IN LABOUR TRAFFICKING CASES – COURT DECISION EXAMPLE (BELGIUM)

Court: First Instance Court of Gent, 19th chamber
Date of decision: 5 November 2012

References:

Court's decision is available on the website of the Belgian Interfederal Centre for Equal Opportunities and the Federal Centre of Migration:
http://www.diversite.be/sites/default/files/legacy_files/Rechtspraak_jurisdiction/h12-11-05_c_Gent.pdf

Summary of the case is available on the website of the Belgian Interfederal Centre for Equal Opportunities and the Federal Centre of Migration:
http://www.diversite.be/tribunal-correctionnel-de-gand-5-novembre-2012

and in the database of human trafficking case-law by the UN Office for Drugs and Crime (UNODC):
http://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/bel/2012/case_no._20123925.html?tmpl=old

Victims

Foreign nationals –Belgian-Moldovan nationality (3), Romanian nationality (1), several unidentified foreign nationals. The victims did not appear in the trial, only the public prosecutor brought charges against the defendants.

Defendants

4 defendants were charged as a **servants or agents of the legal entity Kronos Sanitärservice GMBH**

Kronos Sanitärservice GMBH, company based in Germany (K.S.G)
Kronos was charged as the employer and legal person

N.V. Carestel Motorway Services, company based in Belgium (C.M.S)[1]
Carestel was charged as accomplice in the sense of article 66 of the penal code, for having executed the offense, having cooperated directly to its execution, or having helped in the commission of the offense in such a way that, without the accused, the infraction would not have been committed

[1] *Since 2007 Carestel part of the Auto-Grill concern, see: http://www.autogrill.be/be.*

Charges

4 defendants were charged as a servants or agents of the legal entity Kronos Sanitärservice GMBH for the following offences:

1. Employing Undocumented or Unauthorised Foreigners (Article 12 of the Law of 30 April 1999 on Employment of Foreign Workers)
2. Failure to Notify the Institutions Responsible for the Collection of Social Security Contributions of Relevant Information (4 to 8 and 9 bis of the Royal Decree of 5 November 2002)
3. Human Trafficking (Article 433 quinquies 1, 3° of the Penal Code)

Decision: Term of Imprisonment: 1- 4 years
Fine / Payment to State: 13750 EUR - 55000 EUR

Kronos Sanitärservice GMBH, company based in Germany was charged as employer and a legal person for the following offences:

1. Employing Undocumented or Unauthorised Foreigners (Article 12 of the Law of 30 April 1999 on Employment of Foreign Workers)
2. Failure to Notify the Institutions Responsible for the Collection of Social Security Contributions of Relevant Information (Article 4 to 8 and 9 bis of the Royal Decree of 5 November 2002
3. Human Trafficking Article 433 quinquies 1, 3° of the Penal Code

Fine / Payment to State: 528 000 EUR

1. N.V. Carestel Motorway Services, company based in Belgium was charged as an accomplice and a legal person for the following offences:
2. Employing Undocumented or Unauthorised Foreigners (Article 12 of the Law of 30 April 1999 on Employment of Foreign Workers
3. Human Trafficking Article 433 quinquies 1, 3° of the Penal Code
4. Failure to Notify the Institutions Responsible for the Collection of Social Security Contributions of Relevant Information (Article 4 to 8 and 9 bis of the Royal Decree of 5 November 2002)

Fine / Payment to State: 99 000 EUR

Regarding the charge of trafficking in human beings: the Court considered that the mere fact that the employees worked 15 hours per day, 7 days a week for several weeks in a row was enough to find the defendants guilty of trafficking in human beings.

Fact Summary

The company Carestel (Auto-Grill) manages the motorway services in the Dutch-speaking part of Belgium. It concluded a contract with the company Kronos, based in Germany, concerning the cleaning of the toilets on the motorway rest area. Kronos is responsible for hiring and managing the employees cleaning the toilets.

Several inspections led by the labour inspection services found that the people working in the toilets were working sometimes 15 hours per day, 7 days a week, and received a very small salary. The employees were all foreign nationals, with no knowledge of the Dutch language, most of them coming from Eastern Europe. They had signed a contract with Kronos that they were not able to understand, most of them were not able to say whether they were working as employees or as independent workers.

Kronos organised its activities so that employees were living in a house belonging to the company, someone from Kronos would drive each of the employees to a rest area in the morning and pick them up in the evening. The employees took a few cents from each client going into the toilets, and put the money in a safe. An employee from Kronos came every week or several times a week to take the money.

Judicial reasoning

Unauthorized translation

On liability of the employer- Kronos (K.S.G)

Definition of the crime of human trafficking in Belgian law is broad. It consists of recruitment, transportation, transfer, housing, shelter of a natural person, the exchange or the transfer of power over this person with the aim of employing, or having this person employed in circumstances which are contrary to human dignity.

The use deception, violence, threats or any other form of force or abuse of vulnerable position of victim consitutes an aggravating circumstance, not a constitutive element of the crime.

The legislator has clarified that for the evaluation of the question whether labour circumstances are, or are not, infringing upon human dignity, several elements are to be taken into account, such as the wage, work environment and working conditions. **Conditions which are not in line with human dignity can be deducted from factors such as unpaid services or wages that are not proportionate to the actual work performed** (G. Vermeulen en L. Arnou, o.c., Strafrecht en strafprocesrecht, p. 69-70, nr. 19; Parl. St. Chamber, 2004-05, nr. 1560/1, p. 19).

Kronos recruited the workers and was responsible for the transfer of the workers to Belgium. Kronos was responsible for the housing of the workers in Belgium, as well as for the transport in Belgium to and from the workplace.

The workers performed their tasks 7 days a week, without breaks, from 7h in the morning until (at least during the summer) 22h in the evening, for a continuous period of several weeks.

The fact that the workers depended on the collective transport from their residence in Wetteren to the workplace effectively prevented them from working less hours.

Also, the fact they performed their duties for so many hours on a daily basis and during continuous periods, in itself constitutes a violation of the principle of human dignity. Such a pace of work prevents a person from developing a normal social life alongside the working day.

This type of employment is contrary to the principle of human dignity even the more so because the wages were absolutely insufficient.

The differences noticed in the declarations of the employees and the reluctance with which they were willing to declare anything at all, suggests that some of them pretended their wages were higher than they were in reality. It is also clear from their declarations that they were not paid on a regular basis and that they would only be paid at the end of their employment period. These circumstances also show that **the employees of Kronos found themselves in a situation of complete dependence on Kronos.**

All employees faced such a precarious social situation in their home country or in Germany, that they still favoured the degrading employment situation in Belgium. **In Belgium they found themselves in an irregular, at least uncertain administrative position. They were employed in a fake structure. Without any link to Belgian society, no knowledge of the Dutch, French, English or German language, without the possibility to provide themselves with appropriate transport or housing and completely dependent on Kronos, these workers are subject to precarious social circumstances in Belgium as well. Therefore the aggravating circumstances of art. 433septies, 2° and 6°, Criminal Code are proven.**

Kronos organised the employment of these workers in the sanitary facilities of Carestel on a professional basis. The employment was carefully arranged in numerous sanitary facilities with the input of many workers. **The aggravating circumstance of habit is therefore also proven.**

On liability of company in contractual relationship- Carestel (C.M.S)

Carestel is being charged as an accomplice.

Being an accomplice in the sense of article 66 Criminal Code **does not require the accomplice to have acted with intent,** as is required for the crime he is involved in. The only requirement is that this **person willingly and knowingly assists with the crime set up** by the actual perpetrator. Intent of the accomplice can therefore be separated from the intent required as main element of the actual crime. (Cass. 9 October 1990, Arr. Cass. 1990-1991, nr. 69; Cass. 13 May 1998, Arr. Cass 1990, nr. 248; Cass. 22 June 2004, Arr. Cass. 2004, nr 344; Cass 26 February 2008, Arr. Cass. 2008, nr. 128).

The intent required for complicity requires in principle that the participant has knowledge of which crime it is he is assisting with. In principle the accomplice has to be aware of all the circumstances of the events which give rise to the actions being qualified as a criminal offense. **Specific knowledge of the exact mode of execution of the crime is not required. General knowledge of the crime which will be committed is sufficient** (see amongst others Cass. 9 December 1986, Arr. Cass. 1986-87, 472; see also J. Vanheule, Strafbare deelneming, Antwerp, Intersentia, 2010, nr. 337, p. 422-423 ad nr. 340, p.427-428).

The circumstances in which the accomplice deliberately fails to take note of the concrete circumstances of the crime to be committed, do not amount to non-complicity on the part of this person, yet it amounts to this person being willing to contribute know-how to whichever crime in general (see Cass. 16 December 1983, Arr. Cass. 2003, nr. 647; see also J. Vanheule, Strafbare deelneming, nr. 348, p. 436-437).

The intent required for complicity is also present when a person willingly and knowingly performs a certain act without having the intention to contribute to a particular crime, but is aware of the risk that his act may contribute to a crime and accepts that risk. Such complicity still fulfils the requirements of intent. This form of complicity is not based upon the mere negligence that the person should have taken account of the risks of his acts but was unaware of those risks. It is not even based on the case in which the person

was well aware of the possible consequences of his acts but assumed that those consequences would not materialise and therefore did not in fact accept the risks (see J. Vanheule, Strafbare deelneming, nrs. 350-358, p. 438-456).

Under no circumstance does this kind of intent require the participant to be aware of the legal qualification of the facts to which he is contributing. In the evaluation of the criminal complicity of C.M.S. to the facts laid down under indictment D it is of no importance whether the defendant C.M.S. was aware that the way in which K.S.G operated and employed its workers, could be qualified as human trafficking. Evaluation of the intent of the accomplice does therefore also not require an evaluation of the question whether at the time of the investigation in 2006, the investigators qualified the subject of their investigation as human trafficking.

The only question the court needs to answer is thus whether the defendant C.M.S. willingly and knowingly contributed to the facts committed by K.S.G., irrespective of whether C.M.S. was aware that these acts could be qualified as human trafficking.
The initial investigation in Turnhout that was presented to the defendant C.M.S. should have made C.M.S. aware of the fact that the working conditions of K.S.G were at least problematic.

The court does not have to judge the facts that were the subject of the initial investigation in Turnhout, nor does it have to evaluate the possible legal qualification of those facts or the facts themselves, nor does it have to evaluate the question who is possibly responsible for those facts.

The data in the files from Turnhout, which were added to this file for informational purposes, can however be used by this court to evaluate the question which knowledge the defendant had about the way in which K.S.G. employed its workers. It can also be used to evaluate to what extent the defendant gathered further information about the working conditions and to what extent the defendant showed initiative to do so or whether on the contrary the defendant refrained to acquire a more detailed knowledge of the practices of K.S.G. The criminal files from Turnhout also allow this court to evaluate the internal e-mail correspondence the defendant has presented during the criminal investigation in Turnhout in light of the objective information in those files.

It does not follow from the minutes of the interrogation of S.M. or the other information available in the files from Turnhout that C.M.S. could reasonably assume that the practices of K.S.G. did not give rise to any problems, contrary to what C.M.S. itself claims.

The last contact between the defendant C.M.S. and the federal investigative police dates back to 11 September 2006. During that meeting C.M.S. was informed there were doubts as to whether the changes made to the employment contracts [by K.S.G.] sufficed. It is clear from the criminal files that K.S.G. has not made any subsequent changes to the employment contracts.

During the interrogation of S.M. on 11 September 2006, S.M. confirmed that the practices of K.S.G. were not in conformity with the law in terms of wage and duration. He declared he would consult K.S.G. on this matter and, in case no solution could be reached, he would end the cooperation with K.S.G. He also

declared he would keep the federal investigative police up to date regarding the further developments and contacts with K.S.G.

From the internal e-mail correspondence it has become clear that (11 September 2006, part 4 of the file of the defendant) S.M. had planned a meeting with K.S.G. concerning the guarantees K.S.G. should provide in terms of adjusted wages and the intention of C.M.S. to insert a certain periodical control mechanism to avoid 'such risks' in the future.

The investigation shows this meeting with K.S.G. did not lead to concrete adjustments nor to K.S.G. giving guarantees of any kind. As already stated, the files from Turnhout do not contain any changes made to the employment contracts by K.S.G. after 1 September 2006.

The files also do not show that C.M.S. inquired with K.S.G. under which conditions the latter employed its workers. C.M.S. however did have good reason, in light of the information it possessed, to conduct an inquiry on these matters, as it knew that a sanitary facility with a turnover of 200 euro per day – an amount already higher than expected by C.M.S. (part 4 of the file of the defendant) – is difficult to reconcile with a working day of 15 hours or how that could possibly be in line with the Belgian wage norms.

C.M.S. also failed to notify the federal investigative police of its subsequent contact with K.S.G.

C.M.S. furthermore did not take any steps to verify the current state of the investigation with the federal investigative police.

Where the defendant C.M.S. in the beginning of September declared it doubted whether the working conditions had improved to a satisfactory level and having regard to the announcement that the defendant C.M.S. would itself keep the police informed about the subsequent contact with the firm K.S.G., the defendant C.M.S. cannot reasonably maintain that it acted in good faith when it assumed that the employment by K.S.G. did not give rise to any problems, also given the fact that C.M.S. did not receive any further information concerning the investigation.

Taking into account the interrogations of several managers within the defendant company C.M.S. in 2006, the declarations made by those persons in 2008 that they were not aware of the working conditions employed by K.S.G., are not credible.

P.S. moreover declared that he was aware of the fact that the employees working in the sanitary facilities changed working locations on a regular basis.

K.S.G's employees were offered free meals in the restaurants of C.M.S. C.M.S. therefore was aware of who was working in their sanitary facilities and was aware that these persons worked 7 days a week for a continuous period of several weeks without any breaks (see for example the declaration by the proprietor of the C.M.S.-restaurant in (…), OK 3 p. 10 and 66).

The working conditions employed by K.S.G. were also known with an anonymous complainant, (see OK 2, p. 42) which makes it difficult to picture why the defendant C.M.S. was then not at all aware of these circumstances.

From the wording of the contracts that were concluded between the defendant C.M.S. and K.S.G. for the period April-June 2008 and from the concrete circumstances of their cooperation it appears that C.M.S. had knowledge of the way in which K.S.G. worked with so-called 'self-employed' foreign 'subcontractors' to execute the contracts.

The agreements were concluded with the knowledge that K.S.G. would work with self-employed persons.

The agreement concluded on 28 March between C.M.S. and K.S.G. on the sanitary facilities in Ranst, Kalken, Gierle and Rotselaar contained a clause in article 3 stating that the proprietor remains responsible for the persons he employs for the execution of the agreement and that these persons are to work 'in accordance with' Belgian social- and labour legislation.
The subsequent agreements entered into in the period April-June 2008 no longer contained the clause whereby those employees had to work 'in accordance with' amongst others the Belgian labour laws. Article 3 of these particular agreements provided that K.S.G. bears the responsibility to ascertain itself that the persons hired by it, are affiliated with a social security organisation for self-employed persons and that it acquires from these persons proof of payment of social security contributions (art.3).

The defendant C.M.S. was aware that the status of self-employed person implies that the labour laws regarding wage and working hours do not apply.

A big company like the defendant C.M.S., which above all was advised by external council for these contracts, **was without a doubt aware of the risk that employees were wrongfully categorised as self-employed, that it was a fake construction. The fact that employees of K.S.G. were formerly employed on a regular basis should have warned C.M.S. even the more so.**

The defendant C.M.S. was aware that K.S.G. worked with foreign employees. It appears from the files from Turnhout that K.S.G worked with foreign employees only.

The contracts for the period April-June 2008 simply confirm this. Whereas the contract of 28 March 2006 still contained a provision requiring the proprietor, his assistants or possible replacement, to speak and read either the Dutch or French language, according to the place of employment, such a provision was no longer present in the contracts for the period April-June 2008.

The declaration by S.M. that this was simply overlooked and not intentionally left out, is not credible; neither is his declaration that he 'was not surprised' that the staff did not possess knowledge of the Dutch language.

With the knowledge the defendant C.M.S. possessed about the dubious practices of K.S.G in the past and while being aware of the identity of the persons employed in the sanitary facilities, C.M.S.

could not reasonably expect that their employment was based on a legitimate working relationship between K.S.G. as a contractor and the employees as self-employed subcontractors.

It is apparent from the declarations made by the managers of C.M.S. that those responsible chose to ignore the way in which K.S.G. employed its workers. Despite their knowledge concerning K.S.G's practices in the past and the risk of illegal employment connected with those practices, C.M.S. has even considerably expanded its collaboration with K.S.G. from April 2008 onwards (amongst others in Drongen and Wetteren), without any guarantee that the workers were employed legally.

The fact that K.S.G. did not receive any written confirmation of possible infringements from the investigators in Turnhout, does not imply that K.S.G. could not at any point in time end the agreements with K.S.G., contrary to what the defendant C.M.S. itself argued. C.M.S. could withdraw from those agreements at any given time (both for the contract entered into on 28 March 2006, see art. 12 of that agreement, and those for the period April-June 2008, art. 10).

C.M.S. could also not reasonably assume that the E-101 forms provided by the workers were sufficient proof that they were employed legally by K.S.G., especially having regard to the fact that C.S.M. is a big company with its own legal division which even hired external council for these contracts.

Without the conclusion of the contracts for the facilities in Kalken, Drongen and Wetteren and the continuation of the execution of those contracts it would not have been possible for K.S.G. to commit the criminal facts assigned to it.

The defendant C.M.S. was aware that K.S.G. employed foreign workers using the construction of self-employment without any certainty that this status was legitimate and without any certainty that the labour rules concerning duration and wage were applied correctly (especially with regards to the long and continuous periods of work, 7 days a week, from 7h in the morning until 22h at night). **C.M.S. did thus deliberately take the risk and accepted that its cooperation with K.S.G. would amount to employment of foreign workers without due consideration to the applicable labour rules** (like those concerning work permits and social security) and without respecting the minimum rules for work duration or wage.

To establish complicity it thus suffices that the defendant **C.M.S. willingly and knowingly cooperated with K.S.G. which led to employment of workers who performed their tasks 7 days a week, without breaks and for a period of several weeks in a row, without sufficient pay, or at least that the defendant C.M.S. willingly and knowingly cooperated with K.S.G. and thereby was aware of, and accepted, the risk that cooperation with K.S.G. could lead to such employment of workers.**

It is not necessary, to establish complicity, to go into further detail about the circumstances that lead to the qualification of the facts as human trafficking.

The possibility that the defendant C.M.S. might not have continued its collaboration with K.S.G had it known that the practices lead to the qualification of human trafficking (and not only to non-compliance with social obligations, for which C.M.S. placed full responsibility with K.S.G. – see art.

3, paragraph 7 of the agreement with K.S.G.) does not mean the defendant C.M.S. is not an accomplice to the facts listed under D. The establishment of complicity does not require the accomplice to know the legal qualification of the actions he participates in. A contract which places the responsibility for compliance with labour laws with a third party does also not make the party awarding the contract immune for possible criminal responsibility in connection with complicity.

For the facts concerning P.A and M.C., who were employed in the sanitary facilities in the gas stations of (…) the complicity of the defendant C.M.S consist of recommendation of the services of K.S.G. to BVBA R(…) and without which those criminal acts would not have been committed.

Human trafficking is to be taken very seriously.

The hopeless situation of the workers in their home countries or the country they migrated to was abused in order to make them perform tasks for very low remuneration while generating considerable profit. The workers were no more than tools in that sense. There was no possibility for them to develop any sort of dignified social life outside of their working hours.

The workers completely depended on K.S.G. They had no legal right of stay in Belgium. Their form of employment at constantly changing locations and the low wages made it impossible for them to obtain the right to stay or the possibility to develop a normal life, independent of K.S.G.

Moreover, the reluctance, even fear with which the victims of human trafficking made their declarations, implies that they were under a lot of pressure.

Human trafficking does not only affect the victims but also the community as a whole. Human trafficking, amongst others, infringes upon the social security system and subverts the labour market.

The activities that are employed by the victims of human trafficking also hinder the regular economic order. K.S.G's practices have prevented other companies that did act in compliance with the law to develop their legitimate economic activities.

The imprisonment and monetary fine provided for hereafter are adjusted according to the severity of the facts and participation of this defendant in those facts.

The car possessed by the defendant which was seized, a Mercedes C (OK 5, p. 26), is confiscated as the means by which the defendant committed the criminal acts, namely the transport of the workers from Germany to Belgium (see amongst others the declaration by P.A., OK 2, p. 121).

This defendant was in fact the manager and organiser of K.S.G's activities, which directly provided him profit.

Having regard to the severity of the facts as explained above and the leading role played by this defendant, imprisonment and a monetary fine are imposed as determined hereafter.

With regard to Carestel (C.M.S)

The responsibility of this defendant is extensive. **Mischievous companies can only employ workers and neglect all labour- and social security regulations because they get orders from other companies that deliberately ignore the malpractices.**

The defendant C.M.S. was under the erroneous impression that it could develop itself and realise its goals on the market with the cheapest possible means, thereby disregarding the way in which third parties executed the assignments outsourced to them.

Outsourcing and the free movement of workers and services within the European Union are not an excuse for deliberately ignoring the distressing exploitation of workers.

A commissioning company which has outsourced tasks to third parties and at a certain point becomes aware of the unacceptable working conditions that are imposed on the workers of this third party, yet does not decide to end the contract**, is an accomplice to this exploitation.**

Presuming that the contract with K.S.G. liberates the defendant C.M.S. from all its responsibilities is no more than pure cynicism.

The defendant has asked for a suspension; this would however entail a solution that does not meet the expectations of society.

A monetary fine as imposed hereafter is necessary to point out the responsibilities of the defendant.

The court has taken the financial advantages into account while determining the monetary fine and therefore will not separately go into confiscation of the illegitimately acquired financial advantages.

The court points out that it was impossible to determine the exact advantage acquired by C.M.S.

The illegitimately acquired financial advantages of 32.450euro were determined by the investigators, but for a period which does not correspond to the period investigated for this case (see OK 2, p. 546).

The advantage realised by C.M.S. through its cooperation with K.S.G. is not confined to the compensation that had to be paid by K.S.G., yet expanded to the costs C.M.S. did not incur when it was no longer responsible for the sanitary facilities and had outsourced the responsibility for maintenance of those facilities.