

Question 6-1

What is the test in your country's complicity laws for determining that an accomplice had the requisite *mens rea* in providing assistance, encouragement or means to the principal perpetrator of a crime? In some circumstances, your jurisdiction may find that more than one test satisfies the *mens rea* requirement.

Repression of complicity is based on the theory of "assumption of criminality". The accomplice is punishable because he takes on himself, the criminality of the act committed by the perpetrator.

In order to be punishable the complicity needs a criminal intention to be found in the accomplice. This intention is:

- The fact that the participation act (cf. 6-2) has been voluntary
- The consciousness and the will to participate to the main offence

The intention must exist when the material fact of aiding or abetting has been perpetrated. But, the intent can be inferred from the accomplice's acts committed after the main offence (Cass. Crim. 04/11/1991).

A/ Must the prosecution prove that the accomplice *wanted* the perpetrator to carry out the particular crime, i.e. the accomplice *intended* that the crime be committed? This is the *dolus specialis*, or "shared intent" test. (Note: Please indicate if an accomplice's shared intent might be inferred from his actions as an evidentiary matter)

The needed intention is that the accomplice wished to associate himself to the main undertaking. It is not needed to prove that the accomplice wanted to associate himself to the result of the offence. There are various consequences to this principle:

- If a *dolus specialis* is an element of the offence it is not needed that the accomplice shares this special intent. It is only needed to prove that he knew that this special intention existed within the main perpetrator (Cass. Crim. 23/01/1997, Cass. Crim 30/10/1989)
- It is possible to be an accomplice to an unwilling offence (Cass. Crim. 17/11/1887) even if in general the judges will prefer to consider the alleged accomplice as a co-author (Cass. Crim. 24/10/1956).
- Complicity for misdemeanours qualified as "délits matériels" (material misdemeanour) (eg: that do not require intent to be punishable) can exist and be punished (Cass. Crim. 29/04/1910).

So it is not needed that the prosecution proves the shared intent (Cass. Crim. 23/01/1997).

B/ Must the prosecution prove that the accomplice had actual knowledge that the assistance provided would assist the perpetrator to commit a specific crime (or alternatively a crime or some sort)? (sometimes referred to as a requirement of "knowledge").

As stated above it is needed that the accomplice has the intention to be associated to the main offence. Some problems exist when the offence actually committed is different from the planned offence.

- If the actual offence is less serious and of the same nature than the planned one (For example: the accomplice thought a murder would be committed but violence are actually committed), then the accomplice is still punishable with the penalty attached to the

committed offence. Eventually, the accomplice could be punished for complicity of the attempted planned offence.

- If the actual offence is less serious than the planned one, and if the nature are different (murder and theft) then the accomplice should not be punished because of a lack of intention. He can not be punished for the planned offence because it did not occur, he can not be punished for the actual offence because of the lack of intent.
- If the actual offence is more serious than the planned one then the accomplice should not be declared culprit. (For example: A gives information on the travelling of B to C, in order for C to steal B's wallet. C uses this information to sneak into B's house and kills his wife) (Cass. Crim. 13/01/1955). This is a consequence of the "assumption of criminality" theory. The accomplice can not be punished for the intended offence that has not been committed. He can not be punished for the actual offence because of the lack of intent.
- If the actual offence is of the same nature but differs because of aggravating circumstances then the penalty incurred by the accomplice depends of the kind of circumstances.
 - Personal circumstances (that concern the perpetrator not the act like relapse) are appreciated differently for each participant. They can not extended to the accomplice if he is not in this situation (and they can not be extended to the perpetrator if he is not in this situation)
 - Real or objective causes (that concern the act not the author) can be extended to the accomplice even if they were not foreseen by the accomplice.

So it is needed that the accomplice has actual knowledge that the assistance provided would assist the perpetrator to commit a crime.

C/ Would it be sufficient to show that the accomplice was indifferent toward, or accepted the chance that the assistance provided might assist the perpetrator to commit a crime (not a specific crime)? This is the *dolus eventualis* test.

D/ Would it be sufficient to show that it was *foreseeable* that the assistance provided would assist the perpetrator to commit a crime? (This test is sometimes stated as "knew or should have known that . . .")

To be punishable the complicity needs the intent to be consciously associated to the offence, the consequences is that there can not be any complicity through a careless action, or through negligence (Cass. Crim. 06/12/1989).

So it is not sufficient to show that the accomplice was indifferent toward the result, that he accepted the chance that the assistance provided might assist the perpetrator to commit a crime or that it was foreseeable that the assistance provided would assist to commit a crime.

But as stated above, judges can use material facts, even committed after the offence, to infer the existence of the intention of the accomplice.

E/ Would a court impose a more lenient test to determine whether the *mens rea* was present if the crime involved were a particularly serious or egregious one? Alternatively, would a court impose a more lenient test for lesser types of offenses? (e.g., misdemeanors)?

No, in theory. On the contrary, in case of very serious breach implying very serious sanctions, the 'benefit of the doubt' may, in specific cases be apprehended more favorably by the judge. However, it should be noticed that in such cases, *a contrario*, pressure from victims and the public might lead to an opposite result.

F/ If your country's laws do not impose criminal liability on legal persons, or if government agencies (including state-owned enterprises) are not covered by your country's criminal laws, is there an alternate mechanism whereby victims or foreign governments may obtain administrative remedies against such persons/agencies for acting as accomplices?

ARTICLE 121-2 of the French Penal Code states:

Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

So state-owned enterprise criminal liability can be engaged. Not only against public or private entities but also against their respective executives.

Question 6-2

What is the test in your country's complicity laws for determining that assistance was provided by the accomplice (the *actus reus*)?

Article 121-6 and 121-7 of the French penal code deals with complicity:

ARTICLE 121-6

The accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator.

ARTICLE 121-7

The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission.

Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.

A/ Must the assistance be *physical*, i.e. in the form of money, cash, arms, active physical help, etc?

B/ Could the assistance be *moral or verbal*, i.e. in the form of encouragement, incitement, approval, planning assistance, etc

The act of complicity must, in principle, be a positive act (i.e. not an omission or an abstention) this is a general principle affirmed by many case law (Cass. Crim. 21/10/1948, Crim. 09/02/1950). This is deduced from the fact that complicity supposes participation of the accomplice through one of the facts stated in the article 121-7, the abstention of the person that willingly does not oppose himself to the perpetration of the behaviour can not be assimilated to one of the act of complicity specified by article 121-7. In cases of corporal integrity offences, the penal code provides a specific misdemeanour that incriminates the mere fact of not opposing to the commission of the offence. (For an analysis of these offence cf: question 6-2 D)

The different positive acts that can be acts of complicity:

Provocation

In order to be punishable provocation must be reinforced by use of certain means mentioned in section 2 of the article 121-7. So, in principle, a mere advice to do something can not be punished (Crim. 24/12/1942). But, if the advice contains enough details concerning the execution of the offence, case law punishes it as instructions given to commit the offence (Crim. 25/02/1959).

These means are gift and promises (eg if someone promises money for the commission of a crime), threat (the threat must not consist of a threat as stated in article 222-17, 222-18 or 322-12 and 322-13 of the French penal code) order (even if the author of the offence is not legally bound to fulfil the order), or an abuse of authority (legal, contractual or factual = mainly moral or economic) or powers.

In certain cases (stated by article 29 of the law of 1881 on the freedom of press or art. 227-20, 227-19, 434-32, 411-11, 412-8, 431-6, 464-15) law represses the provocation to commit offences as separate offences

Instruction

In order to be punishable instructions do not need to be backed by any of the precedent means. Nevertheless, they need to be precise, and vague information are not sufficient. There will be punishable instructions each time the alleged accomplice will have supplied the perpetrator with precise instructions that can facilitate the offence. Tribunals must precisely state what have been the instructions and their role in the commission of the offence (Crim. 24/03/1960). But, they do not need to name the person who received the instructions. Generally the instructions do not need to have been followed for the accomplice to be punishable.

Aiding and Abetting

The fact of aiding and abetting must occur before the perpetration of the act or concomitant to the act but case law punish aiding and abetting after the perpetration if it results of an agreement made before the act. Nevertheless, the behaviour of the alleged accomplice after the commission of the fact can be taken into account in order to determine the mens rea. The aiding and abetting can take two forms

The help can have been provided during the preparation of the offence or during its execution (even after the offence if they result from a previous agreement). The only condition is that the author has reached the point of a punishable attempt (Crim 23/05/1973, 28/06/1993). The facts used to help can be very wide and it is not possible to make a comprehensive list of the different possibilities. But the facts made by the accomplice do not need to be element of the offence (this is the distinction between an accomplice and an author).

Supply of means

It can first be the supply of material means used to commit the offence: weapons, documents or any other means useful. So is an accomplice the person (natural or legal) who supplies the money necessary to commit the offence (Crim. 08/01/1998). The fact that the means supplied have or have not been essential for the commission of the offence is not relevant as soon as it has been really used, or even as soon as it has just stimulated the perpetrator to commit the offence (idem if the mean was not useful for the commission of the offence). But if the mean was neither an encouragement nor has been used then the accomplice should not be punished because the offence will have been committed by other means (Crim. 13/01/1954).

The means must, of course, have been supplied, while knowing that it was going to be used to commit an offence (see question 6.1 above).

C/ Could the assistance consist of a failure to perform a legal duty?

In spite of the principle of the existence of a positive fact in order to have a punishable complicity, Judges consider as an accomplice someone who had a duty to prevent the commission of the offence. But in this case, it is not considered as pure abstention but as "abstention dans l'action ou dans le devoir" (abstention in the action or in the duty) that can be considered as a positive act.

The duty to prevent the commission of the offence can be legal (for custom agent Crim. 27/10/1971) or professional (about "Abus de bien sociaux" Crim. 28/05/1980). In this case the abstention will be considered as complicity through aiding or abetting.

D/ Could the assistance consist of remaining silent when the crime is being committed, although the accomplice had the moral, legal or physical ability to prevent the crime, e.g. by withholding the assistance or lodging a protest (sometimes referred to as complicity by omission)?

Pure abstention is not punishable under French law. Some French authors think that there should be a distinction between "neutral" abstention and the cases where the abstention, even without any positive action, constitutes an incitement to commit the offences (A. Chavanne JCP 1950.II.5629). The first should remain non-punishable while the second should be punished. This distinction does not exist yet *de lege data*, even if, in a very special case, a mother has been considered as an accomplice for not having taken off her son a weapon he used a few hours later to kill his father (Cass. Crim. 19/12/1989).

In certain cases the French penal code punishes the mere abstention. It is the above mentioned article 223-6 of the penal code. This article deals with two different behaviour, the abstention to prevent "by immediate action a felony or a misdemeanour against the bodily integrity of a person" and the fact of wilfully failing "to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations".

Article 223-6 of the French penal code deals with complicity:

ARTICLE 223-6 :

Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations.

Both the conditions of existence and the scope of application of the two offences are different.

1 /Abstention to prevent an offence against the bodily integrity

The offence

It is an evidence but this offence can not exist without a temporal proximity with a primary offence against the bodily integrity of a victim. So abstention to prevent the commission of a theft or an act of corruption can not enter in the scope of application of this offence. This condition demonstrate that this offence is not created to prevent the commission of offences in general, but to prevent physical aggression.

The implementation of this offence confirms its finality of protection of the human life. There are nearly no application to offences without any danger for bodily integrity. But the infringement to corporal integrity can derive from the aggravating circumstances.

Even if, it is not necessary that the offence to prevent is currently taking place, the commission of the offence must be imminent. This requirement of imminence imposes a very great temporal proximity between the needed action and the offence.

The absence of action

The article 223-6 states that an " immediate action" must be possible to prevent the commission of the offence. The effective commission of the main offence or its failure are not relevant for the incrimination of the behaviour, because the abstention to act is punishable. As a consequence, to be punishable the abstention only requires a possibility of immediate action that could prevent the commission of the main offence (Cass. Crim. 16/11/1955 Bull. Crim., n°489), without risk for the author of the action.

The possible forms of the action are not stated in the text of the penal code, so any kind of action can be used as long as they are able to prevent the commission of the offence (Actions can be personal or through the warning of police, firemen ...). If the action used by the author is deemed insufficient, the author can still be pursued. But the insufficiency is not appreciated by comparison to the outcome of the offence. To be deemed sufficient the action must have had a probable efficiency, that is why mere verbal dissuasion is often deemed insufficient (Cass. Crim. 26/03/2002). On the other hand, the requirement of absence of risk for the author of action often prevents to make necessary a physical dissuasion.

The mens rea

The author must be aware that an offence was imminent. The hypothesis concerns cases where someone who witnesses behaviour against corporal integrity but who is not aware that they are offences (C.A. Paris 15/06/1951 Dalloz 1951 p. 598). These should not be very problematic in case of corporate implication because the adage "nemo censetur ignorare legem" should be appreciated strictly regarding transnational companies.

Moreover, the author must have had the will of not preventing the offence. So, if the author thought, in good faith, that he could not prevent the commission of the offence, or that all the means he could used had already been used, he can not be punished.

2/ Abstention to offer assistance to a person in danger

The scope of application of this offence is much larger than the precedent: there is no need of an imminent offence, an imminent peril or danger. But the abstention is built of the same manner: Someone must be in peril, the author can be able to act in order to prevent the peril and refuse to do so. So the developments concerning this offence will be much shorter.

The peril

To be punishable the abstention requires the existence of a peril. The state of peril is defined as "a dangerous state or a critical situation that causes fear of grave consequences for the person exposed and that risks either grave corporal infringement or to lose his/her life" (T.C Rouen 09/07/1975 Dalloz 1975 p. 531). The consequence is that a peril exists when a risk exists and not only when the risk is realised (when the injury really takes place). In case of prospective or hypothetical risks there is no peril. The peril must be verified by tangible facts that prove its presence. So, it is necessary to prove that there is really a dangerous situation for the victim (Cass. Crim. 13/11/2005 JCP 1956 II 8560). The origin of the peril is not relevant. It can originate from natural circumstances, from the behaviour of the author of the abstention or from a third person. The only thing that matters is that the peril really exists and that a human being is in danger.

The absence of assistance

The absence of help is the *actus rea* of this misdemeanour. This offence is a "formal offence" (infraction formelle) meaning that the offence exists only because no help has been given, the fact that the peril is or is not realised, later on, is not relevant. The assistance had to be possible. It is not possible to convict someone when no assistance was possible. But the assistance must not be appreciated compared to the peril. The offence is an absence of assistance to the victim not an absence of struggle against the peril. That is why, the offence can exist even if it was not possible to avert the peril, so the perpetrator can not defend himself by proving that the assistance would have been useless because of the gravity of the injuries suffered by the victim (Cass. Crim. 23/03/1953 Bull. Crim., n°104). In another way, the assistance is not subordinated to its efficiency.

The physical presence of the person on the place of the peril is not necessary (Cass. Crim. 21/01/1954 Bull. Crim., n°25 About a doctor refusing to come and see a patient).

The type of required assistance is not written. It could be both direct assistance or calling for help. The only requirement is that the assistance must be of a certain quality e.g., of the best possible quality. If someone calls for help, while a personal action would have been more efficient then his assistance is not of a sufficient quality.

No one is asked to help someone if it puts himself at risk. The kind of risk is not written in the text but only risks of corporal injury or of loss of life can be relevant.

The mens rea

The author must have been aware that there was a peril for the victim. And he must have wanted his lack of assistance (see above)

E/ Must the assistance have amounted to a *substantial* contribution towards the commission of the crime? (This is the term used in the international standard.) Or will the court otherwise assess the *degree* to which the accomplice's aid contributed to the commission of the crime?

Cf A/ and B/

F/ May the assistance be provided after the crime has been committed?

The principle is that the act of complicity must have occurred before or concomitantly to the main act. But if the assistance given after the offence results of an agreement made before the commission the complicity is punishable. The existence of the agreement can be inferred from the behaviour of the accomplice.

Question 6-3

In order to charge an accomplice with complicity:

A/ Must an actual crime have been committed?

No a punishable attempt is enough

B/ Must the perpetrator have proceeded to the point at which he could be charged with an "attempted" crime?

Yes

C/ Must the perpetrator have been apprehended or charged with the principal crime?

No (Cass. Crim. 24/05/1945, Crim. 03/03/1959)

STUDY REALISED BY JOSEPH BREHAM UNDER THE SUPERVISION OF WILLIAM BOURDON