



C L I F F O R D
C H A N C E

Corporate Liability in Europe



contents

Introduction	1
Belgium	4
Czech Republic	7
France	10
Germany	13
Italy	16
Luxembourg	20
The Netherlands	23
Poland	26
Romania	29
Slovak Republic	32
Spain	35
UK	38

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you would like to know more about the subjects covered in this publication or our services, please contact:

UK:	Roger Best +44 (0)20 7006 1640 Rae Lindsay +44 (0)20 7006 8622 Martin Saunders +44 (0)20 7006 8630 Luke Tolaini +44 (0)20 7006 4666 Patricia Barratt +44 (0)20 7006 4820 Judith Seddon +44 (0)20 7006 4820 Chris Stott +44 (0)20 7006 4231
Belgium:	Sébastien Ryelandt +32 2533 5988
Czech Republic:	Alex Cook +420 22255 5212 Michal Jasek +42 0731471431 Miroslava Obdržálková +420 22255 5243 Alexandra Germaniova +420 22255 5215
France:	Christian Dargham +33 14405 5429 Charles-Henri Boeringer +852 2826 3517
Germany:	Heiner Hugger +49 697199 1283 Raimund Röhrich +49 697199 1457 Beatrix Elsner +49 697199 1455
Italy:	Antonio Golino +39 028063 4509
Luxembourg:	Albert Moro +352 485050 204 Claude Eischen +352 485050 268 Admir Buljubasic +352 485050 482

The Netherlands:	Joost Tonino +31 20711 9236 Joost Heurkens +31 20711 9386 Jeroen Ouwehand +31 20711 9130 Simone Peek +31 20711 9182
Poland:	Marcin Cieminski +48 22429 9515 Pawel Pogorzelski +48 22429 9508 Bartosz Kruzewski +48 22429 9514
Romania:	Daniel Badea +40 216666 101 Alexandru Gosa +40 216666 275 Bianca Alecu +40 216666 127
Spain:	Jose Antonio Cainzos +34 91590 9405 Fernando Gimenez-Alvea +34 91590 4175

To email one of the above, please use
firstname.lastname@cliffordchance.com

© Clifford Chance LLP January 2012

10 Upper Bank Street, London, E14 5JJ

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

www.cliffordchance.com

Introduction

This European survey of corporate criminal liability seeks, on a jurisdiction-by-jurisdiction basis, to answer some common questions on a subject which features regularly in boardroom agendas.

The survey looks at whether there is a concept of corporate criminal liability in several European jurisdictions. We consider the underlying principles of such liability and the relationship with individual officers' liability. We look at whether there are any specific defences, or mitigating factors, and at the type and level of penalties.

What our survey shows is not only that corporate liability has been introduced in most jurisdictions enabling courts to sanction corporate entities for their criminal acts; but that there is also a general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers. In those countries where there is no criminal liability per se, there is either quasi-criminal liability or the introduction of corporate criminal liability is being considered. A notable exception is Germany, where the strong feeling is that imposing corporate criminal liability would offend against the basic principles of the German Criminal Code. Nevertheless Germany's regulators have taken robust regulatory action against various German companies as a result of their criminal conduct, imposing large fines which have caused significant reputational damage. Arguably, this has been as effective as any criminal sanction.

European context

Before looking more closely at corporate criminal liability across Europe, it is instructive to consider the context in which Member States are operating. Whilst national security remains the responsibility of each Member State, judicial cooperation in criminal matters across Europe has become an essential element in ensuring the effective operation of each Member State's criminal justice system. Based on the principle of mutual recognition of judgements and judicial decisions by EU countries, this was introduced by the Maastricht Treaty in 1992. Because legal and judicial systems vary from one EU country to another, the establishment of cooperation between the different countries' authorities has been a key feature of the EU legal landscape over the past decade or so. Of particular relevance is the Convention on Mutual Assistance in Criminal Matters dating from 2000 which strengthened cooperation between judicial, police and customs authorities. The first instrument to be adopted on the basis of the principle of mutual recognition of judicial decisions was the European Arrest Warrant ("**EAW**") which came into operation in January 2004 and which has become a key tool in the fight against cross-border crime. An EAW may be issued by a national judicial authority if the person whose return is sought is accused of an offence for which the maximum period of the penalty is at least one year in prison or if he or she has been sentenced to a prison term of at least four months.

With the introduction of the Lisbon Treaty, which came into effect on 1 December 2009, the role of the EU is likely to increase. In particular, the Lisbon Treaty provides for a new legal framework for criminal legislation concerning, for example, minimum rules regarding the definition of criminal offences for so-called 'Euro crimes', which include offences such as terrorism, money laundering, corruption, computer crime and organised crime; common minimum rules on the definition of criminal offences and sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy; and minimum criminal sanctions for insider dealing and market manipulations. In this latter area, current sanction regimes do not always use the same definitions which is considered to detract from the effectiveness of policing what is often a cross-border offence. There is currently a proposed Directive which requires Member States to take the necessary measures to ensure that the criminal offences of insider dealing and market manipulation are subject to effective, proportionate and dissuasive criminal sanctions. Significantly in the context of corporate liability, the proposals suggest the application of criminal sanctions to natural and legal persons (in other words, to corporate entities as well as to individuals). However, it is not proposed that liability would attach to legal persons in circumstances where they had in place effective arrangements to ensure that no person in possession of inside information relevant to the transaction could have transmitted that information.

The criminal liability of legal persons in the context of insider dealing and market abuse opens up the question of corporate liability across Europe more generally.

A new concept

In all jurisdictions where the concept of corporate, or quasi-corporate, criminal liability exists, it is, with the exception of the UK and the Netherlands, a relatively new concept. Those countries apart, France was the first European country to introduce the concept of corporate criminal liability in 1994, followed by Belgium in 1999, Italy in 2001, Poland in 2003, Romania in 2006 and Luxembourg and Spain in 2010. In the Czech Republic, an act creating corporate criminal liability has just become law as of 1 January 2012. Even in the UK where criminal liability for corporate entities has existed for decades, many offences focussing on corporate criminal liability have been created in recent years. In the Netherlands, until 1976 only fiscal offences could be brought against corporate entities.

The movement towards criminal liability for corporate entities is likely to continue.

Basis of corporate liability

The basis or proposed basis of liability for corporate entities within those countries where liability exists (or is proposed) rests on the premise that the acts of certain employees can be attributed to a corporate entity. The category of employees which can trigger corporate liability is limited in some jurisdictions to those with management responsibilities and the act must generally occur within the scope of their employment activities. The act must also generally be done in the interests of or for the benefit of the corporate entity.

Systems and controls

One feature running through the legal framework in many of the jurisdictions is a focus on whether the corporate entity had proper systems and controls to prevent the offence from occurring. Such systems and controls can either operate to: (i) show there was no intent to commit an offence on part of a corporate, (ii) provide a defence, (iii) be a mitigating factor upon sentence or (iv) impact on decisions to prosecute and on penalties.

In relation to intent, in Luxembourg, for example, whilst there are no defences expressly set out in the applicable legislation, all offences require proof of intent leaving it open to a corporate entity to advance arguments that it had appropriate systems and controls in place and so could not have intended the offence.

In many jurisdictions, corporate entities will have a defence if they show they had proper systems and controls in place to prevent an offence from being committed.

In Belgium, except for offences of strict liability, a corporate entity can avoid criminal liability altogether by proving that it exercised proper due diligence in the hiring or supervising of the person that committed the offence and that the offence was not the consequence of defective internal systems and controls; whilst in Germany, a corporate entity's owner or representatives can be held liable (within the regulatory context) if they fail to take adequate supervisory measures to prevent a breach of duty by an employee, but it is a defence for the owner and the representatives to show that they had taken adequate preventative measures. In Italy, the corporate entity has an affirmative defence if it can show that it had in place and effectively implemented adequate management systems and controls. Likewise, in Spain, corporate entities will not be criminally liable if they enforce appropriate supervision policies over their employees. In Poland the corporate entity is only liable if it failed to exercise due diligence in hiring or supervising the offender or if the corporate entity's representatives failed to exercise due diligence in preventing the commission of an offence; and in Romania, the corporate is only liable if the commission of the offence is due to the latter's lack of supervision or control.

In some jurisdictions, measures taken by a corporate entity to prevent the commission of offences may be mitigating factors upon sentence. For example, in Italy a fine imposed on a corporate entity will be reduced by 50% if, prior to trial, a corporate has adopted necessary and preventative internal systems and controls.

Even where it is not an express defence or it is not taken into account expressly as a mitigating factor, the adequacy of a corporate entity's processes and procedures is likely to be relevant both to regulators, prosecutors and courts in determining whether to prosecute and, if prosecuted, in deciding what penalty to apply. For instance, in France, the existence of adequate compliance procedures and control systems may be taken into account by the courts in considering the context of the offending, even though compliance procedures, of themselves, do not constitute an affirmative defence.

The importance placed on adequate systems and controls by applicable legislation, and more broadly by prosecuting authorities and courts, demonstrates the importance of having such systems in place at the corporate level. In the UK, the concept of adequate procedures has risen high up the corporate agenda as a result of the Bribery Act 2010. Corporate entities without adequate procedures are liable to be prosecuted for the offence of failure to prevent bribery by their employees, or indeed by anyone performing services for or on behalf of the corporate entity.

Penalties

The level of penalties varies across jurisdictions, but there are certain common trends. The most common penalty imposed on a corporate entity is a fine. The level of fines has seen an upward trend in recent years across many jurisdictions and can be very high. In Belgium, it is felt that the level of fines can act as a deterrent for small companies. In the UK, in respect of certain offences, the level of fines can be so high as to put the corporate entity out of business, which is seen, in certain circumstances, as an acceptable consequence.

Other penalties are of course available. Several jurisdictions, such as France and Spain, envisage the dissolution of the corporate entity in certain cases. Another common feature is a ban from participating in public procurement tenders.

Mitigation

Another feature across many jurisdictions is the potential to mitigate the consequences of any liability by cooperating with the authorities. It is no surprise that, in an era of increasingly scarce resources, prosecutors and regulators alike are willing to reduce the potential penalties in exchange for co-operation by the corporate entity.

Most jurisdictions recognise co-operation as a factor to be considered in mitigation and it can dramatically affect the penalty.

For example, in the UK the Serious Fraud Office suggests that corporate entities self-reporting instances of corruption may avoid criminal liability altogether and instead face a civil recovery order, which essentially amounts to a civil recovery of unlawful assets, and avoids the stigma of a criminal conviction. In Romania, where corruption offences arise, criminal liability can be avoided altogether if the corporate entity self-reports before an investigation has started. In other countries, co-operation will be considered a mitigating factor when it comes to sentencing.

Given the hefty financial penalties which can be meted out, and with confiscation becoming a regular feature of the legal landscape (including in countries where only quasi-criminal liability exists), it is evident that corporate entities should be focusing on ensuring that their procedures are adequate bearing in mind the risks faced by the business.

There is a growing trend by regulators of taking aggressive action. In straitened economic times which many regard as attributable to corporate wrongdoing, corporate entities are on prosecutors' radars in a way that previously they were not.

In many jurisdictions it is still too early to judge how effectively prosecutors will make use of the legislation at their disposal. Nevertheless, the signs are that the trend is towards greater, not less, scrutiny of the conduct of corporate entities and their officers.

Belgium

Introduction

Traditionally, legal entities were not criminally liable under Belgian law. In the case of an offence committed by a corporate, only those persons who were responsible for the corporate and who had the duty to prevent the offence could be punished.

The situation changed radically with the adoption of the law of 4 May 1999, which came into force on 2 July 1999, on the criminal liability of legal entities. This law enables corporate entities to be prosecuted, with some limited exceptions.

Under Belgian law, corporate entities are mainly exposed to the risk of criminal investigation or prosecution in the fields of environmental law and regulation, labour law, road traffic offences, consumer protection, aggravated tax fraud, market manipulation and money laundering.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- A corporate entity can incur criminal liability either where a criminal offence is committed on its behalf or when an offence is intrinsically linked to its activities.
- This is interpreted broadly. For example, a corporate could be criminally liable if one of its truck drivers caused an accident as a result of a violation of the highway code.
- However, a corporate entity may not be convicted for the criminal acts of its employees committed outside the scope of their professional activities.

What offences can a corporate not commit?

- A corporate entity can commit any offence, except those for which only physical persons could be held liable (e.g. bigamy).

Are there any specific defences available?

- With the exception of strict liability offences, a corporate entity can avoid criminal liability by proving that it did not have any criminal intent, that it has exercised proper due diligence in the hiring or supervising of the person who committed the offence and that the offence was not the consequence of defective internal systems and controls.

What is the relationship between the liability of the corporate entity and its directors and officers?

- There is no need to identify the physical person who committed the offence on behalf of the corporate entity in order to prosecute the corporate entity.
- When a criminal offence, which is committed on behalf of a corporate entity or which is intrinsically linked to the activities of the corporate entity, is attributable to one or more physical person(s), both the corporate entity and the physical person(s) may be prosecuted at the same time.
- In principle, the corporate entity is liable for the civil consequences of the offences committed by its directors, managers and employees.
- For specific offences, such as the violation of the highway code, the corporate legal entity is jointly and severally liable vis-à-vis the Belgian State for the fines imposed on its directors, managers and employees.

- There is an exception to this principle of concurrent liability which applies when an unintentional offence has been committed. In that case, only the person (corporate entity or physical person) who has committed the most serious fault may be prosecuted. This rule is very controversial and creates conflict of interest issues in circumstances where a company is prosecuted for an unintentional offence (strict liability) at the same time as its directors or managers.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- The public prosecutor (*Procureur du Roi / Procureur des Konings*) is in charge of prosecuting criminal offences committed by corporate entities.
- Most investigations will be carried out by the public prosecutor, with the assistance of the police. However, more complex investigations requiring, for example, powers of search and seizure and/or powers of arrest and detention must be carried out by an investigating magistrate (*juge d'instruction / onderzoeksrechter*).
- Criminal proceedings against corporate entities are, like proceedings against physical persons, conducted in accordance with the Belgian Code of Criminal Procedure. At the end of the investigation and upon requisitions from the public prosecutor, the Council Chamber (*chambre du conseil / raadkamer*) will decide whether there are sufficient grounds to bring the suspect(s) before the criminal courts or not. The criminal court of first instance (*tribunal correctionnel / correctionele rechtbank*) is competent to adjudicate the case at first instance. The judgment can be appealed before the Court of Appeal (*Cour d'appel / Hof van beroep*). Issues of law can then be appealed before the Supreme Court (*Cour de cassation / Hof van cassatie*).

Punishment

Corporate entities

- The penalties that corporate entities can face are determined by the Belgian Criminal Code. In cases where imprisonment is the proposed penalty for a particular offence, this is automatically converted into a fine. The amount of the fine is determined according to a formula based on the number of months' imprisonment imposed.
- The level of the fines may have a deterrent effect on small corporate entities. Experience suggests that large corporate entities are more concerned about the reputational risk and the consequential civil liability that can result from a conviction.
- For specific offences, such as market abuse or insider trading, the defendant may be required, in addition to the penalty, to pay an amount of two or three times the profit made from the offence.
- Corporate entities can also face confiscation of assets, prohibition from conducting a specific activity and/or public censure. The corporate entity may also be dissolved if it is found that it was set up for the purpose of committing criminal offences.
- Additionally, corporate entities which have been convicted of specific criminal offences may be prohibited from participating in public procurement tenders.

What factors are taken into consideration in determining the penalty?

- There is a maximum and a minimum penalty for each specific offence. The court will determine the penalty within these limits, taking into account various aggravating or mitigating factors. Aggravating factors taken into account include the harm which the offence caused, whether the offence was planned, the profit generated and any previous offending.

- Mitigating factors include co-operation during the investigation, early acceptance of guilt as well as the compensation of the victim(s). It remains very difficult however to measure the precise impact of each of these factors on the court's decision.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- The Belgian Criminal Code does not contain any leniency provisions. However, voluntary disclosure of a criminal offence will generally be considered a mitigating factor.
- Recently, some public prosecutors have entered into ad hoc agreements with suspects, whereby they agreed to discontinue the prosecution in exchange for payment of a fine by the suspect. The legality of such agreements is disputed and there is debate as to whether such agreements should be used more widely or put onto a statutory footing.

Current position

Since the adoption of the law of 4 May 1999 a significant number corporate entities have faced criminal investigations and/or prosecutions. Public prosecutors have not hesitated to use the broad powers conferred under the law to prosecute legal entities and some prosecutors have been very aggressive in their approach.

As a result, criminal prosecution is now seen as a real risk by the vast majority of corporate entities in Belgium, and this has undoubtedly had an impact on corporate consciousness.

Czech Republic

Introduction

The existence of corporate criminal liability is a new phenomenon in the Czech Republic. The Act on Criminal Liability of Corporations and Proceedings Against Them (the "Act") only came into force on 1 January 2012. The Act was introduced to meet the Czech Republic's international commitments and also as part of the Czech government's anti-corruption strategy.

A corporate entity (including a foreign corporate entity) can be held liable under the Act if it is registered in the Czech Republic, conducts its business in the Czech Republic through an enterprise or branch or otherwise, or has assets in the Czech Republic. Czech corporate entities can also be punished under the Act for criminal offences committed abroad.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- A corporate entity is held criminally liable if the offence was committed:
 - on its behalf, in its interests or within the scope of its activities, and
 - by (i) its statutory body or other persons acting on its behalf (e.g. under a power of attorney); (ii) persons performing managing or supervisory activities within the corporate entity; (iii) persons exercising decisive influence over the management of the corporate entity; or (iv) the employees while carrying out their tasks, subject to further qualifications set out in the Act (e.g. where due supervision was not exercised).

What offences can a corporate entity not commit?

- A corporate entity can only commit a limited number of criminal offences (approximately 80) which are enumerated in the Act, most notably offences related to money laundering, corruption, interference with justice, fraud, fraudulent accounting, rigging of tenders, environmental offences, organised crime, human trafficking, computer crimes and various tax-related offences.

Are there any specific defences available?

- The Act does not provide for any specific defences. However, the Act provides for the application of the Czech Criminal Code and the Czech Code of Criminal Procedure where the Act does not set out specific rules and the nature of the matter permits. For example, the defence of "mistake of fact" which exists under the Czech Criminal Code would be applicable.

What is the relationship between the liability of the corporate entity and its directors and officers?

- If a corporate is convicted, the Act does not provide that secondary liability will automatically attach to the directors if they knew of or were negligent regarding the facts which led to the conviction of the corporate entity. However, the criminal liability of a corporate entity does not preclude the (additional) criminal liability of its directors and officers who are at individual risk of prosecution if their conduct may constitute an offence.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- The police and the public prosecutor would be responsible for investigating and prosecuting offences committed by corporate entities (as they are for offences committed by individuals).

Punishment

Corporate entities

- The most serious penalty which is envisaged is a dissolution of the corporate entity itself if its activities wholly or predominantly consisted of the commission of criminal offences. This penalty can only be imposed against corporate entities with a registered office in the Czech Republic.
- Other penalties contained in the Act include (i) forfeiture of (all) property, (ii) monetary penalties, (iii) forfeiture and/or confiscation of assets, (iv) prohibition of activities, (v) prohibition of performance under public procurement contracts, participation in concession procedures or tenders, (vi) prohibition on accepting grants and subsidies and (vii) publication of judgments.
- The Act does not provide for any mitigating / aggravating factors, but relevant provisions of the Criminal Code are applicable, such as:
 - mitigating factors: if it was a first offence, committed in circumstances that were beyond the control of the offender; or if only minor damage resulted;
 - aggravating factors: if a repeat offence or it was committed deliberately or with premeditation.

Individuals

- The criminal liability of corporate entities does not have any impact on the existing criminal liability of individuals under the Czech Criminal Code. The punishment of individuals will continue to be regulated by the Czech Criminal Code alone.
- However, some offences may only be committed by an offender "vested with a special capacity, status or quality". In such cases the offender does not need to have this special capacity, status or quality him or herself provided that the corporate entity on whose behalf the offender acts had this special capacity, status or quality.

What factors are taken into consideration when determining the penalty?

- Under the Act, similar principles apply as those which apply to individuals under the Criminal Code in determining the type and severity of the penalty. A court will take into account factors such as:
 - the nature and seriousness of the offence committed;
 - the financial circumstances of the corporate entity and the nature of its existing activities;
 - the corporate entity's conduct after the criminal conduct, in particular its efforts at making good any damage or mitigating any other detrimental effects;
 - the effects and consequences that might be expected from the penalty in terms of the corporate entity's future activities; and
 - the effects that the penalty might have on third parties, in particular those persons harmed through the criminal offence. In the case of corporate entities, it would have to consider the effect on creditors with no connection to the offence itself.

Is there a mechanism for corporate entities to disclose violations in exchange for lesser penalties?

- The Act provides for "effective remorse", which means that the criminal liability would expire if the offender voluntarily:
 - prevented or rectified the detrimental effects of its criminal offence, or
 - reported its criminal offence at a time when the detrimental effects of the criminal offence could still be prevented.

- However, effective remorse would not be applicable to corruption-related offences.

Current position

The Act will enable the punishment of criminal conduct that could not previously be sanctioned due to the difficulty in identifying the individual responsible in circumstances where the collective body of a corporate entity adopts a decision. It will also help to prevent individuals being held criminally liable whilst the corporate entity escapes liability and continues its criminal conduct.. The level of penalties contemplated under the Act could severely affect the continued operation and profitability of corporate entities. However, it is hard to judge at this point whether the Act will prove to be an effective deterrent to corporate crime.

France

Introduction

The Penal Code of 1994 introduced the concept of corporate criminal liability in French law. Initially applicable to a limited number of offences, the principle has been extended to all offences as from 31 December 2005 (Law No 2004-204 of 9 March 2004).

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- With the exception of the State and, under certain conditions, the local public authorities, a corporate entity may be criminally liable for the offences committed on its behalf by its legal representatives.
- A corporate entity may also be convicted for the criminal acts of its employees acting on behalf of the company through an express power of attorney (*délégation de pouvoir*), where the corporate entity has validly delegated certain powers to them.
- However, recent case law has suggested that a corporate entity may be convicted on the basis of negligence resulting from careless and/or defective organisation of the company, even if the fault cannot be attributed to a representative or an employee to whom the corporate entity has delegated functions.

What offences can a corporate entity not commit?

- In theory, a corporate entity can commit any offence except for offences which, by their very nature, can only be committed by natural persons. A corporate entity can commit offences for which imprisonment is the only penalty provided by law. In such cases, the company may be fined up to EUR 1 million.

Are there any specific defences available?

- A corporate entity will not be convicted if it is able to demonstrate that the offence was not committed on its behalf. For example, a corporate entity cannot be indicted or convicted of offences committed by its representatives if they acted in their own interest, rather than on its behalf.
- However, this does not apply if the offence was committed in the course of a corporate entity's business for its benefit. A corporate entity may be held to be criminally liable even if it did not benefit financially from the activity in question.
- Whilst the existence of adequate compliance procedures and control systems may be taken into account by the courts in considering the context of the offending, they do not of themselves constitute an affirmative defence.

What is the relationship between the liability of the corporate entity and its directors and officers?

- The criminal liability of a corporate entity does not preclude that of any natural person who may be a perpetrator or accomplice to the same act. For instance, the CEO of a company may be held criminally liable for the same offence as the company, if committed with his consent, assistance or neglect.
- However, a corporate entity's liability for an offence does not automatically result in liability for its directors or officers.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- The public prosecutor is in charge of prosecuting and investigating offences committed by corporate entities. In some complex matters, an investigating magistrate will be appointed to carry out the investigation.
- French regulatory bodies are not entitled to prosecute and investigate criminal offences. For example the French Authority of Financial Markets (*Autorité des Marchés Financiers*) only focuses on regulatory breaches giving rise to administrative liability when dealing with corporate entities or individuals. If a regulatory body becomes aware of possible criminal offences during the course of an investigation, it has a duty to report them to the public prosecutor.

Punishment

Corporates

- The maximum fine applicable to a corporate entity is five times the fine applicable to individuals. For example, a corporate can be fined up to EUR 1,875,000 for misuse of company assets as compared with a fine up to EUR 375,000 for individuals.
- Where expressly provided by law, the following additional penalties may be imposed:
 - dissolution, where the corporate entity was created to commit a felony; or, where the felony or misdemeanor carries a sentence of imprisonment of three years or more, where the corporate entity was diverted from its objectives in order to commit the crime;
 - prohibition to exercise, directly or indirectly, one or more social or professional activities, either permanently or for a maximum period of five years;
 - placement under judicial supervision for a maximum period of five years;
 - permanent closure or closure for up to five years of one or more of the premises of the company that were used to commit the offences in question;
 - disqualification from public tenders, either permanently or for a maximum period of five years;
 - prohibition on making a public appeal for funds, either permanently or for a maximum period of five years;
 - prohibition on drawing cheques, except those allowing for the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition on using payment cards, for a maximum period of five years;
 - confiscation of the object which was used or intended to be used for the commission of the offence, or of the assets which are the product of it; and
 - publication of the judgment.
- From 1994 to 2002, 1,442 sentences were imposed against corporate entities, in comparison with 2,340 sentences between 2002 and 2005¹. The number of prosecutions brought against corporate entities has increased as the general principle of criminal liability of corporate entities was extended to all offences on 31 December 2005.

¹ Infostat, Justice, n°8, December 2008.

Individuals

- Possible legal consequences for a legal representative, director, or employee of a corporate entity to whom powers have been delegated include imprisonment, fines and a prohibition on exercising a commercial profession and/or on managing or controlling a commercial company.

What factors are taken into consideration when determining the penalty?

- When imposing a sentence on a corporate entity, courts take into account, among other factors: the circumstances of the offence; the amount of profit realised; the harm caused; and the financial circumstances of the corporate entity.
- The court must take into consideration aggravating factors, such as if the offence was repeated or planned.
- If the corporate entity co-operates with the prosecutor or with the investigating judge, the court can take such co-operation into consideration. However, there is no official sentencing guideline in relation to co-operation of the offender or self reporting.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- The French Code of Criminal Procedure allows a defendant to "negotiate" his penalty with the Public Prosecutor (in order to try to obtain a lesser penalty), provided that he first admits his guilt. In such circumstances, once the facts are admitted, the Public Prosecutor proposes a penalty to the defendant in the presence of his lawyer. If agreed by the defendant, the "deal" is then submitted to the President of the Criminal Court for approval. However, in practice, this procedural option, which is designed for simple/undisputed cases where the penalty is foreseeable, is rarely used by corporate entities.

Current position

Recent case law has extended corporate liability to a situation where there was no evidence of negligence/fault by a representative of or by a person having power to act on behalf of the corporate entity. The French Courts now tend to consider whether the negligence/fault was part of the business operations/organisation of the corporate entity in order to attribute criminal liability to it. For instance, the Supreme Court has recently held a hospital criminally liable on the basis of negligence without connecting it to any misbehaviour committed by a particular employee or representative.

It should be noted that in France, both individuals and the corporate entities can be convicted on the basis of the same facts. The decision to prosecute an individual or a corporate entity rests with the Public Prosecutor. In practice, despite an increasing number of prosecutions brought against corporate entities, individuals are still the primary target of prosecutors.

Germany

Introduction

- The question of whether German law should be amended to include criminal liability for corporate entities has long been debated. Corporate scandals and large fines levied against corporate entities by foreign authorities keep this debate alive, despite repeated contentions that such liability is incompatible with the essence of German criminal law.
- The advocates of criminal liability for corporate entities consider that regulatory sanctions, typically in the form of fines, are inadequate. In addition they point to the various initiatives in the European Union which require Member States to establish sanctions against corporate entities, and the corresponding growing coverage of corporate liability and sanctions, mainly in the United Kingdom, France and the Netherlands, as well as outside Europe, especially in the United States.
- Opponents to the idea that corporate criminal liability should be introduced in Germany argue that the German penal code is based on the notion of individual culpability, and therefore corporate entities may not be held criminally liable as they lack the capacity to act in the criminal law sense. A move towards criminal liability for corporate entities in Germany is considered inconceivable at present.
- Nevertheless, the imposition of regulatory fines and the siphoning off of economic benefits are tools used frequently as practical solutions to sanction corporate entities for wrongdoing.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- As German criminal law only applies to natural persons, a legal entity cannot commit a criminal offence under German law. However, criminal or regulatory sanctions (namely forfeiture orders or regulatory fines) may be imposed on the entity itself because of criminal or regulatory offences committed by its officers or employees. Such regulatory sanction can be imposed irrespective of whether fines or imprisonment are also imposed on individuals.
- Whilst the imposition of a forfeiture order or an regulatory fine does not necessarily require any prior conviction of an individual, it does require some finding of wrongdoing.
- A regulatory fine (*Geldbuße*) of up EUR 1 million can be imposed on a corporate entity if the prosecution authorities and courts find that a senior executive or an employee of the entity committed a criminal or regulatory offence and thereby either enriched or violated specific legal obligations of such entity. The fine can be increased if the alleged offence led to economic benefit of more than EUR 1 million.
- Alternatively, a court can make a forfeiture order (*Verfallsanordnung*) against a corporate entity if the court finds that the entity was enriched by a criminal or regulatory offence committed by an individual (most likely by an officer or employee of the entity). Such forfeiture orders siphon off the gross proceeds (*Brutto-Erlangtes*) of the criminal or regulatory offence (without deducting any related expenses incurred) and can therefore result in significant amounts.

What offences can a corporate entity not commit?

- As explained above, a corporate entity cannot commit any criminal offence.

Are there any specific defences available?

- Whilst there are no specific defences, the imposition of an regulatory fine on a corporate entity is discretionary and the court could refrain from imposing a fine if it considered that the company had taken adequate measures to prevent such breaches.

What is the relationship between the liability of the corporate entity and its directors and officers?

- There must be a finding of wrongdoing by officers or employees of a corporate entity for forfeiture orders and regulatory fines to be imposed.

Procedure**Who is responsible for investigating and prosecuting offences committed by corporate entities?**

- Forfeiture orders and regulatory fines are imposed on a corporate entity by the competent prosecution authorities and criminal courts. Regulatory fines can also be imposed by supervisory authorities.

Punishment**Corporate entities**

- A regulatory fine can amount to EUR 1 million and can be increased further if deemed necessary to account for the profits made from the alleged offence.
- A forfeiture order siphons off the gross proceeds of the criminal or regulatory offence meaning that anything "gained" through criminal acts can be subject to forfeiture without deducting any related expenses incurred. In corruption cases the "contract value" will be siphoned up, but not the generated turnover, according to the Federal Supreme Court's decision in the so called "Cologne Waste Scandal".
- Other potential sanctions include entries in black lists and procurement bans in relation to tenders of public authorities.
- A regulatory fine and the name of the sanctioned entity will be entered into the German Federal Commercial Register (*Gewerbezentralregister*) unless the amount of the regulatory fine does not exceed EUR 200. However, the entry into the register can only be accessed by public authorities and the corporate entity itself. The entry must be deleted after three years if the regulatory fine is less than EUR 300, and after five years if the regulatory fine exceeds EUR 300.
- There is a growing willingness to impose regulatory fines on corporate entities and a clear trend for prosecuting authorities to extend their activities in this arena (see for instance the recent and current regulatory proceedings against well-known companies such as Siemens AG or MAN AG).

Individuals

- Apart from potential sanctions against individual offenders, the corporate entity's owner or representatives can also be held liable if they have failed to take adequate supervisory measures which would have prevented a breach of duty by an employee. This will apply if the breach of the duty imposed on the owner is punishable with a criminal penalty or regulatory fine.
- It is a defence for the owner and the representatives to show that they took adequate measures to prevent such breaches. These include adequate selection of staff, organisation and processes, guidelines and training, monitoring and controls and responsive action to the misconduct of employees.

What factors are taken into consideration when determining the penalty?

- There are different factors influencing the penalty, such as the severity and quantum of damages, to what extent the corporate entity has co-operated during the investigation, whether it has generated any profits from its offending and whether it is a first offence. It should be noted that there are no sentencing guidelines as to the appropriate level of penalty in each case.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- As mentioned above, disclosure and cooperation may be mitigating factors.

Current position

In the recent past, regulatory proceedings have been initiated against various German companies arising from corruption charges, in particular:

- in 2007 Siemens AG received a regulatory fine of EUR 201 million;
- in 2009 MAN AG received a regulatory fine of EUR 151 million;
- proceedings are currently being brought against Ferrostaal, in which a regulatory fine in the region of EUR 200 million is likely to be imposed.

Italy

Introduction

Administrative vicarious liability for corporate entities for crimes committed by their employees was first introduced by *Decreto Legislativo no. 231 of 2001* ("**Law 231**"). Previously, vicarious liability was covered exclusively by tort law.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- For a corporate entity to be held liable under Law 231, the offence must have been committed (at in least in part if not exclusively) in the interest of or for the benefit of such corporate entity. The corporate entity is not liable if the employee has acted exclusively in their or a third party's interest.

What offences can a corporate not commit?

- Under Law 231 a corporate can be held liable only in relation to specific crimes (the "**Relevant Offences**") listed under articles 24 and 25. The latter applies both to all crimes described thereunder and to the conduct of aiding and abetting the commission of such crimes. The Relevant Offences include the following:
 - fraud for the purpose of receiving public funding or subsidies, fraud against the Italian Government, municipalities or government agencies, computer fraud against the Italian Government or a Government entity;
 - cyber crimes and breach of data protection;
 - criminal conspiracy;
 - extortion and corruption;
 - counterfeit of cash, treasury bonds or stamp duties;
 - trade fraud;
 - corporate offences (including: false financial statements, market abuse and obstruction of regulators);
 - terrorism;
 - market abuse;
 - manslaughter and breaches of health and safety legislation;
 - money laundering;
 - copyright offences; and
 - obstruction of justice offices.

Are there any specific defences available?

- Law 231 provides for different defences depending on the position of the alleged offender within the corporate.
- Where an offence is committed by the corporate entity's directors or officers, the corporate entity cannot be held vicariously liable if it can prove that:

- its management body had adopted and "effectively" implemented, "management and organisational control protocols that were adequate for the prevention of the offence that was committed". These protocols must be adequate to (a) identify those areas of activity where Relevant Offences could be committed; (b) establish training and implementation protocols; (c) identify ways of managing financial resources in a manner that will prevent the commission of the Relevant Offences; (d) ensure that there is adequate internal communication; and (e) introduce an adequate system of sanction for failure to observe the relevant controls;
- an internal body, the "Surveillance Committee" had been set up to oversee the above-mentioned controls (to which independent powers of initiative and control had been entrusted);
- the individual Directors/Officers committed the offences by fraudulently avoiding internal controls;
- the Surveillance Committee had not failed to exercise adequate controls.
- Where an offence is committed by the corporate entity's supervised employees, the corporate entity can only be held vicariously liable if it can be shown that the commission of the Relevant Offence was made possible by the failure to observe the internal control protocols;
 - however, if it can be shown that prior to the commission of the Relevant Offence, the corporate entity had adopted and effectively implemented a system of organisation, management and control that was adequate for the purpose of avoiding the commission of such Relevant Offence, it will not be held liable. The "effective implementation" of the system is evidenced by (a) carrying out periodic reviews of the same, in particular in the event that a Relevant Offence is committed by a Supervised Employee or following changes to the overall structure of the corporate; and (b) adopting a disciplinary process suitable to sanctioning any failure to observe the internal controls.

What is the relationship between the liability of the corporate entity and its directors and officers?

- Pursuant to Section 8 of the Law 231, a corporate entity can be held liable even if:
 - the individual who committed the crime has not been specifically identified (as long as it is proved that a Relevant Offence has been committed by someone working within the entity);
 - the alleged offender is not indictable; or
 - the offence is "extinct" (for example if the offence is time-barred).
- A finding against a corporate entity cannot be used to determine the liability of an individual. However, in proceedings brought against an individual, a court has discretion to introduce the conviction of a corporate entity, if relevant, as evidence of the findings of those facts.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- In Italy there is not a specific judicial body exclusively dedicated to prosecuting corporate entities.
- From a procedural standpoint, proceedings for vicarious liability against a corporate entity are automatically merged with the criminal proceedings for the underlying crimes, except where the underlying offences are summary only (and subject to a few other exceptions). The corporate entity is subject to criminal procedure rules applicable to defendants under the Code of Criminal Procedure, with some minor distinctions under Law 231².

² The main distinctions are the following:

- similarly to the registration of suspects in the relevant register held by the court, a corporation that is the subject of an investigation by the prosecutor will be registered as a vicariously liable entity in a separate register;

- In Italy where, *prima facie*, an offence has been committed, criminal prosecution is mandatory.

Punishment

Corporate entities

- The maximum penalty differs for each offence. The highest fine is EUR 1.549 million. If the offence is market abuse, this amount may be increased up to 10 times the profit of the offence, if the latter is material.
- The court will also impose a fine sufficiently large to have an impact on the corporate entity.
- In addition to pecuniary penalties, corporate entities can be sentenced to:
 - suspension of licences and authorisations;
 - prohibitions from carrying out a business activity, from obtaining government contracts and from advertising products;
 - exclusion from or termination of funding, special terms, or welfare payments;
 - disgorgement of profits (if needed, even disgorgement of other properties until the profits value is reached); and
 - publicising the sentence.
- Judicial practice has shown that if the individual who committed the Relevant Offence is found liable, it is highly probable that the corporate will also be found guilty. Defences provided by Law 231 have only been deemed applicable twice since the introduction of the law.

Individuals

- The liability of individuals is completely independent of the corporate entity's liability and is determined under the Italian law and according to the applicable rules.

What factors are taken into consideration when determining the penalty?

- A judge will take into account the gravity of the offence, the degree of involvement of the corporate entity and the measures, if any, adopted to mitigate the consequences of the offence or to prevent its reoccurrence. In particular, the fine may be reduced by 50% if, prior to trial, the corporate entity has fully compensated any victims or has taken all necessary steps to mitigate the consequences of the offending and if it has adopted necessary and preventative internal systems and controls.

Is there a mechanism for corporate entities to disclose violations in exchange for lesser penalties?

- There is no such a mechanism under Italian law.

-
- a formal notice of investigation served on a corporate entity, addressed to the legal representative of the corporation, will include an order to indicate an address for service of process in connection with the proceedings; and
 - in order to be able to exercise its right of defence in the criminal proceedings against its employees, a corporation must file a representation notice under Article 39, Paragraph 2 of Law 231, by which, among other things, it appoints counsel.

Current position

Italy has seen a positive trend in the effective application of Law 231; the number of lawsuits filed against corporate entities is increasing, especially against small companies and in the South of Italy.

Furthermore, the list of Relevant Offences will soon also include environmental offences.

Finally, the Supreme Court has recently ruled that, unusually, civil claims cannot be filed within the context of the criminal proceedings against a corporate under Law 231. This is significant because, generally, under Italian law it is possible to file civil claims against the defendant in the context of criminal proceedings. However, the Supreme Court has stated that victims can only file civil claims against a corporate charged under Law 231 before a civil court.

Luxembourg

Introduction

The existence of corporate criminal liability is a recent phenomenon in Luxembourg. Legislation was introduced on 3 March 2010 on the criminal liability of legal persons (the "Law").³ Its adoption, which represents a significant change to the principles of the Luxembourg legal system, was influenced both by international considerations such as reports from the Financial Action Task Force and by a deliberate effort of the Luxembourg legislator⁴. The Law applies to all corporate entities (including public legal entities) with the exception of the State and the local government entities.⁵

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- In general, a corporate entity may be held liable if a crime or an offence has been committed in its name and its interest by one of its statutory organs or by one or more of its directors, whether *de jure* or *de facto*.
- A "statutory organ" is defined as one or more physical or legal persons which have specific function in the organisation of the corporate entity, in accordance with the relevant law governing that entity. This can be a function of administration, direction, representation or control.

What offences can a corporate entity not commit?

- Luxembourg has a three-tier system of offences, which in descending order of gravity are called: (i) crimes ("*crimes*"), (ii) offences ("*délits*") and (iii) contraventions ("*contraventions*"). Corporate entities are not liable for the commission of contraventions, which have been specifically omitted from the Law.
- There is no limitation on the crimes and offences which a corporate entity is able to commit. Indeed, the Law was drafted by adding corporate entities as potential perpetrators to the Criminal code in order to render the Criminal code applicable to them, subject to certain conditions specific to corporate entities and with the exception of contraventions. However there are certain crimes and offences which, by their very nature, can only be committed by natural persons.

Are there any specific defences available?

- There are no defences expressly set out in the Law on which only corporate entities might rely. However, all offences for which corporate entities are potentially liable require the prosecution to prove wilful fault ("*dol general*") and so a corporate entity could advance specific arguments in its defence (such as having appropriate procedures in place, exercising adequate surveillance over its employees, and so forth) that a physical person could not.

What is the relationship between the liability of the corporate entity and its directors and officers?

- The Law applies the principle of cumulative liability of corporate entities and physical persons. The logic behind this principle is to attribute criminal liability to a corporate entity for an offence that has, due to the nature of the offence, been committed by one or more physical persons. The aim of this provision is to prevent physical persons using the corporate

³ *Loi du 3 mars 2010 introduisant la responsabilité pénale des personnes morales dans le Code pénal et dans le Code d'instruction criminelle et modifiant le Code pénal, le Code d'instruction criminelle et certaines autres dispositions législatives*. Mémorial A – N°36, 11 March 2011, p. 641.

⁴ See, in this respect, J.-L. Schiltz, *Les personnes morales désormais pénalement responsables*, JTL n° 11, 15 October 2010, p. 157 et seq.

⁵ "*communes*".

entity as a shield for their own criminal liability. Note that the criminal liability of the corporate entity is in no case automatic, and will always need to be specifically ruled upon by the court.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- There are no bodies with a specific remit to prosecute corporate entities although certain divisions of the state prosecution service (e.g. the financial information division) may in practice be more frequently involved in the prosecution of corporate entities than other divisions.

Punishment

Corporate entities

- Fines range from a minimum of EUR 500 to a maximum of EUR 750,000 in matters related to crimes, or to a maximum of double the fine applicable to physical persons in matters related to offences.
- In matters related to offences, in the case of specific offences for which the law only provides a punishment of imprisonment, the Law envisages a 'conversion' system, involving a maximum possible fine for legal entities of EUR 180,000.
- The above amounts are multiplied by five for certain crimes and offences expressly listed by the Law (e.g. money laundering, acts of terrorism or financing of terrorism, drug trafficking, corruption).
- For instance, in the case of money laundering, the maximum fine for physical persons is EUR 1.25 million. By application of the above rules of calculation, the maximum fine for legal entities is EUR 12.5 million.
- The Law also envisages the possible special sanctions of confiscation, prohibition from public procurement contracts and dissolution, subject to certain conditions.

Individuals

- Individuals may be liable according to applicable and relevant legislation, including, without limitation, the provisions of the Criminal Code, company law and other specific legal provisions.

What factors are taken into consideration when determining the penalty?

- Generally, Luxembourg criminal law uses the threshold of the Court's "intimate conviction" when assessing the culpability of any person charged with an offence. According to scholarly opinion, the "intimate conviction" is the *"profound opinion to which the judge comes in his soul and conscience and which is the criteria and foundation of the sovereign power of appreciation of the judge dealing with the facts of the case"*.
- Individuals may be liable according to applicable and relevant legislation, including, without limitation, the provisions of the Criminal Code, company law and other specific legal provisions.
- For corporate entities, specific and distinct provisions apply in case of the offence being repeated after prior conviction: a fixed multiplier is applied to the fines mentioned above.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- The Law does not provide for such a mechanism. Generally speaking, co-operation of the perpetrator and trying to redress the damage caused are mitigating factors which the court will consider.

Current position

The period over which the Law has been in force is too short to allow comment on its application. There has not yet been any published case in which the provisions of the Law have been applied. However, its impact has already been felt by corporate decision makers - it has been extensively discussed in Luxembourg legal press; conferences on its likely application by the authorities have been held by former government ministers and the general feeling is that the public prosecution service will utilise the law to a very large extent. In some circles, the Law is also seen as a way for Luxembourg to shed its image as a primarily offshore financial centre.

The Netherlands

Introduction

The Netherlands have a long tradition of holding corporate entities to account for every kind of criminal offence.

However, for the better part of the twentieth century, entities could only be prosecuted for economic and fiscal offences. Since 1976, however, as a general rule in the Dutch Criminal Code, every criminal offence can be committed by a legal entity and can be prosecuted to the same extent as natural persons. Furthermore, persons supervising the unlawful conduct or the persons ordering the misconduct are liable, alongside the perpetrators themselves. Although most criminal prosecutions are instigated against natural persons, a growing number of corporate entities have been prosecuted in the last twenty years.

Finally, from 1 July 2009 these criminal law rules have been introduced in all administrative punitive procedures, so that corporate entities and the natural persons who have control over such conduct can also be administratively fined for certain offences.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- In a landmark ruling of 21 October 2003 (*Zijpe-arrest*) the Supreme Court held that an offence can be attributed to a legal entity depending on the circumstances of the case and whether such attribution is reasonable.
- A corporate entity can be held liable for all kinds of offences provided the offence can be reasonably attributed to the entity, for example if the offence has been committed within the working environment of the corporate entity. Factors relevant to such attribution include, but are not limited to, the following:
 - the conduct constituting the offence falls within the scope of the corporate entity;
 - the corporate entity conduct benefitted from the offence;
 - the offence was committed by an employee of, or a person working on behalf of, the corporate entity;
 - the corporate entity could have prevented the conduct but did not do so and "accepted" it. Not taking reasonable care to prevent such conduct can also constitute acceptance of the conduct.

What offences can a corporate entity not commit?

- In principle, there are no offences that cannot be attributed to a corporate entity. Even violent crimes could be attributed to a corporate entity, although in general prosecution is limited to economic, fiscal, environmental offences and fraud and corruption based offences.

Are there any specific defences available?

- All defences open to natural persons can be relied upon by corporate entities. There are no specific defences available to corporate entities, beyond arguing that an offence should not be attributed to it. In particular, a valid argument against attribution of individual offending could be that the corporate entity took reasonable care to prevent the prohibited conduct. Reasonable care could be demonstrated by the implementation of a robust compliance system.

What is the relationship between the liability of the corporate entity and its directors and officers?

- In general, all natural persons connected to an offence can be prosecuted separately including the perpetrators, any accomplices and anyone who may be liable for incitement to commit the offence or aiding and abetting and so on.

- Besides the potential offenders mentioned above, directors and managers of a corporate entity can be prosecuted if an offence attributable to a corporate entity (see the paragraph on liability above) can also be attributed to them. This will be the case if there is evidence that they directed or ordered the conduct in question. For instance a director or manager could be held accountable for neglecting to take proper measures to prevent such misconduct, despite being reasonably required to do so.
- There must be some level of knowledge and responsibility to act and therefore the director or manager must be aware of such conduct taking place or have appreciated the risk that such conduct would occur. Liability for offences cannot be imposed solely by virtue of a person's role within the corporate entity and having a direct (management) line is not necessary to impose liability.
- There is no formal limit to the kind of criminal or administrative offences that can be attributed to corporate entities or to its managers and/or directors (as long as the abovementioned criteria are met). But, as noted above, usually it is limited to economic, fiscal, environmental offences and fraud and corruption based offences.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- In the Netherlands all criminal investigations are conducted under the control of the Public Prosecution Office. In particular, the Public Prosecution Office responsible for economic and environmental crimes and fraud will often prosecute corporate entities. This *Functioneel Parket* is located in five regions in the Netherlands.
- All cases investigated by special investigation services responsible for investigating, such as the fiscal investigation service, the environmental investigation service, social security investigation service etc., will be prosecuted by *het Functioneel Parket*. But other fraud offences such as embezzlement, corruption or money laundering can also be prosecuted by each regional department of the Public Prosecution Office and be investigated by each investigation service, such as the police, national police etc.
- For administrative punitive enforcement actions it depends on the relevant set of regulations, and which regulator is authorised to impose a fine. For financial crimes, these are the financial regulators, the *AFM* and *DNB*. For consumer issues the Consumer Authority, for health care issues the Health Care Authority, for competition issues the Dutch Competition Authority, etc.

Punishment

Corporate entities

- The maximum fines in the Dutch criminal law system are defined according to category of offence. In general the maximum fines for corporate entities are one category higher they would be for natural persons. The overall maximum is EUR 760,000 per offence, which can accumulate indefinitely where there are a number of individual offences. For fiscal offences the maximum fine is 100% of the evaded taxes.
- In administrative procedures, the maximum fine depends on which laws are applicable. For financial offences the fines are probably the highest, being EUR 4,000,000 for first offenders and EUR 8,000,000 for repeat offenders or higher if the profits derived from the offence merit a higher fine. In cartel cases, the maximum fine is 10% of the relevant turnover.
- There are no circumstances specifically taken into account for corporate entities.
- As with all offenders, corporate entities can face forfeiture. Furthermore special measures can also be imposed, such as closing the business activities of the corporate entity for a maximum period of one year. Another measure is placing a corporate entity into temporary administration for a maximum of three years.

- Dissolution of the corporate entity is a separate civil procedure that can be started by the Public Prosecution Office. However, this is not considered to be a sanction; it is not part of the criminal prosecution as such and is rarely sought by the Public Prosecution Office.
- The Public Prosecution Office tends to target individuals responsible for the conduct within the corporate entity. The same approach applies to regulators in administrative law. In general administrative fines are much higher than criminal fines.

Individuals

- The maximum fine which may be imposed on an individual is EUR 76,000 although the fines will obviously vary depending on the offence. In administrative procedures the same maximum fines apply as for legal entities. There is no formal distinction between a corporate entity and a natural person in terms of fines but as the amount of each fine is also determined by the financial means of an offender, natural persons are usually fined lower amounts than corporate entities.

What factors are taken into consideration when determining the penalty?

- In criminal and administrative cases all the circumstances of the offence, including the financial circumstances of the offender, should be taken into account in determining the level of the fine.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- Only in administrative law cartel cases does a leniency system exist. In criminal law there is no such system. However, in general voluntary disclosure could lead to a more favourable treatment, including no prosecution at all or lower penalties. But there are no general rules governing voluntary disclosure which could provide any assurance to legal entities as to the consequences of such disclosure.

Current position

After the landmark case of October 2003 (see reference in the paragraph on liability above) in general the actual attribution of offences to corporate entities is readily accepted by the courts. In administrative law, the level of fines imposed has increased considerably over the last few years. Also the range of administrative offences for which fines can be imposed has expanded greatly. These levels of fines have been the subject of recent challenge.

In general the prosecution of corporate entities is more frequently used to set an example and emphasise the importance of having adequate compliance systems in place to prevent violations. Having a robust compliance system is therefore gaining importance, including outside the more regulated business sectors like the financial sector and the chemical sector.

Poland

Introduction

Corporate criminal liability in Poland is regulated by the Act on the Liability of Collective Entities for Acts Prohibited Under Penalty (the "Liability Act"), which came into force in 2003. It generally applies to all corporate entities, except the State Treasury, local government entities and associations thereof.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- In general, under the Liability Act, a corporate entity may be liable if a specified offence is committed by a specific person and his/her conduct has resulted or may have resulted in a benefit for the corporate entity.
- A corporate entity may be held liable for offences committed by:
 - a person acting on behalf of the corporate entity or in its interest and within the scope of his/her powers or duty to represent it, a person who makes decisions on behalf of the entity or who exercises internal control, or, exceeds his/her powers or fails to perform his/her duty (a "Manager").
 - a person given permission to act by a Manager;
 - a person acting on behalf of the corporate entity or in its interest with the consent or knowledge of a Manager; or
 - a person being "an entrepreneur" (a sole trader) who is involved in a business relationship with the corporate entity.
- The entity will face liability for actions of the above-mentioned persons only if:
 - the entity's bodies or representatives failed to exercise due diligence in preventing the commission of an offence by the Managers or the entrepreneur; or
 - it has failed to exercise due diligence in hiring or supervising a person given permission to act by the Manager or a person acting with his/her consent or knowledge.
- The liability of the entity is secondary to the liability of the person who committed the offence, i.e. the entity can be held criminally liable only after the person who committed the offence has been found guilty and sentenced by a court of law.
- Under the provisions of the Liability Act, the lack of criminal liability of a corporate entity does not exclude the possibility of civil liability for the damage caused or the administrative liability of the entity.

What offences can a corporate entity commit?

- The Liability Act lists the offences for which a corporate entity may face criminal liability. It refers to specific offences regulated in the Polish Criminal Code which are generally directed to individuals. The list is constantly being expanded and currently includes, inter alia:
 - offences against economic turnover, e.g. money laundering;
 - offences against trading in money and securities, e.g. currency counterfeiting or the counterfeiting of official security paper;
 - offences against the protection of information, e.g. the obtaining or removing information by an unauthorised person;

- offences against the reliability of documents, e.g. the counterfeiting of documents or use of such documents;
- offences against property, e.g. fraud, receipt of stolen property;
- offences against the environment, e.g. the polluting of water, air or soil;
- bribery and corruption;
- certain fiscal offences; and
- offences of a terrorist nature.

Are there any specific defences available?

- Proving that due diligence was exercised in the hiring or supervision of an alleged offender (being a person given permission to act by the Manager or a person acting with his/her consent or knowledge) prevents the corporate entity from being held liable.
- In the case of offences committed by the Managers it would need to be proved that the entity's bodies or representatives exercised due diligence in preventing the commission of an offence.

What is the relationship between the liability of the corporate entity and its directors and officers?

- The criminal liability of a manager, officer or director as determined in a court sentence may result in the criminal liability of an entity (if the other conditions for liability mentioned above are fulfilled). At the same time, an entity's liability for an offence does not automatically determine the personal liability of its managers, officers or directors.
- However, if a corporate entity is held liable for a fiscal offence, the officers or directors thereof may be held accountable on the basis of auxiliary liability. In order to incur such liability, it is sufficient that a director or officer be negligent in fulfilling his/her duties.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- The Polish Code of Criminal Procedure refers to the criminal liability of corporate entities and therefore public prosecutors are responsible for prosecuting such offences.
- Criminal proceedings against corporate entities are conducted in accordance with the Polish Code of Criminal Procedure with several changes resulting from the Liability Act. The proceedings are commenced on the motion of a public prosecutor or the injured party. The district court is competent to adjudicate the case in the first instance. The district court's judgment may be appealed.

Punishment

Corporate entities

- The penalty for offences committed by corporate entities is a fine ranging from PLN 1,000 to PLN 5,000,000 (approx. EUR 250 to EUR 1,250,000). However, the fine may not exceed 3% of the entity's revenue earned in the financial year in which the offence was committed.
- The court may also order the forfeiture of any object or benefit which derived from the offence.

- Moreover, the court is competent to prohibit the corporate entity from carrying out promotions and advertising, benefiting from grants, subsidies or assistance from international organisations or bidding for public contracts. It can also decide to publicise the judgment. All the above-mentioned bans may be imposed for a period of one year to five years.
- The level of enforcement of this regulation is low and it has rarely been used in practice. According to statistics published by the Polish Ministry of Justice and the General Public Prosecutor's Office, from 2005 to 2010 only 104 corporate entities were prosecuted under the Liability Act, and fines (the highest of which was PLN 12,000 – approx. EUR 3,000) were imposed on only 31 of them. Furthermore, in only seven cases were the judgements publicised.

Individuals

- As mentioned above, directors and officers only face liability for their actions and inactions insofar as they constitute offences under Polish criminal law which requires some mental element (intent, recklessness or negligence).

What factors are taken into consideration when determining the penalty?

- Under the Liability Act, when considering the sentence to be imposed on a corporate entity, the court must take into account in particular the level of benefit obtained from the offence, the corporate entity's financial situation, and the social aspects of the punishment and its influence on the further functioning of the entity.
- This is not an exhaustive list of factors and the court has discretion to consider other issues on a case by case basis. For example, attempts to redress the damage or co-operation in uncovering criminal acts may be regarded as mitigating factors.

Is there a mechanism for corporate entities to disclose violations in exchange for lesser penalties?

- The Liability Act does not contain any specific provisions concerning the requirements which entities must fulfil in order to seek leniency in Poland. However, as the courts generally have discretion when considering the sentence to be imposed, a corporate entity may receive favourable treatment if it has attempted to redress the damage or has co-operated in uncovering criminal acts.

Current position

The Polish Liability Act, a relatively new statute, has rarely been used until now and is therefore still largely untested in practice. Its provisions were considered by the Polish Constitutional Tribunal and amended in 2005 by the Parliament in accordance with a Tribunal decision. The criminal liability of an entity is secondary to the criminal liability of an individual acting on its behalf, and therefore prolonged criminal proceedings to establish the liability of an individual tend to discourage courts from considering the liability of corporate entities. However, because of the tendency in Poland towards the creation of stricter criminal law, it is probable that provisions of the Liability Act will be used more frequently in future.

Romania

Introduction

The criminal liability of corporate entities is a relatively new concept in Romanian criminal law. It was only in 2006 (Law 278 of 4 July) that the Criminal Code of 1968 (the "**Criminal Code**" or the "**Criminal Code of 1968**", currently in force) was modified to include provisions in this respect. The Criminal Code applies to all legal entities, except for the state, public authorities and public institutions which carry out activities in the public domain.

The Romanian legislator has recently adopted a new criminal code (the "**Criminal Code of 2009**") to replace the existing one, which has not yet entered into force. Whilst broadly similar to the Criminal Code of 1968, we outline the main differences below.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- Generally, corporate entities may be held criminally liable for offences committed in relation to their statutory scope of activity, in their interest or on their behalf.
- The rules for distinguishing between holding liable only the corporate entity's directors and officers and holding liable both the directors/officers and the corporate itself are not currently clearly regulated.
- However, a corporate entity may be held criminally liable if, through its individual or collective management body, it was aware of, encouraged or consented to the commission of an offence by an individual in relation to the corporate entity's statutory scope of activity. If the offence is one of negligence, the corporate entity is only liable if the commission of the offence is due to the latter's lack of supervision or control.
- Holding a corporate entity criminally liable does not preclude its civil or administrative liability.

What offences can a corporate entity commit?

- The law does not expressly specify which offences a corporate entity can or cannot commit. In theory, corporate entities may be held liable for all criminal offences provided under Romanian legislation, except for offences which by their very nature may only be committed by individuals. However, the offence must have been committed on behalf of the corporate entity for it to be liable.

Are there any specific defences available?

- Provided the offence was committed against the corporate entity's will and without any negligence on the part of the corporate entity, the corporate entity should not be liable. Each case will be determined on its own facts.

What is the relationship between the liability of the corporate entity and its directors and officers?

- Directors and officers can be held liable as co-participants of the offence, alongside the corporate entity.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- There is no criminal investigation body set up expressly for prosecuting corporate entities. The public prosecutor is responsible for the investigation of offences committed by corporate entities.

- Likewise, criminal proceedings against corporate entities are conducted in accordance with the Romanian Criminal Procedure Code.

Punishment

Corporate entities

- The principal penalty in case of corporate entities is a fine, which currently ranges from RON 2,500 (EUR 600) to RON 900,000 (EUR 215,000) for a single offence and up to a maximum of RON 2,000,000 (EUR 480,000) for recurrent offences where aggravating factors are present.
- The Criminal Code of 2009 will introduce a new fining system, based on the "fine per day" concept. The value of the fine per day ranges between RON 100 (EUR 24) and RON 5,000 (1,200 EUR), while the number of days of fine ranges from 30 to 600 (i.e. a general maximum fine of RON 3,000,000 (EUR 720,000)). A court will establish the number of days based on the general criteria for determining the penalty, while the fine per day is based on the corporate entity's turnover.
- Besides the fine, courts may apply one or several of the auxiliary penalties, although their application is mandatory if provided by the law for specific offences. Auxiliary penalties include the dissolution of the corporate entity, suspension of the corporate entity's activity (or of one of its activities) for a period ranging from three months to three years, closing down some of the corporate entities' working units for a period ranging from three months to three years, debarment from public procurement for a period ranging from three months to three years and/or publicising the conviction.
- The court may also confiscate the proceeds of the crime, unless such are used for compensating the victim(s).
- Given the recent introduction of the legislation, the level of enforcement is currently low.

Individuals

- Directors and officers may also be held liable alongside the corporate entity itself, for offences committed by the latter, as long as their personal actions are deemed to be offences under the criminal legislation. Besides criminal liability, directors and officers may also face civil or administrative liability.

What factors are taken into consideration when determining the penalty?

- When determining the penalty, the courts consider factors such as the harm caused, the danger created following the commission of the offence, any co-operation shown and any previous offending. However, the law does not provide an exhaustive list of factors and courts may consider all the circumstances of the case when determining the penalty.

Is there a mechanism for corporate entities to disclose violations in exchange for lesser penalties?

- Romanian legislation provides the possibility to reduce, or even avoid, criminal penalties. Such provisions relate to specific offences, not to the person of the offender (*i.e.* persons or entities), such as:
 - for corruption offences, the offender is not incriminated if he denounces the committal of the offence before the criminal investigation body is vested with the case;
 - for tax evasion offences, the limits of the penalty are reduced to half if the offender makes the payment before the first court hearing. If the payment required is less than EUR 50,000, the court will apply an administrative penalty;
 - for money laundering offences, the fine is halved if the offender discloses information and facilitates the prosecution of other participants during the criminal investigation;
 - very recent amendments to the Criminal Procedure Code provide that in cases where the offender pleads guilty and accepts the prosecution case, the penalty is reduced (i) by one-third where the sanction is prison and (ii) by one quarter where the sanction is a fine.

Current position

As noted above, the criminal liability of corporate entities is a new concept under Romanian law and has until now remained largely untested. Prosecution authorities tend to focus their efforts on the investigation of corporate entities' officers and directors rather than on the corporate entities themselves. After the entry into force of the Criminal Code of 2009 and given the political trend of fighting economic crime, it is likely that efforts towards prosecuting corporate entities will intensify.

Slovak Republic

Introduction

The concept of quasi-criminal liability of legal entities was introduced into the Slovak legal system on 1 September 2010 by an amendment to the Slovak Criminal Code. In general, any corporate entity may be subject to quasi-criminal liability provisions except for, *inter alia*, states, municipalities, legal entities in possession of state or EU property, and international public law organizations.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- Corporate entities may not be held criminally liable. However, if an individual commits an offence in close connection with the business of the corporate (for which the individual may separately be prosecuted), the corporate may be penalised through the imposition of "protective measures", namely confiscation of money or assets of the corporate.
- A corporate entity may incur such quasi-criminal liability if a criminal offence is committed (or attempted) by an individual. This is dependent on a number of factors, namely:
 - Whether the individual had authority to act on behalf of the corporate entity (e.g. as the statutory body of the corporate entity or under a power of attorney);
 - Whether the individual had authority to make decisions on behalf of the corporate entity (e.g. as a manager of the entity);
 - Whether the individual had "supervisory authority" within a corporate entity (e.g. as a member of the supervisory board of the entity or an internal technical controller); or
 - Whether the offence was committed as a result of a lack of supervision or as a result of a lack of due care within the corporate entity (i.e. attributable to a particular person within the structure of the entity in charge of exercising supervision and due care).
- These "protective measures" may be imposed irrespective of whether the offender has been identified in the criminal proceedings. In order for protective measures to be imposed on a corporate entity, it must be shown that the relevant criminal offence has been committed in close connection with the business activity of the corporate entity. Protective measures may also be imposed on a legal successor of a corporate entity.

What offences can a corporate entity commit?

- A corporate entity may incur quasi-criminal liability in connection with any criminal offence committed (or attempted) by an individual acting in close connection with its business.

Are there any specific defences available?

- The Slovak Criminal Code does not provide for any specific defences in connection with the quasi-criminal liability of corporate entities. However, as one of the decisive factors for imposition of a protective measure on a corporate entity is whether the offence was committed as a result of a failure to supervise or exercise due care (see 2.1.2.(d) above), a potential defence for corporate entity may be to show that due care and supervision were in fact exercised.
- In addition, as the protective measure of confiscation of property constitutes a serious and damaging intervention in the rights of corporate entities, the Slovak Criminal Code only allows it only in exceptional cases. As a result, the confiscation

of property would not be imposed if the protection of society would be achievable without it. In such a case, however, the confiscation of money would be imposed.

What is the relationship between the liability of the corporate entity and its directors and officers?

- Protective measures may be imposed whether or not the person who committed an offence in close connection with the business of the corporate entity has been identified in the criminal proceedings or not. Similarly, imposing a protective measure on a corporate entity does not preclude the criminal liability of its directors and officers.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- Generally, public prosecutors and courts are in charge of enforcing quasi-criminal liability rules. However, certain serious criminal offences for which a corporate might incur quasi-criminal liability fall within the jurisdiction of the Specialised Criminal Court and specialised public prosecutors.

Punishment

Corporate entities

- Under the Slovak Criminal Code, the following protective measures may be imposed on corporate entities:
 - confiscation of money - the court may confiscate up to EUR 1.6 million from a corporate if an individual officially acting on its behalf and in close connection with its business commits (or attempts to commit) or participates in any criminal offence set out in the Slovak Criminal Code.
 - confiscation of property - the court is obliged to confiscate the property of a corporate entity which acquired property as a result of certain criminal offences set out in the Slovak Criminal Code (e.g. certain serious criminal offences of corruption, tax evasion, legalization of proceeds from criminal activities, terrorism, etc.).

Individuals

- Individuals can be held criminally liable for an offence committed in close connection with the business of a corporate entity regardless of whether a protective measure is imposed upon the corporate entity or not.
- A wide range of sanctions may be imposed on individuals found guilty of a criminal offence, such as imprisonment (life imprisonment in the most serious cases), monetary penalties, prohibition of activities (e.g. conducting business), forced labour, confiscation of things, confiscation of property, etc.

What factors are taken into consideration when determining the penalty?

- Confiscation of money - when deciding on the sum to be confiscated, the court takes into account the gravity of the criminal offence committed, the scope of such offence, the benefit gained, the damage caused, the circumstances surrounding the commission of such offence and the consequences of the penalty imposed for the corporate.
- Confiscation of property - when deciding on whether or not to confiscate property, the court considers whether, based on the gravity of the criminal offence committed and the importance of the public interest, the protection of society could be achievable without such confiscation.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- Slovak law does not explicitly provide for any such mechanism.

Current position

The concept of quasi-criminal liability of corporate entities has not yet been tested in the Slovak courts. Given the absence of case law it is difficult to predict with any certainty how the Slovak courts will construe and apply the relevant provisions of the Slovak Criminal Code or what penalties may be expected. It therefore remains to be seen what impact the quasi-criminal liability of corporate entities will have.

Spain

Introduction

Organic Law 5/2010, of 22 June ("LO 5/2010") establishes, for the first time in the Spanish Criminal Code (*Código Penal*) ("CP"), an express regulation of the criminal liability of corporate entities for crimes committed on their behalf by their representatives, *de facto* and *de jure* administrators, employees and/or contracted workers.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- To establish corporate criminal liability, the offence must have been committed for or on behalf of a corporate entity and for its benefit by the following individuals:
 - the legal representatives and *de facto* and *de jure* administrators of the corporate entity;
 - contracted workers and/or employees of the corporate entity, when the offence was committed while carrying out corporate activities and as a result of the corporate not having exercised due supervision in all the circumstances of the case.
- Corporate entities are only liable for crimes expressly applicable to them under corporate law, including:
 - discovery and disclosure of secrets;
 - fraud and punishable insolvency;
 - crimes related to intellectual and industrial property, the market and consumers;
 - tax fraud and money laundering;
 - urban planning offences and crimes against the environment; and
 - corruption offences.

Which offences can a corporate entity commit?

- As indicated above, corporate entities can only commit those offences which expressly apply to them.

Are there any specific defences available?

- LO 5/2010 requires that, in order for a corporate entity to be criminally liable for offences committed by its employees and/or contracted workers, the former must have been able to commit the offence due to lack of supervision in accordance with the specific circumstances of the case. Therefore, corporate entities will not be criminally liable if they enforce appropriate supervision policies over their employees. This is a question of fact that must be assessed on a case-by-case basis.
- Furthermore, LO 5/2010 provides that the establishment of enforceable measures to prevent and discover crimes, which may be committed in the future with the corporate entity's means or under its supervision, can mitigate the corporate entity's criminal liability.
- Therefore, it is highly advisable for corporate entities to establish internally enforceable measures to prevent and/or discover crimes. Such measures should be reflected in a corporate compliance manual which should describe, among

other aspects, the entity's risk-mapping, taking into account its activities and organisational structure, the internal policies and procedures relating to such risks, the internal channels of upward or downward communication and the establishment of a supervisory committee, to name a few.

What is the relationship between the liability of the corporate entity and its directors and officers?

- The CP does not establish any consequences for directors or officers of a corporate entity found guilty in a criminal case. However, in some circumstances, such directors or officers might be found guilty of the same offences committed by the company, if the relevant court considers that they were aware of the criminal conduct and they did not try to prevent it. Under Spanish law, most crimes can only be committed with consent or wilful misconduct. However, for some offences, such as money laundering, negligence is enough. As a general rule, consent and/or connivance is needed to consider individual omissions as an offence but negligence could be considered enough in very exceptional cases.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- The ability to prosecute offences in Spain is limited to the Investigating Courts (*Juzgados de Instrucción*). However, the police, the prosecution office, other regulatory bodies and individuals in general can report to the Investigating Courts any conduct that they might consider to be a crime and can act as complainants.

Penalties

Corporate entities

- LO 5/2010 establishes several penalties which may be imposed on a corporate entity, such as:
 - monetary fines (calculated according to the damage caused or the revenue obtained);
 - dissolution of the legal entity;
 - suspension of activities for a term of up to five years;
 - closure of the premises and establishments for a term of up to five years;
 - prohibition from carrying out in the future any activities which led to the crime being committed, favoured or concealed. This prohibition may be temporary or indefinite. If temporary, the term cannot exceed 15 years;
 - disqualification from obtaining subsidies and public aid, from entering into agreements with the public sector and from obtaining tax or social security benefits and incentives for a term of up to 15 years;
 - legal intervention for a term of up to five years.
- Furthermore, the imposition of criminal liability on a corporate entity is compatible with (i) the criminal liability which may be imposed on the individual who committed the offence, (ii) any civil liability for the loss and damage that the offence may have caused to the victims, and (iii) any other type of civil or administrative liability which may be imposed on the corporate entity or the individual.

Individuals

- Possible consequences for individuals of the company include disqualification, fines, and imprisonment.

What factors are taken into consideration when determining the penalty?

- As a general principle, in considering the seriousness of any offence, the court must consider the company's culpability in committing the offence and any harm which the offence caused.
- Depending on the penalty to be imposed, the court might take into consideration other factors, such as: the suitability of the penalty in preventing future crimes, the social and economic consequences of the penalty, the position within the company of the individual who actually committed the crime, prior offending and whether the company was used as an instrument for crime.
- Furthermore, LO 5/2010 provides that the establishment of enforceable measures to prevent and/or discover the crimes which may be committed in the future with the corporate entity's means or under its supervision shall be mitigating factors in consideration of a corporate's culpability.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- Co-operation and early acceptance of guilt are always mitigating factors in sentencing; as is the voluntary compensation of victims.

Current position

Corporate criminal liability was introduced very recently. Although it is too soon to foresee what the consequences of this new law will be, there have so far been no significant prosecutions. However, complaints against corporate entities filed by individuals have become more frequent in recent months.

As a consequence of the amendment of the CP, most Spanish companies are adapting their corporate compliance programmes in an attempt to prevent liability that could result from the potential commission of relevant crimes.

UK

Introduction

There are many offences in the UK targeted at corporate entities and concerned with the regulation of business activity.

Two recent high profile statutes have also targeted corporate entities specifically – the Corporate Manslaughter and Corporate Homicide Act 2007 ("**CMCHA**") and the Bribery Act 2010 ("**Bribery Act**") - both of which focus attention on the management systems and controls of a corporate entity. In particular the Bribery Act, which imposes liability for failure to prevent an act of bribery *unless* the corporate entity can demonstrate that it had adequate procedures to prevent such an act occurring, is a considerable change in the approach towards corporate criminal liability. An important feature of the new Bribery Act is its extra-territorial reach and its application to non-UK companies. A foreign company which carries on any "part of a business" in the UK could be prosecuted under the Bribery Act for failing to prevent bribery committed by any of its employees, agents or other representatives, even if the bribery takes place outside the UK and involves non-UK persons.

Liability

In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

- Two main techniques have been developed for attributing to a corporate the acts and states of minds of the individuals it employs.
- The first is by use of what is known as the "identification principle" whereby, subject to some limited exceptions, a corporate may be indicted and convicted for the criminal acts of the directors and managers who represent the directing mind and will and who control what it does. This concept has developed over decades. In the case of an offence involving proof of a mental element (*mens rea*), such as many corruption offences, it is possible to combine proof of the act itself (the *actus reus*), on the part of an employee or representative of the company who would not form part of the controlling mind with proof of *mens rea* on the part of a person who does form part of the controlling mind.
- The second technique of vicarious liability was used from as early as the nineteenth century. Although, generally speaking, a corporate entity may not be convicted for the criminal acts of its inferior employees or agents, there are some exceptions, the most important of which concerns statutory offences that impose an absolute duty on the employer, even where the employer has not authorised or consented to the act.
- Wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporate may be indicted, whether or not the statute refers in terms to corporations.⁶
- There are some recent statutes which have offences specifically directed at companies. As described above, the Bribery Act imposes liability, in certain circumstances, on a corporate which fails to prevent an act of bribery on its behalf. Similarly, a corporate is guilty of the offence of corporate manslaughter if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

What offences can a corporate entity not commit?

- A corporate entity can commit most offences *except* those for which imprisonment is the only penalty (such as treason or murder), and those which by their nature can only be committed by physical persons.

⁶ The word "person" in a statute, in the absence of a contrary intention, extends to corporations.

Are there any specific defences available?

- Defences are generally set out in the relevant and applicable legislation.
- However, many regulatory offences which affect corporate entities are offences of strict liability or offences which impose strict liability subject to concepts such as "reasonable practicability". For example, the Health and Safety at Work etc Act 1974 imposes strict liability on an employer whenever there is a failure to ensure his employees' health, safety and welfare at work. Similarly, every employer must conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected by it are not exposed to risks to their health and safety. This creates absolute liability, subject to the defence of reasonable practicability and cannot be delegated.
- A corporate entity may be liable for failure to take reasonable precautions at store management level, notwithstanding that all reasonable precautions to avoid risk of injury to employees have been taken at senior management or head office level.⁷
- The Bribery Act also imposes strict liability on corporate entities subject to the defence of having adequate procedures in place to prevent bribery.

What is the relationship between the liability of the corporate entity and that of its directors and officers?

- Certain statutes provide that, where a corporate has committed an offence, its officers are in certain circumstances⁸ to be deemed guilty of that offence.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?

- The ability to prosecute offences in the UK is not restricted to prosecuting authorities and a number of different authorities and regulatory bodies may investigate and prosecute offences committed by corporate entities. For example it is becoming increasingly common for the Financial Services Authority ("**FSA**") to use its powers to bring criminal prosecutions, albeit so far the most high profile prosecutions have been against individuals rather than corporate entities.
- The procedure to be adopted where a corporate faces a criminal charge is set out in the Criminal Justice Act 1925 and provides that a corporation "*may enter in writing by its representative a plea of guilty or not guilty*". If no plea is entered, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporate had entered a plea of not guilty.

Punishment

Corporate entities

- Penalties which corporate entities can face include fines, confiscation, compensation orders and debarment from public procurement. Where there is evidence that an offender has benefited financially from the offending, the court must, in accordance with the Proceeds of Crime Act 2002, consider whether to make a confiscation order. In cases where corporate entities are not prosecuted, a civil recovery order can be imposed if unlawful conduct of some description is

⁷ *Gateway Foodmarkets Ltd* [1997] 3 All ER 78, [1997] 2 Cr App Rep 40, CA.

⁸ Generally where consent or connivance, or neglect can be shown e.g. Financial Services and Markets Act 2000, s 400.

proved, or, more usually, accepted.⁹ Civil recovery orders do not have the same consequences (for example in terms of debarment from public procurement) as convictions.

- There has been a steady increase in the level of fines over recent years; fines can now be so high that they put a corporate entity out of business. For instance, the Sentencing Guideline issued by the Sentencing Guideline Council in respect of corporate manslaughter said that whilst the question as to "whether the fine will have the effect of putting the defendant out of business will be relevant, in some bad cases this may be an acceptable consequence." More recently, on 11 May 2011 the Court of Appeal refused an application for leave to appeal against a sentence imposed in the first statutory corporate manslaughter case which had put the company out of business. The Court of Appeal held that the fine imposed was appropriate and that to limit a fine to the level which the company was capable of paying would have resulted in a "ludicrous" penalty.
- Lord Justice Thomas stated in his ruling in the recent *Innospec* case¹⁰ that he expected parity between the US and the UK where the facts allowed; that "*a fine comparable to that imposed in the US would have been the starting point*" and that "*it would [...] have been possible to impose a fine that would have resulted in the immediate insolvency of the company*".¹¹ The case concerned a UK company, Innospec Ltd, which pleaded guilty to conspiracy to corrupt in relation to contracts secured in Indonesia and which was also facing charges in the US in relation to corruption in Iraq

Individuals

- Possible consequences for the directors or officers of the company include disqualification, fines, and imprisonment.
- Directors and other senior officers may also be vulnerable to civil claims and regulatory action for their action or inaction; for example, for a failure to maintain "adequate procedures" under the Bribery Act, leading to quantifiable losses.
- Directors or senior officers could also potentially be liable for assisting or encouraging¹² (or the common law offence aiding and abetting) or conspiring to commit crime¹³ which would also leave them open to civil claims and regulatory action.

What factors are taken into consideration when determining the penalty?

- In considering the seriousness of any offence, the court must consider the corporate entity's culpability in committing the offence and any harm which the offence caused, was intended to cause or might, foreseeably, have been caused.
- Guidelines issued on the assessment of seriousness of any given offence identify four levels of culpability for sentencing purposes starting with intention to cause harm to negligence in committing the offence.¹⁴
- The guidelines also refer to aggravating factors which are familiar territory: previous offending is relevant as is whether the offence was planned, whether the offence resulted in high profit and whether there was a failure to respond to warnings or concerns expressed by others about the offender's behaviour.
- The corporate entity's level of co-operation with the prosecuting and regulatory authorities is also a factor in assessing the course of action taken by a regulator¹⁵ and the level of penalty appropriate where there has been corporate criminal offending.

⁹ Most recently, on 13 January 2012, the SFO announced that it had, for the first time, obtained a civil recovery order against a shareholder of a company involved in historic bribery, in which it was accepted that the SFO could trace property obtained through unlawful conduct into the shareholder's hands.

¹⁰ (2010) Crim LR 665

¹¹ See <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-judgment.aspx>

¹² Serious Crime Act 2007, s 44-46

¹³ Criminal Law Act 1977, s 1A

¹⁴ http://sentencingcouncil.judiciary.gov.uk/docs/web_seriousness_guideline.pdf

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?

- Co-operation and early acceptance of guilt are always mitigating factors in sentencing. Offenders can receive up to a third off their sentence for an early plea of guilty¹⁶ and can also be given immunity for co-operating with the prosecuting authorities in certain limited circumstances.¹⁷
- In 2007 British Airways ("**BA**") admitted collusion with Virgin Atlantic ("**Virgin**") over the price of long-haul passenger fuel surcharges and a penalty of £121.5m was imposed by the Office of Fair Trading ("**OFT**"). Virgin avoided any penalty as it qualified for full immunity under the OFT's leniency policy under which a company which has been involved in cartel conduct and which is the first to give full details about it to the OFT qualifies for immunity from penalties in relation to that conduct. Any company staff involved in the price fixing disclosed also qualify for immunity from criminal prosecution in relation to that conduct. In addition to the investigation into BA's corporate conduct under civil competition law, the OFT also commenced criminal proceedings under the Enterprise Act 2002 into whether any *individuals*, namely the BA executives, dishonestly fixed the levels of the surcharges.¹⁸
- The Serious Fraud Office ("**SFO**") has issued guidance specifically for corporate entities on self-reporting in which the SFO explicitly states that: "*we want to settle self referral cases that satisfy paragraph 4 civilly wherever possible*" and that "*[t]he prospects of a criminal investigation followed by prosecution and a confiscation order are much greater, particularly if the corporate was aware of the problem and had decided not to self report.*"¹⁹

Current position

Despite the increase in the number of criminal offences which are targeted at corporate entities, many of these offences created are not being used or are being used very little. It is worth remembering that we have only just seen the first conviction under the CMCHA 2007. So far, there has only been one conviction under the Bribery Act in relation to an individual; the corporate strict liability offence for failure to prevent bribery has yet to be tested.

Nonetheless, legislation such as the Bribery Act, and, in particular, the corporate offence has been given considerable prominence by prosecuting bodies, which has not been lost on the corporate consciousness. It is fair to say that there is an increasing focus by prosecuting and regulatory agencies on bringing corporate entities to account for their actions.

¹⁵ For example, the FSA has stated that one factor it will consider in making a decision as to whether to pursue criminal proceedings or regulatory proceedings for market abuse includes whether the person is being or has been cooperative with the FSA in taking corrective measures. See <http://fsahandbook.info/FSA/extra/5504.pdf> at paragraph 12.8.

¹⁶ Sentencing Guideline Council: Reduction in Sentence for a Guilty Plea (2007)

¹⁷ Serious Organised Crime and Police Act 2005, s 71-73

¹⁸ The prosecution subsequently collapsed following the disclosure of evidence, which only emerged after the start of the trial.

¹⁹ <http://www.sfo.gov.uk/media/133724/approach%20of%20the%20serious%20fraud%20office%20v6.doc>

Worldwide contact information

34* offices in 24 countries

Abu Dhabi

Clifford Chance
9th Floor, Al Sila Tower
Sowwah Square
PO Box 26492
Abu Dhabi
United Arab Emirates
T +971 2 613 2300
F +971 2 613 2400

Amsterdam

Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
T +31 20 7119 000
F +31 20 7119 999

Bangkok

Clifford Chance
Sindhorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
T +66 2 401 8800
F +66 2 401 8801

Barcelona

Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
T +34 93 344 22 00
F +34 93 344 22 22

Beijing

Clifford Chance
33/F, China World Office Building 1
No. 1 Jianguomenwai Dajie
Beijing 100004
China
T +86 10 6505 9018
F +86 10 6505 9028

Brussels

Clifford Chance
Avenue Louise 65
Box 2, 1050 Brussels
Belgium
T +32 2 533 5911
F +32 2 533 5959

Bucharest

Clifford Chance Badea
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1,
Bucharest, 010016
Romania
T +40 21 66 66 100
F +40 21 66 66 111

Casablanca

Clifford Chance
169 boulevard Hassan 1er
20000 Casablanca
Morocco
T +212 520 132 080
F +212 520 132 079

Doha

Clifford Chance
Suite B
30th floor
Tornado Tower
Al Funduq Street
West Bay
P.O. Box 32110
Doha, Qatar
T +974 4 491 7040
F +974 4 491 7050

Dubai

Clifford Chance
Building 6, Level 2
The Gate Precinct
Dubai International Financial Centre
PO Box 9380
Dubai, United Arab Emirates
T +971 4 362 0444
F +971 4 362 0445

Düsseldorf

Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
T +49 211 43 55-0
F +49 211 43 55-5600

Frankfurt

Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
T +49 69 71 99-01
F +49 69 71 99-4000

Hong Kong

Clifford Chance
28th Floor
Jardine House
One Connaught Place
Hong Kong
T +852 2825 8888
F +852 2825 8800

Istanbul

Clifford Chance
Kanyon Ofis Binasi Kat. 10
Büyükdere Cad. No. 185
34394 Levent, Istanbul
Turkey
T +90 212 339 0000
F +90 212 339 0099

Kyiv

Clifford Chance
75 Zhylyanska Street
01032 Kyiv,
Ukraine
T +38 (044) 390 5885
F +38 (044) 390 5886

London

Clifford Chance
10 Upper Bank Street
London
E14 5JJ
United Kingdom
T +44 20 7006 1000
F +44 20 7006 5555

Luxembourg

Clifford Chance
2-4, Place de Paris
B.P. 1147
L-1011 Luxembourg
Grand-Duché de Luxembourg
T +352 48 50 50 1
F +352 48 13 85

Madrid

Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
T +34 91 590 75 00
F +34 91 590 75 75

Milan

Clifford Chance
Piazzetta M. Bossi, 3
20121 Milan
Italy
T +39 02 806 341
F +39 02 806 34200

Moscow

Clifford Chance
Ul. Gasheka 6
125047 Moscow
Russia
T +7 495 258 5050
F +7 495 258 5051

Munich

Clifford Chance
Theresienstraße 4-6
80333 Munich
Germany
T +49 89 216 32-0
F +49 89 216 32-8600

New York

Clifford Chance
31 West 52nd Street
New York
NY 10019-6131
USA
T +1 212 878 8000
F +1 212 878 8375

Paris

Clifford Chance
9 Place Vendôme
CS 50018
75038 Paris Cedex 01
France
T +33 1 44 05 52 52
F +33 1 44 05 52 00

Perth

Clifford Chance
Level 12, London House
216 St Georges Terrace
Perth WA 6000
Australia
T +618 9262 5555
F +618 9262 5522

Prague

Clifford Chance
Jungamannova Plaza
Jungamannova 24
110 00 Prague 1
Czech Republic
T +420 222 555 222
F +420 222 555 000

Riyadh

(Co-operation agreement)
Al-Jadaan & Partners Law Firm
P.O.Box 3515, Riyadh 11481
Fifth Floor, North Tower
Al-Umam Commercial Centre
Salah-AIDin Al-Ayyubi Street
Al-Malaz, Riyadh
Kingdom of Saudi Arabia
T +966 1 478 0220
F +966 1 476 9332

Rome

Clifford Chance
Via Di Villa Sacchetti, 11
00197 Rome
Italy
T +39 06 422 911
F +39 06 422 91200

São Paulo

Clifford Chance
Rua Funchal 418 15º andar
04551-060 São Paulo-SP
Brazil
T +55 11 3019 6000
F +55 11 3019 6001

Shanghai

Clifford Chance
40th Floor, Bund Centre
222 Yan An East Road
Shanghai 200002
China
T +86 21 2320 7288
F +86 21 2320 7256

Singapore

Clifford Chance
One George Street
19th Floor
Singapore 049145
T +65 6410 2200
F +65 6410 2288

Sydney

Clifford Chance
Level 16, No. 1 O'Connell Street
Sydney NSW 2000
Australia
T +612 8922 8000
F +612 8922 8088

Tokyo

Clifford Chance
Akasaka Tameike Tower
7th Floor
2-17-7, Akasaka
Minato-ku
Tokyo 107-0052
Japan
T +81 3 5561 6600
F +81 3 5561 6699

Warsaw

Clifford Chance
Norway House
ul.Lwowska 19
00-660 Warsaw
Poland
T +48 22 627 11 77
F +48 22 627 14 66

Washington, D.C.

Clifford Chance
2001 K Street NW
Washington, DC 20006 - 1001
USA
T +1 202 912 5000
F +1 202 912 6000

C L I F F O R D
C H A N C E

© Clifford Chance LLP, February 2012.

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ.

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or contact our database administrator by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

www.cliffordchance.com

Abu Dhabi ▪ Amsterdam ▪ Bangkok ▪ Barcelona ▪ Beijing ▪ Brussels ▪ Bucharest ▪ Casablanca ▪ Doha ▪ Dubai ▪ Düsseldorf ▪ Frankfurt ▪ Hong Kong ▪ Istanbul ▪ Kyiv ▪ London ▪ Luxembourg
Madrid ▪ Milan ▪ Moscow ▪ Munich ▪ New York ▪ Paris ▪ Perth ▪ Prague ▪ Riyadh (co-operation agreement) Rome ▪ São Paulo ▪ Shanghai ▪ Singapore ▪ Sydney ▪ Tokyo ▪ Warsaw ▪ Washington, D.C.
Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh

J2012020040475