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Corporate Criminal Liability

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Global contacts

Australia:
Diana Chang +612 8922 8003
Jerrem Ng +612 8922 8069
Kirsten Scott +618 9262 5517

Belgium:
Sébastien Ryelandt +32 2 533 5988

China:
Wendy Wysong +85 22 8263 460
Yu Bing +86 21 2320 7372
Richard Sharpe +85 22 8262 427
Montse Ferrer +85 22 8263 562

Czech Republic:
Alex Cook +420 222 555 212
Michal Jasek +420 222 555 229
Ludvik Ruzicka +420 222 555 255

France:
Thomas Baudesson +33 1 44 05 54 43
Charles-Henri Boeringer +33 1 44 05 24 64

Germany:
Heiner Hugger +49 697199 1283
Beatrix Elsner +49 697199 1455

Hong Kong:
Wendy Wysong +852 2826 3460
Yu Bing +862 1232 07372
Richard Sharpe +852 2826 2427
Montse Ferrer +852 2826 3562

India:
Aarna Law www.aarnalaw.com

Indonesia:
Linda Widyati +62 21 2988 8301
Dinasti Brian Harahap +62 21 2988 8317

Italy:
Antonio Golino +39 028063 4509
Jean-Paule Castagno +39 028063 4317
Pasquale Grella +39 028063 4289

Luxembourg:
Claude Eischen +352 48 50 50 268
Hannes Westendorf +352 48 50 50 473

Japan:
Michelle Mizutani +81 3 5561 6646

The Netherlands:
Jereon Ouwehand +31 20 7119 130
Joost Tonino +31 20 7119 236

Poland:
Marcin Ciemiński +48 22 429 95 15
Bartosz Krużewski +48 22 429 95 14
Paweł Pogorzelski +48 22 429 95 08

Romania:
Daniel Badea +40 21 66 66 101
Bianca Alecu +40 21 66 66 127

Russia:
Timur Aitkulov +7 495 725 6415

Singapore*:
Nish Shetty +65 6410 2285
Janice Goh +65 6661 2021

Slovakia:
Michal Jendzelovsky +420 222 555 274

Spain:
Bernardo del Rosal +34 91 590 75 66

UAE:
Graham Lovett +971 4 362 0625
James Abbott +971 4 362 0608
Payam Beheshti +971 4 362 0631

UK:
Roger Best +44 20 7006 1640
Martin Saunders +44 20 7006 8630
Judith Seddon +44 20 7006 4820
Luke Tolaini +44 20 7006 4666
Patricia Barratt +44 20 7006 8853
Chris Stott +44 20 7006 4231

USA:
David DiBari +1 202 912 5098
Chris Morvillo +1 212 878 3437
Ed O'Callaghan +1 212 878 3439
David Raskin +1 212 878 3438
Wendy Wysong +1 202 912 5030
Megan Gordon +1 202 912 5021
Polly Snyder +1 202 912 5025

Introduction

This survey of corporate criminal liability seeks, on a jurisdiction-by-jurisdiction basis, to answer some common questions on a subject which features with increasingly regularity on boardroom and prosecutors' agendas.

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

What our survey shows is not only that corporate liability either has existed for some time, or 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 prosecuting corporate entities for the criminal misconduct of their officers and employees and for higher penalties. In those countries where there is no criminal liability *per se*, there is either quasi-criminal liability or consideration is being given to the introduction of corporate criminal liability. In the United States, where corporate criminal liability has been a feature of US law since the nineteenth century, the criminal prosecution of corporations came to an abrupt halt following the criminal prosecution of Arthur Andersen in 2002, the conviction of which (subsequently overturned) resulted in its collapse and job losses for thousands of innocent employees. However, more recently, prosecutors have been less willing to accept the prospect of collateral consequences as justification for not pursuing criminal charges against corporations.

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 judgments 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 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.

The role of the EU increased further with the introduction of the Lisbon Treaty, which came into effect on 1 December 2009, which 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', including 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 manipulation. In this latter area, current sanction regimes do not always use the same definition which is considered to detract from the effectiveness of policing what is often a cross-border offence. As a consequence, a new regulation on market abuse and a new directive on criminal sanctions for market abuse were published on 12 June 2014 (although the latter will not be implemented in all Member States with the UK having opted out). Member States have two years to transpose the Directive on criminal sanctions for market abuse into their national law. The new rules on market abuse update and strengthen the existing framework and, for example, explicitly ban the manipulation of benchmarks (such as LIBOR). The Directive on criminal sanctions for market abuse requires all Member States to provide for harmonised criminal offences of insider dealing and market manipulation, and to impose penalties which are effective and dissuasive – including maximum sanction levels of at least four years' imprisonment for market manipulation, insider dealing and recommending or inducing another person to engage in insider dealing and two years for the unlawful disclosure of inside information. Member States will

have to make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence, punishable with effective sanctions everywhere in Europe. Significantly in the context of corporate liability, the directive extends liability to legal persons but liability would not 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.

A new concept

In all European 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 was introduced on 1 January 2012. In Germany, hitherto it has been thought that imposing corporate criminal liability would offend against the basic principles of the German Criminal Code. However, in late 2013 the Government of North Rhine-Westphalia proposed a draft law on corporate criminal liability, although time will tell whether it is enacted. In Russia, a draft law on corporate criminal liability was put before the Russian Federation Council at the end of June 2014 and is finding broad support at Government level. 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 (and prosecutors continue to lobby for further extensions to the application of this concept). In the Netherlands, until 1976 only charges for fiscal offences could be brought against corporate entities.

Rest of world context

Our study of a sample of emerging and established economies outside Europe highlights significant variations between arrangements in different jurisdictions, both in terms of the mechanisms by which corporate entities may face exposure to the criminal law and the magnitude of the risk of such exposure crystallising. In some instances, these differences are based on the way in which historical connections between jurisdictions have shaped the development of the concept and continue to influence its application today.

For instance, the concept of corporate liability under the criminal law is relatively nascent in India, where the courts confirmed in a landmark case in 2005 that corporate entities may suffer both civil and criminal liability, and Indonesia, where some statutes provide for patchy potential liability. In these jurisdictions, significant uncertainties will remain until early cases and prosecutorial experiments are followed up with more concrete legislative developments and/or robust jurisprudence.

In other jurisdictions surveyed (namely Australia, Hong Kong, Singapore and the US), the concept is much better established. There are substantial differences between these jurisdictions in the way in which and the extent to which corporate entities are prosecuted. In relative terms, the highest levels of investigative and prosecutorial activity are to be found in the US and Australia, although in both jurisdictions, prosecutors are seeking to send deterrent messages by increasingly and actively pursuing individuals in addition to corporates.

In Hong Kong and Singapore the influence of English law is clear. In these jurisdictions, numbers of cases involving corporate defendants have been relatively low. Largely as the result of similar difficulties with attributing individuals' conduct to corporate entities as have historically beset UK prosecutors, authorities there have adopted the approach of targeting their resources on the pursuit of individuals rather than corporates.

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 the 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 Russia (albeit under the Administrative Offences Code) an organisation is guilty if it *cannot* prove that it took all possible and reasonable steps to prevent the offence and comply with the law.

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, procedures and compliance culture 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. In Australia, due diligence in ensuring compliance with the law is often available to corporations as a defence; where it is not a defence it may be a relevant factor in determining whether fault has been established. In France, whilst there is no specific defence provided by law based on adequate compliance procedures, the fact that a company has implemented strong compliance policies may be taken into account either to demonstrate that there was no mens rea or when assessing the amount of the penalty.

The emphasis placed on an organisation's compliance culture and its 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.

In the US robust compliance programmes may help corporations avoid prosecution, though they are not formally a defence to criminal prosecution – however, a robust compliance programme is likely to facilitate other mitigating circumstances, such as self-reporting of violations, that will help a corporation avoid prosecution.

Penalties

The level of penalties varies across jurisdictions, but there are certain common trends. The most common penalty imposed on corporate entities are fines which have been on an upward trajectory in recent years across many jurisdictions. Several jurisdictions, such as France and Spain, envisage the dissolution of the corporate entity in certain cases. Another common feature of sentencing regimes is a ban from participating in public procurement tenders although there is no formal scheme for mandatory debarment from public procurement processes for corporations convicted of criminal offences in Hong Kong.

In Australia, law reform commissions have recommended introducing sentencing provisions targeted specifically at corporations but there has not been any indication that such recommendations will be implemented in the near future. However, there is an appetite for higher penalties. The Australian Securities and Investments Commission has recently called for the penalties available to it to be increased.

In the US, in determining a corporation's penalty in the federal system, judges refer to several statutory factors enumerated in 18 U.S.C. 3553(a) and Chapter 8 of the Federal Sentencing Guidelines ("**the Sentencing Guidelines**"). The crux of the Sentencing Guidelines is that they punish according to the corporation's culpability and the seriousness of the crime, and reward corporations for self-disclosure, cooperation, restitution, and preventative measures. While there have not been trials, prosecutors have begun to insist on corporate guilty pleas in lieu of more lenient settlements and the settlements themselves have required enormous fines on companies found lacking adequately robust compliance programmes or internal controls.

In The Netherlands, the last couple of years have seen the Public Prosecution Office demonstrate a much greater willingness to impose very substantial fines, against a concern not to fall behind actions by foreign authorities.

In the UK, in respect of certain offences, the Sentencing Council's Definitive Guideline for Fraud, Bribery and Money Laundering Offences ("**the Guideline**") came into force on 1 October 2014. The Guideline contains a ten-step process to be followed by the criminal courts when sentencing corporations for fraud, bribery and money laundering offences. Given the paucity of corporate prosecutions in the UK, there is no meaningful precedent for the sentencing of corporates. This Guideline therefore draws upon a variety of sources including regulatory and civil penalty regimes applied by UK enforcement authorities; sentencing guidelines for corporate manslaughter as well as civil and criminal penalties imposed in other jurisdictions, in particular the US. The Guideline will also be a reference point for fines imposed under the terms of a Deferred Prosecution Agreement ("**DPA**"). A DPA is a new tool available to UK prosecutors since February 2014 as a way of dealing with alleged economic criminal conduct by a corporate entity, one term of which will almost always include a financial penalty – but can also include compensation to victims, the imposition of a monitor and/or disgorgement of profits, among other things. Any financial penalty imposed under a DPA must be broadly comparable to a fine that the court would have imposed upon a corporate entity following a guilty plea.

The concept of DPAs comes from the US, where they are an established and frequently used method of concluding investigations involving corporate entities. The US also has available to it Non-Prosecution Agreements ("**NPAs**"). DOJ turned to these tools following Arthur Andersen's collapse to impose substantial financial penalties and compliance reforms on companies without the collateral consequences associated with criminal charges. DPAs entail a criminal charge publicly being filed with the court, albeit in deferred status, whereas NPAs do not require a charge, deferred or otherwise.

DPAs have been introduced in some European jurisdictions (for example in the Czech Republic), and in some others there are concepts akin to DPAs – such as criminal settlement in Belgium. In some European countries there can be a resolution short of prosecution in certain circumstances not dissimilar to those which must exist under the UK DPA regime. For instance, in Germany, the draft proposal by the State of North Rhine-Westphalia contains a provision stipulating that the competent court can refrain from imposing any penalty at all on the corporate concerned if certain requirements are met, one of which is that the entity has self-reported. Similarly, 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, cooperation will be considered a mitigating factor when it comes to sentencing.

Mitigation

In many jurisdictions a corporate can 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 potential penalties, sometimes dramatically, in exchange for cooperation by the corporate entity.

Perhaps best known is the approach in the US where voluntary disclosure of violations is one of several factors considered by federal prosecutors in deciding whether to bring charges against a corporation.

In the UK "considerable weight" will be given to a "genuinely proactive approach" adopted by the corporate in bringing the offending to the notice of the prosecuting authorities when a decision is taken as to whether or not to prosecute.[1] Prosecutors and judicial authorities in a number of jurisdictions recognise that assistance provided by corporate entities leading to the identification and prosecution of individuals within them responsible for wrongdoing is a powerful mitigating factor which, in appropriate cases, merits meaningful reductions in penalties sought or imposed.

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.

[1] Deferred Prosecution Agreements Code of Practice, published by the UK's Serious Fraud Office and Crown Prosecution Service, paragraph 2.82 (i).

Americas

United States

Introduction

Corporate criminal liability has been a feature of United States law since the nineteenth century. In the early part of the century, corporations could be held liable only for strict liability crimes (i.e., those that impose liability regardless of culpability). This trend started to change in 1890, when Congress passed the Sherman Antitrust Act, explicitly providing a statutory basis for corporate criminal liability. By the early twentieth century, courts also applied the civil doctrine of *respondeat superior* to hold corporations liable for intent-based crimes committed by their agents and employees.

Criminal prosecution of corporations became more commonplace by the turn of the twenty-first century. That practice, however, came to a rather abrupt halt in the wake of the notorious criminal prosecution of Arthur Andersen in connection with the Enron accounting fraud scandal. Arthur Andersen fought the criminal charges and lost at trial, with the resulting conviction resulting in the demise of the well-established company and job losses for thousands of innocent employees. These collateral consequences of the conviction — resounding all the more sharply when the conviction was later reversed for legal error by the U.S. Supreme Court — chilled prosecutors' inclination to pursue criminal cases against corporations, a reluctance that persisted even through the beginning of the financial crisis.

The pendulum has since swung back the other way. Prosecutors are soundly rejecting the theory that any company or institution is "too big to jail" and have become less willing to accept the advent of collateral consequences as justification for not pursuing criminal charges against corporations. While there have not been trials, prosecutors have begun to insist on corporate guilty pleas in lieu of more lenient settlements and the settlements themselves have required enormous fines on companies found lacking adequately robust compliance programs or internal controls. The theories under which such charges may be pursued are discussed below.

Liability

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

Under principles of *respondeat superior*, a corporation is vicariously criminally liable for the illegal acts of any of its agents (including employees and contract personnel) so long as those actions were within the scope of their duties and were intended, even only in part, to benefit the corporation. An act is considered "within the scope of an agent's employment" if the individual commits the act as part of his general line of work and with at least the partial intent to benefit the corporation. The corporation need not receive an actual benefit. A corporation may be liable for these offences even if it directs its agent not to commit the offence.

In contrast with federal law, in many states, a corporation is liable only for the acts of senior level management officials, and not for those of junior employees.

Some courts have also allowed for prosecution where the prosecutor could not identify the specific agent who committed the crime, if the prosecutor can show that someone within the corporation must have committed the offence. Similarly, where no single employee has the requisite intent or knowledge to satisfy a scienter element, courts have recognised a "collective knowledge doctrine," which imputes the collective intent and knowledge to the corporation when several employees collectively knew enough to satisfy the intent or knowledge. Some courts, however, have limited the collective knowledge doctrine to circumstances where the company was flagrantly indifferent to the offences being committed.

Additionally, some statutes impose criminal liability for corporations beyond *respondeat superior*, particularly in the fields of environmental law and antitrust violations.

What offences can a corporate not commit?

Corporations can commit any offence that an individual could commit, provided the offence meets the standards laid out above, and as long as the U.S. Congress has not specifically exempted corporations from liability in an applicable statute.

Are there any specific defences available?

While there are not specific defences available to corporations, corporations have some (but not all) of the same constitutional rights as an individual facing a criminal investigation or prosecution. Any violation of these rights would provide a defence to the corporation. As with individuals, *ex post facto* laws are unconstitutional as applied to corporations. An *ex post facto* law is one that makes conduct criminal retroactively, while it was innocent at the time of the conduct, or that increases the punishment for a crime after the conduct. Furthermore, corporations have a First Amendment right to freedom of speech when it comes to political speech and the government cannot place content-based restrictions on a corporation's truthful speech in the context of lawful commercial activity. Corporations also have a Fourth Amendment right to be free from unreasonable searches and seizures. In certain highly regulated sectors, however, corporations may, by the nature of their business, be subject to

reasonable warrantless inspections or inquiries. Additionally, corporations have Fifth and Fourteenth Amendment rights to due process and a Fifth Amendment right to be free from double jeopardy, or the repeated prosecution for the same crime. However, corporations cannot assert the privilege against self incrimination or the right to a grand jury indictment. Furthermore, corporations also have Sixth Amendment rights to assistance of counsel, notice of charges, public trials, speedy trials, and trials by jury, and to call witness and confront witnesses against them. Finally, corporations have an Eighth Amendment right to be free from excessive fines that are grossly disproportionate to the crime committed.

Robust compliance programs may also help corporations avoid prosecution, though they are not formally a defence to criminal prosecution. However, having a robust compliance program is likely to facilitate other mitigating circumstances, such as self-reporting of violations, that will help a corporation avoid prosecution, as discussed further below.

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

Generally, corporate liability does not insulate the directors, officers, or agents of the corporation from individual liability. Courts have stated explicitly that without a clear intent from the U.S. Congress, both the corporation and the individual can be found liable for the crime. There are several crimes for which officers and directors may be liable even if they did not commit the underlying crime themselves, including conspiracy, procurement, aiding and abetting, misprision, accessory after the fact, and obstruction of justice.

Additionally, both the corporation and its directors or officers may be liable for inchoate crimes, such as a conspiracy between two or more directors or officers. However, an officer or director of the corporation cannot be convicted of conspiring solely with the corporation. Furthermore, under *Pinkerton v. United States*, a director or officer who was not aware of the criminal act may be liable criminally for the foreseeable offences committed by one of his co-conspirators in furtherance of a common scheme.

Corporate directors or officers may also be liable when they have instructed another employee to commit a federal offence for procurement, or for aiding and abetting another in the commission of a federal offence. To aid and abet another, the officer or director would have to know of and facilitate the other's misconduct. Furthermore, a director or officer could be liable for their conduct after the crime has been committed. A director or officer might be liable for misprision if they knew of the commission of a federal felony by another employee and actively tried to conceal the crime. Furthermore, a director or officer could be liable as an accessory after the fact for assisting another in avoiding the consequences of their federal offence. "Misprision" and "accessory" after the fact charges can also lead to specific statutory charges for obstruction of justice.

Procedure

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

On the federal level, the U.S. Department of Justice ("**DOJ**") is responsible for prosecuting offences by corporate entities. Administrative bodies, such as the U.S. Securities and Exchange Commission, can bring civil charges. Individual states, through their attorney general offices, may bring criminal or civil charges against corporations. Notably, New York State has taken an active role in prosecuting financial crimes and other white collar matters. However, the paragraphs below focus on federal law.

Punishment

Corporate entities

Corporations face the same punishments as individuals after conviction, except that, naturally, corporations cannot be sentenced to prison time or death. However, corporations can be fined, put on probation, required to pay restitution, required to perform community service, barred from engaging in certain commercial activity, required to establish compliance programs, or ordered to follow any other condition that the judge believes addresses the harm caused or threat of future harm, or have their property confiscated.

In determining a corporation's sentence in the federal system, judges refer to several statutory factors enumerated in 18 U.S.C. 3553(a) and Chapter 8 of the Federal Sentencing Guidelines ("**the Sentencing Guidelines**"). The crux of the Sentencing Guidelines is that they punish according to the corporation's culpability and the seriousness of the crime, and reward corporations for self-disclosure, cooperation, restitution, and preventative measures.

What factors are taken into consideration in determining the penalty?

Among the factors considered by a federal judge in determining a corporation's penalty, the most significant is the nature and seriousness of the misconduct in question. The Sentencing Guidelines provide a sliding scale fine range based on the gravity and circumstances of the offence, among other factors. In determining where in the range the fine should be set, the judge looks to factors such as the quality of the

corporation's compliance program and whether the corporation would gain a windfall despite the fine. Other factors include the organization's substantial assistance to authorities in prosecuting crimes committed by individuals, whether the offence resulted in death or bodily injury, whether the offence constituted a threat to national security or the environment, whether the organization bribed any public officials in connection with the offence, and whether the corporation agreed to pay remedial costs that greatly exceed the gain the organization received, among others.

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

Voluntary disclosure of violations can help a corporation at several points in the criminal process, including seeking leniency through a settlement or otherwise mitigating penalties. Voluntary disclosure of violations is one of several factors considered by federal prosecutors in deciding whether to bring charges against a corporation. In determining whether to pursue a criminal charge against a corporation, prosecutors are guided by a set of internal criteria called the "Principles of Federal Prosecution of Business Organizations." Sometimes referred to as the "Filip Factors," these publically available criteria include such factors as:

- the pervasiveness of the wrongdoing within the corporation,
- the corporation's history of similar misconduct,
- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents,
- the existence and effectiveness of the corporation's pre-existing compliance program,
- the corporation's remedial actions,
- collateral consequences,
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance, and
- the adequacy of remedies such as civil or regulatory enforcement actions.

What types settlements are available to a corporation in criminal matter?

Alternatives to a criminal trial include a guilty plea, a deferred prosecution agreement ("**DPA**"), a non-prosecution agreement ("**NPA**"), or civil or regulatory sanctions.

DPAs and NPAs are dispute resolution mechanisms that avoid indictment. DOJ turned to these tools in abundance in the wake of Arthur Andersen to impose substantial financial penalties and compliance reforms on companies without the collateral consequences associated with criminal charges. The key difference between NPAs and DPAs is that DPAs entail a criminal charge publicly filed with the court, albeit in deferred status, whereas NPAs do not require a charge, deferred or otherwise. NPAs are private agreements that become public only by the agreement's terms. There is no judicial involvement in a resolution by NPA; DPA settlements require court approval.

Otherwise, NPAs and DPAs are similar. They both include: (i) an admission in the agreement to misconduct described in an accompanying statement of facts; (ii) requirements to implement various measures during the term of the agreement, including (among other things) payment of a fine, continued cooperation with DOJ and other authorities, and enhanced internal controls to remediate the wrongdoing; and (iii) a release from criminal prosecution for any crimes described in the statement of facts, so long as the agreement is not breached. A DPA includes DOJ's commitment to defer prosecution of the charge filed with the court during the term of the agreement and, absent breach, to dismiss the charge entirely at the term's close.

In considering whether to apply civil or regulatory sanctions instead of criminal prosecution, prosecutors consider several factors including the interest of the regulatory body, their ability and willingness to take over the investigation, and the sanction likely to be imposed on the corporation by the regulatory body.

Current position

Recently, DOJ has announced several initiatives concerning corporate liability. Firstly, DOJ has placed greater emphasis on corporations cooperating in the prosecution of individuals to receive cooperation credit sufficient to avoid prosecution. To obtain full cooperation credit, the corporation must act promptly to identify responsible individuals and to procure and produce evidence against them.

Furthermore, DOJ emphasised the value of bringing charges against individuals rather than corporations. According to the DOJ, this promotes fairness to other employees and stockholders, while still maintaining accountability and appropriate deterrence. DOJ also emphasised the need to incentivise whistle-blowers and cooperating witnesses to come forward and cooperate.

The best way for corporations to avoid criminal prosecution in the United States is to implement robust internal compliance programs, to be sure to report any violations in a timely manner, and to cooperate fully should a federal investigation of the responsible agent follow self-reporting.

Europe and the Middle East

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*) ("**PP**") is in charge of prosecuting criminal offences committed by corporate entities.

Most investigations will be carried out by the PP, 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 level 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.

The law of 4 April 2011, which came into force on 16 May 2011, does provide the opportunity to reach an amicable settlement between the entity and the PP at every stage of the proceedings, whereby they agree to discontinue the prosecution in exchange for payment of a fine by the suspect. The initiative can be taken solely by the PP and only for a limited number of criminal offences. The fine cannot exceed the maximum amount provided by the law and should be in proportion to the gravity of the crime. In the event that the suspect and the victim agree upon a settlement, the PP will take note in an official statement and the court will subsequently determine on the discontinuance of the criminal proceedings.

Can the PP settle a criminal matter (transaction pénale/strafrechtelijke transactie)?

The PP can settle a criminal matter for a financial penalty (including compensating victims where appropriate) for both individuals and corporates where s/he considers that the offence does not deserve a penalty of imprisonment exceeding two years. This is regardless of the maximum penalty prescribed by law, so that it is the judgement of the PP that matters. The PP need not explain why he considers two years to be sufficient. In practice, this means that the PP is free to settle cases when s/he believes it is appropriate. However, a settlement is not always possible, for instance where the offence involves customs and excise duties or when the offence has caused severe physical injuries. Further, the potential victim(s) must be indemnified. The victim does not need to be fully indemnified if the quantum is disputed but must be compensated to the extent not disputed. Where tax or social law authorities are among the victims, they must approve the settlement. Other victims can submit their comments to the PP but cannot veto the settlement. A settlement can be reached at any stage of the proceedings until a final decision on the merits is rendered.

The amount of the financial penalty is at the discretion of the PP. However, the amount to be paid cannot exceed the maximum penalty as prescribed by law (and penalties of imprisonment are converted into an amount in EUR).

The settlement must only be approved by a court where proceedings have been transferred to an investigating magistrate (juge d'instruction/onderzoeksrechter) or deferred to the criminal court; otherwise no court approval is required, however its role is limited to verification that the above mentioned conditions have been met.

Two laws of 14 April and 11 July 2011 have introduced into Belgian law an extended possibility of settlement in criminal matters. Pursuant to these new laws, a settlement can now be proposed

by the PP to physical persons or legal entities, if he or she considers that the facts should be sanctioned with a term of imprisonment exceeding two years (though not exceeding 15 to 20 years' imprisonment), provided that the facts do not imply a severe infringement of the physical integrity of a person. A settlement is possible notwithstanding a pending criminal investigation or pending criminal proceedings, as long as no final decision has been rendered and provided that the suspect is willing to indemnify the damages. For a tax or social security offence, a settlement is only possible if the suspect has paid the tax or social security contributions due. The laws contain specific guidelines as to, *inter alia*, the fine which can be proposed, the delays for the execution of the settlement, the hand-over of seized assets, the treatment of civil damages claims and the ultimate discontinuation of the criminal action.

Current position

Since the adoption of the law of 4 May 1999 a significant number of 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.

Criminal settlement is becoming more common, especially in complex financial matters. This is principally because the Belgian authorities lack the resources to deal with these matters within a reasonable period of time, such that in many complex matters, the defendants are acquitted after relying on technical defences relating to time-limitation.

Czech Republic

Introduction

The existence of corporate criminal liability is a relatively 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 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.

There have been two minor amendments to the Act since it came into force. The first amendment implemented certain changes in connection with new legislation on international judicial cooperation in criminal matters and is not specific to corporate criminal liability. As of 1 January 2014, the Act stipulates that a legal entity which is based in the Czech Republic is considered a Czech citizen or a person with permanent residence in the Czech Republic, for the purposes of the Act on International Judicial Cooperation in Criminal Matters. The sections of the Act dealing with international judicial cooperation in criminal matters were repealed when the Act on International Judicial Cooperation in Criminal Matters became applicable.

The second amendment, which became effective on 1 August 2014, extended the list of criminal offences recognized by the Act. Corporate entities may now be prosecuted for e.g. profiteering, the abuse of a child for the production of pornography, or for the participation in pornographic performances. Further, deferred prosecution agreements ("**DPAs**") were introduced into the Czech legal system with effect from 1 September 2012. The rules on DPAs have been incorporated into the Code of Criminal Procedure and are applicable, *inter alia*, in proceedings concerning the criminal liability of corporations and should help to simplify criminal proceedings. A DPA may be proposed by a public prosecutor (upon the petition of the accused or ex officio) and must be approved by a criminal court in a public hearing. The negotiations may be initiated provided that there is sufficient evidence to justify the conclusion that a criminal offence has been committed by the accused. A DPA may only be concluded in the presence of the defence counsel, and the public prosecutor is required to take the victim's interests into consideration. The DPA itself shall contain, among other things, a declaration that the accused committed the act in question and it shall also specify the punishment to be imposed (or waiver of punishment if permissible) as well as the extent and manner of compensation for material or non-material damage, or disgorgement (if agreed).

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) its 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 82 overall) 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 could be applicable.

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

If a corporate entity 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 and they are at riks of individual prosecution under the Criminal Code if their conduct constitutes 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 is the case for offences committed by individuals).

Punishment

Corporate entities

The most serious penalty envisaged is the 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) the forfeiture of (all) property; (ii) monetary penalties; (iii) the forfeiture and/or confiscation of assets; (iv) the prohibition of activities; (v) the prohibition of performance under public procurement contracts, participation in concession procedures or tenders; (vi) the prohibition on accepting grants and subsidies and; (vii) the publication of judgments.

The Act does not provide for any mitigating/aggravating factors, however relevant provisions of the Criminal Code are applicable, such as:

- mitigating factors: if it is a first offence, committed in circumstances that were beyond the control of the offender; or if only minor damage resulted; and
- aggravating factors: if it is a repeat offence or if 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?

In determining the type and severity of the penalty, similar principles apply under the Act as those which apply to individuals under the Criminal Code. 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 with regard to 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, the court 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 is not applicable to corruption-related offences.

Current position

The Act enables the punishment of criminal conduct that previously could not be sanctioned due to the difficulty in identifying the individual(s) responsible in circumstances where decisions are taken by a corporate entity. It also helps to prevent situations where individuals are held criminally liable whilst the corporate entity escapes liability and continues its criminal conduct. The level of penalties contemplated under the Act can severely affect the continued operation and profitability of corporate entities.

Since its enactment, there have been approximately 30 convictions under the Act.

The most severe sentences have included the dissolution of a corporate entity and the prohibition of business activities for a period of 10 years. DPAs have not been used with any great frequency so far. However, since it is now possible to prosecute corporates under the Act, and as DPAs become a greater feature of the international prosecutorial landscape, we anticipate that the use of DPAs for corporate offending in the Czech Republic will increase.

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?

There is no specific defence provided by law, such as the one based on the implementation of anti-corruption adequate procedures set out by the UK Bribery Act. However, the fact that a company has implemented strong compliance policies may be taken into account either to demonstrate that there was no *mens rea* or when assessing the amount of the penalty.

More generally, 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 the company's behalf.

However, the court may infer that the offence was committed on behalf of the company if it was committed in the course of the usual corporate business and for its benefit.

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

The criminal liability of a corporate entity for an offence does not preclude that of any natural person who may be a perpetrator or accomplice to the same act but does not automatically result in liability for its directors or officers.

Both individuals and 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. 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.

In practice, despite an increasing number of prosecutions brought against corporate entities, individuals are still the primary target of prosecutors.

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.

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

French Courts tended, until recently, to consider that it was not necessary to identify the body or representative through whom the legal entity had committed an offence. The fact that the negligence/fault was part of the business operations/organisation of the corporate entity was considered sufficient to trigger the legal entity's criminal liability.

The Supreme Court seems to have recently returned to a stricter position, imposing a requirement to demonstrate the involvement of a representative in the criminal conduct. This involvement could result from a direct participation to the criminal conduct or, in certain circumstances, from a lack of care/control or negligence.

In 2004, a plea bargaining process was introduced (*comparution sur reconnaissance préalable de culpabilité*). Under this process, the defendant admits his guilt for a lesser penalty and there is no public trial. Where the penalty is agreed between the parties, it is then submitted to the President of the Criminal Court for approval through a judgment, which is registered in the criminal record.

Until recently, this process had only been used by prosecutors for minor offences such as car traffic offences. In the last couple of years, some investigating magistrates have started to use this procedural option to settle complex financial matters involving legal entities and it is now officially encouraged by public prosecutors.

Pursant to a law enacted on 6 December 2013, a new prosecutor specialising in financial matters was created. This new prosecutor has, so far, been very active in investigating corporate and financial institutions and a number of major cases are ongoing. Judges have also recently demonstrated their capacity to impose much higher fines on companies than in the past.

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.

In September 2013, the Government of North Rhine-Westphalia proposed a new law creating criminal liability for corporate entities (Verbandsstrafengesetz). The new draft law stipulates that offences committed by an entity's officers/executives are not only to be attributed to the individual but also to the entity on whose behalf the individual acts. The attribution of criminal liability would even apply to offences committed abroad where an entity is headquartered in Germany. The North Rhine-Westphalia draft law provides for a wide range of different penalties, and includes (not necessarily cumulatively) a fine of up to 10% of the entity's annual total revenue, exclusion from government aid, exclusion from public procurement, the prohibition of further (commercial) activity or a warning with the threat of further sanctions. A court can refrain from imposing a penalty in circumstances where no substantial damage was caused or any damage has largely been remediated and/or the entity self-reported, voluntarily disclosing crucial information to assist the discovery of the offending and providing evidence necessary to prove the entity's wrongdoing. The current intention is to introduce the draft bill before Parliament (the Bundesrat) so that the legislative process can begin. Whilst the overall political climate might be favourable to reform, the draft law raises numerous constitutional and doctrinal concerns which are likely to be the cause of lively parliamentary debate. It is difficult to predict the outcome of the process, whether the bill will be passed into law and if so, to what extent it may be the subject of further amendment.

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 a 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 to EUR 10 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 a 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 prosecuting authorities and criminal courts. Regulatory fines can also be imposed by supervisory authorities.

Punishment

Corporate entities
A regulatory fine can amount to EUR 10 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 forfieted, 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 financial institutions and industrial companies such as UBS AG, Credit Suisse, 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;
- in 2011 Credit Suisse received a regulatory fine of EUR 150 million;
- in 2012 Ferrostaal AG received a regulatory fine of EUR 140 million; and
- in 2014 UBS AG received a regulatory fine of EUR 300 million.

As noted above, the draft law on corporate criminal liability for the State of North Rhine-Westphalia is going to be debated in the German Parliament in the near future. It will be interesting to see whether the opponents to the bill succeed in halting the march of legislation creating corporate criminal liability.

Italy

Introduction

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

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 least in part, if not exclusively) in the interest or for the benefit of such corporate entity. Conversely, 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 *et seq*. In addition, responsibility may arise if the employee aids and abets the commission of such crimes. Finally, the corporate can be held liable – albeit exposed to lower penalties – even in the event that the relevant offence is merely attempted by the employee. 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 and obstruction of regulators);
- terrorism;
- market abuse;
- manslaughter and breaches of health and safety legislation;
- slavery, exploitation of prostitution and pornography offences;
- money laundering:
- copyright offences;
- obstruction of justice offices;
- environmental offences;
- use of illegal immigrant workers; and
- private corruption.

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; and
- 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 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 231[2].

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 to up to ten 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

[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;
- 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.

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.

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.

Recently, the list of Relevant Offences was extended to include, among others, the offence of self-laundering.

Finally, the Supreme Court has recently confirmed that, under the provisions of Law 231, employers may be found liable for crimes committed by their employees, even where no employee is being prosecuted. Prior to this ruling, it had been a matter of some debate among academics and practitioners as to whether liability could attach to an employer where the specific employee(s) who committed the relevant offence had not been identified.

New Guidelines from Confindustria (the Italian Employers' Union) concerning the implementation of "management and organisational control protocols" have been approved.

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 legislator.[4] 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 bodies or by one or more of its directors, whether *de jure* or *de facto*.

A "statutory body" 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 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.

[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*".

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".*

For corporate entities, specific and distinct provisions apply in the 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, cooperation of the perpetrator and trying to redress the damage caused are mitigating factors which the court will consider. There is no equivalent concept under Luxembourg law of a deferred prosecution agreement; indeed, entering into an agreement with the public prosecutor or with the courts (and thus "negotiating" as to whether or not the company should be convicted) is impossible under Luxembourg law. Only the public prosecutor has the discretion to start criminal proceedings against a company (the so-called principle of "*opportunité des poursuites*") and once it decides to start these proceedings, the company cannot stop them.

Current position

As the corporate criminal liability concept was introduced recently in Luxembourg, it has rarely been used and is therefore still largely untested in practice. There have been so far no significant cases. The Law has however been extensively discussed in the Luxembourg legal community and the general feeling is that the public prosecution service will utilise the law to a very large extent.

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 an 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 conducted 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 Managers or entrepreneurs, 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. Furthermore, if the person has been convicted of offences relating to hiring illegal immigrants, the court may prohibit the entity from obtaining public funds and order the entity to repay to the State Treasury the public funds obtained by the entity in the 12 months preceding the conviction.

The level of enforcement of this regulation is quite low and it has rarely been used in practice. According to statistics published by the Polish Ministry of Justice, from 2005 to the end of the first half of 2014 only 182 corporate entities were prosecuted under the Liability Act. In addition, up until 2012, fines were imposed on only 44 of them (the highest of which was PLN 12,000 – approx. EUR 3,000). Furthermore, the courts have not yet prohibited entities from bidding for public contracts.

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. Deferred prosecution agreements are not envisaged in the Liability Act. 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 cooperated in uncovering criminal acts.

Current position

The Polish Liability Act 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, which meant it was impossible to prosecute corporate entities for offences committed by members of the board. 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 very probable that provisions of the Liability Act will be used more frequently in future. This follows from the amendments made to the Liability Act in 2011, which repealed the above-mentioned change that corporate entities may not be prosecuted for offences committed by its board members, and the growing number of prosecutions under the Liability Act since then. In recent press releases the Polish anti-corruption authorities (the Central Anti-Corruption Bureau) indicated that in light of current tender corruption investigations they want to make use of the Liability Act's provisions on penalties and a ban on taking part in public tenders. To this end, the Central Anti-Corruption Bureau is now working together with the Public Prosecutor's General Office on improving the enforcement of the Liability Act.

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 was modified to include provisions in this respect.

The Romanian legislator has recently adopted a new criminal code (the "**Criminal Code**") which came into force on 1 February 2014. The Criminal Code applies to all legal entities, except for the State, public authorities and public institutions which carry out purely public (rather than private) activities.

Liability

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

Generally, corporate entities can 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. There are offences incorporated into the Criminal Code that aim to apply to corporate entities, *exempli gratia*: abuse of trust in order to defraud the creditors, public auction misrepresentation, conducting fraudulent financial operations, asset manipulation to defraud the creditors. 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 Criminal Code introduced a fining system, based on the "fine per day" concept. The value of the fine per day ranges between RON 100 (approx. EUR 24) and RON 5,000 (approx. EUR 1,200), while the number of days of fine ranges from 30 to 600 (i.e. a general maximum fine of RON 3,000,000 (approx. 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. If the corporate entity aimed to gain patrimonial advantages through the criminal offences, then the court may increase the special limits of the fine up to a third but without surpassing the maximum fine provided by law.

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 entitie's 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).

Also, during the criminal investigation, if reasonable doubt exists to justify

reasonable suspicion that the legal entity has committed a criminal offence and only in order to provide a smooth operation of the criminal trial, one of the following steps may be taken: a) forbid the initiation or, as the case may be, suspension of the procedure to dissolve the legal entity or liquidate it; b) forbid the initiation or, as the case may be, suspension of the legal entity's merger, division or reduction in nominal capital, that began prior to the criminal investigation or during it; c) forbid asset disposal operations that are likely to diminish the legal entity's assets or cause its insolvency; d) forbid the signing of certain legal acts, as established by the judicial body; and e) forbid activities of the same nature as those on the occasion of which the offence was committed.

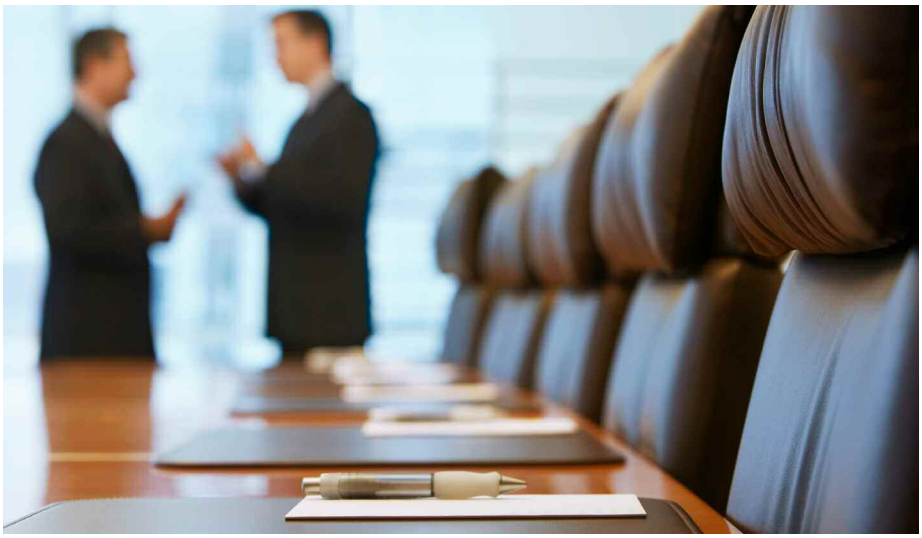
The level of enforcement has started to grow during the last year and has significantly increased at the beginning of this year

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 circumstances and manner of committing the criminal offence, as well as the means employed; the state of danger created against the protected value; the nature and seriousness of the harm caused or of other consequences of the criminal offence; the reason for committing the



criminal offence and the envisaged purpose; the prior criminal history of the perpetrator and its conduct after committing the criminal offence and during the criminal trial. The courts are bound to consider all these circumstances when determining 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:

- Compensation to the victim, during the investigation and before the first court hearing (among others corruption, money laundering and other limited provided offences), will generate a discount of a third;
- for bribery offences the corporate is not liable if it self-reports the offence before the criminal investigation body is vested with the case;
- for tax evasion offences, there is a 50% discount if the offender makes the payment before the first court hearing;
- for money laundering offences, there is also a 50% discount if the offender discloses information and facilitates the prosecution of other participants during the criminal investigation; and
- The Criminal Procedure Code provides that in cases where the offender pleads guilty and accepts the prosecution case, the penalty limits are reduced (i) by one third where the sanction is prison and (ii) by one quarter where the sanction is a fine.

Current position

In the past prosecution authorities have tended to focus their efforts on the investigation of corporate entities' officers and directors rather than on the corporate entities themselves. Following the introduction of the new criminal code, this has begun to change and there is an increased focus on investigating and prosecuting corporate entities. The Romanian National Anti-Corruption Department has said that the number of coporate entities prosecuted for criminal offences doubled in 2014.

Russia

Introduction

The Criminal Code of the Russian Federation ("**RF**") does not establish criminal liability for corporate entities but this issue is being extensively debated in Russia at the moment.

A draft law on amendments creating criminal corporate liability was put forward by the RF Investigative Committee in 2011 but was left to languish and eventually abandoned altogether.

In 2014 the question of corporate criminal liability arose again in connection with the "deoffshorization" of the country's economy announced by the RF President. For that process to take place, a number of new mechanisms will need to be incorporated into Russian law. Those investigating tax evasion and money-laundering need to know who the foreign beneficial owners of Russian businesses are and they also need access to significant assets, which are, in this context, usually owned by legal entities, rather than individuals. Establishing criminal liability for legal entities would also be useful in corruption investigations. For these reasons, the Investigative Committee has now proposed a revised corporate criminal liability draft law.

This draft law reflects the approach taken by international law to transnational organised crime and corruption. It introduces the concept of a legal entity's involvement in a crime and provides that a legal entity would be criminally liable if the officers/executives acting on its behalf commit a crime or use the legal entity to commit a crime or conceal a crime or its consequences. It provides for a wide range of penalties, including fines, the prohibition of further (commercial) activity, license revocation and compulsory liquidation.

The draft law was submitted to the RF Federation Council at the end of June 2014 and is finding broad support amongst the RF Government.

Liability

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

Currently under Russian criminal law, only individuals can be prosecuted.

Legal entities can be liable under the RF Administrative Offences Code if crimes are committed by their management or employees. Specifically, a legal entity is subject to administrative liability for providing, offering or promising unlawful remuneration, for which the penalty is an administrative fine plus confiscation of the money, securities or other assets constituting the unlawful remuneration (Article 19.28 of the RF Administrative Offences Code). Criminal proceedings against an individual and administrative proceedings against an organisation can be based on the same facts and heard in parallel.

What offences can a corporate entity not commit?

Under the current law, legal entities cannot commit any crimes.

Are there any specific defences available?

If an organisation is charged with an administrative offence, it may be a defence to show that it has taken all possible and reasonable measures to prevent the offence and comply with relevant statutory requirements (under Article 2.1 of the RF Administrative Offences Code, an organisation is guilty if it cannot prove that it took all possible and reasonable steps to prevent the offence and comply with the law).

What is the relationship between the liability of the corporate entity and that of its directors and officers?
In practice, Russia's law-enforcement agencies tend to initiate an investigation of an organisation when one of its managers or employees has been convicted of a crime.

Procedure

If a legal entity commits an administrative offence it will be investigated by the competent Russian authority.

Punishment

Corporate entities

Penalties that can be imposed against a legal entity under the RF Administrative Offences Code include the forfeiture of money, securities and other property obtained through unlawful activity, administrative fines and administrative suspension.

If a legal entity is found guilty of unlawful remuneration, the maximum possible administrative penalty is a fine of 100 times the value of the bribe (but at least 100 million roubles (approx. EUR 1.5 million)), plus confiscation of the money, securities or other assets that constituted the unlawful remuneration.

Individuals

The most common penalties for individuals are imprisonment and fines.

What factors are taken into consideration when determining the penalty?
A number of factors are taken into account for the purposes of determining the penalty.

The continuation of an unlawful activity notwithstanding a request from the competent authority to desist and the repeated commissioning of the similar offence within a single year are examples of aggravating circumstances.

Mitigating factors include the prevention of the offence's harmful consequences, the voluntary reimbursement of damages and cooperation during the investigation.

Is there a mechanism whereby entities can disclose violations in exchange for lesser penalties?
Disclosure and cooperation can be mitigating factors.

Current Position

At the moment, the most recent draft law creating criminal liability for legal entities is being considered by the competent authorities.

The idea of criminal liability for legal entities is the focus of such great interest because the current "quasi-criminal" liability for offences similar to crimes has not proved to be very effective. In particular, recently the authorities have only rarely imposed administrative fines for unlawful remuneration and then only at the lowest possible level.

Slovakia

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[6] (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, 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 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

[6] The term "close connection with the business of the corporate" comprises commission (or attempt) of an offence by an individual as described further in the text.

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.) committed (or attempted) or participated in by an individual officially acting on its behalf and in close connection with its business. The corporate entity whose property is to be confiscated is declared bankrupt as a matter of Slovak insolvency law. The property of the estate, however, remains unaffected by the confiscation and creditors' claims will have priority over the confiscation.

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, the scope of such offence, the benefit gained from such offence, the damage caused, the circumstances surrounding the commission of such offence, the consequences of the penalty imposed 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.

In order to introduce an effective mechanism of sanctioning legal entities arising from different international documents (mainly the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) the Slovak Ministry of Justice published a bill on the criminal liability of legal entities (the "**Bill**") at the end of 2013. The Bill is currently in the legislative process and aims to introduce direct criminal liability of legal entities for a limited number of criminal offences enumerated in the Bill (in particular criminal offences against property and economic criminal offences). The proposed effective date is set to 1 July 2015. It is proposed that legal entities would incur criminal liability under similar circumstances as outlined above with respect to the existing concept of quasi-criminal liability. The Bill does not provide for any specific defences in connection with the criminal liability of legal entities. The sanctions would include fines, confiscation of assets or property, debarment from public procurement (for up to ten years) and ban on economic activities (for up to ten years or an indefinite period of time).

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 for 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.

The law has been recently extended by the Organic Law 7/2012 of 27 December 2012 ("**LO 7/2012**"). Originally the CP was limited in its application, and not applicable, for example, to the State, to the territorial and institutional public administrations, to political parties and trade unions, to organisations under public international law, or to any others that exercise public powers of sovereignty, administration, or in the case of State mercantile companies that implement public policies or provide services of general economic interest. Since the passing of LO 7/2012, however, political parties and trade unions are subject to the general regime of criminal accountability and can also be held liable, although the other restrictions concerning the application of the law to other state bodies still apply.

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 any of the following individuals:

- the representatives and *de facto* and *de jure* administrators of the corporate entity; or
- 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.

On 4 October 2013, a Bill of the CP was published at the Parliament Gazette, which for the first time, and in a very clear way, sets out grounds for exemption from criminal liability for legal persons if the corporate entity can show that it possesses and effectively implements a crime prevention or compliance programme. This Bill will be finally approved by the end of March 2015 and enter into force in July 2015. In the case of offences committed by administrators or representatives, the grounds for exemption from criminal liability will apply if the person proves:

- *First*, that prior to the commission of the offence, the management body adopted and effectively enforced organisation and management models that included suitable monitoring and control measures to prevent similar offences – in other words, effective compliance programmes;
- *Second*, that the supervision of the functioning and fulfilment of the prevention model implemented was entrusted to a body with independent powers of decision and control, although in companies which are "smaller" this function may be performed by the management body; and
- *Third*, that there was no omission or deficient performance of the functions of monitoring and control on the part of the compliance body. If these circumstances can only be partially proven, this may be taken into account for the purposes of mitigating the penalty.

The compliance programmes must meet the following requirements:

(a) Identify the activities in relation to which the offences that should be prevented may be committed (risk assessment);

(b) Establish the protocols or procedures for forming the intentions of the legal person, for decision making and the execution of the same in this regard (code of ethics or corporate conduct);

(c) Have appropriate systems for the management of financial resources to prevent the commission of the offences that should be prevented (due diligence);

(d) Impose the obligation to inform of possible risks and breaches to the body responsible for overseeing the functioning of the compliance programme (whistle blowing);

(e) Establish a disciplinary system that duly penalises any breach of the measures that the system establishes; and

(f) Proceed with a regular review of the programme to ensure that it remains effective and to allow for changes in the organisation, the control structure or in the activities performed (monitoring and review).

In the case of offences committed by employees, the exemption from liability will apply if, prior to the commission of the offence, the legal person adopted and effectively enforced a system of organisation, management and control appropriate for the prevention of offences of the kind that were committed, with the above-mentioned requirements being applicable to said system.

Accordingly, 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; and
- 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 (mainly banks and savings banks) 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.

The Netherlands

Introduction

The Netherlands have a long tradition of holding corporate entities to account for criminal offences.

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. As a result, legal persons can be prosecuted as perpetrators or accomplices, or be liable for incitement to commit an offence or aiding and abetting. Furthermore, persons supervising the unlawful conduct of the legal entity or persons ordering the misconduct of the legal entity 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, and especially since 2012 a growing number of large settlements have been concluded with legal entities.

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 benefitted from the offence;
- the offence was committed by an employee of, or a person working on behalf of, the corporate entity; and
- 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, all offences can be attributed to a corporate entity. Even physical crimes like molestation 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.

In the Netherlands, jurisdiction is not automatically given for foreign subsidiaries of Dutch companies. It is generally assumed that a parent company cannot be held liable merely because of its major shareholding and formal legal structure. But the same attribution criteria for liability of legal entities in general could also be used to attribute criminal conduct by a (foreign) subsidiary to its Dutch parent company.

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 of the legal entity 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.

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 four 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*. However, other fraud offences such as embezzlement, corruption or money laundering can also be prosecuted by each regional department of the Public Prosecution Office, the National Public Prosecution Office (mainly responsible for severe crimes, terrorist crimes etc.) 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 and competition issues the Authority for Consumers and Markets, for health care issues the Health Care 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 than they would be for natural persons. The overall maximum is EUR 810,000 per offence, which can accumulate indefinitely where there are a number of individual offences. If though this maximum is not deemed to be appropriate the the maximum fine that can be imposed on a legal entity can run to up to 10% of the legal entity's annual turnover in the previous year. For fiscal offences the maximum fine is 100% of the evaded taxes if that is higher than the maximum fines as described in general.

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, in case of certain economic crimes,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 because it is a measure intended to avoid future wrongdoing; 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.

Individuals

The maximum fine which may be imposed on an individual is generally EUR 81,000 or EUR 810,000 in particularly large cases. 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 (much) 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 and the possibility of a settlement out of court. However, 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. Recent settlements have shown that the Public Prosecution Office is no longer reticient in imposing very substantial fines, which come closer in size to settlements in the US. Recent settlements of EUR 70 million in a LIBOR manipulation case and USD 240 million in a foreign corruption case can be considered ground breaking and have set the bar much higher for entities seeking a settlement.

UAE

Introduction

A corporate entity may be subject to criminal liability in the UAE for a wide range of offences, as it may be criminally liable for any proscribed act committed for its account or in its name by its representatives, directors or agents.

The chapter below explores corporate criminal liability under the federal law of the UAE as well as the law of Dubai. It is important to note that Dubai has its own criminal code (which does not apply in the other Emirates of the UAE) so there might be slight variations that apply in Dubai as stated below.

Liability

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

Under Article 65 of Federal Law No. 3 of 1987 concerning the Promulgation of the Penal Code (the "**Federal Penal Code**"), a corporate (which is a "judicial person" for the purposes of the Federal Penal Code) is responsible for any criminal act committed on its account or in its name by its representatives, directors or agents.

Accordingly, if an employee, director or other representative of the corporate commits a crime whilst acting on its account or in its name, then the corporate may be criminally liable for the same offence.

Similarly, under Article 23 of the Dubai Penal Law for 1970 (the "**Dubai Penal Code**"), a corporate (which is a "juristic authority" for the purposes of the Dubai Penal Code) may be punished with a fine for any crime, whether committed alone or with any other person as if they are a natural person. The provision states that the juristic authority shall be considered to have committed a crime if persons representing the corporate commit, or permit or incite the committing of, a crime.

Accordingly, an employee, director or other representative of the corporate who commit crimes whilst acting on the corporate's account or in its name may attract criminally liability to the corporate under the Dubai Penal Code.

Additionally, if a corporate entitiy has a presence in the Dubai International Financial Centre (the "**DIFC**") (an offshore freezone that has its own civil and commercial laws), then it may be subject to regulatory sanctions.

What offences can a corporate entity not commit?

In theory, there is no limit on the offences for which a corporate may be liable.

Are there any specific defences available?

There are no general defences that exempt corporations from criminal liability in respect of UAE or Dubai laws, such as a general defence based on the corporate taking all reasonable steps to prevent the commission of the offence.

There are, however, specific defences that may apply depending upon the particular offence for which the corporate is charged.

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

A corporate can only become liable if its directors, representatives or agents have committed a crime whilst acting on the corporate's account or in its name.

Procedure

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

The police in the relevant emirate are responsible for investigating criminal offences. Prosecution is conducted by the public prosecutor in the relevant emirate.

In respect of any regulatory offences committed under DIFC law, the Dubai Financial Services Authority (the "**DFSA**") would be the authority responsible for investigating any alleged breaches. It would also be the authority that would issue regulatory sanctions as a result of such investigations.

Punishment

Corporate entities

Pursuant to Article 65 of the Federal Penal Code, the penalties that may be imposed on a corporate entity include fines, confiscations and criminal measures.

If the law imposing criminal liability specifies a principal punishment other than a fine (for example, imprisonment) then, in the case of a corporate, the punishment is to be restricted to a fine not exceeding AED 50,000 under the Federal Penal Code. Similarly, pursuant to Article 23 of the Dubai Penal Code, a corporate may be liable for fines in place of the penalty of imprisonment where relevant, although no specific amount is mentioned in the Dubai Penal Code.

Anything used or which was due to be used for a crime or misdemeanour may be ordered by the Court to be confiscated, without prejudice to the rights of any bona fide third party.[7]

[7] Article 82 of the Federal Penal Code and Article 55 of the Dubai Penal Code.

Criminal measures are classified under Article 109 of the Federal Penal Code as either measures restrictive of liberty or depriving of rights or material measures. Relevantly, these include:

- the closing of an establishment and a prohibition on carrying out a specific job; and
- deprivation of the right to exercise a profession or commercial activity for which it is required to obtain a licence from public official authorities.

Under the Dubai Penal Code,[8] criminal measures such as suspending the company from operating apply if the crime was committed intentionally, and where the crime deserves imprisonment. Such suspension could be for a period not exceeding two years, which the court shall judge. A more stringent penalty applies in the form of dissolving the company for any of the following reasons:

- when the corporate does not comply with the legal principles of establishment;
- if the purpose of establishment violates laws or this was the aim of establishment; or
- if the corporate is suspended by virtue of a concluded suspension resolution that does not pass for more than five years.[9]

Note that any violation of the suspension or dissolution order by an individual is subject to a penalty of imprisonment for a period not exceeding six months or with a fine not exceeding 1,000 riayls.[10]

Individuals

Possible consequences for the directors or officers of the corporate include disqualification, fines and imprisonment.

What factors are taken into consideration when determining the penalty?

It is within the discretion of the judges in the criminal courts to determine the appropriate penalty, subject to any provisions available in the Federal Penal Code or the Dubai Penal Code that stipulate the punishment.

In terms of regulatory sanctions imposed by the DFSA against corporates under its authority, a penalty guidance section is included in the DFSA's Regulatory Policy and Process sourcebook. All relevant facts and circumstances are taken into consideration when determining a penalty. Some of the factors that the DFSA takes into consideration include: the DFSA's objectives; the deterrent effect of the penalty; the nature, seriousness and impact of the breach; the benefit gained; the conduct of the person or entity after the breach; the difficulty in detecting and investigating the breach; the disciplinary record and compliance history; action taken by the DFSA in previous, similar cases; and action taken by other domestic or international regulatory authorities. When determining the appropriate level of a financial penalty, the DFSA's penalty-setting regime is based on three principles: disgorgement (a firm or individual should not benefit from any contravention), discipline (a firm or individual should be penalised for wrongdoing) and deterrence (any penalty imposed should deter the firm or individual who committed the contravention and others from committing further or similar contraventions).

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

There is no such mechanism in either the federal law of the UAE or Dubai criminal law. In respect of entities under the authority of the DFSA, the DFSA allows for enforceable undertakings, which are written promises to do or refrain from doing a specified act or acts, to be given by an entity. These may be provided to the DFSA at any time, either before, during or after an investigation, the making of a decision or the commencement of litigation or proceedings in court. Enforceable undertakings are an alternative mechanism for regulating contraventions of the law and may, amongst other things, include remedial actions that are not otherwise available under a notice of decision.

Current position

We are not aware of any proposed changes to the manner in which corporate entities may be subject to criminal liability under UAE law but regulatory sanctions have been the primary method of holding corporates to account. In the DIFC, the DFSA has been diligent to some extent in pursing entities for breaches of the regulatory laws. There have been a number of instances where the DFSA has brought action against DIFC authorised individuals or authorised firms that have been subject to DFSA investigation or that have breached DIFC laws or rules. Examples of such regulatory sanctions include the withdrawal of a licence of an authorised firm, the fining of directors for failing to disclose material information to the DFSA, fining a former senior executive of an authorised firm for providing false information and fining an authorised firm for market abuse.

[8] Article 57 of the Dubai Penal Code.
[9] Article 58 of the Dubai Penal Code.
[10] Article 59 of the Dubai Penal Code.

UK

Introduction

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

The most recent examples of statutes focused on holding corporate entities liable under the criminal law have been the Corporate Manslaughter and Corporate Homicide Act 2007 ("**CMCHA**") and the Bribery Act 2010 ("**Bribery Act**"). A small number of prosecutions of corporate entities under the former have been concluded. No corporate prosecutions for offences under the Bribery Act have yet been concluded, although the Serious Fraud Office ("**SFO**") is pursuing a number of investigations which may yield such prosecutions before long. Both acts focus attention on the management systems and controls of a corporate entity. In particular the Bribery Act, section 7 of which imposes liability on a corporate for failure to prevent an act of bribery *unless* the corporate entity can demonstrate that it had adequate procedures to prevent such an offence occurring, is a considerable change in the approach towards corporate criminal liability. An important feature of the 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 criminal 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.[11]

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.

The trend towards increased criminal liability for corporates and their senior executives has continued since the enactment of these statutes and with the subsequent passage of legislation criminalising the manipulation of benchmark rates and conduct leading to the failure of a bank.

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.

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

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

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.[12]

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 circumstances[13] 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 Conduct Authority ("**FCA**") to use its powers to bring criminal prosecutions, albeit so far the most high profile prosecutions have been against individuals rather than corporate entities.

Where a corporate faces a criminal charge, it 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 may include fines, compensation orders, debarment from public procurement processes[14] and/or confiscation orders. Indeed, 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 proved, or, more usually, accepted.[15] 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. 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.*" 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.

In his ruling in the leading case of Innospec[16] Lord Justice Thomas (as he was then) stated 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*".[17] 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.

Since then, and following the appointment in April 2012 of David Green QC CB as Director of the SFO, the stance of the SFO in particular towards

[12] *Gateway Foodmarkets Ltd* [1997] 3 All ER 78, [1997] 2 Cr App Rep 40, CA.
[13] Generally where consent or connivance, or neglect can be shown e.g. Financial Services and Markets Act 2000, s 400.
[14] On 26 February 2015 new Public Contracts Regulations came into effect which cap the period of debarment at five years and allow blacklisted companies to bid for public contracts if have self-cleansed which includes demonstrating that they have "*taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct*." (Public Contracts Regulations 2015, Regulation 57(15)(c))
[15] 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.
[16] (2010) Crim LR 665
[17] See http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-judgment.aspx

corporate wrongdoing has toughened and the Director and others at the SFO have been clear that their task, first and foremost, is the prosecution of serious and complex fraud and bribery.

From 24 February 2014, certain prosecutors have been able to enter into deferred prosecution agreements (**"DPAs**") with cooperating corporates. DPAs are agreements between prosecutors and corporate defendants that proceedings for alleged offences of economic crime will be stayed and eventually discontinued provided the corporate complies with certain conditions (which will usually include the imposition of a substantial financial penalty and will, in many cases, also involve other remedial measures and/or the appointment of a monitor). Whether a DPA is appropriate is decided by reference to relatively detailed prosecutorial guidance and its proposed terms are the product of negotiations between the prosecutor and the cooperating corporate, although the DPA itself requires the approval of the Court. Whilst no DPA has yet been concluded with any cooperating corporate defendant, the SFO has publicly stated that it has a number under consideration. Nevertheless, the SFO has also stated that a DPA is not a "short-cut to corporate prosecutions", that they will not be appropriate in every case and that the SFO remains, first and foremost, a prosecution agency.[18]

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 encouraging[19] (or the common law offence aiding and abetting) or conspiring to commit crime[20] 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.

From 1 October 2014, sentencing of corporate offenders has been governed by a new Definitive Guideline for Fraud, Bribery and Money Laundering Offences issued by the Sentencing Council. It sets out a ten-step process for judges to follow when deciding on the appropriate penalties to impose on corporates following conviction. The quantum of the punitive element of financial penalties is determined by reference to multipliers of between 20 and 400 per cent of a figure representing the financial "*harm*" caused by the particular offending in question. Higher levels of "*culpability*", characterised by, for example, orchestrated or sustained wrongdoing, lead to the application of higher "*multiplier*" figures. The Guideline is clear that fines will be high: "*The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.*"

The corporate entity's level of cooperation with the prosecuting and regulatory authorities is also a factor in assessing the course of action taken by a regulator[21] and the level of penalty appropriate where there has been corporate criminal offending.

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

Cooperation 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 guilty[22] and can also be given immunity or reduced sentences for cooperating with the prosecuting authorities in certain limited circumstances.[23]

Under guidance issued by the Competition and Markets Authority ("**CMA**") (formerly the Office of Fair Trading, or "**OFT**") a business which has participated in a cartel may receive total or partial immunity from fines if it comes forward with information about the cartel, provided certain conditions for leniency are met. Subject to certain conditions,

[18] Speech entitled "Enforcing the UK Bribery Act – The UK Serious Fraud Office's Perspective" by Stuart Alford QC, Joint Head of Fraud at the Serious Fraud Office, dated 17 November 2014.
[19] Serious Crime Act 2007, s 44-46
[20] Criminal Law Act 1977, s 1A
[21] For example, the FCA 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 FCA in taking corrective measures.
[22] Sentencing Guideline Council: Reduction in Sentence for a Guilty Plea (2007)
[23] Serious Organised Crime and Police Act 2005, s 71-73

the first cartel member to report and provide evidence of a cartel will be granted total immunity, including immunity from criminal prosecution for any of its cooperating current or former employees or directors and protection from director disqualification proceedings for all of its cooperating directors.[24]

In addition, as noted above, self-reporting is one factor in the decision whether to invite a corporate into DPA negotiations. Prosecutorial guidance suggests that whilst self-reporting will not guarantee a DPA instead of immediate prosecution, a deferred prosecution may be deemed appropriate as a means of disposal of criminal investigations involving corporates if there is full cooperation. This will in practice mean self-reporting early and the subsequent disclosure of documents. In some circumstances it may necessitate the waiver of privilege over relevant documents and/or the provision of active assistance such as giving evidence against individuals in linked proceedings.

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. So far, there have only been a small number of convictions under the Bribery Act in relation to individuals; the corporate offence for failure to prevent bribery has yet to be tested.

Nonetheless, legislation such as the Bribery Act, and, in particular, the section 7 corporate offence have 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.

More recently, David Green has called for an extension of the principle contained in section 7 of the Bribery Act to other financial crimes which would significantly increase the SFO's reach in criminalising corporates for failure to prevent fraud and other financial crime; such potential exposure is in turn likely to increase the attraction and use of DPAs. Although there is considerable scepticism that this represents an appropriate extension of the criminal law, nevertheless it appears that there is the political will for this change – in December 2014 the UK Government published its "UK Anti-Corruption Plan" which set-out the actions that the Government intended to take to tackle corruption in the UK. One action point listed is for the Ministry of Justice to "*examine the case for a new offence of a corporate failure to prevent economic crime and the rule on establishing corporate criminal liability more widely.*"[25] The timescale for this is June 2015. There is cross party support for an extension of the law, particularly following allegations that HSBC helped its clients with Swiss accounts avoid or evade tax – and that British authorities failed to take appropriate action.[26] It therefore seems that there is a significant likelihood that the law will be extended in this area. When and how that happens remains to be seen particularly given the forthcoming general election in the UK. Whilst there is some support in the current Government for the SFO (the current Solicitor General for England and Wales having recently stated[27] that the Government is "committed" to the Roskill model for serious fraud – that is the model on which the SFO, uniquely in the UK, is based[28]) there is clear uncertainty surrounding the SFO's future with "*persistent reports that the home secretary, Theresa May, would be happy to see the fraud-buster wound up and rolled into the National Crime Agency*".[29]

[24] In 2007 British Airways admitted collusion with Virgin Atlantic over the price of long-haul passenger fuel surcharges and a penalty of £121.5m was imposed by the OFT. Virgin Atlantic avoided any penalty as it qualified for full immunity under the OFT's leniency policy and its employees were not prosecuted. In addition to the investigation into British Airway's corporate conduct under civil competition law, the OFT also commenced criminal proceedings under the Enterprise Act 2002 into whether any British Airway executives dishonestly fixed the levels of the surcharges. The prosecution subsequently collapsed following the disclosure of evidence, which only emerged after the start of the trial.

[25] UK Anti-Corruption Plan, December 2014, action 36.

[26] In March 2015, the Government announced that it is to establish a strict liability offence for offshore tax evasion including a criminal offence for corporates which fail to prevent tax evasion on their watch.

[27] Global Law Summit, 23-25 February 2015, Panel Session "Bribery and Corruption" on 25 February 2015.

[28] The model by which the SFO operates was recommended by Lord Roskill in 1986. He recommended that serious and complex fraud be investigated and prosecuted by a multi-disciplinary office combining forensic investigators, accountants, lawyers, computer specialists, counsel working together from the start of a case, right through investigation and prosecution.

[29] Sunday Times, "*Who you going to call — if you don't keep the fraudbusters?*", dated 01 March 2015.

Asia Pacific

Australia

Introduction

Corporate liability under Australia's criminal legal system can arise in many ways and there are few offences which cannot be committed by a corporate entity. Depending on the type of offence – for example, whether it relates to financial markets, anti-competitive conduct, bribery, customs or tax – an Australian corporation may be subject to investigation and prosecution by a range of different authorities, each operating pursuant to distinct statutory regimes. The procedure for a criminal investigation and prosecution of a corporation as well as the subsequent penalties to which it may be exposed where it has committed an offence, will also vary accordingly.

Liability

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

A corporation may be convicted by vicarious liability or by attribution to it of the state of mind of an employee or agent.

Vicarious liability is where a statute imposes liability on an employer for the actions of its employees or agents. The statutes may not expressly refer to corporations, as the word "person" in a statute includes a body corporate. In these circumstances, a corporate entity will become liable so long as the employee or agent is acting within the scope of employment or agency and had the relevant state of mind. Liability will be imposed regardless of whether the employee occupies a senior or junior position. Statutes in Australia under which a corporation may be found vicariously liable of a criminal offence include the Proceeds of Crime Act 1987 (Cth) and the Competition and Consumer Act 2010 (Cth).

Vicarious liability is often, but not always, imposed for absolute or strict liability offences, where a corporation can be convicted without the need to prove a guilty mind or simply if it is unable to rebut the appearance of an honest or reasonable mistake or unable to show that it acted reasonably to prevent the harm. For example, environmental offences commonly involve vicarious and strict or absolute liability. Nevertheless, there are instances where vicarious liability has been imposed for offences which have a mental element, such as an intent to defraud the Revenue under customs legislation.

By contrast, the relevant state of mind of a natural person (generally senior management of a company) may be directly attributed to a company by way of the "identification principle". In these circumstances, the criminal conduct is treated as being that of the company itself and, as such, this form of corporate criminal liability may apply to more serious offences such as homicide.

What offences cannot be committed by a corporate entity?

A corporation cannot be made liable for an offence for which the only penalty is imprisonment unless statute has expressly provided that a corporation can also be guilty of such offence. In Australia, such statutes usually provide for the conversion of a term of imprisonment into a fine. Arguably there are also certain crimes which can only be committed by natural persons and not by corporations. However, case law in different jurisdictions may take different views. For example, unlike in the UK, the authorities in Australia say that corporations cannot commit perjury.

Are there any specific defences available?

Specific defences are set out in the relevant and applicable legislation. In many instances, due diligence in ensuring compliance with the law is available to corporations as a defence. Even where the statute does not provide for such a defence, due diligence may also be a relevant factor in giving rise to a reasonable doubt as to whether a subjective fault element has been established. However, in the case of no-fault offences, the defence would need to be made expressly available under statute. The Commonwealth Criminal Code, for example, makes this defence available for strict liability offences but not for an absolute liability offence.

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

An officer or agent may be liable as an accessory in relation to an offence committed by a corporation. Conversely, where the law imposes criminal liability on a director or officer as principal, it may also be possible for the corporation to be found vicariously liable as a principal or liable as an aider and abettor. Accessorial liability is generally established by proving knowledge on the part of the director or officer. The statute may also reverse the onus of proof so that, where a corporation is convicted of the offence, the director or officer is also deemed to have contravened the law unless they prove that they had no knowledge of the contravention or used due diligence to prevent it.

The Federal and State Governments in 2009 agreed to adhere to a set of principles proposed by the Ministerial Council for Corporations as the basis for imposing personal liability for corporate fault going forward. In addition to outlining the threshold circumstances in which personal criminal liability should be imposed on a director for the misconduct of a corporation, the principles also state that liability should only be imposed on

directors where they have encouraged or assisted the commission of the offence or have been negligent or reckless in relation to it; directors may also in some instances be required to prove that they have taken reasonable steps to prevent the offence. Legal reform in recent years has occurred in line with these principles.

Procedure

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

A number of different regulatory bodies may investigate and prosecute offences committed by corporations, including the Australian Federal Police ("**AFP**"), Australian Securities and Investments Commission ("**ASIC**"), the Australian Competition and Consumer Commission ("**ACCC**"), the Australian Tax Office ("**ATO**") and the Australian Crime Commission ("**ACC**").

The ACC is a Commonwealth body that aims to prevent serious and organised crime and which has a mandate to investigate any matter deemed federally relevant criminal activity. The ACC works closely with many other authorities, including the AFP, various State police forces, and regulatory bodies. While the Commonwealth Director of Public Prosecutions ("**CDPP**") or the relevant state Director of Public Prosecutions (together, the "**DPPs**") do not have formal investigative functions, they may provide advice and assistance on an informal basis during investigations and they may also decide to prosecute following an investigation by one of the aforementioned agencies.

The prosecution policies of the DPPs set out the guidelines for determining when prosecution should be pursued. Guidelines and memoranda of understanding also exist between the agencies and DPPs to establish cooperative relationships and clarify areas of overlap in power and duties.

Punishment

Corporations

Fines are commonly imposed on corporations as an alternative to imprisonment. Legislation often sets a maximum fine as the greater of a specific amount or a multiple of the benefit obtained by the corporation and attributable to the offence or a percentage of the annual turnover of the corporation. The maximum penalty for foreign bribery of a public official or cartel conduct is A$18 M, three times the value of benefits obtained (if calculable) or 10% of the previous 12 months' turnover of the company, including related corporate bodies. There have been substantial increases in the maximum penalty cap in recent years. Minor offences may also attract "on the spot" fines, the payment of which precludes further criminal proceedings.

The Proceeds of Crime Act 2002 provides a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth Law. In some circumstances, it can also be used to confiscate the proceeds of crime against foreign law or the proceeds of crime against State law.

Other forms of punishment include restraint of trade orders, adverse publicity orders, community service or remedial orders, injunctions or orders directing the company to establish a compliance or education program or revise certain internal operations.

Although not technically a criminal penalty, if ASIC concludes that it would be in the interests of the public, members, or creditors that the company be wound up, the Court may also make such an order.

While ASIC accepts enforceable undertakings as an alternative to civil proceedings it will not accept undertakings in place of commencing criminal proceedings.

Individuals

Directors or officers of a company who are found guilty of committing an offence may be sentenced to a period of imprisonment and/or subject to a fine. Further, a person is automatically disqualified from managing corporations if he or she is convicted of certain offences. Civil liability and penalties may also be available against an individual.

What factors are taken into consideration when determining the penalty?

The fundamental principle which informs sentencing is that the penalty should be of a severity appropriate to the seriousness of the offence. Therefore, the degree of culpability of the corporation and the seniority of the officers involved are relevant to determining the penalty.

Other factors which Australian courts take into consideration when sentencing a corporation are largely the same as those applicable to sentencing of individuals. Such considerations include any prior criminal history, the degree of harm caused, whether any steps were taken to remedy the harm and prevent future occurrences, early guilty plea, cooperation with authorities and the degree to which the corporation has demonstrated remorse. Law reform commissions have recommended introducing sentencing provisions targeted specifically at corporations but there has not been any indication that such recommendations will be implemented in the near future.

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

Immunity from prosecution may be granted to a corporation that first exposes serious cartel offences and fully cooperates with the ACCC and the CDPP. Related

corporations may also seek derivative immunity. Where the criteria set out in the ACCC Immunity and Cooperation Policy for Cartel Conduct have been met, the CDPP will provide a letter of comfort and prior to the commencement of a prosecution, the CDPP will provide a written undertaking granting criminal immunity. While similar immunity policies in relation to cartel conduct can also be found in other jurisdictions around the world, it is only available in the very limited circumstances detailed in the relevant competition regulator's policy.

In Australia, cooperation policies generally do not provide for immunity. ASIC's enforcement policy states that early notification of a violation or cooperation with an investigation may be relevant to ASIC's consideration of what type of action to pursue, including whether to refer a matter to the CDPP. Additionally, ASIC may provide a letter of comfort informing a cooperating entity that it is not the subject of an investigation. The Prosecution Policy of the Commonwealth, which sets out the guidelines followed by the CDPP in its prosecutions, lists cooperation as a relevant consideration when deciding whether or not to agree to a charge negotiation proposal. Past and future cooperation is expressed in legislation as a mitigating factor in determining sentencing.

Current position

As a result of the multi-layered and dispersed nature of this area of law in Australia, the landscape of corporate criminal liability is fragmentary and constantly changing.

We have outlined above a wide range of areas in which corporations are vulnerable to criminal liability. However, the extent to which regulators have pursued criminal remedies varies. It has to date been more common for the ACCC to pursue civil, quasi-criminal remedies rather than refer matters to the CDPP. In the years 2013 and 2014 to date, the CDPP did not receive any briefs from the ACCC in relation to alleged cartel conduct. Yet, in the year 2012-13, the ACCC reported the largest penalties obtained for cartel conduct in Australia, being orders for a total of $98.5 M in penalties from 13 airlines in respect of collusion on fuel surcharges for air cargo services. The current ACCC chairman, Rod Sims, has commented that a number of investigations are being conducted and cases would be referred to the CDPP if serious cartel conduct is uncovered. Australian competition laws are currently undergoing a comprehensive review and in its draft report the Harper Review Panel recommended a simplification of criminal sanctions in this area. On the other end of the spectrum, between 2012 and 2014, ASIC reported obtaining 1402 enforcement outcomes of which 989 were criminal. It is unclear what proportion of these represents prosecutions against corporations, however we are not aware of a preference for ASIC to focus on individuals or organisations in its enforcement activities. ASIC has called for the penalties available to it to be increased and in a 2014 Senate report, the Economics Reference Committee recommended that criminal and civil penalties available to ASIC be revisited.

In the foreign bribery arena, the OECD has expressed concerns over the effectiveness of the enforcement of foreign bribery legislation in Australia. For example, the AFP faced criticism for not pursuing enforcement action over the Australian Wheat Board scandal, which involved covert kickbacks-for-wheat contracts. In 2011, two Australian companies – Securency International Pty Ltd and Note Printing Australia Limited – were charged with conspiracy to bribe foreign public officials in the first Australian prosecution under foreign bribery legislation. There are suppression orders in place in relation to these proceedings. In addition the prosecution of several individuals who were senior employees of these companies continue.

In February 2015 the AFP announced it had charged two directors of an Australian company with conspiracy to bribe a foreign public official and money laundering offences, which was only Australia's second foreign bribery case to reach the courts. The AFP and ASIC are currently conducting an investigation into Leighton Holdings Limited in relation to foreign bribery allegations In March 2015, Labor Senator Sam Dastyari announced that he would be moving a motion in the Federal Senate to establish an inquiry into foreign corrupt practices, the practice of facilitation payments to foreign officials and the role of the AFP and other agencies to properly investigate these matters. The large Australian corporations he named in the context of the proposed inquiry were BHP and Leighton Holdings.

The ATO pursues both individuals and corporations. However, criminal liability is mainly attributed to individuals directly involved. Recently Project Wickenby, a cross-agency taskforce targeting international tax evasion, has with the cooperation of ASIC involved extensive investigations into Australian companies. Of the 44 convictions to date, 8 have been of directors. Similarly, the ACC mainly pursues groups or individuals, not corporations. The ACC reports regularly on the arrests that result from its investigations and 2013-2014 the ACC reported that its work had resulted in 40 people being convicted that year.

Hong Kong

Introduction

There are a number of offences in Hong Kong targeted at corporate entities and concerned with the regulation of business activity. Most notable amongst these are the Companies Ordinance[30] (which deals with failures to perform administrative steps in relation to the operation of companies), the Securities and Futures Ordinance[31] (which regulates misconduct in financial markets), the Trade Descriptions Ordinance[32] (which criminalises various acts of consumer misselling), and the Theft Ordinance[33] (in particular those provisions dealing with false accounting).

It is noteworthy that, unlike in some other jurisdictions, there is no specific statutory offence of corporate manslaughter in Hong Kong. In October 2012, 39 people died when a ferry collided with another boat and sank. Whilst the two vessels' captains were each charged with 39 counts of manslaughter, their respective employers, Hongkong Electric and Hongkong and Kowloon Ferry subsidiary Island Ferry Company, were not charged, but were fined HK$4,500 and HK$5,000 respectively for criminal breaches of marine safety rules. Whilst it would have been possible to have attempted to charge the respective companies with manslaughter under the common law rules (see below), such prosecutions are notoriously difficult. Such prosecutions under the common law have taken place in Hong Kong[34], but are extremely rare.

Liability

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

Under section 3 of the Interpretation and General Clauses Ordinances[35], the term "person" in any statute is defined as including any public body and any body of persons, corporate or unincorporated. Accordingly, 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 ordinance either expressly or impliedly to the contrary, a breach of the ordinance is an offence for which a corporate may be liable, whether or not the statute refers in terms to corporations.

The law of Hong Kong has followed the common law of England and Wales in ascribing corporate liability for criminality, and has developed two main techniques 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 corporation may be indicted and convicted for the criminal acts of the directors and managers who represent its directing mind and will, and who control what it does. Following the leading English authority of *Tesco Supermarkets Ltd. V. Nattrass*[36], the Hong Kong Court of Appeal in *R v Lee Tsat-pin*[37] held that:

"[I]n order to attach liability to a limited company for the act of an officer of that company the officer who committed the offence must be a person who was in control of the company so that his criminal act could be identified as that of the company."

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 necessarily authorised or consented to the act (see for example offences relating to misleading consumers under the Trade Descriptions Ordinance).

What offences can a corporate entity not commit?

A corporate entity can technically commit most offences *except* those for which imprisonment is the only penalty (such as murder), and those which by their nature can only be committed by physical persons in their personal capacity and not acting as an agent for the corporation (such as rape or bigamy).

Unlike in other jurisdictions, Hong Kong's anti-bribery and corruption legislation, the Prevention of Bribery Ordinance,[38] has no specifically drafted corporate offence.

[30] Cap 32.
[31] Cap 571.
[32] Cap 362.
[33] Cap 210.
[34] In 1995, Ajax Engineers and Surveyors Ltd pleaded guilty to charges of manslaughter arising out of the deaths of 12 workers on a site, caused by the collapse of a lift.
[35] Cap 1.
[36] [1972] AC 153 (HL)
[37] CACC000315/1985 (Li VP)
[38] Cap 201.

Are there any specific defences available?

Defences are generally set out in the relevant and applicable legislation.

Many regulatory offences which affect corporate entities are offences of strict liability or offences which impose strict liability subject to concepts such as "*reasonable excuse*".[39] For example, the Trade Descriptions Ordinance imposes strict liability on a corporation not to mislead consumers with the descriptions of its goods, subject to a defence that this occurred by "*mistake...default of another…accident or some other cause beyond [its] control*", in circumstances when "*all reasonable precautions and…all due diligence*" had been taken to avoid this. This defence was specifically drafted as an incentive for corporations to implement compliance systems with staff training, which could then be pointed to in the event of a breach.

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 circumstances[40] to be deemed guilty of that offence.

Procedure

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

A variety of agencies within Hong Kong may initiate and conduct prosecutions, beyond the main criminal prosecutor, the Department of Justice.[41] The Securities and Futures Commission, for example has the power to prosecute less serious criminal breaches of the Securities and Futures Ordinance, although more serious cases, in the higher courts, will be prosecuted by the Department of Justice.

Where a corporate faces a criminal charge, it 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 may include fines, and compensation or forfeiture orders. Unlike in other jurisdictions, there is no formal scheme of mandatory debarment from public procurement processes for corporations convicted of criminal offences.

Individuals

Possible consequences for the directors or officers of the company include disqualification, fines, and imprisonment.

[39] See for example, s114(8) Securities and Futures Ordinance, in relation to the offence of carrying out a regulated business activity without a licence.

[40] Generally where consent, connivance, or neglect can be shown e.g. Trade Descriptions Ordinance (Cap 362) (s.20(1)). Certain more serious offences require the higher standard of consent, connivance or recklessness (the Securities and Futures Ordinance (s.390)), or consent or connivance alone (such as the Weapons of Mass Destruction Ordinance (Cap 526), the Biological Weapons Ordinance (Cap 491) and the Theft Ordinance (Cap 210)).

[41] In relation to the Trade Descriptions Ordinance, for example, the Office for the Communications Authority has the power to prosecute matters relating to the telecommunications industry, and Customs and Excise has jurisdiction over all other breaches.

Directors and other senior officers may also be vulnerable to civil claims and regulatory action for their action or inaction.

Directors or senior officers could also potentially be liable for aiding and abetting or conspiring to commit crime[42] 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.

Unlike in other jurisdictions, there are no specific guidelines for sentencing corporations.

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

Cooperation 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 guilty.[43]

Under the Trade Descriptions Ordinance a scheme of Undertakings operates, under which a corporation may volunteer its guilt, and agree to abide by various conditions, in exchange for non-prosecution. In relation to breaches of the Securities and Futures Ordinance, as the Securities and Futures Commission has a discretion as to whether to deal with matters by way of criminal prosecution or regulatory breach, self-reporting by corporations is an effective way of mitigating the risk of criminal prosecution.

Current position

Despite the availability of criminal offences which are targeted at corporate entities, many of these offences are not being used or are being used very little. As regards the criminal prosecution of companies for offences under the Securities and Futures Ordinance, for example, the SFC has generally adopted an approach of prosecuting individuals criminally, whilst dealing with the company in the regulatory sphere.

The exception to this may be the Trade Descriptions Ordinance, which came into force on 19 July 2013, and has already seen a number of corporations prosecuted. It is anticipated that this will continue.

[42] Crimes Ordinance (Cap 200), s159A
[43] Secretary for Justice v Chau Wan Fun [2006] 3 HKLRD 577

India

Introduction

Indian law imposes both civil as well as criminal liability on corporations. Criminal liability was earlier not associated with corporates due to the absence of *mens rea* and Indian Courts were of the view that corporations could not be criminally prosecuted. However, the Supreme Court in the case of *Standard Chartered Bank and Ors. v Directorate of Enforcement* [(2005) 4 SCC 530] held that corporations are liable for criminal offenses and can be prosecuted and punished, at least with fines. This decision is settled the position of law regarding the criminal liability of a corporation.

The Companies Act 2013 ("**Companies Act**") has enlarged corporate governance requirements. It has also expanded the definition of "officer in default". The Companies Act has also amplified the circumstances under which, if the obligations cast on the corporation under the Act are not complied with, the company and/or its officer in default could either be fined or imprisoned.

There are other prevalent statutes such as the Environment Protection Act 1986, the Industrial Disputes Act 1947, Water (Prevention and Control Pollution) Act 1974 which lay down circumstances under which companies could be prosecuted. Under these statutes, when a "person" committing an offence is a company, or other body corporate, every officer or person concerned with or in charge of the management shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence.

Liability

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

The decision of the Supreme Court of India in the *Standard Chartered* case (referred to above) holds that corporations are liable for criminal offenses and can be prosecuted and punished, at least with fines, and overrules all prior decisions to the contrary. Corporations could be convicted of criminal offences and a corporation would be criminally liable even if the recommended punishment for such an offence is imprisonment alone. The definition of 'person' in the Indian Penal Code 1860 ("**IPC**"), the principal law governing criminal law in India, includes a company or a body corporate. Many other statutes in India such as the Income Tax Act 1961 and the Foreign Exchange Management Act 1999 also include corporations in their definition of the word 'person'.

One of the circumstances under which a corporate entity could incur criminal liability is when the company is liable for the acts of its employees, agents or any other person responsible for the affairs of the company. In other words, the company would be vicariously liable for the actions of its employees and agents in the ordinary course of business.

Another circumstance in which a corporation could be held criminally liable is for the criminal acts of its directors or other key managerial personnel who are in charge of the day-to-day affairs of the corporate entity and are its directing minds. In such cases, the corporations would be directly liable for the acts of such directing minds.

Under the Companies Act, criminal as well as civil liability can arise against corporations for non-compliance with requirements under the Act such as (i) filings of annual returns, financial statements, registration of charges, etc.; (ii) failure to comply with pre-requisites to be followed in respect of the purchasing by a company of its own securities, loans and investments by companies, etc.; (iii) and for violations such as misstatements in prospectuses, and investments of company to be held in its own name etc.

The Companies Act has also introduced the concept of fraud (section 447) which is defined as any act or concealment or omission or abuse of position in relation to the affairs of a company, committed with an intent to injure the interests of a company or its shareholders or creditors or any other person, whether or not there is wrongful gain or loss. Punishment for fraud shall include imprisonment for the persons associated with the fraud and fine.

Persons or officers in default shall also be liable for action under section 447 in the following circumstances:

(i) Furnishing false or incorrect particulars in relation to the registration of a company [Section 7(5)];

(ii) Misstatements in prospectus [Section 34];

(iii) Fraudulently inducing persons to invest money [Section 36];

(iv) Depository or depository participant transfers shares with an intention to defraud a person [Section 56 (7)]

(v) The auditor of the company shall be liable if it has conducted in a fraudulent manner [Section 140];

(vi) Where business of a company has been or is being carried on fora fraudulent or unlawful purpose [Section 206];

(vii) Furnishing false statements, mutilation, destruction of documents [Section 229];

(viii) Application for removal of name with an intent to defraud creditors [Section 251];[44]

(ix) Fraudulent conduct of business [Section 339];[45]

(x) Making a false statement [Section 448];

(xi) Intentionally giving false evidence [Section 449].

Furthermore, the criminal intent of a corporation can be derived from the persons who guide the business of the company such as the managing director, the board of directors, or any other person who has been authorised by the company to take decisions on behalf of the company.

What offences can a corporate entity not commit?

Under the IPC, the offences which a corporate entity cannot commit are murder, bigamy and sedition.

Are there any specific defences available?

The statutes generally provide for defences wherever applicable. For instance, under section 34 of the Companies Act, which provides for criminal liability in case of a misstatement in a prospectus, if a person proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary, the penal provisions provided under the section would not be applicable. Similarly section 336[46] which relates to offences by officers of companies in liquidation, it shall be a good defence if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

Generally it is seen from other statutes as well that a good defence would be that the offence was committed without knowledge or consent.

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

The statutes generally provide that officers who are in charge of the day-to-day operations of the company would be liable. The Companies Act defines the officers who shall be deemed to be in default of the provisions of the Act.

The liability of the corporate entity and the directors and officers is limited. In certain cases the corporate veil of the company can be lifted. Under section 213(b)[47] of the Companies Act, the corporate veil can be lifted if it is proved that the business was carried out with the intention to defraud the creditors. Directors, managers and officers of the company will be personally liable for fraudulent conduct of the business as provided under section 339.[48]

Procedure

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

Various authorities are empowered to investigate and prosecute offences committed by corporate entities.

Under Chapter XIV of the Companies Act 2013, the Registrar of Companies has the power to investigate the matters of the company.

Some of the other investigation authorities are the jurisdictional police authorities, the Central Bureau of Investigation ("**CBI**") and the Serious Fraud Investigation Office.

Punishment

Corporate entities

Corporate entities can be punished with fines and other penalties. In the *Standard Chartered Bank* case, the Bank was prosecuted for the alleged violation of certain provisions of the Foreign Exchange Regulation Act 1973. The Supreme Court did not follow the literal and strict interpretation rule required for penal statutes. Rather it held that the corporation could be prosecuted and punished with fines, regardless of the mandatory punishment required under the statute.

Since the decision of the *Standard Chartered Bank* case, courts have generally taken the view that companies are not exempt from prosecution merely because the prosecution is in respect of offences for which punishment prescribed is mandatory imprisonment.

[44] Yet to be notified by the Ministry of Law & Justice, Government of India
[45] Yet to be notified by the Ministry of Law & Justice, Government of India
[46] Yet to be notified by the Ministry of Law & Justice, Government of India
[47] Yet to be notified by the Ministry of Law & Justice, Government of India
[48] Yet to be notified by the Ministry of Law & Justice, Government of India

Individuals

Individuals such as the directors and officers can be punished with imprisonment or a fine or both. Directors, key management personnel and senior officers could be liable for non-compliance of regulatory requirements, aiding and abetting crimes and for falsifying records, financial statements etc. Directors could also be liable for regulatory action if a director including a nominee/independent director was aware of a default or wrongdoing by the company either by participation in board meetings or receiving the minutes of the meeting and not objecting to, default or wrongdoing. Consent or willingness by the directors shall also make them liable for prosecution.

What factors are taken into consideration when determining the penalty?

In most cases, the statute itself provides for the minimum or maximum penalty to be imposed upon the accused. The Criminal Procedure Code 1973 provides wide discretionary powers to the judge once the conviction of the offender is determined. The offender/accused and his counsel is also given an opportunity to address the court for the purposes of mitigation. The judge is required to state the factors which have been taken into consideration in determining the penalty.

Generally, the court in determining the penalty considers the: (i) seriousness of the offence; (ii) prior digressions, if any; (iii) the intent with which the offence was committed; and (iv) likelihood of the offence being repeated by the offender.

The Competition Commission of India ("**CCI**"), in its assessment of abuse of dominance in the case of *Belaire Owners' Association v DLF Limited*, imposed a penalty of 6.3 billion rupees on DLF Limited for having abused its dominance. The CCI took into account various factors other than market share, such as statements issued by DLF Limited in the public domain relating to its dominance in the market, in its red herring prospectus, annual report, etc, vast amounts of fixed assets and capital, turnover, brand value, strategic relationships, wide sales network, etc. The CCI has also imposed a penalty of 17.73 billion rupees on Coal India Limited and its subsidiaries in *Maharashtra State Power Generation Limited v Coal India Limited and Others* for abuse of its dominant position in the market. It is relevant to note here that the Competition Act 2002, under section 19(4), lays down the factors based on which the CCI is required to assess dominance of a corporate entity in the market.

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

For certain offences under the Indian Penal Code, plea bargaining can be used. Plea bargaining was introduced in the Code of Criminal Procedure by the Criminal Law (Amendment) Act 2005 (Act 2 of 2006) through Chapter XXIA to the Code having sections 265 A to 265 L which came into effect on 5th July 2006. Chapter XXI A, allows plea bargaining to be availed for offences that are penalised by imprisonment below seven years [sec. 265-A CrPC].

Plea bargaining is not available for the following:

- if the accused has been previously convicted of a similar offence by any court;
- for offences which might affect the socio-economic conditions of the country; or
- for an offence committed against a woman or a child below fourteen years of age.

Current position

The laws relating to corporate criminal liability are insufficient; though the Companies Act 2013 has increased the liability on corporations, its has not yet been used against a corporate. Corporate governance in the Companies Act is given more importance so that corporate fraud is not carried out in the company. The audit committee has also been given a greater regulatory duty to look into matters of corporate fraud. Currently the main practice is to impose fines on corporate entities; in the case of a director or any officer in default then both fine and imprisonment can be imposed.

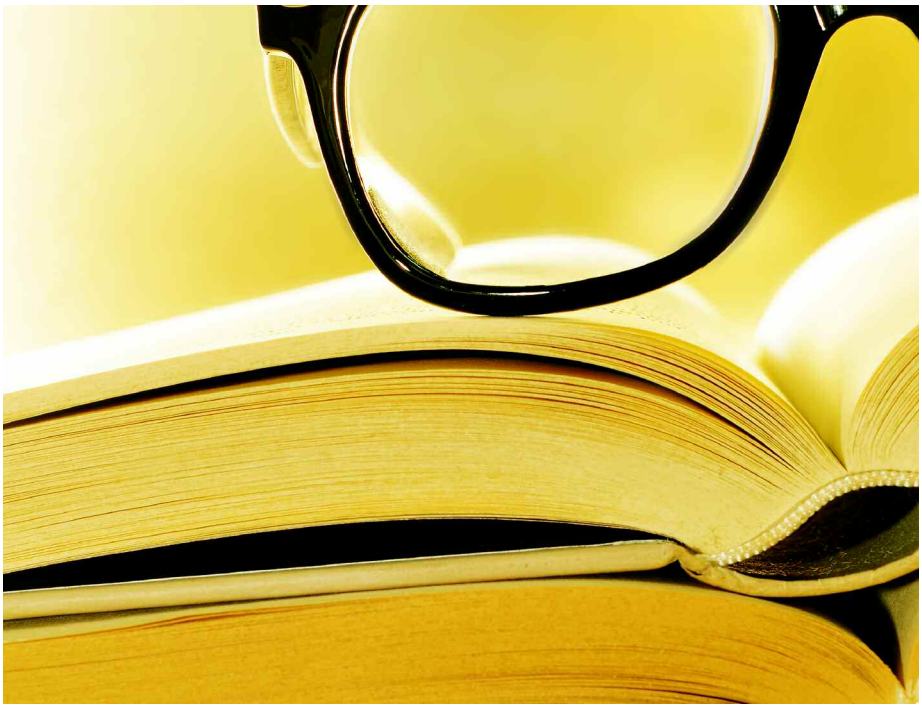
In *Iradium India telecom ltd v. Motorola incorporated and Ors* [AIR 2011 SC] the court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as in respect of statutory offences including those requiring *mens rea*. The Supreme Court in *Iridium* appears to have crystallized the law, laying emphasis on the theory through which the intention of the directing mind and will of a company is attributed to the company, and confirming that a corporation can be held liable for crimes of intent. The judgment further clarifies that a company is not immune from any prosecution for offences for which a sentence of mandatory imprisonment its prescribed, as the sentence can be substituted with a fine.

Indonesia

Introduction

The Indonesian Criminal Code does not specifically establish criminal liability for corporate entities. Under the Indonesian Criminal Code, the principle is that only individuals can commit criminal offences.

A number of laws in Indonesia, namely the Environmental Law, the Anti Corruption Law and the Anti Money Laundering Law have introduced corporate criminal liability for specific offences. In most cases, despite the clear language used in these laws, law enforcement agencies have been reluctant to bring charges against corporate entities and focus their efforts more on bringing charges against individuals who are involved or responsible for the criminal acts.



Liability

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

Depending on the relevant and applicable laws, generally, a corporate entity can incur criminal liability when the criminal offence is committed on its behalf or committed by an employee or a person who has a relationship with the corporate entity acting within the scope of the corporate entity's activities.

Specific examples under the Environmental Law, the Anti Corruption Law, and the Anti Money Laundering Law are as follows.

The Environmental Law

The Environmental Law provides that if a criminal offence is committed by, for or on behalf of a corporate entity, the criminal charges and sanctions can be imposed on (i) the corporate entity, and/or (ii) the person who gave the order to commit such criminal offence or the person who acted as the leader in committing such criminal offence. If the criminal offence is committed by an employee, or an individual based on a relationship with the corporate entity, the criminal sanctions will be imposed on the individual who gave the order or the leader.

The Anti Corruption Law

The Anti Corruption Law provides that a criminal act of corruption is taken to be committed by a corporate entity if the criminal offence is committed by an employee or other individual based on the relationship with the corporate entity, acting alone or together, within the scope of the corporate entity's activities.

The Anti Money Laundering Law

The Anti Money Laundering Law provides that a corporate entity can be criminally liable for money laundering crimes if: (i) committed or ordered by the management of the corporate entity; (ii) committed in the framework of the purpose and objective of the corporate entity; (iii) committed in accordance with duties and functions of the person who committed the offence or the person who gave the order; or (iv) committed for the purpose of benefitting the corporate entity.

What offences can a corporate entity not commit?

Indonesian laws do not specifically set out offences that a corporate entity cannot commit. However, as mentioned above, offences based on the Indonesian Criminal Code can only be committed by individuals.

Are there any specific defences available?

All defences available to individuals 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, but to the individuals instead.

What is the relationship between the liability of the corporate entity and that of its directors and officers?
In general, all individuals 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, abetting and so on.

Specifically under the Environmental Law, if the corporate entity is liable, then the Board of Directors will be liable and the criminal sanctions will be imposed on the Board of Directors since the Board of Directors will be deemed to have authority over the perpetrators or to have "assented to" the offence. The meaning of "assented to" the offence would cover approving or allowing the commission of the offence, insufficient supervision, and/or having the policies which make the commission of the offence possible.

Procedure

Who is responsible for investigating and prosecuting offences committed by corporate entities?
In Indonesia, there is no specific judicial body dedicated to investigating and prosecuting corporate entities.

In general, criminal investigations are conducted by the National Police of the Republic of Indonesia. However, investigations can also be conducted by the internal investigators of certain authorities, such as for environmental, competition, tax, corruption and financial sector offences.

Prosecution of criminal offences is conducted by Public Prosecutors (Jaksa).

Punishment

Corporate entities
Punishment differs for each offence under the relevant and applicable law. For example, under the Anti Money Laundering Law, a corporate entity can be fined a maximum of Rp100 billion, as well as subject to the following sanctions, announcement (publicising) of the court decision, freezing of part or all activities, revocation of business licence, dissolution, seizure of assets, and takeover of the corporate entity by the State. Under the Anti Corruption Law, a corporate entity can be fined the maximum fine for individuals plus one third of the maximum fine.

Under the Environmental Law, a corporate entity, in addition to fines, can also be subject to restoring the environment in the event of environmental damage arising from the offence, as well as freezing or revocation of the environmental permit.

Individuals
Punishment differs for each specific offence under the relevant law and the Indonesian Criminal Code. Under the Indonesian Criminal Code, individuals may be subject to the death penalty, imprisonment, fines, revocation of certain rights, seizure of certain assets and announcement (publicising) of court decision(s).

What factors are taken into consideration when determining the penalty?
There are no sentencing guidelines in relation to cooperation of offenders. The relevant court has discretion to consider mitigating or aggravating factors. Cooperation by the offenders can be taken into consideration as a mitigating factor.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?
There is no mechanism for entities to disclose violations in exchange for lesser penalties.

Current position

As mentioned above, the current Indonesian Criminal Code does not specifically recognise offences committed by corporate entities. It has been suggested that the future revision to the Indonesian Criminal Code should include a provision on corporate criminal liability (as has been reflected in the latest bill). However, since the incumbent Government and Parliament have only recently taken office (October 2014), progress of the bill amending the Criminal Code (including the corporate criminal liability provision) is uncertain.

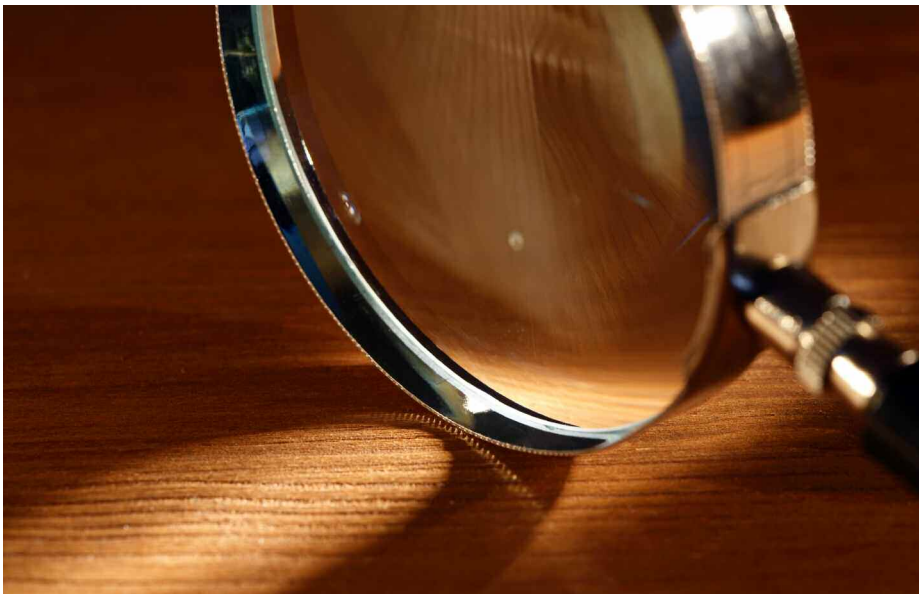
While the Environmental Law, the Anti Corruption Law, and the Anti Money Laundering Law permit the bringing of charges against corporate entities, law enforcement agencies in most cases remain reluctant to invoke the relevant provisions against corporate entities as opposed to individuals.

Japan

Introduction

Historically, only individual persons could be criminally liable under Japanese law. The Japanese Criminal Code, which is the key criminal statute in Japan, does not expressly provide for the criminal liability of a corporate entity.

However as the scope of activities of corporate entities has been rapidly expanding, there has been a growing need to regulate the actions of such entities. Therefore, separately from the Criminal Code, many provisions prescribing criminal liability for corporate entities (approximately 570 provisions as at 2012) have been enacted in various specific pieces of legislation applicable in the areas of company law, anti-monopoly law, employment law, anti-bribery law, corporate taxation law and so on.



Liability

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

A corporate entity can incur criminal liability only when there is a specific statutory provision expressly imposing such liability on it and where a director, officer or employee has been found to have committed the offence in question in connection with the corporate entity's activities or assets (e.g. Article 975 of the Companies Act, Article 22 of the Unfair Competition Prevention Act). A corporate entity may not be convicted for the criminal acts of its directors, officers or employees committed outside the scope of the entity's activities.

What offences can a corporate entity not commit?

Japanese law does not specifically set out offences that a corporate entity cannot commit. There has been theoretical contention over whether a corporate entity generally has the ability to commit an offence but to date, there are no established court precedents in relation to this issue.

However, as mentioned above, there are specific statutory provisions imposing criminal liability on corporate entities.

Are there any specific defences available?

All defences available to individuals can be relied upon by corporate entities.

Moreover, in the event that the offence was committed without any negligence (including, but not limited to, negligence in connection with appointment and supervision of a director, officer or employee) on the part of the corporate entity, the corporate entity cannot be held liable. Accordingly, a corporate entity may rely on the defence that it took all reasonable measures to prevent the offence (e.g. by providing in-house training), although in practice it has been very rare for such a defence to succeed.

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

As discussed above, all of the current statutory provisions creating criminal liability for a corporate entity require that a director, officer or employee of the corporate entity to have been found guilty of having committed the relevant criminal offence in order for the corporate entity to be found criminally liable.

Procedure

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

There is no specific judicial body dedicated to investigating and prosecuting corporate entities. The Police, the Public Prosecutor's Office and (if authorised by specific law) any relevant regulatory body have the power to conduct investigations. However, the ability to prosecute a party for an offence is limited to the Public Prosecutor's Office.

Punishment

Corporate entities

Penalties on corporate entities take the form of fines only. The maximum penalty differs for each offence and fines for corporate entities are usually higher than those for individuals who commited the same crime.

For example, while the maximum statutory fine on corporate entities for securities-related fraud is JPY 700 million (Article 207 of the Financial Instruments and Exchange Act), the fine for an individual for the same offence is JPY 10 million (although, the individual may also be subject to imprisonment for up to 10 years).

There has been an increasing trend for legislation to prescribe ever higher fines for corporate entities. For instance, the Japanese Cabinet decided in March 2015 to introduce a draft bill to Parliament to increase the maximum penalty for unfair obtainment and abuse of trade secrets from JPY 300 million to JPY 1 billion.

Individuals

The most common penalties for individuals are imprisonment or fines or both. Civil liability and penalties may also be available against an individual.

What factors are taken into consideration when determining the penalty?

A number of factors are taken into account for the purposes of determining the penalty.

The continuation of an unlawful activity notwithstanding a request from the competent authority to desist and the repeated committing of the same or similar offence within a single year are examples of aggravating circumstances.

Mitigating factors include the prevention of the offence's harmful consequences, the voluntary reimbursement of damages and cooperation during investigation.

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

Japanese law does not provide for any such mechanism. However, there is presently a draft bill before Parliament that may provide lower penalties for corporate entities in exchange for disclosures concerning certain offences committed by a third party. Nevertheless, in general, voluntary disclosure may lead to a more favourable outcome, including no prosecution at all or a lower penalty.

Current position

Notably, on 3 July 2013, the Tokyo District Court sentenced Olympus Corporation to a fine of JPY 700 miillion in total in connection with its filing of annual securities reports with false statements. Moreover, as described above, there has been an increasing trend for legislation to prescribe higher and highter fines for corporate entities.

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

The best way for corporations to avoid criminal prosecution in Japan is to implement robust internal compliance programmes to prevent or catch violative conduct early and to help with providing the company with a defence to criminal prosecution.

Mainland China

Introduction

In the People's Republic of China ("**PRC**"), a corporation may be held liable only for crimes that specifically provide for corporate criminal liability. Such crimes are considered "entity offences" under Article 30 of the Criminal Law. Article 30 sets forth what types of organizations can be charged with entity offenses, including corporations, enterprises, state-owned non-profit entities (e.g., public hospitals and universities), government authorities, and social organisations. They can be either legal or non-legal entities. Thus, to determine whether a crime can be committed by a corporation, one refers to the relevant section under the Criminal Law to find out whether it specifies entities as potential offenders. Entity offenses are primarily included in the Criminal Law Chapters of Damaging the Order of the Socialist Market Economy and Corruption and Bribery

Recently, one multinational company has been subject to the largest criminal fine in history by PRC authorities, nearly USD 500 million in one case.

Liability

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

Chinese law is unclear about what constitutes an entity offence, as opposed to a personal or individual offence. Legal authorities on this issue are very limited and not definitive. A corporation might be held liable based on a collective decision made by the management of the entity. In practice, a corporation can be liable for crimes committed by its officers, employees, or agents if a decision is made on behalf of the entity, for the benefit of the entity, or if the entity gains illegal income.

What offences can a corporate entity not commit?

A corporate entity cannot be charged with any crime that is not specifically provided as an entity offense under the Criminal Law. Examples for which a corporate entity cannot be charged include homicide or manslaughter.

Are there any specific defences available?

The relevant defences, if any, are provided under each of the provisions relating to the specific entity offences. There is no statutory provision that sets forth a general defense to entity offences. In accordance with a judicial interpretation issued by the Supreme People's Court in 1999, however, an offence should not be regarded as an entity offence if 1) the entity is established for the purpose of committing criminal offences or its primary activities are criminal activities or 2) the illegal gains obtained by the entity from the criminal activities are allocated to the individuals who actually carry out the criminal activities.

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

For crimes designated as entity offenses, both the relevant individuals and entities must be penalized together, unless otherwise provided in respect of any specific crime under the law. An entity is subject to criminal fines and/or confiscation of illegal profits. In addition, any individual who is the person-in-charge of the entity or directly responsible for the criminal offence of the entity is subject to separate criminal penalties as provided by the law. Whether a director or officer shall be criminally liable for a criminal offence commited by the corporate depends on whether he/she falls into either of the above two roles. The head of the entity or its internal department that commits the criminal offece is likely to be regarded as the person-in-charge. A person who directly carries out the criminal activity would likely be regarded as a person directly responsible for the offence.

Procedure

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

Investigations for most crimes are conducted at the local, provincial, and central levels by various agencies within the PRC police force, headed by the Ministry of Public Security. However, for crimes involving government officials, government entities, or state secrets, such as bribery of government officials or leaking state secrets, public prosecutors, the Procuraterate, conduct the investigation, as well as the prosecution.

Punishment

Corporate entities

Corporate entities are subject to criminal fines and confiscation of illegal profits, but not any penalties restricting personal freedom such as criminal detention or imprisonment.

Individuals

An individual charged and convicted of a criminal offense would be subject to any type of criminal penalties provided by the Criminal Law, such as fines, confiscation of illegal profits, criminal detention, imprisonment or even the death penalty.

What factors are taken into consideration when determining the penalty?

To determine a penalty, the specific facts, the merits, the nature of the offence, and the degree of social harm caused by the crime are the four

elements to be considered.
Self-surrender before any of the judicial authorities discovers the offence, reporting another's criminal offence, or providing important evidence or information that leads to a successful criminal investigation of another's criminal offence may be considered for leniencies, including a penalty belowthe minimum penalty required by the law or a penalty in the lower range of the required penalties. Repeated offences will be subject to more severe penalties within the discretionary range, except for negligence.

Is there a mechanism for entities to disclose violations in exchange for lesser penalties?
Yes, if the disclosure is made before the police or the prosecutor discovers the violation. Under this circumstance, the penalty can be reduced or applied lightly. If the offence is minor, the penalty may be exempted.

Current position

The interpretation of an entity offence is unclear, especially in the area where a criminal offence can be committed by either an entity or an individual, e.g. the crime of giving bribes to a government official or entity. Generally speaking, for the same type of criminal activities, the penalty imposed on an individual for an individual offence would be less than that imposed on the same individual if the offence is regarded as an entity offence. Therefore, a conflict of interest may easily arise when determining whether it is the individual manager or the company who commits the offence.

Singapore*

Introduction

There are many offences, civil and criminal, in Singapore targeted at corporate entities and concerned with the regulation of business activity.

An example of a statute which holds corporate entities liable under the criminal law is the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("**SFA**") which provides that corporations may be liable for insider dealing activities carried out by their employees via attributed liability or if the corporation fails to prevent or detect the contravention committed by its employee.[49]

Given that Singapore's criminal law regime is largely based on English law and the Indian Penal Code, reference is made below to English and Indian authorities at various points.

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 entity the acts and states of minds of the individuals it employs.

The first is by use of what is known as the "*identification principle*". As is the case in the UK, under this principle, subject to some limited exceptions, a corporate entity 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.[50] This concept has developed over decades.

The second technique of vicarious liability was used from as early as the nineteenth century.[51] Although, generally speaking, a corporate entity may not be convicted for the criminal acts of its employees or agents,[52] 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.[53] An example is the SFA discussed above.[54]

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 entity may be indicted, whether or not the statute refers in terms to corporations. This is because the Interpretation Act (Cap 1, 1997 Rev Ed) expressly states that a "person" and "party" includes "*any company or association or body of persons, corporate of unincorporate*", unless the relevant Act expressly provides otherwise. Singapore's main criminal statute, the Penal Code (Cap 224, 2008 Rev Ed) also bears this out. Section 2 states "*Every person shall be liable to punishment under this Code*" while section 11 states that "*The word 'person' includes any company or association or body of persons, whether incorporated or not.*"

There are various statutes which contain offences specifically directed at companies. For example, criminal liability can arise against companies under the Companies Act (Cap 50, 2006 Rev Ed), for various offences such as making a false and misleading statements as to the amount of its capital.[55]

What offences can a corporate entity not commit?

A corporate entity can commit most offences except those for which imprisonment is the only penalty[56] or those which by their nature can only be committed by natural persons (such as bigamy and rape).[57]

In Singapore, a corporate entity can commit certain offences which are incapable of being committed by a corporate entity under English law. For example, a company cannot be held liable under English law for conspiracy if the only two alleged conspirators are a "one-man" company and the same person acting in his individual capacity as a director of the company.[58] In contrast, the Singapore courts have held that it is possible for a company and its controlling director to commit the tort of conspiracy to injure a third party by unlawful means notwithstanding that the director may be the "directing mind and will" of the company.[59]

[49] Sections 213 to 231 of the SFA (insider trading provisions)
[50] *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] 1 SLR(R) 327; *Meridian Global Funds Asia Ltd v Securities Commission* [1995] 2 AC 500. See also *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda and another suit* [2014] 2 SLR 673 for more on the "controlling mind" doctrine
[51] *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 (**"Skandinaviska"**); and *Hin Hup Bus Service (a firm) v Tay Chwee Hiang and another* [2006] 4 SLR(R) 723
[52] *Skandinaviska* at paragraph 100; *Walter Woon on Company Law* (Sweet & Maxwell 2005, 3rd Ed) at paragraph 3.94 (**"Woon"**)
[53] Yeo, Morgan and Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis 2012, 2nd Ed) at paragraph 37.6 (**"Yeo et al"**)
[54] Sections 213 to 231 of the SFA (insider trading provisions)
[55] Section 401 of the CA
[56] *Girdharilal* v *Lalchand* AIR 1970 Raj 145; Yeo et al at paragraph 37.8
[57] *State of Maharashtra v Syndicate Transport Co Ltd* AIR 1964 Bom 195, citing *R v ICR Haulage Ltd* [1944] KB 551
[58] *R v McDonnell* [1966] 1 QB 233.
[59] *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80, *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318

Are there any specific defences available?

Defences are generally set out in the relevant and applicable legislation.

For instance, under the SFA, the corporate entity has defences against the offence of insider trading if it communicated the relevant information pursuant to a legal requirement[60] or if it can prove parity of information with the counterparty.[61]

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

There are two types of statutes which provide that, where a corporate has committed an offence, its officers are, in certain circumstances, to be deemed guilty of that offence.

The first type requires the prosecution to prove that the offence is committed with the consent or connivance or be attributable to the neglect on the part of the relevant officer, as seen in section 331 of the SFA.[62]

The second formulation requires the officer to disprove his complicity, that is proof by the accused that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances; for example, see section 48 of the Workplace Safety and Health Act.[63]

Procedure

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

There is no one agency responsible for the investigation of offences committed by corporate entities. The principal investigating agencies are:

- The Singapore Police Force: If criminal proceedings are deemed likely, the matter will be referred to the Singapore Police Force or the Commercial Affairs Department pursuant to the Police Force Act (Cap 235, 2006 Rev Ed);
- The Corrupt Practices Investigation Bureau is responsible for corruption-related offences under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed);
- The Competition Commission of Singapore investigates allegations of a company's anti-competitive behaviour under the Competition Act (Cap 50B, 2006 Rev Ed); and
- The Monetary Authority of Singapore ("**MAS**") may commence inspections or investigations if it is of the view that a bank has contravened the provisions of the Banking Act (Cap 19, 1999 Rev Ed).

The main prosecution authority in Singapore is the Attorney-General's Chambers. Notwithstanding this, various authorities and regulatory bodies may prosecute offences committed by corporate entities. For instance, the MAS takes enforcement actions against breaches of the SFA, the Financial Advisers Act[64] and the Insurance Act.[65] Another example would be the Legal Services Department of the Ministry of Manpower which prosecutes offenders of legislation within the Ministry's purview, such as the Immigration Act[66], the Employment Act[67] and the Work Injury Compensation Act.[68]

Punishment

Corporate entities

Penalties generally take the form of fines. It has been observed that, when corporate activity causes harm, the preference of the state prosecutor appears to be to proceed on the basis of a regulatory offence instead of a more serious Penal Code offence, or to proceed against the individuals concerned instead of the corporation behind them.[69] For instance, when an underground train tunnel being constructed at Singapore's Nicholl Highway collapsed in 2004, resulting in four deaths, proceedings were taken against the main contractor company and three of its senior executives for contravening the Factories Act,[70] and another individual under the Building Control Act.[71]

[60] Section 225 of the SFA
[61] Section 231 of the SFA
[62] See *Madhavan Peter v Public Prosecutor and other appeals* [2012] 4 SLR 613 where the accused's conviction under section 331 of the SFA was eventually set aside.
[63] Cap 354A, 2009 Rev Ed.
[64] Cap 110, 2007 Rev Ed.
[65] Cap 142, 2002 Rev Ed.
[66] Cap 133, 2008 Rev Ed.
[67] Cap 91, 2009 Rev Ed.
[68] Cap 354, 2009 Rev Ed.
[69] Yeo, Morgan and Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis 2012, 2nd Ed) at paragraph 37.1
[70] Cap 104, 1998 Rev Ed. N.B.: The Factories Act has since been repealed and replaced by the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed)
[71] Cap 29, 1999 Rev Ed.

In light of corporate entities being incapable of receiving physical punishment such as imprisonment and caning, various statutes differentiate the punishment meted out to natural persons and corporations. For example, under the SFA,[72] a natural person may be fined up to S$250,000 or sent to jail for up to seven years. A corporation may be fined up to twice the maximum amount prescribed for the relevant offence (i.e. S$500,000).

Individuals

Individuals such as the directors and officers of a corporate entity can be punished with imprisonment or fine or both.

Different statutes provide for specific punishment for the offences covered under that statute. For instance, if a natural person is convicted under section 50 of the WSHA, he is liable to a fine not exceeding $200,000, imprisonment of up to two years or both.

What factors are taken into consideration when determining the penalty?

Various factors are taken into consideration when determining the penalty to be meted out to a corporate entity, depending on the offence in question and the overarching circumstances.

In general, the High Court of Singapore has articulated a non-exhaustive list of factors to be considered vis-à-vis a corporate offender:[73]

- Degree of contravention of the statute;
- The intention or motivation of the statute;
- The steps taken by the company upon discovery of the breach and the degree of remorse shown by the company;
- Whether the company was merely an alter ego of its directors; and
- Whether the company was a small family business, of which the imposition of a heavy fine would be oppressive.

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

Co-operation and early acceptance of guilt are mitigating factors in sentencing, whereby offenders can receive reduced sentences.[74] On occasion, the prosecuting authorities may decide not to prefer charges on compassionate or some other grounds, based on the accused's written representations.

Alternatively, the prosecuting authority may compound certain offences which are prescribed as compoundable such that the charge is considered settled without conviction being entered.[75]

Current position

Financial institutions are subject to relatively stringent scrutiny in Singapore. The powers of investigating and prosecuting authorities are steadily increasing and legislation is increasingly being drafted to cater for specific offences.

By way of example, the SFA is currently being amended to bring the regulation of benchmark setting activities into the purview of the MAS. Other proposed amendments include (a) the setting up of a licensing regime for the administrator of a designated benchmark, (b) the extension of the MAS's supervisory and investigative powers pertaining to financial benchmarks, and (c) the creation of new offences and sanctions relating to the manipulation or attempted manipulation of financial benchmarks.

[72] Section 333, SFA
[73] *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413
[74] *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653
[75] Criminal Procedure Code; Section 41 of the Monetary Authority of Singapore Act; Section 69 of the Banking Act
* Criminal law advice is provided through Cavenagh Law LLP, our Formal Law Alliance partner in Singapore.

Corporate crime

Our aim, across our international network of offices, is to combine first class local expertise with the ability to provide a cross-border team that can manage complex multi-jurisdictional projects.

Our criminal expertise centres on financial and economic crime and extends to many other types of corporate crime, such as corruption. We have particular experience of acting for banks and corporations in cross-border investigations into breaches of securities law, mis-selling, market abuse, money laundering, compliance failings and economic sanctions contraventions.

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The team is at its best working alongside our internationally based network of experts on cross-border investigations involving multiple-authorities who may be responding to events with criminal, regulatory and administrative actions against the world's largest companies. Combined, we bring together expertise in bribery and corruption, fraud, economic sanctions, cartels and anti-money laundering, an expert internal forensic accounting function, and specialist support lawyers. We also have expertise in criminal investigations and procedures including Mutual Legal Assistance.

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Chambers UK 2015: Financial Crime: Corporates (Band 1)

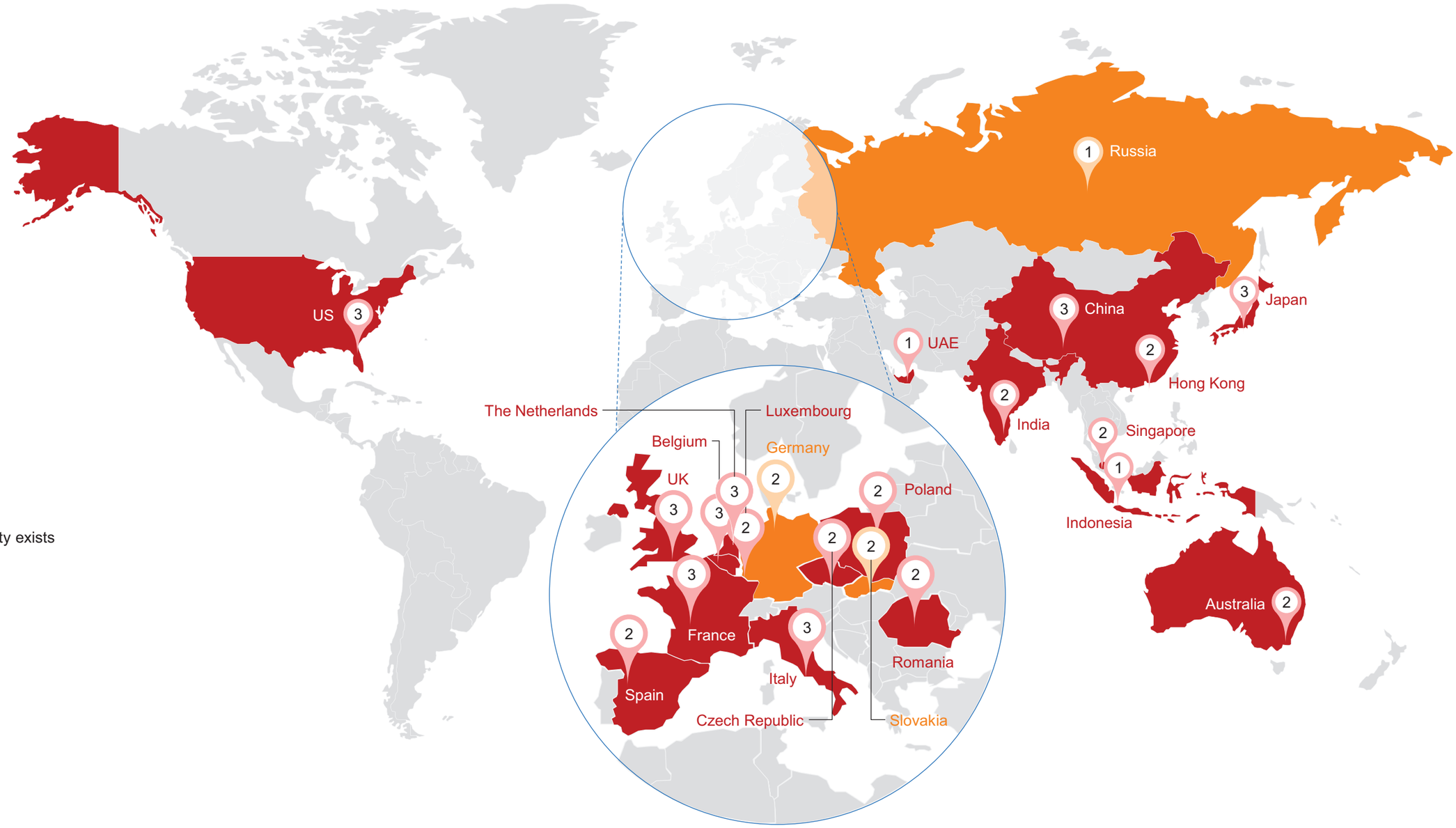
"The corporate crime and investigation team here is complemented by the strength of the firm's civil fraud practice and its transactional prowess, which sees the firm advise high-profile corporate clients on corruption, Bribery Act compliance and the conduct of international investigations, as well as representing those being investigated. The firm's global footprint lends the work a distinctly international flavour, especially in terms of its extensive sanctions work."

Chambers UK 2013: Corporate Crime & Investigations: UK-wide

Notes

Heat map

To accompany our recently published **Corporate Criminal Liability report** we have drawn together some of the high level trends. We have ranked the various jurisdictions on the basis of whether or not corporate criminal liability exists and the enforcement enthusiasm of the authorities.



Key:

- Corporate Criminal Liability exists
- Quasi Criminal/ Administrative liability exists
- No Liability Exists
- 1 No or little interest
- 2 Some interest
- 3 Very enthusiastic

Source: Clifford Chance reviewed the corporate criminal liability landscape in 22 major markets and ranked them according to their level of corporate criminal liability and their enthusiasm for enforcing it.

Australia: An Australian corporation may be subject to investigation and prosecution by a range of different authorities, each operating pursuant to distinct statutory regimes, as a result of which the landscape of corporate criminal liability is fragmentary and constantly changing. Although the trend is still to pursue individuals rather than corporates, there are current high profile corporate investigations such as the investigations by the Australian Federal Police and the Australian Securities and Investments Commission into allegations of foreign bribery involving Leighton Holdings Limited.

China: While corporate criminal liability is a longstanding concept under PRC law, the high criminal fines being imposed on corporations is a newer phenomenon. The distinction between corporate and individual liability is blurred so that companies need to have strong corporate governance policies to avoid this risk.

Hong Kong: Whilst corporates may be held criminally liable for most offences, the Hong Kong authorities tend to target individuals for criminal prosecution, whereas corporates will face greater regulatory enforcement action. Unlike in some other jurisdictions, there is no specific statutory offence of corporate manslaughter which meant that following the ferry disaster in October 2012 when 39 people died, although the two vessels' captains were prosecuted, their respective employers were not, but were instead fined for criminal breaches of marine safety rules.

India: Corporate criminal liability is a relatively new concept in Indian law (established by a Supreme Court decision in 2005). The Supreme Court has recently confirmed that a corporate is in virtually the same position as an individual in terms of prosecution and can be convicted for most common law and statutory offences. Nevertheless criminal enforcement remains focussed on individuals, although there is a growing emphasis on good corporate governance under the Companies Act.

Indonesia: Currently under the Indonesian criminal code only individuals can be prosecuted although corporate criminal liability exists for certain specific offences including bribery and money laundering. Despite this, law enforcement agencies have been reluctant to bring charges against corporate entities and instead focus their efforts on bringing charges against culpable individuals. There is currently a draft bill before Parliament to amend the code to establish corporate criminal liability more broadly.

Japan: Corporates can only incur criminal liability pursuant to specific statutory language expressly imposing such liability and where a director, officer or employee has been found to have committed the offence in question in connection with the corporate entity's activities or assets. The trend is increasingly high maximum fines to be set out in legislation for corporates. Criminal prosecution is now seen as a real risk by the vast majority of corporate entities in Japan. In July 2013 Olympus, one of Japan's most well known corporates, was convicted of submitting false statements in its annual securities filings.

Singapore: Corporate criminal liability operates in a similar way to the UK. Financial institutions are subject to increasing scrutiny in Singapore. Legislation is being amended to create new offences and sanctions created relating to the manipulation or attempted manipulation of financial benchmarks.

Belgium: Since the adoption of legislation in 1999 enabling corporate entities to be prosecuted a significant number of corporate entities have faced criminal investigations and/or prosecutions and public prosecutors have enthusiastically used their powers to prosecute. Criminal prosecution is now seen as a real risk by the vast majority of corporate entities in Belgium.

Czech Republic: In 2012 legislation was introduced enabling the prosecution of corporates as part of the Czech government's anti-corruption strategy and its international commitments. Since its enactment, there have been approximately 30 convictions and some severe sentences imposed – including dissolution and, in another case, prohibition of business activities for a period of 10 years. Also in 2012 DPAs were introduced although have not been used with any great frequency so far. As DPAs become a greater feature of the international prosecutorial landscape, it is likely that the use of DPAs for corporate offending in the Czech Republic will increase.

France: The principle of corporate criminal liability in France was introduced in 1994 since when the number of prosecutions and convictions of corporates has grown significantly, in particular more recently. The level of fines on corporates is also increasing. In December 2013 a new prosecutor's office was created dedicated to financial crime which has recently been very active in investigating corporate and financial institutions.

Germany: Currently corporates cannot be held criminally liable in Germany although whether German law should be amended to include criminal liability for corporate entities is the subject of increasing debate. There is a draft law on corporate criminal liability for the State of North Rhine-Westphalia due to be debated in the German Parliament in the near future.

Italy: Law 231 enables a corporate to be prosecuted if an offence has been committed for its benefit by an employee, even if that employee is not prosecuted. It is a defence for a corporate to show that it had adequate management and organisational control protocols for the prevention of the offence committed. Italy has seen a positive trend in this area with the number of prosecutions of corporates increasing.

One of the most high profile recent cases before the Italian Supreme Court related to the Thyssenkrupp fire in which seven employees died. The company was convicted for failing to implement adequate management and organisational control protocols for the prevention of the offence and fined 1 million Euros, banned from bidding for government contracts and from advertising products for six months. It had to disgorge profits of € 800.000,00 and publicise the sentence.

Luxembourg: Corporate criminal liability was only introduced into Luxembourg law in 2010 and is largely untested in practice. However, the Luxembourg legal community expects that public prosecutors will utilise the new law.

Poland: Corporate criminal liability was introduced in Poland in 2003. Unlike Italy, a corporate can only be held criminally liable after the person who committed the offence on its behalf has been convicted. It is a defence for a corporate to prove that due diligence was conducted in the hiring or supervision of the alleged offender. There has been a growing number of corporate prosecutions and recently the Polish anti-corruption authorities have indicated that they want to start taking tougher action against corporates including banning those guilty of corruption from taking part in public tenders.

Romania: Although corporate criminal liability is a relatively new concept in Romania, having only been introduced in 2006, the number of corporate prosecutions doubled in 2014. Most of the pending cases involve companies affiliated (directly or indirectly) to high ranking officials, ministers, politicians and influential business people. A corporate which self-reports an offence of bribery before an investigation has started can avoid prosecution altogether.

Slovakia: The Slovak Ministry of Justice published a bill on corporate criminal liability which is set to replace the currently applicable quasi-criminal liability regime for certain, mainly economic, criminal offences. The bill is currently in the legislative process, the proposed effective date is 1 July 2015.

Spain: Corporate criminal liability was introduced in Spain in 2010. New legislation is due to come into force in July 2015 which will provide a defence to a corporate if it can show that it has an has implemented a crime prevention or compliance programme.

The Netherlands: After years of steadily growing enforcement actions against corporates, the pace of the authorities in prosecuting and reaching substantive settlements with corporates has picked up dramatically over the last two years. The Prosecution Office has surrendered its last reserves to use its full power to reach unprecedented settlements with well known Dutch companies.

UK: Historically few prosecutions have been brought against corporates in the UK (other than small companies) given the legal challenges of having to establish culpability of a senior director. However, this is changing: recent legislation, including the Bribery Act 2010, has changed the basis of corporate criminal liability for certain offences; the Serious Fraud Office is specifically targeting corporates; and the UK Government is currently considering the case for a new offence of corporate failure to prevent economic crime and the rule on establishing corporate criminal liability more widely.

Russia: Currently corporates cannot be criminally liable in Russia but can be liable under the RF Administrative Offences Code if crimes are committed by their management or employees. The question of criminal liability for corporates is currently of great interest in Russia because the current "quasi-criminal" administrative liability has proved quite ineffective.

UAE: Whilst corporate criminal liability exists, it is regulatory sanctions which are most frequently imposed against authorised firms by the Dubai Financial Services Authority.

United States: The aggressive pursuit of corporates continues unabated in the US. US prosecutors, including the US Attorney General, have made repeated public statements that no entity or institution is "too big to jail". Furthermore, the Department of Justice recently emphasised that if a company wants full cooperation credit they need to secure for the government the evidence sufficient to prosecute individuals, including their senior most executives.

Worldwide Contact Information
36* offices in 26 countries

Abu Dhabi
Clifford Chance
9th Floor, Al Sila Tower
Abu Dhabi Global Market 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
Morroco
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
Level 15
Burj Daman
Dubai International Financial Centre
P.O. Box 9380
Dubai, United Arab Emirates
T +971 4 503 2600
F +971 4 503 2800

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
27th 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

Jakarta**
Linda Widyati & Partners
DBS Bank Tower
Ciputra World One 28th Floor
Jl. Prof. Dr. Satrio Kav 3-5
Jakarta 12940
T +62 21 2988 8300
F +62 21 2988 8310

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
10 boulevard G.D. Charlotte
B.P. 1147
L-1011 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
1 Rue d'Astorg
CS 60058
75377 Paris Cedex 08
France
T +33 1 44 05 52 52
F +33 1 44 05 52 00

Perth
Clifford Chance
Level 7
190 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
Clifford Chance
Building 15, The Business Gate
King Khalid International Airport Road
Cordoba District, Riyadh, KSA.
P.O.Box: 3515, Riyadh 11481,
Kingdom of Saudi Arabia
T +966 11 481 9700
F +966 11 481 9701

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 15ºandar
04551-060 São Paulo-SP
Brazil
T +55 11 3019 6000
F +55 11 3019 6001

Seoul
Clifford Chance
21st Floor, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
T +82 2 6353 8100
F +82 2 6353 8101

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 Asia***
Marina Bay Financial Centre
25th Floor, Tower 3
12 Marina Boulevard
Singapore 018982
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

*Clifford Chance's offices include a second office in London at 4 Coleman Street, London EC2R 5JJ. **Linda Widyati and Partners in association with Clifford Chance. ***Clifford Chance Asia is a Formal Law Alliance in Singapore between Clifford Chance Pte Ltd and Cavenagh Law LLP.

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