



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

Corporate Criminal Liability
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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 increasing regularity on boards' 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.

Our survey shows 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 towards the imposition of 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 corporate entities 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 corporate entities.

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. This is based largely on the principle of mutual recognition of judgments and judicial decisions by EU countries, introduced by the Maastricht Treaty in 1992. Because legal and judicial systems vary from one EU country to another, the establishment of cooperation between 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. This 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 and will enter into force in July 2016 (although the latter will not be implemented in all Member States with the UK having opted out). The new rules on market abuse update and strengthen the existing framework. For example, they 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. Significantly in the context of corporate liability, the directive extends liability to legal persons (although 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 November 2015, Slovakia was the most recent jurisdiction to introduce corporate criminal liability (with effect from July 2016). 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 this remains under discussion and 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, but was rejected in mid-2015. 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, notwithstanding growing bodies of jurisprudence, significant uncertainties will remain until 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. This leaves it open to a corporate entity to advance arguments that it had appropriate systems and controls in place and so could not have intended to commit 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. By contrast, 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 to be taken into account during sentencing. For example, in Italy a fine imposed on a corporate entity will be reduced by 50 per cent 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 a relevant consideration for prosecutors

and courts in determining whether to prosecute and, where they do, in deciding what penalty to apply. In Australia, due diligence in ensuring compliance with the law is often available to corporates 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 corporate 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 a corporate'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. In the UK, the concept of “adequate procedures” has risen high up the corporate agenda as a result of the Bribery Act 2010. Corporates without adequate procedures are liable to be prosecuted for the offence of failing to prevent bribery by their employees, or indeed by anyone performing services for or on their behalf.

In the US, robust compliance programmes may help corporates 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 corporate entity avoid prosecution. In April 2016, the US Department of Justice (DOJ) announced a one year pilot programme applicable to investigations concerning the Foreign Corrupt Practices Act. Under this programme, corporates which are able to show that they have put in place “timely and appropriate remediation” may receive up to 50 per cent credit on penalties. Although it remains to be seen how this is applied in practice, guidance issued by the DoJ has indicated that factors to be taken into account when determining whether remediation has been “timely and appropriate” include whether a culture of compliance exists, evidenced by awareness amongst employees that criminal conduct will not be tolerated; the quality and quantity of resources devoted to and the independence of the compliance function; and the adequacy of risk assessment, audit and governance and reporting arrangements.

Penalties

The level of penalties varies across jurisdictions, but there are certain common trends. The most common

penalties 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 corporate entities convicted of criminal offences in Hong Kong.

In Australia, law reform commissions have recommended introducing sentencing provisions targeted specifically at corporate entities 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 called for the penalties available to it to be increased, looking to the UK and US models in particular, where fewer constraints on maximum levels of penalties apply.

In the US, in determining a corporate entity's penalty in the federal system, judges refer to several statutory factors enumerated in 18 USC. 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 corporate entity's culpability and the seriousness of the crime, and reward corporate entities for self-disclosure, cooperation, restitution, and preventative measures. Under the DOJ's pilot programme referred to above, previous arrangements where fines imposed have been reduced below the lower boundaries of the Sentencing Guidelines in order to incentivise self-reporting and

cooperation have now been codified. In many cases, 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 corporate entities for fraud, bribery and money laundering offences. Some guidance can be derived from the way in which judges are beginning to use the Guideline, both in cases where the corporate entity concerned is prosecuted and those where deferred prosecution agreements (DPAs) are negotiated with authorities and approved by the courts. The Guideline 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. As noted above, the Guideline is also relevant to the determination of fines imposed under the terms of a DPA.

Since February 2014 DPAs have been available to UK prosecutors as a way of dealing with alleged economic criminal conduct by a corporate entity. These will

almost always require payment of 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 a court would have imposed upon a corporate entity following a guilty plea.

The concept of a DPA comes from the US, where DPAs are an established and frequently used method of concluding investigations involving corporate entities. The US also has available to it Non-Prosecution Agreements (NPAs). The 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.

The first DPA in the UK was concluded in November 2015, in a case that also marked the first action in respect of the corporate offence of failing to prevent bribery under section 7 of the Bribery Act 2010. Both it, and a case that followed shortly after it in which another corporate was actually prosecuted for the same offence, underlined the discretion available to UK prosecutors as to how to

deal with cases involving self-reporting corporates based upon their perception of levels of cooperation. DPAs have previously 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. Similar arrangements have also been mooted in draft legislative proposals in France. 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 perhaps unsurprising 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. The DOJ's pilot programme is another clear example of this.

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. Prosecutors and judicial authorities in a number of jurisdictions recognise that assistance provided by corporate entities leading to the identification and prosecution of culpable individuals is a powerful mitigating factor which, in appropriate cases, merits meaningful reductions in penalties. In the US, the Yates Memo's prosecutorial guidance published in September 2015, makes the provision of full information about misconduct (including details of involvement by individuals, no matter how senior) a precondition of receiving cooperation credit.

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, corporate entities could be held liable only for strict liability crimes (ie, 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 corporate entities liable for intent-based crimes committed by their agents and employees.

Criminal prosecution of corporate entities 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 US Supreme Court — chilled prosecutors' inclination to pursue criminal cases against corporate entities, 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 corporate entities. 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. 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 corporate entity 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 corporate entity. 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 corporate entity. The corporate entity need not receive an actual benefit. A corporate entity 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 corporate entity 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 corporate entity 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 corporate entity 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 corporate entities beyond *respondeat superior*, particularly in the fields of environmental law and antitrust violations.

What offences can a corporate not commit?

Corporate entities can commit any offence that an individual could commit, provided the offence meets the standards laid out above, and as long as the US Congress has not specifically exempted corporate entities from liability in an applicable statute.

Are there any specific defences available?

While there are not specific defences available to corporate entities, they 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. As with individuals, *ex post facto* laws are unconstitutional as applied to corporate entities. 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, corporate entities 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 corporate entity's truthful speech in the context of lawful commercial activity. Corporate entities also have a Fourth Amendment right to be free from unreasonable searches and seizures. In certain highly regulated sectors, however,

corporate entities may, by the nature of their business, be subject to reasonable warrantless inspections or inquiries. Additionally, corporate entities 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, corporate entities cannot assert the Fifth Amendment's privilege against self-incrimination or the right to a grand jury indictment. Furthermore, corporate entities also have Sixth Amendment rights to assistance of counsel, notice of charges, public trials, speedy trials, and trials by jury, and to call witnesses and confront witnesses against them. Finally, corporate entities have an Eighth Amendment right to be free from excessive fines that are grossly disproportionate to the crime committed.

Robust compliance programmes may also help corporate entities avoid prosecution, though they are not formally a defence to criminal prosecution. However, having a robust compliance programme is likely to facilitate other mitigating circumstances, such as self-reporting of violations, that will help a corporate entity 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 corporate entity from individual liability.

Courts have stated explicitly that without a clear intent from the US Congress, both the corporate entity 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 corporate entity 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 corporate entity cannot be convicted of conspiring solely with the corporate entity. 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 US Department of Justice (DOJ) is responsible for prosecuting criminal offences by corporate entities. Administrative bodies, such as the US Securities and Exchange

Commission and the US Commodities and Futures Trading Commission, can bring civil charges against corporate entities. Individual states, also have the power to pursue criminal and civil charges against corporate entities for violation of state laws and regulations. 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

In the criminal context, corporate entities face the same punishments as individuals after conviction, except that, naturally, corporate entities cannot be sentenced to prison time or death. However, corporate entities can be fined, put on probation, required to pay restitution, required to perform community service, ordered to implement monitorships, barred from engaging in certain commercial activity, required to establish compliance programmes, 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 corporate entity's sentence in the federal system, judges refer to several statutory factors enumerated in 18 US 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 corporate entity's culpability and the seriousness of the crime, and reward corporate entities 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 corporate entity'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 corporate entity's compliance programme and whether the corporate entity would gain a windfall despite the fine. Other significant factors include the organisation's cooperation with the investigation ie whether the corporate entity provided "substantial assistance" to authorities in the investigation and prosecution of others whether the offence resulted in death or bodily injury, whether the offence constituted a threat to national security or the environment, whether the organisation bribed any public officials in connection with the offence, and whether the corporate entity agreed to pay remedial costs that greatly exceed the gain the organisation received, among others.

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

Voluntary disclosure of violations can help a corporate entity 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 corporate entity. In determining whether to pursue a criminal charge against a corporate entity, prosecutors are guided by a set of internal criteria

called the "Principles of Federal Prosecution of Business Organisations." Sometimes referred to as the "Filip Factors," these publicly available criteria include such factors as:

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

On 9 September 2015, the Filip Factors were updated by Deputy Attorney General Sally Quillian Yates in what has become known as the "Yates Memo." Now, to be eligible for *any* "cooperation credit," companies must "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." Further, if a company "declines to learn of such facts or to provide the Department with complete factual information about the individuals involved" it will receive no credit for cooperation. This new policy reflects the DOJ's express commitment to focus on the prosecution of individual wrongdoers. While it remains to be seen how this policy is enforced in practice,

corporate entities considering cooperation will need to be alive from the outset to the myriad consequences compliance with this policy will entail.

Additionally, on 5 April 2016, the Fraud section of the DOJ announced a one-year pilot programme applicable to all Foreign Corrupt Practices Act matters. Entitled "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance", the programme is intended to clarify the self-disclosure process and provide greater certainty as to the benefits of self-disclosure of FCPA violations. While the new programme, of course, also requires full compliance with the DOJ's Principles of Federal Prosecution of Business Organisations and the Yates Memo, the benefits outlined could result in companies receiving up to a 50 per cent reduction in financial penalties from FCPA violations and avoid the costs and consequences of a monitor. As with the Yates Memo, the effects of this new policy remain to be seen, but it reflects an effort by the DOJ to provide some clarity, certainty and encouragement to companies considering self-disclosure of an FCPA violation.

What types of settlements are available to a corporate entity 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 the 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 the 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 corporate entity by the regulatory body.

Current position

The DOJ has been pursuing several initiatives concerning corporate liability. Firstly, the DOJ has placed greater emphasis on corporate entities cooperating in the prosecution of individuals to receive cooperation credit sufficient to avoid prosecution. To obtain full cooperation credit, the corporate

entity must act promptly to identify responsible individuals and to procure and produce evidence against them.

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

The best way for corporate entities to avoid criminal prosecution in the United States is to implement robust internal compliance programmes, 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, corruption (especially in relation to public procurement tenders), 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 entity could be criminally liable if one of its 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 (eg 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.

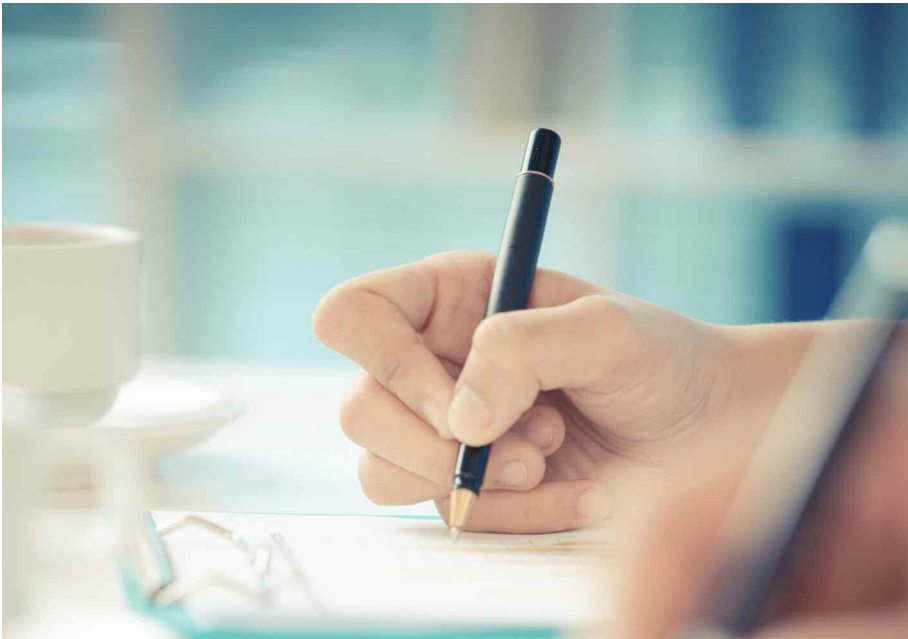
Procedure

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 equal to 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 cooperation during the investigation, early acceptance of guilt and steps taken to compensate victims. 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.

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

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, 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 term of imprisonment exceeding two years, provided that the facts do not imply a severe infringement of the physical integrity of a person. 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 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.

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 several 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 recognised by the Act. Corporate entities may now be prosecuted for eg 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 corporate entities 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 must 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 (eg 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 (eg 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 in total). These include 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. A major amendment that would increase the number of offences a corporate entity could commit to approximately 240 is currently being considered. If the amendment were to be adopted, a corporate entity could be held liable for committing almost any offence recognisable under Czech law with only a few exceptions (eg those offences that by their very nature can only be committed by natural persons or which relate to competition law).

Are there any specific defences available?

The Act does not provide for any specific defences. However, it provides for the application of the Czech Criminal Code and the Czech Code of Criminal Procedure where it 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 risks 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 or 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 90 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 frequently since they were introduced. However, since it is now possible to prosecute corporate entities under the Act, and as DPAs become a greater feature of the international prosecutorial landscape, it is anticipated 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 the commission of an offence by a corporate entity 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. For instance, the CEO of a company may be held criminally liable for the same offence as the company, if the offences committed with his consent, assistance or neglect. The decision to prosecute an individual or a corporate entity rests with the Public Prosecutor.

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

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 from exercising, 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 cooperates with the prosecutor or with the investigating judge, the court can take such cooperation into consideration. However, there is no official sentencing guideline in relation to cooperation 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

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.

Pursuant 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 they have historically.

In 2016, a draft bill on transparency, anti-corruption and economic modernisation, introducing a new framework legislation to prevent, detect and punish corruption in France and abroad is to be discussed before the French Parliament. It proposes to introduce:

- The creation of an obligation for large French companies to prevent risks of corruption through a duty to implement efficient internal measures.
- The creation of a national anti-corruption agency with powers to detect and punish failures to implement corruption prevention measures.
- The creation of new administrative and criminal sanctions imposed and monitored by the agency.
- The possibility for prosecuted entities to enter into criminal settlements with the French authorities, similar to deferred prosecution agreements used in the US, the UK and some other jurisdictions.

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 the German Federal State North Rhine-Westphalia proposed a new law creating criminal liability for corporate entities (Verbandsstrafgesetzbuch). This 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 per cent 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. 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. Furthermore, the draft bill is yet to be presented to the German Federal Assembly (Bundesrat), which would trigger the legislative process. Against this background, it is difficult to predict the outcome of such a process, ie whether the bill will be passed into law and if so, to what extent it may be subject to further amendment.

Nevertheless, the imposition of regulatory fines and the imposition of orders requiring economic benefits associated with particular conduct to be repaid 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 criminal or regulatory sanctions 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 10 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 apply to off the gross proceeds (Brutto-Erlanges) 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 identifies and removes the gross proceeds of the criminal or regulatory offence. Anything “gained” through criminal acts can be subject to forfeiture without deducting any related expenses incurred. In corruption cases the “contract value” will be forfeited, but not the turnover generated profit, according to the German Federal Supreme Court’s (Bundesgerichtshof) decision in the so-called “Cologne Waste Scandal”.

Other potential sanctions include entries in blacklists and procurement bans in relation to tenders to provide goods or services 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, the extent to which

the corporate entity has cooperated 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, it is not clear whether the draft law on corporate criminal liability for the State of North Rhine-Westphalia will be introduced into the German legislative process in the near future. However, should it actually be debated, corporates and their senior executives and representatives will closely follow 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 Legislativo 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 and self-money laundering;
 - copyright offences;
 - obstruction of justice offices;
 - environmental offences;
 - use of illegal immigrant workers; and
 - private corruption.
- (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, (a “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.

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;
- 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 231².

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. For market abuse offences, 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;

² The main distinctions are the following:

- similarly to the registration of suspects in the relevant register held by the court, a corporate entity 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 corporate entity, 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 corporate entity must file a representation notice under Article 39, Paragraph 2 of Law 231, by which, among other things, it appoints counsel.

- disgorgement of profits (if needed, even disgorgement of other properties until the profits value is reached); and
- publicising the sentence.

Judicial practice has shown that if the individual who committed the Relevant Offence is found liable, it is highly probable that the corporate will also be found guilty. Defences provided by Law 231 have only been deemed applicable twice since the introduction of the law.

Individuals

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

What factors are taken into consideration when determining the penalty?

A judge will take into account the gravity of the offence, the degree of involvement of the corporate entity and the measures, if any, adopted to mitigate the consequences of the offence or to prevent its reoccurrence. In particular, the fine may be reduced by 50 per cent 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

In 2014 and 2015, the Italian Parliament amended Legislative Decree 231/2001 as follows:

- (a) Law no. 186 of 15 December 2014 concerning the voluntary disclosure and the criminal offence of self-laundersing. This Law has extended the list of Relevant Offence under Law 231 with the inclusion of the criminal offence of self-laundersing (which covers circumstances where offenders launder the proceeds of crime having been involved in the commission of predicate offences).
- (b) Law no. 68 of 22 May 2015 concerning provisions on criminal offences against the environment. This Law has led to the inclusion of the following environmental offences as Relevant Offences under Law 231: (i) environmental pollution; (ii) environmental disaster; (iii) crimes committed without intent against the environment; and (iv) traffic of radioactive material. Enforcement of these new Relevant Offences started on 29 May 2015. The penalties against the corporate entities for the commission of the environmental offences have been expanded and in cases of environmental pollution and environmental disaster, the court may issue an order prohibiting the corporate entity from carrying out its business operations for a prescribed period of time.
- (c) Law no. 69 of 27 May 2015 concerning provisions on criminal offences against the public administration, conspiracy in organised crimes, false statements in relation to a company's financial statements or accounts. This Law has caused the following changes in Law 231: the legal test for the criminal offence relating to false statements in relation to a company's financial statements/accounts has been modified, in particular the monetary thresholds have been removed, so that any false statement may trigger enforcement. The penalties against corporate entities for the commission of these Relevant Offences have been increased.

Following the recent amendments to Law 231, corporate entities in Italy are assessing whether to update the internal control protocols in relation to the Relevant Offences introduced or modified by Law 186/2014, Law 68/2015 and Law 69/2015.

Luxembourg

Introduction

The existence of corporate criminal liability is a relatively 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 corporate entities can advance specific arguments in their defence (such as having appropriate procedures in place, exercising adequate surveillance over their employees, and so forth) which are not available to physical persons.

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 (eg 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 (eg 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 only introduced relatively 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, ie 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 (for example, money laundering);
- offences against trading in money and securities (for example, currency counterfeiting or the counterfeiting of official security paper, and the illegal issuance of corporate bonds);
- offences against the protection of information (for example, the obtaining or removing information by an unauthorised person);
- offences against the reliability of documents (for example, the counterfeiting of documents or use of such documents);

- offences against property (for example, fraud, receipt of stolen property);
- offences against the environment (for example, the pollution of water, air or soil);
- bribery and corruption and; certain fiscal offences;
- offences of a terrorist nature; and
- major offences against public order.

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. To this end, implementing and enforcing an effective compliance system can provide a defence for corporates.

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 is 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 (approximately EUR 250 to EUR 1,250,000). However, the fine may not exceed 3 per cent 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 2015 only 206 corporate entities were prosecuted under the Liability Act. In addition, up until 2014, fines were imposed on only 55 of them (the highest of which was PLN 12,000 – approximately EUR 3,000). Furthermore, the courts have not yet prohibited entities from bidding for public contracts. The possibility to publicise the judgment is also very rarely used in practice.

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 cooperation 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

Despite the Polish Liability Act being in force for almost fifteen years, it 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 current trend in Poland to create 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. Also, the Polish anti-corruption authorities (eg the Central Anti-Corruption Bureau) indicated that they want to take advantage of the Liability Act's provisions on penalties and a ban on taking part in public tenders.

Romania

Introduction

The criminal liability of corporate entities is a relatively new concept in Romanian criminal law. In 2006, Law 278 of 4 July amended the Criminal Code of 1968, which was subsequently amended through the new 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, according to the majority of doctrine and jurisprudence, 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, examples include abuse of trust in order to defraud creditors, public auction misrepresentation, conducting fraudulent financial operations and 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 an offence is committed against the corporate entity's will and without any negligence on the part of the corporate entity, the corporate entity will not be liable. Each case is determined on its own facts. Courts tend to consider whether any compliance or ethics procedures were in place when deciding criminal liability of a corporate entity.

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-accused, alongside the corporate entity. In most cases where a corporate entity is prosecuted, member(s) of the statutory bodies of the entity are similarly prosecuted.

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 (approximately EUR 24) and RON 5,000 (approximately EUR 1,200), while the number of days of fine ranges from 30 to 600 (ie a general maximum fine of RON 3,000,000 (approximately 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 entity'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 increased significantly over the past year or so.

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; 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.

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 (ie 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 per cent per cent discount if the offender makes the payment before the first court hearing;
- for money laundering offences, there is also a 50 per cent per cent 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 enforcement of new criminal code, this has begun to change and today there is a "trend" by prosecutors and courts to investigate and prosecute corporate entities. DNA, The Romanian National Anti-Corruption Department (the most active prosecutor's office) has said that the number of corporate entities prosecuted for criminal offences doubled in 2014 and an increase of eight per cent is reported for 2015 while DIICOT, the Department for Organised Crime and Terrorism, reported an increase with more than 25 per cent in the finalised investigations.

Whilst most cases investigated and concluded in 2014 involved companies affiliated (directly or indirectly) to high ranking officials, ministers, politicians and influential Romanian business people, in 2015/16 the focus of the authorities seems to have moved to foreign entities, multinationals and investors doing business in Romania (particularly in sectors such as energy/water, pharma, food retail, construction). Investigations commonly concern include corruption, tax evasion and money laundering and may investigations are commenced in respect of tax evasion. A corporate which self-reports an offence of bribery before an investigation has started can avoid prosecution altogether. In many cases authorities are focused on the recovery of the proceeds of crime and damages.

Fines imposed on corporate entities are relatively high and in some cases tend towards the maximum fine permissible for the offence(s) in question.

A similar procedure to the Deferred Prosecution Agreement concept was used in the last year by prosecutors to settle some cases.

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 was abandoned altogether.

In 2014 the question of corporate criminal liability arose again in connection with the “deoffshorisation” 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. In this context, it has been suggested that establishing criminal liability for legal entities would be useful for authorities undertaking corruption investigations. For these reasons, the Investigative Committee and some members of the State Duma proposed a revised corporate criminal liability bill.

However, in mid 2015 the RF Government gave a negative response to the bill and it was not adopted.

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 administrative 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 RUB 100 million (approximately EUR 1.2 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 same offence within a single year are examples of aggravating circumstances.

Mitigating factors include the prevention of any harmful consequences, of the offence the voluntary reimbursement of losses 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 time of publication, 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 system of quasi-criminal liability for offences similar to crimes has not proven very effective. In particular, in recent years, 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 corporate 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, corporate entities in possession of state or EU property, and international public law organisations. This quasi-criminal liability is still effective, as though courts have never applied this concept in criminal proceedings in practice.

In order to introduce an effective mechanism for the sanctioning of corporate entities that have arisen from different international documents that are binding on the Slovak Republic (principally the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), the Slovak National Council adopted a new Act on the criminal liability of corporate entities on 13 November 2015 that will become effective on 1 July 2016 (the Act) and under which corporate entities will incur criminal liability.

A corporate entity (including a foreign corporate entity) can be held liable under the Act if it has committed a criminal offence in whole or partially in the Slovak Republic, if it has committed an offence abroad with intended consequences in the Slovak Republic, or if an offence has been committed abroad by a corporate entity registered in the Slovak Republic or with a registered business or branch office in the Slovak Republic. Foreign corporate entities can also be held liable under the Act for criminal offences committed abroad if these offences were committed in favour of a Slovak corporate entity, a Slovak citizen or a foreigner that has residency in the Slovak

Republic or have the effect of causing loss to these same subjects.

The criminal liability of corporate entities excludes subjects such as the Slovak Republic and its bodies, all other states and their bodies, international organisations established by international law and their bodies, municipalities, corporate entities that have at the time of the commission of the criminal offence been established by law, and other corporate entities that cannot be subject to bankruptcy proceedings.

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:

- in its favour, in its name, within the scope of its activities, or on its behalf; and
- by: (i) its statutory body or a member of its statutory body; (ii) a person performing supervisory or oversight activities within the corporate entity; (iii) a person that is entitled to act on behalf of the corporate entity (eg by means of a power of attorney) or is entitled to make its decisions (together the Directors).

Under the Act, directors authorised to supervise and control a corporate entity may incur criminal liability for negligence, where such negligence leads to the commission of a criminal offence by the person acting under the authority given to it by the corporate entity. However, this liability will not be attributable to the corporate entity when the effect of such negligence (taking into consideration the business activities of the corporate entity, the manner of the commission of the offence, its consequences and the

circumstances under which the offence was committed) is minimal.

What offences can a corporate entity commit?

A corporate entity can only commit a limited number of criminal offences (which are enumerated in the Act), most notably offences related to money laundering, corruption, interference with justice, fraud, fraudulent accounting, rigging of tenders, harming the financial interests of the European Union, 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, it does provide for the application of the Slovak Criminal Code and the Slovak 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 Slovak Criminal Code could be applicable.

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

The criminal liability of a corporate entity is not conditional on the criminal liability of the Directors acting on its behalf, and is not conditional on the identification of the Director who actually committed the relevant act.

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 leading to the conviction of the corporate entity. However, the criminal liability of the corporate entity does not preclude the (additional) criminal liability of its Directors, and the Directors are at risk of

individual prosecution under the general provisions of the Slovak Criminal Code if their conduct constitutes an offence.

Procedure

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

Generally, the police, public prosecutors and courts are in charge of the investigation and enforcement of the criminal liability of the corporate entities.

Punishment

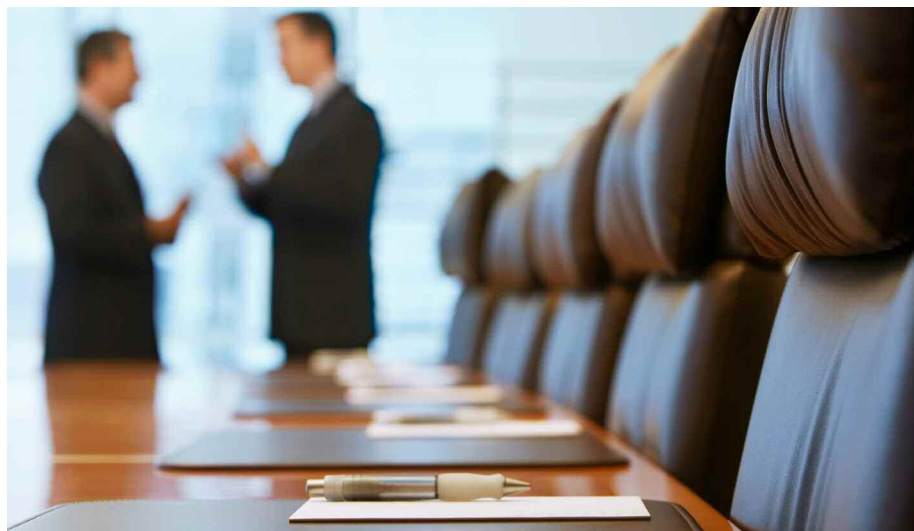
Corporate entities

The most serious penalty envisaged is the dissolution of the corporate entity itself if its activities have wholly or predominantly consisted of the commission of criminal offences or if the penalty available for such criminal offence under the Slovak Criminal Code is 25 years or life imprisonment. This penalty can only be imposed on corporate entities with a registered office in the Slovak Republic.

Other penalties contained in the Act include: (i) the forfeiture of property; (ii) the forfeiture of assets; (iii) monetary penalties; (iv) the prohibition of activities; (v) the prohibition on participation in public procurement; (vi) the prohibition on accepting grants and subsidies; (vii) the prohibition on accepting aid and subsidies provided by European Union funds; and (viii) the publication of judgments.

The Act does not provide for any mitigating or aggravating factors. However, relevant provisions of the Slovak Criminal Code are applicable, such as those inviting courts to consider whether:

- *mitigation 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 Slovak Criminal Code. The punishment of individuals will continue to be regulated by the Slovak 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 to the corporate entities under the Act as those which apply to individuals under the

Slovak 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 to make good any damage or to mitigate* any other detrimental effects;
- the corporate entity’s activities in the public interest and its strategic positions with regard to the national economy, defence or safety;
- the effects and consequences that might be expected from the penalty with regard to the corporate entity’s future activities;
- the effects on creditors with bona fide liabilities that have no connection to the criminal offence itself;
- ensuring the minimal effects of the penalty on employees of the corporate entity; and

- the extent of the benefit that the corporate entity had obtained as an accomplice to the criminal offence.

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, in addition to ceasing all further actions leading to the commission of criminal offences, the offender voluntarily:

- prevents or rectifies the detrimental effects of its criminal offence; or
- *reports* its criminal offence at a time when the detrimental effects of the criminal offence *can* still be prevented.

However, effective remorse is not applicable to corruption-related offences and to those offences related to the harming of the financial interests of the European Union.

Current position

The Act introduces the new concept of the criminal liability of corporate entities and enables the punishment of criminal conduct that could not previously be directly sanctioned at a criminal level. 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.

The concept of the criminal liability of corporate entities has not yet been tested in the Slovak courts. Given the absence of case law in cases of the less stringent quasi-criminal liability since 2010, it is difficult to predict with any certainty how the Slovak courts will construe and apply the relevant legislation.

Spain

Introduction

Organic Law 5/2010 of 22 June 2010 (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, administrators, employees and/or contracted workers.

The law was 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 according to the text amended by Organic Law 1/2015 of 30 March (LO 1/2015):

- Legal representatives or any persons acting individually or as members of a body of the legal person, who are authorised to take decisions on behalf

of the legal person and hold powers of organisation and control within it; or

- Persons who, while subject to the authority of the natural persons mentioned in the foregoing paragraph, were able to commit the acts due a serious breach by the former of the duty of control of their activities while carrying out corporate activities.

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 1/2015, which came into force on July 1st, 2015, sets out grounds for exemption from criminal liability for a corporate entity if it can show that it possesses and effectively implements a crime prevention or compliance programme. In the case of offences committed by administrators or representatives, the grounds for exemption from criminal liability will apply if the person proves that:

- Organisation and management models were effectively adopted and

enforced, demonstrating due supervision and control;

- Supervision was entrusted to a body with autonomous powers of initiative and control;
- The perpetrators committed the offence by fraudulently eluding the organisation and prevention models; and
- The body responsible for the supervision, control and monitoring functions was not guilty of an omission or insufficient exercise of its duties.

The requirements that a criminal compliance plan must meet in order for an entity to be exempt from criminal liability, include:

- identifying the activities in the context of which the offences to be prevented can be committed;
- establishment of protocols or procedures that constitute the process of formation of corporate will, decision-making;
- appropriate models for the management of financial resources to prevent the commission of the offences;
- obligations to inform the body responsible for overseeing the operation and observance of the prevention plan of possible risks and breaches;
- establishment of a disciplinary system with appropriate sanctions for breaches of the measures established in the model; and
- regular checks of the model and ultimately modify it when relevant infringements of its provisions come to light or when there are changes in the organisation, in the control



structure or in the activity performed that makes such changes necessary.

In those cases in which the above circumstances can only be partially confirmed, they will be considered mitigating factors.

The criminal liability of legal persons will be mitigated when, following the commission of the offences and via its legal representative:

- The infringement is confessed to the authorities before receiving knowledge of judicial proceedings in progress in relation to the same;
- The entity collaborates in the investigation of the offence, supplying new evidence that is decisive for the purpose of ascertaining the criminal liabilities derived from the facts;
- Steps have been taken to repair or reduce the damage caused by the offence; and/or

- Prior to the start of the oral hearing, effective measures are established in order to prevent and discover offences that may be committed using the means or under the cover of the legal person.

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 internal policies and procedures relating to the evaluated 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 corporate entity'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 corporate entity of the individual who actually committed the crime, prior offending and whether it 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?

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

Current position

Corporate criminal liability is still a relatively new concept in Spain. It is too early to foresee what the consequences of this new law will be since there have so far been no significant prosecutions. However, complaints against corporate entities (mainly banks and savings banks) filed by individuals are becoming more frequent.

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 has 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 for 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, in particular since 2012 a growing number of large settlements have been concluded with legal entities.

On 1 July 2009 these criminal law rules were 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 types 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, there is no automatic jurisdiction in relation to 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. 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 any person 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, in order to incur liability, 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 fraud, economic and environmental crimes will often prosecute corporate entities. This Functioneel Parket is located in four regions in the Netherlands.

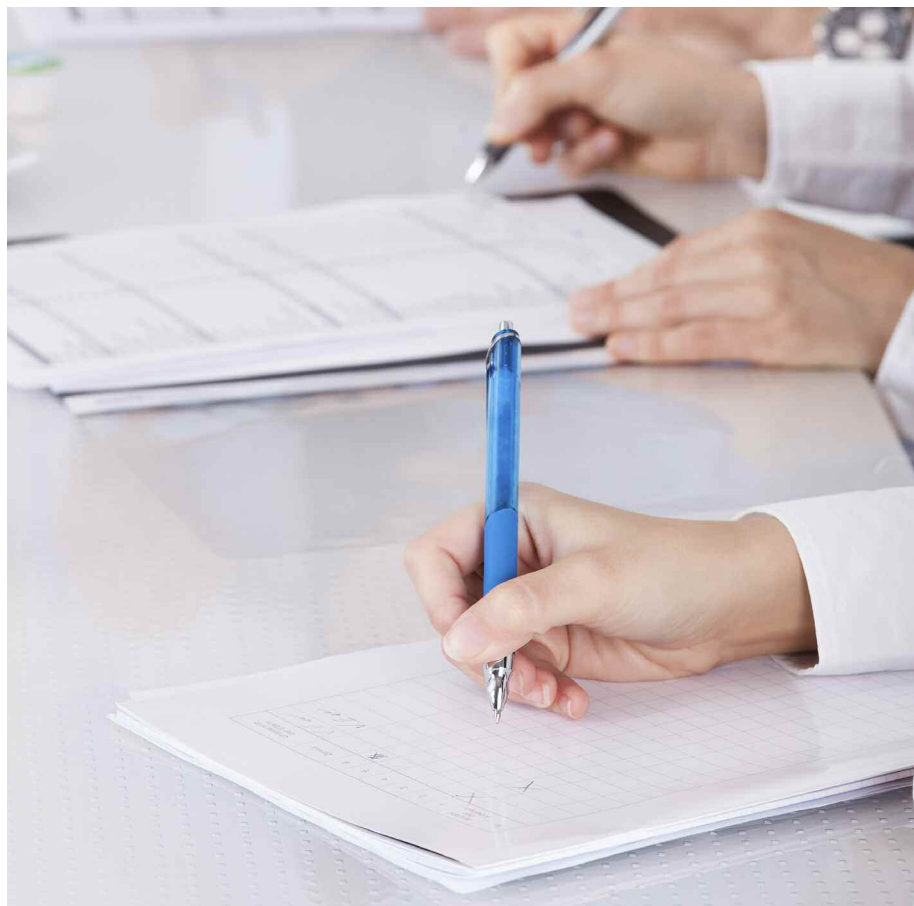
All cases being investigated by special investigation services, such as the fiscal, environmental, social security investigation services will be prosecuted by the Functioneel Parket. However, other fraud offences (for example embezzlement, corruption, money laundering) can be prosecuted by the Functioneel Parket, each regional department of the Public Prosecution Office or the National Public Prosecution Office (the latter mainly responsible for severe crimes) These offences can be investigated by each investigation service, including the regional departments of the police.

For administrative punitive enforcement actions which regulator is authorised to impose a fine depends on the applicable set of rules and regulations. For example, in relation to financial offences, the financial regulators, the AFM and DNB, would have authority. For consumer and competition issues the Authority for Consumers and Markets (ACM), for health care issues the Healthcare Authority (NZa).

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 820,000 per offence, which can accumulate indefinitely where there are a number of individual offences. If this maximum is not deemed to be appropriate a maximum fine can be imposed on a legal entity of up to 10 per cent of its annual turnover in the previous year. For fiscal offences the maximum fine is 100 per cent 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 per cent 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. Rather, it is a measure intended to avoid future wrongdoing and it is not part of the criminal prosecution. In practice, it 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 is taken by regulators under administrative law.

Individuals

The maximum fine which may be imposed on an individual is generally EUR 82,000 or EUR 820,000 in particularly large cases. 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 the imposition of fines. As the amount of each fine is 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?

A leniency regime only exists in relation to cartel offences under administrative law. In criminal law there is no such system. Voluntary disclosure may lead to more favourable treatment, including avoidance of prosecution, imposition of lower penalties or the offer of a settlement out of court. However, there is no obligation on the authorities to offer any of the above. 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 above), in general, the attribution of offences to corporate entities is readily accepted by the courts.

The level of fines imposed under administrative law has increased considerably over the last few years. Some of these fines have been the subject of recent challenges. Also, the range of administrative offences for which fines can be imposed has expanded greatly. Furthermore, the last several years have seen an increase in fines being imposed by the Dutch financial regulators against managers and directors of legal entities in respect of offences committed by such entities (and which were attributed to those managers and directors).

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 such as financial services and chemical. Recent settlements have shown that the Public Prosecution Office is no longer reticent in imposing very substantial fines, which on occasions are close in size to settlements in the US. Recent settlements of EUR 70 million in a LIBOR manipulation case and two settlements in foreign corruption cases of USD 240 million and USD 397 million can be considered ground breaking and may be seen as precedents by entities seeking future settlements.

UAE

Introduction

A corporate entity may be subject to criminal liability in the UAE for a wide range of offences.

The paragraphs below explore 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 and may be different in some respects to similar codes applicable in the other Emirates of the UAE).

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 entity (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 commission of, a crime.

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

Additionally, if a corporate entity 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 corporate entities 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 entity’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.⁶

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. These include:

- the closing of an establishment and a prohibition on carrying out a specific job; and

⁶ Article 82 of the Federal Penal Code and Article 55 of the Dubai Penal Code.

- 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,⁷ criminal measures such as suspending the company from operating apply if the crime was committed intentionally, and where the crime is found to deserve 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.⁸

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 riyals.⁹

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

applicable provisions in the Federal Penal Code or the Dubai Penal Code.

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 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

There are currently no proposed changes to the manner in which corporate entities may be subject to criminal liability under UAE law. Regulatory sanctions remain the primary method of holding corporate entities to account. In the DIFC, the DFSA has been diligent to some extent in pursuing 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.

⁷ Article 57 of the Dubai Penal Code.

⁸ Article 58 of the Dubai Penal Code.

⁹ 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.

Recent examples of statutes focused on holding corporate entities liable under the criminal law include the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) and the Bribery Act 2010 (the Bribery Act). A small number of prosecutions of corporate entities under the former have been concluded. Both acts focus attention on the management systems and controls of a corporate entity. In particular, section 7 of the Bribery Act which imposes liability on a corporate entity 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.

November 2015 saw the first use of the latter in the context of the first deferred prosecution agreement (DPA) to be concluded in the UK. This was swiftly followed by the first prosecution of a corporate entity in respect of the section 7 offence. As exemplified by these cases (which concerned conduct in Tanzania and the UAE respectively), 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 entity the acts and states of minds of the individuals it employs.

The first is by the use of what is known as the “identification principle” whereby, subject to some limited exceptions, a corporate entity 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. 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, 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 these concern 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 entity may be indicted, whether or not the statute refers in terms to corporate entities.¹⁰

There are some recent statutes which contain offences specifically directed at corporate entities. As described above, the Bribery Act imposes liability, in certain circumstances, on a corporate entity which fails to prevent an act of bribery on its behalf. Similarly, a corporate entity 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 corporate entities 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, most recently, the offence of taking a decision causing the failure of a bank introduced as part of the Senior Managers Regime (although the latter offence is unlikely to be frequently prosecuted, if at all, owing to the likely significant difficulties in establishing causation and other evidential hurdles associated with attributing such a decision to one individual senior manager).¹¹

¹⁰ The word “person” in a statute, in the absence of a contrary intention, extends to corporate entities

¹¹ Financial Services (Banking Reform) Act 2013, section 36.

What offences can a corporate entity not commit?

A corporate entity can commit most offences except 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, 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 circumstances¹³ to be deemed guilty of that offence.

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

Numerous different authorities and regulatory bodies may investigate and prosecute offences committed by corporate entities. Which authority pursues proceedings will depend upon the subject matter of the case. Prosecutions in respect of health and safety offences are prosecuted by the Health and Safety Executive (HSE), those under the CMCHA may be prosecuted by the HSE or the Crown Prosecution Service (CPS) and those under the Bribery Act may be prosecuted by the SFO or the CPS (although in practice, it is the SFO that prosecutes serious offences involving corporate entities). It is becoming increasingly common for the Financial Conduct Authority (FCA) to use its powers to bring criminal prosecutions in respect of criminal market abuse, unauthorised financial services business and some money laundering offences, 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

orders a plea of not guilty to be entered and the trial proceeds as though the corporate had entered a plea of not guilty.

Punishment**Corporate entities**

Penalties may include fines, compensation orders, debarment from public procurement processes¹⁴ and/or confiscation orders. Indeed, where there is evidence that an offender (which may include a corporate entity) 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, and fines can now be so high that they put a corporate entity out of business. The Sentencing Guideline issued by the Sentencing 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

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 eg 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.

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. It should be noted though that the courts decide whether insolvency is an appropriate consequence on a case by case basis. For example, in the first prosecution of a corporate entity under section 7 of the Bribery Act (see further details below), the Court, applying the relevant sentencing guideline, took into account the company’s financial circumstances when opting to use a relatively low starting figure as the basis for penalty calculation.¹⁶

In his ruling in the leading case of *Innospec*¹⁷ 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”.¹⁸ 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 corporate wrongdoing has toughened. 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 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.

As mentioned above, November 2015 saw the first DPA concluded with a cooperating corporate defendant.¹⁹ The SFO has publicly stated that DPAs are under consideration in a number of other cases. 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.²⁰ This point was amply demonstrated by another case concluded in early 2016, where the SFO declined to enter into a DPA in respect of the corporate offence under section 7 of

the Bribery Act and instead elected to prosecute (the first time it has done so in respect of this offence) based upon its assessment that the corporate entity concerned, although it self-reported to the SFO, was not sufficiently co-operative.²¹

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 encouraging²² (or the common law offence aiding and abetting) or conspiring to commit crime²³ 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

¹⁶ *R v Sweett Group plc*

¹⁷ (2010) Crim LR 665

¹⁸ See <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-judgment.aspx>

¹⁹ The SFO agreed and the Court approved a DPA with Standard Bank on 30 November 2015 – see the DPA, Statement of Facts and judgments at <https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>

²⁰ 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 – <https://www.sfo.gov.uk/2014/11/17/stuart-alford-qc-enforcing-uk-bribery-act-uk-serious-fraud-offices-perspective/>

²¹ *R v Sweett Group plc*

²² Serious Crime Act 2007, s 44-46

²³ Criminal Law Act 1977, s 1A

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.” Although this Guideline was followed by judges assessing the appropriate level of penalty in the first DPA concluded in the UK and in the first prosecution of the corporate offence under the Bribery Act (both referred to above), a substantial body of case law is yet to develop in relation to its application. In the meantime, some (relatively limited) guidance may be derived from penalties imposed by the courts in cases where corporate entities have been prosecuted for other types of offences, for example under environmental protection and health and safety legislation.²⁴

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 regulator²⁵ or, in cases where DPAs may be available, a prosecutor²⁶ 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 one third off their sentence for an early plea of guilty²⁷ and can also be given immunity or reduced sentences for cooperating with the prosecuting authorities in certain limited circumstances.²⁸

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, 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.²⁹

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. The SFO has referred to the extremely high level of cooperation provided in the case where it concluded its first DPA as a template for future cases.³⁰ In that case, the SFO was notified within days of the corporate entity discovering the misconduct, given very extensive input into how the internal investigation was conducted and provided with significant access to relevant source material. As such, some questions remain about the scope for corporate entities to challenge demands made by the SFO in cases where they may hope to enter into a DPA. Future discussions and cases will provide a guide.

²⁴ See, for example, *R v Sellafield Limited* and *R v Network Rail Infrastructure* [2014] EWCA Crim 49 and *R v Southern Water* [2014] 2 Cr App R (S) 235

²⁵ 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.

²⁶ Joint CPS and SFO Deferred Prosecution Agreement Code of Practice, paragraph 2.8.2.

²⁷ Sentencing Guideline Council: Reduction in Sentence for a Guilty Plea (2007)

²⁸ Serious Organised Crime and Police Act 2005, s 71-73

²⁹ 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 Airways’ corporate conduct under civil competition law, the OFT also commenced criminal proceedings under the Enterprise Act 2002 into whether any British Airways 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.

³⁰ See, for example, a speech entitled “First use of DPA legislation and of s. 7 Bribery Act 2010” given by Ben Morgan, Joint Head of Bribery and Corruption at the SFO, on 1 December 2015 - <https://www.sfo.gov.uk/2015/12/01/first-use-of-dpa-legislation-and-of-s-7-bribery-act-2010/>

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 only recently begun 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.”³¹ There have previously been strong indications of cross party support for an extension of the law, particularly following allegations that banks have helped clients with Swiss accounts to avoid or evade tax and, most recently, with proposals for legislative reforms in that area having

been reinvigorated by the “Panama Papers” leaks.³² It therefore seems that there is a significant likelihood that the law will be extended in this area although the timescales are unclear.

The position of the SFO appears more secure than has been the case in recent years, with public commitments by government ministers to the Roskill Model under which it operates, although neither has the prospect of it being subsumed into an overarching fraud prevention and prosecution authority been entirely eliminated.

³¹ UK Anti-Corruption Plan, December 2014, action 36.

³² In March 2015, the UK 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. In April 2015, the UK Government commenced a consultation exercise on, *inter alia*, the introduction of new tighter arrangements in relation to the ultimate beneficial ownership of offshore companies and a proposed new offence of “illicit” enrichment of public officials.

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

Vicarious liability may apply even though statutes may not expressly refer to corporate entities, 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 corporate entity 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 corporate entity 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 corporate entity 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 corporate entity cannot be made liable for an offence for which the only penalty is imprisonment unless statute has expressly provided that a corporate entity 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 corporate entities. However, case law in different jurisdictions may take different views. For example, unlike in the UK, the authorities in Australia state that corporate entities 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 corporate entities 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 corporate entity. Conversely, where the law imposes criminal liability on a director or officer as principal, it may also be possible for the corporate entity 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 corporate entity 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 corporate entity, 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 corporate entities, 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

Corporate entities

Fines are commonly imposed on corporate entities 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 corporate entity and attributable to the offence or a percentage of the annual turnover of the corporate entity. The maximum penalty for foreign bribery of a public official is AUD18 million, three times the value of benefits obtained (if calculable) or 10 per cent of the previous 12 months' turnover of the company, including related corporate bodies. The maximum penalty for cartel conduct is AUD10 million, three times the value of benefits obtained (if calculable) or, if benefits cannot be fully determined, 10 per cent of the previous 12 months' turnover of the corporate entity, 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 corporate entity to establish a compliance or education programme 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 corporate entity 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 corporate entities 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 corporate entity and the seniority of the officers involved are relevant to determining the penalty.

Other factors which Australian courts take into consideration when sentencing a corporate entity 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 corporate entity has demonstrated remorse. Law reform commissions have recommended introducing sentencing provisions targeted specifically at corporate entities 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 corporate entity that first exposes serious cartel offences and fully cooperates with the ACCC and the CDPP. Related corporate entities 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 identified 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.

As outlined above there are a wide range of areas in which corporate entities 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 criminal 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 AUD98.5 million in civil 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 have undergone a comprehensive review by a Competition Policy Review Panel with the final report (known as the Harper Report) released on 31 March 2015. The Harper Report recommends a simplification of criminal sanctions in relation to cartel conduct. The Australian government supports this simplification.

On the other end of the spectrum, between 2012 and July 2015, ASIC reported obtaining 2736 enforcement outcomes of which 1607 were criminal. It is unclear what proportion of these represents prosecutions against corporate entities but there is no evidence of a preference on the part of 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 March 2016, one of the longest sentences for insider trading in Australia was handed down to Hui Xiao, the former managing director of Hanlong Mining. He was sentenced to eight years and three months imprisonment. Xiao was extradited from Hong Kong after failing to return to Australia from permitted travel to China. In 2013, the former Vice-President of Hanlong Mining was convicted of insider trading and sentenced to two years and three months imprisonment.

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 has historically faced criticism for not pursuing enforcement action over the Australian Wheat Board scandal. However, more recently, greater numbers of corporate entities and individuals have been prosecuted under anti-bribery legislation.

On 1 March 2016, amendments to the Criminal Code (Cth) came into force which introduced new offences for false dealing with accounting documents. It remains to be seen whether the scope of

these offences will extend beyond conduct relating to bribery of foreign officials and how successful the enforcement of these provisions will be.

The Federal Senate is currently conducting an inquiry into the measures governing the activities of Australian corporate entities, entities, organisations, and related parties with respect to foreign bribery. The report from his inquiry is due to be released on 1 July 2016.

The ATO pursues both individuals and corporate entities. 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 46 convictions to date, 8 have been of directors. Similarly, the ACC mainly pursues groups or individuals, not corporate entities. The ACC reports regularly on the arrests that result from its investigations. The ACC reported that from the work in 2014-2015 and previous years, 450 people were convicted.

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 Ordinance³³ (which deals with failures to perform administrative steps in relation to the operation of companies), the Securities and Futures Ordinance³⁴ (which regulates misconduct in financial markets), the Trade Descriptions Ordinance³⁵ (which criminalises various acts of consumer mis-selling), and the Theft Ordinance³⁶ (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 HKD4,500 and HKD5,000 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 Kong³⁷, 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 Ordinances³⁸, the term "person" in any statute is defined as including any public body and anybody 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 corporate entities.

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 corporate entity 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*³⁹, the Hong Kong Court of Appeal in *R v Lee Tsat-pin*⁴⁰ 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 corporate entity (such as rape or bigamy).

Unlike in other jurisdictions, Hong Kong's anti-bribery and corruption legislation, the Prevention of Bribery Ordinance,⁴¹ has no specifically drafted corporate offence.

Are there any specific defences available?

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

³³ Cap 32.

³⁴ Cap 571.

³⁵ Cap 362.

³⁶ Cap 210.

³⁷ 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.

³⁸ Cap 1.

³⁹ [1972] AC 153 (HL).

⁴⁰ CACC000315/1985 (LI VP).

⁴¹ Cap 201.

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”.⁴² For example, the Trade Descriptions Ordinance imposes strict liability on a corporate entity 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 corporate entities 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 circumstances⁴³ 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.⁴⁴ 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 corporate entities convicted of criminal offences.

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.

Directors or senior officers could also potentially be liable for aiding and abetting or conspiring to commit crime⁴⁵ 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 corporate entities.

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.⁴⁶

Under the Trade Descriptions Ordinance a scheme of Undertakings operates, under which a corporate entity 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 corporate entities 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 corporate entities prosecuted. It is anticipated that this will continue.

⁴² See for example, s114(8) Securities and Futures Ordinance, in relation to the offence of carrying out a regulated business activity without a licence.

⁴³ Generally where consent, connivance, or neglect can be shown eg 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)).

⁴⁴ 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.

⁴⁵ Crimes Ordinance (Cap 200), s159A

⁴⁶ Secretary for Justice v Chau Wan Fun [2006] 3 HKLRD 577

India

Introduction

Indian law imposes both civil and criminal liability on corporate entities. Criminal liability was earlier not associated with corporate entities due to the absence of *mens rea* in Indian law, and Indian Courts were of the view that corporate entities could not be criminally prosecuted. However, the case of *Standard Chartered Bank and Ors. v Directorate of Enforcement*⁴⁷ the Supreme Court held that corporate entities are liable for criminal offenses and can be prosecuted and punished, at least with fines. This decision has settled the position of law regarding the criminal liability of a corporate entity.

The Companies Act 2013 (Companies Act) has enhanced corporate governance requirements. It has also expanded the definition of “officer in default”. The Companies Act has also broadened the range of circumstances under which, if the obligations imposed on the corporate entity under the Act are not complied with, the company and/or its officer in default could either be fined or imprisoned.

Other relevant statutes include the Environment Protection Act 1986, the Industrial Disputes Act 1947 and the Water (Prevention and Control Pollution) Act 1974, which lay down circumstances under which corporate entities may 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 referred to above holds that corporate entities are liable for criminal offences and can be prosecuted and punished, at least with fines, and overrules all prior decisions to the contrary. Corporate entities may be convicted of criminal offences and are 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 corporate entities within their definition of the word “person”.

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

A corporate entity may also be held criminally liable 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.

Under the Companies Act, criminal as well as civil liability can arise against corporate entities 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) though fraud 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 for a fraudulent or unlawful purpose (section 206);

⁴⁷ *Standard Chartered Bank and Ors. v Directorate of Enforcement* (2005) 4 SCC 530

- (vii) Furnishing false statements, mutilation, destruction of documents (section 229);
- (viii) Application for removal of name with an intent to defraud creditors (section 251);⁴⁸
- (ix) Fraudulent conduct of business (section 339);⁴⁹
- (x) Making a false statement (section 448); and
- (xi) Intentionally giving false evidence (section 449).

Furthermore, the criminal intent of a corporate entity 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?

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 336⁵⁰ 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, relevant statutes state that it is a defence to show 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?

Relevant statutes generally provide that officers who are in charge of the day-to-day operations of the company may be liable. The Companies Act defines certain officers may 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)⁵¹ of the Companies Act, if it is proved that the business was carried out with the intention to defraud creditors.

Directors, managers and officers of the company will be personally liable for fraudulent conduct of the business as provided under section 339.⁵²

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 concerning companies.

Some of the other investigation authorities are the following:

- (i) jurisdictional police authorities.
- (ii) the Central Bureau of Investigation, a central investigative agency that investigates and prosecutes cases of serious fraud or cheating that may have ramifications in more than one state. Where needed, the CBI can be assisted by specialised wings of the central government especially in economic or cross-boarder crimes. It also becomes involved in serious crimes where it is necessary to use an agency that is independent of local political influence.
- (iii) the Serious Fraud Investigation Office, a multi-disciplinary organisation under the Ministry of Corporate Affairs, consisting of experts in the fields of accountancy, forensic auditing, law, information technology, investigation, company law, capital markets and taxation, and is responsible for investigation and prosecuting white collar crime and fraud.
- (iv) the Securities and Exchange Board of India which mainly deals with securities fraud to protect the interests of investors in securities and which is responsible for promoting the developments of the securities market and regulating the securities market.
- (v) the Central Economic Intelligence Bureau (for economic offences and implementation of the Conservation of

⁴⁸ Yet to be notified by the Ministry of Law & Justice, Government of India

⁴⁹ Yet to be notified by the Ministry of Law & Justice, Government of India

⁵⁰ Yet to be notified by the Ministry of Law & Justice, Government of India

⁵¹ Yet to be notified by the Ministry of Law & Justice, Government of India

⁵² Yet to be notified by the Ministry of Law & Justice, Government of India

Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA)).

- (vi) the Directorate of Enforcement (for foreign exchange and money laundering offences)
- (vii) the Central Bureau of Narcotics (for drug related offences).
- (viii) the Directorate General of Anti-evasion (for central excise related offences).
- (ix) the Directorate General of Revenue Intelligence (for customs, excise and service tax related offences).

Punishment

Corporate entities

Corporate entities can be punished by the imposition of 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 corporate entity 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.

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 misconduct including non-compliance with regulatory requirements, aiding and abetting crimes and for falsifying records, financial statements. Directors may 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 a default or wrongdoing. Consent or willingness by the directors may also make them liable to 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 sentencing judges.

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

Section 19(4) of the Competition Act 2002 sets out the factors required to be taken into account when imposing penalties in respect of abuse of dominant market position. However, it has taken an expansive view. For example, in January 2013, 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 and annual report, the size of its fixed assets and capital, turnover and brand value. In December 2013, the CCI 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.

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]⁵³ with effect from 5th July 2006 in respect of offences punishable by imprisonment below seven years.

Plea bargaining is not available:

- 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 offences committed against a woman or a child below fourteen years of age.

Current position

Corporate criminal liability is still developing as a concept in India. Although the Companies Act 2013 has increased the liability of corporate entities, levels of enforcement activity remain low.

⁵³ [sec. 265-A CrPC]

In *Iradium India telecom ltd v. Motorola incorporated and Ors* [AIR 2011 SC] the court held that a corporate entity 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 *Iradium* appears to have crystallized the law, placing 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 corporate entity 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 is prescribed, as a fine can be imposed instead.

In another recent case of *Sunil Bharti Mittal v Central Bureau of Investigation & Others*⁵⁴ the Supreme Court, while referring to the *Standard Chartered Bank* judgment (*supra*) observed that the criminal intent of the “alter ego” of the company, that is the personal group of persons that guide the business of the company, can be imputed to the company/corporate entity.

In the *Sunil Bharti Mittal* case, however, this principle was applied in an exactly reverse scenario. In this regard, the Court held that it is the cardinal principle of the criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so. Thus, an individual who has perpetrated the commission of an offence on behalf of a

company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Individuals may also be prosecuted in cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision. Hence, when the company is the offender, vicarious liability on the part of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect.

The Companies Act has emphasised the importance of good corporate governance and effective fraud prevention measures. Audit committees have been given more stringent regulatory duties to look into potential corporate fraud.

⁵⁴ [Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013)]

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, including the Environmental Law, the Anti Corruption Law, the Insurance Law and the Anti Money Laundering Law have introduced corporate criminal liability for specific offences. In most cases, despite the clear language used in the 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

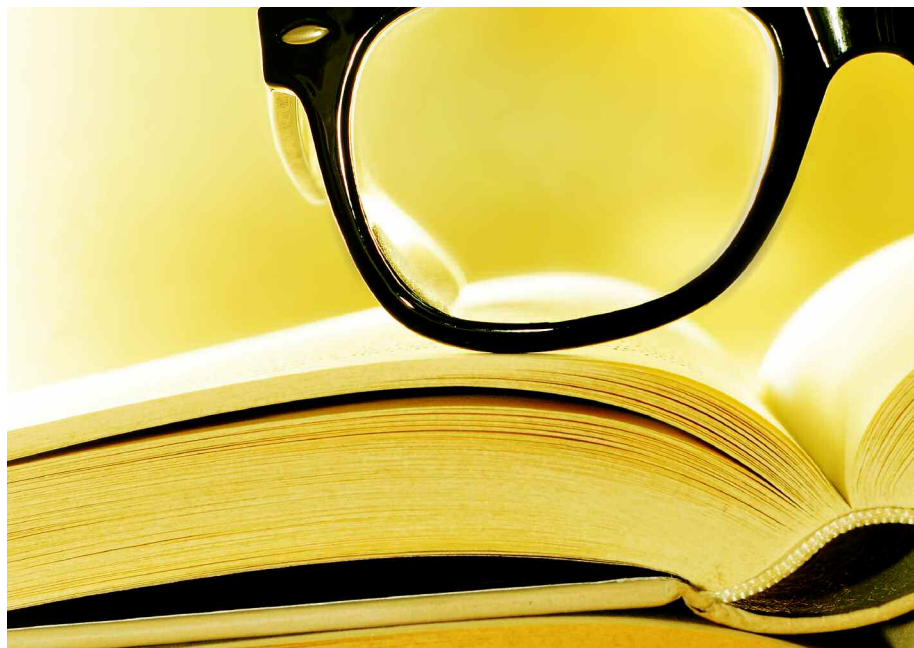
In what circumstances can a corporate entity incur criminal or quasi-criminal liability?

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, the Insurance 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 Insurance Law

The Insurance Law provides that a corporate entity can be criminally liable for a criminal offence if: (i) committed or ordered by the controller and/or management acting for and on behalf of the corporate entity; (ii) committed in the framework of the purpose and objective of the corporate entity; (iii) committed in accordance with the duties and functions

of the person who committed the offence or the person who gave the order; and (iv) committed for the purpose of benefitting the corporate entity.

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 the 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 policies which make the commission of the offence possible.

Under the Insurance Law, if a criminal offence is committed by a corporate entity, the criminal sanctions will be imposed on the corporate entity, the controller, and/or the management acting for and on behalf of the corporate entity.

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 (up to life), 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 (the Government has designated the bill amending the Criminal Code as a priority bill for 2016).

While the Environmental, the Anti Corruption, the Insurance and the Anti Money Laundering Laws (among others) 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.

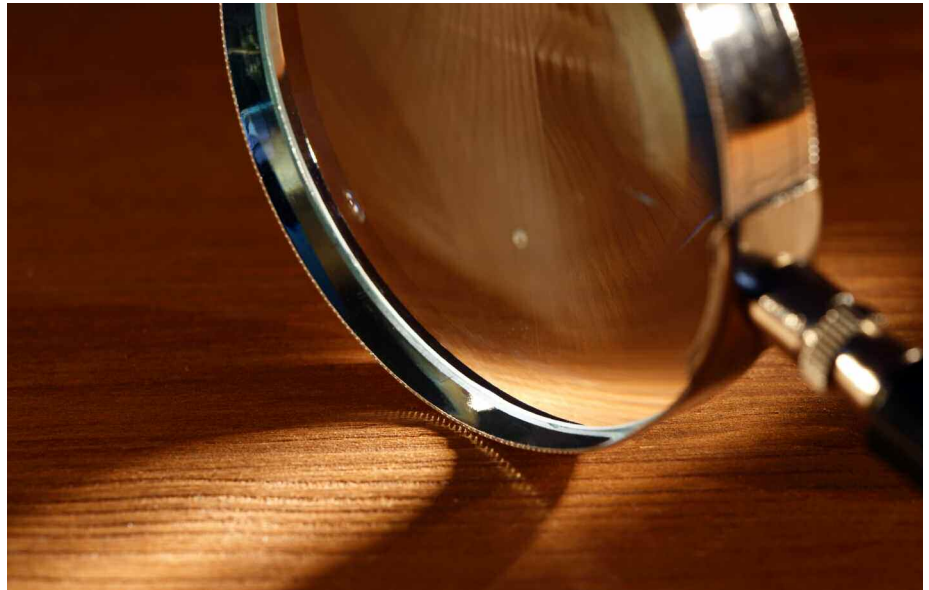
Liability

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 (eg 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 (eg 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 committed 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 million 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 higher 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 corporate entities to avoid criminal prosecution in Japan is to implement robust internal compliance programmes to prevent or catch volatile 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 corporate entity 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 organisations can be charged with entity offenses, including corporate entities, enterprises, state-owned non-profit entities (eg, 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 corporate entity, 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, infringing upon Citizens' Right of the Person and Democratic Rights, Obstructing the Administration of Public Order, and Corruption and Bribery.

In 2014, one multinational company was fined nearly USD 500 million by PRC authorities, the largest criminal fine in history in China.

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 corporate entity might be held liable based on a collective decision made by the management of the entity. In practice, a corporate entity 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 defence 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 offences, 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 committed by the corporate entity 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 offence 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, prosecutors, the People's Procuratorates, 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 below the 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, eg 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 more 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 criminal offences in Singapore targeted at corporate entities and concerned with the regulation of business activity.

An example of a statute which holds corporate entities liable for the acts of their employees or officers is the Securities and Futures Act⁵⁵ (Cap 289, 2006 Rev Ed) (SFA) which provides that corporate entities may be liable for insider dealing activities⁵⁶ carried out by their employees or officers via attributed liability if the act is:

- (a) done with the consent or connivance of the corporate entity and for the benefit of the corporate entity⁵⁷ or;
- (b) committed for the benefit of the corporate entity and attributable to the negligence of the corporate entity⁵⁸.

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 charged and convicted for the criminal acts of the directors and managers who represent the directing mind and will and who control what it does.⁵⁹ In such a case, the liability is not vicarious, but primary, since the person in question is an embodiment of the company⁶⁰. This concept has developed over decades.

The second technique of vicarious liability applies where a person is not regarded as “the company”, but merely as the company’s “servant”. In such a case, the company can only be liable if the person’s acts are within the scope of management properly delegated to him.⁶¹ Although, generally speaking, a corporate entity may not be convicted for the criminal acts of its employees or agents,⁶² 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.⁶³ An example is the SFA discussed above.⁶⁴

Wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a breach of that statute, then, if there is nothing in the statute either expressly or impliedly to the contrary, such a breach is an offence for which a corporate entity may be charged, whether or not the statute refers in terms to corporate entities. This is because the Interpretation Act⁶⁵ expressly states that a “person” and “party” includes “any company or association or body of persons, corporate or unincorporate”, unless the relevant Act expressly provides otherwise. Singapore’s main criminal statute, the Penal Code⁶⁶ 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 Act⁶⁷, for various offences such as making a false and misleading statements as to the amount of its capital.⁶⁸

⁵⁵ Cap 289, 2006 Rev Ed

⁵⁶ Sections 213 to 231 of the SFA (insider trading provisions)

⁵⁷ Section 236B of the SFA

⁵⁸ Section 236C of the SFA

⁵⁹ *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] 1 SLR(R) 327; (**Tom-Reck Security Services**) at [14] to [19]. 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

⁶⁰ *Tom-Reck Security Services* at [17]

⁶¹ *Tom-Reck Security Services* at [17] to [18]. *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* and another and another appeal [2011] 3 SLR 540 (*Skandinaviska*) at [75] and [86] where the Court of Appeal held that the applicable test for determining whether vicarious liability for torts committed by an employee during an unauthorized conduct was the “close connection” test (ie whether the tortious conduct of the employee was so closely related to his employment that it was fair and just to hold his employer vicariously liable for such conduct); and *Hin Hup Bus Service (a firm) v Tay Chwee Hiang* and another [2006] 4 SLR(R) 723 at [58] and [59]

⁶² *Skandinaviska* at paragraph 100; *Walter Woon on Company Law* (Sweet & Maxwell 2005, 3rd Ed) at paragraph 3.94 (Woon)

⁶³ Yeo, Morgan and Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis 2012, 2nd Ed) at paragraph 37.6 (Yeo et al)

⁶⁴ Sections 213 to 231 of the SFA (insider trading provisions)

⁶⁵ Cap 1, 1997 Rev Ed

⁶⁶ Cap 224, 2008 Rev Ed

⁶⁷ Cap 50, 2006 Rev Ed

⁶⁸ Section 401 of the CA

What offences can a corporate entity not commit?

A corporate entity can commit most offences except those for which imprisonment is the only penalty⁶⁹ or those which by their nature can only be committed by natural persons (such as bigamy and rape).⁷⁰

The Singapore courts have held that a company and its controlling director can 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.⁷¹ This principle has not been specifically discussed or applied in reported criminal proceedings in Singapore. Under English law, a company cannot be held liable in criminal proceedings 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.⁷²

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 requirement⁷³ or if it can prove parity of information with the counterparty.⁷⁴

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 to be deemed guilty of that offence if the prosecution can prove that the offence was committed with the consent or connivance or attributable to the neglect on the part of the relevant officer, as seen in section 331 of the SFA.⁷⁵

Other statutes 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 (“WSHA”).⁷⁶

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 Act⁷⁷;

- The Corrupt Practices Investigation Bureau is responsible for corruption-related offences under the Prevention of Corruption Act⁷⁸;
- The Competition Commission of Singapore investigates allegations of a company's anti-competitive behaviour under the Competition Act⁷⁹; 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 Act⁸⁰.

The main prosecution authority in Singapore is the Attorney-General's Chambers. Notwithstanding this, various authorities and regulatory bodies may bring proceedings for offences committed by corporate entities. For instance, the MAS takes enforcement actions for breaches of the SFA, the Financial Advisers Act⁸¹ and the Insurance Act.⁸² 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 Act⁸³, the Employment Act⁸⁴ and the Work Injury Compensation Act.⁸⁵

⁶⁹ *Girdharilal v Lalchand* AIR 1970 Raj 145; *Yeo et al* at paragraph 37.8

⁷⁰ *State of Maharashtra v Syndicate Transport Co Ltd* AIR 1964 Bom 195, citing *R v ICR Haulage Ltd* [1944] KB 551

⁷¹ *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [17] and [20] to [23], *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2009] 2 SLR(R) 318 at [29] and [30]

⁷² *R v McDonnell* [1966] 1 QB 233.

⁷³ Section 225 of the SFA

⁷⁴ Section 231 of the SFA

⁷⁵ 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.

⁷⁶ Cap 354A, 2009 Rev Ed

⁷⁷ Cap 235, 2006 Rev Ed

⁷⁸ Cap 241, 1993 Rev Ed

⁷⁹ Cap 50B, 2006 Rev Ed

⁸⁰ Cap 19, 2008 Rev Ed

⁸¹ Cap 110, 2007 Rev Ed.

⁸² Cap 142, 2002 Rev Ed.

⁸³ Cap 133, 2008 Rev Ed.

⁸⁴ Cap 91, 2009 Rev Ed.

⁸⁵ Cap 354, 2009 Rev Ed.

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 specific statutory offence instead of a more general Penal Code offence, or to proceed against the individuals concerned instead of the corporate entity behind them.⁸⁶ 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,⁸⁷ and another individual under the Building Control Act.⁸⁸

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 corporate entities. For example, under the SFA,⁸⁹ a natural person may be fined up to S\$250,000 or sent to jail for up to seven years. A corporate entity may be fined up to twice the maximum amount prescribed for the relevant offence (ie S\$500,000)⁹⁰.

Individuals

Individuals such as the directors and officers of a corporate entity can be punished with imprisonment or fine 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:⁹¹

- 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?

Cooperation and early acceptance of guilt are mitigating factors in sentencing, whereby offenders can receive reduced sentences.⁹² 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.⁹³

Current position

There is greater regulation of financial institutions and finance-related offences in Singapore, with investigating and prosecuting authorities being given increased investigative and enforcement powers. In particular, the market misconduct enforcement regime in Singapore has been steadily strengthening, with increased powers of enforcement provided to the MAS and record-high penalties imposed in relation to insider trading in 2015. Thus far, there has been no reported case in Singapore involving the attributed liability provisions in the SFA in relation to market misconduct, as these provisions are fairly new (being implemented in 2012). Given the strengthened enforcement regime, it is possible that we may start to see a rise in corporate criminal liability cases and regulatory investigations in the context of the attributed liability regime in the SFA.

⁸⁶ Yeo, Morgan and Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis 2012, 2nd Ed) at paragraph 37.1

⁸⁷ 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)

⁸⁸ Cap 29, 1999 Rev Ed.

⁸⁹ s 204, SFA

⁹⁰ s 333, SFA

⁹¹ *Lim Kopi Pte Ltd v Public Prosecutor* [2010] 2 SLR 413 at [14], [18] and [19]

⁹² *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [74]

⁹³ 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 corporate entities in cross-border investigations into breaches of securities law, mis-selling, market abuse, money laundering, compliance failings and economic sanctions contraventions.

We have represented leading clients in proceedings involving law enforcement agencies, regulators, and other investigators in the US, the EU, the Middle East and Asia, and the team includes former regulators and prosecutors from many different agencies.

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.

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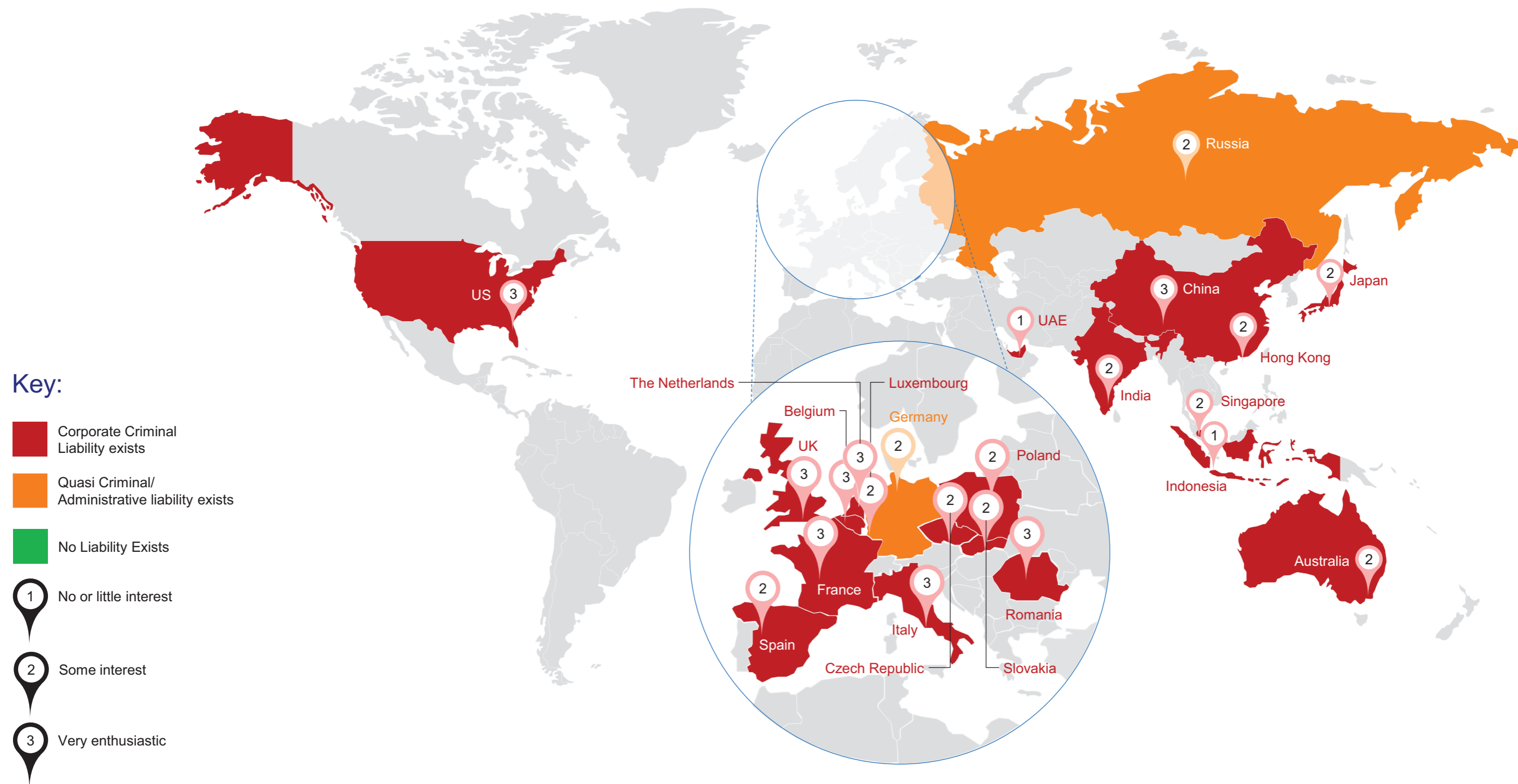
Chambers UK 2015: Financial Crime: Corporates (Band 1)

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Chambers UK 2016: Financial Crime (London)

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.



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: Whilst 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 focused 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. Italy's appetite for prosecuting crime committed for the benefit for the benefit of corporations continues to remain high. Moreover, following recent events damaging the environment, Italy has increased its interest and efforts in prosecuting corporate for actions and conducts that harm the environment and in 2015 has enacted a piece of legislation that expands the punishable offences and increases sanctions, which now also include a temporary suspension from business activity. 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, numbers of cases are growing rapidly. There is a shift towards pursuing foreign corporate entities doing business in Romania and prosecutors are showing a degree of pragmatism, entering into arrangements similar to deferred prosecution agreements in some cases.

Slovakia: A new law providing for corporate criminal liability in Slovakia will become effective on 1 July 2016. It will replace the existing quasi-criminal liability regime for a range of offences.

Spain: Corporate criminal liability was introduced in Spain in 2010. New legislation came 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: In the last few years, the pace of the authorities in prosecuting and reaching substantive settlements with corporate entities has picked up dramatically. The Prosecution Office has entered into unprecedented settlements with internationally operating 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. 2015 saw some important developments, with the conclusion of the first deferred prosecution agreement and the first use of the corporate offence of failing to prevent bribery.

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.

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