

Linklaters

Corporate criminal liability.

A review of law and practice across the globe



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Introduction

A review of law and practice relating to corporate criminal liability in 24 jurisdictions across Europe, Africa, the Americas and Asia-Pacific



Obviously, the implementation of effective compliance programmes is a must for any corporation or bank. However, no compliance programme can be perfect and crimes committed by persons connected with the company will continue to happen. As pressure from prosecution authorities increases, it is becoming even more important for in-house counsel of international companies to be aware of the impact of criminal conduct in all parts of the world where the company is doing business – not the least in order to fine-tune and reinforce the company's compliance programme and to be able to have an informed discussion with local advisors.

This major comparative review considers the position of the concept of corporate criminal liability in 24 jurisdictions, with the chapters provided by 18 Linklaters offices being enhanced by chapters from our contributor firms: Allens, Lefosse Advogados, Widyawan & Partners and Webber Wentzel.

Of all the jurisdictions we considered, only Germany, Italy, Poland, Russia and Sweden did not recognise the concept of criminal liability for companies. Nonetheless, all of them provide for measures by which companies can be sanctioned if criminal offences are committed by individuals associated with them, although the legal prerequisites for such sanctions may be different.

Generally speaking, the acts and omissions of individuals are the link by which a company may be held (criminally) liable. In most jurisdictions the group of individuals for whose acts and omissions a company can be held liable is not limited to the legal representatives and people with managerial functions, but may extend to ordinary employees or even third parties, as is true for the United Kingdom under the UK Bribery Act. However, not every jurisdiction requires the identification of an individual to find a company liable for wrongdoing.

In our globalised world, companies operating internationally may be particularly concerned to know whether corporate criminal liability rules in a certain jurisdiction extend to foreign companies not incorporated there but conducting business there. Very few of the jurisdictions considered in our review have explicit legal provisions dealing with the liability of foreign companies. Usually, no differentiation at all is made between national and foreign companies when it comes to holding a company criminally liable since, generally speaking, it will be the fact that the criminal offence was committed at least in part in the respective country and not fully abroad that will be determinative.

Unsurprisingly, monetary fines are the main form of sanction imposed on companies. However, most jurisdictions also provide for other forms of sanction, such as disgorgement of profits, publication of the judgment, exclusion from public tenders, temporary operating bans, revocation of licences or, as a last resort, the dissolution of the company. And while monetary fines are the most common sanction, there are no uniform rules on the amounts to be imposed. Whereas some countries provide for a maximum fine by law, for example Poland and Sweden, in others, such as the People's Republic of China and the United Kingdom, there is no maximum limit. In yet others, such as Brazil, the calculation of the fine may be tied to annual turnover of the company.

While companies are increasingly sanctioned for misconduct, the existence of an effective compliance system is gaining in importance, both when it comes to determining the amount of any fine to be imposed and at an earlier stage, when the decision is to be made whether a company should be prosecuted at all. However, only very few of the jurisdictions we considered, for example Spain, explicitly provide for provisions regarding the relevance of an effective compliance system when it comes to corporate criminal liability.

Future developments to be expected in this area of law vary from country to country. In some jurisdictions it is expected that prosecution authorities will take an increasingly tough stance against companies, which may result in a growing number of proceedings. In Germany, for example, there are discussions about the introduction of corporate criminal liability and in Sweden, an increase in the amount of fines is under contemplation. However, in some countries, major legal changes have come into force only recently, such as the introduction of corporate criminal liability generally in Spain and Luxembourg, so that implementation in practice remains to be seen.

An understanding of these global trends and the position with respect to the concept of corporate criminal liability in different jurisdictions is key to managing corporate risk. Therefore, Linklaters' review of corporate criminal liability will be of particular interest to businesses with international operations. It provides at-a-glance answers to twelve questions:

- > can companies be criminally liable for wrongdoing?
- > for what kind of wrongdoing can a company be held criminally liable?
- > how far does criminal liability extend?
- > does criminal liability extend to foreign companies?
- > is the company legally obliged to disclose criminal offences to the competent prosecution authorities?
- > are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?
- > what is the position of the defendant company in criminal proceedings?
- > is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

- > what kind of sanctions can be imposed on companies?
- > what is the relevance of an effective compliance system?
- > how are criminal proceedings against companies conducted in practice?
- > likely future scope and development?

We have recently published a related publication, *Taking stock. A review of anti-bribery and corruption law and enforcement across the globe*, which provides a global picture of the fight against corruption in 25 jurisdictions. The publication is available from our client knowledge portal, or by emailing [Edwina Larsen-Jones](#).

This comparative review is intended to highlight issues rather than provide comprehensive advice. If you have any particular questions about corporate criminal liability and the risks companies can face, please contact me or the Linklaters LLP lawyers with whom you work.



Robert Henrici, Partner

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Acknowledgements

Thank you to our contributors

This Review has been developed by lawyers from 18 of Linklaters' global offices, working in collaboration with expert local law firms. Our special thanks goes to our contributor firms for providing the following chapters:

- > **Allens**
Australia; Mongolia; Papua New Guinea
- > **Lefosse Advogados**
Brazil
- > **Widyawan & Partners**
Indonesia
- > **Webber Wentzel**
South Africa

Their involvement and support are greatly appreciated.

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Lefosse Advogados is a leading independent law firm operating in Brazil

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Linklaters and Widyawan & Partners have a formal association in Indonesia and work closely together to provide clients with a market-leading international and Indonesian law capability.

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Australia



Can companies be criminally liable for wrongdoing?

Criminal liability of corporate legal persons has been recognised in Australia for over a century. Principles governing corporate criminal liability mainly derive from the common law. However, Chapter 2, Part 2.5, Division 12 of the Criminal Code (“Code”), Schedule 2 to the Criminal Code Act 1995 (Cth) provides a statutory framework for corporate criminal responsibility at the federal level. Each State and Territory also has its own anti-bribery laws. For the most part in Australia, private sector bribery is covered in State and Territory criminal codes, which have uncertain extraterritorial application.

For what kind of wrongdoing can a company be held criminally liable?

A company may be subject to criminal liability for any offence unless the definition or subject matter of the offence indicates the contrary. For example, a body corporate may be found guilty of any offence in the Code, including one punishable by imprisonment. In relation to white collar crime, notable criminal offences that companies can be held criminally liable for include bribery of foreign public officials, bribery of a Commonwealth public official, money laundering, contravening sanctions laws and false accounting offences.

Criminal liability usually only results where both the physical element and the fault element (such as intention, knowledge, recklessness or negligence) of the offence are satisfied. For instance, the offence of bribery of a foreign public official requires both conduct and intention. There is an exception from satisfaction of the fault element for offences of strict or absolute liability. For instance, the offence of contravening a sanctions law for a body corporate is one of strict liability so that there is no need to prove the fault element.

Under the Code, the physical element of an offence will be attributed to a body corporate where it is committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment (section 12.2 of the Code). The fault element of intention, knowledge or recklessness will be attributed to a company if the “company expressly, tacitly or impliedly authorises or permits the commission of an offence” (section 12.3 of the Code). A company may expressly, tacitly or impliedly authorise or permit the commission of an offence where it is proved that:

- (i) the corporation’s board of directors intentionally or knowingly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- (ii) a high managerial agent of the corporation intentionally or knowingly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- (iii) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the offence provision; or
- (iv) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

“Corporate culture” is defined in the Code to mean an attitude, policy, rule or practice existing in the corporation generally or in the part of the corporation where the relevant offence was committed. This notion of corporate culture underlines the value of robust policies and compliance programmes.

Under the Code, where it is necessary to establish the negligence of a body corporate, the conduct of any number of its employees, agents or officers can be aggregated. Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers or a failure to provide adequate systems for conveying relevant information to the relevant persons in the body corporate.

How far does criminal liability extend?

The general principle at common law is that a corporation is “personally” liable for the mental state and conduct of a “directing mind” (the board of directors, managing director or another person to whom a function of the board had been fully delegated) acting on the corporation’s behalf.

In addition, where an employee or agent acting within the actual or apparent scope of his or her employment commits the physical element of the offence, a company may be held criminally liable if it had expressly, tacitly or impliedly authorised or permitted the commission of the offence. The term “agent” is not defined. However, it may be interpreted broadly to include individuals who are held out by the company to have its authority ‘to act in some way’.

Does criminal liability extend to foreign companies?

Criminal liability will extend to a foreign company in circumstances where the necessary nexus is established. The Code applies on the basis of nationality or territory. As a result, for a foreign company to be subject to the Code, the conduct constituting the alleged offence, or a result of that conduct, must occur wholly or partly within Australia. A foreign company would also be subject to the Code were it found to have engaged in an ancillary offence (for instance aiding and abetting

the primary offence) where the conduct constituting the ancillary offence occurred wholly outside Australia but the conduct constituting the primary offence occurred wholly or partly within Australia (section 14.1 of the Code).

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Although it is not an offence under the Code if the company fails to report a suspicion or knowledge of an offence, in general, if improper conduct has been identified, it is usually in the interests of the company to disclose and then co-operate.

In relation to knowledge of potential future criminal conduct, the company may be found guilty of an ancillary offence, such as complicity, if it is shown that knowledge existed prior to commission of the offence. The Code provides that a person who aids, abets, counsels or procures the commission of a principal offence by another person is taken to have committed that offence (section 11.2 of the Code).

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

The Australian Federal Police (“AFP”), the body responsible for investigating potential or actual criminal conduct regulated by the Code such as bribery, exercises discretion in the way in which it engages with the Commonwealth Department of Public Prosecutions (“DPP”), the prosecuting body. Although the AFP is not legally obliged to investigate criminal wrongdoing, it is very likely to do so where sufficient evidence of criminality exists and it is in the public interest to investigate. Decisions on whether to prosecute are made by the DPP using similar criteria.

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What is the position of the defendant company in criminal proceedings?

As a company is an artificial entity, there will be a number of differences between a criminal proceeding involving a natural person and one involving a body corporate. For example, a corporation cannot give, or be required to give, evidence as a witness except through its officers. Furthermore, a corporation does not have the benefit of the privilege against self-incrimination. Therefore, a corporation must comply with a lawful order or requirement to produce documents or information even though to do so might tend to incriminate the corporation. However, there is no need to convict an individual perpetrator in order to be able to prosecute the company and the criminal action against the company is usually conducted as a separate proceeding.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

There is no “one-size-fits-all” approach to responding to a regulatory investigation as the company must be responsive to the particular circumstances of the investigation, including:

- > the nature of the allegations made by the regulator;
- > the intensity of the investigations by the regulators;
- > the stage at which the investigations are at; and
- > any indication that court proceedings are being contemplated.

As noted above, a corporation must comply with a lawful order or requirement to produce documents or information even though to do so might tend to incriminate the corporation.

Where a company is the subject of regulator interest, it is free to co-operate with the relevant authorities on a voluntary basis. More often than not, a company gains significant legal and commercial benefits from co-operating with the investigation of a regulator.

The AFP does not have a formal leniency policy and is not subject to any statutory or governmental guidelines that require it to exercise leniency on the basis of corporate co-operation, though we understand that is under consideration. However, in our experience, the AFP looks favourably upon co-operative investigation targets. Also, the DPP’s Prosecution Policy expressly takes co-operation into account when considering whether to prosecute, the charges to be laid, mode of trial and related issues. Co-operation will also minimise the risk of the AFP exercising its powers of compulsion, for instance by issuing warrants for search and seizure of evidence, which can be invasive and resource intensive for the target company and its personnel.

What kind of sanctions can be imposed on companies?

Fines are the main form of criminal sanctions imposed on companies. For instance, for bribery of foreign public officials and Commonwealth public officials, the penalty is a fine not exceeding AUD\$18 million, three times the value of the benefit obtained, or if that value cannot be determined, up to 10% of annual turnover during the 12 months preceding the offence, whichever is greater (sections 70.2 and 141.1 of the Code). Furthermore, for money laundering, the range of penalties that may be imposed for such an offence depends upon the relevant circumstances, the fault element standard to be applied and the value of the money or property involved. As an example, where the money being dealt with is the proceeds of crime and is worth AUD\$1 million or more, a company may be liable for a fine of up to AUD\$270,000.

Penalties under the Proceeds of Crime Act 2002 (Cth) may also apply. This Act establishes a scheme for confiscating the ‘proceeds’ of crime.

Moreover, serious offences may lead to a company being wound up (section 461 of the Corporations Act 2001 (Cth)).

Sanctions other than criminal punishment can be imposed on the company depending on the nature of the offence. For example, certain government contracting agencies have special rules in their contracting processes for companies convicted of foreign bribery. The Department of Finance has indicated that if a company were convicted of an offence relating to the foreign bribery provisions, this would be sufficient grounds for an agency to consider refusing to award a public procurement contract to that company.

Other consequences include civil litigation brought by shareholders, reputational damage and investigations costs.

What is the relevance of an effective compliance system?

Prosecuting authorities are very likely to take into account whether a company can prove that it has sufficient control mechanisms in place to prevent wrongdoing when considering what action to take. The impact of a robust and appropriately tailored compliance system can be significant.

For offences such as bribery, where the requisite fault element is one of intention, knowledge or recklessness, adequate compliance structures are likely to weigh against a finding that the company expressly, tacitly or impliedly authorised or permitted the commission of an offence. Conversely, inadequate compliance structures may go towards a finding that the company expressly, tacitly or impliedly authorised or permitted the commission of an offence. Further, it is a defence to offences such as contravening a sanctions law, if the company can prove that it took reasonable precautions and exercised due diligence to avoid contravening the

law: section 16(7) of the Autonomous Sanctions Act 2011 (Cth). Regulators look at substance over form when determining whether to prosecute and the courts do the same when determining liability.

How are criminal proceedings against companies conducted in practice?

Generally, the direction of proceedings against companies is managed by the prosecuting agency at the federal or state level. It is becoming increasingly common practice for companies to negotiate outcomes with police and prosecution agencies.

Likely future scope and development?

We consider that there will be an increasingly active investigative and enforcement environment in Australia in relation to white collar crime, including bribery, serious and complex fraud and corruption. On 31 July 2014, the AFP launched the Fraud and Anti-Corruption Centre ("FAC Centre"), a new 'multi-agency' initiative designed to strengthen law enforcement capability and provide a co-ordinated approach to federal investigations and prosecutions. The creation of the FAC Centre allows for unprecedented information-sharing between government bodies and has been described as marking 'a new era in the approach to dealing with fraud and corruption at a federal level'. The AFP claims to have around 30 investigations on foot.

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Belgium



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There is no requirement to identify a particular individual as responsible for committing a criminally punishable act or omission.

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Can companies be criminally liable for wrongdoing?

Criminal liability of companies was introduced in Belgium by the law of 4 May 1999 concerning the introduction of criminal liability of legal entities. The central provision is to be found in Article 5 of the Code of Criminal Law.

Article 5

“A legal entity is criminally liable for offences that are either intrinsically linked to the realisation of its purpose or the promotion of its interests, or that, as it would appear from the precise circumstances, have been committed for its account.

When the legal entity is held liable on the sole basis of the actions of an identified physical person, only the one who has committed the most serious fault can be convicted. If the identified physical person has committed the fault knowingly and willingly, he may be convicted together with the liable legal entity.”

For what kind of wrongdoing can a company be held criminally liable?

In theory, legal entities may incur criminal liability in the same way as individuals since the legislator did not wish to introduce a limiting list of offences. However, due to the fact that legal entities obviously lack physical status, the attribution of criminal liability for some offences is more difficult to conceive (e.g. for bigamy or rape). Nonetheless, legal entities may be held criminally liable for such kinds of offences if these offences are committed in an organised manner within that legal entity.

How far does criminal liability extend?

Due to its lack of physical status, a company can only be criminally liable for an offence if three components can be attributed to the company: (i) the conduct forming the offence (i.e. the act or omission); (ii) the fault element (i.e. negligence or intention); and (iii) the apportioning of guilt (i.e. whether the person is to be reproached for the offence committed).

Whilst the conduct part of the offence will, in principle, be performed by a physical person, its attribution to the legal entity depends on the fulfilment of at least one of the three alternative criteria set out in Article 5 of the Code of Criminal Law. According to Article 5, a legal entity is criminally liable for offences that are either intrinsically linked to the carrying on of its business or the promotion of its interests, or that would appear from the circumstances to have been committed for its benefit. Case law suggests that these three criteria are frequently loosely, jointly or interchangeably applied so that attribution of the conduct component is quite easily established. However, for the attribution of the fault component and the allocation of guilt, the legislator did not provide for any criteria.

Although a legal entity necessarily operates through individuals and the attribution of criminal liability therefore has to result from these persons' conduct, there is no requirement to identify a particular individual as responsible for committing a criminally punishable act or omission.

Does criminal liability extend to foreign companies?

Jurisdiction is asserted against foreign companies in the same way as it is asserted against foreign individuals. Foreign companies can be prosecuted in Belgium if any of the constitutive elements of the offence was committed in Belgium (for example, the forged document was drafted in Belgium, the bribe was paid in Belgium, etc.), or if they are an accomplice to other indictees over whom jurisdiction can be asserted.

A parent company incorporated in Country X could be held criminally liable in Country Y when employees of the company's subsidiary in Country Y commit a criminal offence, if the judge decides that the parent company was responsible for deciding upon the corruption scheme, for example.

There exist some special rules extending jurisdiction, for example in bribery matters.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Companies are not obliged to self-report criminal conduct to the prosecuting authorities, although there are some self-reporting obligations applying to banks and financial institutions in cases of market abuse.

While Article 30 of the Code of Criminal Procedure imposes an obligation on anyone – regardless of whether it is a physical or a legal entity – who witnesses an attack on public safety or someone's life or property to report this to the Public Prosecutor, a failure to report is not of itself criminally sanctioned.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Belgian law gives discretion to the Public Prosecutor to decide whether it is appropriate to prosecute a case or not. The Public Prosecutor may therefore decide not to prosecute even after a complaint has been brought. However, he may reverse his decision as long as the prosecution is not statute-barred.

The Public Prosecutor is by no means required to prosecute both the legal entity and the physical person who is responsible for committing the factual act or omission. Nevertheless, the injured party may file a formal complaint which will eventually oblige the investigating judge to conduct an investigation.

What is the position of the defendant company in criminal proceedings?

Legal entities may invoke the same rights as individuals against whom criminal investigations and proceedings are brought, including the right to a fair trial.

There is no prohibition on bringing proceedings separately against a legal entity.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Companies may invoke the right not to incriminate themselves, both if they are criminally prosecuted and in other (administrative) proceedings of a criminal nature, or which may result in penalties akin to criminal sanctions.

Although not expressly provided for under Belgian criminal law, a company may find its co-operation efforts taken into account when a prosecutor is considering mitigating circumstances. However, case law provides numerous examples of companies being sanctioned despite full co-operation. In proceedings belonging to the broad sphere of administrative law, a reduction of the punishment might also be available in the event of due co-operation (e.g. the notion of leniency in the context of competition law).

What kind of sanctions can be imposed on companies?

Typically, criminal provisions do not mention sanctions specifically for legal entities. Instead, at least for the two most serious types of offences, crimes and misdemeanours, the criminal sanctions provided for individuals will apply, with prisons sentences being converted into fines by a specified mechanism, where necessary.

In addition, other sanctions for companies, such as dissolution, prohibition on undertaking corporate activities, closure of the relevant company unit, confiscation of assets and publication or distribution of the verdict, may apply. The sanction of dissolution may only be ordered if the legal entity was intentionally set up for conducting the offences or if it was intentionally diverted from its objective to conduct such activities. There is no general maximum sanction applicable to companies. However, bribery is subject to potential fines of up to EUR 1,200,000 for private bribery and up to EUR 2,400,000 for public bribery. The existence of compliance schemes and prevention mechanisms may have a beneficial impact in terms of reducing the punishment which is ultimately imposed on a company, as a mitigating circumstance.

Article 5 of the Code of Criminal Law provides that punishment for an offence may be imposed on only one of the company or the individual responsible for the most serious conduct. A legal entity may therefore avoid punishment if the criminal judge rules that the individual responsible for the actual conduct has committed the more serious fault. However, if the identified individual had intentionally committed the offence, the judge may still impose punishment on both the legal entity and the physical person (and this frequently happens in practice).

Breaches of other administrative laws (such as legislation on market abuse, environmental legislation, public procurement legislation and tax legislation) may also carry quasi-criminal sanctions. Examples include administrative fines, tax increases, exclusion from public tenders and the like.

What is the relevance of an effective compliance system?

A company may try to avoid being found criminally liable for an offence by focusing on preventing wrongdoing within its organisation. It would appear from reported cases that companies are often convicted on the basis of faults in their management, internal structure and governance. Such faults may consist of inefficient delegation (e.g. attribution of responsibilities to incompetent persons or provision of insufficient resources to the responsible person), poor communication lines, shortcomings in environmental or safety policy, insufficient training of staff or unreasonable budgetary restrictions.

The presence of compliance schemes or other prevention mechanisms may convince the criminal judge to agree to prosecute only the individual and not the company itself because the individual will have breached clearly identified internal rules. In this respect, the sector in which the company operates and the nature of its activities is likely to be factored into the analysis of whether a more or less stringent standard of diligence needs to be applied. Furthermore, compliance schemes and internal rules should be effectively applied and not remain a mere formality if the company wants them to have any beneficial impact.

Companies will be less exposed to attribution of criminal liability where the unlawful conduct occurs only occasionally within the organisation. The more systematic or structural such conduct becomes, the more likely a company will be held liable, certainly once a company has become aware of the occurrence of the previous wrongdoing or has been made aware of it by the criminal authorities. A company may then be held liable for a fault in following up or even be attributed with an intention to continue the wrongdoing. It will therefore be key for companies to develop effective detection mechanisms and ensure any allegations of wrongdoing are adequately followed up.

How are criminal proceedings against companies conducted in practice?

Proceedings conducted against companies are conducted in exactly the same manner as proceedings against individuals with the exception that, in some cases, the court may require that the company be represented in the procedure by a special representative.

It is also quite common practice for an allegedly criminally liable company to conclude a settlement with the Public Prosecutor or the regulator in order to bring an end to the criminal prosecution or administrative procedure. However, the settlement amounts proposed by the Public Prosecutor tend to equate to the maximum applicable fine and are generally not negotiable. Companies may also try to include settlement of claims against the individuals responsible for the conduct (e.g. the company's CEO) within the scope of the settlement agreement. Although expensive, this option is often preferred by companies because it avoids the publicity that is inherent to a criminal trial.

Likely future scope and development?

Article 5 of the Code of Criminal Law has been widely criticised, and may be modified in the future.

Furthermore, whereas a legal entity may currently be attributed with criminal liability for the acts or omissions of an individual, even if they are unidentified, case law suggests that the focus is shifting more onto the wrongful acts or omissions of leading individuals within the company when attributing the fault element of an offence to that company. This might imply the beginning of a shift towards a theory of identification (as known in the UK), according to which the fault of the legal entity may be based upon the mindset of leading individuals who can be identified with that legal entity.

For the time being, the ability to settle a proceeding has been suspended due to the annulment of some of the relevant legal provisions by the Constitutional Court. A new law, compatible with the Constitution, is expected to be introduced soon.

In addition, the ability to enter into a plea bargain with the prosecutor has now been introduced into Belgian law. Under this procedure the defendant admits that it has committed an offence and receives a lower sentence than that it could have faced at trial. The agreement must be reviewed and homologated by the court.



Brazil



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There is no legal obligation under Brazilian law ... to report criminal offences to the competent prosecution authorities.

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Can companies be criminally liable for wrongdoing?

In Brazil, only individuals and not companies can be held criminally liable for wrongdoing. Unlike common law jurisdictions, civil law systems, with a few exceptions, generally do not apply criminal liability to legal (as opposed to natural) persons. Civil law typically considers companies to be abstract intangible entities that have no capacity to meet the *mens rea* (intent) required to establish criminal responsibility. As such, even if a legal entity is the ultimate beneficiary of a corrupt activity, such as bribery, it cannot be held criminally liable in Brazil. Therefore, only the directors, management, employees or agents of a company can be held criminally liable for their actions on behalf of the company.

Exceptionally, however, companies may be subject to criminal prosecution or liability in the case of a few specific environmental crimes.

In any event, despite the fact that companies are not subject to criminal liability under Brazilian Law, they can be prosecuted under administrative, civil and antitrust law.

For what kind of wrongdoing can a company be held criminally liable?

As explained above, companies are subject to criminal prosecution or liability only in the case of certain environmental crimes.

However, companies may be subject to heavy administrative sanctions in cases of bribery, corruption, bid-rigging, collusion, boycotts and other anticompetitive conducts, pursuant to the Anti Corruption Law, the Public Procurement Law and the Antitrust Laws, among others.

How far does criminal liability extend?

Since companies cannot be held criminally liable in Brazil, criminal liability of managers or employees does not extend to the company.

However, the Anti-Corruption Law provides for the strict liability (civil and administrative) of a legal entity for unlawful acts performed by its employees, managers, agents or intermediaries, generating illegal benefits to the legal entity.

Parent companies, subsidiaries, other affiliates and consortiums are jointly and severally liable for payment of fines and indemnification of damages resulting from unlawful acts. Corporate successors are also liable, although their liability will be limited to the transferred net equity in the event of mergers or spin-offs.

Does criminal liability extend to foreign companies?

Even if a foreign legal entity is the ultimate beneficiary of a corrupt activity in Brazil, it cannot be held criminally liable under the Brazilian Anti-Corruption Law since criminal liability applies only to individuals. The foreign company shall, however, be subject to administrative and civil sanctions as provided for under the Brazilian Anti-Corruption Law (as explained further below) if their employees, managers, agents or intermediaries commit an unlawful act while acting on behalf of the company.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no legal obligation under Brazilian law, neither on individuals nor on companies, to report criminal offences to the competent prosecution authorities.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Prosecution authorities, including the Police Department and the Prosecutor Office, are under the duty to investigate allegations which fall within their jurisdictions, provided that there is enough evidence of wrongdoing to justify a legal action. Even when the allegations

are not supported by enough evidence of unlawful conduct, the authorities are under a duty to engage in preliminary inquiries to obtain further documents and information.

What is the position of the defendant company in criminal proceedings?

A company is generally only subject to administrative proceedings. In an administrative proceeding, a defendant company has the same rights as other individuals involved in the alleged wrongdoing. However, the Anti-Corruption Law provides that legal entities will be strictly liable for the conduct, which means that no proof of negligence or wilful action or inaction will be necessary to establish liability, whereas the same is not true with regard to individuals. Thus, individuals involved in related wrongdoing are subject to sanctions set out in Brazil's Criminal Code and other Brazilian laws (e.g. the Public Procurement Law) and, unlike companies, are entitled to constitutional guarantees inherent in criminal law, such as the principles of culpability and the presumption of innocence.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

There is no legal obligation to co-operate with the prosecution authorities. However, voluntary co-operation during an investigation may result in reduction of fines.

Moreover, pursuant to the Anti-Corruption Law, companies will be given credit in terms of ultimate calculation of sanctions for self-disclosure and co-operation, which are new concepts for Brazilian anti-corruption enforcement. In addition, companies that co-operate, enter into leniency agreements and fulfil the related legal requirements (which include admissions of wrongdoing) can have their fines reduced by up to two-thirds of the total and will be exempt from certain judicial and administrative sanctions.

What kind of sanctions can be imposed on companies?

The penalties set forth in the Anti-Corruption Law are harsh and divided into administrative and judicial (only civil, not criminal) sanctions.

Administrative sanctions include (i) publication of the condemnatory decision in the local press of the place where the violation happened for a period of at least 30 days, with expenses to be paid by the legal entity and (ii) a fine in the amount of 0.1% to 20% of the gross revenue of the legal entity in the fiscal year prior to the initiation of the investigative administrative proceedings, excluding taxes. If it is not possible to establish the value of the gross revenue of the legal entity, the fine amount may range from BRL 6,000 (roughly USD 2,500) to BRL 60,000,000 (roughly USD 25,000,000).

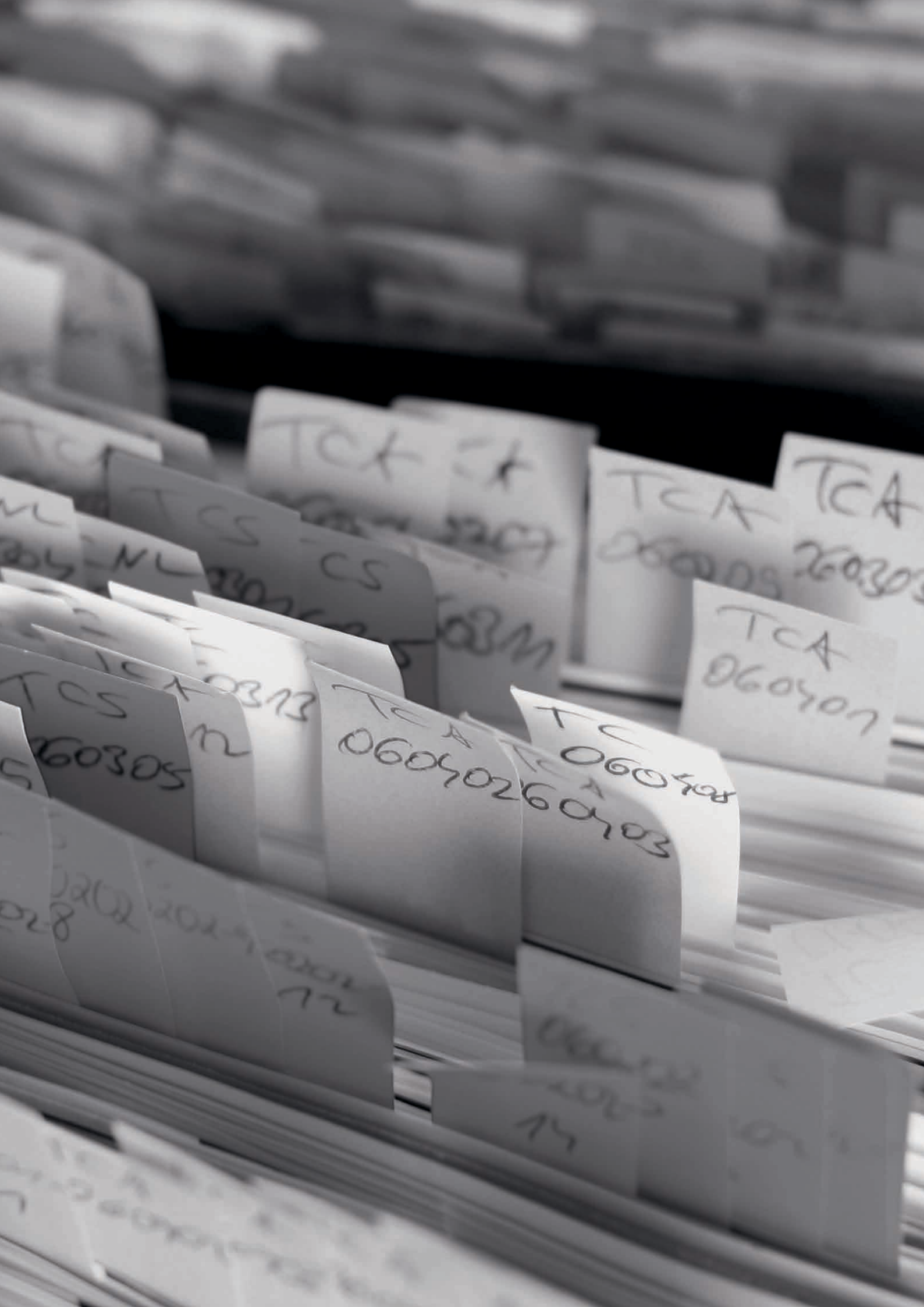
Judicial sanctions include (a) loss of assets, rights or valuables representing, directly or indirectly, the advantage or benefit gained from the violation, (b) partial suspension or banning of activities, (c) compulsory dissolution of the legal entity and (d) prohibition on receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the Government, for a period from one to five years.

Finally, the Anti-Corruption Law created the National Registry of Punished Companies (*Cadastro Nacional de Empresas Punidas*), a blacklisting database that makes public all administrative and civil sanctions imposed under the Anti-Corruption Law. This blacklisting database co-exists with the National Registry of Corrupt and Blacklisted Companies (*Cadastro Nacional de Empresas Inidôneas e Suspensas*), which makes public sanctions that restrict the right of a legal entity to participate in a public bidding proceeding or to execute government agreements pursuant to the Public Procurement Law and other laws applicable to bidding proceedings.

What is the relevance of an effective compliance system

Under the Anti-Corruption Law, the existence and enforcement of compliance programmes such as audits, codes of ethics and incentives for reporting of irregularities may provide for a reduction of penalties of up to 1% to 4% of the amount of fines imposed on the convicted company. In this regard, Decree No. 8,420/2015 ("Federal Anti-Corruption Regulation"), which regulates the Anti-Corruption Law, defines the parameters for a compliance programme to be acceptable for the purpose of reducing the amount of fines; these parameters are in line with international best practices on the matter following standards and precedents created by international treaties, statutes and soft law (for example, guidelines published by international institutions such as Transparency International).

According to the Federal Anti-Corruption Regulation, a compliance programme must be structured, applied and updated in accordance with the features and actual risks of the activities carried out by each legal entity, which must take actual measures to ensure that the programme is continuously improved and adapted in order to remain effective. The general framework and structure of an effective compliance programme should encompass: (i) clarity, transparency and effective engagement of the highest ranking officer of the corporate entity in question, in the enforcement of compliance practices and procedures (i.e. top-level commitment); (ii) effective and confidential communication channels for whistle-blowers; and (iii) effective control mechanisms for the prevention or detection of acts of corruption.



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How are criminal proceedings against companies conducted in practice?

The Federal Anti-Corruption Regulation sets forth the rules for investigation, prosecution and judgment of administrative proceedings to be filed against companies that violate the Anti-Corruption Law by means of the Sanctioning Administrative Procedure (*Processo Administrativo de Responsabilização* ("PAR")).

Such PAR must be concluded within 180 days and the final report will then be submitted to the competent authority for judgment and imposition of administrative sanctions, namely fines and/or publication of the administrative decision. If the unlawful act covered by the Anti-Corruption Law also constitutes a violation under the Public Procurement Law or any other laws related to public bids and contracts, the company's administrative liability will be investigated under the same PAR.

As explained before, companies may execute leniency agreements with the authorities in order to obtain a reduction of fines and exemption from certain sanctions.

Likely future scope and development?

The Anti-Corruption Law is very recent and therefore only a few cases have been brought under it so far. However, Brazilian authorities are increasingly focusing on enforcing anti-bribery laws and regulations against both executives and companies, either under the Criminal Code or under the Anti-Corruption Law. For instance, Brazilian authorities have been investigating a massive domestic corruption case involving the state-owned oil company, Petrobras, in a case known as "Operation Car Wash". After months of investigation, in Brazil in December 2014, Brazilian prosecutors charged 36 individuals in connection with an alleged scheme to overbill Petrobras, provide kickbacks to Petrobras employees to obtain contracts and to funnel money to political parties. In addition, prosecutors charged executives of several of Brazil's major construction companies, as well as two former Petrobras executives, in connection with this scheme.

Although most of the allegedly corrupt conduct relating to Operation Car Wash predated the entering into effect of the Anti-Corruption Law, the development of the investigations launched and criminal and civil proceedings filed against the individuals and corporations involved are influencing and setting the threshold for compliance controls, not only within the Brazilian jurisdiction but also in relation to all entities doing business in Brazil.

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Companies may execute leniency agreements with the authorities in order to obtain a reduction of fines and exemption from certain sanctions.

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France



Can companies be criminally liable for wrongdoing?

The Criminal Code of 1994 (“Code”) introduced the concept of corporate criminal liability into French law. Under Article 121-2 of the Code, “legal persons, with the exception of the State, are criminally liable for the offences committed for their account by their organs or representatives”.

Hence, a company will be criminally liable if:

- (i) an organ – i.e. all persons invested, either individually or collectively by legislation or the articles of association as a legal person with powers of management, but also de facto managers (i.e. someone who is deemed to be manager of the company on the basis of his behaviour) or a representative of the company, commits an offence; and
- (ii) the offence is committed “on behalf” of the company (i.e. it is an act which is linked to the company’s organisation, functioning or compliance with its corporate objects).

For what kind of wrongdoing can a company be held criminally liable?

Before the entry into force of the Perben II law on 31 December 2005, France adhered to the principle of “specialty”, according to which legal persons, including companies, could only be held criminally liable for a particular criminal offence if there were express provisions that provided for corporate criminal liability in relation to the offence in question. Nowadays, companies can be held liable for any offence except for press offences, such as defamation.

However, the criminal act committed by the corporate body or representative must be committed on the company’s behalf in order for the latter to be held liable.

How far does criminal liability extend?

A company may be criminally liable for offences committed on its behalf by its organs, including a de facto manager, or representatives. The notion of “representative” has a specific meaning and should not be confused with legal representatives. It includes individuals who have been granted the right to represent the company in certain situations by a judicial decision (including provisional administrators of a company named by a court or a company liquidator) and also persons who have been delegated powers by the management of the company, such as employees. The French Supreme Court (*Cour de cassation*) has held that criminal liability for a legal person can even be triggered by a third party who is not an employee, where that person is authorised to carry out material acts in the company’s name and on its behalf.

Does criminal liability extend to foreign companies?

Foreign companies, such as any other individuals or legal entities, are criminally liable before French criminal courts as long as the alleged offence has been committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent facts was committed within that territory.

Even if the offence is not committed within the territory of the French Republic, French criminal courts may also have jurisdiction, under certain conditions, when either the perpetrator or the victim of the criminal offence is French.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no obligation under French law to disclose criminal offences: any party under investigation, including a company, has the right to avoid self-incrimination.

However, certain companies, such as banks, have a duty to report any suspicion regarding funds received or transactions performed to the Unit for Intelligence Processing and Action Against Illicit Financial Networks (TRACFIN – *Traitement du renseignement et action contre les circuits financiers clandestins*). This can be the case when it involves terrorist financing, tax fraud or the proceeds of certain offences. Failure to do so may lead to disciplinary sanctions and/or to the prosecution of the company in criminal proceedings if its actions are deemed to be intentional.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

According to Articles 40 et seq. of the French Criminal Procedure Code, the Public Prosecutor has a broad discretion in his decision to initiate a prosecution – whether it concerns an individual or a company. However, pursuant to Articles 85 and 86 of the French Criminal Procedure Code, if the victim of the offence initiates the criminal investigation and satisfies the legal conditions, the Public Prosecutor is obliged to pursue the investigation in relation to the offence in question.

What is the position of the defendant company in criminal proceedings?

Criminal proceedings are directed against the company, as represented by its legal representative. However, the company may also be represented in the proceedings by an individual who has been delegated the power to do so.

Moreover, in the case where both the legal representative and the company are prosecuted, the legal representative may request the appointment by the Court of First Instance (*Tribunal de grande instance*) of an official representative (*mandataire de justice*) to represent the company in the proceedings. The Prosecutor, the investigating magistrate or the civil plaintiff may also request such an appointment when there is no longer a legal representative to represent the company. When such an official representative is appointed, the company loses the ability to conduct its defence independently.

Proceedings against a company are exactly the same as those against an individual, except that the legal representative of the company in the proceedings cannot be remanded in custody ahead of trial, unless he is being prosecuted personally.

Criminal courts must identify the organ or representative who has triggered the company's criminal liability in order to convict the latter for a criminal offence.

A company might be prosecuted without its organs or representatives being personally involved in the proceedings. However, Article 121-2 of the Code provides that just because a legal entity is found criminally liable for an offence, this does not prevent the individuals who were the perpetrators of or accomplices to the same offence from being held liable for it as well.

Further to a Circular of the Minister of Justice dated 13 February 2006, Public Prosecutors are encouraged to:

- (i) prosecute both the individual and the company where an offence has intentionally been committed by the individual for the benefit of the company; and
- (ii) prosecute the company where a non-intentional offence has been committed by an individual to the benefit of the company; but prosecute both the individual and the company if the individual committed a personal fault justifying criminal prosecution.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

The right to avoid self-incrimination allows any person not to co-operate with the prosecution authorities, although co-operation may be given on a voluntary basis. The collaboration of a company and its willingness to co-operate with the prosecuting authorities may be taken into account by courts when ruling on the penalty. There are no official sentencing guidelines in relation to such co-operation.

However, French criminal law is slowly evolving on this point in order to encourage co-operation. For example, according to the newly created Article 324-6-1 of the Code, anyone who has attempted to commit the offence of money laundering is exempted from punishment if information provided to the judicial or administrative authority helped prevent the completion of the offence and identify, if necessary, other perpetrators or accomplices. Moreover, the sentence incurred by the perpetrator or accomplice of money laundering is reduced by half if the alert/information provided to the administrative or judicial authority helped end the infringement or identify other perpetrators or accomplices.



In a landmark decision ... France's Constitutional Court ruled unconstitutional the provisions of the Monetary and Financial Code.



What kind of sanctions can be imposed on companies?

The sanctions that can be imposed on a company are set out in Articles 131-37 to 131-44-1 of the Code. According to these Articles, a fine may be imposed, with the maximum amount applicable to legal persons being five times that which is applicable to natural persons under the law sanctioning the offence.

For instance, legal persons can incur a fine of up to EUR 1,875,000 in cases of money laundering, it being specified that the amount of the fine may be increased to EUR 3,750,000 if aggravating circumstances are present (habitual conduct, organised crime etc.).

Alternatively, the fine may be up to half of the value of the funds laundered. Where there is no provision for a fine to be paid by natural persons, the fine incurred by legal persons is EUR 1,000,000.

Where expressly provided for in the Code, the following additional criminal punishments may also be imposed:

- > dissolution, where (i) the company was created to commit an offence or (ii) the corporate entity was diverted from its corporate objects in order to commit a felony or other offence punishable by a prison sentence of three years or more;
- > prohibition on exercising, directly or indirectly, one or more corporate 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 company's business establishments that were used to commit the offence;
- > exclusion from participating in public contracts, either permanently or for a maximum period of five years;

- > prohibition from conducting a public offer of securities or from having financial instruments admitted to trading on a regulated market, either permanently or for a maximum period of five years;
- > prohibition from drawing certain cheques and 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. (For offences punishable by at least five years imprisonment, as may be the case for money laundering, confiscation may be extended to all assets whose origin cannot be justified by the liable person);
- > display or publication of the judgment; or
- > prohibition from receiving any state aid from the French state, local authorities or a private person entrusted with a public service mission, for a maximum period of five years.

In respect of certain offences, French courts may also impose on the company, instead of or at the same time as the fine, a punishment called "sanction-reparation", which consists of an obligation on the company to indemnify the victim within a certain time period and in accordance with certain conditions determined by the court.

Furthermore, certain types of wrongdoing that constitute a criminal offence, such as stock market, competition and data protection offences, may also constitute a breach of administrative regulation and may be investigated by the relevant administrative authority (such as the Financial Markets Authority (*Autorité des Marchés Financiers*), the Competition Authority (*Autorité de la Concurrence*), the Prudential Supervisory Authority (*Autorité de Contrôle Prudentiel et de Résolution*) and the National Commission for Information Technology and Civil Liberties (*Commission Nationale de l'Informatique et des Libertés*)).

Contrary to the ECHR case law in relation to the *ne bis in idem* rule, French case law permits both administrative and criminal sanctions to be imposed by the relevant courts and authorities on the same legal person for the same conduct.

However, in a landmark decision dated 18 March 2015 and in line with the recent ECHR decision in *Grande Stevens v. Italy*, France's Constitutional Court ruled unconstitutional the provisions of the Monetary and Financial Code, conferring both regulatory and judicial authorities the power to investigate and sanction insider trading offences.

This ruling is likely to extend to other market abuses that are reprimanded by both the Criminal Code and the regulation of the Financial Market Authority (e.g. price manipulation and dissemination of false information).

It is also worth noting that this decision prohibits the continuation of all concurrent sets of proceedings. In that sense, France's Constitutional Court goes further than the reasoning expressed by the ECHR which does not "preclude that several concurrent sets of proceedings are conducted" before a final decision has been issued.

As a result of this ruling, a new bill was enacted on 21 June 2016. This bill introduces a guiding mechanism between the French Financial Markets Authority and the French National Financial Public Prosecutor. These two authorities shall consult each other to determine, within 2½ months, the most effective way to commence proceedings, based on the seriousness of the facts. Should they disagree, the Paris Court of Appeals General Prosecutor will make the final, non-appealable, decision, within two months.

Moreover, the new bill:

- > toughens penalties for market abuse offences by increasing the maximum amount of the fine from EUR 7.5 million to EUR 500 million for legal entities;
- > creates a new criminal offence of encouraging or recommending transactions in financial instruments, based on insider information.

Please note, however, that currently both administrative and criminal sanctions can still be imposed by the relevant courts and authorities on the same individual or legal entities for the same conduct, for offences that are not included in the Monetary and Financial Code (that is, in matters such as tax, antitrust, and so on). A recent example is the decision rendered on 24 June 2016 by the Constitutional Court in the so-called "*Cahuzac case*".

What is the relevance of an effective compliance system?

France does not require its companies to implement any particular compliance systems and the law does not take such compliance systems into account when assessing penalties. Hence, generally speaking, adequate compliance structures do not mitigate the risk of being prosecuted/fined and, conversely, inadequate compliance structures do not increase the risk of being prosecuted/fined. However, the judge is free to take into account any relevant circumstances when assessing the appropriate sanction to impose.

Recently, influenced by US, UK and Italian legislation, by best practice derived from them and the sanctions imposed pursuant to their provisions, many French companies have adopted internal compliance structures to ensure respect for the law, as well as the company's ethics policy, led by compliance officers selected from among the senior management or legal department.

Moreover, a new draft bill is currently under discussion which would introduce legislation on compliance systems and reinforce the fight against corruption in France.

The following measures, among others, are proposed:

- > the creation of a new administrative anti-corruption agency with investigative and administrative sanctioning powers and able to check the enforcement of compliance programmes by companies and produce guidelines;
- > the obligation for large companies (with a turnover above EUR 100 million and 500 employees or more) to apply compliance and corruption prevention plans, to set up a code of conduct describing the types of behaviour to be avoided, to set up an internal scheme for whistle-blowing and to establish a process for checking the integrity of clients, suppliers and partners;
- > the protection of whistle-blowers, from confidentiality to financial assistance;
- > the adoption of a new settlement tool allowing a company to avoid criminal conviction for corruption, by accepting a fine of up to 30% of its average annual turnover over the last three years and agreeing to be monitored to ensure it implements specific remedial measures and compliance systems, without having to plead guilty.

Another draft bill under discussion would impose an obligation on French companies with over 5,000 employees to implement compliance programs in order to prevent their employees, subsidiaries, subcontractors and suppliers worldwide, breaching legislation regarding human rights, fundamental freedoms, personal injury, environmental and sanitary damages and corruption. A breach of this obligation, also called "duty of care" (*devoir de vigilance*) could be sanctioned by a civil fine of up to EUR 10 million.

How are criminal proceedings against companies conducted in practice?

Deals between companies and the prosecution authorities/criminal court terminating criminal proceedings are not common practice in France, even though Articles 495-7 to 495-16 of the French Criminal Procedure Code allow any defendant charged with most intermediate offences to ask to negotiate its penalty with the Public Prosecutor, provided that it first admits its guilt. If the Public Prosecutor agrees to initiate the discussion, once the facts are admitted, the Public Prosecutor proposes a penalty to the defendant. Once they come to an agreement, it is then submitted to the Court for approval.

Until recently, this procedure, which was created in 2004, was mainly used for minor offences. However, in January 2016, for the first time, a financial institution and its two directors, who were involved in a complex money laundering procedure, managed to conclude a settlement agreement with the National Financial Prosecutor.

Also, as detailed above, a draft bill currently under discussion proposes a new settlement tool allowing a company to avoid a criminal conviction for corruption, by accepting a fine of up to 30% of its average annual turnover over the last three years and agreeing to be monitored to ensure it implements specific remedial measures and compliance systems, without having to plead guilty.

Lastly, it should be noted that the French procedural system allows civil and criminal claims to be pursued in the same set of proceedings. Hence, a company can face a civil damages claim from the victim of an illegal act at the same time as it faces criminal sanctions.

Likely future scope and development?

Recent regulation clearly demonstrates a tough stance regarding corporate liability.

In this context, on 1 February 2014, France's Financial Public Prosecutor took office. This new specialist Public Prosecutor has been granted exclusive jurisdiction to investigate and pursue offences related to stock market activities. The position also has concurrent jurisdiction over offences such as bribery, influence peddling, unlawful taking of interests, misappropriation of public funds and tax fraud, as well as any related money laundering activities, in respect of offences with a high degree of complexity due to the large number of perpetrators, accomplices or victims or their geographical reach. This should lead to an increase in the number of investigations into companies' activities.

French investigating judges do not hesitate either to seize companies' assets or to order companies to pay large amounts in bail when placing them under judicial examination. For instance, in July 2014, a foreign bank was ordered to pay EUR 1.1 billion in bail after being judicially examined in relation to allegations it had laundered the proceeds of tax evasion.

Moreover, a special Agency for the Recovery and Management of Seized and Confiscated Assets in criminal matters ("AGRASC") was created by a law of 9 July 2010, aimed at facilitating asset seizures and confiscation in criminal matters. Among its other responsibilities, the AGRASC handles the management of assets seized in the course of criminal proceedings. It also undertakes the sale of confiscated assets prior to judgment when they are no longer necessary for the investigation or may decrease in value. There has been a significant increase in the activity of AGRASC since its creation.

Finally, as described above, a new bill was enacted on 21 June 2016 which modifies legislation regarding market abuse offences and two further bills are currently under discussion, which would introduce French legislation on compliance systems and reinforce the fight against corruption.



Germany



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An adequate compliance system can protect the owner of a company from being found guilty.

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Can companies be criminally liable for wrongdoing?

At present, companies cannot be held criminally liable under German law. Rather, only those individuals committing a crime can be held accountable under German criminal law, even if the crime benefits solely the company. However, it is possible to impose administrative fines on companies under the German Administrative Offences Act (*Ordnungswidrigkeitengesetz*) (“OWiG”), to disgorge profits and to order forfeiture against a company.

This legal situation may change in the future since, in September 2013, a draft bill was presented by the Ministry of Justice of the Federal State of North-Rhine Westphalia which provides for the implementation of the concept of corporate criminal liability in the German legal system.

For what kind of wrongdoing can a company be held criminally liable?

Under the OWiG there are two relevant sections governing the (administrative) liability of companies: Section 30 and 130 OWiG.

If criminal or administrative offences have been committed, a corporate fine (*Unternehmensbuße*) pursuant to Section 30 OWiG may be ordered against the company if, generally speaking, an organ, a representative or a person with functions of control within the company has committed a criminal or administrative offence resulting in the breach by the company of any of its duties or which resulted or was intended to result in the enrichment of the company.

Section 130 OWiG does not directly govern the liability of a company as such but sets out the liability of the company’s owner. This section is still of utmost importance as to the liability of the company itself, as an administrative offence under this section can constitute the basis for liability of the company under Section 30 OWiG.

Under Section 130 OWiG, the owner of an operation or a business who wilfully or negligently fails to take the supervisory measures required to prevent a breach of any duties which are incumbent on him or her, the breach of which is potentially subject to punishment or fine, can be held administratively liable if such a breach would have been prevented or materially impeded by due supervision. Given that the legal entity cannot take any supervisory measures itself and is therefore not capable of acting nor being criminally liable, Section 9 OWiG extends the owner’s duties mainly to its representatives.

How far does criminal liability extend?

In order for a company to be found liable, the individuals committing the criminal or administrative offence must belong to the group of persons listed in Section 30 para. 1 OWiG. Under this provision, the individual perpetrator must be an executive or representative of the company or, at least, someone responsible for the management of the operations or business of the company, which includes persons with managerial powers (*Leitungsbefugnisse*) or with surveillance and supervisory powers (*Überwachungs- und Kontrollbefugnisse*). Whereas managerial powers may result from the powers of representation or decision-making, persons with surveillance or supervisory powers are generally those people with particular responsibility for a certain business division, e.g. the internal financial control or audit. Members of the supervisory board belong to this group, provided that the position entails the potential to influence the management of the company.

The company cannot be held liable for crimes committed by persons other than those mentioned in Section 30 para. 1 OWiG. This means that the conduct of third parties, such as subcontractors, cannot be attributed to the company for the purposes of administrative liability under Section 30 OWiG.

Does criminal liability extend to foreign companies?

Generally, a fine can also be imposed on foreign companies pursuant to Section 30 OWiG, provided that the corporate structure of the foreign company is comparable to that of a German legal entity and German criminal or administrative law is applicable to the relevant crime or administrative offence. In general, German law applies in the following cases:

- > Pursuant to Section 3 et seq. German Criminal Code (*Strafgesetzbuch*), crimes that are committed in Germany or, with certain restrictions, are committed by a German citizen in a foreign country, or in a foreign country by a foreigner but the victim is a German national, are subject to German criminal law.
- > The territorial reach of Section 5 OWiG which governs administrative offences is narrower in scope and, in essence, only allows for the sanctioning of administrative offences which have been committed within Germany.

However, for practical reasons, an administrative company fine is likely to be imposed on a foreign company only where the foreign company has a registered office or assets on German territory.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no such obligation under German law in general. However, there are some exemptions. For example:

- > Pursuant to Section 10 Securities Trading Act (*Wertpapierhandelsgesetz*), investment services enterprises, other credit institutions and asset management companies are obliged to notify the supervisory authority of any facts giving rise to the suspicion that a transaction involving financial instruments contravenes certain provisions.

- > Pursuant to Section 11 of the Anti-Money Laundering Act (*Geldwäschegesetz*), entities shall report any transaction to the competent prosecution authority whenever factual circumstances exist indicating that the assets or property connected with a transaction or business relationship are the product of an offence under Section 261 of the German Criminal Code (namely breach of trust) or are related to terrorist financing.

- > Section 153 Fiscal Code (*Abgabenordnung*) imposes an obligation to correct tax returns upon discovery of an inaccuracy or inadequacy that may indirectly lead to the disclosure of a past criminal offence by a third person.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

In relation to the prosecution of administrative offences, the principle of discretionary prosecution applies. This means that the prosecution authority has to decide, after due consideration, whether or not to prosecute the offence. However, the legal situation is different under German criminal law where the prosecution authority is generally legally obliged to conduct a criminal investigation once it becomes aware of a potential criminal act (*Legalitätsprinzip*). Hence, the prosecution authorities are under a duty to investigate the crime committed by an individual perpetrator but, where the crime also fulfils the prerequisites for a company fine under Section 30 OWiG, the prosecutor retains discretion whether or not to commence administrative proceedings against the company.

What is the position of the defendant company in criminal proceedings?

The decision whether or not to impose a corporate fine or forfeiture (*Verfall*) pursuant to Section 73 German Criminal Code is usually made in the

main proceedings against the accused individuals, the company appearing in the proceedings as an ancillary participant by way of a participation order (*Beteiligungsanordnung*).

The participation order may be issued by the court *ex officio* or at the request of the Public Prosecutor. The court's decision on the participation is final and non-appealable.

Generally, an ancillary participant has the same rights as an accused individual in the main proceedings, in particular the right to present one's arguments in full to the court, the right to refuse to testify and the right to file applications for the taking of evidence. However, some specifics exist:

- > Right to refuse to testify: In principle, the ancillary participant has the right to refuse to give testimony. In the case of legal persons, this right lies with the current statutory representatives only. Former statutory representatives or other employees may not invoke the company's right to refuse to testify. Instead, these individuals have the rights of normal witnesses and are therefore entitled to refuse to answer only such questions that would subject them to the risk of being prosecuted for an offence (Section 55 German Code of Criminal Procedure (*Strafprozessordnung*)). Obviously, this only applies to former statutory representatives who are not accused themselves and thereby have the right to refuse to testify.
- > Right to file applications for the taking of evidence: The ancillary participant has the right to file applications for the taking of evidence in support of the accused. However, the court has a wider discretion to reject these applications in comparison to applications for the taking of evidence filed by the accused individuals. Nevertheless, the court is obliged to investigate the case and to collect all relevant evidence *ex officio*.

The decision to impose a corporate fine or forfeiture on the company can also be rendered in separate and independent proceedings. A division of the proceedings is only permitted by law if no proceedings against the individual have been initiated at all, the proceedings against the individual perpetrator have been terminated or the competent authority has decided not to impose a sanction on the individual. In this respect, it is irrelevant why the individual perpetrator has not been sanctioned. Under German law, in order to be able to prosecute the company, it is not even necessary to identify the individual perpetrator. It is only necessary to prove that any individual acting in the capacity required by law has committed an offence. One of the reasons for this is that the allocation of responsibilities in large international companies or groups makes it almost impossible to trace misconduct back to one single employee.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Under German law, there is no obligation for the company to co-operate with the authorities during the investigation proceedings. In practice, however, co-operation occurs on a voluntary basis, often in complex business crime matters.

In addition, German cartel law provides a leniency rule, stipulating that the Federal Cartel Office may reduce the fine or even refrain from imposing a fine at all on participants of a cartel who co-operate with the authority and thus contribute to the detection of the existence of the cartel.

What kind of sanctions can be imposed on companies?

The potential sanctions under the Administrative Offences Act, in conjunction with the Criminal Code, are mainly: the imposition of an administrative fine, the disgorgement of profits (*Gewinnabschöpfung*), recovery (*Einziehung*) and forfeiture (*Verfall*).

In principle, a company may be fined up to EUR 10,000,000. However, if the profit generated by the offence is greater, then the fine can be as high as the profit made or even exceed that. Thus, where the firm has gained a commercial advantage by the wrongdoing, its “advantage” will be the lower limit of the fine. In recent cases, fines have even exceeded EUR 100,000,000.

Section 17 para. 3 OWiG stipulates that the basis for determining the amount of the fine is the significance of the administrative offence and the blameworthiness of the perpetrator. Mitigating circumstances are, *inter alia*: if the perpetrator attempts to compensate for resulting damage, helps to solve the case, especially in very complex cases, or if the contravention dates back some time and the company has been compliant since then. Circumstances that may justify a lower fine are: if the contravention remains exceptional, the degree of wrongdoing is low and only minor damage was caused and if no other adverse consequences resulted.

Companies may also be subject to a forfeiture order requiring them to surrender all profits gained from a criminal offence committed by an individual perpetrator, who may not even be connected to the company. Such order is neither a criminal sentence (*Strafe*) nor an administrative fine (*Bußgeld*) implying any wrongdoing by the company liable to forfeiture, but rather a measure (*Maßnahme*) to resolve and rectify the unlawful situation.

Forfeiture requires that an unlawful act has been committed and that the company has obtained something in return for, or as a result of, the perpetrator’s criminal offence. In calculating the amount to be surrendered, the courts generally apply the “gross principle”, using the company’s revenue without deducting any expenses. However, should the draft law on corporate criminal liability eventually be implemented, sanctions for companies may be significantly higher in the future since the draft bill provides for, for example, a fine potentially amounting to up to 10% of the average annual turnover of the company, assessed on the worldwide turnover of the corporate group over the past three years.

A company may also face exclusion from public tenders. Such debarment is mandatory in cases where an individual whose conduct is attributable to the company is convicted of certain qualified criminal offences (*Katalogstraftaten*), including bribery. An administrative fine exceeding the amount of EUR 200 must be registered in the central trade register if it relates to the operation of a business or if the offence was committed by a responsible individual when operating the business (Section 149 para. 2 no. 3 of the German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*)). A registration is not cancelled until the expiry of a three year period if the fine is less than EUR 300, and a five year period if the fine amounts to EUR 300 or more. During the award procedure, bidders are usually required to submit an excerpt from the central trade register, which means that the registration is of major importance in practice. However, the registration in the central trade register by itself does not automatically result in a mandatory or discretionary exclusion.

Special rules with different and/or higher sanctions apply in special industry sectors (e.g. banking) or in special areas of law (e.g. cartel law).

What is the relevance of an effective compliance system?

An adequate compliance system can protect the owner of a company from being found guilty under Section 130 OWiG. Section 130 requires that the owner of a company must have wilfully or negligently omitted to take adequate supervisory measures, which would have been able to prevent or at least materially impede the breach. An adequate compliance system could thus help to ensure that the owner is not be sanctioned in relation to the contravention committed by one of his employees. As Section 130 OWiG is the main ground on which a fine may be imposed on the company under Section 30 OWiG, the risk of the company being fined would be minimised significantly. However, as there are no clear rules, neither in law nor in court rulings, on how a compliance system has to be organised to be deemed as sufficient, there is no absolute certainty to the companies as to whether their owners may be fined. Moreover, German courts often take the fact that a breach of duties took place as evidence that supervisory measures have not adequately been taken, meaning that no adequate compliance system was in place.

Whether a compliance system should be taken into account when determining the amount of the company fine is not clearly stated in the law. It is not expressly stated that it should be taken into account, but neither is its consideration explicitly forbidden. A survey taken in different prosecution authorities shows that only a minority of the responding authorities take compliance systems into account.

How are criminal proceedings against companies conducted in practice?

The number of cases in which a corporate fine has been imposed on a company is rather low. According to a survey which has been conducted among the 19 public prosecution offices in the Federal State of North-Rhine Westphalia, a company fine was ordered in only 27 cases during the period 2006-2011¹.

Moreover, in practice, the vast majority of cases in which administrative fines are actually imposed on companies do not undergo a full trial but are instead terminated by negotiated agreements between the companies and the prosecution authorities and courts respectively.

Likely future scope and development?

The draft bill on the introduction of corporate criminal liability is currently under scrutiny by the Federal Ministry of Justice and Consumer Protection, which is expected to decide by the end of 2016 as to whether or not it will introduce a draft bill into the legislative process.

The current draft law sets out two separate offences for which companies can be held criminally liable:

- > the inappropriate choice of its management staff and decision makers (which mainly corresponds to the current administrative liability under Section 30 OWiG); and
- > the failure of a decision maker of the company to take sufficient supervisory measures (which mainly corresponds to the current administrative liability under Section 30, 130 OWiG).

Possible sanctions are, *inter alia*, a financial criminal penalty, the public announcement of the sentence, the dissolution of the company and also the exclusion from subsidies or public calls for tender.

Should the draft law eventually be adopted by parliament, the existence of a well-functioning compliance system will be of increased importance for companies when it comes to defending themselves in criminal proceedings. If the company has engaged personnel or organisational measures to prevent similar crimes in the future and has additionally supported the investigating authority in detecting the crime, or if no significant damage was caused or the damage was mostly remedied, the court may, under the draft law, refrain from sanctioning the company. Thus, under the draft law, a compliance system can be taken into account for the purposes of sentencing. Another difference to the current law is that the prosecution authorities would be obliged to conduct a criminal investigation into the company and to prosecute the company. They would, under the draft law, no longer have discretion in that regard.

1. Draft bill on corporate criminal liability (*Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden*), p.23.

Hong Kong



Can companies be criminally liable for wrongdoing?

Yes, companies can be criminally liable for wrongdoing in Hong Kong.

For what kind of wrongdoing can a company be held criminally liable?

There are a number of offences in Hong Kong that have been drafted with companies in mind. These are mainly set out in the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), the Companies Ordinance (Cap 622) and the Securities and Futures Ordinance (Cap 571) (“SFO”).

For the purpose of construing statutes, unless the contrary intention appears, “person” includes a company (Interpretation and General Clauses Ordinance (Cap 1) s 3).

Hong Kong law follows English law in attributing to a company the acts and states of mind of the individuals it employs. It will generally be necessary to invoke the identification principle, by which the acts and states of mind of any directors and managers who represent a company’s “directing mind and will” are imputed to the company.

How far does criminal liability extend?

A company cannot be guilty as a principal of offences which by their very nature require a natural person, for example perjury.

Where a company commits an offence, and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the management of the company, or any person purporting to act as such director or officer, the director or other officer is guilty of the same offence (Criminal Procedure Ordinance (Cap 221) s 101E). It has been held that the words “consent” or “connive” cover a situation where the officers had deliberately shut their eyes to an obvious means of knowledge¹.

There is no specific bribery offence for companies under the Prevention of Bribery Ordinance (Cap 201) (“POBO”). However, companies can be held liable under the identification principle outlined above.

Does criminal liability extend to foreign companies?

Certain offences set out in the Companies Ordinances (Cap 32 and 622) apply to registered non-Hong Kong companies.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no general obligation under Hong Kong law to disclose criminal offences. There is an obligation to report where a person knows or suspects that any property is the proceeds of, was used in connection with, or is intended to be used in connection with an indictable offence under the Organised and Serious Crimes Ordinance (Cap 455 s 25A) and the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405 s 25A). There is also an obligation to report in the context of terrorism. Under the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575 s 12) there is an obligation to report property which a person knows or suspects is terrorist property.

There are also obligations under the Securities and Futures Commission (“SFC”) Code of Conduct and the SFO to report actual or suspected misconduct either by the firm, its employees or clients. For example, the SFC would expect a regulated firm to notify it and the Hong Kong Monetary Authority (“HKMA”) (if applicable) of an event which:

- (i) directly involves the firm or any of its representatives and may impact on their fitness and properness;
- (ii) may have a significant impact on the operations or validity of the firm’s corporate group as a whole; or

(iii) arises from a material failure of systems and controls, even if the failure occurred outside Hong Kong or to other group entities.

There are requirements under the Securities and Futures (Client Money) Rules², the Securities and Futures (Client Securities) Rules³, the Securities and Futures (Keeping of Records) Rules⁴ and the Securities and Futures (Contract Notes, Statements of Account and Receipts) Rules⁵ for regulated firms to self-report non-compliance with the provisions under these Rules. Such non-compliance may amount to a criminal offence without reasonable excuse.

Under the Securities and Futures (Licensing and Registration) (Information) Rules⁶, a regulated firm is required to notify the SFC if it is or has been convicted of or charged with any criminal offence (other than a minor offence), in Hong Kong or elsewhere.

Further, under the HKMA Supervisory Policy Manual⁷, an authorised institution is required to notify the HKMA as soon as practicable of the breach of any provision of the Banking (Amendment) Ordinance 2002 or the SFO (including its subsidiary legislation), committed by the authorised institution itself or an associated entity.

The HKMA has also stated in a Circular⁸ that if there is a suspected case involving possible criminal elements, authorised institutions are expected to report the incident to the HKMA and the police in a timely manner.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

There are a number of law enforcement agencies which may investigate and prosecute corporate crime in addition to the Department of Justice. These include: the Hong Kong Police Force; the SFC; the HKMA; and the Independent Commission Against Corruption (“ICAC”).

These entities are generally under a duty to investigate matters which fall under their respective jurisdictions. This includes indications of wrongdoing by a company.

As for the decision to prosecute, the Prosecution Code states that the two factors which should be considered are the sufficiency of evidence and the public interest. In assessing the sufficiency of evidence, the test is whether the evidence demonstrates a reasonable prospect of conviction. There is no specific code catering for the prosecution of corporate defendants.

What is the position of the defendant company in criminal proceedings?

A company will have the same rights as an individual defendant in criminal proceedings. It will have the right to be represented and the same burden and standard of proof will apply. However, because of the identification principle outlined above, it will usually be necessary for the prosecution to identify an individual who was the “directing mind and will” of the company, although conviction of the company is not contingent upon conviction of that individual.

In some instances, only individuals will be prosecuted for the offence and not the company. If both the individual and the company are prosecuted, they can be prosecuted for different offences.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

At the investigation stage, certain law enforcement agencies have powers to require information from companies. For example, the SFC or ICAC may require a company to produce documents or answer questions (through a representative). Failure to comply with the enforcement agencies’ search warrants or production orders constitutes a statutory offence under the SFO and POBO and could amount to contempt of court. This duty of compliance would generally override the data protection and privacy laws in Hong Kong.

Co-operation and early acceptance of guilt are likely to be mitigating factors in sentencing. The sentence can be reduced by up to one third if an early guilty plea is entered⁹.

The SFC has discretion as to whether to deal with matters by way of criminal prosecutions, civil proceedings or disciplinary actions. Self-reporting can be an effective way of mitigating the risk of criminal prosecution and the SFC puts a lot of emphasis on this. The SFC has stated that, as a general rule, the earlier and the more extensively a regulated firm co-operates, the greater will be the credit given for it and a lighter sanction may be imposed (although the SFC will still take such disciplinary action as it may consider appropriate).

Those under investigation by the SFC may make a settlement proposal to the SFC. The SFC has the discretion to agree to a settlement if it is in the public interest.

What kind of sanctions can be imposed on companies?

Penalties may include fines and compensation or forfeiture orders. There is no mandatory scheme of debarment from public procurement processes for companies convicted of criminal offences.

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

There are no specific guidelines for sentencing companies.

What is the relevance of an effective compliance system?

The existence of an effective compliance system will generally be most relevant at the public interest stage of the prosecutor's decision referred to above.

The SFC also emphasises that regulated firms should have adequate internal control systems which would ensure compliance with the relevant law and regulations. Whether they are in place and how adequate they are would almost always have a bearing on the sanctions to be imposed.

How are criminal proceedings against companies conducted in practice?

There must be sufficient evidence which demonstrates a reasonable prospect of conviction and the public interest must require that the prosecution be conducted.

When choosing charges, the prosecution should attempt to reflect adequately the criminality of the conduct alleged in a manner that is both efficient and that will enable the court to do justice between the community and the accused.

From the outset of the proceedings, the prosecution must consider appropriate orders in respect of property, whether used in the commission of crime or regarded as the proceedings of offending.

There is no separate policy for prosecuting companies.

In certain cases, the prosecutor may agree to withdraw certain charges or to pursue charges for lesser offences.

Likely future scope and development?

In light of the fact that the United States has been targeting PRC companies under the Foreign Corrupt Practices Act 1977, it remains to be seen the extent to which Hong Kong companies may also come under the same scrutiny.

To date there are no legislative proposals to introduce specific corporate criminal liability.

1. *R v MG Mirchandani* [1977] HKLR 523.
2. Cap 571I, section.11.
3. Cap 571H, section.12.
4. Cap 571O, section.11.
5. Cap 571Q, section.18.
6. Cap 571S, section 4, Schedules 1 and 3.
7. SB-1, Supervision of Regulated Activities of SFC-Registered Authorised Institutions.
8. Abuse and Fraud Prevention in Private Banking and Wealth Management, 14 July 2009.
9. See *Secretary for Justice v Chau Wan Fun* [2006] 3 HKLRD 577.

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Regulated firms should have adequate internal control systems which would ensure compliance with the relevant law and regulations.

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Indonesia



Can companies be criminally liable for wrongdoing?

The Indonesian Penal Code does not establish a general doctrine of corporate criminal responsibility. Nonetheless, a number of individual statutes creating criminal offences provide for the attribution of criminal responsibility to companies (“Relevant Statutes”) such as: Law No. 8/2010, Countermeasure and Eradication of Money Laundering (“Anti-Money Laundering Law”); Law No. 31/1999, Eradication of the Criminal Act of Corruption (“Anti-Corruption Law”); or Law No. 32/2009, the Environmental Protection and Management Law (“Environmental Protection Law”).

In addition, a small number of individual statutes provide for the attribution of criminal responsibility to boards of companies.

For what kind of wrongdoing can a company be held criminally liable?

Companies can be held criminally liable for various criminal offences under the Relevant Statutes, including, for example, under the Anti-Corruption Law, for providing or offering bribes to public officials and engaging in related improper conduct or under the Anti-Money Laundering Law, for hiding or disguising the origin of assets obtained as a result of criminal action.

How far does criminal liability extend?

Whether a company can be held criminally liable for acts committed by employees and third parties as well as directors and senior executives, is determined by the terms of the Relevant Statute. For example, Article 20 of the Anti-Corruption Law provides that “*Criminal acts of corruption committed by a corporation are actions by persons either in the context of a working relationship or other relationships, undertaken within the environment of the Corporation, either singularly or jointly*”.

Does criminal liability extend to foreign companies?

Yes, criminal liability can be extended to foreign companies in Indonesia. However, this will only occur where, by virtue of the specific working relationship of the individual committing the act and the company (e.g. as a director or other authorised officer or employee of the company), the act is attributable to the company. In the ordinary course, the acts of an employee of a subsidiary should not be attributable to the parent company.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Generally, companies are not required to disclose potentially criminal conduct. However, there are some exceptions. For example, under the Anti-Money Laundering Law, financial services providers are required to report certain suspicious financial transactions. If a financial service provider fails to disclose such transactions, the relevant authority can then impose sanctions against the financial services provider, including fines and formal warnings.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Generally, relevant prosecutorial authorities are not obliged to conduct criminal investigations into potentially criminal conduct by companies.

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Generally, companies are not required to disclose potentially criminal conduct.

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What is the position of the defendant company in criminal proceedings?

A defendant company will be represented by the board of the company, and special sanctions may be imposed on the company (including suspension or revocation of business licences). If the acts of an individual can be attributable to the company by virtue of the individual's working relationship with the company, then it is not necessary to prosecute separately an individual perpetrator and/or to convict the individual perpetrator in order to be able to prosecute the company. In this sense, the criminal proceeding against the company is not an annex to the criminal proceeding against an individual perpetrator; it is a separate proceeding.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Generally, companies are not formally required to co-operate with prosecutorial authorities in proceedings and Indonesian law does not provide formal rewards for companies that do so co-operate.

However, prosecutorial authorities may exercise various compulsory powers in investigating and prosecuting offences, including freezing or confiscating assets, questioning employees and conducting searches of property. They may also request information and the refusal to disclose information can result in fines or imprisonment of the persons who fail to provide the information requested.

What kind of sanctions can be imposed on companies?

Generally, companies are subject to fines for contraventions of criminal provisions. For example, under the Anti-Corruption Law, the maximum fine that may be applied to a natural person may be increased by one-third when applied to a company, which, depending on the offence, may ultimately lead to a fine of up to 1 billion rupiah (EUR 90,000).

Some Relevant Statutes impose additional criminal sanctions. For example, under the Anti-Money Laundering Law, a company may be fined up to 100 billion rupiah (EUR 9,000,000) for committing an offence under the statute and may also be subject to suspension of all or some of its business activities, revocation of its business licence, dissolution, confiscation of its assets or state-takeover. If a company cannot pay a fine after its assets have been confiscated, board members' assets can be confiscated to discharge the fine. Where board members' assets are still insufficient to pay the fine, board members may be imprisoned to discharge the fine.

The Indonesian legal system does not contain a formal mechanism for plea bargaining.

What is the relevance of an effective compliance system?

The Relevant Statutes do not directly address the effect of compliance structures. However, having adequate compliance structures in place might be used as a ground to argue that criminal responsibility should not be attributed to a company.

For example, the Anti-Corruption Law does not provide for the mitigation of corporate criminal responsibility on the ground that a company had compliance structures in place. However, a company may be able to adduce evidence of compliance structures as evidence that a relevant act of an individual should not be attributed to the company, as the act was not committed for or on behalf of the company.

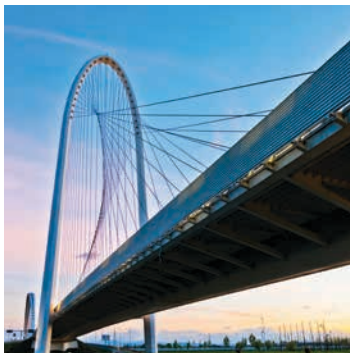
How are criminal proceedings against companies conducted in practice?

The Indonesian legal system does not allow for prosecutorial authorities to reach settlements with defendant companies. Once commenced, a criminal proceeding may only be terminated on the ground of lack of evidence at the investigation stage but must otherwise continue through to the issuance of a decision by a court.

Likely future scope and development?

The presidential elections held in 2014 had a strong focus on anti-corruption enforcement. However, no clear statements regarding tightening of sanctions against companies have been made yet.

Italy



A company can be held liable only if the criminal conduct occurred in the interest of the company.



Can companies be criminally liable for wrongdoing?

Italian law does not provide for corporate criminal liability, as is the case for an individual. On the other hand, the Legislative Decree of 8 June 2001, no. 231 (“Legislative Decree”), which came into force on 4 July 2001, provides for the administrative liability of companies and other legal entities for crimes committed by its directors, executives, subordinates and other persons acting on behalf of the legal entities, provided that the unlawful conduct has been carried out in the interests of or for the benefit of the relevant companies.

For what kind of wrongdoing can a company be held criminally liable?

Pursuant to Article 5 of the Legislative Decree, a company can be held administratively liable only for crimes committed in its interest or to its advantage.

The criminal offences for which a company can be held administratively liable are listed in Articles 24 – 25 *duodecies* of the Legislative Decree and include typical white collar financial crimes such as embezzlement, corruption and money laundering.

How far does criminal liability extend?

As provided for by Article 5, the company can be held administratively liable only for crimes committed by:

- (i) persons in positions of representation, administration or management of the company or one of its organisational units having financial and functional autonomy, as well as persons who undertake the management and control of the company in practice; and/or
- (ii) persons under the direction or supervision of one of the persons referred to above, if they committed the crimes while exercising their duties.

A company can be held liable only if the criminal conduct occurred in the interest of the company, even if the profit gained by the company itself is marginal and incidental. However, when determining the amount of the sanction, the judge takes into account the actual benefit derived by the company from the particular crime: the lower the benefit, the lower the relevant sanction will be. Only where the individuals committing the crime acted exclusively in order to further their own interests or the interests of third parties, may a company not be held liable.

Does criminal liability extend to foreign companies?

The Legislative Decree does not expressly provide for administrative liability of foreign companies. In this regard, Italian case law states that a company having its headquarters abroad shall be deemed liable pursuant to the Legislative Decree if:

- (i) the company operates in Italy, even occasionally; and
- (ii) all other conditions provided by Article 5 of the Legislative Decree are met (see above).

As a general rule, Article 6 of Italian Criminal Code states that crimes committed in Italy shall be punished pursuant to Italian Law. In this regard, a crime is considered committed in Italy if the relevant unlawful conduct is carried out, even partially, in Italy or if the consequences of such conduct take place in Italy.

It is therefore advisable for a foreign company operating in Italy to adopt an adequate compliance system and organisational policies, pursuant to the provisions of the Legislative Decree (discussed further below).

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

The Legislative Decree does not impose any obligation on the company itself to disclose criminal offences to the competent prosecution authorities. However, Article 6 of the Legislative Decree provides that the company will not be held liable if it demonstrates that it has adopted organisational policies capable of preventing the crimes listed in Articles 24 and 25 *duodecies* of the Legislative Decree from being committed.

Such a policy must (i) identify the conduct during which crimes may be committed, (ii) provide for protocols aimed at planning the formation and implementation of decisions of the company in relation to the prevention of such crimes, (iii) identify ways of managing financial resources in order to prevent the commission of crimes, (iv) include a duty to disclose relevant information to the body of the company tasked with supervising the functioning and observance of the policy and (v) introduce a disciplinary system to sanction non-compliance with measures set out in the policy.

The task of supervising the functioning and observance of such policies should be entrusted to a body of the company with independent powers of initiative and control.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Pursuant to Articles 55 and 56 of the Legislative Decree, the prosecution office that acquires the information concerning the administrative offence of the company arising from the crimes listed in Articles 24 and 25 *duodecies* is obliged to make inquiries into the company. This is the same prosecution office as the one conducting the investigation with respect to the crime committed by an individual in the interests of and/or for the benefit of the company.

What is the position of the defendant company in criminal proceedings?

Article 36 of the Legislative Decree provides that jurisdiction to rule on the administrative liability of the company lies with the criminal court competent for the crimes on which the administrative liability depends. Nonetheless, as provided by Article 8 of the Legislative Decree, the company's position in the criminal proceedings is autonomous, so that the company can be held liable even when:

- (i) the person who committed the crime has not been identified or, although identified and deemed guilty of the crime, cannot be convicted pursuant to Italian Law (since, for example, that when he committed the crime, he was of unsound mind);
- (ii) the crime is not being prosecuted for a reason other than amnesty.

Usually, the proceedings dealing with the administrative liability of the company are conducted alongside the criminal proceedings concerning the accused individuals, unless:

- (i) the criminal proceedings concerning the accused individuals are suspended;
- (ii) the criminal proceedings concerning the accused individuals are terminated by a summary decision, with a plea-bargaining agreement or a criminal order of conviction is issued;
- (iii) it is necessary due to procedural provisions.

Furthermore, as stated by Article 35 of the Legislative Decree, the procedural rules provided for individuals also apply to companies, which will therefore have the same rights as an individual against whom criminal investigations/proceedings are conducted.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

The Legislative Decree does not impose a duty on the company to co-operate with the prosecution authorities. In practical terms, the company will usually choose to co-operate with the Public Prosecutor, at least in order to try to avoid preventative and/or disqualifying sanctions which prevent the company from entering into agreements with public administration.

What kind of sanctions can be imposed on companies?

The Legislative Decree provides only for administrative penalties since criminal penalties cannot be imposed on companies in Italy. Pursuant to Article 9 of the Legislative Decree, such administrative penalties include monetary fines, disqualifying sanctions, confiscation of assets and the publication of the decision.

Administrative offences which arise from crimes always result in monetary fines, which are calculated according to a scale set out in Article 10 of the Legislative Decree.

In practice, courts have imposed double-digit fines. In decision 31-05-2011, n. 29930 of the Italian Supreme Criminal Court against Ingross Levante S.p.A., Levante was convicted of the corruption of certain judges and seizure of the company's goods and cash up to the maximum amount of EUR 58,972,680 was ordered. In another case, Saipem, an Italian company, was convicted of paying Nigerian public officials (such as CEO of Nigerian National Petroleum Corporation and members of Government) more than USD 187 million in order to obtain EPC Contracts for the construction of a gas plant in Bonny Island in Nigeria. According to the publicly available information, Saipem challenged the decision imposing the confiscation of about EUR 24,000,000 before the Supreme Court of Cassation and those proceedings are still ongoing.

Disqualifying sanctions may only be applied if expressly provided for and when either:

- (i) the company has profited from a crime committed by persons in senior positions or by persons under the direction of others, and the crime was caused or facilitated by serious organisational shortcomings; or
- (ii) there is a repetition or pattern of criminal conduct.

The Legislative Decree provides for the mitigation of penalties imposed on the company in certain circumstances. For example, a monetary fine will be reduced by half and limited to approximately EUR 100,000 if the accused individuals have committed the crime in their or in a third party's best interests and the company has not gained any material advantage or if the economic damage caused is not particularly serious (Article 12 of the Legislative Decree).

Similarly, a reduction of one-third to one-half is possible if the company, prior to the beginning of the proceedings, has fully compensated the damage and has taken steps to remove the harmful or dangerous consequences of the crime and, in addition, has adopted and implemented procedures and policies aimed at preventing crimes like the one committed.

If the conditions for both types of reduction are fulfilled, the fine may be reduced by half to two-thirds, although the fine can never be less than approximately EUR 10,329.14 (in the Legislative Decree the minimum amount of the fine is expressed as 20 million Lire, the former Italian currency, which approximates to EUR 10,329.14).

According to Article 17 of the Legislative Decree, disqualifying sanctions will not be imposed if, prior to the commencement of proceedings, the company:

- (i) has fully compensated the damage and has removed the harmful or dangerous consequences of the crime or has taken effective steps in this direction;

- (ii) has removed the organisational weaknesses that led to the crime through the adoption and implementation of procedures and policies suitable to prevent crimes like the one/s committed in the future; and/or
- (iii) has surrendered the profit obtained from the crime for the purposes of confiscation.

What is the relevance of an effective compliance system?

In general, the main effect of having adequate compliance structures in place is the company's ability to exclude or limit its liability arising from any of the crimes listed in the Articles 24 – 25 *duodecies* of the Legislative Decree.

In order to avoid or limit its liability, a company has to demonstrate that:

- (i) it has adopted procedures capable of preventing the crimes listed in the Articles 24 – 25 *duodecies* of the Legislative Decree from being perpetrated;
- (ii) the task of supervising the functioning and observance of the models has been entrusted to a body of the company with independent powers of initiative and control;
- (iii) the perpetrators of the unlawful conduct committed the crime by deliberately ignoring the procedures and management of the company; and
- (iv) there has not been a lack of or inadequate supervision by the body of the company responsible for overseeing the operation of the policy.

How are criminal proceedings against companies conducted in practice?

Deals between companies and prosecutors (which need the approval of the judge) are quite common in Italy, since they can avoid the application of disqualifying sanctions.

Likely future scope and development?

Although there is currently no discussion about a potential tightening up of the sanctions against companies, proceedings against companies generally are increasing. "Criminal" liability of legal entities often derives from very serious crimes, such as corruption or mafia-related offences. In recent years, the Italian legislator has increased sanctions in this regard and public opinion deems it fair to convict each legal person (whether individual or company) involved in such crimes, including the company associated with the convicted individual. Furthermore, but no less importantly, the Italian State is able to use the monetary fines recovered to compensate the damage suffered as a consequence of the crime, at least in part.



Japan



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A company will be held criminally liable for crimes committed by any of its employees.

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Can companies be criminally liable for wrongdoing?

In Japan, the criminal liability of companies is generally set out as a dual criminal liability provision (*ryobatsu kitei*), which means that both the company, as a business operator, and the individual perpetrator can be punished for a certain crime. This dual criminal liability provision was introduced in the Act on the Prevention of Capital Outflow in 1932.

For what kind of wrongdoing can a company be held criminally liable?

Criminal liability of companies always requires a criminal offence being committed by the company's representatives or employees. The company can then be held criminally liable if a dual criminal liability provision exists. This is not the case regarding offences like bribery or embezzlement. However, the company can be held criminally liable regarding offences such as insider trading or crimes under the Antitrust Act. In addition, the Companies Act makes it a crime for companies to violate an order to suspend business or to falsely notify the Electronic Public Notice System (*denshi koukoku*). Further criminal offences are included, *inter alia*, in the Income Tax Law, the Foreign Exchange Law and the Environmental Pollution Offence Law.

How far does criminal liability extend?

A company will be held criminally liable for crimes committed by any of its employees, not only by its senior executives. However, a company will not be held criminally liable for crimes committed by third parties.

Does criminal liability extend to foreign companies?

Criminal liability extends to foreign companies if they own a branch or an office in Japan, which is not considered a separate legal entity under Japanese Law. Criminal liability, however, would be dependent on the existence of a dual criminal liability provision. So far, no case law exists on this point.

In contrast, if a foreign company has a subsidiary company which is validly incorporated under Japanese Law, only the subsidiary company can be held criminally liable.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no such obligation under Japanese law.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

The prosecution office has the discretion to decide both whether to conduct a criminal investigation into the company and, following that, whether to prosecute the company.

What is the position of the defendant company in criminal proceedings?

When subject to criminal proceedings, a company will have the same rights as an individual defendant. In criminal proceedings against a company, it will be represented by one of the company's representatives. Even a representative who itself is under investigation for the crimes the company is suspected of or charged with can validly represent the company during the criminal proceedings against the company.

Although it is necessary to identify the individual perpetrator and the relevant offence committed, the conviction of the individual perpetrator is not a prerequisite to the prosecution of the company. Proceedings against the individual perpetrator and the company are generally separate sets of proceedings. However, they can be consolidated.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

There is no obligation on the company to co-operate with the prosecution authorities. However, the Antitrust Act provides for a leniency programme, by which the first reporting company can be exempted from fines set by the Fair Trade Commission. If the reporting company is not the first one to submit an independent report to the Fair Trade Commission, the fine can still be reduced. The percentage by which the fine will be lowered depends on how soon a company filed its report in comparison to others and on the quality of the material submitted in the report.

What kind of sanctions can be imposed on companies?

In cases of criminal conduct, fines will usually be imposed on companies. In addition, confiscation (*bosshu*) or collection of the equivalent value (*tsuityo*) can be ordered in cases where confiscation is not possible.

Under the Penal Code, a fine shall in principle be no less than 10,000 yen unless it is specifically reduced to less than that. This minimum amount applies to both fines against individuals or companies. The Penal Code does not generally provide for a maximum amount. Apart from sanctions under criminal law, Japanese Law also allows for administrative and other sanctions against companies. These include the public naming of companies in the Official Gazette or newspapers, revocation of business licences or the exclusion

from public tenders (e.g. from providing construction services to the government, as provided for in the Antitrust Act) for some time, as well as setting fines or tax penalties.

What is the relevance of an effective compliance system?

If a company can successfully show that it paid due attention and supervised its employees, it will be exempted from liability. Accordingly, the existence of adequate compliance procedures will generally reduce the risk of being prosecuted. Even if the company is prosecuted, the set fine is likely to be reduced as the court will take into consideration the company's adequate compliance procedures. However, the threshold to convince a court of the adequacy of a company's compliance efforts is very high in practice.

How are criminal proceedings against companies conducted in practice?

When a company and its representatives or employees are prosecuted simultaneously, the proceedings are usually consolidated and examined in parallel. However, the Japanese legal system does not allow for deals between companies and the prosecution authorities in order to conclude proceedings.

Likely future scope and development?

The statutory maximum fines that can be imposed on companies have gradually increased over the past years. Amendments to the Unfair Competition Prevention Law (*husei kyousou boushi hou*) came into force on 1 January 2016. These amendments provide that the maximum fine to be imposed on a company whose employees or representatives have acquired the trade secrets of another company by way of fraud or any other unlawful act will increase from 300 million yen to 500 million yen. Furthermore, if a company unlawfully obtains another company's trade secrets and uses them outside of Japan, a maximum fine of 1 billion yen, which was increased from 300 million yen, can be imposed.

In practice, the fines set by the relevant authorities have mirrored this statutory development.

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The conviction of the individual perpetrator is not a prerequisite to the prosecution of the company.

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Luxembourg



Can companies be criminally liable for wrongdoing?

Corporate criminal liability was introduced in the Luxembourg legal system by a law of 3 March 2010 (“Law”). The provisions of the Law have been incorporated into the Luxembourg Criminal Code (Articles 34 to 40) and the Luxembourg Code of Criminal Procedure and entered into force on 15 March 2010.

This liability applies to all legal entities which are subject to private or public law except for the State and municipalities (*communes*). The only requirement provided for by the Law is for the relevant legal entity to have legal personality. Hence, companies in the process of incorporation (*sociétés en formation*), groups of companies (*groupes de sociétés*) as well as temporary associations (*associations momentanées*) and venture associations (*associations en participation*) fall outside of the scope of the Law.

For what kind of wrongdoing can a company be held criminally liable?

According to the Law, a legal entity may be held liable for crimes (*crimes*) or misdemeanours/offences (*délits*), provided for in the Luxembourg Criminal Code and other relevant laws, committed in its name and in its interest by one of its legal corporate bodies or by any of its de jure or de facto managers/directors.

Only minor offences (“*contraventions*”) are excluded from the scope of the Law.

There is no limitation as to the crimes and offences for which a corporate entity may be held liable. However, certain crimes and misdemeanours can, by their very nature, only be committed by natural persons and are thus excluded.

How far does criminal liability extend?

According to the wording of the Law, the offence (either act or omission) has to be attributable de jure or de facto to

the statutory bodies or to one or several managers/directors. However, the legal entity may be held responsible for crimes committed by an employee if the employee is acting as a de facto manager/director (*dirigeant de fait*).

By referring not only to the management bodies of the legal entity but also to any other legal corporate body or de facto management, the Law seeks to have a wide application. Given the broad approach taken by the Luxembourg legislator, it is possible that actions by delegates of the board of directors also fall within the scope of the Law.

Whereas the wording of the Law (“in the name of the legal entity”) seems to indicate that the offence must have been committed in the course of the legal entity’s activities, the fact that a legal corporate body or a manager/director may have acted outside their scope of competence does not seem to be relevant.

The offence must also have been committed “in the interest” of the legal entity. In this context “interest” is to be understood as any financial or non-financial interest of the legal entity, i.e. the fact that the company did not derive any economic profit from the offence is not necessarily a reason to exclude the legal entity’s criminal liability. The interests of the legal entity may be considered to be those that oppose the personal interests of the manager/director or those of any third party. Offences committed in the exclusive interest of the perpetrator (natural person) are thus excluded (e.g. misuse of company assets).

It should be emphasised that no wrongdoing of the legal entity separate from that of the perpetrator of the offence is required. The legal entity will be held criminally liable as main perpetrator of the offence only when the conditions in Article 34 of the Luxembourg Criminal Code are met; there is no “automatic” criminal liability of the legal entity.

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There is no limitation as to the crimes and offences for which a corporate entity may be held liable.

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Does criminal liability extend to foreign companies?

Criminal liability for companies under Luxembourg law is triggered by crimes (*crimes*) or misdemeanours (*délits*) committed by certain natural persons or management bodies such as, for example, the manager or the director of the company. Therefore, the Luxembourg Criminal Code does not distinguish between foreign and national companies but between two types of natural persons, foreigners and nationals/residents.

The Luxembourg Criminal Code makes a distinction between crimes and offences committed by foreigners (for example, the foreign director of a foreign company) in the territory of Luxembourg and crimes and offences committed by foreigners outside the territory of Luxembourg.

Crimes and offences committed by foreigners within the territory of Luxembourg are punished in exactly the same way as crimes and offences committed by nationals or residents. Just like nationals or residents, foreigners may be held liable for crimes and offences provided for by the Luxembourg Criminal Code, as well as by other relevant laws. For example, the foreign director of a company that is not incorporated under Luxembourg law may be held criminally liable, together with the company, if he commits acts of bribery within the territory of Luxembourg in the name and in the interest of the company.

As regards crimes and offences committed outside the territory of Luxembourg by foreigners, the law distinguishes between crimes and offences committed entirely outside Luxembourg and crimes and offences which have been partly committed in Luxembourg.

If the crime or offence is committed entirely outside the territory of Luxembourg, a foreigner cannot, in principle, be held liable (and, consequently, no corporate criminal liability under Luxembourg law can incur). It is only in certain specific cases determined by the law that the foreigner may be held liable for crimes

and offences committed entirely outside Luxembourg, namely those that are considered as particularly harmful to society or to individuals, e.g. crimes against the state or against public security, acts of terrorism and financing of terrorism, provocation of terrorism, recruitment of terrorists and training of terrorists, forging money, forging passports or similar documents, corruption and unlawful taking of interests, private bribery, crimes against the protection of minors, prostitution, control of prostitution ("sex trade"), rape, indecent assault, violating public decency, smuggling of migrants and human trafficking, false testimony or incitement of a false testimony before an international tribunal and acts of torture committed against a Luxembourg citizen or a Luxembourg resident.

Further, following the principle of '*aut dedere, aut judicare*' ("either extradite or prosecute"), Luxembourg can prosecute foreigners who are not extradited and who have committed one of the following crimes outside Luxembourg: attacks against individuals who enjoy international protection; acts of terrorism or financing of terrorism; serious violations of human rights; acts of torture; prostitution and sex trade; human trafficking; child pornography; sexual advances or propositions to a minor using means of electronic communication and certain IT related infractions.

Lastly, a foreigner who has been an accomplice to a crime committed by a Luxembourg citizen outside of the Luxembourg territory can be prosecuted either jointly with the Luxembourg citizen or after the latter has been convicted.

Crimes and offences partly committed outside Luxembourg are considered to be committed within the jurisdiction of the Luxembourg courts, and may hence incur criminal liability, if any one element of the crime or offence took place within the territory of Luxembourg.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There are no specific rules which impose an obligation upon legal entities to self-report criminal offences.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Under Luxembourg criminal law, the prosecution office has discretion whether to conduct criminal investigations. Article 23 of the Luxembourg Criminal Procedure Code states that "The State prosecutor shall be informed of complaints and accusations and shall determine what action is to be taken in respect of them".

This principle should, however, be combined with the Luxembourg rules of criminal procedure according to which a victim may file a criminal complaint together with a claim for damages with an investigating judge. In such a case, the investigating magistrate loses discretion and has the obligation to open a formal investigation (although this may not necessarily lead to an actual prosecution).

What is the position of the defendant company in criminal proceedings?

The Law does not distinguish between crimes committed by legal entities or by individuals. The company therefore has the same rights as an individual against whom criminal proceedings are conducted.

According to Article 34 of the Luxembourg Criminal Code, "the criminal liability of legal entities does not exclude that of natural persons who perpetrated or were accomplices to the same offences". This cumulative nature of criminal liability of companies aims at preventing natural persons from using legal entities to evade or conceal their personal criminal responsibility.



The prosecutor or the plaintiff may thus elect to sue (i) both the legal entity and the individual who physically committed the offence or (ii) the individual only or (iii) the legal entity only.

The recitals of the draft Law stress that, although it is not necessary for the actual perpetrator (legal corporate body or de jure/de facto manager/director) to be sued and sentenced, its guilt must be established by the court. The judge must declare that all the essential elements of the offence were committed in order to hold the legal entity criminally liable. Hence, if criminal proceedings are commenced against both the company and the individual perpetrator and the latter is found not guilty or not responsible, the legal entity may not be successfully charged with the criminal offence at issue.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

No specific rules impose an obligation to co-operate with the prosecution authorities or establish a reward system for co-operation on a voluntary basis.

What kind of sanctions can be imposed on companies?

In terms of sanctions, the Law provides for fines, special seizure proceedings, the exclusion from public contracts bids processes (*marché public*), as well as dissolution and liquidation of the legal entity. These sanctions may apply in the alternative or cumulatively.

In general, fines may vary from a minimum of EUR 500 for both crimes and misdemeanours to a maximum of EUR 750,000 for crimes only. A specific “conversion system” is provided for offences punishable by imprisonment (terms of imprisonment being converted into fines). For specific offences (e.g. offences regarding the security of the state, terrorism, money laundering, illegal taking of interests, bribery and corruption, etc.), the above maximum amounts may

be multiplied by five, raising the maximum fine for these crimes to EUR 3,750,000. Moreover, in the case of re-offending, the maximum applicable fine will be substantially increased. For example, in cases of money laundering, bribery or corruption, the applicable fine for re-offending could reach a total amount of EUR 15,000,000.

Special seizure may apply to the material assets that are the object of the offence, the material assets that helped commit the offence or the material assets that were gained by the offence or acquired with the proceeds of the offence.

Dissolution and liquidation may apply when the legal entity was set up for the purpose of committing the offence or used to perpetrate a serious offence (as further specified in the Law). However, this sanction is not applicable to public legal entities.

The Law neither sets out specific circumstances in which liability will be excluded nor provides for mitigating factors. However, courts generally take into account the co-operation of the perpetrator and its attempt to redress the damage caused as mitigating factors in determining the penalty.

What is the relevance of an effective compliance system?

Generally speaking, the prosecution must establish wilful fault in order for a legal entity to incur criminal liability. Therefore, a defence based on the existence of sufficient control mechanisms/compliance systems could be taken into account if the compliance systems are effective to the point that wilful fault can be excluded. There is no case law in which it was held that sufficient control mechanisms could be a mitigating or even exonerating factor for the prosecuted legal entity. However, one decision (confirmed in appeal) found a company criminally liable on grounds of a lack of internal organisation, which lack was attributable to the director of the company.

How are criminal proceedings against companies conducted in practice?

The period over which the Law has been in force is still rather short. Hence, the number of criminal cases conducted against companies remains limited. The cases identified so far relate to the absence of sufficient security measures/lack of precaution of the company, which resulted in accidents and caused injuries.

However, investigations and prosecutions in cases of criminal proceedings against companies are carried out according to the general rules contained in the Criminal Procedure Code and the Criminal Code.

A law of 24 February 2015, published on 4 March 2015, introduced a plea bargaining procedure applicable to both natural and legal persons in the Luxembourg Criminal Procedure Code. It has been applicable since 7 March 2015.

The law applies to crimes and offences punishable by fines or subject to a maximum penalty of five years’ imprisonment (so as to exclude the most serious criminal offences). Complex and/or economic offences, carrying a maximum penalty of five years’ imprisonment, also fall within the scope of the law. Thus, the new plea bargaining procedure may be frequently used in the future to reduce the need for detailed inquiries in complex cases involving economic offences. Minor offences (“*contraventions*”) are excluded from the scope of the Law.

The plea bargain will terminate the public prosecution as to the facts included in its scope, without affecting civil actions.

Likely future scope and development?

The existence of corporate criminal liability is a recent phenomenon in Luxembourg Law. Case law is still scarce on the issue and actual trends difficult to establish so far.

Mongolia



Can companies be criminally liable for wrongdoing?

Traditionally, corporations have not been considered to be subject to criminal liability in Mongolia. Article 8 of the General Part of the Criminal Code of Mongolia (2002) (“Criminal Code”) governs the “Principle of Criminal Liability In Person”. It expressly states that only physical persons may be subject to criminal liability and that an individual wrong-doer must bear criminal liability himself/herself.

In January 2014, amendments to the current Criminal Code were made to modify Article 8 to state that, “where specified in the Special Part of the Criminal Law, corporations may be held criminally liable”. These “specified” crimes are “Money Laundering”, and “Financing Terrorism”.

Furthermore, as part of a legal reform initiative, a new revised Criminal Code (“Revised Criminal Code”) was adopted by the Parliament of Mongolia on 3 December 2015. Set to enter into force on 1 September 2016, this revision establishes corporate criminal liability in greater detail than the abovementioned interim amendment to the Criminal Code. In particular, the Revised Criminal Code incorporates in its general rules and principles that a “legal entity” (i.e. a company) shall be subject to criminal liability if the crime was committed on behalf of, and in the interests of such legal entity, and furthermore provides specific rules on the grounds on which to base criminal liability on companies and types of punishments to impose and identifies specific types of crimes for which corporate criminal liability may be applied.

For what kind of wrongdoing can a company be held criminally liable?

As stated above, under the current Criminal Code, there are two crimes for which a corporation may be held criminally liable: money laundering and financing terrorism.

Under the Revised Criminal Code, the crimes for which corporations may be criminally liable have been extended to cover a wide range of crimes in numerous categories, from “Economic Crimes”, crimes such as “competing illegally” (anti-trust crimes), tax evasion, money laundering, to crimes against public safety and interest such as terrorism, illegal possession of firearms, crimes against the justice system, crimes against the environment, and crimes against traffic safety. Interestingly, there is still no corporate liability specified for crimes of corruption.

Other than criminal liability, a company may be subject to administrative liabilities for violations of law that are not of criminal nature (i.e. not identified by the Criminal Code). Under the current administrative law system, there are no other sanctions known (and tested) other than the possible blacklisting by the state procurement authorities. The Law on Procuring Goods, Works and Services by the State and Local Property provides that, if a participant in a tender or any person violates an obligation under the agreement to purchase, fails to fulfil a duty under such agreement, has provided misleading information in a tender pitch or committed a crime of corruption that has been established by court or state inspector, the decision shall be submitted to the state administrative central organisation in charge of budget affairs (i.e. the Ministry of Finance) and such person shall be added to the list of persons restricted from participating in tenders.

The traditional approach under the current law does not provide clear prerequisites for a company to be held liable, other than where the legal provision expressly provides the violation and liability to be applicable to a business entity or a legal person rather than a natural person.

It should be noted that administrative liabilities are set forth separately in each of the 400+ laws in Mongolia at present and the violations for which administrative liabilities are applicable are independently identified by each law, with no underlying prerequisites set for its application to legal or natural persons.

However, like the Criminal Code overhaul, these various administrative liabilities have been combined by the legislator to form one general Law on Breaches, which will also enter into force on 1 September 2016. This Law on Breaches provides rules regarding the grounds on which a company may be held administratively liable and the types of administrative liabilities that may be imposed on companies, and identifies specific violations for which companies may be deemed as breaches of administrative law. The administrative breaches for which a company may be held liable is wider in range than in the Criminal Code, covering almost all of the breaches specified by the Law on Breaches, ranging from categories such as breaches of rules to protect social health and environmental security to breaches of social morale and order, breaches of rules on public property, breaches of business activities, etc. The sanctions applicable to companies under the Law on Breaches are fines or the termination of the licence to carry out specific activities. It is expected that this new Law on Breaches will remove any inconsistencies or overlapping of breaches and liabilities, as is common at the present time.

Separately, given the absence of administrative liability set for companies in respect of breaches of anti-corruption laws, it should be noted that Article 6.5.2 of the Anti-Corruption Law of Mongolia passed in July 2006 (“Anti-Corruption Law”) stipulates a general obligation on economic entities and organisations to define and comply with the rules of business ethics in the private sector. The current Anti-Corruption Law, however, does not specify any administrative sanctions for private companies – those that are embedded in the law refer to public officials or officials subject to the Anti-Corruption Law only.

How far does criminal liability extend?

The current Criminal Code does not provide rules other than the provision to add corporate criminal liability and to specify the two crimes for which corporate criminal liability is applicable. In particular, the Criminal Code fails to provide any further clarification as to who may commit the offence. There is no formal legal commentary around this matter at the moment (there is no longer any Supreme Court commentary as it has been ruled unconstitutional by the Constitutional Court and judicial precedence does not exist in the legal system).

The general provisions section of the Revised Criminal Code provides that a “decision made solely or by a group of officials authorised to represent a legal person, to commit or omit to commit an action in the interests of a legal person shall constitute the grounds for sanctions”. The term “official authorised to represent a legal person” is currently not formally defined, although similar terms such as “authorised official of a company” (which includes “member(s) of the Board of Directors, Executive Management team, Executive Director, Head of Financial Department, Chief Accountant, Chief specialist and Secretary of Board of Directors amongst others, who participate directly or indirectly in making official decisions of the company, or in concluding agreements and transactions” under the Company Law, and “Person authorised to represent a company without proxy” (which is only the Executive Management Team or Executive Director)) are used commonly in practice. It is expected that further clarity around the definition will be available once the new Revised Criminal Code comes into effect in September of 2016.

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[The] Law on Breaches provides rules regarding the grounds on which a company may be held administratively liable.

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Does criminal liability extend to foreign companies?

The current Criminal Code does not provide for specific rules regarding whether corporate criminal liability extends to a foreign company. The general rule provided by the Criminal Law sets forth that a “person” (general term that applies to both natural and legal) that has committed a crime within the territory of Mongolia shall be subject to criminal liability under the Criminal Law.

The Revised Criminal Law sets forth that a “legal entity” that has committed a crime within the territory of Mongolia shall be held criminally liable. The wording suggests that there is no differentiation between a foreign and a national legal entity in terms of application of the law if the crime was committed on Mongolian territory. There are no further rules regarding application of the Revised Criminal Code to foreign companies outside of Mongolia.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no obligation for private entities to report prohibited conduct by persons operating in the public sector. However, citizens and legal persons may submit complaints, requests or information to the Anti-Corruption Agency. The Anti-Corruption Agency is established under the Anti-Corruption Law and is defined as an independent, special state organisation with the remit to:

- > promote public awareness of corruption;
- > conduct operational work and criminal investigations for the purposes of discovering and preventing corruption; and

> review and verify the declaration of assets and income of persons specified by the Anti-Corruption Law. This is a general function, and not related to the investigatory role of the Agency. The Anti-Corruption Law requires specific public officials to declare their income and assets on a regular basis, which is reviewed by the Agency.

Furthermore, under the Law on Prevention of Crimes (1997), citizens (individual persons) are obliged to inform the authorities of any information they possess regarding a crime. Organisations (i.e. companies) do not bear the same obligation.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

The general rule applies in this case, as there is no specific rule of law that pertains to corporate wrongdoing. Under the Criminal Procedure Law (2002), prosecution authorities are required to accept any complaints or information regarding a crime and to initiate an initial investigation based on such. However, prosecution authorities have discretion in deciding whether to open a criminal case investigation based on the initial investigation or whether to terminate the initial investigation.

What is the position of the defendant company in criminal proceedings?

Since the Criminal Procedure Law has not been updated to reflect the corporate criminal liability amendment to the Criminal Law, the current law does not provide adequate clarity as to what rights a defendant company has. The new Revised Criminal Procedure Law, which will enter into force on 1 September 2016, provides that a legal entity is entitled to the same rights and obligations as a natural person. There are no rights particular to a company outside of the general rule¹.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

As stated above, there are no specific rules that deal with procedural matters and the rights and obligations of the corporation in a corporate criminal liability case. However, the Criminal Procedure Law generally provides that the court shall consider voluntary self-reporting and active co-operation in recovering illegal gains of a crime as a mitigating circumstance in imposing a penalty.

What kind of sanctions can be imposed on companies?

The criminal sanctions applicable for corporations are: fines; termination of licence to carry out specific activities; and/or liquidation of the company. For administrative breaches, the applicable sanctions for corporations are fines and termination of licence to carry out specific activities. Currently, the fines for crimes range between USD 10,000 and USD 400,000, for administrative breaches between USD 100 and USD 50,000, based on the current exchange rate.

A specific administrative sanction, for example, is that under the Law on Procuring Goods, Works and Services by State and Local Property. If a company participating in a tender has breached the procurement agreement, is in default of any obligations set forth in the procurement agreement, has provided false information in the pitch documents or has been determined by court or by a competent state inspector of having committed a crime of corruption, it is possible for the State Procurement Inspector to suggest that the company be included on a blacklist. If an entity is registered on the blacklist, it is prohibited from participation in any Government procurement process for three years. A general sanction for breaches of this law has been included in the new Law on Breaches.

What is the relevance of an effective compliance system?

These are matters that have not been addressed by the law at all.

How are criminal proceedings against companies conducted in practice?

Taking into account the procedural framework in general, it is expected that deals between the companies and the prosecution authorities are not made/allowed. Practical examples, however, do not exist so far.

Likely future scope and development?

In a recent report, the OECD recommended, in general terms, that Mongolia establish effective liability of legal persons for corruption criminal offences with proportionate and dissuasive sanctions, including liability for lack of proper supervision by the management which made the commission of the offence possible. According to this recommendation, corporate liability should be autonomous and not depend on detection, prosecution or conviction of the actual perpetrator. The report also suggests that Mongolia consider developing incentives for compliance with this legislation, such as providing that the existence of an effective anti-corruption compliance programme may provide companies with a defence from liability².

Subsequently, as mentioned above, there have been major legal reforms in the criminal and administrative systems. These include the revised versions of the Criminal Code and the Criminal Procedure Law and, for administrative violations, the Law on Breaches amongst others.

While a major novel aspect of these laws is the establishment of corporate criminal liability, certain practical issues, such as the extent of corporate liability and the specific rights and obligations of a company and the prosecution authorities in criminal proceedings, have yet to be clarified and tested.

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1. At the time of writing, the Revised Criminal Law draft had not been made public yet and should not be considered to be the final version officially.
 2. See OECD, Anti-Corruption Network for Eastern Europe and Central Asia report titled "Anti-Corruption Reforms in Mongolia: Assessment and Recommendations" dated 18 April 2014.

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The OECD [has] recommended ... that Mongolia establish effective liability of legal persons for corruption criminal offences.

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The Netherlands



Can companies be criminally liable for wrongdoing?

Section 51 of the Dutch Criminal Code (“DCC”) provides that both individuals and legal entities can commit criminal offences. Before the introduction of this provision in 1976, Section 15 of the Economic Offences Act (*Wet op de Economische Delicten*, (“WED”)) was the most important provision regulating the criminal liability of corporate entities for economic offences. When the number of companies began to grow rapidly, it became necessary to introduce a more general and practical provision which made the entire DCC applicable to companies, i.e. via Section 51 DCC. Under this provision, not only the company but also the person by whose authorisation the offence is committed (*opdrachtgever*) and/or the person who de facto directs the offence (*feitelijk leidinggevende*) can be prosecuted¹.

For what kind of wrongdoing can a company be held criminally liable?

Section 51 DCC is a broad provision which does not exclude criminal liability of companies for any section. It is obvious that, in practice, companies can only commit certain offences under the general criminal law. A company prosecuted for unlawful entry of a dwelling or bigamy, for example, is highly unlikely (if not impossible). On the other hand, companies can be held liable for the typical white collar crime offences such as bribery of officials, embezzlement, fraud and money laundering. A company may also be prosecuted as a fellow perpetrator (*medeplichtige*) of a criminal offence.

Furthermore, the WED codifies the economic criminal laws which may also be applicable to companies, encompassing a wide range of social and economic offences as well as environmental offences.

Since a company will always act through individuals, the relevant act of that individual must be attributable to the company. Only then can the company be held criminally liable for the wrongdoing. The Dutch Supreme Court has ruled that this may be the case when:

- (i) the relevant conduct concerns the act or omission of a person who, by virtue of an employment or other reasons, is working on behalf of the company;
- (ii) the conduct is part of the normal operations of the company;
- (iii) the criminal conduct has been beneficial to the company’s business; and/or
- (iv) the company could have prevented the occurrence of the criminal conduct but did not do so.

How far does criminal liability extend?

A company must have been negligent or have a certain degree of intent for it to be liable for a crime which is attributed to it.

The Dutch legislator found it too restrictive to limit criminal liability of a company only to the conduct of its bodies, directors or managers. In certain circumstances, crimes committed by other individual employees will also be attributable to the company. Whether the criminal conduct of a particular employee is attributable to the company itself will depend on (*inter alia*) the internal organisation of the company and the duties and responsibilities allocated to that employee. For instance, if the internal organisation of the company guarantees a certain level of control by the company and it can thus be said that the company could or should have been aware of the actions of its employees, the criminal conduct committed by its employee may be attributable to the company. This will, however, be determined on a case by case basis.

Does criminal liability extend to foreign companies?

The DCC does not exclude the criminal prosecution of foreign companies for conduct in the Netherlands. Pursuant to Section 2 DCC, the Dutch courts have jurisdiction when an offence has been conducted, even just in part, in the Netherlands.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Under the DCC, there is no obligation for companies to disclose criminal offences committed by it to the competent prosecution authorities.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Section 124 Judiciary Organisation Act (*Wet op de rechterlijke organisatie*) has vested the enforcement of criminal law solely with the prosecution office. The prosecution office may at its own discretion decide whether or not to pursue prosecution. Section 167, subsection 2, of the Dutch Criminal Procedural Code ("DCPC") provides that the prosecution office may refrain from prosecution on grounds based on the public interest.

Any party directly concerned with the decision by the prosecution office to refrain from prosecution may file a complaint with the relevant court of appeal, with the request to order the prosecution office to pursue prosecution (Section 12 DCPC). A decision by the court in this regard cannot be appealed.

What is the position of the defendant company in criminal proceedings?

To the extent possible, the rules and regulations applying to individuals in pre-trial investigations and during the trial itself are also applicable to companies.

With regard to (human) rights, the tendency is to apply these equally to companies, (again) to the extent appropriate. The court should assess the purpose of a particular right in order to decide whether or not it may apply to a company. Procedural rules, such as the right to an impartial judge, are acknowledged to be of such importance for the quality and fairness of a trial that they equally apply to companies. Furthermore, the Supreme Court has ruled that the safeguards as laid down in Article 6 ECHR are applicable to companies as well as individuals. Therefore, "the right to remain silent and not to incriminate himself" can be invoked by a company.

If criminal proceedings are initiated against a company, that company will be represented during the trial by, in principle, (one of) its director(s) (Section 528 DCPC). This representative cannot act as a witness during the trial and may invoke his right to remain silent. Since the legislator has not provided for the representation of a company during pre-trial investigation, there is an ongoing discussion in Dutch literature whether or not any representative of a company can use the right to remain silent during the pre-trial process.

If a company has committed a criminal offence, both the company and the instructor and/or de facto manager of the offence can be prosecuted. These are separate proceedings, in which the outcome of one will not affect the other. The proceedings do not necessarily take place simultaneously.

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Procedural rules ... are acknowledged to be of such importance for the quality and fairness of a trial that they equally apply to companies.

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Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Derived from Article 14 ICCPR and (implicitly) Article 6 ECHR, the *nemo tenetur* principle applies in the Netherlands. This principle, in essence, grants the accused a right to be silent when questioned. As the safeguards laid down in Article 6 ECHR apply to companies as well, it is generally acknowledged that companies fall under the *nemo tenetur* principle. As such, they cannot be forced to co-operate with a criminal prosecution. Therefore, certain investigative powers are restricted by this principle. Please note that the investigative powers as outlined under Sections 18-23 WED (e.g. the right for investigating officers to seize objects, review documents and enter premises) are in principle not restricted by Article 6 ECHR.

In administrative enforcement rather than criminal investigations, however, the regulatory authorities may demand the active involvement of a company and companies may be fined for refusing to do so. Pursuant to the Act establishing the Authority for Consumers and Market (*Instellingwet Autoriteit Consument en Markt*), for example, a company can be fined a maximum of EUR 450,000 if it does not provide the documents requested by the authority under that Act.

What kind of sanctions can be imposed on companies?

Companies are subject to all the penalties and measures set out in the relevant legislation and applicable to individuals to the extent that these penalties are effective and appropriate in relation to companies. Hence, a financial penalty is the main penalty available for companies. Consequently, if the only sanction provided by the law is imprisonment, the court may not be able to impose a penalty on the company at all.

If a company is convicted of a crime for which the specified fine category does not include an appropriate penalty, a fine may be imposed not exceeding the amount of the next higher category (Section 23, subsection 7, DCC). There are six fine categories ranging from a maximum of EUR 405 to EUR 810,000. Additionally, pursuant to legislation that entered into force in 2015, the maximum fine may be as high as 10% of a company's annual turnover. It is noted that, where an offence has been committed by a subsidiary whose policy is determined by the parent company, their joint revenues will be taken into account when calculating the fine.

Under the WED, there are in principle three types of sanctions: (i) pecuniary sanctions (e.g. a fine or confiscation of the proceeds of criminal conduct); (ii) corporate sanctions (e.g. the dissolution of the company, deprivation of rights and publication of the punishment); and (iii) freedom sanctions (which are not applicable to companies).

During the criminal trial, only the court has the right and the discretion to determine the degree of the sanction given the circumstances and within the limits established by applicable statutory provisions. The existence of sufficient control mechanisms or compliance systems (see below) could, for instance, be of relevance when the sentence is determined, provided that the judge considers it appropriate in the circumstances.

In addition, non-criminal sanctions may apply. Breaches under the General Administrative Law Act (*Algemene wet bestuursrecht*) as well as under the Competition Act (*Mededingingswet*) by a company may result in a penalty or administrative fine. Similarly, according to the Financial Supervision Act ("FSA") (*Wet financieel toezicht*), the Dutch regulator has the authority to impose a designation order on a company, appoint an administrator, or impose a penalty or administrative fine up to EUR 4,000,000 (Section 1:81 FSA). This amount will be doubled if the same breach has been committed less than five years previously.

The maximum amount could furthermore be higher than EUR 8,000,000, if the company has gained a financial benefit of at least EUR 2,000,000 from non-compliance with the FSA. In that case, the maximum amount of the fine could be twice the amount of such financial benefit.

Similarly, according to the Financial Supervision Act ("FSA") (*Wet financieel toezicht*), the Dutch regulator has the authority to impose a designation order on a company, appoint an administrator, or impose a penalty or administrative fine up to EUR 5,000,000 (Section 1:81 FSA). This amount will be doubled if the same breach was committed less than five years previously. The maximum amount may be increased up to EUR 20,000,000 where this is required under binding EU law. However, the amount of the fine will be limited to 10% of the net turnover of the preceding financial year in respect of breaches of the information obligations of issuing institutions and of the reporting requirement in respect of interests in issuing institutions, where this is higher than two times the applicable maximum fine. This percentage may be increased up to 15% where this is required by binding EU law. Alternatively, the maximum amount of the fine could be three times the amount of the financial benefit the company has gained from non-compliance with the FSA. The Dutch regulator is obliged to publish the fact that a fine has been incurred, unless publication would violate the purpose of supervision carried out by the regulator.

What is the relevance of an effective compliance system?

In general, having a compliance system in place not only mitigates the risk of wrongdoing occurring but simultaneously mitigates the risk that any wrongdoing may be attributable to the company. Where a company has set control mechanisms in place to avoid criminal conduct by its employees, it can be considered to have taken sufficient steps not to have "accepted" the criminal behaviour of others in its organisation.

In this way, the company can raise the bar at which it will be deemed to be liable for any wrongdoing. However, the company may still be found liable depending on the other circumstances of the case.

How are criminal proceedings against companies conducted in practice?

Pursuant to Section 74 DCC, the Public Prosecutor may, before the start of a trial and under certain conditions, offer the defendant an out-of-court settlement. These conditions may include (for instance) the payment of a fine up to the maximum amount set by law for the relevant crime and/or deprivation of the proceeds or advantages from that crime and/or compensation of losses incurred. Upon fulfilment of the conditions laid out by the Public Prosecutor, the wrongdoing may no longer be prosecuted. The prosecution will decide to offer a would-be defendant such a settlement in appropriate circumstances. Any such settlement does not involve the admission of guilt or the approval of the court, it is merely a consensual agreement with the view of avoiding prosecution.

Tens of thousands of settlements are concluded by the prosecution authority every year. An increasing tendency towards settling larger criminal (financial) cases can be derived from this course of conduct. Examples include a settlement of EUR 70,000,000 which was agreed in 2010, in relation to an extensive property fraud case involving several legal entities, a settlement in 2012 when Ballast Nedam settled for EUR 17,500,000 regarding unauthorised payments made to foreign intermediaries and a settlement between the public prosecutor and SBM Offshore for USD 240 million (consisting of a fine of USD 40 million and confiscation of unlawfully obtained gains for USD 200 million). More recently, in February 2016, the public prosecutor reached the highest settlement publically known in the Netherlands with telecom company VimpelCom Ltd., amounting to USD 397,500,000, in relation to corruption.

This development is intertwined with the recent focus on the prevention of financial crimes (see below).

Likely future scope and development?

New legislation amending the DCC, the DCPC and the WED, with a focus on financial criminality, entered into force on 1 January 2015 (*Wet verruiming mogelijkheden bestrijding financieel-economische criminaliteit*). This legislation aims to promote a more responsive and efficient framework for financial criminality, tightening sanctions and increasing the possibility of detection, prosecution and adequate punishment for such offences. In addition, it includes provisions expanding the criminalisation of certain conduct, i.e. the abuse of public funds, money laundering and offences relating to official corruption and corruption in the private sector.

Continuing and systematic infringements of the WED will carry increased penalties pursuant to this new legislation. Acknowledging that the severity of the penalties available is limited in comparison to the financial capacity of companies, it introduces a flexible cap for fines in respect of legal entities, increasing the maximum fine up to 10% of a company's annual turnover instead of the EUR 810,000 noted above.

However, as most of the proceedings against companies relating to criminal activities are settled by agreement with the public prosecutor with such settlements not being limited to the statutory fines, it is not clear whether the flexible fine system will have a significant impact on the criminal prosecution of companies.

1. The *de facto* director of an offence will have been actively involved in the offence and would have had the authority to prevent and/or stop the offence. These criteria were re-affirmed by the Dutch Supreme Court in a judgment of 26 April 2016 (ECLI:NL:HR:2016:733).

“Tens of thousands of settlements are concluded by the prosecution authority every year.”

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Papua New Guinea



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There are very few reported prosecutions against corporations and little judicial treatment of corporate criminal liability.

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Can companies be criminally liable for wrongdoing?

In given circumstances, companies can be held liable for criminal acts in Papua New Guinea (“PNG”). Whilst the term “person” is undefined in the Criminal Code Act 1974 (“Criminal Code”), the Interpretation Act (Chapter 2) (“Interpretation Act”) recognises companies as legal “persons”. Companies are therefore subject to the general provisions in the Criminal Code, including those that regulate bribery, corruption, secret commissions and improper gifts in the public and private sectors. Companies are also expressly subject to the Proceeds of Crime Act 2005, which prohibits money laundering by both natural persons and corporations and the Criminal Code (Money Laundering and Terrorist Financing) Act). The Anti-Money Laundering and Counter-Terrorist Financing Act has recently come into operation and also expressly applies to corporations.

In practice, there are very few reported prosecutions against corporations and little judicial treatment of corporate criminal liability.

For what kind of wrongdoing can a company be held criminally liable?

To attribute liability to a corporate entity the necessary elements of the applicable offence must be established. In criminal law, the requirements of each offence may include both *actus reus* (the physical element of an offence) and *mens rea* (the mental element of an offence). Some crimes do not require proof of a mental element and are called crimes of strict liability.

In general, the Criminal Code will directly hold directors and employees liable as individuals for their criminal acts and omissions. However, in light of the broad definition of “person” as including corporations in the Interpretation Act, it is technically possible to also hold the corporation criminally liable for offences under the Criminal Code.

A corporation cannot be imprisoned, but the Criminal Code at Section 19(1)(b) permits a person liable to imprisonment to instead be sentenced to pay a fine. It is not clearly established how the courts in Papua New Guinea would deal with offences where criminal intent is a necessary element of the offence. However, corporations operating in Papua New Guinea have been found guilty of strict liability offences and ordered to pay a fine. There are numerous statutes in Papua New Guinea which set out these offences (e.g. the Environment Act 2000, the Mining (Safety) Act 1977 and the Investment Promotion Act).

How far does criminal liability extend?

Where liability depends on corporate intention, this must be established on the part of the “directing will and mind” of the corporation. This will usually be the directors.

However, a company may be found liable in criminal law for the actions of an agent, employee or contractor if the company has the right to control that person and they are acting within the scope or course of their employment¹. In *Bromley and Manton Pty Ltd v Eremas Andrew*, the Papua New Guinea National Court of Justice (“National Court”) held that:

“...if responsibility has been delegated to an employee by a company which involves day to day compliance with particular laws, the requirement of those laws to be obeyed lies clearly within the scope of his employment and his failure is that of his employer. After all, it is somewhat unreal for a company, simply because it has instructed its employees to obey a particular law, to escape liability to prosecution by blaming its employees.”²

In this case, the National Court found that the relevant employee was “in control of the ‘effective management’ of the appellant’s business” and as such was the directing mind for the purposes of assessing attribution.

The Interpretation Act extends liability in the context of “aiders and abettors”, where it provides in Section 23 that:

“A person who aids, abets, counsels or procures, or by an act or omission is in any way directly or indirectly concerned in, the commission of an offence against or contravention of any law shall be deemed to have committed the offence or contravention, and is punishable accordingly.”

The Criminal Code goes further to provide, at Section 7, that where an offence is committed, in addition to the person who actually committed the offence, each of the following people will also be liable:

- (i) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; and
- (ii) every person who aids another person in committing the offence; and
- (iii) any person who counsels or procures any other person to commit the offence.

Accordingly, a company may be liable for the commission of an offence where an agent, employee, officer or contractor, who is “the directing mind and will of the corporation”, has aided a third party to commit an offence³. Moreover, the directors and other officers of a company that were involved in the commission of an offence, along with any other individuals that were involved in committing the offence, may be liable as individuals, either directly or as aiders and abettors of the company.

While the Criminal Code does not contain provisions dealing explicitly with the criminal liability of companies, there are a number of laws that contain provisions that apply specifically to corporations. For example, the Proceeds of Crime Act 2005 provides for the manner in which the “state of mind” of a corporation may be established. To that end, the Proceeds of Crime Act provides at Section 171:

“Conduct engaged in for a body corporate is taken for this Act, to have been engaged in by the body corporate if it was engaged in –

- (a) *by a director, servant or agent of the body corporate within the scope of his actual or apparent authority; or*
- (b) *by another person, if –*
 - (i) *it was done at the direction or with the consent or agreement, whether expressed or implied, of a director, servant or agent of the body corporate; and*
 - (ii) *giving the direction, consent or agreement was within the scope of the actual or apparent authority of the director, servant or agent.”*

The Proceeds of Crime Act goes further to provide at Section 171 (2) that in order to establish the “state of mind” for conduct engaged in by a body corporate, it is sufficient to show that a director, servant or agent of the body corporate who engaged in the conduct within the scope of his or her actual or apparent authority had that state of mind.

Does criminal liability extend to foreign companies?

Section 12 of the Criminal Code sets the territorial application of the Criminal Code and provides that the Criminal Code applies to every person in PNG at the time of the doing of an act or omission that constituted an offence. The Criminal Code also applies in respect of offences where elements of the offence occurred in PNG and elsewhere in the world.

Thus, a foreign company that is registered to carry on business in PNG or has a resident agent appointed under the PNG Companies Act may be subject to the provisions of the Criminal Code in the same way as PNG incorporated companies, provided the offence in question has occurred wholly or partly in PNG.

To be amenable to service of PNG process, the foreign company would be required to have a registered office in PNG, or for a director to be served within PNG.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

It is not an offence under the Criminal Code if the company fails to report a suspicion of an offence.

However, where any person assists another who is, to their knowledge, guilty of an offence, in order to enable him to escape punishment, that person is liable as an accessory after the fact and guilty of a crime under Section 10 of the Criminal Code. Particularly, Section 390 of the Criminal Code specifically requires that anyone aware of an unlawful killing has a duty to report the killing and it is an offence not to do so.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

The Royal PNG Constabulary (“RPNGC”) is the body responsible for investigating suspected or actual criminal conduct. While the Criminal Code does not expressly refer to it, as a matter of practice the RPNGC does not have unlimited resources and does make judgements as to which cases have priority.

Section 4 of the Public Prosecutor (Office and Functions) Act (Chapter 338), provides that the Public Prosecutor “shall control and exercise the prosecution function of the State” and⁴:

“shall, in his absolute discretion, give consent or refuse consent, to proceed with the prosecution of any criminal offence where his consent is by law required; ...”

What is the position of the defendant company in criminal proceedings?

Section 37 of the Constitution of PNG sets out the rights of every “person” to the protection of the law and provides, among other things that:

- > every person has the right to the full protection of the law (Constitution, Section 37(1)); and
- > a person charged with an offence shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would be, peculiarly within his knowledge (Constitution, Section 37(4)(a)).

Companies in PNG are recognised as having separate legal personality. As noted above, pursuant to the Interpretation Act, “person” is defined to include “a corporation sole” and “a body politic or corporate”.

The Criminal Code does not provide for the manner of prosecution of a corporation and there is no requirement to identify an individual perpetrator to be able to prosecute a company. In cases where there is an individual perpetrator identified, it depends on the circumstances and the discretion of the prosecuting authority whether the trial against the individual and the company would be conducted separately or jointly.

In a prosecution for a strict liability offence, the prosecution need only prove the facts constituting the offence and need not lead evidence of the intention of any individual.

However, in an offence with a mental element, evidence of the intention of the individuals who represent the “directing will and mind” of the corporation will need to be adduced.

The Criminal Code modifies the applicable punishment where the perpetrator is a corporation, typically by increasing the amount of the fine. Where the only punishment available for an offence is imprisonment, there is arguably an “implied” indication that a company cannot commit the offence.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Where the corporation is the defendant in criminal proceedings, there is no requirement for a company to co-operate with prosecution authorities in the proceedings, although guilty pleas generally result in reduced fines.

Failure to disclose that a person has committed an offence, however, may itself result in prosecution, as an accessory after the fact.

Under other legislation, companies are required to provide information and assistance to regulators, such as under the Income Tax Act 1959, the Companies Act 1997 or the Independent Consumer and Competition Commission Act 2002.

What kind of sanctions can be imposed on companies?

The penalties for companies that breach provisions of the Criminal Code or the Proceeds of Crime Act 2005 vary and include fines as well as confiscation of the proceeds of a crime. In theory, there is no maximum sanction applicable for companies as a number of criminal offences carry a penalty of an unlimited fine.

For instance, under the Criminal Code there is no statutory upper limit for fines in cases of bribery of certain public officials, including judges and public servants.

Guilty pleas generally result in imposition of a lower fine than otherwise.

There are no PNG cases of which we are aware that have resulted in convictions for white collar crimes.

What is the relevance of an effective compliance system?

Prosecuting authorities are very likely to take into account whether a company can prove that it has sufficient control mechanisms in place to prevent wrongdoing when considering what action to take. The impact of a robust and appropriately tailored compliance system can be significant.

Conversely, inadequate compliance structures may go towards a finding that the company expressly, tacitly or impliedly authorised or permitted the commission of an offence.

How are criminal proceedings against companies conducted in practice?

Generally, the direction of proceedings against a company will be managed by the prosecuting body. As noted in Section 6 above, criminal matters are the province of the RPNGC and the Public Prosecutor, although there is very little case law involving criminal proceedings against companies. Furthermore, there is no precedent of which we are aware involving an agreement between a company and the prosecution authorities/criminal court to terminate criminal proceedings.

Section 130 of the Criminal Code is relevant, which makes it an offence to settle a prosecution without the consent of the court in which it is brought.

Likely future scope and development?

Over the past few years the government of PNG has implemented a number of anti-corruption measures, although they have not been aimed specifically at tightening up the sanctions against companies.

On 16 July 2007, the government ratified the United Nations Convention Against Corruption. Following this, in 2011, a National Anti-Corruption Strategy was approved pursuant to which the government established what essentially became the country's anti-corruption watchdog, Task Force Sweep, also in 2011.

One of the key anti-corruption platforms of the PNG government has been the creation of an Independent Commission Against Corruption ("ICAC"). A significant step toward achieving this milestone was reached in February 2014, with the country's Parliament unanimously passing legislation introduced by Prime Minister Peter O'Neill to amend the country's Constitution and provide for the creation of, and basic framework for, the ICAC. An Organic Law to provide more detail on the powers and functions of the ICAC has been presented in Parliament but has not yet been passed.

In addition to this, the Chief Justice of the National Court, Sir Salamo Injia, launched a new specialised court track for fraud and corruption. The new track was established under the Criminal Practice (Fraud & Corruption Related Offences) Rules 2013, which were made on 4 November 2013. The rules apply to offences involving theft, fraud, dishonesty, misappropriation of property and corruption and are intended to provide for the quick, fair and efficient disposition of such cases.

In addition to the recent anti-corruption and fraud related developments there have also been changes in legislation indicating an increased readiness to hold corporations liable for a variety of offences.

In July 2015, the PNG Parliament passed the Anti-money Laundering and Counter-Terrorist Financing Act ("AML/CTF Act") and the Criminal Code (Money Laundering and Terrorist Financing) (Amendment) Act 2015 ("Criminal Code amendments").

In Section 5, the AML/CTF Act defines "person" to mean both a natural person and a body corporate. While the Criminal Code does not define "person", the AML/CTF Act does provide that the Criminal Code applies to all offences under the AML/CTF Act, which indicates that companies will clearly be liable for criminal offences related to money laundering or terrorist financing.

The AML/CTF Act also contains a provision that is almost identical to the provisions of the Proceeds of Crime Act necessary to determine the "state of mind" of a corporation that may have engaged in conduct prohibited by the AML/CTF Act.

The AML/CTF Act and the Criminal Code amendments also introduce separate penalties for individuals and corporations.

These new provisions paint a clearer picture of the manner in which corporations will be dealt with in some cases and may indicate the direction that the PNG Government may move in, in relation to the prosecution of white collar crimes, including bribery, fraud and corruption-related offences.

1. *Heduru Transport Pty Ltd v Gairo Vegoli* (Unreported) Judgment N 99 of 24 June 1977.

2. *Bromley and Manton Pty Ltd v Eremas Andrew* (1978) PNGLR 498.

3. *Heduru Transport Pty Ltd v Gairo Vegoli* (Unreported) Judgment N 99 of 24 June 1977.

4. *Public Prosecutor (Office and Functions) Act* (Chapter 338) Sections 4(1)(g) and 4(1)(ga).

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People's Republic of China



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There is an increased scrutiny of, and enforcement against, companies in the PRC for criminal liability in an ongoing nationwide crackdown on corruption.

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Can companies be criminally liable for wrongdoing?

Both companies and individuals employed or engaged by those companies may face criminal liability in the PRC.

Criminal liability for companies was first introduced in the PRC under the Customs Law of the PRC of 22 January 1987. The relevant sections were subsequently repealed in 1997, when the Criminal Law of the PRC (“Criminal Law”) introduced a specific statutory regime in respect of such liability.

For what kind of wrongdoing can a company be held criminally liable?

A company can be held criminally liable if it is found to have committed one of the offences expressly set out in the Criminal Law. Other than terrorism, threats to state security and severe environment pollution, these offences mostly relate to white collar financial crimes which seek to make an unlawful economic gain, such as corruption, embezzlement, tax evasion, fraudulently or dishonestly creating corporate records or inducing investment in companies.

A company may incur criminal liability where it acts at the direction of, and/or its acts are performed directly by, a person in charge of it or other personnel who are directly responsible for the company. In each case it must be intended to gain an unlawful advantage for the company.

How far does criminal liability extend?

A company may be held criminally liable for crimes committed by a person in charge of the company or other personnel who are directly responsible for that company. The person need not be a senior executive, nor is it required by law that the person who committed the crime is an employee of the company, as long as that person is in charge of the company or directly responsible for it. However, there are no statutory examples as to who such persons may be.

If a person is found to have incorporated a company for the sole purpose of committing a crime or the company's primary activity is to commit crimes in the PRC, only that person, and not the company, may be criminally liable for the unlawful conduct.

Does criminal liability extend to foreign companies?

The Criminal Law adopts the principle of territorial jurisdiction. A company incorporated under the law of any jurisdiction other than the PRC may be held criminally liable if it commits a corporate offence set out in the Criminal Law within the territory of the PRC. A criminal offence is deemed to have been committed within the PRC if either the act or consequences of the criminal offence take place within the PRC.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Upon becoming aware of the facts of a crime or a criminal suspect, a company or individual has a duty to report the case or provide information to the public security authority, procuratorate or court under Article 108 of Criminal Procedure Law of the PRC. However, failure to report suspicious circumstances does not result in criminal liability. When the court, procuratorate and public security authority exercise their right to collect evidence from a company or individual, there is an obligation to co-operate with the authorities' investigation and truthfully provide evidence.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

In normal circumstances, the public security authority (which is the equivalent of the police in the PRC) should conduct a criminal investigation into a company which has allegedly committed a crime.

In the PRC, criminal investigations are usually undertaken by the public security authority which will submit the case to the procuratorate for prosecution. The exception is certain cases where a company bribes a PRC government official or a PRC state-owned entity, in which case criminal investigations will be conducted directly by the procurator. Once a case is submitted to or taken up by the procurator, it will use its discretion to determine, within a statutory set of rules, whether the alleged crime should be prosecuted.

What is the position of the defendant company in criminal proceedings?

A defendant company has the same rights as an individual in criminal proceedings, including legal representation and a right to receive compensation in cases where the authorities wrongfully exercise their powers.

To convict a company of a crime, an individual perpetrator (e.g. a member of the company's management team) must be a joint defendant under the procedures prescribed by the Criminal Procedure Law, because it is the presence of the act or omission of the individual in the name of the company which forms a component of the alleged crime committed by the company.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

The Criminal Procedure Law provides for an express duty of companies to co-operate with the authorities. Such co-operation may result in a mitigated punishment or, in cases where the impact of the crime is minimal, an exemption from punishment subject to the court's discretion.

What kind of sanctions can be imposed on companies?

A fine is the only type of criminal penalty that may be imposed on a company found criminally liable under the Criminal Law. The confiscation of unlawfully obtained property and/or unlawfully gained profit may only be imposed on convicted individuals. However, there is no limit on the level of fine imposed on companies except that, according to Article 52 of the Criminal Code of the PRC, the amount of the fine shall take into account the circumstances of the crime.

In addition to criminal penalties, there are five types of sanctions set out under the Law of the PRC on Administrative Penalties that may be imposed on companies, namely: disciplinary warnings; fines; confiscation of unlawfully obtained property; suspension of business and revocation of a regulatory permit or licence. Also, if an administrative organ imposes fines on a company which is later convicted of a crime and fined by a court, the obligation to pay those administrative fines can be offset against the criminal penalty.

The implementation of control mechanisms and compliance systems is neither a valid defence to criminal liability nor a mitigating factor to be considered by the procuratorate under the Criminal Law or the prosecution standards issued by the PRC courts. However, a court is obliged to impose a mitigated penalty where it finds that a company has discontinued the crime, surrendered itself to the authorities and provided a truthful statement of its crime, exposed others' crimes or provided important information on those crimes or acted only as an accomplice or been coerced to participate in the crime. In practice, a judge may, at his or her discretion, give a mitigated penalty to the company if an individual defendant who is representing a company confesses to the crime and shows genuine remorse during the trial.

What is the relevance of an effective compliance system?

Adequate compliance structures should, in practice, help a company to monitor and mitigate the risk of criminal activity occurring within the company. However, whilst a court would consider the existence of adequate or inadequate compliance structures when exercising its discretion in rendering a judgment, there is no guidance on the extent to which adequate compliance structures would mitigate the risks of being prosecuted and fined or how the lack of such would enhance the risk.

How are criminal proceedings against companies conducted in practice?

While there has been speculation in social networking forums about deals or negotiations between companies and the prosecution authorities, there is no statutory or other formal framework for this to occur as in certain other jurisdictions. If, however, a defendant and its victim reach a settlement such as payment of a compensation, the procuratorate may choose not to prosecute the defendant or may recommend a more lenient sentence is applied by the court.

Likely future scope and development?

There is an increased scrutiny of, and enforcement against, companies in the PRC for criminal liability in an ongoing nationwide crackdown on corruption. Officials are keen to be, and to be seen to be, more proactive in punishing such offences. Related to this government initiative, PRC administrative and criminal regimes are understood to be currently under review by the government and relevant authorities, in particular in connection with the execution, auditing and accountability of the activities of PRC state-owned enterprises.

Poland



Can companies be criminally liable for wrongdoing?

Under Polish criminal law, only an individual can be prosecuted for and convicted of an offence. Polish criminal law does not recognise crimes that can be committed by a legal entity.

However, a legal entity, including a company, may incur a specific type of liability which can be described as a “quasi-criminal liability” under the Act of 28 October 2002 on the Liability of Collective Entities for Acts Prohibited Under Penalty, as amended (“Liability Act”). Under the Liability Act, a company may be held liable for specific types of punishable criminal or fiscal offences committed by its employees after 28 November 2003.

For what kind of wrongdoing can a company be held criminally liable?

Article 16 of the Liability Act sets out a list of offences that may result in quasi-criminal liability of a company. This exhaustive catalogue consists of crimes specified in the Polish Criminal Code of 6 June 1997 (“PCC”) and other legal acts and includes, amongst other things, bribery, fraud, an abuse of trust and certain fiscal offences.

Pursuant to the Liability Act, a company may be held liable for an offence committed by an individual that has resulted (or may have resulted) in a benefit for the company, even if such benefit is non-pecuniary. However, before a company can be found liable, an individual must first have been convicted of the offence by a court, as set out in the Liability Act (Articles 3 and 4). The potential criminal liability of the legal entity is therefore secondary, yet separate, to the liability of the individual who committed the crime.

How far does criminal liability extend?

A company may be held liable for offences committed not only by its senior executives but also by other persons specified in the Liability Act. In general, the list of persons whose offences may lead to quasi-criminal liability of a company is very broad. It includes managers, directors, proxies, accountants, tax advisors, employees and virtually every person acting on behalf of the company, provided that the company had knowledge or ought to have had knowledge of the offender’s actions.

More specifically, Article 3 of the Liability Act provides the following list of persons who may incur company liability: (i) a person acting on behalf of the corporate entity or in its interests and within the scope of his powers or duty to represent the corporate entity, making decisions for it and exercising internal control, or as a result of an abuse of such powers (“Manager”)¹; (ii) a person authorised to act by a Manager as a result of the Manager’s abuse of power or oversight; (iii) a person acting on behalf or in the interests of the corporate entity with the consent or knowledge of a Manager; or (iv) a sole trader being directly involved in a business relationship with the company in pursuit of a goal permitted by the law.

Does criminal liability extend to foreign companies?

Yes. Foreign entities may also incur liability under Article 2 section 2 of the Liability Act. The circumstances in which a foreign entity may be liable under the Liability Act are the same as for Polish entities.

However, where an employee of a foreign company’s Polish subsidiary commits a criminal offence incurring liability under the Liability Act, it is the Polish subsidiary that will be held liable rather than its non-Polish parent.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no such obligation resulting from the Liability Act. However, the Fiscal Penal Code of 10 September 1999 ("FPC") provides that an offender (whether they be a corporate or an individual) will not be subject to a penalty for a fiscal offence or a fiscal transgression, provided that they report the unlawful conduct to the prosecution authority, disclosing the relevant circumstances of the conduct and, in particular, identifying any other persons involved in its committal (Article 16 FPC).

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Prosecution of offences may be classified into three groups: (i) offences prosecuted *ex officio* where the prosecution authorities are obliged to institute proceedings; (ii) offences which require a petition of the aggrieved party in order to be prosecuted by the prosecution authorities; and (iii) offences which can only be prosecuted in a private prosecution brought by the aggrieved party.

According to Article 27 of the Liability Act, proceedings regarding the liability of a company are instituted at the petition of the prosecutor or the aggrieved party. In cases where the liability of a company is founded on an offence defined by the law as an unfair trading practice, proceedings may also be commenced at the petition of the President of the Office of Competition and Consumer Protection.

What is the position of the defendant company in criminal proceedings?

In criminal or criminal fiscal proceedings against an individual for an offence where it may reasonably be suspected that a company benefitted or could have benefitted, whether financially or otherwise, from the offence, the company may, no later than the close of first instance proceedings, appoint a representative in the proceedings. The company's representative may not be the individual against whom the criminal action or criminal fiscal action has been brought (Article 21 of the Liability Act). In such court proceedings, after declaring of the attendance of such a representative, the company may benefit only from those rights established in the Polish Code of Criminal Procedure of 6 June 1997 ("PCCP") as specified in Article 21a of the Liability Act². The court may hear the company's representative as a witness. However the company representative has an implied right to decline testimony.

In relation to proceedings involving the alleged quasi-criminal liability of a company, the provisions of the PCCP will apply, save for specific provisions regarding the private prosecutor, civil plaintiff, social representative and pre-trial procedure (Article 22 of the Liability Act).

Since the potential quasi-criminal liability of a legal entity is ancillary yet separate from the liability of the individual who committed the crime, quasi-criminal proceedings against a company may either be run separately from or concurrently with the proceedings of the individual.

Usually the proceedings are run separately, with those against the individual taking place first, since the proceedings against the legal entity cannot be completed before the offence of the individual has been confirmed by a final court decision.

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A company may be held liable for offences committed not only by its senior executives but also by other persons specified in the Liability Act.

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The relatively small number of cases to date dealing with quasi-criminal liability of companies has not allowed for any common practice to be established with regard to criminal proceedings against companies.



Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

A company does not have a duty to co-operate with the prosecution authorities in the proceedings, but the court may take any voluntary co-operation into consideration when deciding upon the sentence. It may therefore potentially result in a more favourable sanction for the company.

What kind of sanctions can be imposed on companies?

A fine ranging from PLN 1,000 to PLN 5,000,000 is the main penalty for offences committed by legal entities (Article 7 of the Liability Act).

The fine may not exceed 3% of the entity's revenue in the financial year in which the offence was committed. When determining the fine, the court must take into account several factors, the most important being the company's financial situation, the social implications of the penalty and its effect on the company's future. The court also has full discretion to evaluate other factors that may prove material in the specific case, such as co-operation in uncovering the offence or actions taken to mitigate the damage.

In practice, the fines imposed on companies under the Liability Act range from PLN 1,000 to PLN 5,000 on average and the highest fine imposed, based on available sources, is PLN 20,000³. In addition, the forfeiture of any proceeds or benefit derived from the criminal activity is often imposed under the Liability Act (pursuant to Article 8). The Liability Act does not provide any maximum cap on the amount that may be ordered to be forfeited. Furthermore, the court may prohibit the company from bidding for public contracts, running promotions or benefiting from certain grants. The court may also decide to make the judgment public (Article 9 of the Liability Act).

The Liability Act provides that the court shall take into account the gravity of the irregularities in the supervision procedures within the company when determining a monetary penalty (Article 10 of the Liability Act). Also, where it can be shown that the company did not benefit from an offence for which it is held liable, the court may decide not to impose a fine but order only forfeiture, prohibition of certain activities (such as advertising, utilising public or foreign organisations aid or applying for public tenders), or publication of the judgment (Article 12 of the Liability Act). Alternatively, both a fine and one or more of these penalties may be imposed. Other than these provisions, the Liability Act contains no provisions that would permit the mitigation of the level of penalty.

Sanctions other than criminal (quasi-criminal) may also be specified by statutes other than the Liability Act.

For example, under the 2004 Polish Public Procurement Law ("Polish PPL"), a company could be excluded/debarred from future public tenders if individuals convicted for specified types of offences were responsible for managing its affairs, i.e. if they were members of its managing body at the time of bidding in a public tender. A conviction for the following types of offences justifies debarment under the Polish PPL: (i) an offence committed in connection with contract award proceedings; (ii) an offence against the rights of persons performing paid work; (iii) an offence against the environment; (iv) bribery; (v) an offence against commercial trade; (vi) any other offence committed to obtain a material benefit; (vii) a fiscal offence; and/or (viii) an offence of participation in an organised group or in an association whose purpose is to commit an offence or fiscal offence (Article 24.8 Polish PPL).

Also, under the FPC, a company may incur subsidiary liability where the person with primary responsibility (for example, the individual acting on the company's behalf) does not pay any penalty ordered against them, if the company has benefited or could have benefited in any way from the unlawful conduct committed by the individual (Article 24.1 FPC). In addition to this subsidiary liability, a company would also be ordered to disgorge the benefit obtained to the State (Article 24.5 FPC).

What is the relevance of an effective compliance system?

To protect itself against liability for an offence committed by its Manager, a company must prove that it exercised due diligence in preventing the offence from being committed. To do that the company will need to show that its organisation and the way it is run provided safeguards against that Manager committing the offence. The existence of adequate compliance procedures and control systems may therefore be considered by courts when deciding whether the required due diligence was exercised by the company (Article 5.2 of the Liability Act).

If an offence is committed by a person who is not a Manager in the company, it is sufficient to prove that due diligence was exercised in the hiring or supervision of that person (Article 5.1 of the Liability Act).

It must be noted, however, that there are no (more) specific criteria provided in statute that would indicate what elements are to be assessed by the court in order for the company to exculpate itself.

Moreover, there is insufficient case law available to identify any patterns in the reasoning of Polish courts when it comes to the defences a company can use to protect itself from liability for the offences of its Managers or employees.

How are criminal proceedings against companies conducted in practice?

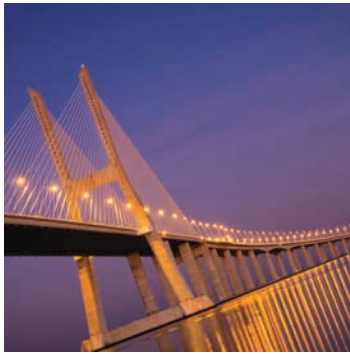
The relatively small number of cases to date dealing with quasi-criminal liability of companies has not allowed for any common practice to be established with regard to criminal proceedings against companies. It should be noted that under Polish law it is not possible for companies and the prosecution authorities to enter into "deals" that would prevent the instigation of criminal proceedings.

Likely future scope and development?

In practice, the Liability Act has been engaged only on rare occasions. There are no indications that would suggest a major change in this trend in the near future. Neither is the topic of tightening up sanctions connected with criminal liability against companies currently subject to debate.

1. The statutory basis for liability was modified through amendments to the Liability Act that came into force on 14 November 2011. Due to the legal loophole that existed before this date, the company did not have a due diligence obligation with regard to running the company in a manner that should prevent an offence by its Manager. As a consequence, the Polish Supreme Court ruled on several occasions that the company cannot be held liable for offences committed by its Manager prior to 14 November 2011.
2. These rights include, inter alia, access to criminal proceedings, files and rights, including: to request evidence; to question a witness; to participate in a hearing for conditional termination of proceedings; to participate in a hearing regarding voluntary submission to criminal liability; to participate in a main criminal case hearing; to participate in evidence presented out-of-court; to have a final word in a case; to request written grounds or a judgment and receive it; and to file an appeal from a judgment or challenge other court decisions.
3. As reported under Supreme Court file no. V KK 128/12, published in Legalis No. 517582; please note that since the Supreme Court annulled the judgment imposing the fine and returned the case for re-examination, we are not aware of whether the fine was finally adjudicated.

Portugal



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It was not until 2007 [that corporate criminal liability] was established in the Portuguese Criminal Code.

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Can companies be criminally liable for wrongdoing?

Although the existence of corporate criminal liability in Portugal can be traced back to 1984, it was not until 2007, with the approval of Law no. 59/2007 of 4 September, that it was established in the Portuguese Criminal Code (“General Law”).

For what kind of wrongdoing can a company be held criminally liable?

Under Portuguese law, a company may only be held criminally liable if a specific rule so provides. Where no such provision exists, only individuals may be held liable for crimes.

Crimes for which companies can be held liable under the General Law relate to white collar crimes, crimes against property, crimes against physical and moral integrity and environmental crimes.

Apart from the General Law, there are some specific legal provisions which provide for companies to be held liable for criminal offences, such as crimes against the economy and public health, crimes compromising the security of computer data, systems or communication networks, tax crimes (including tax fraud, tax evasion and embezzlement), corruption crimes relating to international commercial and private activities, crimes against the social security system, terrorism crimes (such as terrorism financing), crimes relating to illegal immigration, crimes against industrial property rights and sport-related crimes.

In addition, the acts or omissions have to be attributable to the company. While the requirements for such attribution may differ, it is usually necessary for the crimes to have been committed in the name and on behalf of the company for its benefit.

How far does criminal liability extend?

Under the General Law, companies may be held liable for crimes committed by either (i) a person who holds a position of authority within the company or (ii) any person under their supervision, provided

that the crime has been allowed to occur due to a breach of any duty of control or supervision of the former.

For these purposes, the company's corporate bodies (*órgãos*) and any attorney acting on behalf of the company, as well as any other person who controls the company's activities to any extent (which may include both top and middle-level management), will be considered to hold a position of authority within the company. The Portuguese Constitutional Court has already ruled that companies can also be held liable for crimes committed by de facto directors.

However, in the case of tax crimes and crimes against the economy and public health, only the actions of senior executives (that is, those who hold a position on the company's corporate bodies) will be attributable to the company.

Finally, as a general rule, a company will not be criminally liable for conduct committed by an individual acting in breach of a direct order or an instruction given by a person with the authority to do so.

Does criminal liability extend to foreign companies?

When determining whether Portuguese law applies to a given crime, the General Law does not distinguish between foreign and national companies but rather whether the crime has been committed in Portugal or abroad. As a general rule, Portuguese criminal law will apply to crimes committed within Portuguese territory, regardless the nationality of the perpetrator. Therefore, crimes committed by a foreign company within Portuguese territory will be punished exactly in the same way as crimes committed by a Portuguese company. As such, if a director of a company which is not incorporated under Portuguese law commits an act of bribery within Portuguese territory in the name and in the interests of the company, the foreign company may be held criminally liable (together or not with the director).

On the other hand, if a crime is committed outside Portuguese territory, Portuguese criminal law will only apply if given conditions are met. With regard to corporate entities, Portuguese law will only apply to crimes that have been committed outside Portuguese territory if they were committed by a company or against a company which is headquartered in Portugal.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Companies have the benefit of privilege against self-incrimination, which means that they are not required to disclose any criminal offences they have committed. However, voluntary disclosure may be considered a mitigating factor when determining any applicable sanction.

Some companies, particularly regulated companies, (e.g. public companies and credit institutions) are legally bound to co-operate with the regulatory authorities and are required to provide information requested by the regulators.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Whenever there is a suspicion that a crime has been committed, either by an individual or a company, the competent prosecution office is required to initiate an investigation to determine if there are sufficient grounds to submit the case to the court.

Nevertheless, subject to certain requirements, Portuguese procedural law allows the prosecution authority (*Ministério Público*) to suspend criminal proceedings for up to two years (or, in relation to sexual crimes against underage persons, up to five years) for offences for which the penalty is imprisonment of less than five years or a penalty other than imprisonment.

What is the position of the defendant company in criminal proceedings?

Apart from the natural limitations applicable to legal entities, Portuguese Law recognises the same procedural rights for a company as for individuals. Companies are therefore in a similar position to an individual in criminal proceedings, both in terms of rights and prerogatives and in terms of defence mechanisms.

Since companies can only be held criminally liable if the crimes are somehow attributable to them, it is always necessary to identify the individual perpetrator that has committed the wrongdoing.

However, Article 11(7) of the General Law, as well as several other specific provisions, provide that corporate criminal liability is completely independent from the individual's criminal liability. Thus, although identification of the individual perpetrator is necessary, the conviction of the latter is not necessary in order to prosecute and convict the company. In practice, when there is proof that a crime has been committed by both the company and the individual, the most common situation is for the proceedings to be conducted together. This will also be the case when, from the same set of facts, different criminal liabilities arise for the company and for the individual.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Under Portuguese law, co-operation with the prosecution authorities is always voluntary. However, this co-operation can be taken into account by the court as a mitigating factor, particularly when it takes place at an early stage of the proceedings, depending on the benefit of such co-operation to the overall investigation.

Also, companies will often co-operate with the prosecution authorities on a voluntary basis as a way to reduce the reputational damage of certain crimes.

What kind of sanctions can be imposed on companies?

The General Law provides for two different kinds of criminal sanctions that can be applied to companies: main penalties (i.e. monetary fines and winding-up); and ancillary penalties (i.e. judicial determinations, limitations to carrying out its business, prohibitions on entering into certain agreements or conducting business with certain entities, losing the right to public grants or subsidies, temporary closure of undertaking or the disclosure of the conviction to the media).

Monetary fines are the most commonly applied main penalties for crimes committed by companies. In some cases, a monetary fine may be replaced by other penalties (such as admonitions, good behaviour caution or judicial supervision of the company).

Where the penalty for an offence committed by a company is imprisonment, that penalty will be converted into a monetary fine with the conversion mechanism taking into consideration the financial resources of the company and its staff costs.

Winding-up is the most severe penalty that can be applied to a corporate entity. This may only be applied if the company (i) is found to have been incorporated with the main purpose of committing crimes or (ii) is repeatedly committing crimes that reveal that the company is being mainly used for such purpose by persons in positions of authority.

Ancillary to these main penalties, the court may also order a company to take certain specific measures to prevent criminal activities. For example, the court may order that the company refrain from entering into certain agreements or negotiations with particular entities for a period of time from one to five years. It may also deprive the company from benefits, such as public grants or subsidies for the same period of time.

The court may also order the company not to carry out certain activities for a period between three months and five years, or close an undertaking for the same period of time. In some specific cases, the court may also order the court's ruling to be published in the media.

Portuguese law also provides for the sanctioning of misdemeanours (*contra-ordenações*), which are essentially regulatory wrongdoings and administrative offences. These are punishable by administrative fines of up to EUR 5,000,000 (an amount which, in some cases, may increase depending on the company's net turnover or the economic benefit arising from the misdemeanour), depending on the company and its business area.

The regime applicable to misdemeanours also provides for several ancillary penalties relating to the operation of the company's business.

Misdemeanour proceedings are conducted by regulatory authorities (e.g. the Securities Market Commission or the Bank of Portugal) which will both conduct any investigations and apply the applicable sanction. These decisions can then be appealed to the national courts. Portuguese law provides for several mitigating factors that can reduce the level of penalty and which are considered on a case by case basis.

For legal entities, the main mitigating factor is the existence of control mechanisms/compliance systems. This will not always prevent the conviction but it will almost certainly reduce the penalty imposed.

Early acceptance of guilt and co-operation with the prosecution authorities may also be taken into account and lead to a reduced penalty. On the other hand, previous convictions and the profits arising from the crimes, together with the degree of culpability of the company, are usually aggravating factors that the courts take into account when determining the penalty.

What is the relevance of an effective compliance system?

The existence of adequate compliance systems is crucial when assessing a company's criminal liability as it is a way for the company to argue that it has made all appropriate efforts to prevent crimes from being committed, thereby reducing or even eliminating its culpability.

The existence of control structures and effective compliance systems can lead to a finding that individuals committing crimes within the company were acting contrary to the company's corporate culture and that, therefore, the company should not be liable for them.

The effect of having compliance structures in place depends on the specifics of the particular case. For example, when the crimes have been committed by the directors of a company or any of its managerial agents, the existence of a compliance system is less likely to affect the sanctions imposed than where the crime was committed by a company employee.

How are criminal proceedings against companies conducted in practice?

Plea bargain deals are not permitted under Portuguese Law. However, early acceptance of guilt and co-operation with the prosecution authorities can be treated as a mitigating factor, although they will not usually lead to the negotiation of the outcome of the case.

Conversely, in situations where a temporary suspension of the proceeding is applied by the prosecution authorities, it is possible to negotiate about the terms of such suspension.

Likely future scope and development?

Following the recent financial crisis, it is expected that public authorities will increase their supervision of companies' businesses. Additionally, some in the judicial community favour the relaxation of requirements to attribute criminal and administrative wrongdoings to companies, including removing the need to identify the individual perpetrator, especially in the financial sector.

Some recent court decisions relating to misdemeanours have imposed administrative fines on companies without determining the identity of the individual perpetrator. It should be noted, however, that this approach has not yet been considered in criminal proceedings.

In terms of legislative actions, the trend has been to reduce the conditions needed to attribute an action to a company, with more recent legislation widening the group of persons whose actions can be attributed to the company so as to include employees and other staff.

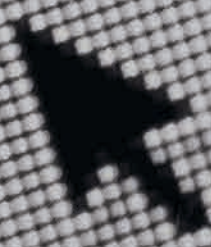
As the management responsibilities of companies are increasingly under the scrutiny of public authorities, we can expect an increase in the number of criminal proceedings brought against companies in the near future.

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We can expect an increase in the number of criminal proceedings brought against companies in the near future.

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password



Sign in

Russia



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In Russia, there is no criminal liability for companies such as exists for individuals. If a company commits illegal conduct, it may face civil or administrative liability.

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Can companies be criminally liable for wrongdoing?

In Russia, there is no criminal liability for companies such as exists for individuals. If a company commits illegal conduct, it may face civil or administrative liability.

Administrative liability, in contrast to civil liability connected with breach of civil legislation, is imposed when the public interests of the state and society are violated (“Administrative Offence”).

Under Russian administrative legislation, it is presumed that a company itself is an independent legal entity and may commit various actions, including Administrative Offences. Therefore, administrative liability of a company means that a company itself is liable for its Administrative Offences.

In reality, a company acts through individuals. Under Russian law, any individual who acts on the company's behalf, whether or not they are formally employed by the company or provide services under a civil law contract, may bring about liability for the company for an Administrative Offence. In situations when it is possible to identify a particular individual who has committed illegal actions on behalf of a company, this individual may face personal criminal liability for his conduct in parallel with administrative liability of the company.

Therefore, Russian legislation provides for two parallel liabilities if an offence is committed by the company: (i) administrative liability and sanctions for the company for an Administrative Offence (generally a fine); and (ii) criminal liability for a specific individual acting on behalf of the company (various types of liability and sanctions, including imprisonment).

Administrative liability is imposed based on the rules of the Code of the Administrative Offences of the Russian Federation (“CAO RF”).

For what kind of wrongdoing can a company be held criminally liable?

In the context of white collar offences, the CAO RF imposes liability on companies, for instance, for transferring a bribe on behalf of, or in the interests of, a company to a public official or a person performing management functions within a commercial company. The same conduct will lead to criminal liability for commercial bribery or bribe-giving by the individual, acting on behalf of the company.

Companies can also be held liable under the CAO RF for not providing tax authorities with relevant information as required, a failure to pay taxes or customs fees on time, a failure to submit necessary information or the submission of misleading information when applying under a public tender, breach of the currency regulation, breach of anti-monopoly regulation, unlawful use of insider information and the like.

Criminal proceedings against an individual are not necessary to find a company administratively liable if it has committed an Administrative Offence. Criminal proceedings against an individual and administrative proceedings against the company may be started independently of each other.

How far does criminal liability extend?

Under the CAO RF, a company is liable for an Administrative Offence if it is established that the company had a chance to comply with the rules and regulations of the CAO RF, but it did not take all reasonable steps to comply with it.

According to certain available court reports, companies may be held administratively liable when they are found to have failed to exercise due control over individuals who physically committed the Administrative Offence on their behalf.

In addition, available court reports suggest that, in order for a company to be held liable, individuals who commit the Administrative Offence do not even need to be formally employed by, or provide services under a civil law contract to, the relevant entity, as long as they act on its behalf.

Does criminal liability extend to foreign companies?

Foreign companies, incorporated in foreign jurisdictions, can also be held administratively liable for the Administrative Offences committed on their behalf by various individuals within the territory of Russia. At the same time, shareholders and subsidiaries are not liable for actions of the foreign company.

A Russian company may transfer functions of its chief executive officer to another company and not to an individual as it is usually done (“Management Company”). According to available court practice, a Management Company may also face administrative liability if it commits an Administrative Offence on behalf of the company. In this situation the Management Company would be considered as acting on behalf of the company.

Therefore, if the Management Company is involved in the illegal conduct, the following liability may be imposed:

- (i) administrative liability for the company;
- (ii) administrative liability for the Management Company acting on behalf of the company; and/or
- (iii) criminal liability of an individual of the Management Company.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no obligation under Russian law to disclose information about Administrative Offences.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Pursuant to the CAO RF, the prosecutor decides whether to initiate administrative proceedings and issues an order on the administrative investigation as soon as he receives information about the facts of the Administrative Offence committed by the company. The prosecutor initiates administrative proceedings only in relation to the most serious offences against society – corruption, terrorism financing and the like. For other offences, another state official initiates administrative proceedings. Once all the facts of the Administrative Offence have been investigated and established, the case is transferred to the court for consideration.

What is the position of the defendant company in criminal proceedings?

In essence, two different proceedings for illegal actions committed by an individual on behalf and in the interests of the company will be conducted: administrative proceedings against the company; and separate criminal proceedings against the individual.

Moreover, the Russian Supreme Court has indicated that the liability of a company should not depend on the sentence passed on the relevant individual and that the company should be prosecuted separately. Nonetheless, current case law shows that there is a tendency for authorities to start an investigation into the conduct of the individual first. Once they have established that unlawful conduct was committed by a specific individual, they will commence proceedings against the company.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Although there is no legal obligation to co-operate, co-operation with the authorities in establishing the facts of the Administrative Offence can be taken into account as circumstances alleviating administrative liability and can thus result in a more lenient punishment.

What kind of sanctions can be imposed on companies?

For an Administrative Offence, the company can face an administrative fine, the confiscation of property or the suspension of operations. In the case of bribery, the penalty for a company is an administrative fine of up to 100 times the value of the bribe accompanied by the confiscation of the bribe itself. However, disgorgement of profits may not be ordered.

In the context of public procurement, the Procurement Law No. 44-FZ dated 5 April 2013 (“Procurement Law”) requires the CEO, executive directors and the chief accountant of any company taking part in a public tender, not to have been accused of or penalised for any economic crimes, nor to be barred or disqualified from any professional positions. However, the Procurement Law does not impose the same requirements on the company itself as, under the rules of Russian criminal law, only individuals can be found criminally liable.

Russian law does not automatically exclude companies which have been found administratively liable in Russia or criminally liable outside of Russia from public tender. However, there remains a risk that such liability can be taken into account by the tendering authorities and can preclude a company from participating in a tender. Companies with taxes and other state fees in default are excluded from public tenders.



When imposing a punishment, state authorities or the court may also take into account other factors, such as the compliance system and reputation of the company.



According to the CAO RF, the voluntary provision of information about an Administrative Offence by the company that has committed that Administrative Offence, the assistance in establishing the circumstances of the Administrative Offence, the prevention of harmful circumstances resulting from the Administrative Offence and the voluntary payment of compensation or elimination of harm can be taken into account by the state authorities and the court as circumstances alleviating administrative liability. As the list of circumstances alleviating administrative liability is open, when imposing a punishment, state authorities or the court may also take into account other factors, such as the compliance system and reputation of the company.

Under the general principles of the CAO RF, the company can be exempted from administrative liability for Administrative Offences if, for instance:

- > the action was taken in order to prevent harm to individuals or the interests of the state, the harm could not have been prevented by other means and the action was less damaging than the harm that would have occurred without the company's intervention; or
- > a judge or an administrative official rules that the Administrative Offence is insignificant.

However, case law emphasises that, for example, bribery is considered to be a serious Administrative Offence even when the amount paid is small, due to the social harm it engenders.

What is the relevance of an effective compliance system?

Federal Law No. 273-FZ "On Combatting Corruption" obliges companies to take measures to combat corruption, such as designating departments, units and officers responsible for the prevention of bribery; developing and implementing standards and procedures to ensure ethical business conduct; and creating means of identifying, preventing and resolving conflicts of interest. Moreover, government officials can apply for a court order to compel a company to comply with this obligation.

Having such measures in place may be put forward by a company as a defence to an allegation of corrupt practices.

How are criminal proceedings against companies conducted in practice?

There are different types of administrative proceedings in Russia and they depend on the type of the Administrative Offence in question. For example, administrative liability for bribery on behalf of companies is relatively new in Russia and case law on the issue is limited. However, the Supreme and Constitution Courts have already stated that the administrative liability of companies is in line with the rules of international agreements and the fact that there are two different and separate proceedings for companies and individuals in Russia does not breach the right to a fair trial, enshrined in Article 6 of the European Convention on Human Rights.

There are already several cases in which administrative liability for bribery was imposed on companies. However, most of these cases were based on criminal cases against individuals.

Likely future scope and development?

The need to introduce criminal liability for companies has been widely discussed in legal circles, especially since Russia has signed several international agreements, including the Criminal Law Convention on Corruption 1999 and the United Nations Convention against Corruption 2003.

As stated above, there is currently no criminal liability for companies in Russia. However, a draft law which would create criminal liability for companies was published in March 2015. The draft law provides that companies would be criminally liable for corruption, money laundering and other serious crimes. Suggested criminal penalties include significant fines, confiscation of the company's property, prohibition of the company's activities and involuntary liquidation. The draft law has not been transferred to the Russian Parliament and there have been no developments with regard to its adoption.

Since the introduction of criminal liability into the Russian legal system would necessitate complex amendments to the Russian Criminal Code, the Criminal Procedure Code and the Criminal Execution Code, it is likely to take some time.

Over the last few years, there has been a tendency towards tightening up administrative liability. According to statistics from the state *arbitrazh* courts (commercial courts), the amount of administrative fines levied on companies doubled between 2010 and 2013. This corresponds to recent amendments to the CAO RF. For example, liability for breaching corporate legislation on conducting general meetings, for non-disclosure of information to the Central Bank and for attracting financial resources in a manner prohibited by legislation has already been added to the CAO RF. Fines for these Administrative Offences amount to approximately USD 10,000.

For now, disgorgement of profits gained as a result of an Administrative Offence is not stipulated in the CAO RF as a sanction for companies. However, the Federal Financial Monitoring Service has prepared a draft law imposing administrative liability for money laundering which proposes sanctions in the form of disgorgement of profits gained as a result of such an offence.

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Over the last few years, there has been a tendency towards tightening up administrative liability.

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Singapore



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A refusal to co-operate ... is likely to result in the prosecution authorities applying for and obtaining the necessary court orders to secure the company's compliance.

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Can companies be criminally liable for wrongdoing?

Yes, companies can be criminally liable for wrongdoing in Singapore.

For what kind of wrongdoing can a company be held criminally liable?

A company can be held criminally liable for a very wide range of offences. Although Singapore is a common law jurisdiction, the criminal law of Singapore is largely statutory in nature. These statutes usually make it an offence for “a person” to do or fail to do a particular act. By virtue of the Interpretation Act (Chapter 1), subject to the appearance of a contrary intention, “a person” will include a company. It is generally necessary for a prosecutor to invoke the principle of identification, by which the acts and state of mind of any directors and managers who represent a company's “directing mind and will” are imputed to the company, or the principle of agency, by which a company's officers and employees are said to have acted as agents of the company.

How far does criminal liability extend?

Case law has established that the appropriate test for the court is whether the individual in question had sufficient status and authority to make his acts the acts of the company, such that the individual is to be treated as the company itself. It follows that individuals other than directors or senior executives may be found to have been the company's “directing mind and will” and/or agent. The individual's title is unlikely to be determinative. That said, there are natural limits to the types of crimes that a company may commit, so it cannot commit bigamy or perjury, or an offence that is punishable only by imprisonment.

Does criminal liability extend to foreign companies?

Where offences are concerned, the statutes generally do not distinguish between local and foreign companies and extend criminal liability to foreign companies when there is a penal provision. For example, criminal liability under the various offences prescribed under the Securities and Futures Act (Chapter 289) extends to foreign companies which participate in Singapore's securities and futures market and/or are regulated by the Monetary Authority of Singapore. Similarly, a foreign company can be held criminally liable for contravening the provisions of the Prevention of Corruption Act (Chapter 241).

That said, as a general matter, the Singapore courts recognise separate legal personality and a parent company incorporated overseas will not be held criminally liable in Singapore when employees of its Singapore subsidiary commit an offence. An exception to this may be where it is demonstrated that the corporate structure was instituted for the primary purpose of assisting the parent to evade the consequences of wrongdoing.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no general obligation under Singapore law, either on individuals or companies, to report criminal offences. This is subject to a few exceptions. First, the Terrorism (Suppression of Financing) Act (Chapter 325) requires companies which have, for example, information about transactions in respect of any property belonging to any terrorist, to immediately inform the police. Secondly, the Terrorism (Suppression of Bombings) Act (Chapter 324A) requires companies which have, for example, information which may be of material assistance in preventing the commission by another person of a terrorist bombing offence, to immediately disclose the information to the police. Thirdly, the Corruption, Drug

Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A) requires companies which have, for example, reasonable grounds to suspect that any property was used in connection with criminal conduct, to disclose the knowledge or suspicion to a competent officer.

Nonetheless, it may be advisable, depending on the facts of a particular case, for a company to report discovered offences even where there is no positive obligation to do so. The fact that an offence has been self-reported may result in a lighter fine for the company. Further, it reduces the risk of the company of being found to be guilty of aiding and abetting the commission of the offence.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

There are a number of law enforcement agencies that may investigate and prosecute corporate wrongdoing. In Singapore, these include the Singapore Police Force (including its constituent unit, the Commercial Affairs Department), the Corrupt Practices Investigation Bureau, the Accounting and Corporate Regulatory Authority, the Inland Revenue Authority, the Ministry of Manpower and the National Environment Agency. These prosecuting authorities are, generally speaking, under a duty to investigate allegations which fall within their ambit and this will include allegations which suggest wrongdoing by a company.

That said, the authorities have a wide discretion as to whether to institute criminal proceedings. While it may be possible to apply for judicial review of the exercise of prosecutorial discretion, we are not aware of any such instance and assess the chances of success of such an application to be low in view of the prevailing attitudes of the Singapore courts.

Practically speaking, the prosecution authorities' decision as to whether to conduct a criminal investigation will be guided by evidential sufficiency, public interest and the availability of prosecutorial resources.

What is the position of the defendant company in criminal proceedings?

A company will have the same general rights as an individual defendant in criminal proceedings. For example, it will have the right to be represented and the same burden and standard of proof will apply. Although (for the reasons set out above), it will usually be necessary for the prosecution to identify one or more individual(s) who, in the particular case, constituted the "directing mind and will" and/or agent(s) of the company, conviction of the company is not contingent upon conviction of the individual(s). Criminal proceedings against the company are not, therefore, ancillary to criminal proceedings against the individual(s) and prosecutions may be brought against the company without the individual(s) also being prosecuted.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

At the investigation stage, certain law enforcement agencies have powers to require information, documents and/or things from companies. For example, the police may, by way of written order, require a company to produce documents or things which they consider necessary or desirable for any investigation. While we are not aware of judicial guidance on point, it is arguable that an employee is only required to produce company property in response to an investigation into the company and not personal property.

Further, the police may examine orally any person (including company representatives) who appears to be acquainted with any facts or circumstances of the case. A person being examined by the police shall be bound to state truly what he knows of the facts and circumstances of the case, except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture. This privilege against self-incrimination would appear to extend to corporate entities as well as individuals. While a company representative who is being questioned has a right to exercise the privilege against self-incrimination that is contained in this proviso, this right is subject to two qualifications. First, if the employee can properly be said to have acted "as the company" and claimed the privilege against self-incrimination on behalf of the company in the matter, the company risks incurring an evidential disadvantage at the trial if he exercises this right; that is, the trial judge may draw an adverse inference against the company from his failure to mention a fact in its defence when questioned. Secondly, the police do not have to inform him that the company has this right.

While it may not always be an offence not to comply with the prosecution authorities' requests, a refusal to co-operate on a matter which the investigators deem to be material is likely to result in the prosecution authorities applying for and obtaining the necessary court orders to secure the company's compliance. Other than in the context of these powers, co-operation by the company during an investigation would be voluntary. Co-operation with the authorities during an investigation is likely to result in a lower fine, although this will also depend on how the company approaches the criminal proceedings themselves.

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The existence of an effective compliance system is more likely to support a finding that the conduct of an individual did not reflect the “mind” of the company.

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What kind of sanctions can be imposed on companies?

Criminal statutes generally provide for two sorts of sanctions: imprisonment; and fines. A company cannot of course be imprisoned, although if individuals are themselves separately convicted in relation to the same activity, they may be. In the event of a corporate conviction, the sentencing court will almost inevitably impose a fine.

There are no specific guidelines for sentencing companies and the usual sentencing considerations of, for example, retribution and deterrence will apply. Sentencing courts will generally take into account timely guilty pleas and the fact that an offence was self-reported when assessing fines.

The conduct which gives rise to a prosecution for a criminal offence, whether or not it leads to a conviction, may result in civil consequences.

An example of this would be prosecutions for breaches of financial services regulations where the prosecutor does not succeed in meeting the burden of proof for a criminal conviction, but the market regulator is able to establish breach on a balance of probabilities. The obligation to hand over evidence also differs between criminal and civil proceedings in that companies do not have a right against self-incrimination in civil proceedings.

Types of non-criminal sanctions include civil penalty, suspension, variation or revocation of a licence by a regulator (such as the Monetary Authority of Singapore, in the case of a financial institution). Listed companies are subject to the purview of the Singapore Exchange which can take various disciplinary actions, including reprimand, fine, suspension, expulsion and/or impose requirements on company officers to attend education or compliance programmes; these sanctions too are non-criminal.

What is the relevance of an effective compliance system

The existence of an effective compliance system will, generally, be most relevant at the public interest stage of the prosecutor’s decision referred to above. If criminal proceedings are brought, the existence of an effective compliance system will not amount to a defence in criminal proceedings, although it is likely to be a mitigating factor when the court assesses the level of fines in the event of a conviction.

Further, the existence of an effective compliance system is more likely to support a finding that the conduct of an individual did not reflect the “mind” of the company or was otherwise not authorised by the company.

How are criminal proceedings against companies conducted in practice?

Under Singapore law, technically speaking, any criminal offence which can be committed by a company carries corporate criminal liability, because the definition of “person” in all laws includes corporate persons. However, prosecution of individuals rather than corporations for offences is often preferred by the authorities because the mental state of larger corporations is difficult to establish in the absence of specific provisions dealing with corporate liability, as is the case with the anti-bribery and corruption legislation. This is to be contrasted with the anti-money laundering legislation, which includes express corporate offence provisions that can be proven through the state of mind as well as the conduct of any “director, employee or agent” who was acting within the scope of his or her actual or apparent authority. The issue is obviated in the case of strict liability offences where there is no need to establish the mental state of the company.

Hence, in regulatory areas where liability for offences is often strict (for example environmental protection, workplace safety and health, taxation, food and drug safety), it is common for companies to be prosecuted.

Criminal proceedings against companies are commenced with the service of charge sheet(s) on the company by the prosecuting agency. There will usually be a reasonable period before the company is required to answer to the charges at a first mention date. If the company pleads guilty, proceedings will move to a date for sentencing. If the company seeks a trial or is otherwise not prepared to plead guilty, a Pre-Trial Conference date will be fixed. The objective of the Pre-Trial Conference process is to ensure parties would be ready for trial within the court's target timelines (usually cases are disposed of within six months of first being charged). In the process, there is usually some limited disclosure by the prosecution and defence of their respective cases and the evidence they are relying on, subject to an overriding duty of the prosecution to disclose material that tends to undermine the prosecution's case or strengthen the defence's case. This helps in plea bargaining and to narrow down contentious issues to achieve a more accurate assessment of the time required for trial.

There is no formal mechanism for companies to negotiate a settlement of criminal proceedings with a prosecutor. Rather, the usual course is that the company will initiate such negotiations, if at all. Court approval of the negotiated outcome is not required. It is possible for the prosecution to reduce charges to lesser charges or withdraw charges altogether without court approval.

We understand that the Attorney-General's Chambers have studied the merits of introducing a Deferred Prosecution Agreement scheme in Singapore. To date, no such mechanism has been introduced.

Likely future scope and development?

Financial markets and anti-bribery and corruption are two of the key areas of regulatory focus given Singapore's dependence on finance and corporate activity for its prosperity. In January 2015, the Singapore government announced enhanced funding for the detection and prosecution of bribery and corruption matters and in March announced the co-operation of the Commercial Affairs Department (which handles white collar crime) and the Monetary Authority of Singapore in investigating market misconduct. The government has also recently announced a new executive department focused on cybersecurity and we anticipate a strong focus on enhanced regulation in this area. In view of their subject matters, it is anticipated that the scope for corporate criminal liability will increase with these developments.

Since 1 August 2016, the Monetary Authority of Singapore has had dedicated anti-money laundering and enforcement departments, whose functions used to be carried out by different departments in the organisation. Consistent with the authority's statements, we anticipate these developments to result in greater supervisory focus, more rigorous investigations of suspected violations and swifter action by the regulator to punish wrongdoing.

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In January 2015, the Singapore government announced enhanced funding for the detection and prosecution of bribery and corruption matters.

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South Africa



Can companies be criminally liable for wrongdoing?

South Africa does not have one specific piece of legislation which deals with the criminal liability of companies. However, it is possible for corporations to incur criminal liability in terms of Section 332 the Criminal Procedure Act, 1977 (“CPA”).

For what kind of wrongdoing can a company be held criminally liable?

Under section 332 of the CPA, companies can be held criminally liable for any offence, under any law or at common law either for:

- > *“any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and*
- > *the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body”.*

A company can be held liable for common law crimes, statutory offences, strict liability crimes and crimes requiring either intention or negligence¹. However, a corporation cannot be held liable for a crime where a particular statute limits the liability to natural persons only. Actual knowledge of the act or omission by the director or servant is not necessary for the company to be held criminally liable².

Both the company and the individual who commits the offence can be held liable in terms of Section 332 of the CPA. This allows for a company to be held liable while not allowing the individual who knew that they were acting in a criminal capacity to escape liability³.

The liability of the company where an employee has committed a criminal offence is not based on vicarious liability but rather on the derivative approach.

This goes further than vicarious liability as it allows liability to be imputed on the company even where the individual was not acting in the course and scope of their employment but rather in the furtherance of the interests of the company. This imputes *mens rea* onto a corporation even though the corporation is strictly incapable of thinking⁴.

How far does criminal liability extend?

Section 332 refers to actions or omissions by a company “by or on instructions or with permission, express or implied, given by a director or servant of that corporate body”. The section defines “director” as “any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body”.

There is no definition for “servant” in the CPA but it seemingly includes any person who performs his or her work under the control of the company⁵. This definition would be consistent with South African labour law.

Although the section does also refer to persons acting on instructions or with permission, express or implied, of a director or a servant, this has been interpreted restrictively by the courts and a degree of supervision and control by the company is required in order for the company to incur liability⁶.

Does criminal liability extend to foreign companies?

The CPA does not provide a definition for a “corporate body” as referred to in section 332. It does not expressly include multi-nationals or companies incorporated outside South Africa. Furthermore, the rest of the CPA does not refer to multi-national or foreign companies.

However, the Companies Act 71 of 2008, (“Companies Act”) does acknowledge foreign companies, referring to them as external companies. External companies are defined as *“a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23 (2)”*.

Section 23(1) of the Companies Act provides that *“an external company must register with the (Companies and Intellectual Property) Commission (“the Commission”) within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic”*. Therefore, for a foreign company to operate in South Africa, it has to register with the abovementioned commission and will thus be bound by its rules. Section 186 (d) of the Companies Act sets out the objectives of the Commission, including *“the promotion of compliance with this Act, and any other applicable legislation”*.

If a multi-national corporation has a subsidiary in South Africa, such subsidiary will have to be registered with the Commission and will thus be bound to comply with the Companies Act and other related legislation such as the CPA. Therefore, if a parent company incorporated abroad has a subsidiary in South Africa, its subsidiary will be bound by the Companies Act and the CPA (and other related legislation), such that if the subsidiary’s employees in South Africa commit a criminal offence, then they will be liable in terms of local legislation. The criminal liability will only extend to the employees and subsidiary operating within South Africa and the parent company will not incur criminal liability.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Certain legislation imposes a duty on persons who become aware of possible offences to report those offences to police officials.

A salient example of such a duty is found in Section 34(1) of the Preventions and Combating of Corrupt Activities Act 12 of 2004 (“PCCA Act”) which provides that any person holding a position of authority and who knows, or ought reasonably to have known, that another person has committed an offence under the PCCA Act involving an amount of at least R100,000, must report such knowledge or suspicion to a police official. Failing to do so shall itself constitute an offence under the PCCA Act.

Another example of ways in which co-operation with authorities may occur is found in the Protected Disclosures Act, 2000 (“Disclosures Act”). It must be noted that the Disclosures Act applies to disclosures made by employees rather than companies themselves.

The Disclosures Act was enacted to protect employees, in both private and public sectors, from being subjected to an occupational detriment on account of having made a protected disclosure. It sets out procedures by which an employee can, in a responsible manner, disclose information regarding improprieties of his or her employer and provides remedies for any detriment suffered as a result of having made a protected disclosure.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Investigation into criminal activity is undertaken by the South African Police Service (“SAPS”) while the responsibility for the prosecution of the crime will lie with the National Prosecuting Authority of South Africa (“NPA”).

Chapter 11 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) prescribes that the SAPS has a responsibility to investigate any crimes that threaten the safety or security of any community.

If a crime is reported, a case docket will be opened and allocated to a police detective. The police detective will then be required to carry out an investigation and upon completion of the investigation must present the docket to the relevant court for prosecution.

The NPA does have discretion with regard to the actual prosecution. Section 6 of the CPA provides that an attorney-general or any person conducting a prosecution at the instance of the State may withdraw a charge before pleading or stop a charge any time after pleading but prior to conviction.

Under Section 7 of the CPA, where a Director of Public Prosecutions declines to prosecute an offence, a private person can pursue a private prosecution under certain circumstances, provided they have suffered harm as a result of the alleged conduct of the accused.

The Companies and Intellectual Property Commission (“CIPC”) is established in terms of section 185 of the Companies Act. In terms of section 187 of the Companies Act, CIPC must, amongst other things, monitor the proper compliance with the Companies Act, issue and enforce compliance notices and refer any alleged offences in terms of the Companies Act to the NPA.

What is the position of the defendant company in criminal proceedings?

Section 8(4) of the Constitution grants companies all the rights pertaining to arrested, detained and accused persons found in Section 35 of the Constitution, including amongst others, the right to a fair trial.

It is not necessarily a requirement that the individual perpetrator be identified in order to prosecute the company.

The prosecution will take place as a separate prosecution with an individual being cited in his/her representative capacity.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

As set out above, both companies and individuals are subject to the rights pertaining to arrested, detained and accused persons and thus both companies and individuals have a right to remain silent after having allegedly committed an offence. Further, both individuals and companies cannot be compelled to make any confession or admission that could be used in evidence. During the trial, there is the right to be presumed innocent, to remain silent and not to testify.

The CPA sets out that any record which was made or kept by a director, servant or agent of the company within the scope of his activities or which was under his custody shall be admissible in evidence against the company (see Sections 332(3)-(4)). This would therefore require the company to hand over any such records to the prosecuting authority and they are obliged not to withhold the same.

What kind of sanctions can be imposed on companies?

Under Section 332(2)(c) of the CPA, the court may not impose any punishment other than a fine, even if the relevant statute does not make provision for the imposition of a fine in respect of the offence in question.

Although certain statutes may prescribe the maximum fine which can be imposed, the amount of a potential fine is often variable and will ultimately be determined by the court during sentencing.

Fines as a punitive measure have been criticised as they prejudice not only the offending corporation but also the innocent employees⁷.

In general, the determination of an appropriate sentence will be affected by the moral blameworthiness of the accused⁸. In assessing moral blameworthiness of corporations, certain texts may be useful.

> Section 8(2) of the Constitution provides that the Bill of Rights is binding on a juristic person to the extent that it is applicable, taking into account the nature of the right and any duty imposed by the right. It is therefore likely that a criminal offence which violates a victim's rights under the Constitution would be used as an aggravating factor in sentencing.

> The King Report on Corporate Governance in South Africa ("King III") may provide guidelines regarding the morality of actions of corporations. King III was released in 2009 and became effective on 1 March 2010. It prescribes a set of principles as well as best practice in relation to each principle. King III applies to all entities incorporated and resident in South Africa. King III indicates certain peremptory requirements by use of the word "must" and other principles, which are not legal requirements but which would result in good practice, by use of the word "should". Failure to comply with King III could also result in an aggravated sentence.

> The courts have held that as a general rule, a South African court should not impose a fine on an individual which is clearly beyond the means of an accused⁹. However, the Appellate Division has stated that this rule is not inflexible¹⁰.

Company law and competition law both prescribe other specific types of sanctions for companies found guilty of contraventions.

The Companies Act makes provision for punitive measures in respect of an offence committed by a company. Under section 175(1) of the Companies Act, a court, on application by CIPC or the Takeover Regulation Panel, may impose an administrative fine for the company's failure to comply with a compliance notice issued under the Companies Act.

The Competition Commission is governed by Chapter 4 of the Competition Act and is empowered by Section 21 to investigate alleged contraventions of the Competition Act and refer investigated firms to the Competition Tribunal ("Tribunal"). The Tribunal may impose an administrative penalty of up to 10% of the firm's annual turnover if that firm is found guilty of a contravention. Section 4(1)(b) of the Competition Act prohibits restrictive horizontal practices and therefore the behaviour of a cartel is specifically prohibited under section 4(1)(b)(iii).

What is the relevance of an effective compliance system?

Once an accused has been convicted in a criminal court, the parties make arguments regarding aggravation and mitigation of sentencing. Factors such as control mechanisms may be raised by the defence as a mitigating factor that could ultimately result in the judge imposing a lower fine. However, this is an issue which will be dealt with on a case by case basis.

In the case of *Director of Public Prosecutions, Kwazulu Natal v P¹¹*, the court held that three main factors are considered in sentencing: the crime; the offender; and the interests of society. It is therefore important that all information regarding the commission of the offence is placed before the court in order that an appropriate sentence may be imposed. Information regarding control mechanisms may be useful in completing the picture of the surrounding circumstances which the court may rely on for sentencing purposes.

Chapter 7 of the King Code (King III) provides that the board of a company should ensure that there is an effective risk-based internal audit, which should, *inter alia*, provide a source of information regarding instances of fraud, corruption, unethical behaviour and irregularities.

Self-disclosure and a willingness to co-operate would likely be recognised as a ground of mitigation in sentencing.

Plea and sentence agreements are also recognised under Section 105A of the CPA. Plea and sentence agreements are always subject to judicial supervision and approval.

How are criminal proceedings against companies conducted in practice?

Criminal proceedings against companies will be governed by the CPA and do not differ from those against individuals in form. The prosecution shall first present their case and thereafter the accused may present their case. If the court does not believe that the prosecution has proven its case at the close of the prosecution's case, then the court may return a verdict of not guilty before the accused presents their evidence. The burden of proof in criminal proceedings is that the accused is guilty beyond a reasonable doubt, which is a higher burden of proof than in a civil case. All proceedings are to take place in open court unless otherwise expressly provided. All persons are to be examined under oath or affirmation unless the person is found not to understand the nature and import of the oath or affirmation.

In the prosecution of a company, the employee must be cited rather than the actual company, and for this reason it must be made clear whether an individual is being prosecuted in their personal or representative capacity¹². The cited representative does not stand as the accused but allows the company to have a physical presence in court. Should the company be found guilty of an offence, the punishment will not be imposed upon the individual representative (unless they are also guilty of the offence).

The cited representative is to be dealt with as though he were accused of having committed the offence.

If the representative pleads guilty, other than by way of paying a fine without appearing in court, then that plea shall not be valid unless the corporate body had authorised the representative to plead guilty.

If the cited representative ceases to be a representative of the company during the proceedings, then he may be substituted for another representative of the company and the proceedings shall continue as though there was no substitution.

Likely future scope and development?

One of the prevalent concerns with section 332 of the CPA is whether or not its provisions would survive a challenge in the Constitutional Court.

The constitutionality of section 332(5) was challenged in the case of *S v Coetzee*¹³. This section provided that a director or servant of a corporation would be convicted of the same crime as that committed by the company, unless that director or servant could show that they did not take part in the commission of the crime and could not have prevented it. This section, and the reverse burden of proof it placed on individuals, was held to be unconstitutional as it violated the right to be presumed innocent, contained in section 35(3)(h) of the Constitution. Therefore, the liability of other directors and servants will be determined by the common law¹⁴.

It has been suggested that section 332 of the CPA, and in particular section 332(1), may be further challenged in the future for being overbroad¹⁵.

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The liability of other directors and servants will be determined by the common law.

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1. CR Snyman Criminal Law (5ed) 254.
2. *S v African Bank of South Africa Limited* 1990 2 SACR 585 (W) at 650.
3. Farisani D “The Regulation of Corporate Criminal Liability in South Africa: A close Look (Part 1)” 2006 *Obiter* 27 2 265.
4. *Ibid* at 266.
5. *R v Murray and Stewart* 1950 1 SA 194 (C).
6. *Ibid* at 119.
7. A Rycroft “Corporate Homicide” (2004) 17 SACJ 141.
8. *Msane v S* [2009] 1 All SA 454 (SCA) at para 11.
9. *S v Sithole* 1979 (2) SA 67 (A) at para 69G.
10. *S v Van Rooyen* 1994 (2) SACR 823 (A).
11. 2006 (1) SACR 243 (SCA) at para 13.
12. Farisani D, at 266.
13. 1997 (4) BCLR 437.
14. Farisani D, at 274.
15. L Jordaan *Criminal Justice in a New Society* – essays in Honour of Solly Leeman 55.

Spain



Can companies be criminally liable for wrongdoing?

Corporate criminal liability was introduced in June 2010, (effective as from December 2010), as an amendment to the Criminal Code. In addition, Resolution 1/2011 from the Crown Prosecution Service contains specific instructions to public prosecutors on applying the new regime of corporate criminal liability. The Criminal Code was recently amended by a reform which defines more accurately the liability of companies for criminal offences and which came into force on 1 July 2015. In addition, in January 2016 the Crown Prosecution Service (*Fiscalía General del Estado*) issued an instruction (Circular 1/2016 (“Circular”)) addressed to public prosecutors, providing details on the practical application of this liability regime.

For what kind of wrongdoing can a company be held criminally liable?

While not all offences can be attributed to companies, the Criminal Code sets out the specific offences for which a company can be held criminally liable. These include the following:

- > 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
- > bribery/corruption offences

It is required that the offence is committed for the benefit of the company (even if the benefit ultimately might not be achieved or even if the individual acted with the intention of obtaining a benefit just for himself).

How far does criminal liability extend?

A company can be held criminally liable for crimes committed by either: (i) the members of its managing body, its legal representatives or those members of a body within the company that are authorised to take decisions on behalf of the company or that have organisational or control powers within the company; or (ii) its employees (whether senior executives or regular employees subject to the authority of the persons identified in (i) above) while carrying out corporate activities and provided that the offence was committed as a result of a gross lack of due supervision and control of such employees (which requires a case by case analysis).

In terms of penalties, it makes no difference who committed the offence.

Does criminal liability extend to foreign companies?

Criminal liability under the Criminal Code does not depend on the nationality of the company. However, some scholars believe that its extension to foreign companies may present procedural and penalty enforcement issues.

As a general rule, provided that part of the conduct constituting the offence takes place in Spain or the perpetrator of the offence is a Spanish national (or a foreign national that has acquired the Spanish nationality) or a company registered in Spain, the Spanish courts will have jurisdiction over the conduct.

However, in cases where the conduct takes place outside Spain, such conduct must also be an offence in the country where it took place; the perpetrator must have not been acquitted or already served the relevant sentence; and either the affected person or the Public Prosecutor must bring a criminal action against the perpetrator before the Spanish courts.

In relation to certain criminal offences (e.g. corrupt practices between individuals or corrupt practices involving public authorities in the course of international economic activities taking place outside Spain), Spanish courts will have jurisdiction, provided that either the affected person or the Public Prosecutor brings a criminal action against the perpetrator before the Spanish courts and where at least one of the following conditions is met:

- > the proceedings must be against a Spanish national or a foreign national with permanent residence in Spain; or
- > the offence must have been committed by: (i) the officer, manager, employee or an associate of an entity with its registered office, or based, in Spain; or (ii) a legal entity based or having its registered office in Spain.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no legal obligation but co-operation in a criminal investigation or voluntary disclosure prior to the commencement of the investigation can mitigate the degree of penalties. The Circular from the Crown Prosecution Service goes beyond this standard and requires the company immediately to report any criminal activity within its organisation of which it becomes aware.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

Although most of the crimes legal entities can commit can be prosecuted *ex officio*, there is in effect no legal duty for the Public Prosecutor to do so. In addition, public prosecutors are subject to the general instructions issued by the Crown Prosecution Service.

What is the position of the defendant company in criminal proceedings?

In essence, companies generally have the same rights as an individual against whom criminal proceedings are conducted. Hence, there are few specific provisions in the Criminal Procedural Law dealing with legal entities in criminal proceedings. These provisions were introduced in 2011 as a separate reform from the one establishing corporate criminal liability in the Criminal Code. The most relevant one in practice is that the company must appoint a representative for the criminal proceedings, a so-called “*procurador*”; in addition to its lawyer and court representative. For the company to be held criminally liable, there is no need to identify and/or to convict an individual perpetrator.

The criminal proceeding against the company constitutes a “separate” proceeding in the sense that there is no need to proceed against the individual in order to find the company criminally liable. However, if the individual is identified, both the individual and the company will be tried in the same judicial proceeding. In this case, the company and the individual should have different legal counsel so that the individual's rights of defence are not jeopardised in practice.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Co-operation is not mandatory but co-operation can mitigate the degree of penalty. The following actions may constitute mitigating circumstances: that, after the offence was committed, the company's legal representatives took steps:

- > prior to having knowledge of judicial proceedings being brought against them, to disclose the offences committed by them to the authorities;

- > having collaborated in the investigation of the events, to provide evidence, at any stage of the proceedings, that is new and decisive to clarify the criminal liabilities arising from the events;
- > to repair or decrease the damage caused by the offence at any time during the proceedings and prior to the trial itself;
- > to institute, prior to the trial itself, measures that are effective to prevent and discover offences that might be committed in the future under the auspices of the company.

What kind of sanctions can be imposed on companies?

The following types of sanctions can be ordered against a company:

- > fines (between EUR 30 and EUR 5,000 per day, up to a maximum of five years)
- > winding up of the legal entity (a sanction that in practice would only be imposed in those cases where there has been a fraudulent use of the company's legal personality)
- > suspension of activities of up to five years
- > closure of the company's premises and establishments for a period of up to five years
- > prohibition from carrying out in the future any activities during whose performance the crime was committed, favoured or concealed. This prohibition may be temporary or definitive. If it were temporary, the term cannot exceed 15 years
- > disqualification from obtaining subsidies and public aid, from entering into contracts with the public sector and from enjoying tax or social security benefits and incentives for a period of up to 15 years
- > judicial intervention of up to five years.

“Criminal liability under the Criminal Code does not depend on the nationality of the company.”

The relevant penalty is imposed through a court judgment and may differ depending on the relevant offence. Where the penalty provides for discretion, its degree depends on the circumstances of the case and the situation of the entity. In relation to fines, if both the individual and the company are found liable, the amount of the fine can be moderated by the court so that the resulting amount is not disproportionate in relation to the facts of the case.

In some sectors, such as the environmental, energy, telecoms or securities sector, administrative sanctions may be compatible with criminal liability and its criminal sanctions. However, in cases where the administrative offence and the criminal offence overlap, the principle of *ne bis in idem* (or double jeopardy principle) would apply (based on the identity of facts, subjects and merits). To avoid violating the *ne bis in idem* principle, by law the same person cannot be punished for the same crime and on the same legal grounds for which they have already been punished by the criminal courts or authorities. If proceedings by the authorities are in progress and actions are expected to constitute a criminal offence, these will be referred to the Public Prosecutor, requesting a report on the procedures carried out to that effect and agreeing to adjourn the proceedings. If public prosecutors do not find sufficient grounds to make a criminal case against any or all of the persons involved, or the criminal proceedings end with acquittal, they will inform the authorities so that the administrative proceedings can resume.

This has been subject to some debate and the Spanish Constitutional Court has effectively ruled that: (i) the criminal courts have precedence over the sanctioning power of the public administration; and (ii) the public administration is bound by the facts declared proven in the criminal proceedings.

Although the specific kind of administrative sanction will depend on the sector, there are certain kinds of administrative punitive

regimes that would apply to a wider range of companies:

- > Tax: in general, proportional administrative fines (i.e. a percentage of the relevant amount, up to 150%) and, depending on the seriousness of the offence, disqualification from obtaining subsidies and public aid, from entering into public sector contracts and from enjoying tax benefits and incentives of up to five years.
- > Money laundering¹: sanctions for the more serious offences include administrative fines of up to 5% of the company's net equity, revocation of the operating licence (if one is required) and fines of up to EUR 600,000 for directors and officers, together with dismissal and disqualification for up to 10 years.
- > Environmental: fines of up to EUR 2,000,000 and revocation of the relevant operating licence (if one is required). In addition to sanctions, companies can be forced to make good any damage caused or to take preventive measures.

What is the relevance of an effective compliance system?

Since 1 July 2015, the existence of an effective compliance system may serve to mitigate or exclude criminal corporate liability.

A key aspect of the recent reform of the Criminal Code is the introduction of a defence of adopting and effectively having in place, before the offence was committed, an “adequate organisational and management system to prevent offences of the kind committed or to significantly reduce the risk of such offences”.

For offences committed by “employees” (as defined above), having adequate procedures in place is enough for companies not to be liable, provided that the measures were actually applied in practice and were suitable to prevent wrongdoing (so that there has not been

a serious failure in the duty of oversight and supervision of the “employees” in question).

For offences committed by “management and legal representatives” (as defined above), the following circumstances must apply:

- > supervision of the functioning of and compliance with the system of prevention in place must have been entrusted to a body within the company with autonomous powers of initiative and control or which has the legal function of overseeing the effectiveness of the company’s internal controls;
- > the individual authors have committed the crime fraudulently, circumventing the systems of organisation and prevention;
- > there has not been a failure or shortfall in the performance of its functions of supervision, monitoring and oversight on the part of the supervisory body referred to.

A complete exemption from criminal liability will only be available where all the circumstances apply (as well as having the prevention programme in place). However, should only some be present, they may still be taken into account to mitigate the sentence.

How are criminal proceedings against companies conducted in practice?

Given the short period of time for which the new legislation has been in force, there is little practical experience of how proceedings against companies will be conducted. In particular, settlement deals between companies, prosecution authorities and the criminal courts are not commonplace, since the Spanish Criminal Procedural Law does not expressly foresee those kinds of deals. It is therefore not yet possible to say how the new law will be implemented in practice.

Likely future scope and development?

Currently, we do not anticipate any further changes given that the most recent changes to the regime of corporate criminal liability were only introduced in 2015. Having said that, the Spanish Supreme Court handed down two relevant judgments at the beginning of 2016. These judgments dealt with issues such as direct or indirect benefit, requisites for the release of liability, rights of defence, the use of shell companies and the burden of proof. In one of the cases there was a dissenting opinion in the judgment, backed by seven (out of fifteen) judges. This dissenting opinion covered key issues such as the absence of a culture of control as an element of the *actus reus* and the company’s burden of proof in relation to exculpatory circumstances. There is therefore currently a degree of uncertainty in case law as to how the new liability regime will develop.

1. The anti-money laundering regime under Spanish law is only applicable to certain types of entities (credit institutions, investment firms, pension fund managers, private equity managers, currency exchange houses, real estate developers, money transfer companies, entities trading with goods when receiving or making payments above EUR 15,000, etc.) and individuals (lawyers, notaries, auditors, jewellers, antiquarians, etc.).

Sweden



Can companies be criminally liable for wrongdoing?

There is no corporate criminal liability under Swedish law since only physical persons/individuals can commit and be held directly responsible for criminal offences. The introduction of criminal liability for companies was suggested as early as 1997 but rejected. To our knowledge there are currently no plans to introduce a specific criminal liability for companies.

Nonetheless, the Swedish Penal Code (1962:700) (“Penal Code”) does provide a specific sanction for companies: the “company fine”. The company fine, which is classified as a “particular legal consequence of a criminal offence” rather than as a criminal punishment, can be imposed on a company in respect of criminal offences committed in the course of the company’s business.

For what kind of wrongdoing can a company be held criminally liable?

The imposing of a company fine requires that a crime has been committed, i.e. that all prerequisites of a criminal provision are fulfilled, including, where necessary, wilfulness/intent. In theory, any criminal offence can result in a company fine, provided that the punishment under the provision for such offence includes a more severe punishment than a fine (i.e. imprisonment).

How far does criminal liability extend?

It follows from chapter 36, section 7 of the Penal Code that the company fine can be imposed on a company, provided that a crime (for which the punishment under the Penal Code includes imprisonment) has been committed in the exercise of business activities, and:

> the company has not done what could reasonably be required to prevent the crime; or

> the crime has been committed by:

- (i) a person with a managerial position in the company (based on the person’s capacity to represent the company or make decisions on behalf of the company); or
- (ii) a person who has otherwise had a special responsibility for supervision or control in the company.

As set out in chapter 36, section 7, the imposition of a company fine requires that a crime has been committed *in the exercise of business activities* (crimes committed directly against the company are excluded). This requires that the criminal offence must have been committed by a person acting for or on behalf of the company, such as a director, an employee or a contractor and, as a general rule, that the criminal offence has a clear connection to the business conducted by the company and the tasks performed by the person committing the criminal offence.

The existence of general rules or instructions are unlikely to be sufficient to show that a company has done what is reasonably required to prevent crimes. In order to fulfil this requirement, company policies must be precise in this regard.

Even if a company has done what could reasonably be required to prevent a crime, a company fine may still be imposed if the crime has been committed by a manager/executive or a person with a supervisory position in the company. Generally speaking, these two groups include persons in the senior management of the company, as well as persons who report to senior management, (the provision mentions employees in a “managerial position”) and persons responsible for ensuring that legislative rules and company policies are adhered to. Where appropriate, this may include foremen and supervisors below senior management.

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[A] company fine can be imposed on a company, provided that a crime ... has been committed in the exercise of business activities.

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In brief:

- > crimes committed by third persons and crimes that could not reasonably be anticipated will generally fall outside the scope of the provision (as they are generally speaking not carried out in the exercise of the company's business activities);
- > crimes committed by employees, that have a connection with their tasks at the company, may lead to a company fine if the company has not done what could reasonably be expected to prevent the crime (such as, appropriate policies and supervision); and
- > crimes committed by senior executives and management are likely to lead to a company fine regardless of the company's measures to prevent such crimes.

In very specific circumstances, a company can incur liability in the form of a company fine even though a physical person is not actually charged with a criminal offence. This option has been included to permit, in exceptional circumstances, a finding that a company's liability is primary rather than ancillary to an individual's offence.

Does criminal liability extend to foreign companies?

A company exercising business activities in Sweden may become subject to a company fine regardless of whether the company has a permanent establishment in Sweden or not, provided that the prerequisites of chapter 36, section 7 of the Penal Code (set out above) are fulfilled.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

No, but the company's voluntary disclosure of a criminal offence is an extenuating circumstance when the amount of the company fine is being determined.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

The prosecution office is obliged to bring a company fine action against a company if the legal prerequisites for such an action are deemed to be fulfilled, provided that there are no specific grounds not to impose a company fine (in which case, the prosecutor should refrain from bringing an action altogether). These specific grounds include; for example, situations where a company fine is deemed disproportionate or where the company has voluntarily taken measures to self-report the offence.

What is the position of the defendant company in criminal proceedings?

It is not necessary that an individual is prosecuted, convicted or even identified in order to impose a company fine, as long as it can be ascertained that a crime has been committed in the exercise of the company's business activities. It will, however, generally be difficult to ascertain the existence of a crime if a perpetrator cannot be identified. Accordingly, in some cases, it may be preferable from the prosecutor's point of view to carry out a preliminary investigation with the purpose of imposing a company fine rather than to seek a judgment against an individual (such as the exceptional circumstance set out above to make a company primarily responsible in certain cases).

Company fine proceedings against a company may be conducted separately from the criminal proceedings against the individual perpetrator. It is, however, considered appropriate from a practical perspective that the proceedings are joined as far as possible so that; for example, the assessment of the criminal offence does not have to be repeated. It is also possible to impose a company fine by way of an order for a summary punishment, i.e. where the company consents to the imposition of a fine without

a formal trial. In these cases, the company fine may not exceed SEK 500,000.

A company that is subject to company fine proceedings (which are categorised as criminal proceedings in the courts) will, as far as possible, have the same rights as an individual who is subject to criminal proceedings. Hence, the company may be entitled to a defence lawyer, in accordance with the general rules set out in the Swedish Code of Judicial Procedure. The company will, however, be obliged to repay the cost for the defence lawyer if the court finds that the company is liable to pay a company fine.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

Co-operation happens on a voluntary basis. However, the fact that the company has voluntarily reported the crime is a ground that may result in a reduction of the company fine in accordance with chapter 36, section 10, item 3 of the Penal Code.

What kind of sanctions can be imposed on companies?

The amount of a potential company fine ranges from SEK 5,000 to SEK 10,000,000 (approx. EUR 550 to EUR 1,100,000). In assessing the size of the fine, the fact that company management was unaware of a criminal offence or that the offence has been committed in breach of management guidelines or policies may be taken into account to the company's benefit. So far, no Supreme Court cases have become public in which company fines have been imposed as a result of "white collar crime". However, following criticism from the OECD, Sweden has taken several steps to enforce white collar crimes. Recent Supreme Court cases on company fines have primarily pertained to work environment offences. The absence of case law indicates that company fines due to white collar crimes are currently unusual but that Sweden is taking steps to change this.

Apart from white collar crimes, the highest company fines that have been made public amount to SEK 6,000,000 (against Skanska AB) and SEK 2,500,000 (against Cascade Djupafors AB), both due to work environment offences.

Chapter 36, section 10 of the Penal Code sets out four factors that may result in a reduction of the company fine:

- > if the crime has already resulted in another sanction for the business proprietor and the total sanction resulting from the crime (including the company fine) would be disproportionate;
- > if the company tried to prevent, remedy or limit the effects of the crime;
- > if the company voluntarily reported the crime; or
- > there are other specific reasons to reduce the fine. These would include that it would be manifestly unreasonable to impose a company fine (a theoretical example is that the crime is *indirectly* directed against the company).

Moreover, according to chapter 36, section 4 of the Penal Code, the economic benefits that a company has gained as a result of a crime may be subject to forfeiture.

In addition to the company fine, the following are examples of administrative sanctions that may be imposed on Swedish companies:

- > Exclusion from public tenders, chapter 10, sections 1-2 of the Public Procurement Act (2007:1091).
- > Fines under sections 29-32 of the Marketing Act (2008:486) (from SEK 10,000 to SEK 10,000,000).
- > Fines under chapter 30 of the Environmental Act (1998:808) (from SEK 1,000 to SEK 1,000,000).

- > Fines under chapter 3 sections 5-11 of the Competition Act (2008:579) (may not exceed 10% of the company's turnover for the previous financial year).
- > Fine under the Banking and Financing Business Act (2004:297). Such a fine may not exceed: (i) 10% of the credit institution's turnover for the previous financial year; (ii) twice the amount of the profit gained as a result of the violation; or (iii) twice the costs that have been avoided as a result of the violation. The previous maximum amount was SEK 50,000,000.

What is the relevance of an effective compliance system?

Adequate compliance systems reduce the risk of a company fine being imposed, as chapter 36, section 7 is only applicable where a company has not done what could reasonably be required to prevent the crime (provided that the crime has not been committed by a manager, etc.). Adequate compliance structures may therefore limit a company's risk exposure for crimes committed by employees.

How are criminal proceedings against companies conducted in practice?

Swedish law does not allow deals in criminal cases. However, it is possible for a prosecutor to impose a company fine by way of an order for a summary punishment, for example, where the company consents to the imposition of a fine without a formal trial. In these cases, the company fine may not exceed SEK 500,000.

Likely future scope and development?

Sweden is currently seeking to bring its Penal Code provisions on company fines in line with the OECD 2009 Recommendation on Further Combating the Bribery of Foreign Public Officials. This may potentially entail a raising of the maximum potential corporate fine from the current level of SEK 10,000,000 (approx. EUR 1,100,000). The Government's official report will be published by the end of November 2016. Moreover, the OECD's criticism of Sweden's measures to combat bribery may lead to an increase in the number of prosecutions against companies, particularly in corruption cases, as the government seeks to answer its critics.

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Thailand



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Criminal liability may be imposed on legal entities The principle has been acknowledged by the court of Thailand since the 1920s.

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Can companies be criminally liable for wrongdoing?

Yes, under Thai law, criminal liability may be imposed on legal entities (including companies, limited partnerships, foundations and associations), which may be penalised in the same way as individuals (although they cannot be subject to certain penalties, such as imprisonment, confinement and capital punishment). The principle has been acknowledged by the court of Thailand since the 1920s (for example, in the Supreme Court's judgment no. 841-842/2469 (1926)). In most cases, companies will be held criminally liable for the unlawful actions of its authorised persons or the persons responsible for the company's unlawful conduct.

There are several statutes which impose criminal sanctions on entities: the Anti-Money Laundering Act, B.E. 2542 (1999), as amended (“AMLA”)¹; the Financial Institution Business Act, B.E. 2551 (2008) (“FIBA”)²; the Counter Terrorism Financing Act, B.E. 2556 (2013) (“CTFA”)³; and the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations, B.E. 2499 (1956), as amended (“Partnerships and Companies Act”)⁴. Under a number of statutes which impose sanctions on legal entities for criminal conduct, the representatives (including executives and the persons responsible for the relevant conduct) shall also be subject to criminal sanctions. In such cases, it must be proven that the offence was committed by the representatives or with their knowledge or consent, or that they did not make reasonable efforts to prevent the offence.

Under the Criminal Procedure Code, for a company to be sanctioned, the Public Prosecutor is required to prove all elements of a particular offence and prove beyond reasonable doubt that the company committed the crime. If the Public Prosecutor fails to prove this, the court will dismiss the case. It should be noted that if any reasonable doubt exists

as to whether the accused has committed the offence, the benefit of such doubt shall be given to the accused⁴.

For what kind of wrongdoing can a company be held criminally liable?

As a general principle, a company can only be held criminally liable for the offences which are committed in connection with business within the scope of the objectives of the company, as set out in the memorandum of association and where the relevant conduct was carried out by its representatives, i.e. the directors. Therefore, in order for a company to be liable for a criminal offence, the unlawful action must have been conducted for and on behalf of the company, in the course of its business. The offences for which a company can be liable include tax evasion, money laundering, embezzlement, bribery and terrorist financing.

Note, however, that some legislation also places criminal liability on a company regardless of whether the offender is an authorised person. For example, under Thai anti-corruption law, a company, having no proper measures to prevent bribery, may be held criminally liable if a person acting on its behalf commits bribery for the benefit of that company.

How far does criminal liability extend?

In principle, a company may be held criminally liable for the offences committed by its representatives (such as directors or managers) as a company will be held to have acted through its representatives. Unlawful conduct by employees or other third parties would not give rise to criminal liability for the company as it cannot be assumed that such conduct was authorised by the company.

Does criminal liability extend to foreign companies?

A Thai court has jurisdiction over any entity committing a criminal offence under Thai law within Thailand, notwithstanding the country in which it is incorporated. Therefore, it is possible that foreign companies may be held criminally liable. A criminal offence is deemed to have been committed within Thailand even if it was only partially committed within Thailand, the consequence of the offence is intended by the offender to occur within Thailand (and does so), the nature of the offence necessarily means that the consequence of it will occur within Thailand or it was foreseeable that the consequence of the offence would occur within Thailand. Accordingly, a foreign company may be held criminally liable, as a conspirator, for an offence committed in Thailand by its Thai-incorporated subsidiary or the subsidiary's representative.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Under the Criminal Procedure Code, there is no obligation for a company itself to make a disclosure of criminal offences to the competent prosecutors.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

In general, pursuant to the Criminal Procedure Code, a police officer can commence an investigation or inquiry into a criminal allegation on his own initiative. However, in respect of compoundable offences (i.e. offences which are regarded as private wrongs and so are considered less harmful to the public and may be settled by the injured party, a police officer will not have the authority to commence an investigation unless a complaint has been brought by a person allegedly suffering injury or damage as a result of

the conduct (Section 121 of the Criminal Procedure Code). If a complaint has been made to a police officer, whether for a compoundable offence or others, the police officer is obliged to proceed with the criminal investigation without delay (see Section 130 of the Criminal Procedure Code) and report his findings and opinion to the Office of Attorney General ("OAG"). The OAG does not conduct the investigation itself but will decide, after reviewing the evidence, whether to take the case to court.⁵

White collar crimes, which are complicated or which have a serious impact on public or the economics and finance of the country, are investigated by the Department of Special Investigation ("DSI"), pursuant to the Special Case Investigation Act, B.E. 2547 (2004) ("DSI Act"), who may act jointly with the Public Prosecutor (Section 32 of the DSI Act).

What is the position of the defendant company in criminal proceedings?

A legal entity is treated the same way as an individual facing criminal proceedings and will be subject to the same rights and obligations. In an inquiry, preliminary examination or trial in which a company is the defendant, its representatives shall be summoned to appear before the inquiry official or the court (Section 7 of the Criminal Procedure Code). There is no need to identify or convict an individual perpetrator in order to prosecute the company. Nor is it required that the representatives be prosecuted together with the company and the proceedings against the company can be separate. However, in practice, if the company is alleged to have committed a crime, the Public Prosecutor would be likely to prosecute the company and its representatives (as legal conspirators) as joint defendants in the same proceedings.

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In court proceedings, the company may refuse to provide any information and remain silent throughout the trial.
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Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

The company may be requested by the government authority or police officer to provide evidence or information as part of the investigation into the alleged act or to permit a search of the business premises of the company. However, in court proceedings, the company may refuse to provide any information and remain silent throughout the trial and is not obliged to provide evidence. Under the Criminal Procedure Code, no guilty judgment can be delivered by the court unless it is proved beyond reasonable doubt that a company has committed the alleged offence.

Pursuant to Section 78 of the Criminal Code, if a company provides the court with information which facilitates the court trial, this co-operation may be taken into account and the court may reduce the punishment to be imposed on the company by up to one-half of the penalty prescribed for the relevant offence.

What kind of sanctions can be imposed on companies?

Pursuant to Section 18 of the Penal Code, there are five criminal sanctions which can be imposed by the court: capital punishment; imprisonment; confinement; fine; and forfeiture of property. The criminal sanctions that are applicable to companies are limited to fine and forfeiture of property. Under the Criminal Procedure Code, for a company to be penalised by those two criminal sanctions, the Public Prosecutor is required to prove all elements of a particular offence and prove beyond reasonable doubt that a company committed the crime. If the Public Prosecutor fails to prove this, the court will dismiss the case. It should be noted that if any reasonable doubt exists as to whether the accused has committed the offence, the benefit of such doubt shall be given to the accused.

The maximum and minimum levels of fines which can be imposed on a company for any given offence will be set out in the relevant legal provision, with the actual fine to be imposed being subject to the court's discretion. Examples in the field of white collar financial crimes include a maximum fine of Baht 2 million for the offence of terrorism financing (Section 16 of the CTFA). Note that certain statutes also impose daily fines for regulatory breaches, which will continue to apply while the breach continues and for which there is no maximum amount.

For some offences, the government authorities (e.g. the Anti-Money Laundering Commission under the AMLA⁶, the commission appointed by the Ministry of Finance under the FIBA⁷) may be empowered to impose fines on a company, the payment of which will result in the termination of the criminal proceedings.

There is no one centralised and publicly accessible index of white collar crime cases and the respective sanctions in Thailand. The sanction to be imposed on a company in any case depends on several factors and is subject to the court's discretion.

The company may mitigate the degree of penalty by way of providing useful information which facilitate the court trial, e.g. by way of confession or testimony which accelerates the investigation process or the trial process. In addition, the fact that the company had sufficient control mechanisms/compliance systems in place may help prove that the company had no intention in committing the relevant crime and had made all reasonable efforts to prevent an offence. In such case, the court may lower the penalty to be imposed on the company on the discretionary basis.

In addition to criminal sanctions, a company may be liable for administrative sanctions imposed by the relevant government authorities. For example, the Transaction Committee under the AMLA may seize or attach the assets related to an offence (Section 48 of the

AMLA), the Bank of Thailand under the FIBA may order to prohibit any action in violation of, or to take action in compliance with, the relevant regulations (Section 89 of the FIBA), or to suspend the operations of the company within a specified period (Section 90 of the FIBA).

What is the relevance of an effective compliance system?

A compliance system may help prove that the offence was not deliberately committed by the company and that the company has made every effort not to engage in wrongdoing. This may persuade the court to impose a lower penalty on the company. On the other hand, the existence of inadequate compliance structures would not, of itself, increase the risk of being prosecuted or fined, absent a regulatory breach or a criminal offence occurring.

How are criminal proceedings against companies conducted in practice?

In general, white collar crimes are dealt with by the government authority empowered to initiate proceedings under the relevant legislation. The government authority would normally review the reported crime in order to gather information and submit a complaint to the Economic Crime Suppression Division (a police division responsible for economic crime investigation) or the DSI (if it is a serious crime and may have extensive impact on public under the DSI Act), who would proceed with further investigation before referring the case to the OAG. The OAG, as the prosecuting authority, will decide whether the case should progress to court. In practice, the government authority will use its powers to impose fines for regulatory breaches which do not have a serious effect on the public and in these cases, the criminal prosecution shall be terminated without proceeding to trial.

It is unusual for deals to be agreed between defendant companies and the prosecuting authorities or the criminal court for the purpose of terminating the criminal proceedings. In particular, there is no principle of plea bargaining under Thai law.

Likely future scope and development?

The principle of corporate criminal liability has long been developed in the Thai legal system and it is now relatively established how a court would penalise a company whose action has constituted a criminal offence. The current trend in legislation practice is for laws to include provisions that impose clear penalties on company representatives and other persons responsible for a company's activities, to ensure that such individuals avoid committing an offence on the company's behalf.

We are not currently aware of any discussions in relation to a potential tightening up of sanctions against companies, particularly those in the context of white collar crimes, in addition to the anti-Corruption Law discussed above.

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1. Section 61 of the AMLA.
 2. Sections 122, 124, 125 and 128 of the FIBA.
 3. Section 16 of the CTFA.
 4. Sections 7-24 of the Partnerships and Companies Act.
 5. Section 227 of the Criminal Procedure Code.
 6. Examples would include criminal offences under the AMLA, the FIBA, the Securities and Exchange Act, B.E. 2535 (1992), as amended, the Exchange Control Act, B.E. 2485 (1942), as amended and the Revenue Code.
 7. Section 64/1 of the AMLA.
 8. Section 156 of the FIBA.

United Kingdom



Can companies be criminally liable for wrongdoing?

Yes, companies have been criminally liable for wrongdoing in the UK for many decades.

For what kind of wrongdoing can a company be held criminally liable?

A company can be held criminally liable for a very wide range of offences. With a few exceptions, criminal offences in the UK are created by statutes. These usually make it an offence for “a person” to do or fail to do a particular act. By virtue of the Interpretation Act 1978, subject to the appearance of a contrary intention, “a person” will include a company. It is generally necessary for a prosecutor to invoke the principle of identification, by which the acts and state of mind of any directors and managers who represent a company’s “directing mind and will” are imputed to the company.

How far does criminal liability extend?

Case law has established that the appropriate test for the court is whether the individual in question had sufficient status and authority to make his acts the acts of the company, such that the individual is to be treated as the company itself. It follows that individuals other than directors or senior executives may be found to have been the company’s “directing mind and will”. The individual’s title is unlikely to be determinative. Although Section 7 of the Bribery Act 2010 (“UKBA”) introduces wider liability in the context of bribery, by making a company liable where (for example) one of its agents has paid a bribe intending to obtain business for the company, general corporate criminal liability is governed by the identification principle outlined above.

Does criminal liability extend to foreign companies?

Generally, whether the English authorities will prosecute a foreign company for wrongdoing is a decision to be made by the prosecutors and investigators of the jurisdictions involved. Specific factors will be considered when reaching a decision where to prosecute.

However, in specific cases, legislation may extend UK criminal liability to offences committed by foreign companies. For example, under Section 7 UKBA, a company may be liable to prosecution in the UK if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for the company and the company has no adequate procedures in place designed to prevent bribery. Under Section 7(5) UKBA, this provision extends to companies and partnerships carrying on business in the UK, no matter where they are incorporated. “Carrying on a business” is not defined in the UKBA but will include engaging in commercial activities, irrespective of the purpose for which profits are made. Under guidance published by the Ministry of Justice (“MoJ”) to accompany the UKBA, a “common sense approach” is to be applied by the courts when deciding whether a foreign company has a “demonstrable business presence” in the UK, such that it would be caught by this provision.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

There is no general obligation under English law, either on individuals or companies, to report criminal offences. This is subject to an exception in two particular areas. First, there are duties to report in the context of terrorism, such as the obligation to pass on information which may be of assistance in preventing the commission of an act of terrorism.

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A company can be held criminally liable for a very wide range of offences.

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Second, the Proceeds of Crime Act 2002 makes it a criminal offence for those employed in the “regulated sector” to fail to report any suspicions they have of money-laundering. Examples of activities falling within the regulated sector include: accepting deposits from the public; offering life assurance or investment services; performing statutory audit work and operating a casino. It may also be advisable, depending on the facts of a particular case, for a company to report offences even where there is no positive obligation to do so.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

There are a number of law enforcement agencies which may investigate and prosecute corporate wrongdoing: in particular, the police, the Serious Fraud Office (“SFO”), the Financial Conduct Authority (“FCA”), Her Majesty’s Revenue and Customs (“HMRC”) and the Department for Business, Energy and Industrial Strategy. These are, generally speaking, under a duty to investigate allegations which fall within their ambit and this will include allegations which suggest wrongdoing by a company. As to the decision to prosecute, there is a two-stage test based on evidential sufficiency and public interest. This test applies to both individual and corporate suspects. Prosecutors have a discretion as to whether to institute criminal proceedings but this is subject to judicial oversight. There is formal “Guidance on Corporate Prosecutions” which makes it clear that although corporate prosecutions should not be seen as a substitute for prosecutions of individuals, they are important in capturing the “full range of criminality” and ensuring “public confidence in the criminal justice system”.

What is the position of the defendant company in criminal proceedings?

A company will have the same general rights as an individual defendant in criminal proceedings. For example, it will have the right to be represented and the same burden and standard of proof will apply. Although (for the reasons set out above) it will usually be necessary for the prosecution to identify an individual who, in the particular case, was the “directing mind and will” of the company, conviction of the company is not contingent upon conviction of that individual. Criminal proceedings against the company are not, therefore, ancillary to criminal proceedings against the individual(s). The “Guidance on Corporate Prosecutions” envisages that a company will usually be tried at the same time as (i.e. in the same trial as) relevant individuals, although this will not necessarily be the case.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

At the investigation stage, certain law enforcement agencies have powers to require information from companies. For example, the SFO may require a company to produce documents or to answer questions (through a representative). It is a criminal offence to fail to comply with such a requirement, although there are limitations on the use to which the SFO might put any evidence obtained in this manner in any criminal proceedings against the company. Other than in the context of these powers, co-operation by the company during an investigation would be voluntary. Co-operation with the authorities during an investigation is likely to result in a lower fine, although this will depend on how the company approaches the criminal proceedings themselves.

What kind of sanctions can be imposed on companies?

Criminal statutes generally provide for two sorts of sanction: imprisonment (up to a certain number of years) and an unlimited fine. A company cannot of course be imprisoned, although if individuals are themselves separately convicted in relation to the same activity, they may be. In the event of a corporate conviction, the sentencing court will almost inevitably impose a fine. Since October 2014, new sentencing guidelines have applied to companies convicted of offences of fraud, bribery or money laundering. These make it clear that the sentencing court should seek, through a combination of a fine and any orders for compensation or confiscation, to achieve the removal of all gain and impose any appropriate additional punishment. For example, in serious cases of bribery, the penalty might be four times the gross profit from the contract obtained, although it should be stressed that there is usually no financial maximum set by law. Rather, the court will use multipliers set out in guidelines to achieve an appropriate figure. There have been very few criminal penalties imposed on companies for financial crime in the UK. Most penalties take the form of civil recovery orders, which are a non-criminal sanction. Recently, companies have been found liable to pay over dividends and payments received as a result of contracts obtained by corruption by subsidiaries.

Sentencing courts are obliged to take into account guilty pleas when assessing fines. A company which has pleaded guilty either to the offence charged or to some lesser offence (as part of a negotiated plea) can expect to receive a lower fine than if it had fought the case unsuccessfully. The degree of discount depends on the stage at which the guilty plea is entered.



Additionally, conviction for certain types of offences (such as corruption) results in mandatory exclusion from public sector tenders (subject to an exception based on “overriding requirements in the general interest”). Other offences, if they relate to the conduct of business, may give rise to a discretionary exclusion from such tenders. Other types of non-criminal sanction would include suspension or variation of a licence by a regulator (such as the FCA in the case of a financial institution).

What is the relevance of an effective compliance system?

The existence of an effective compliance system will generally be most relevant at the public interest stage of the prosecutor’s decision referred to above, or when the SFO is deciding whether to offer a deferred prosecution agreement (“DPA”). For example, on page 7 of the “Guidance on Corporate Prosecutions” it is said that a prosecution is more likely to be in the public interest where the offence was committed at a time when the company had an ineffective corporate compliance programme. Conversely (on page 8), the existence of a “genuinely proactive and effective corporate compliance programme” will be a public interest factor against prosecution. If criminal proceedings are brought, the existence of an effective compliance system will not generally amount to a defence in criminal proceedings (unless, as with section 7 UKBA, the law specifically provides for it), although it is likely to be relevant when the court assesses the level of financial penalty in the event of a conviction.

How are criminal proceedings against companies conducted in practice?

Criminal proceedings generally may be brought against a company by the Director of Public Prosecutions and, in relevant circumstances for specified crimes, by other authorities, including the SFO, FCA and HMRC. Historically it has been difficult to bring successful prosecutions against corporate bodies, due to the need to demonstrate the involvement of “the directing mind and will” of the company in the relevant conduct. Prosecuting authorities have therefore tried to encourage the self-reporting by companies of crimes such as bribery and corruption offences. However, there is no formal mechanism for companies to negotiate a settlement of criminal proceedings with a prosecutor without court approval. Even where formal plea discussions take place and the prosecutor agrees in principle to the payment of a particular fine, the ultimate decision is for the court. That said, it is common for a company to negotiate with a prosecutor by offering to plead guilty to a lesser offence. If these negotiations are successful, the court cannot force the prosecutor to proceed with the more serious charge.

As of February 2014, companies may be offered DPAs in certain cases. Such an agreement is likely to include the payment of a financial penalty and the disgorgement of profits and may include a review of the company’s anti-corruption and/or anti-fraud policies and monitoring by an appropriate third party. Prosecution would then be deferred for a set period. Again, court approval is needed.

Two DPAs have been concluded since their introduction in 2014. The first, relating to Standard Bank PLC, was concluded in November 2015 while the second, between the SFO and an as yet unidentified company, was agreed in July 2016. In both cases the companies had admitted to misconduct and agreed to pay a financial penalty and to abide by other terms in the DPA.

Likely future scope and development?

There are now strong signs that the government wishes to place increased emphasis on the prosecution of corporate entities.

At the time of writing, the government is consulting on a new corporate criminal offence of failure to prevent the criminal facilitation of tax evasion. The proposed offence would impose criminal liability on corporations who fail to prevent their “representatives” facilitating or committing a UK tax evasion offence or an equivalent offence committed overseas and who cannot show that they have taken reasonable steps to prevent such misconduct.

Furthermore, in May 2016, it was announced that the government is to consult on whether to extend the corporate criminal offence of “failing to prevent” beyond bribery and tax evasion to other economic crimes. The proposed new general offence would extend at least to misconduct such as money laundering and fraud and possibly other forms of economic crime, such as false accounting. However, it will be unclear until the consultation is published how the offence will be framed and its scope. It is probable that liability will be balanced by some form of “adequate procedures” defence, akin to that available for failing to prevent bribery.

United States



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By the beginning of the 20th century, corporate criminal liability was widely accepted.

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Can companies be criminally liable for wrongdoing?

Yes, U.S. law at both the state and federal levels provides for criminal liability for corporations for crimes committed by individual directors, managers, or low-level employees¹. Corporate criminal liability was applied in courts in the United States to varying degrees during the late 19th century, but by the beginning of the 20th century, corporate criminal liability was widely accepted when it was validated by the U.S. Supreme Court².

For what kind of wrongdoing can a company be held criminally liable?

In the U.S., corporations can be held liable for a number of offences, including white collar crimes (for example, fraud under the Securities Exchange Act and corruption under the Foreign Corrupt Practices Act (“FCPA”)), antitrust violations, and regulatory violations (for example, environmental and food and drug regulations). Since the U.S. Supreme Court’s decision in *New York Central*, under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the acts or omissions of its employees if the criminal act committed is (i) within the scope of the employee’s employment, and (ii) if it is for the benefit of the corporation. This doctrine has been applied by U.S. courts at the state and federal level in a wide variety of statutes, including mail and wire fraud statutes, money laundering statutes, and the Racketeer Influenced and Corrupt Organizations (“RICO”) Act. As described by one journal article, by some estimates “there are more than three hundred thousand federal offences with which a corporation could be charged”³.

How far does criminal liability extend?

Under U.S. law, corporations may be subject to liability for the actions of their directors, managers, and even low-level employees.

Does criminal liability extend to foreign companies?

Although jurisdiction to prosecute criminal offences in the United States generally relates to territorial borders, U.S. law does allow for the extraterritorial enforcement of U.S. criminal law, including as regards non-U.S. companies. Among the most important examples of laws with such extraterritorial implications is the FCPA, which contains two sets of prohibitions and requirements: the “books and records” provisions, and the “anti-bribery” provisions. The anti-bribery provisions of the FCPA broadly prohibit offers or payments of anything of value made directly or indirectly to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. The anti-bribery provisions apply to: (i) “issuers” and their officers, directors, employees, agents and shareholders; (ii) “domestic concerns” and their officers, directors, employees, agents and shareholders; and (iii) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the U.S. The books and records provisions require any “issuer” that has registered U.S. securities or that is required to file certain periodic reports with the U.S. Securities and Exchange Commission (“SEC”), including non-U.S. companies, to keep records that accurately reflect transactions affecting the issuer and to maintain an adequate system of internal controls.

The Resource Guide to the U.S. Foreign Corrupt Practices Act, issued in the fall of 2012 by the U.S. Department of Justice (DOJ) and the SEC noted that the FCPA’s anti-bribery provisions apply to “foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise or authorization to pay) while in the territory of the United States”⁴. Because of the broad interpretation by the DOJ with respect to these various jurisdictional

hooks under the FCPA, including, for example, the passage of email communications related to the alleged bribery through U.S. email servers,⁵ non-U.S. companies can quite easily be found to be subject to jurisdiction under the FCPA. Other U.S. laws and regulations, including U.S. economic sanctions and antitrust rules, also give rise to liability for non-U.S. companies. Indeed, a majority of corporate criminal FCPA and antitrust cases over the past decade have been against non-U.S. companies. Because most U.S. legislation does not explicitly address the issue of its extraterritorial application, it is generally left to the federal courts to determine from Congress' intent whether individual laws will have extraterritorial affect. As such, it is difficult to make general statements regarding the application of U.S. criminal law to non-U.S. companies; it is therefore essential that such issues be considered on a case by case basis.

Is the company legally obliged to disclose criminal offences to the competent prosecution authorities?

Except in very rare circumstances, there is no obligation for the company itself to make a disclosure of criminal offences, though self-disclosure is rewarded at the sentencing stage and could be a factor when the federal prosecutor decides whether to initiate a prosecution.

This principle was recently reinforced in a memorandum released by DOJ Deputy Attorney General Sally Quillian Yates in September 2015, commonly referred to as the "Yates Memo". The U.S. Attorneys' Manual, which has been updated to reflect the guidance in the Yates Memo, encourages corporations to conduct internal investigations and to disclose the relevant facts to the appropriate authorities, and signals that "timely and voluntary disclosure" is a factor to be considered in determining whether to pursue prosecution.

Are the prosecution authorities legally obliged to conduct a criminal investigation into corporate wrongdoing?

United States Attorneys offices have the discretion to prosecute a corporation or its culpable employees, though the U.S. Department of Justice has guidelines, set forth in Title 9 of the U.S. Attorneys' Manual, governing the decision to prosecute.

What is the position of the defendant company in criminal proceedings?

In a criminal investigation or proceeding, corporations enjoy many, but not all, of the constitutional rights afforded to individuals. For example, the Fourth Amendment contained in the U.S. constitution right to privacy is not as extensive for corporations as for individuals, particularly in the regulatory context⁶. The Fifth Amendment guarantees against self-incrimination and a right to grand jury indictment are not provided to corporations, though a corporation is entitled to due process and protection against double jeopardy. In contrast, the Sixth Amendment (regarding the right to notice of the charges, assistance of counsel, a public and speedy trial and to confront accusers) applies equally to corporations and individuals.

Statutes which expose a corporation to criminal liability do not absolve officers or employees of responsibility, though the necessity to identify an individual is dependent on the circumstances of the charge brought by the prosecution.

Is the company legally obliged to co-operate with the prosecution authorities in the proceedings?

As with individuals, corporate defendants have no obligation to talk to or co-operate with investigators or the prosecution under U.S. law. However, co-operation, or the lack thereof, is a factor that can affect

a prosecutor's decision to prosecute. In fact, recent amendments to the U.S. Attorneys' Manual in accordance with the Yates Memo explain that in order for a company to receive any consideration for co-operation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to DOJ all facts relating to that misconduct. If the corporation is ultimately indicted, any co-operation could be considered to reduce penalties either in a plea bargain with the prosecutor or by the judge at the sentencing stage.

What kind of sanctions can be imposed on companies?

Federal law has a separate set of corporate sentencing guidelines, which can call for fines for corporations into the hundreds of millions of dollars for each offence (see 18 U.S.C. 3571, ("Guidelines")). The Guidelines set specific standards only for crimes with a commercial purpose—antitrust, smuggling, and gambling offences, for example.

The U.S. Sentencing Commission declined to promulgate corporate fine standards for other offences, leaving such fines to the general statutory sentencing provisions. However, limited case law suggests that sentencing courts may disregard these general statutory provisions. In addition, a sentencing court has discretion in applying fines and may take into account a variety of factors, including the presence of an effective ethics and compliance program. There is no minimum amount under the statute but the statute does provide maximum amounts for different kinds of offences committed by organizations, e.g., for a felony, the maximum amount per offence is USD 500,000. However, the statute provides an alternative fine based on gain or loss, which provides that if there is pecuniary gain from the offence, or if the offence results in pecuniary loss, a defendant can be fined not more than the greater of twice the gross gain or twice the gross loss.

Corporations can also be placed on probation or ordered to pay restitution and their property can be confiscated. Depending on the specific statute, other sanctions can be instituted, such as suspension and/or debarment from entering into contracts with the federal government.

Administrative agencies like the SEC may choose to bring a civil action against a company in a federal court or before an administrative law judge. In a civil action before a federal court, the SEC can seek (similar to a criminal action) monetary penalties or disgorgement. In an administrative proceeding, the agency can seek a variety of sanctions in accordance with the role of the agency. For example, the SEC can seek cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement. The Guidelines also allow a court to impose at sentencing (or pursuant to a plea bargain) an effective compliance and ethics program.

What is the relevance of an effective compliance system?

Corporate sentencing guidelines reward self-disclosure, co-operation, restitution, and the presence of preventative measures (i.e. compliance programs). An effective compliance program may reduce the chances of a prosecution and reduce the severity of the charges or any subsequent sentence should a prosecution occur. The Fraud Section at DOJ now employs a compliance expert to assist, among other things, in assessing the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing.

How are criminal proceedings against companies conducted in practice?

Federal prosecutors have wide latitude to reach plea bargains/deals with defendants. Trials represent inherent risk for companies; the certainty of a resolution negotiated with a prosecutor is often preferable to the uncertainty of a trial verdict. In addition, trials can prove costly. For these reasons, corporate prosecutions rarely result in a criminal trial and, often, the corporation pleads guilty in exchange for a reduced sentence negotiated with the prosecution or entry into a deferred or delayed prosecution agreement or non-prosecution agreement.

Likely future scope and development?

There is increasing focus in the United States on criminal law, particularly with respect to corporations. The Yates Memo, discussed above, is just one example and indicates that federal prosecuting authorities will be focusing more of their attention on identifying the individuals responsible for corporate misconduct. As another example, there is legislation currently pending in the U.S. Congress that would require federal agencies that enter into settlement agreements that include over USD 1 million in payments to publicly disclose the key terms of those agreements.

The DOJ has also recently implemented a new pilot program offering leniency for alleged FCPA violations, which will run for one year beginning 5 April 2016. The pilot program requires companies to (i) voluntarily self-disclose FCPA-related misconduct; (ii) fully co-operate with any investigation; and (iii) remediate internal flaws in internal controls and compliance programs in order to be eligible for the full range of potential mitigation credit. The pilot program offers up to a 50% reduction in otherwise applicable fines, as well as the possibility that DOJ will decline to prosecute any alleged violations. In connection with the pilot program,

the DOJ has hired 10 additional FCPA prosecutors, increasing the number of staff in the FCPA Unit responsible for investigating and prosecuting violations of the Act by more than 50%, and announced that it is strengthening its co-ordination with foreign counterparts in an effort to increase individual and company accountability.

1. Note, that due to the federal nature of the U.S. government, individual states have their own criminal laws covering corporate criminal liability. This note focuses on federal law because "Federal law dominates the principal fields in which corporate prosecutions arise, and federal prosecutions are much more numerous and significant than state prosecutions." Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability*, Duke Law Scholarship, 1 (January 6 2014), http://scholarship.law.duke.edu/faculty_scholarship/3205/.
2. *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613 (1909) (upholding the constitutionality of the Elkins Act, a federal statute regulating railway rates that imposed criminal liability on corporations that violated the statute's mandates).
3. Edward Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 Yale L.J. 126, 139 (2008).
4. A Resource Guide to the U.S. Foreign Corrupt Practices Act, November 2012, available at <http://www.justice.gov/criminal-fraud/fcpa-guidance>.
5. *SEC v. Straub*, 11-cv-09645 (S.D.N.Y. Feb 8, 2013).
6. See *New York v. Burger*, 482 U.S. 691, 702-703 (1987) ("*Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search have lessened application in this context....*").



Contacts

Australia



Rachel Nicolson
Partner
Tel: (+61) 3 9613 8300
rachel.nicolson@allens.com.au

Belgium



Françoise Lefèvre
Partner
Tel: (+32) 25 01 94 15
francoise.lefevre@linklaters.com

Brazil



Carlo Verona
Partner
Tel: (+55) 11 3024 6189
carlo.verona@lefosse.com

France



Kiril Bougartchev
Partner
Tel: (+33) 1 56 43 58 52
kiril.bougartchev@linklaters.com

Germany



Robert Henrici
Partner
Tel: (+49) 6971 003 472
robert.henrici@linklaters.com

Hong Kong



Melvin Sng
Partner
Tel: (+852) 2901 5234
melvin.sng@linklaters.com

Indonesia



David Holme
Partner
Tel: (+62) 21 2995 1509
david.holme@linklaters.com

Italy



Alessandro Villani
Partner
Tel: (+39) 02 88393 4221
alessandro.villani@linklaters.com

Japan



Hiroya Yamazaki
Partner
Tel: (+81) 362121435
hiroya.yamazaki@linklaters.com

Luxembourg



Guy Loesch
Partner
Tel: (+352) 2608 8212
guy.loesch@linklaters.com

Mongolia



Igor Bogdanich
Partner
Tel: (+61) 3 9613 8747
igor.bogdanich@allens.com.au

The Netherlands



Daniella Strik
Partner
Tel: (+31) 20 799 6338
daniella.strik@linklaters.com

Papua New Guinea



Allan Mana
Partner
Tel: (+67) 5 305 6000
allan.mana@allens.com.au

People's Republic of China



Jian Fang
Partner
Tel: (+862) 12891 1858
jian.fang@linklaters.com

Poland



Cezary Wiśniewski
Partner
Tel: (+48) 225 26 5022
cezary.wisniewski@linklaters.com

Thailand



Pichitpon Eammongkolchai
Partner
Tel: (+66) 2305 8017
pichitpon.eammongkolchai@linklaters.com

Portugal



Nuno Ferreira Lousa
Partner
Tel: (+351) 21 864 0044 5044
nuno.lousa@linklaters.com

United Kingdom



Satindar Dogra
Partner
Tel: (+44) 20 7456 4316
satindar.dogra@linklaters.com

Russia



Ben Carroll
Partner
Tel: (+44) 20 7456 5406
ben.carroll@linklaters.com

United States



Lance Croffoot-Suede
Partner
Tel: (+1) 212 903 9261
lance.croffoot-suede@linklaters.com

Singapore



Jelita Pandjaitan
Partner
Tel: (+65) 6692 5881
jelita.pandjaitan@linklaters.com

Editor



Kerstin Wilhelm
Managing Associate
Tel: (+49) 6971 003 506
kerstin.wilhelm@linklaters.com

South Africa



Nick Alp
Partner
Tel: (+27) 11 530 5339
nick.alp@webberwentzel.com

Editor



Jane Larner
Counsel Professional Support Lawyer
Tel: (+44) 020 7456 4244
jane.larner@linklaters.com

Spain



Francisco Malaga
Partner
Tel: (+34) 91 399 61 68
francisco.malaga@linklaters.com

Sweden



Niclas Widjeskog
Partner
Tel: (+46) 8665 4140
niclas.widjeskog@linklaters.com



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