



Criminal Liability of Companies Survey

Malaysia Skrine

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1. General

1.1. Can a company be prosecuted in your jurisdiction in a similar way as an individual offender? Please explain the main differences, if any.

As a company is recognized as a separate legal entity, it can be prosecuted. However, one main difference between an individual offender and a corporate entity, would involve the issue of sanctions. For instance, a company cannot be imprisoned. Another area of difference would be the service of process by way of summons on the company secretary and trial appearance by an authorized officer on the company's behalf.

1.2. Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.

The sanctions that can be imposed on a company under criminal law would involve fines and compounding. For both fines and compounding, such sanctions must be specifically provided under the relevant legislation.

- 1.3. Are there any other kinds of sanctions in other fields of law which can be imposed on companies following the commission of an offence by its directors, managers or employees (e.g. fines, dissolution of a company, etc.)? Please describe the relevant sanctions and summarize the legal prerequisites.**

Generally, the other types of sanctions that can be imposed would be, in the case of a public company, a suspension of trading, fines, reprimands and delisting. Further, a company can be dissolved under the provisions of the Companies Act 1965 on application by the Minister.

2. Criminal Liability of Companies

- 2.1. What types of sanctions can be imposed on a company? What is the minimum/maximum punishment for each sanction? If the sanctions distinguish between certain types of offences please describe the sanctions for the most relevant offences or groups of offences.**

The types of sanctions that can be imposed would be fines and compounding. Both the maximum and minimum would depend on the provisions of the legislation under which the company is charged.

- 2.2. What are the legal requirements for each type of sanction?**

This would depend on the requirements set out under the relevant legislation. In the case of fine, the quantum would be determined by the trial court subject to its limits of sentencing jurisdiction and also the maximum limit prescribed in the relevant legislation. In the case of compounding, there must be an enabling provision in the relevant legislation and the quantum cannot exceed the maximum prescribed in the punishment provision

- 2.3. Is the prosecution of a company confined to certain types of offences or to offences committed by certain hierarchy of company staff? If yes, please explain in more detail.**

Yes, it can be confined to certain types of offences. For example, crimes requiring acts of a personal nature such as rape would be impossible of commission by companies. The prosecution of offences can be confined to a certain hierarchy of company staff such as director, manager, officer, secretary, employee or agent of the company, who can in a way be said to be the "mind of the company" in cases involving mens rea crimes but in strict liability offences, the company would inevitably be vicariously liable for the crimes of any of its employees.

The prosecution of offences can be confined to a certain hierarchy of company staff such as the director, manager, officer, secretary, employee or agent of the company who can in a way be said to be the 'mind of the company' in cases involving mens rea.

In strict liability offences, the company would inevitably be vicariously liable for the crimes of any of its employees.

2.4. How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions be attributed if the individual violated only internal (but not statutory) rules or regulations?

In the event that the legislation has a deeming provision whereby an offence committed by an individual is deemed to have been committed by a company, then such acts can be attributed to a company.

No, only the violation of statutory rules or regulations, and not internal ones, would give rise to possible criminal prosecution.

2.5. How will mens rea of the company be established?

Where it is necessary to prove the mens rea of the company, it is often enough to show the state of mind of a director, servant or agent by whom the conduct was engaged in if that person was acting within his, her or its actual or apparent authority.

2.6. Is there a strict liability of a company for certain kinds of offences for which mens rea is not required? Please describe for which kind of offences mens rea is necessary and for which not.

Yes. Generally, for offences which involve the exercise of diligence, connivance or consent, such offences requires the proof of mens rea. In offences involving licensing requirements for example, it may be construed as strict liability in nature.

2.7. Is it necessary to identify and/or convict the individual offender in order to prosecute a company?

Generally, the prosecution does not need to identify and/or convict the individual offender in order to prosecute the company. It is possible to charge as well as convict a company without also charging its officers.

2.8. What additional defenses (except of lack of offence) can a company raise?

For certain types of offences, the statute will list out the available defences for instance whether due diligence was carried out, or whether the company acted under a genuine belief or a mistake.

2.9. Can a company avoid punishment if it is sufficiently organized, has duly instructed its directors, managers or employees and has taken reasonable care to exert control on its directors, managers or employees? What extent or organizational requirements and control are necessary to avoid conviction?

Generally, a company can avoid punishment if it has taken reasonable care to exert control on its directors or employees and the directors or employees who nonetheless acted *ultra vires*, or for the specific offence of insider trading or misuse of information, by putting in place “Chinese walls” i.e. ensuring proper segregation of the different units in a company and ensuring non-dissemination of sensitive information to unauthorized units.

2.10. Can certain kinds of sanctions be executed during the investigative phase of a criminal proceedings (e.g. preliminary seizure of bank accounts, attachment of claims)?

Yes, for instance the disclosure of certain accounting/bank books and records can be ordered during the investigative phase of criminal proceedings. More recently, even the "freezing" of assets such as bank accounts housing illegal proceeds has been imposed.

2.11. Can both the individual offender and the company be convicted for the same offence?

In certain cases, yes, such as the submission of false information to the Securities Commission, which is the regulator of the securities and futures industry.

2.12. Can a parent/group company be prosecuted for offences being committed within a subsidiary?

Generally, no since both are separate legal entities unless there is evidence of collusion for instance in the nature of conspiracy.

3. Criminal Sanctions on a Company

3.1. What other types of sanctions but a criminal punishment can be imposed on a company? Please describe the types of sanctions and their legal requirements.

Please refer to the answers to questions 1.3, 2.1 and 2.2.

3.2. Is the imposition of these sanctions confined to certain types of offences? Describe the most relevant sanctions and types of offences?

Please refer to the answers to questions 1.3, 2.1 and 2.2.

3.3. What defenses can a company raise against these offences?

Please refer to the answer to question 2.8.

3.4. Can such sanctions been executed during the investigative phase of a criminal proceedings?

Generally, no.

4. Procedural Issues in Cases of Corporate Liability**4.1. Does the prosecution have discretion to prosecute or not a company? Which aspects will the prosecution take into account?**

Yes, the prosecution does have discretion on whether or not to prosecute a company. Some of the factors that may be taken into account are the strength of the evidence, public policy considerations, the availability of witnesses, and also the knowledge to be imputed to the corporate entity itself.

4.2. At what stage during an investigation/proceeding does a company have the status as a suspect or similar status?

Generally, if the authorities request for the directors or officers of a company to provide statements, on the grounds that the authorities believe that an offence may or may not have been committed, then the company may be considered to be a suspect in the investigation.

4.3. Does a company have the rights to remain silent (nemo tenetur se ipsum accusare), to refuse production of documents, to deny access to company site without search warrant, to refuse testimony, to answer questions or to any other suspects rights? Who exerts these rights if investigations are made against the company's directors?

Generally, any person, whether company or individual, is bound to answer all questions relating to the case put to him/it except those which may incriminate himself/itself. Even then, modern legislations have incorporated provisions compelling answers and denying the right to refuse to answer on such grounds.

The company has the right to deny access to its premises without a search warrant, except in certain circumstances where the law empowers entry and search without warrant to prevent the removal or destruction of evidence.

The company cannot refuse production of documents in the face of a court order or a warrant.

In investigations against the individual directors, the individual directors also enjoy such rights, subject to certain legislations which now deny refusal on such grounds.

4.4. When will a company be informed that it is or can become prosecuted?

After the investigation has been completed, and if the prosecution decides to prosecute the company, a summons to appear in court is normally then issued which informs the company that it is being prosecuted and hence, required to appear in court on the return date.

4.5. Can the directors, managers or employees be witness in proceedings against a company? Does this also apply if the directors, managers or employees are suspects themselves?

Yes, although it is arguable whether the company-defendant can object on the ground that the particular witness is its 'directing mind' and hence entitled not to incriminate itself in which case, the company would want to call such person as its own defense witness.

Yes they can be witnesses in their own defense even if they are suspects themselves.

4.6. Will there be a joint proceeding against the company and the individual offender?

Yes, in certain cases there can be joint proceedings against the company and the individual offender.

4.7. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

No.

5. Procedural Issues on Other Criminal Sanctions

5.1. Does the prosecution have discretion to impose or not a sanction on a company? Which aspects will the prosecution or court take into consideration?

Yes, the prosecution does have limited discretion in offering the alternative sanction of compounding in certain cases in lieu of public prosecution. An aspect that may be taken into consideration can be the severity of the offence. In relation to other prescribed punishments such as fines, that is the sole prerogative/discretion of the court itself.

5.2. Does the company, have the status of a suspect or a similar status and at what stage in proceedings?

Please refer to the answer to question 4.2.

5.3. When will the company be informed that the prosecution is considering to impose sanctions or have sanctions imposed?

In the case of compounding, the offer may be made in advance by way of a letter incorporating such offer which if unaccepted, would then lead to public prosecution. In the case of other sanctions, such as a fine, upon the company being found guilty by the court, the court enters into sentencing process which involves a plea of mitigation to be made on behalf of the company

5.4. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

None.

5.5. Will there be joint proceedings against the company and the individual offender?

There can be joint proceedings against the company and the individual offender at the discretion of the prosecuting authority.

5.6. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

No, except in the matter of service of summons.

6. Criminal Liability of Directors or Managers

6.1. Can directors or managers be criminally held liable for offences committed by other individual directors, managers or employees? Which legal concepts apply in your jurisdiction?

Theoretically speaking, a person cannot be held liable for offences committed by another person. However, if the offence is one which is such that the director or the manager's act or omission constitutes an abetment to the offences, it is possible for the corresponding criminal liability of the director or manager to arise.

6.2. What are the legal requirements for a criminal liability of directors and managers for offences committed by others?

As mentioned above, a director or a manager may be criminally liable if he or she is in a position whereby his acts or omission constitutes an abetment of the offence.

6.3. Does a criminal liability arise only from the fact that another director, manager or employee was not adequately selected, instructed, supervised or the company not adequately organized?

Not necessarily.

6.4. What recommendations do you have to exclude or minimize criminal liability risks of directors of a company?

It is recommended that directors, officers and employees be aware of the rules and regulations as well as statutes which govern their companies. Directors should also employ good legal advisers as well as financial officers to ensure all documentations and accounts are in order. In Malaysia for example, all serving or aspiring directors are now required to educate themselves by the compulsory attendance of "Corporate Directors Training Program" conducted by the Company Registry with other various institutions.