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About This Survey

This Lex Mundi multi-jurisdictional survey represents a country-by-country overview of some key criminal offense laws. Each Lex Mundi member firm was asked to respond to a series of questions, regarding their jurisdiction. Some jurisdictions differentiate between regulatory (summary) offenses and criminal offenses. In many jurisdictions the rules of criminal procedure on the prosecution of criminal and regulatory offenses are similar. The term “offense” used in this paper means both types of offenses.

The descriptions set forth below are intended only as a general overview of the law as of February 2008. No summary can be complete, and the following is not intended to constitute legal advice as to any specific case or factual circumstance. Readers requiring legal advice on any of the specific case or circumstance should consult with counsel admitted in the relevant jurisdiction.

The lead editor for this survey is Christian Pelz, the Chair of Lex Mundi’s Business Crimes and Compliance Practice Group and a partner of Nörr Stiefenhofer Lutz; Germany. The survey’s coordinator is Jami de Lou, Lex Mundi’s Practice Group Coordinator.

This multi-jurisdictional survey will be updated from time to time. For the most up to date information, please go the Lex Mundi Website (www.lexmundi.com) and access the Criminal Liability Survey from the Business Crimes and Compliance Practice Group web page or from the Publication and Resources page. If you need assistance, please contact the Lex Mundi office 1.713.626.9393.
Business Crimes and Compliance Criminal Liability of Companies Survey

About Lex Mundi

Lex Mundi is the world’s leading association of independent law firms. Lex Mundi facilitates the exchange of information regarding the local and global practice and development of law and improves the ability of its members to serve their respective clients. Lex Mundi has member law firms in 99 countries. Lex Mundi firms have adopted uniform standards of client service and are comprehensively and periodically reviewed to ensure continued adherence to Lex Mundi’s standards of excellence.

The worldwide coverage of Lex Mundi’s membership provides Lex Mundi the unique ability to conduct and facilitate surveys of local law and procedure on a global scale. Lex Mundi member firms have produced global surveys on a number of topics in addition to this survey on Criminal Liability of Companies, including: Attorney-Client Privilege, Pre-merger Notification Survey, Labor and Employment Desk Book, European Union: Accessions State Tax Guide, Bank Finance and Regulation Survey, Telecommunications Regulation Matrix and Real Estate Survey Part I: Issues in Real Estate Investment and Finance. Lex Mundi member firms have also cooperated with the World Bank, Harvard University and Yale University to complete the most comprehensive comparative studies of litigation ever undertaken.
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.

Austrian law distinguishes between criminal offences and regulatory (statutory) offences under administrative law. The main differences are that criminal offences are prosecuted by public prosecutors, while regulatory offences are prosecuted by the administrative authorities. Sanctions for criminal offences may only be imposed by courts, whereas sanctions for regulatory offences may also be imposed by authorities (at least at first instance). There are also differences between criminal and statutory offences as regards the stigma-effect of sanctions: while such effect is clearly present in sanctions for criminal offences, it is not present (or only present to a much smaller extent) in sanctions for statutory offences.

Austria introduced the criminal liability of legal persons only recently, in 2006, when the Verbandsverantwortlichkeitsgesetz (“VbVG”) entered into force. By means of this Act the criminal offences contained in the Austrian Penal Code (Strafgesetzbuch, “StGB”) and in other laws were made applicable to legal persons. The VbVG did, however, not introduce a liability of companies for regulatory offences (even in cases in which such offences are sanctioned by penalties (fines) under the Austrian Administrative Penal Code (Verwaltungsstrafgesetz). The exceptions to this rule are violations of the Penal Tax Code (Finanzstrafgesetz). Tax offences of natural persons—depending on their severity—sanctioned by criminal law or by administrative law. According to para 28a of the Penal Tax Code, however, both the violation of criminal offences and of statutory offences under the Penal Tax Code may lead to the imposition of criminal sanctions on companies under the VbVG.
As regards procedural rules, the VbVG mostly refers to the rules contained in the Austrian Code on Criminal Procedure (Strafprozessordnung, “StPO”). So far there have been only very few cases under the VbVG so that the interpretation of the – sometimes very vague – provisions of the VbVG cannot be foreseen with certainty in some points.

The main differences between sanctions imposed upon companies under the VbVG and sanctions imposed on natural persons are that sanctions for companies may only consist in fines and that sanctions under the VbVG may be imposed also if there is no sufficient element of guilt present (as normally required to punish individuals for the respective deeds) at the level of the company in general and at the level of its representatives or employees (for details see below 2.2.)

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

The VbVG basically does not provide for the imposition of criminal sanctions other than fines (as existent in other legal systems, such as the dissolution of the company or (temporary) down periods etc).

However, the sanction of disgorgement of gains (para 20 StGB, serving the purpose to remove revenue from criminal offences) may be imposed against companies. This sanction may also be imposed against companies which were not actively involved in a criminal offence, but merely have received benefits derived from a criminal offence (e.g. a company received benefits from a fraud committed by an employee). The sanction of disgorgement is, however, not a criminal sanction strictu sensu, since it is limited to removing the unlawful proceeds of a criminal offence and is consequently not punitive in character.

The VbVG also introduced the possibility of a “diversion” for companies and the possibility to impose conditional fines (for details see below 3.1.).

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.

While the imposition of criminal sanctions on companies for offences committed by a company’s management or employees is still a very new legal concept in Austria and has only been introduced in 2006, there had been other kinds of sanctions on companies for offences committed by management or employees in place already prior to the introduction of the VbVG:

Probably the most important of these sanctions is contained in para 9 (7) of the Austrian Administrative Penal Code (Verwaltungsstrafgesetz): Para 9 Austrian
Administrative Penal Code provides for the responsibility of the managing directors (or other “responsible persons” which may be designated by the company) for compliance of the company with administrative law (e.g. compliance with the duty to obtain a trade license; safety regulations; environmental provisions etc.). Para 9 Austrian Administrative Penal Code provides for a liability of the managing directors for violations of administrative law by companies. According to para 9 (7) Austrian Administrative Penal Code, however, companies are jointly liable for administrative fines imposed on managing directors or responsible persons under para 9 Austrian Administrative Penal Code. By way of para 9 (7) Austrian Administrative Penal Code the economic effects of sanctions under administrative law may therefore be conferred upon companies.

Similar provisions (providing for a joint liability of legal persons with natural persons) are contained in the Penal Tax Code (para 28) and in the law on safety of foodstuffs (para 86 Lebensmittelsicherheits- und Verbraucherschutzgesetz). The scope of application of these provisions was, however, limited substantially with the introduction of the VbVG.

Sanctions under the VbVG do not include the dissolution of a company. A dissolution may, however, be ordered according to para 86 of the Austrian Limited Liability Company Law (GmbH-Gesetz) by the administrative authorities in case the directors of a company committed criminal offences in the course of their business activities and if it is to be expected due to the nature of the business being pursued by the company that a continuation of this business might abet further criminal actions. The mentioned provision of para 86 Limited Liability Company Law only applies to limited liability companies (GmbHs), but not to public companies (Aktiengesellschaften) or other types of companies.

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 main type of criminal sanctions which can be imposed on companies under the VbVG are fines. Fines under the VbVG are criminal sanctions, even though the VbVG uses the term “Geldbuße” instead of “Geldstrafe” in order to avoid the term “Strafe” (punishment). Irrespective of this misleading designation (which was used in order to avoid criticism that a punishment which may be imposed in the absence of guilt would be unconstitutional) fines imposed under the VbVg are punitive in character, since their intention is to express social and ethical reprehension for an action or omission.

Fines will be imposed in daily rates (between 1 and 180 daily rates; the amount of each rate ranging from a minimum of € 50 to a maximum of € 10,000). The court will determine the number of rates depending on the severity of the criminal offence (a
pertinent scheme is contained in para 4 (3) VbVG). According to this scheme (which differs from the scheme for the imposition of daily rates which applies to natural persons under the StGB), criminal offences which may lead to life imprisonment or imprisonment of up to 20 years for natural persons are to be sanctioned with up to 180 daily rates; criminal offences which may lead to imprisonment of up to 15 years are to be sanctioned with up to 155 daily rates (just to mention two examples).

The amount to be paid per rate will be determined with regard to the profitability of the company. The amount should be commensurate to the threehundredsixtieth part (or 0.0028%) of the company’s EBIT, but not falling below 50 € and not exceeding 10.000 €. Accordingly, the minimum fine which can be imposed on a company amounts to € 50 (1 daily rate of 50 €), the maximum fine amounts to € 1,8 mio (180 daily rates of 10.000 €).

For other types of sanctions (diversion, conditional fines) please see below 3.

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

The first condition for a criminal liability under the VbVG is that an act or omission has been committed (i) to the benefit of a company or (ii) the act or omission violates duties addressed to a company. The first criterion excludes criminal offences of representatives or employees which were committed during or on the occasion of activities performed by employees or representatives, but were not otherwise connected to the company. Further the VbVG does not apply to criminal offences which were committed by representatives and employees to the detriment of their own company; legal disadvantages such as the possibility of claims against the company are not to be taken into consideration (but may reduce the fine imposed on a company according to para 5 (3) VbVG). The second criterion is very broad, but also very vague; it includes all duties which are addressed to a company as an employer, duties under administrative law and all duties (e.g. all legal requirements to take care in the interest of others) which address the risks involved in the business pursued by a company. It remains to be seen how this criterion will be interpreted by the courts.

As regards the attribution of such acts or omissions to the company, the VbVG provides for a “hybrid system” and differentiates between actions and omissions committed by natural persons within the “inner circle” of a company (representatives; “Entscheidungsträger”) and by persons which belong to the “outer circle” of a company (employees; “Mitarbeiter”):

The definition of “representative” is broad and includes all persons which may influence decisions of a company such as directors, board members, proxy holders (for the company). As regards the attribution of criminal offences committed by representatives, the VbVG provides for a direct attribution of such offences to the company: A company is liable for any act or omission of a representative, if such act or omission fulfils all elements of the criminal offence, was committed culpably and all other requirements for a conviction of the individual representative must be present.
(fully specified crime). Nevertheless there may be cases in which the act or omission of the individual representative is not punishable under criminal law, but may lead to a criminal liability of a company under the VbVG (e.g. in case the natural person dies).

In contrast, due to its “hybrid nature”, the VbVG does not provide for a direct attribution of criminal offences to companies in case of criminal offences committed by employees (defined in a wider sense than in labour and employment law and also including other people working for a company). In case of actions or omissions committed by employees, the company is liable if an employee commits a criminal offence and if the action or omission was caused or facilitated by a failure of the company’s management to take appropriate (technical, organizational etc.) measures in order to prevent criminal offences. As regards criminal offences by employees the VbVG therefore does not pursue a system of “direct attribution”, but also requires (in addition to the commission of a criminal offence by an employee) the causation or facilitation of criminal offences by the company’s management. The failure to take appropriate measures is established by comparing the level of diligence present at the level of a specific company with an “objective” level of diligence. It is consequently not necessary that an individual representative (culpably) neglected to take appropriate measures; in order to establish a liability of a company for criminal offences committed by employees under the VbVG it is sufficient to demonstrate that the level of diligence in surveillance at a specific company did not meet the “objective” standard.

A further important difference between criminal offences committed by the “inner” and the “outer” circle of a company pertains to the requirement of a culpable commission of criminal actions (culpable being defined in the narrow sense of “guilt”, not in the sense of negligence/intent): Contrary to the liability of companies in the case of criminal offences committed by representatives, actions or omissions committed by employees may also lead to a liability of companies under the VbVG, if the criminal offence was not committed culpably. This leads to the – in our view unconstitutional – result that a company may be criminally liable under the VbVG even though neither the individual employee (committing a criminal offence) nor the management (which neglected its duty to prevent criminal offences by taking appropriate organizational measures) acted culpably.

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.

Prosecution is in principle not limited to certain types of criminal offences; every criminal offence committed by a natural person may consequently lead to criminal sanctions against companies; there are, however, certain types of offences which will in practice not lead to a prosecution of companies (e.g. sexual offences) since it is hard to conceive how such criminal offences could be to the benefit of a company or could violate duties addressed to a company (which is, as mentioned above, a condition for a criminal liability of a company under the VbVG).
There is no limitation of prosecution with regard to offences committed by a certain hierarchy of company staff – as explained in greater detail above in 2.2 also criminal offences committed by low ranking employees may lead to a liability of a company.

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?**

For the attribution of criminal offences of individuals to a company under the VbVG see above 2.2.

Sanctions under the VbVG may only be imposed in case representatives or employees committed criminal or tax offences. There is consequently no criminal liability of companies in cases of violations of internal rules or regulations.

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

As mentioned above, the VbVG allows for the imposition of criminal sanctions on companies (in cases of criminal offences committed by employees) even in the absence of mens rea. As regards criminal offences committed by representatives, mens rea of the representatives will be attributed to the company (for details see above, 2.2).

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.**

Under Austrian law there is no strict liability of a company for certain kinds of offences. The VbVG, however, introduced a liability of companies in case of criminal offences committed by employees which is related to a strict liability, since it allows for the imposition of fines upon companies even in cases in which there is no guilt present at the level of the individual employee committing a criminal offence and at the level of the company’s management.

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

It is not necessary to identify or convict the individual offender to prosecute a company. It is only necessary to establish that (i) all elements of a criminal offence have been fulfilled and (ii) the criminal offence has been committed by a representative or employee of the company (and not by somebody outside of the company).
2.8. **What additional defenses (except of lack of offence) can a company raise?**

In case of criminal offences committed by representatives, companies may invoke all defences which are available for natural persons. If there is a reason excluding culpability at the level of the natural person whose acts or omissions are to be attributed to the company, culpability of the company is also excluded. The most important defences are lapse of time, withdrawal of an attempt to commit a crime, indemnification of the victim of the criminal offence prior to the initiation of criminal proceedings (*tätige Reue*, para 167 StGB) and absence of a punishable crime (*mangelnde Strafwürdigkeit der Tat*, para 42 StGB, in cases of criminal offences of minor importance).

As regards criminal offences committed by employees, the company may defend itself by proving that the management acted with due care (and did not neglect any surveillance-obligations; for greater details see below, 2.9).

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?**

As mentioned above, companies may be liable for criminal acts of *representatives* even if all precautionary measures in order to prevent such acts have been taken.

Such measures may, however, rule out a criminal liability in cases of actions or omissions committed by *employees*. Para 3 Art 3 No 2 VbVG mentions a failure to take appropriate measures with regards to technical, organizational and human-resource-related aspects of the company’s business as an example for a lack of surveillance by the company’s management (for details see above, 2.2). The extent of organizational measures and control required to rule out a criminal liability cannot be defined with certainty, since there have been very few cases under the VbVG so far.

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

The VbVG foresees for a possibility to impose preliminary injunctions (para 20 VbVG) if there is a strong suspicion that a company is responsible for a criminal action and if it is likely that a fine will be imposed on the company under the VbVG. The only example mentioned for a preliminary injunction in the VbVG is the confiscation of assets of the company if it is likely that the levy of a fine under the VbVG would be endangered in the absence of a confiscation.
2.11. Can both the individual offender and the company be convicted for the same offence?

Yes.

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

Generally speaking no. There may be cases, however, in which an employee or a representative is working both for a parent company and a subsidiary (or in which an employee of a parent company is active as a representative in the subsidiary). If the conditions for an attribution of acts or omissions of natural persons to a company laid down in para 2 VbVG are met for the parent company and for the subsidiary (act or omission has to the benefit of a company; act or omission violates duties which are addressed to the company), one action or omission of a natural person might lead to a criminal liability of both the mother company and the subsidiary (there is no case-law to this effect so far, however).

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.

As mentioned above, criminal punishment under the VbVG mainly consists in the imposition of fines. There are, however, also other types of sanctions available under the VbVG:

The fine may be reduced or entirely cancelled if the fine imposed on the company does not exceed certain levels (70 daily rates) and if it possible to set aside the imposition of the fine for a probation period with regards to the prevention of further criminal acts committed by the company (under the VbVG) and in general. In such case, the court may issue instructions on the company which are to be respected during the probation period. Instructions may pertain both to indemnification and to the execution of certain organizational measures (in order to prevent further criminal actions by employees). Organizational instructions may, however, only be imposed with the consent of the company.

Further, a fine may also be replaced by an act of “diversion”. Dversion may be an option if the facts of the case are clear, the underlying criminal action is of relatively minor relevance (does not fall within the competence of a court of lay assessors or juries), the act did not lead to casualties, the company provided for an indemnification and removed all other consequences of the criminal act, a fine would not be necessary with regards to the prevention of future crimes and the company agrees to a diversion. Acts of diversion may consist in the payment of certain amounts of money determined by the court, rendering charitable acts and in following instructions issued by the court (as described above).
There are further consequences of criminal actions (which are, however, not typical of criminal actions attributed to companies under the VbVG): These consequences include the disgorgement of financial gains received through criminal acts, financial sanctions under cartel law, consequences under trade law (such as the withdrawal of trade licenses), under the law of public procurement (exclusion from award procedures) and damages.

We assume in the following, that section 3 does not deal with the sanctions just mentioned above in 3.1. (and also not with the disgorgement of gains which was dealt with in 1.2) but rather with sanctions such as the dissolution of a company and other criminal sanctions for companies existing in other legal systems and therefore did not answer these questions.

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

N.A.

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

N.A.

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

N.A.

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?

According to para 18 VbVG the prosecutor can desist from the prosecution of offences under the VbVG, if a sanction under the VbVG seems not necessary in light of the gravity of the crime and in light of the consequences of the criminal offence. Para 18 VbVG does not apply in cases in which a prosecution seems necessary for the prevention (both as regards the individual company and as regards prevention in general) of further criminal offences.

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

According to para 13 (1) VbVG the company obtains the status of a “suspect” as soon as the public prosecutor decides to initiate investigations or criminal proceedings against a company.
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?

As soon as the company obtains the status of a “suspect”, it enjoys all rights which are also accorded to natural persons suspected of having committed a criminal offence under the StGB (and consequently also all rights mentioned in the question). The VbVG explicitly mentions some (but not all) of these rights: According to para 17 (1) VbVG the representative and/or the employee which is under suspicion of having committed a criminal action has to be informed about such suspicion and has to be interrogated. According to para 17 (2) VbVG the representative and/or employee have to be informed that they have the right to remain silent and to consult a defense attorney before answering any questions and that their testimony may be used both against them as individuals and against the company. The rights as a suspect also apply in criminal proceedings against representatives or employees of the company, if a conviction of these natural persons could lead to a prosecution of the company under the VbVG (in case there are no joint proceedings).

As regards the representation of a “suspected” company in the course of criminal investigations and proceedings, the VbVG is based on the notion that the company is represented by its organs. Consequently all suspect rights of the company are exercised by the company’s representatives (for and on behalf of the company). Only in case that criminal investigations are commenced against all persons entitled to represent a company, para 16 (2) VbVG provides for an appointment of a defense attorney ex officio in order to avoid conflicts of interest. This defense attorney is entitled to represent the company in the criminal proceedings (and to exercise all suspect rights) until the company has appointed another representative or another defense attorney.

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

According to para 16 (1) VbVG in conjunction with para 50 StPO the company has to be informed “as soon as possible” about the initiation of criminal investigations. This duty of information is stalled if there are specific circumstances which make it seem likely that the criminal investigations would be thwarted by the information of the suspect.

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?

Directors and managers (representatives) cannot be summoned as witnesses in proceedings against the company they represent, since according to para 17 VbVG they are regarded as “suspects” (irrespective of whether they are also suspected of having committed criminal actions individually).
Employees may be summoned as witnesses, as long as they are not suspected of having committed the criminal offence leading to the investigations against the company. Employees may, however, refrain from testifying if a testimony could lead to a self-incrimination or the incrimination of close relatives (para 157 StPO).

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

According to para 15 (1) VbVG there will usually be a joint proceeding (at the court which is competent for the proceeding against the natural person). Separate proceedings should only be initiated in order to avoid a delay of proceedings or to keep arrest of suspects as short as possible (para 27 StPO).

In the course of joint proceedings there will be a joint procedure of taking evidence. The court will then adjudicate upon the natural person. In case the natural person is convicted of having committed a criminal offence, the trial is continued as regards the criminal liability of the company under the VbVG. In case the natural person is acquitted, the public prosecutor has to declare within three days whether the criminal proceeding against the company should be continued (independent of the proceeding against the natural person).

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

Proceedings against companies under the VbVG basically do not differ from proceedings against natural persons. The legal rules contained in the StPO apply to procedures under the VbVG, unless otherwise stipulated in the VbVG (for the most important exceptions see above, 4.1-4.6).

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?**

N.A. (as described above in 3.1., the VbVG does not contain other criminal sanctions. Therefore we did not answer the questions in this section.)

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

N.A.

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

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

N.A.

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

N.A.

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

N.A.

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?

Under Austrian law the basic principle of individual guilt (“nulla poena sine culpa”) applies. Therefore, a manager or director cannot be held liable for offenses committed by other directors, managers or employees. Accordingly, we did not answer the questions in this section.

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

N.A.

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?

N.A.

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

N.A.
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.

Article 3 of Law 9.605/98 provides for the legal entity's criminal liability, as follows: "Legal entities will incur administrative, civil and criminal liability as provided for herein in the event of violation committed as a result of a decision by its legal or contractual representative, its management board, either in the interest, or for the benefit, of the entity."

Under article 21 of the Environmental Criminal Law (9.605/98), the penalties imposed on legal entities, applicable only in case of environmental offenses, are fine, restriction on rights, or provision of services to the community. The penalties of restriction on rights are partial or total suspension of the activities, temporary discontinuance of the establishment, work or activity, and prohibition against entering into contracts with the public authorities as well as seeking any subsidies, subventions or donations from those authorities. The penalties of provision of services to the community are funding of environmental programs and projects, execution of works for recovery of degraded areas, upkeep of public spaces and contributions to environmental or cultural public entities.

In addition, the liability of legal entities does not exclude the liability of individuals, perpetrators, co-perpetrators or persons taking part in the same event.
1.2. Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.

As mentioned in the answer above, legal entities can only be held liable for environmental criminal offenses.

Under article 21 of the Environmental Criminal Law (9.605/98), the penalties imposed on legal entities, applicable only in case of environmental offenses, are fine, restriction on rights, or provision of services to the community. The penalties of restriction on rights are partial or total suspension of the activities, temporary discontinuance of the establishment, work or activity, and prohibition against entering into contracts with the public authorities as well as seeking any subsidies, subventions or donations from those authorities. The penalties of provision of services to the community are funding of environmental programs and projects, execution of works for recovery of degraded areas, upkeep of public spaces and contributions to environmental or cultural public entities.

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.

It is important to understand from the criminal standpoint the general rule provided by the Brazilian law. Directors, officers and administrators of a legal entity cannot be held criminally liable for acts committed by other people. On the contrary, directors, officers and administrators can be held criminally liable for acts performed by themselves.

However, it is necessary to prove that directors or officers have performed acts in contravention of the Brazilian Criminal Code.

And the reason is that under the Brazilian legal system, the criminal liability has a subjective nature (personal) and falls upon the individual who manages the company and performs (directly) an act which represents a crime under the Brazilian Criminal Code or any other criminal law.

It is impossible to attribute criminal liability only based on someone's position or functions in a company. This is considered liability of objective nature, which is not allowed by the Brazilian legal system, from a criminal point of view.

The only exception we deem relevant is related to environmental crimes. In such cases it is possible to attribute criminal liability to those who, despite of not having committed the offense directly by themselves, had the opportunity of preventing the environmental damages, provided that they had knowledge of the facts.
Article 2 of Law of the Environmental Crimes (Law 9605/98) provides as follows: "Those who in any way concur to the commission of the crimes provided for herein, will incur the penalties imposed thereon to the extent of their culpability, as well as the officer, administrator, member of the board and technical board, the accountant, manager, assign or attorney in fact of a legal entity who, when knowing another party's criminal conduct, fails to prevent it, when they could do so".

Hence, the criminal liability will apply only to those people who, through their conduct, have effectively contributed to the criminal offense, and the attribution of the liability will further depend on proof of the person's willful misconduct or fault.

From the environmental standpoint, however, this liability may reach the administrators, in case of proof that they could have prevented the criminal act and failed to do so. As a consequence, theoretically speaking, officers and directors could be held liable provided that it is proved that they failed to prevent the crime, in view of their (i) previous knowledge/awareness and (ii) authority/capacity to do so. In case of an environmental damage, had the officers and managers the power to prevent the damages and failed to do so, they could be held criminally liable as well.

Consequently, the legal entity can only be held criminally liable for cases of environmental offenses. And according to the jurisprudence of the Superior Court of Justice legal entities can only be held criminally liable if the officers, director, managers are liable for the commission of a environmental criminal infraction or have failed to prevent the offense, as explained above.

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.

Under article 21 of the Environmental Criminal Law (9.605/98), the penalties imposed on legal entities, applicable only in case of environmental offenses, are pecuniary fine, restriction on rights, or provision of services to the community. The penalties of restriction on rights are partial or total suspension of the activities, temporary discontinuance of the establishment, work or activity and prohibition against entering into contracts with the public authorities as well as seeking any subsidies, subventions or donations from those authorities. The penalties of provision of services to the community are funding of environmental programs and projects, execution of works for recovery of degraded areas, upkeep of public spaces and contributions to environmental or cultural public entities.

Since the environmental criminal law does not provide for the minimum and the maximum penalty of pecuniary fine, we follow the general rule of the criminal code to calculate these patterns.
The pecuniary fine is not a civil penalty. It is also a criminal penalty, calculated based on article 49 of the Criminal Code. The pecuniary fine can vary from 1 to 360 "units". Each unit is determined by the judge, ranging from a minimum of 1/30th of the minimum wage to a maximum of 5 times the minimum wage (currently, the minimum wage in Brazil is R$ 415.00 -- approximately US$ 259.00).

The amount of the pecuniary fine is calculated based on the economic situation of the defendant. Hence, article 60 of the Criminal Code authorizes the judge to increase 3 times the amount of the pecuniary fine if the maximum fine is not sufficient to punish the defendant.

Although legal mechanisms are available for the judge to perform a deeper evaluation of the economic situation of each defendant, in practical terms, this evaluation is quite superficial. In the great majority of the cases, during the interrogatory the judge asks the defendant how much is his salary. An exception to this procedure is when the judge determines that an official letter should be issued to the banks and the IRS, enquiring about the economic and financial condition of the defendant.

Based on our experience, the pecuniary penalties applied are usually low, probably as a result of such poor analysis of each defendant's economic condition, and we cannot estimate how much it would be in the present case, due to its complexity.

Regarding the penalty of restriction on rights and provision of services to the community, the environmental criminal law does not provide for the minimum or the maximum time of restriction. The period of the restrictions is determined by the judge.

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

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.

See 1.3 above

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

See 1.3 above.

For a criminal offense to be established, it is mandatory that it is committed in contravention of the Federal Law. Violations of internal rules or regulations can only be considered a criminal offense if they go against the Federal Law that defines such conduct as a crime and imposes a criminal penalty.
2.5. How will mens rea of the company be established?

See 1.3 above

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.

See 1.3 above

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

See 1.3 above

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

The defense of the company is directly connected to the defense of the individual. Normally, two lines of defense are used. The first is to deny the direct participation in the criminal infraction or deny the failure to prevent the criminal infraction. The second line of defense is challenging the cause/effect relation between the damage and the conduct.

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?

The evidence that the company is sufficiently organized, has duly instructed its directors, managers or employees and has taken care to exert control on its directors, managers or employees are not sufficient to avoid a criminal conviction, but for sure the judge will take it into consideration when convicting such persons.

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

No. According to the Brazilian Constitution all defendants are presumed innocent. Criminal penalties can only be imposed after the sentence of conviction has been pronounced.
2.11. Can both the individual offender and the company been convicted for the same offence?

As mentioned in answer 1.3, the jurisprudence of the Superior Court of Justice establishes that the legal entity can only be prosecuted together with the individual that have performed the offense. As a logical consequence the conviction of the individual will result in the conviction of the company. The individual may not be convicted, but the company will be convicted should it be proved the criminal infraction was perpetrated by another individual within the organization and not by the defendant.

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

No. See 1.3 above.

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.

See 2.1 above.

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

See 1.1 and 1.3 above

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

See 2.8 above

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

No. See 2.10 above

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 has discretion to prosecute or not a company. The prosecution will take into account the fact that the company is sufficiently organized, has duly instructed its directors, managers or employees and has taken care to exert control on its directors, managers or employees. In this case, if the individual has violated the
internal rules, the prosecution may take into account these aspects and prosecute only the individual.

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

The criminal procedure in Brazil comprises two separate phases: the investigation and the prosecution. The investigation is conducted by the police. During it, the policeman in charge can order the indictment of the individual and the company. As of this moment the company and the individual are formally considered suspects. At the end of the investigation, the police will issue a final report, submitting the case to a public prosecutor. The public prosecutor can commence the prosecution, pressing charges against the company and the individual. After this moment, the company and the individual are considered Defendants.

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?

According to the Brazilian Constitution, all defendants have the right to remain silent, and to refuse to produce evidence against its interests.

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

The company or the individual will be informed that they are being or will be prosecuted at the moment the police performs the indictment as mentioned at 4.2 above.

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?

The directors, managers or employees can be appointed by the police or the prosecution as witnesses. This does not apply if the directors, managers or employees are defendants, because, as mentioned in item 4.3 above, all defendants have the right to remain silent and to refuse to produce any kind of evidence against them, which obviously includes to be appointed witnesses.
4.6. **Will there be a joint proceeding against the company and the individual offender?**

Yes. According to the jurisprudence of the Superior Court of Justice the legal entities can only be held criminally liable if the officers, director, managers are responsible for a criminal environmental infraction or have failed to prevent the offense, as explained above.

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

No. It is the same proceeding.

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?**

No, because it is the judge who imposes the sanction. The prosecution has discretion to request the judge not to impose the sanction. In this case the prosecution will take into account if the fact that the company is sufficiently organized, has duly instructed its directors, managers or employees and has taken care to exert control on its directors, managers or employees and if the individual has violated the internal rules, acting independently.

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

See 4.2 above

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

See 4.4 above

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

Based on the Law 9099/95, as to crimes for which the maximum penalty is two years' imprisonment is possible to make a settlement with the prosecution in order to avoid the criminal sanctions. Based on the same law, as to the crimes for which the maximum penalties is over two years' imprisonment, but the minimum penalties are not less than one year's imprisonment it is possible to have the proceeding suspended for two to four years under certain conditions imposed by the judge.
5.5. Will there be joint proceedings against the company and the individual offender?

See 4.6 above

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

No.

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?

No. See 1.3 above

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

See 1.3 above

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?

See 1.3 above

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

The company should be sufficiently organized, duly instruct its directors, managers or employees and take care to exert control on its directors, managers or employees by providing regular training to them.
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.

Yes, the Criminal Code of Canada applies equally to corporations. Indeed, the Criminal Code is not limited to applying to corporations but applies broadly to “organizations”. An “organization” is broadly defined, in s.2 of the Criminal Code, as being:

(a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(b) an association of persons that

(i) is created for a common purpose,
(ii) has an operational structure, and
(iii) holds itself out to public as an association of persons.

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 Criminal Code provides for a number of potential sanctions for corporations and those directors, officers or employees of the corporation who are convicted of criminal offences. The precise sentence to be imposed – be it imprisonment, fine, probation or
any other punishment – depends on a consideration of all relevant circumstances, including the range of sentences that have in the past been imposed upon conviction for similar offences.

In determining the appropriate sentence to impose on an organization, the Criminal Codes sets out specific factors that ought to be considered by the sentencing judge. Section 718.21 states:

718.21 A court that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the organization as a result of the offence;
(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
(e) the cost to public authorities of the investigation and prosecution of the offence;
(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
(g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Moreover, the Criminal Code contains a number of sentencing provisions directed at offences affecting the capital markets, i.e. fraud, fraudulent manipulation of stock exchange, insider trading, tipping and making a false prospectus. Section 380.1, for example, sets out a number of factors that the sentencing judge is required to consider as “aggravating factors” (i.e. factors justifying a harsher sentence) in imposing a sentence upon conviction for one or more of these offences:

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in sections 380, 382, 382.1 and 400, it shall consider the following as aggravating circumstances:
(a) the value of the fraud committed exceeded one million dollars;
(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;
(c) the offence involved a large number of victims; and
(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community.

Section 380.1(2) prohibits the sentencing judge from considering a number of factors as “mitigating factors” (i.e. factors justifying a more lenient sentence) in imposing a sentence upon conviction for one or more of these offences.

380.1(2) The court shall not consider as mitigating circumstances the offender’s employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

Notably, those factors that in the past have helped so-called “white collar criminals” in securing more lenient sentences are no longer to be considered in imposing a sentence.

Having regard to all of the preceding factors, there are a wide range of sentencing options available to a judge who has convicted a corporation or its officers, directors or employees of a criminal offence. A summary of some of these options is set out below.

**Imprisonment**

The sentence that is most closely associated with conviction for a criminal offence is imprisonment. While a corporation obviously cannot be imprisoned, its directors, officers and employees who are convicted certainly can be.

The length of imprisonment that can be imposed depends on the offence in issue. In most cases, the Criminal Code prescribes maximum, rather than minimum sentences. In the realm of the so-called “white collar” crimes, Parliament has clearly moved in the direction of increasing the maximum length of imprisonment that can be imposed upon conviction. For example, the amendments to the Criminal Code in 2004 increased the maximum sentence for fraud from 10 years to 14 years. It also increased the maximum sentence for the fraudulent manipulation of stock exchange transactions from 5 to 10 years. All of the preceding factors will be relevant to the court’s determination of the appropriate sentence.

**Fines**

When a corporation is convicted of a criminal offence, it cannot be imprisoned. However a fine will be imposed in lieu of imprisonment.\(^1\) In the case of conviction for

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\(^1\) Section 735 of the Criminal Code
an indictable offence (i.e. more serious criminal offences such as fraud), the amount of the fine is in the discretion of the sentencing judge and is subject to no limit. The judge will, however, likely consider factors such as the nature of the offence, the circumstances surrounding its commission, the harm caused to the public caused by the offence and the “profit” obtained by the wrongdoer.

If the wrongdoer fails to pay a fine in accordance with the order of the sentencing judge, the Attorney General of the province or of Canada may file the order with the court and enforce it as if it were a civil judgment, i.e. obtain writs of execution and sale with respect to the corporation’s assets and property.

**Probation**

Where a person is convicted of an offence, it is open to the court to direct that the offender comply with the conditions prescribed in a probation order. The amendments to the Criminal Code in 2004 gave sentencing judges broader powers to impose a wider range of conditions on convicted organizations. In particular, s. 732.1(3.1) provides that:

The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

(a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
(b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
(c) communicate those policies, standards and procedures to its representatives;
(d) report to the court on the implementation of those policies, standards and procedures;
(e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
(f) provide, in the manner specified by the court, the following information to the public, namely,
   (i) the offence of which the organization was convicted,
   (ii) the sentence imposed by the court, and
   (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
(g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

The conditions that can potentially be imposed on an organization are numerous and potentially unlimited. Indeed, the basket power in s. 732.1(3.1)(g) is extremely broad, i.e. order the organization to “comply with any other reasonable conditions
that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence. There is an issue as to whether a court is in the position to assume the role as overseer and supervisor of the conduct of business organizations. There is no doubt that it makes sense to require an organization convicted of a criminal offence to “establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence”. However, the question is whether the court is in a position to determine what policies should be established and to police compliance with those policies. To the extent that the court is reluctant to do so, the Criminal Code envisions that this role be assumed by a regulatory body:

732.1(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

A failure to comply with a probation order is potentially punishable by imprisonment for a term not exceeding two years.

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.

Regulatory statutes at the municipal, provincial and federal level sanction misconduct by corporations and other business entities. They are too numerous to list in this survey. In many cases, these statutes create offences that are strict liability, i.e. no requirement to prove intent or even absolute liability, i.e. proof of commission of prohibited act is sufficient to make out offence.

Significant statutes to be aware of include the federal Competition Act which sets out the country’s “anti-trust” laws. Each province has also passed its own securities laws governing the issuance and trade in securities and which contain prohibitions against “tipping” and “insider trading”. For example, s. 122(1) of the Ontario Securities Act creates a general offence for contravening securities laws as follows:

122. (1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or
(c) contravenes Ontario securities law,

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both. 1994, c. 11, s. 373; 2002, c. 22, s. 181 (1).

Violations of these regulatory statutes give rise to penalties ranging from fines to imprisonment.

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.

See above s. 1.2.

There are, in Canada, two categories of criminal offences: “summary conviction offences” and “indictable offences”. Summary conviction offences are generally offences of a less serious nature. The Criminal Code designates certain offences as “summary conviction offences” and others as “indictable offences”. For certain other offences, the Criminal Code leaves a discretion to law enforcement agents to pursue a matter as an indictable offence or a summary conviction offence depending on the circumstances in which the offence was committed.

Where a matter is pursued as summary conviction offence, a limitation period applies to commencing a prosecution. In particular, s. 786(2) of the Criminal Code provides that “No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.” For a summary conviction offence, there is also a limit on the punishment that can be imposed. Pursuant to s. 787(1) of the Criminal Code, “Except where otherwise provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both.”

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

See above s. 1.2 and 2.1.
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.

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

[Answer for 2.3 and 2.4]

The criminal liability of corporations has historically been determined in Canada using what is known as the “identification theory”. In particular, criminal liability of a corporation was determined by examining the actions and intentions of its “directing minds” acting within their sphere of delegated authority. The “directing mind” of a corporation – there may be more than one – is a person within the corporation who has been assigned the authority to design and supervise the implementation of corporation policy as opposed to a person who simply carries out the policy, i.e. director or officer rather than manager. In effect, the corporation is identified with the conduct of these officers and directors.

For offences committed after September 2004, criminal liability of a corporation is no longer determined using the “identification theory”. This basis of liability has been effectively abandoned through the amendments to the Criminal Code in 2004. Liability of organizations is now to be determined from the standpoint of actions of its “senior officers” rather than directing minds. Section s. 22.2 of the Criminal Code makes a corporation liable for the acts of its senior officers in three circumstances:

22.2 In respect of an offence that requires the prosecution to prove fault – other than negligence – an organization is a party to the offence if, with the intent at last in part to benefit the organization, one of its senior officers:
(a) acting within the scope of their authority, is a party to the offence;
(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

The term “senior officers” is defined in s. 2 of the Criminal Code as meaning “a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”. The term “representative” is further defined in the Criminal Code as meaning “a director, partner, employee, member, agent or contractor of the organization.” Clearly then, the term “senior officers” encompasses a wider range of persons within a corporation than the definition of “directing mind”.

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2 A person is a party to an offence if…[insert definition]
Indeed, for a large, multi-layered corporation, the terms “representative” will likely include a significant number of persons. This change – the replacement of the “directing mind” with the “senior officer” for the basis of determining criminal liability – clearly exposes the organization to greater risks of liability.

Section 22.2(b) of the Criminal Code is also noteworthy because it imposes an affirmative obligation on the senior officer who know that a representative of the organization (i.e. a director, partner, employee, member, agent or contractor) is or is about to be a party to the offence to take “all reasonable measures to stop them from being a party to the offence.” This is an obligation that is uncertain but potentially onerous in scope. What exactly does “all reasonable measures” require? Arguably, a report to the police would be the most effective means to prevent a representative from becoming a party to the offence. Is this required? If an employee is, or is about to become a party to an offence, is a severe warning to that employee enough to satisfy the affirmative obligation? Is a suspension required? Is termination required? Does the senior officer have to begin monitoring the e-mails, phone calls or activities of the representative who is or is about to become a party to an offence? To date, there is no court decision providing guidance on this area. It is clear, however, that senior officers who do nothing or who turn a blind eye to a criminal offence may expose the corporation to criminal liability.

New Criminal Offences

Amendments to the Criminal Code brought in March of 2004 also created a number of new offences directed at conduct that affects the capital markets.

There is now a specific criminal offence for “insider trading”. While many have questioned the need for a separate offence of “insider trading” – having regard to the broad scope of the offence of fraud and the availability of sanctions against insider trading in provincial securities law – Parliament nonetheless moved forward to attach criminal liability and stigma for engaging in insider trading. The offence is set out in s. 382.1(1) as follows:

382.1 (1) A person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years who, directly or indirectly, buys or sells a security, knowingly using inside information that they
(a) possess by virtue of being a shareholder of the issuer of that security;
(b) possess by virtue of, or obtained in the course of, their business or professional relationship with that issuer;
(c) possess by virtue of, or obtained in the course of, a proposed takeover or reorganization of, or amalgamation, merger or similar business combination with, that issuer;
(d) possess by virtue of, or obtained in the course of, their employment, office, duties or occupation with that issuer or with a person referred to in paragraphs (a) to (c); or
(e) obtained from a person who possesses or obtained the information in a manner referred to in paragraphs (a) to (d).
Parliament has similarly made it a criminal offence to engage in “tipping”. Section 382.1(2)
382.1 (2) Except when necessary in the course of business, a person who knowingly conveys inside information that they possess or obtained in a manner referred to in subsection (1) to another person, knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security, is guilty of
(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
(b) an offence punishable on summary conviction.

For the purposes of s. 382.1, the Criminal Code defines “insider information as follows:
382.1(4) “inside information” means information relating to or affecting the issuer of a security or a security that they have issued, or are about to issue, that
(a) has not been generally disclosed; and
(b) could reasonably be expected to significantly affect the market price or value of a security of the issuer.

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

See above s. 2.3 and s. 2.4

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.

As indicated earlier, most municipal, provincial and federal regulatory statutes create offences that are either strict liability offences or absolute liability offences. To establish these offences, the prosecutor need only establish the commission of the prohibited act. In the case of strict liability offences, the onus will shift to the accused to demonstrate that he/she/it acted with “due diligence”. For absolute liability offences, proof of commission of the prohibited act will be sufficient to make out the offence.

For Criminal Code offences, mens reas is normally an element that is required to be proven in order to establish the commission of an offence. Mens rea can be established through actual knowledge of commission of the prohibited act or, in some cases, through establishment of recklessness or willful blindness.

However, there is a category of criminal offence – negligence – which does not require proof of mens rea. In particular, s. 219(1) of the Criminal Code provides that “Everyone is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or
safety of others.” Proof of criminal negligence does not require proof that that the accused corporation acted with “intention” or “deliberation”. Rather, what is necessary is proof that the act or omission showed a “wanton or reckless disregard for the lives or safety of others”.

The amendments to the Criminal Code passed in 2004 have similarly broadened the potential liability of corporations for negligence based offences. In particular, s. 22.1 defines “corporate negligence” as follows:

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if
(a) acting within the scope of their authority
   (i) one of its representatives is a party to the offence, or
   (ii) two or more of its representatives engage in conduct, whether by act or omission, such that if it had been the conduct of only one representative, that representative would have been a party to the offence; and
(b) the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in all the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

As with criminal offences requiring proof of “intent”, the criminal negligence of corporations is now to be assessed from the standpoint of its representatives and its senior officers. In particular, negligence is established if one of the corporation’s representatives is a party to a negligence offence and if the senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs markedly from the standard of care that could reasonably be expected to prevent a representative of the organization from being a party to the offence. The focus on whether the senior officer has departed markedly from standard of care is likely to be problematic. What is the standard of care that a senior officer should exercise in preventing a representative of an organization to be party to a negligence offence? This is really a question as to the management of the company. What is a marked departure from this standard? Most courts are ill-equipped – either through personal experience or practice -- to make either assessment. Indeed, courts tend to avoid second guessing “business decisions” made by corporate managers and provide great deference to officers and directors when they make such decisions, i.e. through business judgment rule. A real issue arises as to whether the court is able to make this important determination in the criminal law context.

The potential liability for negligence based offences has further been broadened by amendments which permit the court to amalgamate the conduct of multiple representatives and senior officers of the corporation in order to assess criminal liability. In particular, where the acts or omissions of two or more representatives would be sufficient to make a single representative a party to an offence, s. 22.1 permits the court to rely on those acts or omissions as a basis for an offence. In the result, while the individual conduct of a representative may not be “negligent” in and of itself, the combination of the conduct of two or more in one person may be
“negligent” and may expose the corporation to liability. The same discretion to amalgamate the conduct of representatives applies to “senior officers” in determining whether their conduct was a marked departure from the standard of care in preventing the representative from becoming a party to the offence.

Note that several provincial and federal regulatory offences create strict liability offence and absolute liability offences.

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

No. The police can charge and convict the corporation without charging the individual offender, i.e. the “representative” of the corporation for the purpose of determining criminal liability of the corporation.

Section 21 of the Criminal Code makes it clear that when a corporation commits a criminal offence, its directors, officers or employees can – depending on their role in the commission of the alleged offence and their knowledge of the same – be potentially charged. Section 21 sets out a broad definition of who can be found to be a “party” to a criminal offence. Section 21 states:

21(1) Everyone is a party to an offence who
(a) actually commits it;
(b) does or omits to do anything for the purpose of aiding any person to commit it; or
(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Therefore, when a corporation commits an offence under the Criminal Code, criminal charges can be laid against the corporation and against the directors, officers and employees who knowingly carry out the allegedly criminal acts, or who do or omit to do anything for the purpose of aiding any person to commit it or who abets a person in committing an offence. Such liability may come as a surprise to those more familiar with the civil law. In a civil context, it is well accepted that a wrong committed by the corporation -- be it a breach of contract by the corporation or the commission of a tort -- cannot be visited upon the officers and directors of the corporation merely because the officer or director was the person who authorized or carried out the breach or the tort. However, such is clearly not the case with criminal liability. Officers and directors of a corporation can be held personally liable for the criminal acts of the corporation, either as a principal or as a party to the offence.

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

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3 “Abetting” means intentionally encouraging another to commit an offence
The company generally has the same defences available to individuals.

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?

Merely prohibiting directors, managers or employees from committing criminal acts will unlikely be effective in shielding the corporation from criminal liability. Arguably, such a prohibition would mean that any such acts committed by the directing minds would not be within their delegated authority. However, the Supreme Court of Canada has clearly rejected such an argument. In Canadian Dredge & Dock Co. Ltd. v. R. (1985), 19 C.C.C. (3d) 1 (S.C.C.), Justice Estey stated:

*It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his authority unless expressly ordered to do the act in question.* Such a condition would reduce the rule to virtually nothing. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition. [emphasis added]

Only in limited cases where the directing mind or representative is acting in fraud of the corporation or where the acts are directed at the destruction of the corporation or for the sole benefit of the directing mind can the corporation avoid criminal liability based on the culpable and intent of its directing mind.

Note, however, that under s. 22.2 of the Criminal Code (see above), some of the circumstances that can cause the corporation to be liable based on the acts of its senior officers can be avoided by taking all reasonable measures to prevent a representative from becoming a party to a criminal offence, see s. 22.2(c).

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

Generally no.

However, special search warrants are available under the Proceeds of Crime/Money Laundering provisions of the Criminal Code (Part XII.2) which permits the seizure and detention of “proceeds of crime” which is defined as “any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission of a designated offence (i.e. an indictable offence under the Criminal Code), or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

2.11. Can both the individual offender and the company been convicted for the same offence?
Yes see 2.7 above.

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

In most cases, a parent corporation and the officers and directors of the same cannot be held liable for the criminal acts of a subsidiary corporation based merely on the fact of the parent-subsidiary relationship.\(^4\) In particular, where the subsidiary is a bona fide corporation that operates “independently” from its parent, its criminal acts cannot be visited upon its parent or on its parent’s officers and directors.\(^5\) This is because the criminal law recognizes the existence of the “corporate veil” that separates a company and its shareholders as enunciated by the House of Lords in *Salomon v. A. Saloman & Company Limited*, [1897] A.C. 22 (H.L.). There, Lord McNaughton famously established the first principle of corporate law that a duly incorporated company is a legal entity, separate and distinct from its shareholders. As Lord McNaughton stated:

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

While the parent corporation and its officers and directors cannot generally be held criminally liable for the acts of the subsidiary, such liability may arise where a court chooses to “pierce the corporate veil” in respect to a particular transaction that is alleged to be criminal.\(^6\) When this occurs, the alleged criminal acts of the subsidiary become the acts of parent and the parent is open to criminal prosecution. Corporate veils are, however, generally respected by Canadian courts and rarely pierced. To have the corporate veil pierced, the prosecution would have to satisfy a rigorous two-part test:

1. The subsidiary corporation is merely the alter ego (or “cloak” or “sham” or “puppet” of) the shareholder. Generally, a subsidiary, even a wholly owned subsidiary will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability; and

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\(^4\) A parent corporation could, of course, be held to be a party to a criminal offence committed by the subsidiary under the circumstances set out in s. 21 of the Criminal Code.

\(^5\) Note, however, that to the extent that the officer or director of the parent corporation also serves as the officer and director of the subsidiary and is found to be a “directing mind” of the subsidiary, he or she can be held criminally responsible through the identification doctrine.

\(^6\) Alternatively, if the subsidiary acts as the “agent” of the parent in carrying out the alleged criminal acts, the parent can be held criminally liable. However, liability on agency grounds is generally difficult to establish. The evidence of agency must be “pretty clear – possibly overwhelming” in order to pierce the corporate veil on agency grounds. This is because there is a presumption that a transaction is what it purports to be: *Snook v. London & West Riding Investments Ltd.*, [1967] 2 Q.B. 786 (Eng. C.A.)
2. The corporation was created or is being used for a fraudulent or improper purpose.\(^7\)

Generally speaking, where a subsidiary runs a legitimate and separate business from its parent, the courts are loath to pierce the corporate veil.

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.**

See 1.2 above.

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

See s. 1.2 and s. 2.1 above.

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

See s. 2.8 above.

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

See s. 2.10 above.

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 decision as to whether to proceed with a prosecution is within the discretion of the prosecutor. The prosecution will look at whether there is a reasonable prospect of conviction and whether a prosecution will be in the public interest.

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

This varies from case to case. However, at the point where the company becomes a suspect in a criminal investigation, this fact must be disclosed to the company before any further interviews or document requests can be made of the business. This is because certain constitutional protections, i.e. right to remain silent come into effect at

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that time and failure to disclose may prevent the police from proceeding with a prosecution.

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?**

There is no obligation on a corporation or indeed any member of the public to co-operate with or assist the police in the investigation of a criminal offence. The corporation can decline to participate in an interview with the police and can refuse to voluntarily turn over corporate documents or records. Generally speaking, absent a search warrant, the police are not entitled to enter upon the private premises of a corporation and it is open to the corporation to deny the police entry without a search warrant.

It is also open to the corporation to advise its employees of a police request for assistance in the investigation of a criminal offence and the decision of the corporation to not co-operate. The corporation may also remind employees of the importance of maintaining the confidentiality of corporate information. What the corporation cannot do, however, is to punish or threaten to punish an employee who chooses to co-operate with police. To do so may give rise to liability under the new s. 425.1 of the Criminal Code or to liability for obstruction of justice.

However, while there is no obligation to co-operate with or assist the police in an investigation, the corporation must be careful to not obstruct an investigation. For example, knowingly destroying records that are relevant to a criminal investigation may be found to be obstruction. Deliberately providing the police with false or misleading information relating to the alleged offence may similarly be found to be obstruction.

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

This varies depending on the investigation.

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?**

If the directors, managers or employees are charged along with the corporation, they have a right to remain silent and cannot be compelled to testify. However, if they have not been charged and are mere witnesses, they can be subpoenaed and required to testify at the trial of the corporation.
The prosecutor may, in certain circumstances, seek the co-operation of directors, manager or employees in prosecuting the company in exchange for dropping charges against the directors, manager or employee.

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

This is at the discretion of the prosecutor.

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

Not significantly.

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?**

The prosecutor may make a recommendation as to the appropriate sentence to the trial judge. However, sentencing is at the discretion of the trial judge. Please see factors in s. 1.2 that are relevant to exercise of discretion in relation to sentencing.

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

A company can be a “suspect” in a criminal investigation. When it attains this status depends on the stage of the investigation and the evidence gathered. As a suspect, the company generally enjoys the same constitutional protections as individuals.

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

Varies.

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

Generally, the same rights as the individual.

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

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

Not significantly.

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?

Yes, see above s. 2.7.

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

See above s. 2.7.

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?

This is possible. See, for example, s. 2.3 and 2.4 above. See also s. 2.6 above and offences of strict liability and negligence offences

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

Use due diligence in carrying out responsibilities as director.

Do not ignore signs that problems exist – recklessness and willful blindness are sufficient to satisfy the mens rea of several criminal offenses including fraud.

Employ competent officers and managers who are capable of complying with legal requirements.

Create clear compliance protocols and programs for officers and managers. When irregular transactions are detected, investigate promptly. Set up an audit committee if necessary.

Encourage “whistleblowing”, i.e. have employees report conduct which they believe to be suspicious. Note that the amendments to the Criminal Code in 2004 brought in protections for so-called “whistle-blowers” in an organization. In particular, “whistle-blowers” are protected by making it a criminal offence punishable by up to five years imprisonment if an employer or person action on behalf of an employer takes action to retaliate against “whistleblowers” or to prevent them from providing information to the
police relating to an offence that the employee believes has been or is being committed by the employer or an officer or employee of the employer or, in the case of a corporation, by its directors.
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.

It is certainly possible for a company to be prosecuted in the Cayman Islands in a similar way as an individual offender. This is because a charge or indictment will lie against any person who commits an offence or assists in the commission of an offence. According to the Interpretation Law (1995 Revision) "person" (unless inconsistent or otherwise provided) in any law means any corporation, either aggregate or sole, and any club, society, association, or other body, of one or more persons. This is in line with most common law jurisdictions. A company is, for most purposes, a legal person just as much as an individual. Clearly a company cannot be assaulted or murdered as an individual can, but in relation to offences against property, "person" and "owner" include corporations of all kinds and any other association of persons capable of owning property: Penal Code (2006 Revision).

Inconsistency or contrary intention, however, will preclude criminal liability of a company. It is important to consider distinctly whether a company may be convicted of an offence from, if it can be so convicted, how it may be convicted. In short, a company's liability will depend on whether the offence is one for which there is vicarious liability, or, if there is not, whether the natural person who performed the actus reus with the requisite mens rea was part of the controlling mind of the company. The well-documented principles of the common law govern this area.
1.2. Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.

Assuming that the offence is one for which a company can be held criminally liable, then the normal sanctions available under criminal law upon conviction can be imposed on companies, i.e. imprisonment and other restrictions on or deprivations of liberty, and financial penalties. For example, the director of a company convicted of manslaughter could be sentenced to a term of imprisonment.

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.

There are a number of non-criminal sanctions available to the courts in the Cayman Islands which can be imposed on companies, their directors or officers, upon certain failures or omissions, as set out for example in the Companies Law (2007 Revision). These largely take the form of financial penalties but do include the winding-up of the company and the possible prosecution of its directors or officers.

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.

See 1.2 above. The minimum and maximum penalties for a criminal offence would be the same for a company as for a natural person convicted of the offence. Non-criminal sanctions can take the form of financial penalties which are incurred at a fixed amount on a daily basis during the lifetime of the particular infraction.

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

The legal requirements for the imposition of a criminal sanction would be the same for a company as for a natural person, i.e. a criminal conviction, that is to say one in which the particular tribunal has found the charges proven on the evidence to the extent that it is sure of the defendant's guilt. For certain non-criminal sanctions, e.g. where, on the winding-up of a company, the court orders a delinquent director to repay misapplied monies, there would still be an examination of the conduct of that director by the court, before he were ordered to repay: section 169 Companies Law (2007 Revision).
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.**

See 1.1 above. Certain statutory provisions and the principles of the common law mean that the prosecution of a company is, effectively, confined to certain offences. For example, a company may not be prosecuted for bigamy, as it is not a natural person and cannot commit the offence vicariously or otherwise. For conviction for other offences, a company may be held liable for the acts or intentions, etc. of any person who represents its "directing mind and will".

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

The acts or omissions of individuals are attributed to a company according to both the company's primary rules of attribution found normally in its constitution, and according to the normal rules of agency and of vicarious liability. The question will be a factual one in each individual case. It would be possible for the violation of internal company rules or regulations, but not statutory rules or regulations, to result in criminal liability of the company, so long as there is an actus reus and the requisite mens rea for the offence.

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

The mens rea of the company can be established by reference to the acts and state of mind of those directors, managers and officers who, on the particular facts of the case, represent the "directing mind and will" of the company.

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.**

Strict liability comes when there is no requirement of mens rea. There are some offences in the Cayman Islands which are offences of strict liability. Please see relevant legislation.

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

It is not necessary to convict an individual offender in order to prosecute a company, though both may be prosecuted at the same time and for the same offence. It is usual, therefore, for the individual to be at least identified. In addition, it is possible for corporate liability to arise where the actus reus is proven to have been committed by an employee of the corporation who is not part of the "directing mind or will" but where the mens rea is within the "directing mind or will".
2.8. What additional defenses (except of lack of offence) can a company raise?

There are no special defences in criminal law open to a company that would not be open to a natural person.

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?

A company would avoid punishment if the usual common law rules of agency and vicarious liability were found not to apply.

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

A company would avoid punishment if the usual common law rules of agency and vicarious liability were found not to apply.

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

See 2.7 above.

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

See the normal rules of the "directing mind or will" principle at common law.

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.

See 1.2 above.

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

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

Outside of criminal offences and where there are non-criminal sanctions, they are available only in certain specific circumstances, e.g. where a delinquent director may be compelled to pay back misapplied funds upon the winding-up of the company. In cases such as this, there would be no "offence" as such.
3.4. Can such sanctions been executed during the investigative phase of a criminal proceedings?

It is possible for, to use the example above, the delinquent director to be ordered to repay misapplied funds, notwithstanding the fact that he could be also criminally liable for his act or omission. As such, the sanctions could be executed during the investigative phase of criminal proceedings.

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?

There is prosecutorial discretion in relation to all alleged criminal offences. The decision whether to prosecute is based on the satisfaction of two tests: (i) whether there is sufficient evidence, or a prima facie case, and (ii) whether it is in the public interest to proceed to prosecute.

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

The point at which a person 'has the status of a suspect or similar status' will depend on the form the particular investigation takes. For example, if a company's offices are searched but no-one is arrested for some months after, it would be argued that 'suspect' status came at the time of the search, rather than at the time of arrest.

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?

A company does not stand in exactly the same position as a natural person, to the extent that it (or its directors, managers or officers) can be investigated for and charged with specifically corporate offences. As such, though the right to remain silent would remain for an individual director, etc. arrested and charged for a criminal offence - even a corporate criminal offence – there are certain circumstances where an investigating authority has powers to enter offices, examine documents, etc, and where to refuse would be a criminal offence for either the company and/or its directors, etc. See, for example, the powers of the Cayman Islands Monetary Authority to have access to certain documents and information, pursuant to the Monetary Authority Law (2004 Revision), and under the Banks and Trust Companies Law (2007 Revision).
4.4. When will a company be informed that it is or can become prosecuted?

The time at which a company is informed that it is to be prosecuted is a matter of discretion for the investigative authorities and will depend upon the specific facts of each case.

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?

The directors, managers or employees of a company are *prima facie* competent and compellable witnesses for the prosecution at the trial of a company. If they too were suspects in the same proceedings, the normal common law rules would apply to whether they gave evidence.

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

See 2.7 above.

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

No. See 2.7 above.

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?

The sentence or penalty to be imposed on a convicted company or director, etc. is a matter only for the court and not the prosecution.

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

See 4.2 above.

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

See 4.4 above.
5.4. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

See 4.3 above.

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

See 4.6 above.

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

See 4.7 above.

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?

Yes, if the directors or managers held criminally liable are found to be part of the "directing mind or will" of the company.

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

The directors or managers would be liable for the acts committed by others if they themselves were part of the "directing mind or will".

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?

No. These are just some examples of factors which may incur liability on the part of the director or manager. The facts of each case will be specific as to what lapse or omission, if any, gives rise to liability.

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

The criminal liability of directors of a company can be minimized by ensuring clear and effective chains of command and rigorously enforced safety standards.
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.

No. It is not possible to prosecute a company in matters regarding criminal liability under Colombian law.

However, the Colombian Constitutional Court has stated in several rulings, such as decisions C-674 of 1998 and C-320 of 1998, that the criminal liability of companies is not prohibited under the Colombian Constitution. On the contrary, the Constitutional Court has made clear that corporations or companies may be prosecuted for certain crimes such as the ones which attempt against the environment or the general interest of the community, amongst others, provided that (i) a law has foreseen said type of liability, and (ii) Congress enacts a law which regulates the specific procedure to prosecute companies.

The Court has argued that under Colombian law, it is not possible to prosecute corporations as the Criminal Code does not foresee such type of responsibility. In light of this, according to the Court, under the principle nullum criminem, nullum poena, sine lege praevia lege poenali, it is not possible to determine fair sanctions to be imposed unless the law expressly regulates the criminal act. As a result, corporations and/or companies may not be prosecuted under Colombia laws.

Notwithstanding the above, according to article 107 of Law 906 of 2004, the Criminal Procedural Code, (i) a natural person or a company may be liable for damages caused by others, provided: (a) the damages are caused by persons who depend directly upon the natural person or the company, or (b) the damages are caused by persons over whom the natural person or the company have the duty of vigilance and control. In
addition, the natural person or the company under this article may be considered as a liable third party to be notified to appear in the “reparation hearing”, as per the victim’s petition request or his own attorney petition, in which case the court must determine the damages to be paid by the liable third party.

The Criminal Procedural Code before Law 906 of 2004, Law 600 of 2000, in its Article 69, which remains enforceable in the prosecution of crimes and felonies performed before the issuance of Law 906, 2004, also regulated third party liability. The incorporation of liable third parties to the process may be requested through a petition to “incorporate a civil party” filed within the same criminal process by the victim or victims. After the petition to include the liable third party within a process is notified, the third party is considered as a party with all the rights and obligations granted by (a) due process principle, (b) the Constitution, (c) the Criminal Procedural Code, (d) the Criminal Code, and (e) applicable rules.

Finally, it is important to note that under Law 906 of 2004, (i) preventive measures over the assets of liable third parties may be requested by victims once the decision to prosecute filed by the prosecutor is definitive, and (ii) per the request of the victims the courts must decide if the liable third party must or must not pay damages to the victim or victims, once the defendant is found guilty in the final ruling.

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

Apart from the liability applicable to liable third parties as explained above, and as a result of the influence of Spanish law in Colombian legal tradition, Law 906, 2004, establishes certain sanctions which may have an effect on companies as a result of a criminal procedure. As such, Article 91 of the Code of Criminal Procedure states as follows:

“Article 91. Suspension and closing of the organization (company). At any time before the indictment, by the petition of the prosecutor, the judge must order the competent authority (...) to suspend the activities of a company or order the temporary closing of commercial establishments owned by individuals or companies, when it is reasonable to believe they have dedicated, totally or partially, to undertake criminal activities.

The measures described above will be permanent, when certainty beyond any reasonable doubt exists ...”

Even though Law 906 of 2004 established the aforementioned sanction, the Colombian Constitutional Court has stated that this provision may not be applied, as it is not clear from the existing criminal regulations applicable which are the specific procedural rules applicable to corporations. Furthermore, the sanctions which may be imposed to corporations in each specific crime are not clear, thus its application would violate the principle *nullum crimen, nullum poena praevia.*
In addition, Article 16 of the Code of Commerce, states the following:

“Every time a sentence regarding crimes against ownership rights, authorities (public officer, notary public, consul), the national economy, industry and commerce, smuggling, illegal or unfair trade, usurpation of rights of industrial ownership and issuance of checks with insufficient funds or related to non existing accounts, a sanction prohibiting the exercise of commerce during two to ten years will be imposed as an accessory sanction”.

Nonetheless, as it was previously pointed out, this article may not be applied as no specific criminal procedure regarding these sanctions has been implemented in Colombia, and Article 16 of the Code of Commerce does not clarify the procedure to follow in order to impose the accessory sanctions.

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.

According to Decree 3100 of 1997, the Superintendence of Companies must supervise and control certain companies in Colombia and impose administrative sanctions over said companies, when necessary. The Superintendence may (i) take the control over, or intervene in the control of, the company, (ii) order its dissolution, which may be considered as its organizational death penalty, and (iii) impose fines if, for example, the company does not register a change of control over the company before the competent authority.

Further, throughout the Code of Commerce several articles establish sanctions that may be imposed to corporations or companies:

(i) Article 37 establishes the possibility of the Superintendence of Industry and Commerce (SIC) to impose fines against persons who develop commercial activities without being registered before the mercantile register. The same sanction may be imposed in the case of the lack of registration of new commercial establishments. The SIC may also impose sanctions to companies who violate the applicable rules of Law 256 of 1996 regarding unfair trade or cutthroat competition (Title V. Article 33).

(ii) Article 58 establishes the possibility of imposing fines to companies which infringe the prohibitions of article 57 of the Code of Commerce, regarding restrictions to companies in relation to information registered or provided in balance sheets. Such fines may be imposed by the Chamber of Commerce, the Superintendence of Finance, or the Superintendence of Companies, but their imposition will not exclude criminal liability of the persons involved. According to said provision, in the event it is impossible to establish the person responsible of the infraction, the person who has the
ownership over the balance sheets, the accountant, and the fiscal auditor shall be considered to be joint and several debtors of the fines imposed.

(iii) Article 62 of the Code of Commerce establishes that the fiscal auditor, the accountant or the tenant of the balance sheets who incur in the violation of the obligation to maintain the confidentiality over the same, will be sanctioned, according to the Criminal Code, for the crime of violation of confidentiality and correspondence, albeit the applicable disciplinary sanctions.

(iv) According to article 87 of the Code of Commerce, the SIC may impose fines or order the suspension or closing of the company to the competent Chamber of Commerce.

(v) Other acts which may be punished by competent authorities are (a) the infraction of the prohibition for one person to occupy more than five positions in the board of directors of different companies, (b) the fraud or falsification of information, (c) the misdirection of working capital of a foreign company in investments different to the social purpose of the company by its subsidiary, and others.

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.

No sanctions may be imposed on companies derived from criminal liability, due to the arguments stated above. Only administrative sanctions may be imposed, as those described in 1.2 and 1.3.

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

Not regulated.

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8 Article 202 of the Code of Commerce.
9 Articles 297, 298, 319, 335, 390, and 395, of the Code of Commerce (sanctions and fines due to fraud and falsification of documents).
10 Article 491 of the Code of Commerce. “When a foreign company does not invest the assigned capital in activities intended to perform the social purpose of its subsidiary, the competent superintendence shall impose fines (…) to the legal representative in order to oblige him to use the moneys in a proper manner in order to accomplish its purpose. Notwithstanding the foregoing, the legal representative may be subject to other sanctions under this title.”
11 Articles 201, 212 (criminal liability of the fiscal auditor), 216 (sanctions against the fiscal auditor), 217 (imposition of sanctions), 221 (dissolution or closing of the company ordered by the Superintendence of Companies or a court), 404 (restriction to the managers of the company to transfer or purchase its shares), 414 (obliged transfer of shares), and 458 (restriction to perform mercantile acts if the net patrimony of the company decreases below 50% of outstanding capital), of the Code of Commerce.
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.

Not regulated.

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

Not regulated.

2.5 How will mens rea of the company be established?

Colombian law does not regulate this issue. However, if sanctions against companies were regulated by Congress, it is deemed that some crimes (such as those who affect the environment) could be judged in application of the strict liability criteria, following current tendencies by western countries towards the prevention of damages derived from risk related activities.

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.

Colombian law does not regulate sanctions against companies in criminal procedures.

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

Criminal liability of companies does not exist under the Criminal Code or under the Code of Criminal Procedure.

However, if the Congress were to develop in a legal manner the concept of criminal liability of companies, it would not be necessary to identify or convict the individual offender in order to punish the company, unless it were absolutely necessary to establish the liability of the company or its participation in the crime or felony.

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

Not regulated.

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?
It depends on the type of liability regulated by law for each conduct. In certain activities, which represent major risks for society, the companies may be liable due to strict liability, as explained above in 2.5. However, strict criminal liability is forbidden under criminal procedural Colombian laws and applicable rules.

Nonetheless, strict civil liability is applicable in criminal cases, in the precise cases regulated by law. However, it is of common use that the companies and persons demonstrate that they have performed all the activities and taken all the measures required to minimize and/or avoid possible harm to third parties.

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

No. Nonetheless, when a company is called into a proceeding as a liable third party, the courts may impose protective measures against it, such as seizure and freezing of bank accounts, or garnishments over its shares or other assets.

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

If Congress legislated on criminal liability procedures to prosecute companies, it would be possible to convict both the company and the individual offender. However, we believe said alternative is not feasible, due to a very strong position of Colombian scholars and politicians who believe that the simultaneous prosecution and imposition of sanctions against (i) companies, and (ii) individual offenders (who are owners or members of the companies), would constitute an infraction of the *non bis in idem* principle.

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

There are no specific rulings on this issue under Colombian law.

However, on 2007, the National General Prosecutor, initiated criminal actions against high executives of Chiquita Brands International and its Colombian subsidiary Banadex, for their support and financing of paramilitary illegal armed forces, who intended to exterminate trade union leaders in Colombia. The prosecution is currently being held by the National General Prosecutor.

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.
As stated above in 1.3, fines and other administrative sanctions may be imposed upon companies.

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

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

Not regulated.

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

Please read 1.3 above.

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?

The Colombian Code of Criminal Procedure grants the prosecution the option of desisting from prosecuting in certain cases. Thus, if Congress legislates on the sanctions and procedure applicable to companies said option would be applicable in criminal liability procedures where companies are involved.

Article 114, numeral 2; and article 324 of the Code of Criminal Procedure, regulate the causes which allow the prosecutor to decline from exercising the legal action against the offender.

The prosecutor may not desist from the prosecution, when the investigated facts are related to infractions against international humanitarian law, crimes against humanity, genocide, drug trafficking and terrorism.

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

Not regulated.

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?

Yes, according to the due process principle regulated under article 29 of the Constitution.
4.4. When will a company be informed that it is or can become prosecuted?

Not regulated.

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?

Not explicitly regulated. However, the answer is yes, taking into account the due process principle regulated under article 29 of the Constitution.

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

Not regulated.

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

Colombian Code of Criminal Procedure does not regulate procedural rules applicable to companies.

5. Procedural Issues on Other Criminal Sanctions

5.1. Does the prosecution have discretion to impose or not a sanction on a company?

This issue is not regulated under Colombian law. However, Colombia has adopted since 2004 a Code of Criminal Procedure which allows the prosecution to waive the right to initiate the criminal action based on different considerations. It is likely that the option to withdraw the action would be applicable to companies in the event the criminal procedures applicable to companies were created, as explained in 4.1 above.

5.2 Which aspects will the prosecution or court take into consideration?

Read answer 4.1 above.

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

Not regulated.

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

Not regulated.
5.5. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

Not regulated.

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

Not regulated.

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

Not regulated.

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?

Yes. In certain cases it is possible to prosecute directors or managers when a criminal conduct is committed due to negligence or lack of performance of their duties.

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

Not regulated.

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?

No. This circumstance only applies for civil liability, unless criminal law states otherwise, which is not the case under Colombian law.
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.

According to the Law on Criminal Liability of Legal Entities (Official Gazette of the Republic of Croatia No. 151/03) a legal entity will be punished for the crime of its responsible person if by the said crime some duty of the legal entity has been breached or if the legal entity realized or should have realized illegal material gains by the commitment of such crime.

Therefore, a company can be prosecuted only under the above conditions, and then in principle in the same procedure where the responsible person is prosecuted.

In such a procedure the legal entity is represented by a special representative appointed according to a special procedure set by the above law.

A legal entity found guilty for a crime is punished by monetary fine set in accordance with the maximum prison sentence that can be pronounced for a natural person (for ex. if maximum prison sentence can be pronounced for more than 15 years, a company which committed the same crime may be punished by a monetary fine ranging from HRK 20.000,00 to HRK 5.000.000,00 which is approx. EUR 2.800,00 to EUR 685.000,00).
Apart from the monetary fine legal entity may be abolished if it was established with the intention to commit crimes or its activity was predominantly the committing the crimes.

Legal entity criminal offender may receive a conditional sentence, i.e. a monetary fine may be set together with the probation period during which the said legal entity must not commit a new crime. If no new crime was committed, the fine will not be executed. This is possible only for crimes where the maximum prison sentence for natural person as offenders is set not higher than 3 years provided that the monetary fine determined by the court is not higher than HRK 50,000,00 (approx EUR 6,850,00).

Also various security measures may be set against a legal entity as a crime offender, which are: a ban to perform certain activities or businesses, a ban to receive necessary approvals, confirmations, concessions, incentives, a ban to conduct the business with official entities, a confiscation of objects.

Material gains realized through committing the crime will be confiscated. The judgment may be published if the court deems it justified for the public to be informed of it.

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

All types of sanctions prescribed by the criminal law have been described above under 1.1.

The legal prerequisites for imposing of security measures:

− a ban to perform certain activities or businesses: may be set in respect of one or more activities or businesses through which the crime was committed, for the duration from 1 to 3 years. This measure may be imposed if further performance of a business or activity in question would be dangerous for public safety, property or economy, or if the legal entity is a repeated offender of same or similar crime.

− a ban to receive necessary approvals, confirmations, concessions, incentives: may be set for the duration from 1 to 3 years if there is a danger that such approvals, confirmations, concessions, incentives would encourage a new crime.

− a ban to conduct the business with official entities: may be set for the duration from 1 to 3 years if there is a danger that such business would encourage a new crime.

− a confiscation of objects: may be set if the object was intended to be used or was used to commit a crime or is a result of a crime or there is a danger that it would be used to commit a new crime or such confiscation is necessary for reasons of general safety or moral.
Sanctions similar to monetary fines prescribed by the criminal law may be imposed on companies breaching various laws and regulations (misdemeanors).

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.

Sanctions similar to monetary fines prescribed by the criminal law may be imposed on companies breaching various laws and regulations (misdemeanors). Such misdemeanors are prescribed by almost every Croatian law and regulation and as their description would require extensive review and summarization of Croatian law (which we believe is not the purpose of this questionnaire) we would refrain from it at this point.

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.

Types of sanctions have been described above under 1.1 and 1.2.

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

Please see above under 2.1.

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.

As stated above, a legal entity will be punished for the crime of its responsible person if by the said crime some duty of the legal entity has been breached or if the legal entity realized or should have realized illegal material gains by the commitment of such crime.

Responsible person is defined as any natural person managing the affairs of the legal entity or to which the management of affairs from the field of operation of the legal entity is entrusted.

2.4. How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions been attributed if the individual violated only internal (but not statutory) rules or regulations?
As we have already described the acts or omissions will be attributed to a company if conditions from 2.3 above have been met.

The breach of internal rules may trigger a responsibility for a crime only if such breach falls into the definition of a specific crime as set by the criminal law.

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

The responsibility of a legal person is based on the responsibility of its responsible person, i.e. mens rea of the company will be established if such mens rea exists for the responsible person.

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.**

Mens rea will not be required in some cases of various breaches of laws and regulations prescribed as misdemeanors.

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

It is necessary to identify the individual offender in order to prosecute the company. But in some cases it will not be necessary to convict him (for example if the individual offender lacks the mental capacity to stand trial).

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

A company can raise all defenses available to a natural person, such as statute of limitation, lack of mens rea etc. Also, the lack of conditions described above under 2.3 may be argued.

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?**

In principle these facts can be used to obtain a lesser or conditional sentence.

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

For certain crimes listed by the Law on the Office on Prevention of Organized Crime such as abuse in bankruptcy procedure, concealment of illegal gains (money
laundering) etc. preliminary measures (seizure of objects, profit or property) may be imposed if there is a reasonable doubt that they are directly or indirectly realized through the crime, their value is higher than HRK 100,000,00 (approx. EUR 13,700,00), and there is a possibility that the seizure of the same will not be possible in later stage of the proceedings.

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

Yes.

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

No

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.

N/A

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

N/A

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

N/A

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

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?
The prosecution has discretion to prosecute if the legal entity has no property or if the property is insignificant and there is not enough means to cover procedure costs or if bankruptcy is initiated. The discretion exists only if the punishment set for the crime in question for the natural person is a monetary fine or imprisonment up to 3 years and public order does not require the initiation of criminal proceedings. If this is the case the prosecutor, the wronged party and a perpetrator have to reach an agreement and the perpetrator has to undertake appropriate actions to restitute the consequences of its crime. If the action is undertaken as agreed the criminal charges will be dropped.

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

A company has the status of a suspect as soon as the police or other authorities have reason to suspect it of committing a crime.

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?

Yes

4.3.1. Does a company have the right to refuse production of documents?

No

4.3.2. Does a company have the right to deny access to company site without search warrant?

In principle yes.

4.3.3. Does a company have the right, to refuse testimony?

The company cannot be a witness.

4.3.4. Does a company have the right to refuse to answer questions or to any other suspects rights?

The company (its responsible person) can refuse to answer questions if they are suspected of a crime.

4.3.5. Who exerts these rights if investigations are made against the company’s directors?

A special representative appointed according to a special procedure set by the above law.
4.4. **When will a company be informed that it is or can become prosecuted?**

The company will be informed that it is suspected of a crime as soon as the first action by the police or other competitive authority is undertaken to investigate the crime.

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?**

In general yes.

4.5.1. **Does this also apply if the directors, managers or employees are suspects themselves?**

No, they will be heard as suspects.

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

In principle yes.

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?**

No.

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

Yes the company has the status of a suspect after the charges were brought.

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

The company will receive an order to pay the fine in so called shortened procedure, or will receive summons with written charges.
5.4. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

None in principle.

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

In principle a join proceedings will be held.

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

No.

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?

In principle the directors or managers will not be held criminally liable for actions of other co-directors, unless omitting of supervision or similar is prescribed as a legal description of another crime.

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

Please see above under 6.1.

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?

No.

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

The only recommendation to provide is to advise organization and definition of supervision of directors, and to prescribe internal rules in which the directors will be obliged to work in close cooperation with the appropriate internal services of the company (such as legal department, financial and accounting department) before deciding, and to oblige them to obtain consent of the assembly (or Supervisory Board) for important matters.
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.

Under Cyprus Law, a company can be prosecuted in a similar way as an individual offender. The Interpretation Law Cap. 1, defines a “person” to include any company, partnership, association, society, institution or body of persons, corporate or unincorporated. Consequently, whenever any statute makes it an offence for a “person” to do or omit to do something, that offence can be committed by a corporation as well, unless a contrary intention is apparent in the statute.

The general framework of the Cyprus Criminal Law

It may be pertinent, to briefly describe the key features of Cyprus criminal law and procedure at this stage:

Cyprus criminal law is based on a large extent on the general principles and main offences prescribed under English Common Law. The core of the Cyprus criminal law is to be found in the Criminal Code, Cap 154 (hereinafter referred to as the “Code”). The Code represents a codified version of all major offences and criminal responsibility existing under Common Law. The procedural aspect of criminal law is regulated by the Criminal Procedure Law, Cap 155, which also bears a number of similarities to established Common Law principles.

The interpretation of the Code and the Criminal Procedure Law is greatly assisted by the precedents set by English case law or principles in England (Court of Justice Law
Although these precedents and principles do not constitute binding authority (Mouzouris v Xylophagou Plantations Ltd (1977) 1 CLR) under Cyprus Law, they nevertheless provide useful guidance on numerous points of law, and it is rarely that the Cyprus Supreme Court will depart from such English precedents (Attorney General v Tsioli (1991) 2 CLR 194.).

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

Under the Code, the same types of sanctions that apply for individuals also apply to Companies. Perhaps the only exception that could be made to the above is for those offences that apply, in particular, to the directors of the company. Offenses of this nature would include theft of the company’s property or falsification of the books or accounts, or circulation of false written statements with intend to deceive any member, shareholder or creditor of the company under sections 269, 311, 312 of the Code, respectively.

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.**

**Criminal liability for non-payment of tax**

Pursuant to the Assessment and Collection of Taxes Law, where a company has failed to pay the tax it was supposed to pay, and this was due to an unjustified refusal, failure or delay of its manager or other person having responsibility to carry out or perform the duties required to be done under this Law on behalf of the company, such manager or other person, in case of conviction, is subject to:

(a) a monetary fine up to 20% of the tax due; and

(b) in the case where the amount of tax due over is £1,000, in addition to the penalty under (a) above, to imprisonment not exceeding 2 years or both the monetary fine and the imprisonment.

**Criminal Liability under the Cypriot Securities and Stock Exchange Law**

Pursuant to section 190 of the Cypriot Securities and Stock Exchange Law, criminal liability could be imposed on the Board of Directors, the Secretary and auditors of a company for any misleading information included in the prospectus of the company.
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 Code prescribes the maximum penalty which is to be imposed for a certain offence. These maximum sentences are set by the legislative authority and, in delivering justice; the courts must follow what is outlined by legislature. Nevertheless, the courts do have absolute discretion, both with regard to the choice of punishment and its extent.

The types of sanctions that could be imposed on a company by a court, as set out in the Code, are a fine or the payment of compensation.

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

A fine is usually viewed as a punishment alternative to imprisonment, especially for serious crimes where, as in the case of companies, imprisonment cannot be imposed. The level of the fine which is to be imposed is usually stated in the relevant section of the Code. If no amount is mentioned, the level of fine will be determined by the court and must not be excessive (Criminal Code, s.31).

The payment of compensation avoids the institution of further proceedings for the recovery of money or damages (Court of Justice Law 1960, s.20(2)). These payments are different to those adjudicated in civil proceedings, as they may be enforced under the provisions of Part IV of the Code and recovered as penalties.

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.

As already explained in section 1.1 above, a company cannot be guilty of any criminal offences which, by their very nature, can only be committed by natural persons (such as bigamy), nor those which cannot be committed vicariously (such as perjury) (D.P.P. v Kent and Sussex Contractors Ltd [1944] K.B. 146). A company cannot be indicted for a crime where the only punishment is death or imprisonment (R v I.C.R. Haulage Ltd, [1944] K.B.551, C.A.).

Apart from these exceptions, a company may be guilty both of statutory (Brentnall and Cleland Ltd v. London County Council [1945] 2 All E.R. 552) and common law offences (R v I.C.R. Haulage Ltd, [1944] K.B.551, C.A.), even though the latter involve mens rea (Halsbury’s Laws of England, 3rd Edition, volume 6 at paragraph 853).
2.4. **How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions been attributed if the individual violated only internal (but not statutory) rules or regulations?**

If any act or omission, relevant to the internal rules and regulations of a company, has all the elements of a criminal offence that could arise from any other piece of legislation, then that act or omission could give rise to that particular criminal offence.

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

Under the Code, the nature of the mental element (*mens rea*) depends on the definition of the particular crime in question. One well-defined proposition is that “a person intends to cause a result if he acts with the purpose of doing so” [Smith and Hogan, Criminal Law (9th Ed, 1999) at p.54].

All the principles which have been established by the various cases on this issue do not provide a clear set of rules in determining the existence of intention. The authorities may sometimes take a narrow view and other times may interpret the matter in a more flexible manner. In establishing the requisite *mens rea* in cases where the offense requires proof of intention, it must be asked whether intention bears the original narrow meaning or the broader meaning attributed to it thereafter.

Notably, the same analysis as to how *mens rea* would be established, would apply for companies as well as individuals.

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.**

Whether an offence could be considered as a strict liability offence or an offence for which *mens rea* is required, could be inferred from the wording of the particular offence. Case law could also provide some guidance on that matter.

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

In principle, there is no need to identify and/or convict the individual offender in order to convict the company (*Dias United Publishing Company Ltd v the Police* (1982) Criminal Appeal No. 4250).

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

The particular offence charged in each case would determine the possible defenses that could be raised. Indicatively, some possible defenses could be the following:
Mistake

It is established by the “landmark decision” in Director of Public Prosecution v Morgan [1976] AC182, that mistake is a defense which prevents the defendant from having the mens rea, required by the law for the crime which he is charged for. Where the law requires intention or recklessness with respect to some element in the actus reus, a mistake (whether reasonable or not) which precludes both states of mind, will excuse the defendant from charges (Caldwell [1981] 1 All ER 961). Where the law requires only negligence, then only a reasonable mistake can afford a defense.

Impossibility

Where the law imposes a duty to act, it has sometimes been held that, the fact that it was impossible for the defendant, through no fault of his own, to carry out the aforementioned act, is a defense. When impossibility might be available as a defense, it will presumably fail if the impossibility has been brought about by the defendant’s own fault. The defense would also seem to be confined to cases where the law imposes a duty to act, and not to cases of commission where the corresponding defense, if any, is necessity.

Non-compliance with Community law

A defense which has not yet been tested in Cyprus courts, but which may be presented in the future is that the provision under which the company is charged is invalid, because it conflicts with the law of the European Community.

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?

In each case the different elements of the offence charged need to be proved. The burden of proof is on the prosecution and it must be beyond any reasonable doubt. The fact that a company is sufficiently organized, it has duly instructed its directors, managers or employees and has taken reasonable care to exert control on its directors, managers or employees, could be factors to be taken into account.

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

Pursuant to the Concealment, Investigations, Confiscation of Income and other Criminal Acts Law N.61/96, the following orders could be issued by the court during the investigative phase of criminal proceedings:

- Freezing orders for the preliminary seizure of bank accounts
2.11. Can both the individual offender and the company been convicted for the same offence?

Under the Cyprus criminal law there is no obstacle for both the company and the individual offender to be convicted (*Alithia Ekdotiki Eteria Limited v The Police* (1984) Criminal Appeals Nos. 4484-4485).

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

Under Cyprus Companies Law, the Parent and the subsidiary company are considered to be two distinct legal entities. For this reason, in each case they have to be prosecuted separately. The only case where the parent company could be prosecuted for offences being committed within the subsidiary is when the criminal offence is committed upon instructions given by the parent company.

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.

Apart from criminal liability, several actions of the company could give rise to civil liability. For example:

*Civil liability for misstatement in prospectus*

Section 43(1) of the Companies Law Cap 113 (hereinafter to as “Companies Law”) states the following:

Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damages they may have sustained by reason of any untrue statement included therein:

(a) every person who is a director of the company at the time of the issue of the prospectus;
(b) every person who has authorized himself to be named in the prospectus as a director or as having agreed to become director either immediately or after an interval of time;
(c) every person being a promoter of the company; and
(d) every person who has authorized the issue of the prospectus 
Publication of name by company

Pursuant to section 103 of the Companies Law every company shall

(a) paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried out, in a conspicuous position, in letters easily legible

(b) have its name engraved in legible characters on its seal;

(c) have mentioned in writing in legible characters in all business letters of the company and in all notices and other official publications of the company, the name of the company, the registration number of the company and whether it is a private or a public company.

If the company and every officer of the company does not comply with the above, the company and every officer of the company who is in default shall be liable to a fine not exceeding £25 and if a company does not keep its name painted or affixed in manner so directed, the company and every officer of the company who is in default shall be liable to a default fine.

Liability as regards the reorganization plan of the company

Pursuant to section 201G (1) of the Companies Law, the directors who have signed the reorganization plan and the recommendation report, as well as the experts who signed the evaluation report, shall be liable in respect of every loss resulting from negligent conduct in drawing up those documents.

Penalty for improper use of word “limited”

Under section 374 of the Companies Law, if any person or persons trade or carry on business under any name or title of which “limited”, or any contraction or imitation of that word, is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding £25 for every day upon which that name or title has been used.

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

See 3.1

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

Section 43(2) of the Companies Law exonerates any person for any civil liability for misstatement in prospectus- an offence already explained in question 3.2 above- if he proves that:
(a) having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(b) the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or

(c) after the issue of the prospectus, and before allotment he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason thereof.

In addition to imposing duties and liabilities on directors, the Companies Law grants protective relief to directors in certain cases. Section 383(1) provides that, in any proceedings against a director for negligence, default, breach of duty, or breach of trust, if a director who is or may be liable has, in the opinion of the court, acted honestly and reasonably and that, having regard to all the circumstances of the case, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may either wholly or partly relieve him from his liability on such terms as the court thinks fit.

It should be emphasized that it is not enough for the director to have acted honestly and reasonably; additionally, it must be proved that he ought fairly to be excused.

Furthermore, according to section 197 of the Companies Law, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any officer of the company or any person, whether an officer of the company or not, employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company, shall be void.

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

Such sanctions can only be imposed on the company upon found guilty. As provided by section 378 of the Companies Law, all offences under this Law made punishable solely by any fine may be prosecuted at any time within twelve months from the date on which evidence sufficient in the opinion of the Law Officer to justify the proceedings comes to his knowledge.
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?

In private criminal proceedings the prosecution has the discretion on whether or not to prosecute a company. In public criminal proceedings the discretion lies with the Attorney General who may decide whether or not to prosecute the company, taking into account all the relevant evidence that has been gathered during the investigation stage. In addition, the Attorney General has the discretion to discontinue any public criminal proceedings.

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

The company has the status of a suspect at the investigation stage of the proceedings.

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?

Production and inspection of books where offence suspected

Pursuant to section 376 of the Companies Law, if on an application made to a member of a District Court in Chambers by or on behalf of the Attorney-General, the registrar of companies, the official receiver or a Police Officer above the rank of Inspector, there is shown to be reasonable cause to believe that a person has, while an officer of a company, committed an offence in connection with the management of the company’s affairs and that evidence of the commission of the offence is to be found in any books or papers of or under the control of the company, an order may be made, as follows:

(a) authorizing any person named therein to inspect the said books or papers or any of them for the purpose of investigating and obtaining evidence of the offence; or

(b) requiring the secretary of the company or such other officer thereof as may be named in the order, to produce the said books or papers or any of them to a person named in the order, at a place so named.

The right to remain silent

Although the accused person’s silence may be treated as something which has a bearing on the weight of his evidence, it is not something which can support an inference that the story told by him in court is untrue.
Right to deny access to company site without search warrant

Pursuant to section 29 of the Criminal Procedure, Cap 155, the company has the right to deny access to the company site without a search warrant.

The same considerations that apply for a company, apply for individual directors as well.

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

A company will be informed that it is or can become prosecuted at the investigation stage of the proceedings.

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?

In principle, every witness can be a competent and compellable witness for the prosecution. As an exemption to the general rule, a co-defendant is a competent but not compellable witness for anyone being tried jointly with him. This exemption does not apply where he has ceased to be a co-defendant or was originally jointly indicted with the accused, but is subsequently being tried separately (R v Boal [1964] 3 All E.R.269).

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

There is no restriction in the Criminal Procedure Law, Cap 155 prohibiting joining 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.

There is no difference between the proceedings against a company and the individual offender.

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?

The prosecution has discretion to prosecute a company or not in the case of private criminal proceedings. During that process, the prosecution will have to assess all the information that it has at its disposal. The prosecution has no discretion whether to prosecute a company or not, in the case of public criminal proceedings.
5.2. **Does the company, have the status of a suspect or a similar status and at what stage in proceedings?**

The company could have the status of a suspect; this situation would occur at the investigation stage of the proceedings.

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

The company will be informed that the prosecution is considering imposing sanctions on the company during the investigation stage of the proceedings.

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

The same procedural rights that apply for individual in each case will apply for a company as well.

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

There is no rule prohibiting joint proceedings against the company and the individual offender.

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

There is no difference between the proceedings against a company and those against an individual.

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?**

In principle, individual directors, managers or employees cannot be held liable for offences committed by others.

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

N/A
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?**

In each case the particular elements of the criminal offence charged will need to be proven. The burden of proof will be on the prosecution and will be beyond any reasonable doubt. The fact that another director, manager or employee was not adequately selected, instructed, supervised or the company was not adequately organized could be a factor to be taken into account.

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

The following recommendations would help, in our opinion, to exclude or minimize criminal liability risks of directors of a company:

**Meetings**

- Attend meetings, be prepared to discuss the items on the agenda and participate fully in decision-making
- Provide reports to the board in written form
- If there exists any real or perceived conflict of interest, it must be declared when the issue first arises, and the director should not vote, participate in or influence the decision-making process. Disclosure should be recorded in the meeting minutes.

**Finance**

- Take an interest by reviewing regular financial reports, and approving and monitoring the organization’s annual budget.
- Use a professional, independent accountant to perform an annual audit of the organization’s finances

**Contracts**

- Ensure that all contracts the organization enters into are carefully reviewed by staff or by counsel.

**Policy**

- Ask for a copy of the organization’s policy manual. If the organization does not have a policy manual, develop a work plan for staff to prepare one.
- Be familiar with the content of the organization’s constitution and bylaws. If they are out of date, or no longer adequately reflect the mandate and activities of the organization, then undertake to update them.
Training

- Support professional development for staff and training for volunteers.
- Commit resources to the development and updating of board and staff orientation.
Criminal Liability of Companies Survey

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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.

A company may under Danish criminal law be punished by a fine, provided such punishment is provided for by law or by regulations issued pursuant to law (section 25 of the Danish Criminal Code (the "Criminal Code")). Thus a company is under Danish law only subject to criminal punishment provided the law (or regulation issued pursuant to law) in a certain area stipulates specifically that a company is subject to criminal punishment in case an offence is committed by the company. A company may thus be prosecuted in a similar way as an individual offender provided such legal basis is present. However, a company may only be subject to punishment by a fine - not by imprisonment.

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

A company may be subject to confiscation (section 75 of the Criminal Code), if the company has gained proceeds from a criminal act. Confiscation is, however not an automatic sanction. Thus confiscation requires that the prosecution - in its discretion - opts to demand confiscation and that the court endorses the demand.
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.

Several Danish tax laws impose an obligation upon companies to file various information to the authorities within certain time limits. If these time limits are not adhered to the company may be subject to an administrative charge in form of a penalty fine. Penalty fines may also be executed for breaches of environmental protection laws. Furthermore a company may risk dissolution under certain circumstances. Thus the Danish Public Companies Act and the Danish Company Accounts Act impose an obligation upon the management and board to file the company's yearly accounts within certain time limits. If the time limits are not adhered the Danish Commerce and Companies Agency will request the Bankruptcy Court to dissolve the company.

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.

As explained above a company may only be punished by a fine. The fine will be fixed as a lump sum for offences laid down in special criminal laws (as opposed to the Criminal Code, which is generally applicable) which offences are the more important for companies. The size of the fine is left to the discretion of the court. Thus there are no maximum limits and neither any minimum limits. The court shall, when fixing the size of the fine, give special consideration, within the limits relative to the nature of the offence and the gravity of the offence, to the offender's capacity to pay the fine and to the gained or expected gained proceeds or savings resulting from the crime.

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

Punishment by a fine is the general sanction applicable to companies and the levying of a fine requires only that the company is guilty of an offence which the law stipulates that a company may be punished for. Confiscation requires that the company has gained proceeds or made savings as a result of the offence.

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.

As explained above prosecution of a company (or in fact any legal entity) is subject to this possibility being specifically provided for in the law. Criminal liability for a company is on the other hand only subject to it being established that a (natural) person
connected to the company or the company as such commits an offence (which the law
provides is a criminal offence for the company). A person connected to a company
comprises the management and all employees of the company; however it may in rare
cases also cover independent contractors acting on behalf of the company.

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

Acts or omissions will be attributed to the company provided they are done by
directors or employees of the company in connection with the carrying out of
assignments for the company (section 27 of the Criminal Code). Only in case of clearly
abnormal behavior may the company argue that it is not liable for the acts of such an
individual. Violation of internal rules does not (in itself) qualify as abnormal behavior
for which the company is not liable.

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

If mens rea is required by the law (or regulation given pursuant to law) in order for an
act or omission to qualify as a criminal offence for a company mens rea will need to be
established on part of the natural person for which the company is liable, see above.

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.**

The general rule under the Criminal Code is that mens rea is required in order to
punish for a criminal offence. However for other criminal offences laid down in other
acts (special criminal laws) the general rule is that a penal sanction shall apply even if
the offence is committed only negligently. Moreover companies are subject to strict
criminal liability for certain offences related to work environment and agriculture.

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

It is not required that an individual offender is identified. Thus the company may be
prosecuted, if the company as such is guilty of an offence, which it can be for a
number of acts or omissions committed by individuals for whom the company is liable,
irrespective of whether each single act or omission qualify as an offence in itself.

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

The general defenses available to natural persons are also available to companies. Thus
a company may avoid punishment, provided it i.e. proves necessity or consent from the
victim.
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?

A company may under Danish law be held criminal liable in spite due care has been exercised in the instructions of directors, managers and employees. Thus a company may only avoid conviction in case of clearly abnormal behavior from an individual for which the company is liable, see also above.

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

The police may seize objects, including monies, already during the investigative phase of criminal proceedings if the object is of importance as evidence, if it is subject to confiscation or in order to obtain security for payment of fines or costs, or in order to secure stolen goods or effects to be given back to the victim, or in case the offender charged has avoided prosecution (section 801 of the Danish Administration of Justice Act).

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

The prosecution has the right to prosecute not only the company, but also the individuals guilty of the acts or omissions for which the company is being held liable. However the prosecution applies in general "the principle of choice" for the purpose of not prosecuting employees only guilty of minor efforts.

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

The general rule is that only the subsidiary can be prosecuted for offences committed within the subsidiary. However, a parent company may dependent on the circumstances and the type of offence be prosecuted for lack of control or insufficient instructions. It has also been suggested in legal writing that the general rule may be departed from, if the basis for the offence committed within a subsidiary is in fact decisions taken by the parent company.

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.

As explained above a company may be subject to confiscation, if the company has gained proceeds from a criminal act. It is also mentioned that an administrative charge
in form of a penalty fine may be levied upon companies for breach of duties under various Danish tax and environmental protection laws. Further a company may risk dissolution under certain circumstances. A company may, however also be faced with a claim for damages by the victim, subject to the victim establishes that the company has caused a loss for the victim as a result of the offence. The prosecution is obliged to pursue such claims for damages in connection with the criminal proceedings upon request from the victim; however the courts may in its discretion decide that the claim for damages shall be pursued in separate civil proceedings, if it is not convenient to hear the claim for damages together with the criminal proceedings.

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

Reference is made to what is said above under 3.1.

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

Penalty fines may in general only be avoided in rare cases. Whether a defense is available will depend upon the wording of the specific provision forming the legal basis for imposing the penalty fine, however in general a penalty fine for breach of a time limit stipulated in law may only be avoided provided the offender can establish that the breach was due to circumstances beyond the control of the offender which could not have been foreseen (force majeure).

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

Levying administrative charges in form of a penalty fine and dissolution of a company are not considered criminal punishment and may as such also be executed during the investigative phase of criminal proceedings.

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?**

The prosecution is under no obligation to prosecute a company. Thus it is left at the prosecution's discretion whether a company shall be prosecuted for an offence. When considering whether to prosecute or not the prosecution will only decide to prosecute if it considers that a conviction is more probable than an acquittal. Obviously the evidence available will in this regard be of major importance. The prosecution may also in rare cases decide to withdraw a charge in spite the necessary evidence is in principle available. Such withdrawal may be affected in case the efforts and costs required to prosecute does not adequately correspond the importance of the case and the punishment which it can be expected that the court will order (section 721 of the Administration of Justice Act).
4.2. **At what stage during an investigation/proceeding does a company have the status as a suspect or similar status?**

A company is regarded as "accused" (and not only a suspect), if the police or prosecution expressly designates the company as being accused. However, a company is also to be regarded as accused when means of compulsion have been imposed upon the company, which could be before the company expressly has been designated as accused. Means of compulsion includes invasion of communication, search and seizure.

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?**

The Administration of Justice Act does not expressly provide a company with the right to remain silent etc. However it has been taken as a well established rule in Danish criminal procedure that a company has the right to remain silent etc. Thus the general rule is that the individual representing the company in criminal proceedings is entitled to remain silent etc. Section 10 of Act no 442 of 9 June 2004, which applies outside criminal proceedings, stipulates that obligations to disclose information to an authority laid down in law do not apply in case there are specific grounds for suspecting a natural or legal person of being guilty of an offence subject to criminal punishment, unless it is established that the information sought by the authorities have no bearing on the prosecution of the alleged offence. Thus it is specifically laid down in Danish law that a company has the right to remain silent towards a request for disclosure put forward by the authorities (outside criminal proceedings), even if such request has legal basis, provided there is specific grounds for suspecting the company of being guilty of a criminal offence subject to punishment.

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

It will depend upon the circumstances when a company is informed that it is or can become prosecuted, however a company cannot expect to be informed of the matter before it is formally charged. A charge will follow investigations carried out by the police and thus it may be that the company during such investigations will realize that it may be prosecuted.

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?**

The Danish criminal law commission has stated that it is only the company's legal representative in criminal proceedings that are to be treated as accused with the benefits this implies (the right to remain silent etc.). The legal representative will in
most cases be the company's managing director. It follows that board members and employees are to be considered witnesses subject to the witness rules in the Administration of Justice Act. These rules include the protection against self-incrimination. Thus employees or board members have the right to remain silent should they expose themselves to criminal liability if they testify. It follows that employees or board members cannot be compelled to testify if they are suspects or even accused themselves.

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

The general rule is that there will be a joint proceeding against the company and the individual offender; however the circumstances may require that separate proceedings be conducted.

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

There are no material differences between criminal proceedings against a company and against an individual.

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?

The prosecution has no rights to impose sanctions upon a company. Thus sanctions will be imposed by the court in its discretion having due regard to the limits for punishment of the type of offence in question stipulated by the law. The prosecution is, however entitled to invite the accused to pay a compound fine in case the penalty stipulated in law for the offence is a fine. Thus the criminal charge may be settled by the accused company paying a compound fine without the involvement of the court. The only requirement is that the company does not expressly plead innocent. Thus it is accepted that the compound fine is paid without any express statement as to guilt.

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

N/A

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

N/A, see above.
5.4. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

N/A

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

N/A

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

N/A

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?

Under Danish law each director or manager will be judged individually. Thus there is in principle no possibility of being liable for other directors', managers' or employees' offences. Having said that it should be had in mind that the general rule of complicity (Section 23 of the Criminal Code) does also apply to directors. Thus in case an employee is guilty of a criminal offence a director may be held liable for negligent complicity if he is guilty of not having issued orders and guidelines pertinent to the behavior of the employee, if the law imposes an obligation on a director to issue such orders and guidelines.

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

As explained above director and managers may be held liable for negligent complicity to criminal acts and omissions done by employees if they do not live up to their responsibility to issue orders and guidelines and to supervise, provided the law imposes obligations on the directors to this effect.

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?

Section 54 of the Danish Public Companies Act stipulates that the board of directors shall ensure proper organization of the business of the company, that the management board shall be in charge of the day-to-day business of the company and that the management in that capacity shall follow the directions and guidelines provided by the board of directors. The provision does also lay upon the board an explicit obligation to
consider from time to time whether the financial position of the company is sound in
the context of the company’s operations. Moreover the board of directors shall
pursuant to the same section ensure that the book-keeping and asset management is
controlled in a satisfactory manner in consideration of the position of the company and
that the book-keeping of the company is conducted in compliance with the relevant
rules of law and that the asset management is carried out in a proper manner. Negligent
breach of the duties laid upon the board of directors and the management board
pursuant to section 54 of the Danish Public Companies Act is a criminal offence which
shall be punished by a fine. However there are in case law only a few examples in
which board members have been prosecuted for breach of section 54. As appears
criminal liability may under Danish law be imposed upon directors or managers for
breach of the obligation to ensure that the company is adequately organized as
provided for in section 54 of the Danish Public Companies Act.

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

As explained above breach of the obligations imposed upon the board and the
management pursuant to section 54 of Danish Public Companies Act may result in
criminal liability for the board or management members. Consequently, it is of the
utmost importance for the board to ensure that the duties are met. An important tool in
this regard is rules of procedure. Thus the board should always adopt specific rules of
procedure in which is laid down, how the board ensures that the obligations imposed
upon the board are complied with.
1. General

The general rule in Egyptian legislation is that only natural persons can be criminally prosecuted. The reason for this is that the Egyptian legislature does not envision criminal liability without free will and awareness. Such free will can only exist in human beings.

While the Egyptian legal system recognizes juridical persons, as a group of individuals or capital enjoying legal personality, it does not recognize the possibility of criminally prosecuting juridical persons. Rather, criminal acts are attributed to the legal representative of the company- he who voices its will- who is always the one held criminally liable.

Nevertheless, it should be taken into consideration, before responding to the questions, that Egyptian law recognizes the possibility of civil liability on the part of juridical persons, in addition to the seizure of assets owned by them, if used in the commission of a crime, or if they were acquired as a result of it.

The settled rule in Egyptian jurisprudence and the courts in Egypt is that the legal representative of a juridical person voices its will with regard to commission of a particular crime, in the name of and for the account of the juridical person, and he remains criminally liable in the same manner as if he had committed the crime in his personal capacity and for his own account.
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.**

It is not possible to raise criminal charges against companies, because the principle under Egyptian law, as mentioned above, is that companies, as juridical persons, cannot be held criminally liable.

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

Penalties which can be imposed on companies as juridical persons are those which are regarded in the Law as incidental or complementary, such as seizure.

A penalty shall not be imposed in the absence of the use of the seized item in the commission of a felony or a misdemeanor, and the seizure shall only take place pursuant to a court judgment.

It should be noted that the previous Companies Law recognized that a fine is a mandatory penalty on companies, as juridical persons. However, the present Law does not contain this requirement.

Example: Article (104) of Companies Law No. 26 for the year 1954 (Canceled) states: “The fine to be imposed may not exceed LE500 nor be less than LE100 for each company violating the percentage requirement of Egyptian members on Boards of Directors.”

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.**

The sanction of seizure of a company’s assets will be imposed if these assets have been used in the commission of a criminal offense.

In the imposition of fines, it is to be noted that the sanction will be imposed on the natural person representing the will of the juridical person (the company), bearing in mind that the sanction may be executed on a company’s funds based on an important legal principle recognized in Latin legal systems, which is the Master-Servant Relationship which exists between a company and its employees and not merely with the legal representative of a company.
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.

Sanctions are not directly imposed on companies, as stated above, and so there are no minimum or maximum punishments.

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

There are no direct sanctions imposed, so we cannot determine a maximum or minimum.

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.

There are no sanctions.

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

There are no acts or omissions of individuals attributed to a company.

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

One cannot attribute to companies the acts or omissions committed by individuals.

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.

No, since the company is never criminally liable.

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

The company is never a party to a criminal offense.

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

A company is not criminally liable and therefore, is not sanctionable and is not in need of defenses.
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?

Inapplicable, since a company cannot be held criminally liable.

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

There are no sanctions, either during the investigation phase or during the trial phase, although the investigatory authorities may order retention of the company’s books and documents which is a precautionary measure rather than a sanction.

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

This does not apply, as companies are not criminally liable.

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

This does not apply, as companies are not criminally liable.

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.

Civil sanctions may be imposed, such as a judgment for compensation, termination of a contract and administrative sanctions such as cancellation of a license or official closure of work premises.

These civil and administrative sanctions may be imposed on a company without the occurrence of a criminal offense or after the commission of a criminal offense by an employee. In the latter case, the company must be vicariously liable for the acts of its employees based on the master-servant relationship.

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

At a minimum the offense must be classified as a felony or a misdemeanor.
3.3. **What defenses can a company raise against these offences?**

There are defenses to civil and/or administrative penalties a company can raise. The company’s defense is to prove that the offense committed by the employee was not related to the employee’s employment with the company.

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

Throughout the investigation of the natural person who committed the offenses, no sanctions are imposed against the Company. Retention of its documents is not considered a sanction.

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?**

N/A

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

N/A

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?**

N/A

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

N/A

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?**

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

N/A

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

N/A

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?

The court does not recognize the principle of criminal liability of companies, so there is no discretion involved.

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

A company is never a suspect; however, it may have civil liability which may occur when a case is raised against either the company or its employees.

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

There are no criminal sanctions imposed against a company; however, a company may be advised that procedures to retain documents will be taken. In the case of civil or administrative sanctions, the company shall be notified at the time of issuance of the order or the rendering of a court judgment in a civil case.

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

There are no criminal sanctions against a company. In respect to civil offenses, the company has the right to deny its employee’s civil liability for wrong doing and consequently, the company itself is not liable. In the area of administrative sanctions, the company may challenge the administrative decision issued against it before the State Council.

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

Inapplicable as companies are not criminally prosecuted.
5.6. **Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.**

Same as 5.5 above

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?**

Directors or managers cannot be held criminally liable for offenses committed by others unless they participated in committing the offense or instigated it.

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

See 6.1 above

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?**

No.

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

Egyptian law is very balanced in this respect and does not extend criminal liability widely. Therefore, we have no recommendations in this regard.
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.

Legal entities (including companies) in Finland have the capacity to act as defendants in criminal proceedings. A company in whose operation an offence has been committed may, on the request of the public prosecutor, be sentenced to a corporate fine if such a sanction has been provided in the Finnish Penal Code (39/1889, as amended, in Finnish "Rikoslaki"; the “Penal Code”). Thus a company may be prosecuted in a similar manner as an individual offender if the Penal Code provides a corporate sanction for the offence in question.

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

Forfeiture is the only other sanction that may be imposed on companies under the Penal Code. Forfeiture may include forfeiture of proceeds of crime and forfeiture of property used for the crime or other illegal property such as hazardous substances and property that is particularly suitable as a target of an offence or as an instrument of a crime. Forfeiture is a mandatory sanction that shall be ordered against the offender, a participant or a (legal or natural) person on whose behalf or to whose advantage the offence has been committed, when these parties have benefited from the offence. If there is no evidence of the amount of the proceeds of a crime, or if such evidence is difficult to present, the proceeds shall be estimated, taking into account the nature of the offence, the extent of the criminal activity and other relevant circumstances. If the
proceeds of crime or property can be compensated or reimbursed to the injured party, they are not subject to forfeiture.

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.

Certain areas of law, such as competition law and the securities market regulations, specifically entitle administrative authorities to impose sanctions. The entrance of administrative sanctions in these areas of law is a result of European integration and protection of common economical interests. These administrative sanctions include for instance the imposition of an administrative fine for a breach of a certain provision or negligence and a conditional fine in order to force the party (legal or natural person) being fined to comply with the relevant regulations.

Compensation for damages caused by an offence is sanctions that can be imposed on a company as a result of a crime, although claim for compensation per se is a civil claim. General prerequisites for the compensation are set out in the Finnish Tort Liability Act (412/1974, as amended, in Finnish “Vahingonkorvauslaki”). Basic requirements for compensation are the commission of a crime, a showing of damages and an adequate causal relationship between the two. Special legislation such as the Companies Act (624/2004, as amended, in Finnish “Osakeyhtiölaki”), Securities Market Act (495/1989, as amended, in Finnish, “Arvopaperimarkkinalaki”) and environmental legislation contain specific rules on compensation for damages.

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 sanctions that can be imposed on a company under the Penal Code are corporate fines and forfeiture.

The minimum amount of a corporate fine is EUR 850 and the maximum amount of the fine is EUR 850 000. The amount of the corporate fine is determined by considering the nature and extent of the negligence or the participation of the company’s management, and the financial standing of the company.

When evaluating the significance of the negligence or the participation of the management, the nature and seriousness of the offence and the offender’s standing in the company are to be duly taken into account as well as the issue of whether the violation of the company’s duties manifests a disregard for the law or the orders of the authorities.
When evaluating the financial standing of the company, the size of the company, its solvency, its earnings and other essential financial factors shall be duly taken into account.

Forfeiture of the proceeds of a crime is ordered in full or, if there is no evidence as to the amount, or if such evidence is difficult to present, the proceeds shall be estimated, taking into account the nature of the offence, the extent of the criminal activity and other circumstances. If the proceeds of crime can be compensated or reimbursed to the injured party, they are not subject to forfeiture.

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

A corporate fine may be imposed on a company if: (i) the Penal Code provides for such a sanction for the offence in question; and (ii) the public prosecutor requests the court to order such a fine in accordance with the discretion detailed below under 4.1; and (iii) the court decides that under the conditions detailed below under 2.8, it will not waive the imposition of the corporate fine.

The requirements for forfeiture of the proceeds of a crime are the commission of a crime and a proceed resulting from that crime to an offender, a participant or a (legal or natural) person on whose behalf or to whose advantage the offence has been committed.

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.**

Prosecution of a company is confined to those offences for which a corporate fine has been provided as a sanction in the Penal Code. Among these crimes are certain crimes against public order (arrangement of illegal immigration, animal welfare offences, organised gambling, distribution of depictions of violence, unlawful marketing of obscene material), bribery and aggravated bribery (of authorities), bribery in business, marketing offences, unfair competition offence, business espionage, misuse of a business secret, money laundering and aggravated money laundering, subsidy frauds and subsidy misuse, receiving offence, aggravated receiving offence, professional receiving offence, regulation offence and aggravated regulation offence, smuggling, environmental crimes and securities market offences, e.g. abuse and aggravated abuse of insider information, market place distortion and aggravated market place distortion and security market information offence.

An offence is deemed to have been committed in the operations of a company if the offender has acted on behalf of or for the benefit of the company and belongs to its management or is in a service or employment relationship with the company or has acted on assignment for the company.
2.4. How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions been attributed if the individual violated only internal (but not statutory) rules or regulations?

There are three ways of attributing an offence to a company: Direct contribution of the members of the management, vicarious liability and the so called ‘anonymous liability’ of companies.

Direct contribution of managers may result in corporate fine if a person who is a part of the company’s statutory governing body or other management, or who exercises actual decision-making authority therein, is an accomplice in an offence or has allowed the commission of an offence. In the former case it suffices if one member of management has participated in, abetted or incited to an offence. In the latter case the prerequisites for liability are knowledge of an offence about to be committed and the ability and omission to prevent that offence.

Vicarious liability will be found if the care and diligence necessary for the prevention of the offence has not been observed in the company’s operation. The offence need not be a necessary result of negligent conduct; it suffices that the lack of diligence has noticeably enhanced the feasibility of an offence.

Anonymous liability may be attributed to a company even if the offender cannot be identified or the offender is not punished. The fact that the individuals (management or employees) who have contributed to an offence either directly or by negligence cannot be identified does not remove the grounds for criminal liability of the company on whose behalf the offence has been committed. An example of an individual offender not being punished would be for instance in cases where the actual offender has not been caught or the statute of limitations has expired on the right to institute criminal proceedings against the individual.

No corporate fine shall be imposed for a complainant offence (an offence where charges may be brought only if the injured party reports the crime) which is not reported by the injured party so as to have charges brought unless there is a very important public interest for bringing the charges.

Under the principle of legality (= rule of law; *nulla poena sine lege*) prevailing in the Finnish criminal law, criminal sanctions may only be imposed on a legal or natural person on the basis of legislation that has specifically criminalized the offence or omission at the time of its commission. Therefore, a breach of non-statutory rules does not result in criminal sanctions and may not be attributed to a company.
2.5. **How will mens rea of the company be established?**

The concept of *mens rea* is not applied as such in Finland. Certain offences are criminalized only when committed with deliberation, other behavior is sanctioned also when committed as a result of negligence. For corporate criminal liability and attribution of a crime to a company the basic prerequisites are described above in 1.1 and 2.4. Criminal liability may derive from direct contribution of members of the management to an offence, vicarious liability and anonymous liability of companies. These prerequisites are the same for all crimes where the Penal Code provides a corporate sanction for the offence in question.

For instance, lack of supervision may give rise to criminal liability. Establishing lack of supervision or another basis for corporate liability is a question of evidence and is finally decided by the court seized of each case. Lack of supervision may be found according to the Penal Code preparatory works, for instance when the possibility of an offence being committed for or on behalf of a company has increased materially, i.e. when the risk of an offence would, under careful consideration based on general experience of life, be taken into account.

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.**

See 2.5 above.

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

No. As described above in 2.4, corporate liability may be found anonymously, i.e. even if the individual offender cannot be identified or otherwise is not punished.

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

The court may waive imposition of a corporate fine on a company in certain cases:
- if the omission of care and diligence necessary for the prevention of the offence is slight or the participation in the offence by the management is slight; or
- if the offence committed in the operations of the company is slight.

The court may also waive the imposition of a corporate fine when the punishment is deemed unreasonable taking into consideration:
- the consequences of the offence to the company;
- the measures taken by the company to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation into negligence or offence; or
where a member of the management of the company is sentenced to a
punishment and the company is small, the offender owns a large share of the
company or his personal liability vis-à-vis of the company is significant.

These issues may thus be raised as defenses in the proceedings, where applicable.

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?**

The discretion of the court to waive the imposition of the corporate fine described
under 2.8 above is exhaustive.

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

Yes. These measures are not classified as sanctions but as coercive measures
(stipulated in the Coercive Measures Act, 450/1987, as amended, in Finnish
“Pakkokeinolaki”). Coercive measures include a prohibition of transfer of funds,
confiscation of property as security and attachment of property. Prohibition on the
transfer of funds and confiscation as security may be ordered by the court if there is a
danger that a suspect of a crime or a person that may be liable for damages stemming
from an offence or subject to forfeiture of proceeds of a crime will attempt to escape
the payment of a fine, compensation or amount forfeited to the State. Attachment of
property may be ordered if the property may be used as evidence in criminal
proceedings or if the property is obtained via a crime or court orders it forfeited.
Attachment of property may be ordered either by officials conducting criminal
investigations or by the court seized to decide the charges.

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

Yes.

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

Normally, no. Corporate fines may be ordered against the parent company only if the
offence can also be attributed to the parent company in the sense that the offence has
been committed in the operations of the parent company. This is the case if the
offender has acted on the behalf or for the benefit of the parent company and belongs
to its management or is in a service or employment relationship with it or has acted on
assignment for the company. This criterion may be fulfilled for both the parent and
subsidiary in some cases, for instance if the management of the two companies consists
of the same people and one company benefits from the offence committed within the other. In such cases a joint corporate fine may be ordered.

If the parent company were to benefit from the offence committed within a subsidiary, forfeiture of the proceeds of crime could be ordered against the parent company as well.

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.

As stated above in 1.3, in certain areas of law such as competition law and securities market law there are specific provisions entitling administrative authorities to impose sanctions. These administrative sanctions include for instance the imposition of a conditional fine in order to force the party (legal or natural person) being fined to comply with the relevant regulations and administrative fine for a breach of a certain provision or negligence. The group of administrative sanctions is heterogeneous and is based on special legislation. The administrative authorities do not have general authority to order sanctions.

The most relevant sanctions are the conditional fine, administrative fine and public notices and cautions. The prerequisites of sanction are specified in the relevant legislation.

Compensation for damages stemming from an offence is a civil claim that can be claimed in connection with the criminal proceedings. The right to compensation is stipulated in the Tort Liability Act, which states that a person who deliberately or negligently causes injury or damage to another shall be liable for damages, unless the Act provides otherwise. Economic loss that is not connected to personal injury or damage to the property (e.g. loss of profit, property sold by someone other than the owner, agreeing to a contract costing money to fulfill, etc.) are as a rule recoverable if the damage has been caused by an offence.

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

As stated above, the most relevant administrative sanctions are the conditional fine and the administrative fine. These types of sanctions are applicable, for instance, in securities market offences specified in the Financial Supervision Act (587/2003, as amended, in Finnish “Laki Rahoitustarkastuksesta”), such as breach of duty to disclose certain issues, failure to comply with procedural regulations within the market, etc. The maximum amount of such an administrative fine, which may not exceed 10 percent of the company’s last yearly turnover, is EUR 200 000. The minimum amount is EUR 500. For less serious breaches determined in the Financial Supervision Act the margin of EUR 500-10 000 may be applied on companies. Public notices and cautions
are also used in the securities market. The Ministry of Finance may revoke the license of a clearing organization under the Securities Market Act in full or in part if the operation has involved a material breach of an Act or a decree or orders issued there under by the authorities, the conditions of the license or the Articles of Association or the Rules of the clearing organization.

Administrative sanctions such as administrative fines and conditional fines may be imposed for the breach of provisions on unfair competition. The maximum amount of such an administrative fine is 10 percent of yearly turnover of the company. This fine is ordered by the Market Court at the request of the Finnish Competition Authority in accordance with the Act on Competition Restrictions (480/1992, as amended, in Finnish “Laki kilpailunrajoituksista”).

In both cases, when determining the amount of the conditional fine, regard is to be had on the type and scope of the primary obligation, the solvency of the party being fined and other relevant factors. The general prerequisites for the conditional fine are set out in the Conditional Fine Act (1113/1990, as amended, in Finnish: “Uhkasakkolaki”).

Compensation for damages may be claimed by the injured party as a result of any offence that has caused damages.

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

As the prerequisites for each administrative sanction are set out in the relevant legislation, in general the only defenses that can be raised against the sanctions is a showing that the prerequisites are not fulfilled, i.e. that there was no negligence or failure to comply, etc.

However, if an administrative sanction has been ordered against a company for the same conduct that is also criminalized in the Penal Code (e.g. securities market offences), the Penal Code provides that such other sanctions must be taken into account in determining the criminal sanction.

Damages may be adjusted under the Tort Liability Act if they are deemed unreasonably onerous in view of the financial status of the person causing the injury or damages and the person suffering the same, and the other relevant circumstances. However, if the injury or damage has been caused deliberately, full damages shall be awarded unless it is deemed that there are special reasons for a reduction in the damages. Normally damages due to an offence are considered to have been caused deliberately; the compensation is therefore usually ordered in full.
3.4. Can such sanctions been executed during the investigative phase of a criminal proceedings?

For the administrative sanctions in administrative proceedings, no. Conditional fines and administrative fines may, however, be imposed on a company in administrative proceedings while criminal investigations are taking place, as these proceedings are independent.

Damages may be claimed in a separate civil case prior to the determination of the criminal liability issue; however this is normally not the procedure, as a conviction in the criminal matter is a serious indication of deliberation in causing damages. Compensation for damages is normally decided by the court in the same proceeding as criminal liability. The public prosecutor is, at the request of the injured party, to pursue a claim of damages if this is possible without essential inconvenience and if the claim is not obviously ill-founded.

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. However, a corporate fine may not be imposed for a complainant offence which is not reported by the injured party so as to have charges brought unless there is a very important public interest for bringing the charges.

The public prosecutor may decline to bring charges against a company in the following cases:
- if the company’s level of negligence or the participation of the management has been of minor significance in the offence and the company has voluntarily taken necessary measures to prevent new offences;
- if only minor damage or danger has been caused by the offence committed in the operation of the company and the company has voluntarily taken necessary measures to prevent new offences;
- if the offender is a member of the management of the company and the company is small, the offender owns a large share of the company or his personal liability vis-à-vis the company are significant and the offender as already been sentenced to a punishment and it is to be anticipated that the company for this reason is not to be sentenced to a corporate fine by the court.

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

According to the Criminal Investigations Act (629/1997, as amended, in Finnish “Esitutkintalaki”) a person against whom actions are commenced in criminal investigations must be notified of his status as soon as possible. This may not always
be possible during the earliest stage of investigations as they are often conducted in the very purpose of determining the status of the person.

Even though companies in Finland have the capacity to act as defendants in criminal proceedings, the status of a suspect is not applied to companies as such. The provisions of law relating to the rights of a suspect are applied on a company’s statutory governing body or other members of the management in criminal investigations.

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?

As the provisions on the rights of the accused are applied on the statutory governing body or other members of the management of the company, when conducting criminal investigations in order to determine whether the prerequisites for a corporate fine are present, these persons are not obliged to assist in the investigations against the company. The principle of nemo tenetur se ipsum accusare applies.

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

As stated above, according to the Criminal Investigations Act, a person against whom actions are commenced in criminal investigations must be notified of his position as soon as possible. Any changes in the person’s status must also be made known. There is no exact time or period given in the law, but the notification of a party-status in criminal investigations and any change thereof must be made to the company as soon as possible.

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?

Members of the Board of Directors or the Managing Director (i.e. legal representatives) of a company may not be heard as witnesses, as the provisions on the hearing of suspects are applied on them.

As regards other managers and employees, anyone who is suspected of a crime may not be heard as a witness on that matter, as the principle of nemo tenetur se ipsum accusare applies. They may be heard as a suspect: the difference for hearing as a witness being that a witness may not refuse to testify and a witness has an obligation to tell the truth under an oath or an affirmation; whereas a suspect may refuse to testify.
4.6. Will there be a joint proceeding against the company and the individual offender?

The Criminal Procedure Act (689/1997, as amended, in Finnish “Laki oikeudenkäynnistä rikosasioissa”) provides that charges for different offences committed by the same defendant or for the same offence committed by different defendants are to be heard jointly, unless it is deemed more appropriate to hear them separately. The same applies to different offences committed by different defendants, where the joint hearing of the charges would further the resolution of the matter. Different charges chosen up for a joint hearing may later be separated, if this is deemed appropriate. These provisions also apply to corporate sanctions.

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

No. As the proceedings are in principle joint, the proceedings are the same.

5. Procedural Issues on Other Criminal Sanctions

In this part, the procedural issues addressed will be observed from two aspects:

(i) administrative sanctions of companies and
(ii) claim of damages due to an offence.

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?

(i) Administrative sanctions are ordered by the relevant administrative officer, for instance the Financial Supervision or the Market Court at the request of the Finnish Competition Authority, and the ordering of such sanctions is based on the respective legislation. These authorities do have certain discretion on the matter.

(ii) Claims for damages are, as stated, civil claims. Thus the injured party may decide to claim damages or to waive such right. Claims for damages may however be resolved in the same proceedings as the main claim of criminal liability, as explained in detail below in 5.5. On request of the injured party, the public prosecutor who has brought charges is to pursue the civil claim of the injured party arising from the offence for which the charge has been brought, against the defendant in the criminal case, if this is possible without essential inconvenience and if the claim is not obviously ill-founded.

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

(i) Administrative sanctions are imposed on a company in administrative proceedings. Therefore no suspect status applies.
(ii) No. Claims for damages are civil matters even if they are handled jointly in the criminal proceedings.

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

(i) Administrative sanctions are imposed by the relevant administration authority, not the prosecution. However, as administrative sanctions resemble criminal sanctions (although imposed in administrative proceedings), the basic requirements of fair trial set out in the European Convention on Human Rights must be observed. Therefore the company must be afforded a right to be heard before imposing any sanctions. There is, however, no exact provision on when the authorities must inform the company of the investigations and the threat of sanctions.

(ii) Claims for damages will be made known to the company at the latest when the summons is served.

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

(i) The legal status of a company subject to the risk of being imposed administrative sanctions against is not entirely clear throughout the proceedings, as there may be preliminary hearings already prior to the imposition of any suspect status. In general, the same rules as described above in connection with the criminal proceedings would be deemed to apply. However, the Financial Supervision and the Finnish Competition Authority have legal supervisory powers under which they may require companies to disclose information that may be detrimental to them. There is no clear legislation on whether this information may then be used against the company in subsequent criminal proceedings against the same company.

(ii) Damages claimed as result of an offence, are formally civil claims that may be handled jointly with the claim of criminal liability of the offender. The company shall therefore have the same rights it has in the criminal proceedings that are described above at 4.3 and 4.5. If claims for damages are heard as a separate civil case, the company will be treated as a normal civil respondent.

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

(i) The administrative proceedings may have several parties; therefore issues relating to one offence may be handled jointly.

(ii) According to the Criminal Procedure Act and the principle of adhesion, the related (civil) claims such as claims for damages may be decided in the same proceedings as the main claim of criminal liability. If these civil claims are
heard in the same proceedings as the criminal liability claim, the provision of the Criminal Procedure Act providing that charges for different offences committed by the same defendant or for the same offence committed by different defendants are to be heard jointly, unless it is deemed more appropriate to hear them separately, applies. There may thus be joint proceedings against the company and the individual offender.

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

(i) Normally the relevant provisions on administrative sanctions only apply to legal entities. Proceedings vary from one issue to another, as the power of imposing sanctions is not centralized but are given to several authorities, each in their specific field.

(ii) No, the proceedings are the same.

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?

Criminal liability may under the principle of legality only follow from a personal act or omission that has been specifically criminalized in law, and abetting or inciting to such an act or omission. Hence, directors or managers may be held criminally liable for offences committed by other individual directors, managers or employees only in case such offence has been specifically criminalized as an offence also for a member of the management.

For instance, it follows from the statutory definition of an accounting offence that both the accountant and the managers of the company may be held liable for neglecting the recording of business transactions or the balancing of the accounts. The accountant's liability is based on neglecting his or her tasks whereas the management's liability is based on neglecting to supervise that the company's statutory accounting obligation is fulfilled.

In environmental and employment offences, criminal liability falls on the person whose duties the act or omission is to deemed breach. This liability may cover several people on different hierarchy levels in the company. Thus, also regarding such offences a director or manager may be held liable for an act or omission by other individual directors, managers or employees in case such act or omission simultaneously constitutes a criminalized act or omission for the director or manager.

Also, a member of a statutory body or management of a corporation, foundation or other legal person, a person who exercises actual decision-making power in the legal
person or a person who otherwise acts on its behalf in an employment relationship in the private or public sector or on the basis of a commission may be sentenced for an offence committed in the operations of this legal person, even if he/she does not fulfill the special conditions stipulated for an offender in the statutory definition of the offence, but the legal person fulfils said conditions. This provision can however only be invoked against an individual deliberately committing an offence on behalf of a company, not another person. The provision is intended for situations where for instance a company is a debtor and a member of the management commits an offence on behalf of the company. Without this provision, that individual could not be held liable for the offence by a debtor as the debtor status is the requirement of criminal liability and that status lies with the company.

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

As stated in Section 6.1 above, criminal liability may fall on the directors or managers for acts and omissions of others only within the limits of the principle of legality. This means that the act or more often the omission of the directors or management must be criminalized as well.

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?

Criminal liability is based on an act or omission that has been specifically criminalized in law. Therefore, criminal liability does normally not arise merely from the fact that another director, manager or employee was not adequately selected, instructed, supervised or the company is not adequately organized. As stated above, criminal liability for both the individual director, manager or employee and the manager or director require specific criminalization and corresponding fulfillment of the statutory definition of a crime.

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

In order to minimize the risks of being subjected to criminal or like sanctions, companies should be diligent and employ careful supervision in their operations. Any specific supervision obligations and internal guidelines should be carefully complied with. The existence of internal guidelines is a good indication of a company’s intention to follow the law and relevant regulations. It is also important that the management can demonstrate sufficient supervision of compliance with the company’s internal guidelines. Also good record keeping is vital for excluding or minimizing criminal liability risks.

As regards liability for offences committed by others it should be noted that the directors and managers may not succeed in excluding their own criminal liability
merely by showing that they have diligently tried to fulfill their supervisory obligations. In some cases criminal liability may arise regardless of such attempts if in fact the statutory definition of an offence is fulfilled.

References:

- The Penal Code
- The Criminal Procedure Act
- The Tort Liability Act
- The Companies Act
- The Code of Judicial Procedure
- The Securities Market Act

All Acts are found in Finnish and in Swedish at http://www.finlex.fi/fi/.

http://www.fin-fsa.fi/eng = Financial Supervision Authority of Finland

http://www.kilpailuvirasto.fi/cgi-bin/english.cgi? = Finnish Competition Authority
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.

French law provides for the prosecution of companies as legal entities in a similar way as an individual offender. Under article 121-2 of the Penal Code, «legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives».

As implied from article 121-2 of the Penal Code, companies may be held liable through imputation for acts caused by a natural person, so long as the natural person is acting as its organ or representative. A company may be prosecuted for most of the same offences as an individual offender. Therefore, the differences in the prosecution of an individual and a company result from practical realities, as detailed below.

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

Sanctions for the legal persons are five times greater than the fines that are applicable to natural persons, to make up for the fact that they cannot be imprisoned.

Fines are an efficient sanction in terms of deterrence and follow the principle of proportionality of the offence committed and the scale of the damage caused.

The other sanctions applicable are dissolution, forfeiture, prohibition from exercising a social or professional activity, closure of the establishment, disqualification from
public tenders, prohibition from drawing checks, and posting public notice. The sanctions mentioned are discussed in more detail in § 2.1.

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.**

In other fields of law, the kinds of sanctions imposed on companies following the commission of an offence by its directors, managers or employees are often similar to the ones outlined above. The most common sanction is the imposition of a fine, in addition to the other sanctions discussed in § 2.1.

Along with the penal sanctions, administrative authorities, independent public authorities, or certain administrative agencies, can also impose administrative sanctions on companies. For example, the French Market Authority (Autorité des Marchés Financiers) can impose formal demands, injunctions, and monetary sanctions.

Such a dual burden (non bis in idem) on the company will be allowed if the elements of the penal and administrative sanctions are of different nature.

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 on a company for a felony or misdemeanor are outlined under article 131-37 and article 131-38 of the Penal Code. The sanction that can be imposed on a company, as a legal person, for petty offences, are outlined under article 131-40 and 131-42 of the Penal Code.

Both provisions provide that a fine may be imposed with the maximum amount applicable to legal persons being «five times that which is applicable to natural persons by the law sanctioning the offence». In addition to this, «where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is €1,000,000».

Article 131-39 of the Penal Code enumerates additional sanctions depending on the offence committed.

Dissolution applies where «the legal person was created to commit a felony, or, where the felony or misdemeanor is one which carries a sentence of imprisonment of three years or more».
Other sanctions include prohibition from exercising directly or indirectly one or more social or professional activity 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 or closure of one or more of the establishments of the enterprise that was used to commit the offences in question, disqualification from public tenders either permanently or for a maximum period of five years, prohibition, either permanently or for a maximum period of five years from making a public appeal for funds, prohibition from drawing cheques except those allowing the withdrawal of funds by the drawer from the drawer or certified cheques and the prohibition from using payment cards for a maximum period of five years, confiscation of the thing which was used or intended for the commission of the offence or of the thing which is the product of it, and posting a public notice of the decision.

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

Laws and regulations can only set the maximum fine applicable to a certain offence. The judge has the discretion to apply the sanction up to the legal limit.

Article 131-19 of the Penal Code can prohibit companies from drawing cheques for up to five years. The same provision applies to the prohibition to use payment cards under article 131-20 of the Penal Code.

Article 131-28 of the Penal Code prohibits the exercise of one or more social or professional activities.

Article 131-33 of the Penal Code allows for mandatory closure of an establishment and for prohibition from exercising on such premises the activity that occasioned the commission of the offence.

Article 131-34 of the Penal Code allows for the disqualification from public tenders. This includes the right to participate «directly or indirectly, in any contract concluded by the State and its public bodies, territorial collectivities, their associations and public bodies, as well as enterprises granted as a concession or controlled by the State or by territorial collectivities or their associations».

Article 131-35 of the Penal Code provides that the court may order public display of its judgment. A public display order is carried out in such places and for such a period as the court determines. Unless the statute sanctioning the offence otherwise provides, a public display may not extend beyond two months.

Article 131-45 of the Penal Code orders the dissolution of a legal person. This entails a referral to the competent court for its liquidation.

Article 131–46 of the Penal Code provides for the appointment of a judicial supervisor, renewable in six month terms.
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.**

Since the 1st of January 2006, the criminal liability of legal entities has been largely extended and applies to all the offences outlined in the French Penal Code. Corporations can be liable for any crime, offence and infringement therein except for claims related to freedom of speech for the press and related audio-visual claims.

Upper level managers have the legal capacity to represent their employer and thus invoke the company's penal responsibility. In contrast, lower level employees do not have the capacity to represent their employer and therefore cannot invoke its penal responsibility.

All employees (directors, managers and lower level employees) through their illegal acts can impute civil liability on themselves (under article 1382 of the Civil Code) and their employer, if they are acting in the scope of their employment under article 1384 of the Civil Code.

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?**

Where French law requires a positive act, it will be noted as such in the Code. If the law simply states «acte», it can imply either positive or negative acts, «omissions». For example, involuntary manslaughter and involuntary injuries require positive act, while negligence does not necessarily require a positive act.

Companies are liable for the acts or omissions of their employees under article 121-2 of the Penal Code.

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

The offence in question has to be performed on the company's behalf by an executive organ or a representative of the company. This includes individuals who are being conferred administrative duties and functions by law or by the company's charter itself.

Under article 121-3 of the Penal Code «there is no felony or misdemeanor in the absence of an intent to commit it». The criminal liability of the legal entity is therefore imputed.

«However, the deliberate endangering of others is a misdemeanour where the law so provides. A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed
to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him.

In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware».

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.**

Article 121-3 of the Penal Code (discussed in § 2.5) provides that mens rea must be proved. However, «there is no petty offence in the event of an act of God» (force majeure).

For example, false advertising does not require any mens rea.

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

Case law has made clear that it is not necessary to identify and/or convict the individual natural offender in order to prosecute a company.

It must be established that the legal infringement could only have been committed on behalf of the company by the company's organs or representatives.

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

Articles 122-1 to 122-8 of the Penal Code outline the grounds for absence or attenuation of criminal liability. Possible defences include insanity, duress, mistake of law, command of lawful authority, self defence, and incapacity.

A company can also argue that an employee was not acting within the scope of his employment or that he was not a legal representative of the company.

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?**

A company has a duty of care to respect statutes and regulations. It will be criminally liable for any breach thereof (under article 121-3 of the Penal Code).
To avoid conviction, a company can base its defence on articles 122-1 to 122-8 of the Penal Code discussed above in 2.8.

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

Under article 706-45 of the Penal Procedure Code, the investigating judge may impose sanctions as follows.

Security deposit, personal or real sureties to guaranty the victim's rights, prohibition from withdrawing checks, prohibition from exercising certain professional or social activities, and/or placement under judicial proxy.

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

Article 121-2 of the Penal Code provides that «the criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act». This implies that both the individual offender and the company can be convicted for the same offence.

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

Subsidiaries and parent companies are autonomous legal entities. However, the principle of judicial autonomy will not apply if the parent company has interfered with the subsidiary's own affairs.

French law distinguishes between the «société mère» (parent) and the «filiale» (subsidiary) while the group encompasses both the parent and the subsidiary. When an offence is committed within a subsidiary, the subsidiary is the natural perpetrator of the offence. The parent may be considered as the subsidiary's accomplice and may be prosecuted as an «organ» under article 121-2 of the Penal Code.

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.

In the French procedural system, civil and criminal claims are pursued in the same trial. Therefore, a company can also face a civil damages claim from the victim of an illegal act at the same time it faces criminal penalties.
In addition to the above, a company may face administrative sanctions from the applicable governmental bodies.

The most common type of sanction for both civil and administrative proceedings is the imposition of fines.

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

In order for civil damages to be imposed, a third party must claim that it is the victim of the company's illegal act. A victim can move for a civil claim under any circumstances except where prohibited by law.

Administrative agencies have the power to impose sanctions on the companies relevant to the industries that they govern. They often have the power to impose fines and disciplinary sanctions, including injunctions and publication of its disciplinary actions. The relevant sanctions depend on the infraction of law.

3.3. **What defences can a company raise against these offences?**

For civil claims, a company can argue that the natural person who committed an illegal act acted outside the scope of his employment contract. Because the employee acted on his own initiative «faute détachable de ses fonctions», the company is not liable for his acts.

Under administrative law, no mens rea is necessary to prove violation of an act. Therefore, a company can only plead not guilty in response to such allegations.

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

A civil judge cannot impose any presumptory sanctions until the criminal judge has ruled on any presumptory movement for sanctions.

Administrative bodies can impose presumptory sanctions on their own volition and without a prior ruling from courts of civil or criminal law.

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?**

According to Articles 40 and 41 of the Penal Procedure Code, the prosecutor has the right to commence an investigation regarding a company without restriction.
The prosecutor has the right to pursue investigations and criminal claims against a company on his own volition. There is no prerequisite complaint, judicial order, or police investigation necessary. Further, this discretionary right may not be questioned by either the parties involved in the investigation or by the jurisdictional court. However, there may be certain cases in which prosecution is required by law.

Article 40 of the Penal Procedure Code provides that: «The district prosecutor receives complaints and denunciations and decides how to deal with them, in accordance with the provisions of article 40-1». The prosecutor has broad discretion in his decision to prosecute a complaint, and makes it largely based on his own conscience, the gravity of the infraction, the character of the actor, and the public consequences of the act. The prosecutor will decide whether to investigate the accused, or to classify an actor as a suspect discussed below in further detail, even if the facts indicate that an infraction has occurred.

If a civil party engages the criminal investigation, and there is a legitimate basis for such a complaint, the prosecutor is obligated to pursue an investigation of the acts committed by the accused under articles 85, 86, and 88 of the Penal Procedure Code.

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

According to Article 706-43 § 2, every company has designated a representative who is present in the name of the company at each stage of an investigation.

There are three possible classifications for companies under investigation. The first is a witness, or «témoin simple». In such case, the judge must give the company a citation to come before the court to notify the party of their stake in this introductory stage of investigation. The second classification is a person of interest, or “témoin assisté,” for which there is reason to investigate such witness as a person of interest in the accused illegal activity.

The third and final classification is the official suspect, or «mis en examen». In order to attain this status there must be substantial evidence that the accused participated in illegal actions and should no longer be treated as a simple witness, but rather as an official suspect (article 80-1 Penal Procedure Code).

4.3. **Does a company have the right 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?**

Under French law, investigations can take three different forms. The first is a simple inquiry. During this preliminary investigation, one must have assent of the party under
investigation in order to require production of documents, access to a company site, testimony, etc.

There is a second form of investigation, called the «enquête de flagrance» used in circumstances in which notification of investigation would impede the discovery of important evidence. During this type of investigation, a company does not have the right to refuse to produce such evidence.

In a judicial investigation (information judiciaire), the investigating judge has specific powers which are broader than those in the preliminary investigation and during the “enquête de flagrance”. For example, the investigating judge has the right to demand that a witness give testimony regarding a case.

As a fundamental principle, every investigated party has the right to avoid self-incrimination. In respect of this principle, the Law of June 15, 2000 creates the right to remain silent and requires that a warning be given to questioned parties that have such a right. Only the court can require a company to produce documents and each refusal to produce such documents will be considered by the court on a case by case basis.

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

A company will be notified of its interest in a criminal investigation from the moment that it attains the status of a «témoin assisté», or person of interest, or an official suspect (mis en examen).

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?**

Under article 101 of the Penal Procedure Code, «the investigating judge summons any person whose statement appears useful to him before him through a bailiff or a police officer...Where he is summoned or sent for, the witness is informed that if he does not appear or refuses to appear, he can be compelled to by the law-enforcement agencies in accordance with the provisions of article 109». This includes directors, managers, and employees who can be witnesses in proceedings against their employer, even if they are suspects.

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

The criminal liability of legal entities does not exclude individuals acting on behalf of the company from being prosecuted as perpetrators or accomplices. Thus, the criminal liability of legal entities may be combined with the personal criminal liability of individuals (article 121-3).
The Ministry of Justice recommends that claims of criminal activity should, in fact, be brought against both the individual perpetrator and the legal entity, provided that the offence was performed on its behalf by one of its agents or representatives.

The claims will generally be prosecuted in a joint process.

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

In theory, a proceeding against a company will be very similar to that against an individual. However, certain measures cannot practically be imposed on a company in the same way that they can be imposed on an individual. For example, questioning a company as a suspect and questioning an individual for his own acts will certainly differ.

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?**

Under article 40, the prosecutor has discretion to prosecute a claim against a company if all required elements of the crime in question have been met. The prosecutor may suggest sanctions based on the gravity of the offence in question, however, it is ultimately the court that decides which sanctions will be imposed. If the prosecutor plea bargains with an offender, the court must approve the result of their negotiations.

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

As detailed in § 4.2, a company may have the official status of suspect or «mis en examen» and be placed under judicial supervision. Therefore, the suspect status is applicable to legal persons, particularly to a company's legal representative.

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

The prosecutor does not have the right to impose sanctions on a company on his own volition. When the court imposes sanctions on the company, it will be notified at the hearing.

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

The company has the right to prepare its defence and to gather the applicable evidence. It has the right to an attorney and access to its case file. It also has the right to a fair and speedy trial and the right to remain silent.
5.5. **Will there be joint proceedings against the company and the individual offender?**

As explained in § 4-6, in the case of intentional offences, a claim will result in actions being brought against both the individual perpetrator or accomplice and the legal entity, provided that the offence was performed on its behalf by one of its organs or representatives.

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

As detailed in § 4-6, the proceedings will be similar, excluding some practical procedural differences.

6. **Criminal Liability of Directors or Managers**

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

Under article 121-1 of the Penal Code, one can be responsible for only his own acts. However, it is possible to hold a director or manager criminally liable as an accomplice or coactor to offences committed by other individual directors, managers or employees.

The Criminal Division of the French Supreme Court has decided that a representative who has not personally participated in the commission of the offence can be exonerated from criminal liability if he can provide evidence that he had delegated his powers to a person who had the competence, authority, and the necessary means to accomplish the task, except in cases where the law provides otherwise.

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

In order for liability to be imputed from one employee to another, it must qualify as an accomplice or coconspirator. Articles 121-6 and 121-7 of the Penal Code provide that an «accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.»

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?**

Criminal liability cannot arise from the simple fact that an employee was poorly chosen, instructed, or equipped. However, as discussed in § 6-1, a representative who
has not personally participated in the commission of the offence can be exonerated from criminal liability if he can provide evidence that he had delegated his powers to a person who had the competence, authority, and the necessary means to accomplish the task.

Therefore, if the agent to whom powers were delegated did not have the proper competence, authority, or necessary means to accomplish the delegated task, the agent’s manager may also be held liable for his employee's criminal actions.

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

In order to minimize the risks of criminal liability, a company should take advantage of the delegation principle in French law. The delegation principle states that if the director or manager delegates his power through proper means, in an unambiguous manner, and the agent consents to the delegation, the manager can rely on this consent to exonerate his criminal liability.

Only a delegation of power allows the transfer of penal responsibility from a director to the agent.

It is important for companies to establish the appropriate hierarchical structure and policies to ensure that these delegations of power take place in the proper manner. Ensuring that the upper management is aware of the delegation principle may aide the company in its effort to minimize its liability. Additionally, ensure that proper control measures are in place to prevent criminal activity from occurring in the workplace.
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.

Under German law only natural persons can be punished as offenders. Legal persons lack the capacity to act and the capacity to be criminally liable. Therefore, generally speaking they cannot be prosecuted or punished as individual offenders. In particular, it is not possible to impose the two main punishments under German law, namely fines or imprisonment, against a company.

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

It is possible to impose the criminal law sanctions of forfeiture (§ 73 et seq., German Criminal Code [StGB]) and confiscation (§ 74 et seq., StGB) against companies.

a) Forfeiture pursuant to § 73 et seq., StGB, serves to remove advantages gained from criminal offences. The pre-requisite for ordering forfeiture is that an unlawful act has been committed and that the company has obtained something for or as a result of the perpetrator’s or participant’s criminal activities. Advantages gained from the act are all financial assets obtained by the company as a result of the offence, i.e. both material objects obtained directly as a result of the act (e.g. through fraud or deception) as well as other advantages gained from the act, e.g. profits made from unlawful excessive prices. According to the gross principle, the forfeiture covers everything obtained from the unlawful act, without the deduction of any own expenses or consideration incurred by the company.
b) According to § 74, StGB, objects generated by a criminal offence or used or intended for the commission or preparation of an offence, can be confiscated. Objects generated by the offence (so-called *producta sceleris*) means objects which either originate from or whose current qualities are a result of the offence, e.g. counterfeit coins or forged deeds. Confiscation is only permissible if, at the time of the decision, the perpetrator or the participants own or have a claim to the objects, or if the objects due to their nature and the circumstances endanger the general public, or if there is a risk that they will be used to commit unlawful acts. However, the acts committed by the perpetrator of an offence can be attributed to a company pursuant to § 75, StGB, if the perpetrator is a member of an executive body or a representative of the company, or a person responsible for the management of a business or company, and commits the relevant criminal offence in that capacity.

c) In case of certain offences against the Act on Economic Offences [WiStG] of 1954, instead of forfeiture the transfer of excess proceeds pursuant to § 8(1) of that Act can be ordered. This concerns criminal or minor offences which consist in prices charged which are higher than those allowed. Excess proceeds are deemed to be the differential amount between the allowed price and the price charged. According to § 10(2) in conjunction with § 8, WiStG 1954, the transfer of excess proceeds can be ordered against a company if the company obtained the relevant proceeds from an unlawful act in the sense of the Act.

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.

a) § 30 of the Administrative Offences Act [OWiG] allows a fine to be imposed against legal persons or partnerships, subject to the condition that the representatives of such persons have committed a criminal or an administrative offence through which obligations of the partnership or company were breached or which resulted or were intended to result in the enrichment of the partnership or company. However, this sanction is not a consequence of unlawful acts under criminal law, but, rather, a fine imposed collectively on a company or partnership under the law on administrative offences. In order to impose a fine, it is not sufficient for any employee of the company to have committed a criminal or administrative offence. Rather, a fine can only be imposed if the offence was committed by certain representatives of the company. These representatives are listed exhaustively in § 30 OWiG. These are, in particular, members of the executive entities of a legal person with authority to represent, members of a partnership with legal capacity who have authority to represent, persons with general authority to represent as well as persons holding power of *procura* and persons with commercial power of attorney, if they are...
executive staff members. In addition, other persons who act with responsibility on behalf of the management of a business or enterprise come into question as perpetrators as do persons with monitoring and control authority within the enterprise.

A further pre-requisite for imposing a fine is that the representative acted in that capacity, i.e. that there is a functional connection between the offence and his position as a member of an executive body. In general, this is affirmed in case of breaches against obligations towards the company. In addition to the functional connection, as a rule a further requirement is that the offender acted in the interest of the partnership or company, in which respect it is not harmful for the offender to do so while safeguarding his own interests. A fine can also be imposed if the offender committed the act while exceeding his powers.

Where a derivative offence is an intentional criminal offence, the fine imposed can be up to EUR 1 million, and for a criminal offence committed through negligence up to EUR 500,000.00. As regards administrative offences, the maximum fine depends on the maximum fine threatened for the specific administrative offence committed.

b) Dissolution of a company as a sanction is not provided for under criminal law or under the law on administrative offences at the present time. In some cases, however, dissolution of the company is provided for as a measure under civil or administrative law. For example, a stock corporation can be dissolved by way of a court judgement pursuant to § 396, German Stock Corporation Act [AktG], if the stock corporation endangers the general public due to the unlawful conduct of members of its administrative bodies and if the supervisory board and the general meeting fail to ensure that such persons are removed from office. The matter is regulated similarly with regard to limited liability companies in § 62, Act on Limited Liability Companies [GmbHG]. However, these provisions are of no substantial relevance in practice.

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.

N/A

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

N/A
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.

N/A

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

N/A

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

N/A

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.

N/A

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

N/A

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

N/A

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?

N/A

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

N/A
2.11. Can both the individual offender and the company been convicted for the same offence?

N/A

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

N/A

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.

See supra (1.3).

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

The imposition of a fine pursuant to § 30 OWiG (see 1.3 a) above) requires the commission of criminal or administrative offences by breaching obligations resting on the company (“company-related duties”). These are particular offences where the duties concern the proprietor of the enterprise as such. As a rule, particular circumstances such as the position as proprietor of a plant play a role, the position as the producer or distributor of goods or the position as an employer. It is not necessary in this respect that the representative actively commits the offence himself. Rather, it can suffice for the representative to have failed intentionally or negligently to take supervisory measures which are necessary in order to prevent criminal or minor offences being committed by ordinary employees (§ 130, § 9, OWiG).

General offences can also include a breach of company-related duties (e.g. fraud to consumers by fraudulent representations on characteristics of goods, deceiving inability to pay). The same applies if the company or partnership can be considered a guarantor for the avoidance of the commission of an offence, in particular within the context of safety at work or protection against risks arising from the handling of company products.

A fine can also be imposed against a partnership or company if the company was enriched or was intended to be enriched through the offence committed by the representative. The term enrichment here means any more advantageous financial situation, i.e. any increase in the financial value of the assets or saving of costs. An indirect advantage, i.e. an improved competitive situation caused by bribery, can also constitute a better position.
3.3. What defenses can a company raise against these offences?

The first defence a company can raise is that there has been no offence or administrative offence or that such offence was not committed by a person acting as representative of the company. For this reason grounds excluding an offence, such as a voluntary declaration made to the tax authorities in case of tax offences (§ 371, Tax Code [AO]), or obstacles to prosecution such as the statute of limitations, can be brought forward by the company.

The company could also argue that an offence committed by a representative of the company is a so-called excessive offence, i.e. there is no functional connection with the person’s position as a representative, and that the company was not enriched as a result of the offence. If both prerequisites are given, the offence will be excluded as a derivative offence for which a fine can be imposed.

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

As a matter of principle the above mentioned sanctions cannot be imposed during an ongoing preliminary investigation. However, provisional measures pursuant to § 111b et seq., Code of Criminal Procedure [StPO], may be taken during the course of a preliminary investigation. Pursuant to § 111b, StPO, objects may be secured through seizure if there is reason to suspect that the pre-requisites for forfeiture or confiscation are given. Apart from this, pursuant to § 111b, StPO, seizure may be ordered due to the forfeiture or confiscation of replacement objects. Such seizure serves to secure claims of the state and permits assets of the company to be seized. The pre-requisite is that there be pressing reasons to suspect a criminal offence against a natural person (the accused) and there be pressing reasons to believe that forfeiture or confiscation of replacement objects will be ordered against the company in a subsequent decision.

However, sanctions against a company can be imposed while the investigations against the individual offender are still continuing.

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?

N/A

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

N/A
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?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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?

If the pre-requisites of § 30 (1), OWG, are given, a fine can be imposed against the company. This means that it is at the discretion of the prosecuting authorities whether or not a fine is to be imposed, as is the amount of a potential fine. However, the discretion has to be duly exercised, i.e. the decision may not be arbitrary. When imposing the fine, the authority has to take into account, in particular:

- **The significance and dimensions of the offence**, in particular the question whether the offence reflects a general “criminal attitude” of the company’s or partnership’s representative.
- **The financial advantage gained** by the company or partnership as a result of the offence. This financial advantage is to be rectified by the collective fine unless company or partnership is affected anyway by forfeiture or confiscation.
• **The danger to claims of third parties.** The claims of those harmed by the offence are not to be impaired by the fine if possible, at least not insofar as claims are in fact made.

• **The impact on members or shareholders not involved in the offence.** The impact due to the collective sanction is not to be unreasonably severe. Nor is the enterprise to be ruined by the fine. If possible, double punishment, which appears possible especially where partnerships are concerned, where the possible offender also suffers financially as a partner due to the collective fine, is to be avoided.

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

Under German law the company participates in criminal proceedings with a status which is similar to that of the accused or defendant. This applies during the preliminary investigation and the subsequent court proceedings. This gives rise to several procedural rights (see No. 5.4 below). The same applies for proceedings in which a fine may be imposed against the individual perpetrator.

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

The criminal prosecution authorities have to inform the company upon completing of the investigation at the latest. In most cases, however, the company will be informed as soon as there is an indication that a collective fine may be imposed.

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

The company has to be involved in the proceedings. Its representatives have to be heard. In addition, the company has a right to file motions for the admission of evidence, although such motions can be rejected at somewhat simplified terms compared with the case where a natural person is the accused. During the preliminary investigation the company also has a right to refuse to testify, as is the case in court proceedings. This means that legal representatives of the company accused may not be pushed into the role of witnesses. Other employees, former executive entity members or shareholders with authority to represent who have left the company are unable to invoke the right to remain silent. They are only entitled to refuse to testify if they have to fear that they might incriminate themselves or a relative by responding to questions posed.

Obligations of the company pursuant to administrative laws to provide documents or provide information to administrative agencies remain unaffected even if such documents or information can be used as evidence against the company.
5.5. Will there be joint proceedings against the company and the individual offender?

As regards especially the fine pursuant to § 30, OWiG, as a matter of principle there will be joint proceedings as separate proceedings against an executive entity member on the one hand and the company on the other hand are prohibited. However a fine can be imposed independently on a company if criminal proceedings or proceedings for a fine are not initiated against the offender, if such proceedings are suspended or if no punishment is imposed.

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

To sum up the proceedings are quite similar except for the differences mentioned above (e.g. the right to file motions for the admission of evidence is somewhat limited as compared to individual persons).

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?

The executive management has the duty to organise the company in a way ensuring that all company's duties are fulfilled and safety measures against danger for people, objects and assets inside and outside the company are taken. As a result acts committed by other management board members or by employees can lead to criminal liability on the part of (other) management board members or other representatives of the company if they either actively support such acts or refrain from preventing respectively tacitly approve them.

In addition to criminal liability, liability for an administrative offence pursuant to § 130, OWiG, also comes into question. According to this provision, the proprietor of a business or company or persons with certain management functions can be fined if they fail to take supervisory measures which are necessary in order to prevent breaches of duty in the business or if such breach would have been prevented or made substantially more difficult to commit by proper supervision.

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

As regards collegial bodies, a distinction has to be made: if a joint resolution is adopted, the relevant members of the entity are considered co-perpetrators. Members outvoted do not participate in the offence. Their sole obligation is, using their corporate rights of participation, to do what is possible and reasonably acceptable in order to prevent a resolution by the entity with a corresponding punishable substance.
It may be necessary to remonstrate with the supervisory board or the shareholders since otherwise an offence due to omission is conceivable.

If, however, there is no involvement of the entire entity, on principle overall responsibility remains under corporate law. Still the obligations of a managing director under criminal law are generally connected with the area of business and responsibility he looks after, so a division of responsibilities within a board is possible. If there has been such an internal division of tasks and areas of responsibility, then there is no full revocation but, however, a significant limitation on the responsibility for tasks which do not fall within one’s own sphere of responsibility. In that case each individual managing director may generally trust that the competent board member will perform his obligations properly and hence in accordance with the laws. However, the other board members have an obligation to monitor. Their full responsibility revives as soon as there are indications that the competent board member does not properly perform his duties, irregularities being detected or the company runs into critical situations.

Apart from this, the status as a guarantor establishes liability of the management bodies of an enterprise for criminal offences committed by subordinate departments and for the risks flowing from an enterprise or business. In this respect one may assume general responsibility and general competence of the management if the enterprise as a whole is concerned, which can be the case in crisis or exceptional situations. However, the management may discharge itself by delegating obligations to third parties in line with its duties (see 6.3).

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?

Irrespective of certain obligatory delegations of duties, the management level of a company has to take supervisory measures, which include the appointment, careful selection and monitoring of supervisory personnel. However, upon an admissible obligatory delegation of duties, the liability of delegating decision-makers is limited in that they remain subject to supervisory obligations alone. Such a transfer of obligations to employees can be agreed, for example, in employment contracts, directives issued or similar measures. When delegating obligations, the responsible decision-maker has to ensure, in particular, that the employees commissioned to perform the obligations are in a position to perform them in full and properly on the basis of their personal qualifications, their position in the business and their possibilities of working.

Apart from proper organization, the decision-maker has a duty of control, to assure himself insofar as possible and reasonable whether or not the person entrusted with the task performs it properly and whether that person is sufficiently reliable and knowledgeable. Stricter supervisory measures are required if irregularities have arisen in the business or if there are doubts as to the proper performance of tasks by the employees entrusted with them. There is also an obligation to instruct and inform and ensure sufficient monitoring of personnel, including supervisory personnel, by way of
spot checks. Failure to duly fulfil such obligations of selection and monitoring can lead to criminal liability of the managing directors subject to the pre-requisites set out in No. 6.1 above.

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

By way of proper organizational measures, the responsible managing director complies with his obligations and those of the company he manages while at the same time limiting his liability in both internal and external relations. It is advisable for the decision-maker of corporate management to delegate significant matters to as few persons as possible at the next operational level, while supervising that level intensely at the same time. This enables the difficulties of sufficient supervision of personnel to be minimized in that only a few, carefully chosen supervisory persons at the second hierarchy level within the company can become liable as persons responsible for the company.

Apart from this, there should be a clear horizontal division of responsibilities within collegial entities so that each member is clear about his area of responsibility, so as to minimize the risk of criminal liability for the remaining members.

Furthermore, it is becoming more and more essential that the company runs proper compliance systems to avoid any breach of obligations in its processes.
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.

A company cannot be prosecuted in a similar way as an individual offender under Greek Criminal Law. Legal entities cannot be prosecuted, and that is the reason why directors or managers of companies can be prosecuted for offences related to the companies.

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

As companies have no criminal liability, no sanctions under criminal law can be imposed.

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.
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.

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

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.

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

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

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.

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

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

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?

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

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

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

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

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

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

During an investigative phase of a criminal proceeding only against a person related to the company, as a company cannot be prosecuted, there are sanctions such as seizures, sealing of premises, that could be executed in order to collect or maintain critical evidences or to prevent the perpetration of other crimes. These sanctions have to do with the company because they may be related to company's products but they are not imposed upon the company as criminal subject.

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?

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

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?

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

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?

4.6. Will there be a joint proceeding 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.
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?

There is no discretion to impose a sanction on a company, given the fact that companies have no criminal liability.

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

A company can never have the status of a suspect or a similar status at any stage in proceedings.

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

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

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

There are proceedings only under civil or administrative law that could be joint against the company and the individual offender, but not under criminal law.

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

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?

It may happen in the above cases.

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

a. Participation to the offence as instigator, aider, abettor etc.

b. Special relationships or characteristics that under the Criminal Law establish liability.

c. Special legal obligation that under the Criminal Law can be established because of prior actions or the common law or a convention.

d. Special criminal laws for some specific offences.
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?

Yes it may happen. There are several cases in which directors or managers can be subject to joint criminal proceedings with other directors or employees (e.g. a doctor who has trained another doctor who was accused for malpractice)

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

In order to exclude or minimize criminal liability risks, companies could propose to their directors to act under full transparence. Written documents and best practices on all possible issues that could entail criminal risks can be used to prove at any time that a director has taken any possible precaution and has given specific orders to the employees by addressing such issues.
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.

Section 4 of the Interpretation Law, 1981 notes that, with respect to any act, the term "person", if not expressly stated otherwise, should be interpreted to include not only natural persons but also body corporate. Furthermore, section 4 of the Companies Law, 1999 ("the Companies Law") describes a company as "a legal personality qualified for every right, obligation and act that conforms to its character and nature as an incorporated body".

In this spirit, there is nothing to prevent the imposition of criminal liability on a company for almost all types of offences.

At the outset, it is worth noting that, in principle, the Israeli legal system does not base a company's criminal liability on the American "respondent superior doctrine" but, rather, on the English and Canadian models that require that the offence be committed by an "organ" (in certain jurisdictions, for example, in the USA, this functionary is termed a "superior agent"; for the sake of consistency, we have adopted to use the British term "organ" throughout in this response) of the company acting as its "ego" (i.e., on its behalf). This model was also accepted in the American Penal Code).

Accordingly, Section 23 of the Penal Law, 1977 ("the Penal Law"), provides that a company may be indicted and bear criminal liability.
The section distinguishes between three types of offences:

1. With respect to strict liability offences, it is possible to indict a company for the actions of any person who acted within the scope of his employment in the company (section 23(a) (1) of the Penal Law).

2. With regard to offences requiring \textit{mens rea} or negligence, a company could bear criminal liability where, in light of the specific circumstances and the person's function, authority, and responsibility in the handling and management of the company's affairs, there is reason to deem his actions, \textit{mens rea} or negligence as the actions, \textit{mens rea} or negligence of the company. This is, of course, the English common law model that requires that the offence be committed by an "organ", acting as the company's "ego" (section 23(a) (2) of the Penal Law).

3. Finally, with regard to offences by omission, where the duty to act is imposed directly on the company, the company will bear criminal liability regardless of whether the offence may be attributed to a specific employee or not (section 23(b) of the Penal Law)—this, admittedly, constitutes a deviation from the "organ" model and tends more towards the American "respondent superior doctrine".

Even though the section does not state so expressly, it is well established in practice that with respect to all types of offences, in order to base a company's criminal liability, there is a need to show that the offender acted within the scope of his employment and with the intent to benefit the company.

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

In principle, Israeli criminal law requires an indictment in order to impose criminal sanctions. However certain variations to this rule exist, as follows:

\textit{First}, a variety of criminal misdemeanors allow for the imposition of a \textit{fine} instead of a \textit{criminal indictment}. These offences are anchored in many different statutes and promulgated by the Minister of Justice. The offender (including companies) may elect to pay the fine or stand trial. A decision to pay is regarded as a confession to committing a misdemeanor and carries a criminal conviction. Included among these misdemeanors are many environmental and transportation offences.

In the field of tax law, an alternative to a criminal indictment is the \textit{payment of a penalty agreed upon, by way of compromise} ("penalty by compromise"), between a company having allegedly committed a tax offence and the tax authorities. The option to pay such penalty by compromise is anchored in the specific taxation laws. The achievement of a compromise, on the one hand, alleviates the efficiency of the judicial system while allowing the company to avoid criminal conviction and stigma, on the other hand.

Examples of other alternatives to a standard criminal indictment are:
• *A private complaint filed by an individual.* Section 68 of the *Criminal Procedure Law, 1982* ("the Criminal Procedure Law"), provides that in a variety of offences (some very relevant to companies such as environmental offences and intellectual property offences), an individual may initiate criminal proceedings without the involvement of the prosecution. Although this is not a "normal" criminal indictment, the proceedings are quite similar.

• *Criminal mediation*—a modern alternative to a full-fledged criminal indictment, that is gaining some momentum. Although this alternative proceeding normally takes place after the formal indictment, it still facilitates a different approach towards criminal offences. Mediation proceedings were legislated in order to ease the backlog of the civil courts but are today used also in order to reach agreements between the prosecution, the defendant company and victims (if any) and allows for a speedy and satisfactory conclusion of criminal proceedings. The mediation is conducted by an appointed mediator and concludes with the imposition of sanctions requiring the court's approval.

• Lastly, some specific Israeli laws allow for the imposition of sanctions without an indictment in cases involving criminal offences. For example, *the Planning and Building Law, 1965* ("the Planning and Building Law") allows the court to order the destruction of a building that was built with criminal intent and contrary to a court injunction, even if the prosecution did not decide on an indictment. Another example may be found in certain environmental laws that allow the authorities, prior to or even without an indictment, to demand the polluting company to cease its polluting activities.

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.**

In Israel, in addition to sanctions under the Penal Law, there are many other fields of law where under non-criminal sanctions may be imposed on a company following the commission of an offence by its directors, managers or employees. Usually, the origins of these non-criminal sanctions are specific laws that largely impose fines, but also injunctions.

For example, one dominant alternative to criminal proceedings are *administrative proceedings* pursuant to the *Administrative Offences Law, 1985* whose provisions authorize the Minister of Justice to promulgate offences, with respect to which the offender (including companies) may elect to pay a fine or withstand a regular criminal indictment (as opposed to the imposition of a criminal fine as set out in the response to question 1.2). Among the offences promulgated by the Minister as aforesaid are violations of labor laws, workplace safety laws, tax laws, environmental laws and the like.
In the field of anti-trust law, a non-criminal sanction is available to offenders of anti-trust issues through payment of an agreed fine. The amount of the fine is agreed to by the Restrictive Trade Practices Authority (“the Antitrust Authority”) and the company and also requires the approval of the court. Such sanction is an alternative to criminal proceedings, used often when the Antitrust Authority believes it is either problematic or unnecessary to prosecute the offending company due to lack of public interest or difficulty in proving guilt.

Another type of non-criminal sanction is civil confiscation due to the commission of an offence. This type of confiscation is possible under several specific laws, such as the Prohibition on Money Laundering Law, 2000 (“the Prohibition on Money Laundering Law”), that allows for the civil confiscation of property and moneys acquired through the commission of a money laundering offence, regardless of the existence of criminal proceedings or indictment.

Another non-criminal sanction possible under civil law is a pecuniary sanction imposed under section 354 of the Companies Law. These sanctions are not admitted in response to offences but rather, in response to civil corporate wrongdoings, such as the failure to submit reports timely or the failure to pay various obligatory fees.

With regard to the dissolution of a company, there exists an option—albeit in theory (according to section 257 of the Companies Ordinance [New Version], 1983)—to dissolve a company in civil proceedings due to the commission by the company of a criminal offence or its refusal to pay the aforesaid civil pecuniary fines. However, this option is not adopted in practice.

It should be noted in this context that, under the Companies Law, a company may not be incorporated if its objects are illegal or are contrary to public policy.

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.

Clearly, some sanctions are not dependent on the nature of the company and, therefore, may not be imposed in practice (e.g., imprisonment or the performance of community service). On the other hand, the imposition of a criminal fine is the classic and appropriate means to deter companies as it threatens the main objectives of the company's shareholders—maximizing profits.

As to the amount of the fine: each law sets out a specific maximum sum that may be reduced at the court's discretion. Section 61 of the Penal Law establishes the general benchmark for the amount of most fines In a nutshell, a fine of: (i) 12,900 New Israel
Sheqels ("NIS"), (approximately US $3,000) is imposed for offences carrying a jail sentence term of up to six-months; (ii) NIS 26,100 (approximately US $6,000) is imposed for offences carrying less than a one year jail sentence term; (iii) NIS 67,300 (approximately US $16,000) is imposed for offences carrying less than a three-year jail sentence term; and (iv) NIS 202,000 (approximately US $50,000) is imposed for offences carrying a jail sentence term exceeding three years.

Offences under many company-oriented laws such as workplace safety, anti-trust and environmental laws result in the imposition of much higher fines (even up to 20 times the amount stated in section 61). Some of these laws even differentiate between companies and individuals and impose higher fines on companies committing the same offences as those committed by individuals.

Another type of criminal sanction that may be imposed is the criminal confiscation (as opposed to civil confiscation, see response to question 1.3) of money, property or instruments that were either acquired illegally or used in order to commit an offence.

In addition, specific laws have been enacted that allow for the imposition of injunctions (for example an injunction ordering the destruction of an illegal structure under the Planning and Building Law, the disposal of waste, etc.).

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

In order to impose sanctions on a company, the company must be found guilty of the relevant offence according to section 23 of the Penal Law, as referred to above. Different offences of particular severity, as outlined above, carry different fines and might require the fulfillment of additional conditions, such as aggravated circumstances (aggravated danger to human life, malice and so on and so forth).

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.

With regard to the nature of the offences for which companies may be found liable, the rule of thumb is that a company may bear criminal liability for the commission of any offence.

However, there are certain offences that would not lead to corporate indictment, examples of which include bigamy, perjury and incest. As these offences are understood to be of a human nature, they cannot apply to companies under the "legal person doctrine".

With regard to the hierarchy of the offender, as explained above (see response to question 1.1), with respect to strict liability offences, the company may bear criminal liability for offences committed by any person acting within the scope of his employment in the company.
With respect to offences by omission, not only does no hierarchy requirement exist, but even without identifying an offender, a company may bear liability.

With respect to mens rea or negligence offences, a company may only be indicted for offences committed by an "organ" of the company. Section 23(a) (2) of the Penal Law specifies a senior functionary that may be regarded as the company's "ego", when in light of the specific circumstances as well as his function, authority, and responsibility in the handling and management of the company's affairs, there is a reason to regard his actions, mens rea or negligence as the actions, mens rea or negligence of the company. Furthermore, section 47 of the Companies Law provides that the actions and intentions of an organ are deemed to be the actions and intentions of the company.

The term "organ" is defined in section 46 of the Companies Law as "the General Meeting, the Board of Directors, the General Manager and any person whose action on a certain matter—according to an enactment or by virtue of the Articles of Association [i.e., the company’s by-laws]—is deemed the company's action on that matter". Therefore, the definition of "organ" is very wide allowing the courts considerable flexibility and discretion when ruling on matters of this nature.

In the Supreme Court case 3027/90 MODIEIM, it was held that senior managers, directors, the general assembly of shareholders and the board of directors are all "organs" who may impose criminal liability on the company. In addition, Chief Justice Barak clearly stated that employees from a lower hierarchy could be considered as "organs" in certain circumstances.

It is therefore difficult, in the framework of this survey, to analyze how the Israeli courts would interpret an "organ" of a company, but it is clear that the courts tend to broaden the scope of the term "organ" when ruling on the issue.

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

Attribution of the actus reus from individuals to the company is done in accordance with the provisions of section 23 of the Penal Law as detailed above (see responses to questions 1.1 and 2.3).

With regard to the latter part of the question, it should be emphasized that under Israeli law, violations of internal rules do not amount to a criminal offence. Therefore, attribution of such violations to the company is of no relevance.
2.5. **How will mens rea of the company be established?**

As noted above, section 23(a) (2) of the Penal Law specifies that in the case of offences requiring *mens rea* or negligence, they will be established by attributing the *mens rea* or negligence of the "organ", who committed the offence, to the company. It is important to clarify that the courts will decide on attributing criminal liability from the offender to the company as aforesaid, when, in light of the specific circumstances and the offender's function, authority, and responsibility in the handling and management of the company's affairs, there is a reason to regard the offender's actions, *mens rea* or negligence as the actions, *mens rea* or negligence of the company.

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.**

According to section 23(b) of the Penal Law, a company may be liable with respect to strict liability offences. This will be the case when a person, while acting within the scope of his employment and with the intent to benefit the company, commits a strict liability offence.

Strict liability provisions deal with petty crimes and do not impose a jail term sentence. Therefore, in most cases, minor fines are imposed for such offences.

Section 22(b) of the Penal Law defines "strict liability offences" as offences that require the commission of the *actus reus* without the offender doing "all that is possible" to prevent his conduct.

Section 22(a) of the Penal Law, which was enacted as an amendment to the Penal Law in 1994, provides that every new strict liability provision from 1994 and thereafter, must be expressly worded. However, offences defined by the courts as strict liability offences prior to 1994 still exist as such, despite not being explicit.

Due to the legislation of section 22(a) of the Penal Law, it is not easy to identify, under the Israeli criminal system, which offences constitute offences of a strict liability nature and which require *mens rea*.

With regard to the content of strict liability offences, it is very difficult to identify a common thread between them. Nevertheless, many of the strict liability offences are public welfare offences aimed at preventing a public nuisance and protecting public safety in an efficient manner that, as a matter of judicial policy, should not impose the burden of proof on the prosecution's shoulders (for example, workplace safety offences, environmental offences and public health offences).
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

The answer to this question is divided in two:

(i) The *need* for identification exists with respect to strict liability, *mens rea* and negligence offences, since the company's criminal liability is established through the attribution of acts and intentions from the individual to the company, as generally explained above. With respect to omission offences, as noted above, when the duty to act is imposed directly on the company there is no need to identify an individual offender.

However, another option is available for indicting and imposing criminal liability on a company, without the need to identify a specific individual. This is based on the "collective knowledge doctrine" that holds the company criminally responsible for the collective actions and intentions of all of its "organs". Therefore, even if the crime cannot be attributed to one specific "organ" committing both the *actus reus* and the *mens rea*, it could still be attributed to the company as a whole. The "collective knowledge doctrine" has not yet been adopted in Israel and, therefore, at this point and time is not used.

(ii) With respect to the *need* to indict or convict an individual offender in order to indict or convict the company—it is true that, in most cases, the individual offender is prosecuted jointly with the company since he is the one having committed the offence. However, there is no obligation to do so and there are cases where the company could be indicted or convicted without first procuring the indictment or conviction of an individual offender, for example: where the offence may only be committed by a company or requires extra elements that may only be attributable to a company; or where the prosecution uses its discretion and decides not to indict the individual due to personal circumstances or lack of public interest, while such circumstances may not be enjoyed by the company.

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

In addition to arguing that no offence was committed by the offender, the company may also try to refute any one of the elements of section 23 of the Penal Law.

With regard to *mens rea* or negligence offences, the company may argue that the offender is not an "organ" of the company and, therefore, the attribution should not be made.

In omission offences, the company could argue that the duty to act was not imposed directly on it and, therefore, the onus is on the prosecution to identify a specific "organ" that had a duty to act but failed to do so.
Furthermore, in all type of offences the company may argue that the offence was not committed within the scope of the individual's employment and, therefore, may not be attributed to the company. In this regard, it is worth noting that the Israeli courts have held that acts are deemed to fall within the scope of an individual's employment even if they were committed when the employer deviated from his general authority or acted contrary to express instructions.

The company may also argue, with respect to all type of offences, that the offence was not committed in order to benefit the company but, rather, was aimed at benefiting or advancing the offender's personal interests. In this regard the courts have held that an employer's aims are to benefit the company in which he is employed, even if he has ulterior motives and even if, in practice, his deed did not at all benefit the company.

It should be noted that the Israeli Supreme Court has held that a company's insolvency may not be raised as a defense in criminal proceedings and may not be relied upon in order to avoid, delay or postpone criminal proceedings (as opposed to civil proceedings, where such a defense is available).

Coupled with these "corporate" defenses, it should be emphasized that all other defenses as specified in the Penal Law that apply to an individual employee or an "organ" (such as self defense, necessity and de minimis) may also be relied upon in order to prevent criminal liability from being imposed on a company.

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?

In general, no. The conduct and state of mind that constitute the focus of the criminal procedure are those of the company's employees or "organs". With this in mind, some scholars believe that, in strict liability offences the company may avoid criminal conviction if it shows its "organs" did "all that was possible" in order to prevent the offence committed by a low hierarchy employee. However, this opinion is, as yet, only academic.

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

Many Israeli statutes such as the Dangerous Drugs Ordinance [New Version], 1973, the Prohibition on Money Laundering Law and various search and seizure acts allow the police and other enforcement agencies (such as, the Antitrust Authority, the Israeli Securities Authority, etc.) to take preliminary measures against companies in order to assist their investigation or prevent further law violations.
Actions such as the seizure of assets used to commit the offence, the apprehension of evidence, the confiscation of money acquired from the commission of an offence, etc., are possible even before the indictment, but in most cases require judicial approval.

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

Certainly. As noted above (see response to question 2.7), there is nothing to prevent both the individual and the company from being indicted and convicted for the same offence and, in practice, this is generally the case.

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

This seems unlikely. According to section 23 of the Penal Law, in order to prosecute a company, the law requires that its employee or "organ" commit the offence. Therefore, the common scenario is that an employee or an "organ" commits an offence, and his employing company (and not the parent company, affiliated company or other company within the group) is prosecuted and bears criminal liability. This distinction between parent and affiliated companies or between member companies in a group accords with the "legal person doctrine".

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.

As noted above, other than criminal sanctions (see response to question 2.1) specific proceedings, such as administrative proceedings, civil proceedings and specific laws allow for the imposition of non-criminal sanctions on companies (e.g., fines, injunctions and confiscations (see also response to question 1.3)).

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

With regard to administrative proceedings, such sanctions are available only under specific laws that relate largely to workplace safety; environmental protection and labor rights (see response to question 1.3). Various laws have been promulgated and continue to be promulgated in this respect in an endeavor to limit the reliance on criminal proceedings.

All other non-criminal sanctions that may be imposed on companies are based on specific laws, such as the Companies Law, which allows for the imposition of pecuniary fines due to civil wrongdoings; the Planning and Building Law, which allows for the destruction of a building, regardless of a criminal indictment; and the Prohibition of Money Laundering Law, which allows for the civil confiscation of
property and money acquired due to the commission of an offence relating to money laundering (for further details, see response to question 1.3).

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

With regard to administrative proceedings, a company may elect not to pay the fine and withstand regular criminal proceedings, thereby allowing it to raise all the defenses mentioned above (see response to question 2.8).

All other civil sanctions referred to above are imposed within the context of civil proceedings, such that the provisions of section 23 of the Penal Law, which apply to criminal proceedings only, will not apply; accordingly, the defenses available to a company will be those expressly included in the relevant statute to which the offence relates. Therefore, a company could attempt to convince the court that it did not breach the relevant law or any of its provisions. For example, section 354 of the Companies Law imposes a pecuniary fine on companies that fail to pay obligatory fees. In such case, the company could argue that the obligation does not apply to it or that it had already paid the fee.

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

Administrative fines and agreed fines payable for anti-trust offences may be imposed on companies without a criminal indictment. It is therefore not unusual for administrative fines to be imposed prior to completion of the investigative work so as to obviate the need for procuring a criminal indictment.

Other civil sanctions may clearly be imposed during the investigative phase of criminal proceedings since their application does not require or depend upon the existence of criminal proceedings, in general and a criminal indictment, in particular. For example, the Prohibition of Money Laundering Law allows for the civil confiscation of money or property that was acquired illegally, regardless of the completion of the investigative phase and issue of a criminal indictment.

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?

Section 62 of the Criminal Procedure Law empowers the prosecution to apply professional discretion when deciding on whether to indict an individual as well as a company.

The interpretation accorded to this section by the Supreme Court is that the prosecution should decide to indict (individuals as well as companies) where there exists both
evidence establishing a "reasonable chance of conviction" and "public interest" in the indictment.

It is worth noting that the "public interest" requirement has been widely interpreted by the Israeli courts and allows the prosecution to take into account all aspects of the public interest, including the possibility that full-fledged criminal proceedings against the company will lead to financial instability and loss of jobs, the undermining of public trust in the judicial system or an exaggerated expense of public moneys. Nonetheless, the court can overrule the prosecution's decision, but this is rarely done.

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

When suspicion of the commission of an offence arises against a company, as in the case of suspicions raised against an individual, the police will, in most cases, decide to initiate an investigation. Upon initiating the investigation, the police have a duty to inform the offender of the suspicions against him and his status as a "suspect" (similar to the "Miranda warning").

Largely, the purpose of the investigation is aimed, inter alia, at establishing or disproving the suspicions having regard to the provisions of section 23 of the Penal Law (i.e., the offender's actus reus and mens rea, and their attribution to the company, etc.).

In most cases, as described above, suspicions will arise against a company based on the conduct of its "organs". In these circumstances, both the company and the individual will be treated as suspects simultaneously and in the same manner.

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?

In Israel, under the "legal person" doctrine, a company is conferred with many constitutional rights, including those of a suspect and a defendant. Therefore, if the company is also a suspect, it has all the rights available to an individual suspect that accord with its qualities as a corporation.

A company suspected of an offence, for example, has the right to remain completely silent during the investigation. Nevertheless, with regard to the refusal to produce documents, it seems that recent Supreme Court decisions stipulate that a suspect (individual as well as company) does not have an absolute right to refuse the production of documents but, rather, only the right to refuse the production of self-incriminating documents (see Supreme Case decision 8600/06 SHARON).
In addition, a company is conferred with all other relevant rights, such as consultation with a lawyer, being informed of the suspicions against it and being subject only to legally authorized searches, etc.

It should be emphasized that a company's rights may be exerted only by its "organs", which are regarded as representing the company's mental and physical self. Therefore, when a company's directors are interrogated, they could be interrogated as individual suspects and, at the same time, as "organs" in a company suspected of an offence and, in these circumstances, exert both sets of rights.

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

Both with regard to individuals and companies, at the end of the investigative phase the findings are brought before the prosecution to allow it to decide whether or not to indict. According to section 60(a) of the Criminal Procedure Law, in felony cases, the prosecution must inform the suspect that the investigation's findings have been brought before it, and of the possibility of an indictment (in misdemeanors, an indictment may be served without preliminary notice).

It is worth noting that, pursuant to section 60(a) (d) of the Criminal Procedure Law, a company, like an individual, has the right, in felony cases only, to a preliminary hearing, before the prosecutor in an attempt to convince him not to press charges.

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?**

In Israel, under the *Evidence Ordinance [New Version], 1971*, the general rule of thumb is that every person is capable of giving testimony. Directors, managers or employees in a company are no exception, even in the case of an indictment against their employing company or their fellow employees.

However, "organs" that represent the defendant company's "ego", may exert the company's right to remain silent and not testify, regardless if they, themselves, are indicted.

With regard to other employees who are not "organs"—if they are indicted together with the company, they may remain silent in court and in so doing avoid giving testimony against the company and other individual offenders. However, if such employees are not indicted or, alternatively, indicted in separate proceedings, then, they may be obliged to testify as prosecution witness and will then have only the right not to incriminate themselves (rather than the right to remain completely silent).

During a police investigation, against a suspected company, "organs" and other employees who are also suspects have the right to remain completely silent and not
answer any questions. However, employees who are not "organs" and are merely witnesses, have only the right not to incriminate themselves.

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

Using its professional discretion, the prosecution will decide whether to serve joint or separate indictments against the company and the individual offender. This decision, *inter alia*, is based on evidential considerations (see the possibility of joining a defendant in one proceeding to testify against the company in a separate proceeding, as set out in the response to question 4.5) and considerations regarding the length of the proceedings in an endeavor to prevent a distortion of justice to the individual offender.

In most cases, the proceedings against the company and the individual offender are joint from the outset. It should be noted that, during the trial, the defendants, as well as the prosecution, can ask the court for a joint or separation of the proceedings, in light of the considerations mentioned above.

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

As explained above, the company is an independent defendant in a criminal trial. As such, the proceedings against it are conducted in a manner similar to proceedings against an individual offender (therefore, the proceedings are usually joined, see response to question 4.6).

For example, the Criminal Procedure Law requires that a criminal trial be conducted in the presence of the defendant, notwithstanding whether the defendant is an individual or a company, represented by its "organs".

Furthermore, on many occasions the company hires a separate attorney, due to its status as an independent defendant and having separate interests.

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?**

As noted above, very few criminal sanctions are available in Israel that may be imposed without first obtaining an indictment and a conviction (see response to question 1.2).

Certain of these sanctions do depend on the prosecution or the court's discretion. For example, in misdemeanors that allow for a criminal fine instead of an indictment, the prosecution still has the power to insist on conducting a criminal trial if it believes the public interest requires so. The same holds true in cases of penalties by compromise.
where the final decision as to whether to allow the payment of such penalties instead of issuing a regular criminal indictment is made by the regulatory tax authorities. The relevant considerations are usually: evidential considerations, the severity of the offence, the public interest in criminal proceedings, etc.

With regard to different injunctions that do not require a criminal indictment, such as the destruction of an illegal building, these are issued by the courts or other relevant regulatory bodies and are subject to both their discretion and the specific circumstances of the case.

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

*See* response to question 4.2. It should be emphasized that the imposition of special sanctions as set out in such response allows suspected companies to settle the accusations against it without becoming defendants in a trial.

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

Here too, *see* response to question 4.2. When the police or other law enforcement agencies witness or discover that the relevant offences were committed, they will notify the company of the possibility of a fine or a penalty by compromise being imposed (*see* response to question 1.2) or of their intension to press charges.

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

In the investigative phase, the suspected company has all the procedural rights, regardless of the type of sanctions that may be imposed on it.

If a company elects not to pay the fine or the penalty by compromise it will then be the subject of a regular criminal indictment and, in such event, have all the rights of a defendant as set out in the response to question 4.3.

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

If the company and the individual offender decide to pay the fine or the penalty by compromise (as an alternative to an indictment, as noted above) no proceedings will ensue. If they do not pay, then regular criminal proceedings will be instituted (*see* response to question 4.6), usually in the form of joint proceedings, all in accordance with the prosecution's discretion.
5.6. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

If proceedings are ensued, then they will be conducted in the form of regular criminal proceedings and in the same manner for companies and individuals alike (see also response to question 4.7).

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?

In Israel, many specific statutes apply vicarious liability and hold directors and managers responsible for offences committed by a company. It should be emphasized that vicarious liability cannot be imposed without an explicit provision in a statute.

Therefore, the common scenario is that an "organ" or an employee commits an offence; the offence is attributed to the company on the basis of section 23 of the Penal Law (as explained above) and thereafter follows specific statutes that impose vicarious liability on managers and directors.

Sections evidencing vicarious liability include, for example, section 48 of the Restrictive Trade Practices Law, 1988, section 253 of the Planning and Building Law, and many other environmental, labor and public welfare laws.

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

As noted above, in order to impose vicarious liability on a director or a manager for offences committed by the company, a provision must first and foremost be included therefore in the relevant statute.

In most such statutes the actus reus comprises of two elements: first, that the offence may be attributed to the company pursuant to section 23 of the Penal Law, and second, that the person on whom the vicarious liability is imposed is a director or a manager to which the specific vicarious liability provision refers.

Usually, these provisions do not require mens rea or negligence in order to impose vicarious liability on directors and managers, but rather, create a strict liability regime that, in order to escape conviction, requires not only that the director or manager did not know and was not obliged to know of the offence, but that he also used "all reasonable measures" to prevent the offence being committed by the company (see, further, Supreme Court decision 26/97 LACKS).
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?**

If a company commits an offence (under section 23 of the Penal Law) and there exists a vicarious liability provision allowing for the imposition of liability on directors or managers, then the director or manager must prove that he took "all reasonable measures" to prevent the offence (see response to question 6.2). In light of this requirement, it is certainly possible that any lack of supervision and proper instruction, as well as the inadequate selection of employees will lead to the imposition of criminal liability on the directors and managers referred to in the relevant vicarious liability provision.

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

As already noted, directors and managers may be vicariously liable for offences committed by the company (even if they did not know or were not obliged to know of the offence), if they failed to use "all reasonable measures" to prevent the commission of such offences. Therefore, in order to exclude or minimize the risk of criminal liability being imposed on directors or managers of a company, we would recommend the following:

1. It is highly recommended for directors and managers to implement various "internal compliance programs". These programs may be adopted in different areas of law, such as environmental protection, workplace safety, prevention of sexual harassment in the workplace and prevention of anti-trust offences. The primary goal for incorporating such programs would be to increase awareness of the legal prohibitions in the relevant areas. This could be carried out *inter alia*, by:
   (i) the directors and managers providing written declarations to abide by the various laws; (ii) the appointment of a "compliance officer"; and (iii) the distribution of pamphlets and notices to employees setting out the substance of the various laws and the penalties imposed for any person transgressing same.

   In certain fields of law such as anti-trust, the Antitrust Authority has established a model "internal compliance program" which companies may adopt voluntarily as a deterrence to minimize the risk of criminal offences by employees and in an endeavor to avoid vicarious liability from being imposed on directors and managers.

2. Directors and managers should also, where possible, adopt the mechanism of a "business review procedure" or a "pre-ruling", in order to ensure that the company's activities, policies and procedures comply with applicable law. Different regulatory authorities, such as the Israeli tax authorities and the Antitrust Authority allow an applicant company to seek a preliminary opinion or a preliminary pre-ruling before proceeding to consummate a certain transaction or
conducting its business activities in a certain manner. Moreover, directors and managers should also ensure that, following receipt of the relevant opinion or pre-ruling, the company operates and acts in strict compliance therewith.

3. Do not underestimate the importance of adequate selection and screening of employees. It is recommended to ask the potential employee to supply recommendations from former employers and to insist that they undergo reliability and personality tests (polygraph, etc.). The company could hire a special employment adviser to help with the screening and selection of employees.

4. After an employer is selected, it is essential that he receive adequate training and instruction. The training of employees should be done on an ongoing basis. It is not enough for directors and managers to merely provide isolated training courses; rather directors and managers should ensure that employees continue to receive up-to-date training and also be permitted to attend professional courses and lectures. Managers should also ensure that each and every employee is aware of the scope of his employment as well as of the laws, regulations and internal workplace procedures and policies that apply to his job.

5. Managers have the duty to ensure that employees are adequately supervised and that when failures occur, they are rectified immediately together with recommendations and conclusions for improvements in the future.

6. Directors and managers should be aware of different developments (technological advances, better equipment and improved workplace safety etc.) so as not to be held responsible for not using "all reasonable measures" to prevent the commission of the offence.

7. Directors and managers should also be aware of new legislation and judicial precedents that impose criminal liability in the relevant field in which the company operates, and direct the company's actions accordingly. In order to implement these duties, section 266 of the Companies Law allows the directors to consult with an external professional adviser at the company's expense.

8. In the above context, great importance has been placed on the Supreme Court's decision in 935/00 BUCHVINDER, a case that held the directors of the North America Bank liable for its collapse. Chief Justice Barak noted in his decision that the directors have a duty to attend board of directors' meetings and, sometimes, even to demand its convening. He further noted that the board of directors must supervise management's actions and be fully acquainted with the company and its actions.
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.

Yes. In Italy the criminal liability of companies is regulated by Legislative Decree No. 231 of June 8th, 2001 (the “Decree”), which introduced in the Italian legal system the concept of administrative liability of corporations for crimes committed by their management and/or representatives, on the assumption that the relevant criminal conducts are committed in the company’s interest. The proceeding against a company does not differ from that against an individual suspect.

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

No, no other type of sanction can be imposed on companies under criminal law.

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.

Yes, there are other kinds of sanctions (of administrative nature) that can be imposed directly on companies. Although the general rule with respect to administrative sanctions consists in the joint liability of the Company and the actual author of the offence, (as set forth by Law No. 689 of November 24th, 1981, which states that...
companies and entities are jointly and severally liable with the offenders for the payment of the sanction and can exercise the right of recourse against the responsible for the offences\textsuperscript{12}), there is a number of legal provisions which impose sanctions directly on the company, making an exception to the above mentioned rule.

These sanctions are set forth by different laws. The following list gives a number of examples:

(i) Articles 15 and 19 of Law 287/1990 imposes fines in case of infringement of the rules on competition provided by the mentioned Law No. 287 (concerning agreements and concerted practices between undertakings, abuse of a dominant position, concentrations between undertakings);

(ii) Article 2 paragraph 20 of Law No. 481/1995 (concerning regulations for the public utilities sector) imposes fines on the companies and -in case of reiteration of the violations- also the suspension of the activity and the suspension or loss of the authorization;

(iii) with respect to management companies in the financial sector, Article 75 of Legislative Decree No. 58/1998 (Consolidated Law on Financial Intermediation, the “Decree No. 58”) provides for the revocation of the market’s authorization if the irregularities are exceptionally serious;

(iv) with respect to auditing companies, Article 163 of the Decree No. 58 provides for several sanctions to be imposed directly on the entity: pecuniary administrative sanctions between ten thousand and five hundred thousand Euros; prohibition to employ, for a period of not more than five years, the person responsible for the audit who committed the irregularities; revocation of the audit engagements; prohibition to accept new auditing engagements for a period not longer than three years; deletion of the company from the register;

(v) Article 6 paragraph 5 of Legislative Decree No. 374/1999 (concerning money laundering and financial activities especially liable to be used at money laundering purposes) imposes pecuniary sanctions in case of infringement of its provisions;

\textsuperscript{12} For an application of this principle, see for example, Article 195 of Legislative Decree No. 58/1998 (Consolidated Law on Financial Intermediation)
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.

Pursuant to the Decree, the following sanctions may be imposed on the company, in case of violations of its provisions:

- a pecuniary fine, the measure of which is established by the judge, on the basis of the relevance of the violation, the level of responsibility of the company, and the activities carried out in order to avoid the violation;

- the mandatory seizure (“confisca”) of the price or profit deriving from the violation;

- the interdiction of the company’s activities (for a period ranging from three months to two years or permanently in case of significant and repetitive violation);

- the suspension or revocation of the administrative authorisations or licenses, functionally linked to the violation;

- the prohibition to enter into agreement with the public administration (with the exception of public services);

- the exclusions from public contributions or financial aid, and possible revocation of such contributions and aids;

- the prohibition to advertise goods or services;

- The publication of the judgement.

Please consider that more restrictive sanctions are applied subject to the following:

(a) the violation is reiterated within five years from the judgement;

(b) The violation is committed by apical persons, and the company gains a relevant profit.

Crimes and criminal proceedings are respectively regulated by the provisions of the Italian Criminal Code and Italian Criminal Procedure Code, to which reference is made.
2.2. **What are the legal requirements for each type of sanction?**

Pecuniary sanctions, mandatory seizure and publication of the judgment are sanctions which are always applied in any case of offence. The sanctions are applied only when expressly provided for by the Decree.

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.**

The criminal conducts falling within the scope of application of the Decree include:

- fraud against the State or other public entities aimed at receiving public contributions;
- unlawful perception of contributions;
- extortion and corruption;
- corporate crimes;
- counterfeiting of money, credit cards or stamps;
- crimes of terrorism or crimes directed towards the subversion of the democratic system;
- market manipulation;
- money laundering;
- crimes against the person (including pornography);
- computer fraud;
- crimes committed in different countries (cross-borders crimes).

Article 5 of the Decree contains a list of the persons whose conducts trigger the application of the Decree, namely:

- representatives;
- managers;
- directors;
- directors of units provided with financial and functional independence;
- persons carrying out de facto management or control activities;

(Hereinafter defined as “top officers and managers” or “soggetti apicali”)

Persons acting under the supervision or direction of the above top officers and managers.

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

Acts or omissions of individuals are attributed to the company if executed in the company’s interest.
The company is not considered responsible if the author of the offence has operated exclusively in his own interests or in the interests of a third party.

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

Mens rea of the company will be established on the basis of the mens rea of the top officer and managers committing the relevant crimes which will attribute to the company.

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.**

In a certain sense the liability of the company provided for by the Decree can be considered as a strict liability, since the company shall be considered liable if the mentioned offences are committed in the company’s interest by the relevant officers of the company, regardless of a mens rea of the company itself. However, as indicated under 2.5 above, mens rea of the top officer or managers is required.

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

It is not necessary to convict the individual offender in order to prosecute the company. Pursuant to the Decree the company can be prosecuted even in the event of non-identification/conviction of the individual offender.

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

Please note that the implementation of the compliance programs (as described under 2.9 below), prior to the occurrence of the violation, and provided that such circumstance can be proved by the company, may exempt from the application of the sanctions.

Even in the case of a delayed adoption of such compliance programs, the application of most intrusive sanctions (such as the temporary interdiction of the activities and the publication of the relevant judgement) could be prevented, in the event that the program is adopted during the preliminary phase of the relevant criminal proceeding or before the publication of the judgement.

The declaration attesting that the company intends to adopt and implement the compliance programs could determine the suspension of certain sanctions, such as the temporary interdiction of its business.
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?**

Pursuant to Article 6 of the Decree, the company’s liability can be excluded in the event the relevant company proves that:

(i) before the relevant violations were committed, organisational and management models aimed at preventing such violations (the “compliance programs”) were adopted;

(ii) together with the above measure, a specific supervisory body – provided with independent powers of “initiative and control” – was appointed for the purpose of verifying the effective functioning of the compliance programs;

(iii) the violations were committed by the relevant persons with the fraudulent intention to elude and avoid the compliance programs;

(iv) the supervisory body did not omit to exercise a “sufficient” level of control.

The management body entrusted with the implementation of the organisation aimed at preventing violations is deemed to be the board of directors. Thus, the board of directors is, first of all, in charge of the appointment of the supervisory body and approval of the compliance programs.

The supervisory body as per point (ii) above should be composed of third independent parties with wide power of inspection and access to information (also vis-à-vis directors).

The compliance programs shall:

(a) point out the activities that might give rise to violations;

(b) provide for specific protocols aimed at planning the adoption and implementation of the decisions of the company in connection to the crimes to be prevented;

(c) create adequate procedures for the management of financial resources for the purpose of preventing violations;

(d) provide for duties of information vis-à-vis the supervisory body;

(e) implement a sanctions’ system applicable in case of violation of the compliance programs.
Please note that according to Article 6 of the Decree, the relevant entrepreneurs’ associations (“associazioni di categoria”) are given the power to prepare and approve - with the supervision of the Ministry of Justice and other competent ministries – models and guidelines on the basis of which companies may adopt their compliance programs.

Pursuant to article 7 of the Decree, in the event of a violation committed by persons acting under the supervision or direction of the top officers and managers, the company is responsible if the violation took place as a consequence of the lack of direction or supervision. In any event, such lack of supervision is excluded if, prior to the commission of the crime, the company adopted and effectively implemented its compliance programs.

In this respect, article 7 provides for a definition of “effective implementation”, meaning:

(a) the carrying out of periodical revisions of the compliance programs and the introduction of amendments to the same in the event significant violations to such programs are found or changes in the organisation or business of the company have occurred;

(b) the introduction of a system of sanctions applicable in case of violation of the compliance programs.

Pursuant to Article 8 of the Decree, the company’s responsibility is deemed effective also in the event the person committing the crime is not identified or cannot be indicted, and where the crime is annulled or revoked for a reason different from amnesty.

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

Yes. According to Article 45 and ff. of the Decree, provisional orders and measures (“misure cautelari”) can be imposed on the company, in case of serious elements of responsibility of the company and risk of reiteration of the same type of criminal conduct.

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

Yes, both the individual offender and the company can be convicted for the same offence.
2.12. Can a parent/group company been prosecuted for offences being committed within a subsidiary?

Yes, a parent/group company can be prosecuted for offences being committed within a subsidiary. Notwithstanding the fact that the Decree does not address this specific issue, case law states that the liability of a parent/group company for crimes committed by their subsidiaries can arise on the assumption that the relevant criminal conducts are committed also in the interest of the parent/group company.

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.

The only criminal sanctions which can be imposed on a company are the ones provided for by the Decree. The other sanctions of administrative nature are described under answer 1.3 above.

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

N/A

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

N/A

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

N/A

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?

Under Italian criminal law, the principle of compulsory exercise of investigations by the public prosecutor upon notice of crime applies. However, the public prosecutor may weigh, under its own discretion, the persuasiveness and sufficiency of evidence before filing the criminal action.
4.2. **At what stage during an investigation/proceeding does a company have the status as a suspect or similar status?**

A company will have the status of a suspect as soon as its name is introduced in the registry of persons under investigations.

Specifically, the Italian Criminal Code states that: (i) the investigation is a phase of the criminal action preceding the trial, during which the public prosecutor is granted the time to carry out the investigation; (ii) this phase is covered by public secret; (iii) the suspect has the right to be informed on the investigation and to entrust an attorney.

This phase has a maximum duration of 6 months from the notice of criminal offence, and any prorogation of this term may not exceed the maximum term of 18 months (except for a list of particularly dangerous offences).

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?**

The company has the rights to (i) remain silent and (ii) refuse to answer questions. The company does not have the rights to (iii) refuse production of documents, (iv) deny access to company site without search warrant, (v) refuse testimony. The person entitled to exert these rights is the legal representative of the company, i.e. the person is given the relevant powers.

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

At the end of the preliminary investigations pursuant to article 415-bis of Italian Criminal Code the company is informed that it is prosecuted.

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, the directors, managers or employees can be witness in proceedings against a company. This principle applies also if the directors, managers or employees are considered suspects.

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

Yes, there will be a joint proceeding against the company and the individual offender. Pursuant article 38 of the Decree the proceedings shall be brought jointly.
4.7. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

The rules applying to the proceedings against a company are the same.

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?

Please, see answer 1.2 above.

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

Please, see answer 1.2 above.

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

Please, see answer 1.2 above.

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

Please, see answer 1.2 above.

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

Please, see answer 1.2 above.

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

Please, see answer 1.2 above.

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?

No, directors or managers cannot be criminally held liable for offences committed by other individual directors, managers or employees, by virtue of the following principle: “the criminal liability is personal”.

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

See answer 6.1 above.

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?

No a criminal liability does not arise only from the fact that another director, manager or employee was not adequately selected, instructed, supervised or the company not adequately organized.

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

The only way to exclude or minimize criminal liability risks is the adoption of the compliance programs by the company (please see point 2.9 above).
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.

The Jordanian Penal Code No.16 of Year 1960 (the “Penal Code”) and the Criminal Law Procedures do not differentiate between individuals and companies in regard to the prosecution and the implementation thereof in Jordanian courts. Nonetheless, an individual in criminal proceedings is prosecuted in his personal capacity. However, in criminal proceedings against a company, the company is prosecuted as a separate defendant but should be represented throughout the trial by its authorized representative who should be present during the trial. In accordance with the Penal Code, the company should be liable for any criminal acts committed by any of its directors, employees or shareholders provided that such acts have been committed in their capacity as employees or representatives of the Company.

Any judgment given against the company is enforceable against the company itself, and does not extend to hold the company’s directors, employees or shareholders liable unless direct fault can be attributed to such individuals in the company except in limited described circumstances that are provided for within the Jordanian Legislation.

Furthermore, pursuant to the Penal Code companies are not subject to imprisonment sanctions as that is practically impossible. Imprisonment sanctions against companies are converted to a fine by operation of Article 74(3) of the Penal Code. Only the identified individuals can be prosecuted and sentenced to prison, and may be subjected
to fines. Companies are subject to other forms of sanctions depending on the severity of the committed crime such as the obligation to temporary cease of its business activities, wind up the company and pay various fines imposed by the laws and regulations relating to the offence committed.

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

Under Jordanian laws and regulations, companies may be subject to two categories of sanctions; precautionary sanctions, and post-trial sanctions that are imposed on the company upon the issuance of a final judgment by the courts.

Precautionary sanctions include an order for the confiscation of all materials that may be admissible as evidence or material used to carry out the offence. Lock-down may be ordered against the company, if the offence is committed by the company owner or is carried out with his approval. The minimum duration for lock-downs is one month and does not exceed one year. Furthermore, a court order to dissolve the company or an order for ceasing business activities may be imposed on the company. Court orders for dissolving the company or ceasing activities are only imposed when the offence committed is punishable by a minimum penalty of two years imprisonment. Companies are typically ordered to cease business activities for a period of not less than one month and not exceeding two years. It should be noted that failure to comply with the aforementioned penalties results in the imposition of additional financial penalties.

Post-trial sanctions vary according to the type of offence committed. Typically, criminal offences are punishable by the imposition of fines and other financial penalties. The Penal Code states that companies may not be subject to imprisonment. Therefore, should the company commit an offence punishable by imprisonment, the courts shall convert the imprisonment sanction into a corresponding sanction in the form of a fine.

Please note that it is difficult to provide accurate minimum and maximum sanctions, as sanctions are largely dependent on the type and severity of the offence committed. For example, the penalty for the strict liability offence of embezzlement is a fine and imprisonment. Since companies are not sanctioned by imprisonment, the penalty imposed on the company constitutes a fine equivalent to the amount of money embezzled, in addition to the fine resulting from the conversion of the imprisonment sentence to that of a fine.

Pursuant to Article 4 of the Jordanian Economic Crimes Law (the “Economic Crimes Law”), any individual that commits an offence that is considered an economic crime under the provisions of Economic Crime Law or any other law that refers to such law shall be subject to the penalties imposed under the Penal Law. Furthermore, a fine not exceeding one hundred thousand Jordanian Dinars shall be imposed in accordance to the penalties imposed in accordance to the Economic Crime Law. Furthermore,
according to Article 4 of the Economic Crimes Law, the punishment for aiding and abetting a criminal offence is identical to that of the original offender.

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.

Companies may be subject to various forms of sanctions, many of which are set out in the Penal Code and the Economic Crimes Law. Article 5 of the Economic Crimes Law states that, criminal offenders will be liable to the sanction imposed under the provisions of the Economic Crimes Law over and above sanctions stipulated in any of the relevant Jordanian laws. Furthermore, Article 442 of the Penal Code stipulates that companies found to have committed the offence of defrauding third parties will be subject to precautionary sanctions as stipulated in paragraph 1.2 above.

Furthermore, the Jordanian Anti-Corruption Commission Law No.62 of Year 2006 stipulates that companies found to have committed an offence stipulated under certain provisions of the Penal Law or the Economic Crimes Law shall be subject to the precautionary sanctions as set out in paragraph 1.2 above.

Moreover, companies may be sanctioned for breaches of the Jordanian Companies Law (the “Companies Law”). Mere proof of the breach will suffice to impose such sanctions. Companies Law sanctions include mandatory liquidation. Mandatory liquidation is imposed on the company if it commits a serious breach of the provisions of the Companies Law or violates the provisions of the company’s articles and memorandum of association. Furthermore, mandatory liquidation may be imposed if the company, without legitimate cause, suspends its activities for a period of one year. In addition, a company may be subject to a fine of not less than one thousand Jordanian Dinars and not exceeding ten thousand Jordanian Dinars for violations of the Companies Law.

Civil liability sanctions may be imposed on companies in the event that civil liabilities arise as a consequence to the criminal offence. Civil liability remedies include rescission, where the court orders that the defendant compensate the claimant for the loss suffered as a direct consequence of the criminal offence. Furthermore, the court may award the claimant damages for the breach of civil liabilities. The court has the discretion to confiscate certain assets, as it deems necessary, and may impose various other charges on the defendant.

Civil liability remedies may only be awarded if the victim files a civil claim alleging a breach of its civil rights, which could be filed in conjunction with criminal proceedings or as separate proceedings. It should be noted that the chairman of the board of directors of a limited liability company, shall be liable under civil law for committing any breach to the provisions of the Companies Law or the company’s articles and memorandum of association.
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.

Please see paragraph 1.2 and 1.3 (above).

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

Criminal liability arises upon the occurrence of an action that constitutes a criminal offence, stipulated under the provisions of relevant Jordanian laws. In order to establish criminal liability, both the criminal act (actus reus) and the requisite criminal intent (mens rea) must be proven in order to convict the company/individual, and impose the relevant sanctions. However, in certain strict liability offences which are specified in the Penal code such as fraud, the company can be prosecuted by merely proving that the actus reus has occurred. An example of such offence is set out in Article 441 of the Penal Code. The said article provides that any individual who has defrauded a third party by misrepresenting the existence or transfer of funds to such third party (e.g. signing a check with insufficient funds in the relevant account) shall be liable regardless of the criminal intent of the individual. Furthermore, the company shall be held independently liable for such an act.

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.

Companies may be prosecuted for various offences set out in the provisions of the Penal Code, the Companies Law, the Economic Crimes Law and any other relevant Jordanian Laws and Regulations. The company will be held independently liable for the criminal offences committed by an employee acting on its behalf. Furthermore, the employee will be held independently liable as well. The general rule under Jordanian law is that a criminal

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

Companies will be held independently liable for criminal offences committed by its directors, managers and employees in their capacity as employees of the company. Furthermore, any director, manager or employee committing an offence will be held independently liable as well. The general rule under Jordanian law is that a criminal
offence cannot be committed unless such offence, and its corresponding sanctions, is specified under the relevant provisions of Jordanian law. Therefore, violation of the company’s internal regulations is not deemed as a criminal offence, provided that such an offence is not considered as a criminal offence pursuant to the Jordanian laws.

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

Under Jordanian law, the company’s mens rea will only need to be established if the provisions relating to the offence so require. Should an individual commit a criminal offence that requires mens rea for conviction, the prosecution must prove that the individual carried out the said offence with the requisite mens rea. Article 74(2) of the Penal Code stipulates that the company will be independently liable for the criminal offences of employees acting on its behalf. Therefore, the company’s mens rea will be presumed, and the onus of proof is shifted to the company to prove that it had not intended to commit the offence under question.

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.**

The general rule is that mens rea must be proved for criminal liability to arise. However, certain offences detailed in the law may be tried as strict liability offences.

Pursuant to the Penal Code, check fraud is a strict liability offence. The individual that has signed the check will be held liable for issuing the check, and the company will be liable independently for the actions of the individual acting on its behalf. Regardless of the intention of the company, liability will arise as soon as the individual commits the offence.

According to the Penal Code, corporate embezzlement is a strict liability offence. The prosecution may not initiate corporate embezzlement claims unless the victim files the case with the prosecution. Furthermore, income tax evasion is a strict liability offence under the Jordanian Income Tax Law (the “Income Tax Law”). Pursuant to the Penal Code, the company will be held liable if an authorized employee or shareholder evades tax or forges income tax returns in respect of the company’s financial situation.

Pursuant to the Jordanian Customs Law (the “Customs Law”), the evasion of custom tariffs amounts to the offence of smuggling. Customs evasion is another strict liability offence, where mere proof of the commission of the offence raises criminal liability on the individual offender and the company.

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

As mentioned in paragraph 2.5 above, the individual committing the offence and the company such individual is representing will both be independently liable for the
criminal offence. Therefore, the claimant can sue both the individual offender and the company such individual is representing. However, the claimant may opt to sue one party rather than the other. As both parties are held independently liable for the commission of the offence, the claimant may opt to sue the company, the individual or both independently under the same proceedings.

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

A company is free to raise all kinds of defenses available to it pursuant to the Jordanian Criminal Procedure Law (the “Criminal Procedure Law”). There are two types of defenses available to a company; procedural defenses and factual defenses. Procedural defenses include the right to claim lapse of time to hear a case, the void affidavit taken by the public prosecutor, non-jurisdiction of the courting hearing the case, the right to submit a preliminary statement, the right to cross examine prosecution witnesses and the right to appeal a judgment or object to a judgment given in absentia.

The company may raise factual defenses in order to prove that the company did not have the requisite mens rea for the commission of the offence (in offences requiring mens rea) or that the company was not the actual offender or the proper entity to sue. This is in addition to the evidence to be submitted by the defendant, both in a form of documentation and oral testimony of witnesses to support its defense.

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?**

The company cannot avoid liability where an individual, acting in the name of the company or using its resources, commits a criminal offence, regardless of whether the said individual is acting within the scope of his/her authority. Taking reasonable care along with sufficient organisation and control are requirements pursuant to the commercial Law and the Companies Law, but such care does not minimize nor avoid criminal liability. The only way the company can avoid punishment is if the offender is not an employee, manager, director or shareholder of the company. Therefore, sufficient organisation, control and the reasonable care taken are required but not sufficient to escape criminal liability.

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

Certain sanctions can be executed during the investigative phase. As per the Criminal Procedure Law, if the suspect is an individual, the prosecution may order the detainment of the suspect if sufficient evidence is available indicating that the said suspect has committed the offence. Article 36 of the same law also allows the Attorney General to temporarily lock down a company if enough evidence indicates that an
offence, which is punished by a minimum of two years of imprisonment, may have been committed.

In addition, Article 6 of the Criminal Procedure Law permits the attachment of civil claims to the criminal claims, which means that civil liability sanctions may be imposed during the investigative phase such as preliminary seizure of bank accounts and preventing the suspect from leaving the country.

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

Both the individual who has committed the offence and the company such individual is representing, may be convicted for the same offence in the same proceedings. It should be noted that the company and the individual would be tried as separate defendants as part of the same proceedings.

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

The parent/group company can only be prosecuted if it served as an accessory or enabled the subsidiary to commit such offenses. If the parent/group company was not involved in the offenses committed they cannot be held liable for the offenses.

3. Criminal Sanctions on a Company

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

Please see 1.3

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

Sanctions will apply depending on the type of offence and its corresponding sanction as stipulated under the provisions of the relevant Jordanian laws. As an example, a civil remedy such as damages or compensation will only apply if the legal prerequisites are established pursuant to the Jordanian Civil Code. Pursuant to the Criminal Procedure Law, criminal liabilities resulting in civil liabilities can be brought before the same court for adjudication. For examples of types of offences and their relevant sanctions, please refer to question 1.3.

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

Please see 2.8.
3.4. Can such sanctions been executed during the investigative phase of a criminal proceedings?

Please see 2.10

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?

The prosecution’s duty is limited to an assessment of the merits of the case including the interrogation of witnesses if necessary. The prosecution determines which of the Jordanian Courts of First Instance has competence to resolve the case at hand, and allocates the cases accordingly. Under no circumstance does the prosecution impose, or have the discretion to impose a sanction on the company for the exception of temporarily locking down the company if enough evidence indicates that an offence, which is punished by a minimum of two years of imprisonment, may have been committed. Moreover, if the suspect is an individual, the prosecution may order the detention of the suspect if the evidence reviewed strongly indicates that the said suspect has committed the offence.

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

Typically, a company/individual is deemed a suspect upon the initiation of criminal proceeding investigations, whether by local police authorities or the Attorney General.

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?

Pursuant to Articles 63 and 98 of the Criminal Procedure Law, a company is obliged to furnish the court with all relevant documentation. However, if a request was made to the company for the disclosure of information before investigations began, the company has the right to refuse to cooperate. Furthermore the company is obliged to provide a testimony and answer questions, but is allowed to deny access to the premises without a search warrant or court order.

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

The company is informed that it will be prosecuted when receiving notification of the same from the prosecution or the court.
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?*

Directors, managers or employees may be witnesses in proceedings against a company according to Article 148(2) of the Criminal Procedure Law.

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

Please see 2.11

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

Please see 1.1

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?

Please see 4.1

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

Please see 4.2.

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

As mentioned in 5.1 (above), the prosecution does not have the right to impose sanctions on companies for the exception of temporarily locking down the company if enough evidence indicates that an offence, which is punished by a minimum of two years of imprisonment, may have been committed. Should the Jordanian courts seek to impose a sanction, the company will be informed of the same after the issuance of a court order or enforcement of the same.

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

The company has the right to appeal any sanction imposed by the Jordanian courts.
5.5. Will there be joint proceedings against the company and the individual offender?

Please see 4.6.

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

Please see 4.7

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?

The basic legal concept underlying criminal liability in Jordanian law is that a criminal offence cannot be committed unless such offence, and it's corresponding sanctions, are specified under the provisions of the applicable Jordanian laws. Directors or managers cannot be held criminally liable for offences committed by other individual directors, managers or employees. Pursuant to Article 74 of the Penal Code, only the original offender and the company such offender is representing are to be held criminally liable for the commission of the offence. Therefore, directors or managers cannot be held liable in their personal capacity for any criminal offence committed by another individual director, manager or employee, unless they have committed an offence themselves by participating, encouraging, aiding or abetting the said offence.

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

In order for directors or managers to be held criminally liable for offences committed by others, they have to act as either a participant or an accessory and aid or abet the offence either by directly contributing to the commission of the crime or by planning the same. Notwithstanding the above, in specific cases, mere encouragement to the crime can suffice as grounds for imposing criminal liability.

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?

Criminal liability arises upon the occurrence of an action that constitutes an offence under the provisions of the Penal Code and any other applicable Jordanian laws such as the Companies Law, Economic Crimes Law, Income Tax Law and the Customs Law. Accordingly, failing to give adequate instructions to employees or supervising the same does not constitute a criminal offence, nor does the inadequate selection of employees and inadequate organization of the company.
6.4. **What recommendations do you have to exclude or minimize criminal liability risks of directors of a company?**

Since criminal liability arises upon the occurrence of an action that constitutes an offence, the way to avoid liability is by avoiding all actions resulting in such offences or contributing to them in anyway. Therefore, managers and directors can exclude and minimize criminal liability risks by acting in 'good faith' and within the scope of their authority and powers.
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.

Under Kuwaiti law, a company cannot be prosecuted in a similar way as an individual offender. A company is a deemed to be a juristic person. Juristic persons cannot be prosecuted due to the crimes committed by their representatives in the course of their employment. The basic principle of penal liability is set forth in Article 33 of the Constitution of the State of Kuwait, which provides that “Penalty shall be personal”.

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 Penal Code Law No.16 of 1960 (“The Penal Code”) stipulates categories of penalties, according to the nature of the offences. In addition to the original penalties, the Penal Code contains provisions regarding accessory and complementary penalties in respect of various criminal offences. A penalty is deemed as accessory if it is determined under law as an inevitable effect of the judgment of the original penalty. A penalty is considered complementary if it is not inflicted unless pronounced by the Judge, whether obligatory or permissible to him under law.

As per Article 66 of the Penal code, the following accessory and complementary penalties are determined:
1. Deprivation of the rights and privileges contained in Article 68 (i.e. deprivation of the rights to seek appointment in public jobs, membership in public councils and organizations, participation in the election of the members of the public councils and organizations).
2. Dismissal from public jobs.
3. Deprivation from practicing a profession.
4. Closing of public shops.
5. Police surveillance.
6. Confiscation.
7. Deportation of the foreigner.
8. Submission of a recognizance to keep security and to act in good conduct, attached with or without a bail.

In certain circumstances the court can condemn the juristic person with one of the appertained or complementary penalties such as confiscation of the things, imposing fine, appointing receiver or even liquidation of the company in addition to the personal penalties.

For instance, in respect of crimes involving trademark infringement, court can order confiscation of machines or instruments, which are used in committing the crime as per Article 93 of the Law of Commerce No. 68 of 1980 (the “Commercial Code”). Please find attached relevant provisions (Articles 92, 93 and 94 of the Commercial Code) relating to the penalties in respect of trademark infringement, for your reference.

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.

Please find attached relevant provisions (Articles 789 and 791 of the Law of Commerce No. 68 of 1980) relating to offences of bankruptcies, stipulating punishment for directors, managers or liquidators in respect of the various crimes committed by them. In such cases, in addition to the personal penalties, court can also penalize the company with fine and/or dissolution of the company.

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.

N/A

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

N/A
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.**

N/A

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

N/A

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

N/A

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.**

N/A

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

N/A

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

N/A

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?**

N/A

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

N/A
2.11. Can both the individual offender and the company been convicted for the same offence?

N/A

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

N/A

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.

As referred in Point No.1, types of sanctions that can be imposed on a company by way of a court judgment are fine or liquidation of the company.

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

Imposition of these sanctions depends on the circumstances of the case. Although there are no stipulations under law as to the specific types of offences that could result in sanctions on companies, the most common types of offences are trademark infringement and bankruptcy related offences.

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

A company could file a case seeking cancellation of the proceedings.

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

No such sanctions can be executed during the investigative phase of a criminal proceeding. Sanctions can be executed only as a result of a judgment issued by a court to that effect.

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?

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

N/A

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?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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?

No, the prosecution cannot impose a sanction on a company. Sanctions can be imposed only by way of a judgment issued by a court to that effect. However, depending on the circumstances of the case, for instance in a case related to bankruptcy, the prosecution is empowered to impose certain preventive measures like freezing the bank account of the company, appointing a receiver to manage the affairs of the company etc.
5.2. Does the company, have the status of a suspect or a similar status and at what stage in proceedings?

The Company will not be treated as a suspect at any stages of the proceedings.

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

Not applicable, as the prosecution cannot impose sanction on a company.

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

The Company is entitled to file a case seeking cancellation of the proceedings.

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

In certain cases, joint proceedings can be initiated against the company and the individual offender. For instance, the public prosecution can give instructions to the company’s bank to freeze the bank account of the company or the company can be forced into receivership in order to prevent any detriment against the pending criminal action.

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

Yes, a corporate entity cannot be treated as an individual suspect. Only certain preventive measures such as appointing a receiver or freezing the bank account can be taken against the company.

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?

The directors or managers can be held liable for the offences committed by other individual directors, managers or employees, for their action or omission unless they prove that they are not in such official capacity that binds them responsible for such offences. In case of a final judgment declaring a company bankrupt, the members of its board of directors, managers or liquidators can be penalized if it is proved that they have committed certain offences after the company ceases payment of debts. Please find enclosed copies of Articles 789 and 791 of the Law of Commerce No. 68 of 1980, wherein enumerated are the specific offences.
6.2. What are the legal requirements for a criminal liability of directors and managers for offences committed by others?

If it is proved that the manager or director is in a position to control the offenders and if no action has been taken to prevent such an offence, then a criminal liability may arise against them for the offences committed by others.

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?

Yes, if the director or manager did not take necessary action to prevent such an offence, which should have been reasonably taken care of either by instructing the concerned person, supervising or by adequately selecting the employee, then a criminal liability may arise against him.

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

In order to exclude or minimize the risks of criminal liability of managers or directors of a company we recommend that the managers or directors should have some background of the laws and regulations applicable to the activities of the company. Further, legal consultation is essential while making key business decisions.
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.

The prosecution of criminal cases in Latvia is regulated by the Criminal Procedure Law and the Criminal Law.

Section 1 of the Criminal Law provides that a person guilty of committing a criminal offence intentionally or negligently may be held criminally liable. Interpreting provisions of the Criminal Law, guilt (mens rea) is a psychological concept as it requires intent or negligence which is typical only for individuals. A company cannot commit a criminal offence as it is impossible to identify the extent of guilt (mens rea) in its unlawful activity or inactivity.

Therefore, according to the provisions of the Criminal Law the subject of a criminal prosecution is an individual. Please note, however, that Section 12 of the Criminal Law provides that an individual can be prosecuted for the unlawful activity or inactivity of the company for offences prescribed in the Special Chapter of the Criminal Law regarding acting on behalf of the company as a member of the executive body, if it is established that such activity was to benefit the company. Being a member of the executive body or employee of the company such individual shall be entitled to represent the company, operate and take decisions on its behalf. Pursuant to the Commercial Law, such authorization might be provided for in the Articles of
Association of the company, if such individual is a member of the executive body of the company, or by Power of Attorney or procura\(^{13}\).

Upon convicting an individual for an offence committed for the benefit of a company, the state authority may impose “coercive measures” against the company as well. According to Part VIII\(^1\) of the Criminal Law, coercive measures are liquidation, limitation of rights, confiscation of property, monetary levy, and compensation of damages caused by the offence. Such coercive measures are not considered to be criminal penalties. Pursuant to Section 12 of the Criminal Law, coercive measures are not applied in respect to state authorities.

Regarding administrative offences, in cases provided in the Latvian Code of Administrative Violations, a company is subject to prosecution for administrative violations in the same way as an individual would be.

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

In accordance with Part VIII\(^1\) of the Criminal Law, one of the following coercive measures may be imposed upon a company:

- **Liquidation.** As a result of liquidation, all the property of the company is seized (confiscated) in favor of the state. Only property that is necessary to fulfill obligations related to employees, creditors, and the state is not seized.

- **Limitation of rights** is the deprivation of rights in respect of a specific type of entrepreneurial activity, to the acquisition of permits or rights provided for in laws and regulations or a prohibition to perform a specific type of activity for a term of minimum one year and not exceeding five years.

- **Confiscation of property** is imposed based on a decision of the court and may be determined as confiscation of the entire property of the company or only a part of it. If confiscation of the entire property of the company is imposed against the company, the property necessary to fulfill obligations to the employees, creditors, and the state is not confiscated. Confiscation of property may be imposed as the principal coercive measure or as an additional measure.

- **Monetary fine** – the amount of this sanction may vary from one to ten thousand minimum wages established in Latvia at the moment the court decision is adopted.

In addition to the measures noted above, the state authority may require compensation of damages caused if the offence has caused material damages or grave consequences.

\(^{13}\) A commercial Power of Attorney that entitles a person to enter into transactions and perform all other operations necessary for the commercial activity of the company including the authority to represent the company in court.
It should be noted that coercive measures imposed against the company are not considered to be a criminal punishment and do not preclude or affect the punishment imposed on the individual for committing the offence for the benefit of the company. Please see response to question 3.2.

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.

According to the provisions of the Latvian Code of Administrative Violations, both companies and individuals can be liable for committing administrative offences. The following sanctions may be imposed on a company under the administrative procedure:

- **Warning.**
- **Fine** – the amount of the fine may vary from one to ten thousand minimum wages established in Latvia as of the day of adoption of the decision. Presently the minimum wage in Latvia is LVL 160 (~ EUR 112.45). In accordance with the Latvian Code of Administrative Violations the amount of the fine is determined as a percentage of the value of the financial transaction not to exceed 30% of the value of the financial transaction.
- **Confiscation of the object of administrative violation or the instrument of committal** – only objects that the violator uses personally may be confiscated. However, in cases related to violations in trade, commercial activity, the field of customs or violations related to goods which are subject to excise tax can objects owned by other person be confiscated.
- **Forfeiture of rights to specified or all forms of commercial activities.**

The state authority may impose a fine, confiscation of the object of administrative violation or the instrument of committal, and forfeiture of rights in respect of certain or all forms of commercial activities as either the principal punishment or as an additional punishment.

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.

N/A

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

N/A
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.

N/A

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

N/A

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

N/A

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.

N/A

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

N/A

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

N/A

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?

N/A

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

N/A
2.11 Can both the individual offender and the company been convicted for the same offence?

N/A

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

N/A

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.

Since the company is not considered to be a subject of criminal offence, no criminal punishment might be imposed on the company. The only sanctions that can be applied are coercive measures. (Please see response to question 1.2)

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

The imposition of coercive measures does not depend on the type of the offence but on the degree thereof. Thus, pursuant to Section 7 of the Criminal Law criminal offences are classified as follows:

1. Criminal violation – an offence, for which imprisonment for a term not exceeding two years, or a lesser punishment is provided for by the Special Part of the Criminal Law;
2. Less serious crime – an intentional offence, for which imprisonment is provided for a term between two through five years, or an offence, which has been committed through negligence and for which imprisonment for a term exceeding two years is provided for by the Special Part of the Criminal Law;
3. Serious crime – an intentional offence, for which imprisonment for a term between five and ten years is provided by the Special Part of Criminal Law;
4. Particularly serious crime – an intentional offence, for which imprisonment for a term exceeding ten years, life imprisonment or the death penalty is provided for by the Special Part of the Criminal Law.

Taking into account the above, liquidation, confiscation of property or monetary levy might be imposed on a company for committal of serious or particularly serious crimes. If a criminal violation or less serious crime is committed a monetary levy might be imposed on the company as a coercive measure, excluding cases when the company was established in order to perform unlawful activities.
In addition to one of the above coercive measure, if the offence has caused material damages or grave consequences, the company could be required to compensate damages caused by the offence. Confiscation of property might be used as the principal coercive measure or in addition to liquidation or monetary fine.

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

A company may take action in order to prevent committal of a new criminal offence. Such mitigation is taken into account when deciding coercive measures during the court procedure and may reduce the extent of the sanction imposed.

Since imposition of coercive measures on the company is reviewed at the same criminal proceeding initiated against the individual who committed the offence for the benefit of the company, the case depends on whether the individual is convicted or not. The defenses that the company may use are similar to the defenses used by the individual.

According to the provisions of the Criminal Law if a person voluntarily suspends committal of a criminal offence, this can be treated as a voluntary withdrawal, and such person shall not be held criminally liable.

If the damage was caused by professional activity, the elements of which would constitute a criminal offence, but if this activity is performed in order to achieve a socially beneficial purpose and if all possible means were employed to protect the legally prevented interests, the person who has caused this professional risk might be considered justified.

According to the Criminal Law, if the purpose of the committed offence was to prevent damage that threatened the public or state interests or the rights of any person and there was no other possibility to prevent such damage and if the damage caused by the offense is less than that which was prevented, the offender might be considered justified.

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

If during criminal proceedings it can be established that an offence was committed by an individual acting on behalf of the company, imposition of coercive measures on the company can be reviewed during the pre-trial criminal prosecution stage. This procedure takes place within the criminal prosecution, in which the individual is acknowledged to be a suspect or to be held criminally liable.

Having adjudged that the individual committed a criminal offence for the benefit of the company and that the company was aware of the committal of such an offence and did not perform any action to prevent it or the consequences thereof, the court shall decide in the judgment whether the coercive measures shall be applicable or not.
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?

N/A

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

N/A

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?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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?

According to the provisions of the Criminal Procedure Law and the Criminal Law, the court adopts a resolution regarding imposition of coercive measures on the company
and establishes this in its judgment on the basis of a proposal of the prosecutor during pre-trial procedure. Section 70.8 of the Criminal Law and Section 440 of the Criminal Procedure Law provide conditions for imposition of coercive measures on a company. Thus, in determining coercive measures the court is taking into account the nature of the criminal offence and the harm caused as well as observing the following conditions:

- Actual operations of the company;
- Status of the individual within the company;
- Nature and consequences of the activities of the individual;
- Measures, which the company has performed in order to prevent the commission of a new criminal offence;
- Volume, type of activities and financial status of the company.

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

As the company is not the subject of criminal proceedings, the Criminal Procedure Law does not provide for any status of a company in criminal proceedings.

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

In accordance with Section 438 of the Criminal Procedure Law, upon initiation of proceedings on the imposition of coercive measures, the prosecutor shall inform the respective company by sending a copy of the resolution as well as by providing information about the rights and obligations of the representative who takes part in the proceedings on behalf of the company.

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

In order to ensure that the rights and interests of the company are respected during the proceedings on imposition of coercive measures, the Criminal Procedure Law stipulates that a representative of the company is entitled to participate in the proceedings on behalf of the company. The following persons are entitled to act as representatives:

- An individual with the requisite authority as specified in documents regulating the operations of the company. According to the Commercial Law this authorization is established by the Articles of Association.
- An individual on the basis of a Power of Attorney issued specifically for such purpose. The Commercial Law provides for a possibility to represent a company basing on a procura – a commercial Power of Attorney that entitles a person to enter into transactions and perform other operations necessary for the commercial activity of the company including the authority to represent the company in court. As the Criminal Procedure
Law stipulates that the authorization to represent the company in the criminal proceedings shall be specifically mentioned in the Power of Attorney, a person is not entitled to represent the company in criminal proceedings on the basis of a commercial procura unless such authorisation is specifically stipulated by the procura.

A person involved in the respective criminal proceedings as a witness or victim, or a person whose interests or close relatives’ interests are in conflict with the interests of the company, shall not represent the company in such proceedings.

The company representative participating in the procedure on application of coercive measures possesses the same rights and procedural duties as the accused and suspect. Thus, the Criminal Procedure Law provides the following rights to the company in proceedings on imposition of coercive measures:

1. **During pre-trial procedure:**
   - To be informed about the criminal proceedings and to become acquainted with the materials in the criminal file, including receipt of the resolution on initiation of proceedings, to examine the Criminal Register, to examine resolutions regarding determination of an expert-examination;
   - To submit applications, including applications regarding initiating an investigation and participation in such operations and application regarding the termination of criminal proceedings, if the term for completion of pre-trial proceedings provided by Criminal Procedure Law is violated;
   - To take part in the investigation and cooperate with the officials who are conducting the criminal proceedings;
   - To settle with the victim;
   - To testify or refuse to provide testimony;
   - To submit complaints, regarding the actions of officials authorised to conduct criminal proceedings as well as to appeal procedural decisions.

2. **During the trial procedure:**
   - To be informed about the place and time of trial in due time and to participate in the hearing of the criminal case, in a language that the representative understands, if necessary, using the assistance of an interpreter free of charge;
   - To take part in the procedure through an attorney as defence counsel or representative, including to submit requests, testify, participate in an examination performed directly and orally of the evidence, submit a request to recuse to the panel of the court, regarding an individual judge, a state prosecutor, and an expert;
   - To receive and examine a copy of court decisions and minutes of the court hearing;
   - To appeal a court decision.
In court of appeals and court of cassation the representative of the company is entitled to:

- Receive copies of the appellate complaint or protest that is the basis for their participation in the appeal and information regarding the term for examination of complaints;
- Submit objections or explanations regarding the complaint or protest;
- Maintain and justify his or her complaint, or withdraw his or her complaint or the complaint of a counsel.

To exercise the rights of the company, the representative may hire an attorney who is entitled to take part during all stages of the criminal proceedings.

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

Proceedings on the imposition of coercive measures are conducted within the criminal prosecution process, during which an individual may be acknowledged as a suspect or held criminally liable. This is not considered as a separate criminal proceeding, thus there cannot be joint proceedings against the company and the individual offender.

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

Since the company cannot be held criminally liable as a criminal offender in Latvia, criminal proceedings against the company cannot be initiated. The only sanctions that can be imposed on the company are coercive measures that do not exclude punishment, which shall be imposed on an individual who has committed the offence for the benefit of the company. As mentioned in response to question 5.5, the imposition of coercive measures is reviewed as part of the criminal proceedings against the individual and not as a separate criminal proceeding. However, the Criminal Procedure Law provides that the representative of the company has the same rights as the suspect.

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?**

The Criminal Law provides for criminal liability for jointly committing a criminal offence. According to Section 20 of the Criminal Law, joint committal is an intentional action or omission of a person jointly with another person in order to commit an intentional criminal offence. The Criminal Law establishes three forms of complicity:

- as an organizer – an individual who organized or managed the commission of a criminal offence;
• as an instigator – an individual who has encouraged another person to commit a criminal offence;
• as an accessory – an individual who consciously has promoted the commission of a criminal offence, by providing advice, guidelines or means, or removing obstacles for the commission of such, as well as by promising to conceal the offender or accomplice, the instruments or means for commission of the criminal offence, evidence of the criminal offence or the objects acquired by criminal means or has promised to purchase or to sell these objects.

An individual who has participated in the joint commission of a criminal offense is held liable according to the same Section of the Criminal Law, where the liability of the offender is established.

If it is proven that the member of the executive body of the company is not guilty of an offence this person cannot be held criminally liable for an offence committed by another member of the executive body or employee.

A member of the executive body is not criminally liable for an offence committed by other member of executive body or employee, if he was not aware of such offense. According to the practice of the Supreme Court of Latvia, an individual who is an accessory to a crime by creating the circumstances enabling such offence without knowledge of the unlawful consequences of such activities is not criminally liable for the commission of such offence.

However, if other members of the executive body of the company, the authorized representative of the company or employee are recognized as criminally liable, this fact does not preclude the possibility of imposing coercive measures on the company.

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

To be criminally liable for an offence committed by others the member of the executive body shall conform to the definition of an accessory to the crime described in the response to question 6.1.

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?**

As noted in response to question 6.1, a member of the executive body of the company is not criminally liable for an offence committed by another member of the executive body or an employee, if he was not aware of such and could not predict the consequences of such operations.

However, the Latvian Commercial Law stipulates that members of the executive body of the company shall act and carry out their duties carefully and honestly and are liable
for the losses that have arisen out of their actions jointly. The Criminal Law provides for punishment that can be imposed on members of the executive body of the company for negligent performance of their duties as an employee or member of the executive body of the company as well as malicious abuse of their authority, if substantial damage is caused thereby to the company. Furthermore, as was mentioned in the response to question 6.1, the fact that other members of the executive body of the company, the authorized representative of the company or an employee are recognized as criminally liable does not preclude imposing coercive measures on the company.

In addition, criminal liability may occur when one of the forms of the joint committal (described in the response to question 6.1) is discovered, and the conformity of actions of the member of the executive body of the company to commission of the offence is obvious.

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

To avoid the possibilities of imposition of the criminal sanctions on the company it is advisable for the members of the executive body of the company to:

- Act in accordance with the effective law and follow the amendments and changes that could affect the operation of the company;
- Maintain an effective structure of control of the company to be able to supervise operations of the accountancy, transactions and adoption of the decisions of the executive body;
- Clearly define the scope of authorization of the representatives and employees of the company and control its implementation;
- Properly select and instruct employees and new members of the executive body of the company.

The Latvian Commercial Law provides for either joint or individual authorization for members of the executive body. Additional control of the operation of the company would be achieved by providing for joint authorization for the members of the executive body.
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.

The rules on criminal liability in Lithuania are provided for in the Criminal Code and the Criminal Procedure Code. Whereas both the Criminal Code and the Criminal Procedure Code are in force from the 1 May 2003, the judicial practice concerning corporate criminal liability is not material yet.

According to the Criminal Code the subjects of criminal prosecution are individual offenders as well as companies. An individual can be prosecuted practically for all the offences established in the Criminal Code. Meanwhile, a company can be prosecuted only if such possibility is provided for in a particular article of the Special Part of the Criminal Code. If the particular article of the Criminal Code does not establish corporate criminal liability, a company cannot be prosecuted for an offence even if the latter is the offence in respect of an individual. In addition, the prosecution of a company is possible only when an individual offender is identified (for details, please see answer to the question 2.7).

It should be noted, that some public legal persons, namely the state, municipality, state and municipal institutions and public international organisations are exempt from the...
corporate criminal liability (whilst other public legal persons, e.g. state or municipal enterprises, remain the subjects of the corporate criminal liability).

The prosecution of individual offenders and companies is conducted under the Criminal Procedure Code. In both cases the procedures are almost the same, except for some procedural peculiarities as regards prosecution of companies (for details, please see answer to the question 4.7).

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 Criminal Code provides for different criminal sanctions for companies and individual offenders. The criminal sanctions imposed on companies are provided for in paragraph 1 of Article 43 of the Criminal Code and are the following:

1) Fine;
2) Restriction of company’s activity;
3) Liquidation of a company.

The Criminal Code states that for one offence only one sanction may be imposed. These sanctions are not distinguished according to certain types of offences, i.e. any of the abovementioned sanction can be imposed on a company for any of the offences committed. However, a fine is believed to be the lightest sanction, whereas a liquidation of a company is the hardest. While imposing a particular sanction and deciding on its extent the court must take into consideration the degree of a crime, aggravating and mitigating circumstances, type and sort of fault, stage of a crime and other relevant factors.

For details on the criminal sanctions, please see answer to question 2.1.

As has been mentioned, for one offence only one sanction may be imposed. However, the latter is not applicable in respect of punitive measures. For one offence a punitive measure can be imposed together with a sanction. Furthermore, there can be more than one punitive measure imposed for one offence. The punitive measures imposed on companies are provided for in paragraph 2 of Article 43 and Article 72 of the Criminal Code and are the following:

1) Decision to disclose the judgement to mass media;
2) Confiscation of property.

For details on the punitive measures, please see answer to question 3.1.
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.

In Lithuania there are some other measures in other fields of law which could be considered as sanctions and which can be imposed on companies following the commission of an offence by its directors, managers, employees or other persons pursuant to the provisions applicable thereupon.

The respective laws regulating activities of companies for which the licence is required sometimes provide for refusal to grant the respective licences or termination of already granted licences if the directors or other employees committed some offences. As an example, in Lithuania the companies are required to have the respective licences for sale of alcohol products. According to the Lithuanian Law on Alcohol Control:

- the respective licences for companies might not be granted up to 5 years if general directors or incorporators of the companies were general directors or incorporators of another companies, which respective licences were terminated due to the respective reasons. In particular, the respective licences might not be granted and/or terminated if a company’s directors, incorporators or even employees (in latter case provided they acted on behalf of the company or in its interest) were, respectfully, directors, incorporators or employees of another company, which respective licences were terminated following the court’s judgement of conviction or court decision, or a decision of the customs office, Tax Inspectorate, police or the State Tobacco and Alcohol Control Agency on the imposition of a penalty or fine for smuggling of alcohol products, illegal keeping, transportation or sale of alcoholic beverages, as well as sales, transportation or keeping of falsified alcoholic beverages;

- the respective licences for a company might also not be granted up to 5 years if general directors or incorporators of the company are general directors or incorporators of the company (or were general directors or incorporators of another company), which kept or sold of alcoholic products without the respective licenses;

The mere fact of the respective offence on part of the respective directors, managers or employees is sufficient to refuse to grant the respective licences or terminate the already granted licences. The practically similar grounds when the respective licences are terminated and/or not granted are provided for in the Lithuanian Law on Tobacco Control, Rules on Licensing of Trade of Oil Products and Rules on Licensing of Production of Weapons, Ammunitions and its Accessories.

Furthermore, an obligation to dismiss a particular employee could be imposed on a company if such employee was convicted of an offence and was punished by the sanction which forbids him/her to work a certain work or to hold a certain office.
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.

Criminal sanctions imposed on companies are listed in Article 43 of the Criminal Code and the following: (i) fine, (ii) restriction of company’s activity and (iii) liquidation of a company. The sanctions are not distinguished according to certain types of offences (for details, please see answer to questions 1.2).

Fine is a monetary penalty imposed on a company. The Criminal Code does not define the exact amount of fine for a particular offence. Fines differ from LTL 130 (approx. EUR 37.65) to LTL 6 500 000 (approx. EUR 1 882 530.12). While deciding on the exact amount of fine the court must take into consideration the relevant circumstances such as degree of a crime, aggravating and mitigating circumstances, type and sort of fault, stage of a crime and other relevant factors.

Restriction of company’s activity is usually understood as prohibition to exercise certain activity or closure of certain branch of the company. A restriction on activity is imposed for a period ranging from 1 to 5 years. There are no open-ended restraints in Lithuania.

Liquidation is the strictest criminal sanction for a company. In such case the company must terminate its all economical, commercial, financial or professional activities and to liquidate all its subdivisions in accordance with the applicable laws. It is held that this sanction can be applied only in exceptional cases.

The aforesaid sanctions are executed in accordance with provisions of the Execution of Punishments Code (in force from May 2003). This Code establishes that the sanctions imposed on companies are executed by a court bailiff.

It has been mentioned that together with any of the foregoing sanction the court may also adopt a decision to impose a punitive measure - decision to disclose the judgement to mass media and/or confiscation of property (for details, please see answers to questions 1.2 and 3.1).

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

Please see answers to questions 1.2 and 2.1.
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.**

As mentioned, the prosecution of a company is confined to certain types of offences since a company can be only prosecuted if such possibility is provided for in a particular article of the Special Part of the Criminal Code.

In order to prosecute a company, however, it is not required that an offence would be committed by certain hierarchy of company staff. Article 20 of the Criminal Code sets forth the rules how acts (or omissions) of individuals are attributed to a company. Sometimes a company can be prosecuted for an offence committed by a regular employee or representative of the company. Although, in latter case it is still necessary to establish lack of control or supervision on behalf of the respective persons belonging to certain hierarchy of company staff (for details, please see answer to question 2.4).

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

Article 20 of the Criminal Code sets forth the rules how acts (or omissions) of individuals are attributed to a company. The Lithuanian legal doctrine construe this Article to provide for 2 (two) major cases when acts (or omissions) of individuals (directors, managers, employees) are attributed to a company.

1. First case is provided for in paragraph 2 of Article 20 of the Criminal Code. The latter states that a company is held liable for a criminal offence if the criminal offence has been committed for the benefit or in the interests of the company by any natural person, acting either individually or on behalf of the company, who has a leading position within the company and has the right of:

   1) power of representation of the company, or  
   2) an authority to take decisions on behalf of the company, or  
   3) an authority to exercise control of the activities of the company.

This provision is deemed to introduce to the Lithuanian legal system such concepts of the corporate criminal liability as the concept of direct liability, the theory of corporate organs and the identification doctrine. A person, acting individually or on behalf of a company, is deemed to have a leading position within the company, if such conclusion can be made after the thorough analysis of the company’s incorporation documents, company’s by-laws and other company’s internal documents. It is claimed that a general director (the CEO), directors of subdivisions of a company, members of the board and supervisory board would usually have a leading position within the company. Depending on circumstances of the case the leading position within the company could also hold other managers or even participants (shareholders) of the company (in latter case
provided that participants (shareholders) are individuals, otherwise Article 20 of the Criminal Code will not apply). However, in order to prosecute a company it is necessary that such person would also satisfy at least one of the abovementioned conditions i.e. would have a power of representation of the company, an authority to take decisions on behalf of the company, or an authority to exercise control of the activities of the company. It is also necessary that an individual person committed an offence for the benefit or interests of a company. Since the Criminal Code uses the expression “interests” it is argued that benefit may be of different kinds but in all cases for attribution purposes of acts (or omissions) of individuals to a company it is not necessary for the company to in fact gain benefit (property, save or avoid costs etc.). For attribution purposes of acts (or omissions) of individuals to a company it is sufficient that an individual acted in the interests of a company, i.e. sought but not necessarily gained the real benefit.

2. Second situation is provided for in paragraph 3 of Article 20 of the Criminal Code. The latter states that a company can also be held criminally liable, if any other employee or representative of the company, committed an offence for the benefit of the company due to lack of control or supervision on behalf of the persons, whose actions fall within the scope of the paragraph 2 Article 20 of the Criminal Code.

This provision is deemed to introduce to the Lithuanian legal system the vicariuos liability concept of the corporate criminal liability. It means that that a company can also be held criminally liable, if any other employee or representative of a company, whose actions do not fall within the scope of the abovementioned paragraph 2 of Article 20 of the Criminal Code (setting forth the rules how acts (or omissions) of individuals are attributed to a company), committed an offence for the benefit of the company due to lack of control or supervision on behalf of the persons, whose actions do fall within the scope of the said paragraph 2 of Article 20 of the Criminal Code. Some authors tend to interpret the benefit as material, although the Criminal Code does not qualify that kind of benefit the employee or representative has to seek and whether the company has to actually benefit from action of the employee or representative. In order to estimate lack of control or supervision (or insufficient control or supervision), it would be necessary to examine the control and supervisions systems, their implementation, including thorough investigation of the company’s documents, practice, capacities and functions of employees, division of responsibilities, subordination, etc. Since systems of control or supervision of employees are usually provided for in internal rules or regulations of companies, it would be logic to assume that if an individual violated only such internal rules or regulations, his/her acts or omissions can still be attributed to a company, provided that such person meets other criterion established in the said paragraph 2 of Article 20 of the Criminal Code.

Liability of legal entity does not exclude criminal liability of the natural person, who is a perpetrator, organizer or instigator of, or accessory for the commission of the crime.
2.5. How will mens rea of the company be established?

According to the Lithuanian criminal laws, a person can be convicted only if \textit{actus reus} and \textit{mens rea} are proved. In Lithuania, \textit{mens rea}, depending on a case, consists of fault or/and aim or/and motive. The main element of \textit{mens rea} is fault. The latter must be proved in all criminal offences. The corporate criminal liability is not an exception. According to the Lithuanian criminal laws, the criminal corporate liability shall arise only in case a company is guilty of committing an offence.

The Criminal Code provides for the rules on establishment of fault. In respect of individual persons fault is established \textit{subjectively}, i.e. as persons’ psychological relationship with their offence. Obviously, such rules do not fit well if attempted to invoke on a company. The Lithuanian legal doctrine argues that in respect of companies the fault of a company should be established \textit{objectively}, i.e. actions or omission of a company should be compared to some respective standards; a company should be considered guilty when it does not fulfil its obligation to behave carefully, promotes offences or does not controls or controls insufficiently) its employees. However, such interpretation is not supported by the provisions of the Criminal Code. The latter does not provide for any exceptions in respect of establishment of companies fault. This is why we think that \textit{means rea} (fault) of the company would still be established subjectively, most likely as person’s, whose acts or omissions are attributed to a company, relationship with his/her offence. At the same time this concept implies some difficulties in practical implementation. An offence could be a joint result of different actions or omission by large number of such person (whose acts or omissions are attributed to a company). The greater is number of such persons, then the bigger is chance that their psychological relationship with their actions or omissions would be different, especially in respect of final result – the offence. Thus, in such cases it would be rather difficult, if possible, to establish \textit{means rea} (fault) of the company as currently required by the Criminal Code.

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.

The Lithuanian criminal law does not provide for the strict liability. \textit{Mens rea} is an obligatory element which must be established in all criminal offences prosecuted in Lithuania.

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

In Lithuania in order to prosecute a company it is necessary to identify the individual offender. This conclusion is based on provisions of Article 20 of the Criminal Code, which ties attribution of an offence to a company with acts or omissions of the \textit{respective individuals} (for details, please see answer to question 2.4). Theoretically “to
identify” means that the particular individual offender and specific factual circumstances must be identified.

Further, from wording of the said Article 20 of the Criminal Code (the word “offence” is used) it would appear that acts or omissions of the respective individuals have to qualify as an offence too. As a consequence, one might say that it is necessary to convict the individual offender in order to prosecute a company. It theoretically means that there will be no such situation when an individual offender is acquitted because of absence of fault on his part, but a company would be convicted (unless an individual offender was recognized guilty, but punishment was not imposed, then a company could still be prosecuted).

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

It has been mentioned earlier that in Lithuania the judicial practice concerning corporate criminal liability is not material yet and lack any case law in this regard. The Lithuanian legal doctrine argues that a company can rise as a defence lack of mens rea (fault) on part of a company. It is deemed that a company could avoid criminal liability if it creates and implements effective control and supervisions systems of its activities (“corporate compliance policy”). It means that a company should create the respective conditions within the company to prevent employees from the committing offences. It could be corporate culture, governing style, etc., but more evident would be designated and implemented rules on capacities and functions of employees, division of their responsibilities, subordination and liability for non compliance. Such rules have to be not only written, but also practically implemented. Should such rules be violated or some defects are identified, they have to be eliminated as soon as possible. Only when the company is sufficiently organised, company’s directors, managers and employees are duly instructed and the company takes a reasonable care to exert control on its directors, managers or employees, it is deemed that the company will be able to invoke such defence. However, this idea of defence is largely based on the concept of the objective mens rea (fault) that should, in one’s opinion, be applicable in case of the criminal corporate liability. In meantime, it has already been mentioned that in Lithuania there are more prerequisites to argue that mens rea (fault) of the company would still be established subjectively, most likely as person’s, whose acts (or omissions) are attributed to a company, relationship with his/her actions (for details, please see answer to question 2.5). If it were the case, then effectiveness of the above-described defence would be quite doubtful.

As regards other possible defences, the Criminal Code provides for some circumstances which sometimes could eliminate the criminal liability or justify it, e.g.: justifiable professional or economical risk or scientific experiment, the state of necessity, etc. However, the main concern is they practical implementation in case of the criminal corporate liability. It is not clear how to practically apply these defences to companies.
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?

The Lithuanian legal doctrine argues that a company can rise as a defence lack of *mens rea* (fault) on part of a company if the company creates and implements effective control and supervisions systems of its activities (“corporate compliance policy”). Although there are some doubts as to whether in Lithuania such defence would be effective arguing the lack of offence (for details, please see answer to question 2.8), we think that it still could serve as a ground to minimise or even avoid punishment. Nonetheless, the Lithuanian laws are silent in respect of the required extent or level of organisational requirements or control that are necessary to avoid conviction or punishment. There is no case law either.

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

The Criminal Procedure Code sets forth that during the pre-trial investigation and the trial (until the verdict is passed and comes into force or until the subject is acquitted) interim procedural measures can be imposed on a person suspected of committing a criminal offence. There can be imposed one or a few interim procedural measures in respect of criminal subject.

An interim procedural measure is imposed on a company suspected of committing a criminal offence by an order of the pre-trail judge or the judge hearing the case when company’s activity can have influence on the process of investigation, can violate the economic or finance order or can damage nature, the safety of community or other valuables. Such interim procedural measures are listed in paragraph 1 of Article 389 of the Criminal Procedure Code and are the following:

1) interim restriction of company’s activity;
2) interim suspension of company’s activity.

The interim restriction of company’s activity means that a company cannot practice certain activity or has to close its subdivision(s). This measure is temporary and the exact restriction term should be determined in the order of the court on application of such measure.

The interim suspension of company’s activity is regarded as more severe measure. It is supposed to be imposed on a company when the activity of the suspected company causes major danger for values protected under laws of Lithuania. In case of application of such measure, a company shall stop all of its activities and shall close all its subdivisions. This measure is also temporary and the exact term shall be defined in the order of the court on application of such measure.
Please note that the Criminal Procedure Code also establishes some other interim procedural measures (e.g. restriction of ownership, search of postal batch, surveillance, record of information transferred by telecommunications, etc.). Because of insufficiently regulation of the criminal liability of companies, it is not clear whether these other interim procedural measures can be imposed on companies and how. There are some authors claiming that the only interim measure applicable to companies are listed in the aforesaid Article 389 of the Criminal Procedure Code and the other interim procedural measures, which are provided for in others articles of the Criminal Procedure Code, are designated to individual offenders only. However, we note that property of companies can sometimes be confiscated. Therefore, we think that there are no major obstacles to apply in respect of companies at least one of other interim procedural measures – the restriction of ownership - since its aim is to assure probable confiscation of property and/or to ensure a civil claim.

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

The Lithuanian legal doctrine argues that under the Lithuanian law an individual person and a company are separate subjects and their liability should be also separate. Thus, if an individual offender has committed an offence for which the liability of a company also arises and requirements of Article 20 of the Criminal Code regulating attribution of acts or omissions of individuals to a company are satisfied, both the individual offender and the company can be convicted of the same crime (e.g., false administration of accounting, as defined in Article 222 of the Criminal Code).

However, there are some authors who resist the idea. In one’s opinion, if an individual offender and a company can be convicted of the same offence, then sometimes it could violate one of the main principles of the criminal law - non bis in idem (no one may be punished for the same criminal offence twice). As an example the personal companies are mentioned. In Lithuania the personal companies are legal persons of the unlimited liability, i.e. they liability is not separated from the liability of their owners. It is argued that if an individual offender (being a owner of personal company) is convicted of an offence and for the same offence is also convicted his/her personal company, then such individual person would in fact be punished twice for the same offence. Nevertheless, based on the Lithuanian Constitutional Court ruling, as of 6 December 2000, it seems that there are more prerequisites to still claim that both an individual offender and a company can be convicted of the same offence. In the said ruling the Lithuanian Constitutional Court ruled in respect of tax liability that punishment of both individual (with an administrative sanction) and his/her companies (with economical sanction) does not mean punishment of the same person for the same offence twice. We do not see any major obstacles in importing the reasoning of the said ruling, and, consequently, the established principle of liability from tax law field into the criminal law field.
2.12. Can a parent/group company been prosecuted for offences being committed within a subsidiary?

According to the Lithuanian law, a parent/group company cannot be prosecuted for merely an offence being committed within a subsidiary. In order to prosecute a parent/group company it is necessary to establish all the necessary prerequisites for prosecution of parent/group company.

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.

As regards criminal punishment, please see answers to questions 1.2 and 2.1. For one offence together with a sanction a punitive measure can be imposed. Furthermore, there can be more than one punitive measure imposed for one offence.

The punitive measures imposed on companies are listed in paragraph 2 of Article 43 and Article 72 of the Criminal Code and are the following: (i) decision to disclose the judgement to mass media; and (ii) confiscation of property (for details, please see answer to questions 1.2).

Decision to disclose the judgement to mass media is public announcement about the crime offence to newspapers, TV, radio and other mass medium. The Lithuanian legal doctrine does not have the unified view as to whether such disclosure is indeed a punitive measure or a sanction. Taking into account the fact that disclosure of the judgement to mass media can be imposed together with sanctions, whereas for one offence only one sanction can be imposed, such disclosure more often is deemed to be a punitive measure.

Confiscation means that property gratuitously and constrainedly is taken to the ownership of the state. The rules on confiscation are provided for in Article 72 of the Criminal Code. The property is subject to confiscation if it was a tool, instrument or a result of the crime. The court has to confiscate:

1) money and other material things given to the person responsible for or accessory to a criminal offence to commit the offence;
2) money and other material things used for committing a criminal offence;
3) money and other material things originated from a criminal offence.

According to the paragraph 3 of Article 72 of the Criminal Code, the property given to other persons (either individuals or companies) is subject to confiscation irrespective of prosecution of such persons, provided that:

1) the property was given to them to commit a criminal offence;
2) The person knew or had to and could know that the property given originates from a criminal offence.

If property is hidden, consumed, sold, passed to other persons or it is impossible to take it because of other reasons, the court can award the state with money in the amount equal to value of such property.

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

The imposition of the punitive measure - decision to disclose the judgement to mass media - is not confined to certain types of offences. The imposition of the punitive measure - the confiscation of property - also is not confined to certain types of offences. The latter can be imposed for any criminal offence provided that all prerequisites established in Article 72 of the Criminal Code are met (please see answer to questions 3.1.).

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

As regards defences against the imposition of the aforementioned punitive measures, we think that: (i) expediency of the decision to disclose the judgement to mass media can a raised in respect of this punitive measures; and (ii) against imposition the confiscation of property the only defence is that application of such measure in a particular situation does not fall within the scope of Article 72 of the Criminal Code of Lithuania (please see answer to question 3.1.).

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

The punitive measures - the decision to disclose the judgement to mass media and the confiscation of property – are imposed only after a person is recognised guilty and convicted of a criminal offence. Thus, the decision to disclose the judgement to mass media and the confiscation of property cannot be imposed during the pre-trial investigation or trial.

However, during the pre-trial investigation or trial interim procedural measures can be imposed on a company suspected of committing a criminal offence, namely: (i) interim restriction of company’s activity; and (ii) interim suspension of company’s activity. During the pre-trial investigation or trial the restriction of ownership, one of other interim procedural measure, can also be imposed on a company (for details, please answer to question 2.10).
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?

In Lithuania criminal procedure generally comprises of pre-trial investigation and, after indictment, the trial in the first instance court. Sentence passed by the court of first instance may be appealed to the appeals court and the decision of the appeals court may further be challenged in the Lithuanian Supreme Court.

Pre-trial investigation may be initiated by the receipt of the complaint, application or notification on the committed criminal offence (by pre-trial officer or prosecutor). Neither pre-trial officers nor prosecutors do not have discretion to decide whether to prosecute or not a company. The pre-trial officer or prosecutor can only refuse to commence a pre-trial investigation when the facts indicated in the complaint, application or notification document are obviously false. The pre-trial investigation can be also initiated by the pre-trial officer or prosecutor when they establish themselves that a criminal offence has been committed. In this case they are free to decide whether the facts available are sufficient to adopt a decision to commence the pre-trial investigation.

A pre-trial investigation ends by the decision of the prosecutor either (i) to terminate the pre-trial investigation or (ii) to prepare indictment. The prosecutor does not have a full discretion to decide whether to terminate the pre-trial investigation or to prepare indictment. The Criminal Procedure Code establishes that the prosecutor shall issue the indictment if the prosecutor is persuaded that enough data is collected establishing that a suspect has committed a criminal offence. Pursuant to the Criminal Procedure Code, the prosecutor can terminate the pre-trial investigation if: (i) the prosecutor does not establish all the necessary elements of the specific criminal offence, (ii) the statute of limitation lapses, (iii) the prosecutor fails not collect enough data to prove that a suspect has committed a criminal offence and (iv) in other certain cases defined by the law. In the event a pre-trial investigation is not concluded within six month of the first interrogation of a suspect, the suspect has a right to apply to the pre-trial judge and request termination of the pre-trial investigation because of delay of the procedure.

As regards appeals against judgments that are unsatisfactory for prosecution, the prosecutor has a full discretion whether to appeal a judgement or not and on what grounds.

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

According to Article 21 of the Criminal Procedure Code, a person generally becomes a suspect, alternative: (i) as of the moment of the person is kept in custody under suspicion that he/she has committed a criminal offence; (ii) from the start of interrogation when the person is questioned about a criminal offence he/she is thought
to be guilty of; or (ii) as of the moment the person is summoned to interrogation provided that a notification about suspicion is adopted in his/her regard.

Taking into consideration specific nature of a company, we believe that a company could become a suspect as of the moment a notification about suspicion in respect of the company is adopted. The notification must be handed against the signature to a representative of a company before the first interrogation. This notification must indicate a criminal offence (place, time and other circumstances of the criminal offence) and the criminal law which establishes liability for the offence. The rights of a suspect must also be listed in the notification. Before the subsequent interrogations a new notification about the suspicion must be presented to the suspect if content of the suspicion changes.

The Criminal Procedure Code establishes that if a person is hiding or his/her place of stay is unknown (and a notification about suspicion cannot be delivered), then the person can be declared suspects by resolution of the prosecutor or by ruling of the pre-trial judge. The Criminal Procedure Code is silent whether this option is available in respect of a company. The registration place of a company (so to say “the place of stay”) in respect of the company is always known. Thus, the only ground on which a company could theoretically be declared suspect is “hiding”. We believe that in respect of the company “hiding” could be construed as hiding of its representatives or/and when place of stay of representatives of company is unknown.

The status of a suspect retained throughout the whole pre-trial investigation period, unless terminated. The pre-trial investigation stage ends by the decision of the prosecutor to terminate the pre-trial investigation or to indict the suspect. If the pre-trial investigation is terminated, all other decisions adopted during the pre-trial investigation must also be terminated. If a suspect is indicted (charged with the crime) procedural status of the “suspect” is changed into the “accused person”. A copy of the indictment must be provided to the accused person. Procedural rights of an accused persons are practically identical to those of the suspect, except that an accused person has some additional procedural rights, e.g. to participate in the examination of evidences, to participate in final speeches etc. (for details, please see answer to question 4.3).

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?

The Criminal Procedure Code lists the rights of a suspect inter alia to testify and to present documents and things important for trial (Article 21 of the Criminal Procedure Code). No exemptions are provided for in the Criminal Procedure Code in case of company being a suspect. Since all the foregoing are rights of a suspect, not its/his/her obligations, we believe that a company, suspected of a criminal offence, has a right to
remain silent, to refuse production of documents, as well as to refuse testimony or to answer questions.

We also believe that a company, suspected of a criminal offence, has a right to deny access to company site without search warrant. The Civil Procedure Code determines the search procedure in detail. The search is permitted only pursuant to the decision of a pre-trial investigation judge. In urgent cases, search could also be made pursuant to the resolution of the prosecutor or officer of pre-trial investigation; however, in this case, it must be approved by a pre-trial investigation judge in 3 days. If the pre-trial investigation judge refuses to approve such search, all evidences collected during the unauthorised search must be returned and could not be relied upon in the further proceedings.

As regards other suspect’s rights, these are provided for in the Criminal Procedure Code and are the following: to know what it/he/she is suspected of, to have an attorney (advocate) from the moment of suspicion or the first interrogation, to present requests, to challenge pre-trial officers or judges, to get acquainted with material of the pre-trial investigation, to appeal actions and decisions of pre-trial officer, public prosecutor or pre-trial judge.

The Criminal Procedure Code does not in any way specify how the aforementioned rights are exercised in the event of criminal prosecution against a company. This issue also has not been analysed neither in the court practice nor in Lithuanian legal doctrine yet. Thus, answer to this question remains unclear. On one hand, according to general principles of corporate governance, general manager (the CEO) organises daily activities of the company and acts on behalf of the company. Therefore, it is most likely that in case of prosecution of a company, its procedural rights of a company would be exercised by the company’s general director. Prosecution against general manager does not eliminate his/her status of the representative of a company in company’s relations with any third party. Accordingly, even if investigation is made against company’s director, still the procedural rights of a suspect would most likely be exercised by the general directors. If the court issues the decision to recall a general manager from the office (it is one of the interim procedural measures permissible under the Criminal Procedure Code in respect of individual suspects), the persons authorised to act on behalf of the company and exercise its rights and obligations shall be determined in accordance with the by-laws of the company. On the other hand, it could be interpreted that the right person to exercise right of the company shall be the person appointed to represent a company in the criminal procedure (please see answer to question 4.7) exists.

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16. If the “double signature rule” is introduced in a company, then the company’s procedural rights would probably be exercised by the persons having the right to act on behalf of the company in accordance with such rule.
4.4. **When will a company be informed that it is or can become prosecuted?**

Please see answer to question 4.2.

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?**

The Criminal Procedure Code establishes an obligation of all the persons, if summoned, to appear and give the testimony, unless plausible excuse can be presented.

It has been mentioned that the Criminal Procedure Code provides for the right of a suspect not to testify. It has also been mentioned that in the event of criminal prosecution against a company its rights of suspect are exercised either by its general manager or the person appointed to represent the company in the criminal proceedings (for details, please see answer to question 4.3). Following the aforementioned position it could be argued that general manager (or the person appointed to represent the company in the criminal proceedings) cannot be witness in proceedings against a company, as it would contradict with his/her right not to testify.

But general manager is not the only corporate body that a company may have. Pursuant to the Lithuanian Law on Companies, a company either public or private must have at least general meeting of its shareholders and one corporate body – general manager. Optional corporate bodies are the board and supervisory board. Pursuant to the Lithuanian Civil Code, a company either public or private exercises its respective rights and duties through its respective bodies. Though, neither the Criminal Procedure Code nor any other legal act does not in any way specify whether members of such (corporate) bodies can exercise the rights of a company, suspected of a criminal offence. This question has not been analysed neither in the Lithuanian court practice nor in Lithuanian legal doctrine yet. Thus, answer to the question whether members of such (corporate) bodies can be witness in proceedings against a company remains unclear. Unless, of course, such members would be prosecuted as individual offenders. In this case, they would enjoy all the rights a suspect may have, including the right to remain silent and to refuse testimony or to answer questions.

As regards other directors (not members of corporate bodies of companies), managers or employees, it seems that they would have an obligation to testify, as no plausible excuses can be present that would exempt them from testifying (unless, of course, they would be prosecuted as individual offenders and enjoy all the rights of suspects, including the right to remain silent and to refuse testimony or to answer questions).

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

In accordance with the Criminal Procedure Code, there will be a joint proceeding against the company and the individual offender accused for the same offence. The
Code establishes that the court must evaluate both the company’s and the individual offender’s offences in the final judgement. In other cases, the court has discretion to join proceedings if it considers that the joined cases would be heard faster.

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

In Lithuania prosecution against a company is practically conducted under the same procedural rules designated for individual offenders. However, the Criminal Procedure Code explicitly provides for some exceptions, namely:

1) **Appointment of a representative.** The Criminal Procedure Code provides for a company’s obligation to appoint a representative of the company;

2) **Interim procedural measures.** The Criminal Procedure Code establishes two additional interim procedural measures that are applicable only to companies, - the interim suspension of company’s activities and interim restriction of company’s activities (for details, please see answer to question 2.10);

3) **Judgement.** In the event a company and an individual offender are prosecuted for the same offence, the proceedings are joined and the court passes one judgement whereof evaluations of actions or omission of the individual offender and the company are given;

4) **Enforcement.** Court judgements against companies are enforced exclusively by the court bailiffs.

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?

As regard criminal sanctions imposed on companies (fine, restriction of company’s activity or liquidation of a company), for details, please see answers to questions 1.2 and 2.1. As regards punitive measures imposed on companies (confiscation of property and decision to disclose the judgement to mass media), for details, please see answers to questions 1.2 and 3.1.

As regards interim procedural measures imposed on companies during the pre-trial investigation and trial until the verdict is passed and comes into force or until the subject is acquitted (interim restriction of company’s activity, interim suspension of company’s activity and/or restriction of ownership), for details, please see answer to question 2.10.
5.2. Does the company, have the status of a suspect or a similar status and at what stage in proceedings?

Please see answer to question 4.2.

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

Companies are fully aware of the requests on application of criminal sanctions (i.e. fine, restriction of company’s activity or liquidation of a company) and/or punitive measures (i.e. confiscation of property and decision to disclose the judgement to mass media) that are submitted by prosecutors to the court. But the sanctions are imposed by the court judgement and companies are informed about these sanctions only after the respective judgment is announced.

Interim procedural measures (interim restriction of company’s activity, interim suspension of company’s activity and/or restriction of ownership) can be imposed by an order of the pre-trial judge at pre-trial investigation stage or the judge hearing the case in the court. The Criminal Procedure Code does not establish an obligation to inform a company about these interim procedural measures before it is imposed. However, some authors argue that interim restriction of company’s activity and interim suspension of company’s activity are quite severe measures. Therefore, in accordance with a proportionality principle, a company should be provided with an advance notice and opportunity to rectify the situation and avoid applications of the aforesaid measures (despite the fact that the Criminal Procedure Code provides for no such explicit requirement).

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

Lithuanian criminal law does not determine any procedural rights of a company before the sanction is imposed, except for a general right to submit a written explanation re issues in questions.

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

Please see answer to question 4.6.

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

Please see answer to question 4.7.
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?

The Criminal Code embodies personal criminal liability of persons since it is determined that criminal liability can only be applied to the person whose own acts constitute all elements of offence. Therefore, in Lithuania directors or managers are not criminally liable for offences committed by other individual directors, managers or employees of the company. This concept is also confirmed in many judgments of the Lithuanian Supreme Court.

However, when subordinating relations exist, then an offence committed by a director, manager or employee could serve as a precondition (one of the factors) to prosecute the principal of such director, manager or employee, e.g. for abuse or omission of his/her (principal’s) service obligations. Importantly, the mere fact of the crime is not enough for criminal liability of the principal to arise. In order to constitute an abuse or omissions of service obligation on part of the principal all other elements of the abuse or omission of the service obligations must be established, including some failures on part of the principal himself/herself (e.g. lack of supervision or control on part of the principal, abuse of principal’s rights or failure to observe limits of competence on part of the principal, some substantial damage for the state, international public organization, legal or private person and etc.).

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

As mentioned, a criminal liability of directors and managers does not arise for mere offences committed by others.

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?

Under the Criminal Code only the fact that the director, manager or employee was not adequately selected, instructed, supervised or the company not adequately organised does not constitute the offence.

However, as mentioned, non adequate selection, instruction, supervision of the employees or managers of the company could serve as a precondition (one of the factors) to prosecute the principal of such director, manager or employee (for details, please see answer to question 6.1).
6.4. **What recommendations do you have to exclude or minimize criminal liability risks of directors of a company?**

In order to minimise risks of the criminal liability of directors of a company it is advisable:

- to be aware of the requirements of the legal acts of the Republic of Lithuania, especially regulating the rights and obligations of the directors, and observe at it all times;

- to designate and implement rules on capacities and functions of employees, division of their responsibilities and subordination; to be aware of the competence vested by and obligations provided for in companies by-laws and observe at it all times; and

- to create and implement effective control and supervisions systems of activities of the company and its employees (*corporate compliance policy program*).
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
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 been 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 been 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 been 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 been 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 been 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.
1. General

First of all, it is important to mention that the possible legal consequences for companies resulting from the commission of a criminal offence are different, depending upon whether the matter falls under federal or state law. The specific law that regulates particular criminal conduct depends on the jurisdiction where the crime was committed, the nature of the victim, and other circumstances.

For purposes of this study, we will essentially base our responses on federal criminal law as well as the criminal legislation in effect for Mexico City. Most state legislation follows the same general rules.

Please take into consideration that in order for us to give a specific, complete and adequate legal opinion regarding possible criminal consequences for companies, shareholders, partners, directors, managers, representatives and/or employees, we would need to consider the particular fact pattern of a specific case.

In our study, we will consider “crime” and “offence” as having the same meaning under criminal law.

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.

No, only individuals (not companies) can be criminally liable for their conduct. Nevertheless, when a member, shareholder, director, officer, or representative of a company (except state institutions) commits a crime using the means provided by the company for that purpose, so that the offence is committed on behalf of the company,
under its protection or for its benefit, then the court, in its final judgement, can make specific orders against the company, independently of the criminal liability for those individuals that committed the crime.

The legal consequences, mentioned above, for the company cannot be considered as criminal liability as the company is considered as only acting through individuals, not acting itself. Decisions are made by individuals. So, according to Mexican legislation and federal court precedents, members, shareholders, directors, officers, and other representatives of the company are those who must criminally respond for their individual conduct and for the offences committed under the protection, on behalf of or for the benefit of the company. If, however, the criminal offence has been proven to have been committed by the individuals involved for the company, then legal consequences can be imposed upon the company, independently of the criminal sanctions for the individuals.

On a general basis, the proceeding against the company will follow the same procedure as that followed for the individuals that directly committed the offence: an investigation by the public prosecutor and a later proceeding before a criminal court. Prior to making an order against a company, its legal representative has the right to take part in the proceedings.

Federal criminal law requires the court dealing with the matter to consider, in its final determination, whether the making of an order against the company is necessary for public safety. Such a consideration is not required in the legislation in effect for Mexico City.

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

According to the criminal legislation in effect for Mexico City, the sanctions that can be made against a company under criminal law are:

1) **Suspension:** The suspension of the company’s business operations for the period that the court determines.

2) **Dissolution:** The dissolution and liquidation of the company. The company may not be constituted again by the same individuals and/or legal entities that formed its shareholders. The court designates a liquidator to be in charge of carrying out the liquidation.

3) **Prohibition on carrying out specific operations or businesses:** The company is forbidden from carrying out those activities directly related to the crime committed. The directors and statutory examiners of the company are responsible to the court for enforcing the prohibition and if they do not do so, they will be responsible for committing an independent crime (disobedience of a court order).
4) Removal: Replacement of the directors of the company with those designated by the court, after hearing proposals made by those shareholders who did not participate in the commission of the crime. Once the period determined by the court for the replacement ends, the designation of new directors may take place according to the normal procedure for doing so set out in corporate law.

5) Oversight: The supervision of the company through an overseer or supervisor appointed by the court.

The above mentioned possible legal consequences are determined in the final judgement of the court, after the criminal proceedings.

The court may order measures necessary to ensure that the rights of workers and third parties involved with the company are protected. Even if the court does not order any such measures, however, the above-mentioned rights are protected by law.

With respect to possible legal consequences for companies, under federal criminal law, these are: suspension and dissolution, in the terms explained above.

Independently of the above, Mexican legislation establishes that companies may be required to pay damages for the loss caused to the victim of a crime, committed specifically by its shareholders, directors or managers. Damages may be claimed and their amount determined in the same way in which, according to Mexican legislation, companies would normally be responsible with respect to the actions of shareholders, directors or managers.

Companies, their shareholders, and in general, those carrying out any type of commercial business, may be required to pay damages for the loss caused to the victim of a crime, when the crime is committed by their employees or contractors, in carrying out their work or services. For example: a construction company might be responsible for paying for the damages caused to a nearby building due to the construction work done by its employees, independently of the criminal liability of those who actually caused or were involved in causing the damage, such as employees, managers, etc. of the company.

Damages include:

a) Restitution of matters as they were before the crime was committed.

b) Restitution of any benefits obtained from the crime.

c) Payment of non-pecuniary damages, pain, suffering and mental distress caused by the crime.

d) Payment of any financial loss.
e) Payment of loss of wages or salary and benefits, in case of injuries that result in the inability to work.

Those entitled to obtain payment of damages are:

a) The victim or otherwise aggrieved party.

b) If the victim or aggrieved party is dead or missing, their dependants, heirs or successors.

To obtain payment of damages from the company, its shareholders, or those carrying out a commercial business, the process begins with the filing of an ancillary civil proceeding with the court hearing the criminal matter, before a final judgement in the criminal matter has been issued.

In the ancillary civil proceeding, the claimant(s) will have to set out the facts and circumstances that caused the damages and specify the amount of the claim. The defendant in the ancillary civil proceeding (company, shareholders, person in charge, etc.) will have the right to offer evidence as considered necessary.

If the victim or other aggrieved party does not file the civil ancillary proceeding before a final decision is issued in the criminal proceedings, then a separate civil action may be filed in a civil court, in accordance with normal civil procedure.

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.

As can be seen from the previous discussion, to some extent, Mexico does not maintain a sharp distinction between criminal and civil remedies with the result that a criminal court may impose civil-style penalties upon companies or award damages to an innocent party.

In addition to the foregoing, additional non-criminal sanctions include, where applicable, the revocation of concessions, permits or authorizations.

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.

As previously explained, the legal consequences that can be imposed on a company under criminal law are: suspension, dissolution, prohibition on carrying out specific
operations, removal and oversight. Also, the company can be required to pay for damages caused, as explained above.

The maximum parameters for the sanctions are:

a) Suspension: Cannot exceed 2 years.

b) Dissolution: Permanent.

c) Prohibition: Cannot exceed 5 years.

d) Removal: Cannot exceed 3 years.

e) Oversight: Cannot exceed 3 years.

The amount of the damages will be the exact sum duly proven during the proceeding.

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

Previously set out in the response to question 1.2

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.

An order against a company can arise from any kind of criminal offence, when committed by a shareholder, director or representative of the company using the means provided by the company to achieve that purpose, so that the crime is committed on behalf of the company, under its protection or for its benefit.

In order to issue an order against a company, it has to be proven that a shareholder or representative (directors, managers, administrators, legal representatives, etc.) of the company, regardless of the internal hierarchy, have committed a crime in the circumstances above explained (means given, benefit, protection, etc.). The court, besides imposing a criminal sanction upon the individual shareholder or representative for the commission of the crime, can issue an order against the company in the final judgement.

As a third party, the company, its shareholders and representatives, as well as those in charge of any type of commercial business, may be obligated to pay damages caused due to the crime committed by their employees and contractors, in their work. There is no need for the employees, etc. to occupy a specific place in the hierarchy of the company; the only requirement is evidence that proves that the individuals really had the alleged relationship with the company and that the illegal conduct was performed in the course of their duties.
Also as a third party, the company may be obligated to pay damages caused by its shareholders, officers and directors, on the same terms in which, according to Mexican legislation, such companies are normally responsible for the actions of their shareholders, officers and directors. In this particular case, in order for the company to pay damages, the specific internal status of those individuals has to be proven.

Mexican legislation establishes some specific criminal offences that can be committed by directors, administrators, representatives or employees of specific types of companies, such as health centers or funeral parlors (for example, preventing a patient from leaving a hospital or denying the release of a body, until payment for service is made). Also, employers commit a criminal offence if they do not pay wages and salary to their employees.

Directors of a company can commit a criminal offence against their own company if they divert or misuse resources, alter accounts, create non-existent operations or expenses, hide or retain securities, etc.

If a company has the intention of filing a criminal complaint against one of its own directors, there has to be a previous resolution of the shareholders authorizing this.

The previously mentioned criminal offences are only examples of the crimes that can be committed by employers, directors, and managers, etc.

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

The acts and omissions of certain individuals in the company (directors, managers, shareholders, employees, etc.) can be criminally attributed to them and so, if they commit an offence, they will be criminally responsible for their conduct. Nevertheless, and as previously explained, if it is proven that the criminal conduct was performed using the means provided by the company in order to achieve the criminal purpose, and such conduct was carried out on behalf of the company or under its protection or for its benefit, then the company may be liable for such conduct, independently of the individual criminal responsibility of those that committed the crime. The legal consequences for the company cannot, however, be considered as direct criminal responsibility.

According to some state legislation in Mexico, for example Queretaro, if an offence is committed by reason of a decision approved by the shareholders; those individuals that gave their affirmative vote will be considered as participants in the realization of the criminal conduct. Those shareholders that witnessed the voting but abstained or voted in a negative way can be considered as abettors or accomplices if they do not advise the authorities of the criminal conduct.
Violation of the internal rules and regulations of a company by an individual is not considered criminally illegal itself, unless what is done constitutes the commission of an offence under criminal law. It is necessary, therefore, to analyze the specific conduct to establish if a crime has been committed. Example: The misuse of a machine violating an internal rule of a company is not a crime; nevertheless, if such misuse causes an accident causing the death of someone, then such activity can be criminally prosecuted.

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

It has to be remembered that only individuals are criminally responsible for their conduct although there can be legal consequences for the company resulting from the commission of a crime. Companies cannot be considered as “living and conscious” as their decisions are made by individuals.

According to most criminal legislation in Mexico, “mens rea” is understood as culpability, which can be intentional or negligent (a violation of a duty of care). To a certain extent it might include culpable recklessness, knowledge and consent.

Although the term “mens rea” is only applicable to individual conduct, proof of intention, knowledge of, negligence, recklessness and/or consent to the criminal conduct by officers, directors, shareholders, representatives and higher level employees of the company, directly influence whether the conduct will have legal consequences for the company. Example: An employee, with the authorization of the board of directors and with the information provided by them, commits a crime intending to obtain an economic benefit for the company. In such case, one can say that the company provided the individual with the means to commit the offence in order to obtain a benefit for the legal entity. Independently of the individual criminal responsibility of those directly involved in the commission of the crime (employee and directors), the company can be sanctioned.

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.**

Most of the crimes require intentional culpability. However, there are certain offences in which negligence or recklessness can also constitute culpability. These offences are mainly those that create a risk and those that cause or can cause a material result; for example: injuries, damage to things, homicide, dangerous environmental or technological activities, attacks on means of communication, among others. In these offences “mens rea” can be proven either as something done intentionally or negligently (or recklessly).
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

Generally, in order for there to be legal consequences for a company, including payment of damages caused by a crime, there has to be a prosecution against the individuals that directly committed the crime. It is necessary to remember that there is no criminal liability for companies, individuals such as members, officers, legal representatives, etc. will be those who will be criminally liable, although the company can be also sanctioned.

There have, however, been cases of prosecution against companies through their legal representatives, directors, officers, etc. although those who directly committed the criminal conduct were not specifically identified.

Example: The employees of a big construction company cause damage to a nearby building. The company can be held liable, although the specific employees that caused the damage are not clearly identified. The only certainty is that the damages were caused due to the construction. The company might be obligated to pay for the damage independently of individual liability.

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

The company may allege, among other defenses, that: there was no financial loss suffered due to the crime or that the loss has already been paid or that the claimant is not really the true victim and thus not entitled to payment for the loss alleged; the company’s members, directors, representatives, officers, or shareholders did not commit the offence; the crime was not committed under the protection of the company, on its behalf or for its benefit; the company did not supply the means to commit the criminal offense; the employees and contractors that committed the offence did not do so in the performance of their duties, or that the alleged relationship with the company did not exist; prosecution for the crime is statute barred; it is not necessary to impose a sanction upon the company; or the company took all the means possible to avoid the commission of an offense (see response to questions 2.9 and 6.4); etc.

It is important to analyze each particular case in order to decide upon a specific defense strategy.

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?**

In connection with this latter point, with respect to certain types of offences (for example those related to health, safety, environmental or technological matters) the possible legal consequences for companies may be reduced to some extent if: there is a proper job description for the employees, managers and others directly involved in
such matters and the offense is committed outside the scope of the description; company policies are created identifying risks and the proper way to prevent and deal with such risks; policies are clearly established and made generally available in the workplace (acknowledgement of such policies by those to whom they are directed is needed in writing); employees are properly trained in order to adequately perform their duties; the company provides all of its workers with safety and educational courses; the company ensures its compliance with legislation, generally environmental, civil, etc., regulations and official standards; and that the company has the proper permits, authorizations, licenses and generally complies with other legal requirements to carry out its operations.

There are also other recommendations set out in response to question 6.4

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

Generally, no sanctions can be imposed during the investigation phase by the public prosecutor, unless the company does not respond to requests made by the prosecutor, for example: if the company does not respond to a summons for its legal representative to appear, a fine may be imposed.

However, a court may order specific preventive measures such as seizure of bank accounts.

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

No, as previously mentioned, only the individual who committed the offence may be convicted for it. In the same proceeding, however, an order may be made against the company by the court (suspension, dissolution, payment of damages, etc.).

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

If a parent/group company provides an individual with the means to carry out the offence or if the criminal conduct is performed on behalf, under the protection or for the benefit of the parent/group company, then such legal entity may also be subject to legal consequences (suspension, dissolution, etc.).

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.

Previously set out in the response to questions 1.2 and 1.3
3.2. **Is the imposition of these sanctions confined to certain types of offences? Describe the most relevant sanctions and types of offences?**

Mexican legislation establishes some specific criminal offences in particular areas that can be specifically committed by the directors, administrators, representatives or employees of specific kinds of companies, such as health centers or funeral parlors (for example, preventing a patient from leaving a hospital or refusing to release a body). Also, employers commit a criminal offence if they do not pay wages and salaries owing to their workers.

Directors and others can commit a criminal offence against their own company if they divert or misuse resources belonging to the company, alter accounts, engage in sham transactions or incur non-existent expenses, hide or retain securities, etc.

If a company has the intention to file a criminal complaint against one of its own directors, there has to be a previous resolution by its shareholders authorizing this.

The previously mentioned criminal offences are only examples of the crimes that can be committed by employers, directors, officers, representatives, and others.

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

The company may allege, among other defenses, that: there was no financial loss suffered due to the crime or that the loss has already been paid or that the claimant is not really the true victim and thus not entitled to payment for the loss alleged; the company's members, directors, representatives, officers, or shareholders did not commit the offence; the crime was not committed under the protection of the company, on its behalf or for its benefit; the company did not supply the means to commit the criminal offense; the employees and contractors that committed the offence did not do so in the performance of their duties, or that the alleged relationship with the company did not exist; prosecution for the crime is statute barred; it is not necessary to impose a sanction upon the company; or the company took all the means possible to avoid the commission of an offense.

In connection with this latter point, with respect to certain types of offences (for example those related to health, safety, environmental or technological matters) the possible legal consequences for companies may be reduced to some extent if: there is a proper job description for the employees, managers and others directly involved in such matters and the offense is committed outside the scope of the description; company policies are created identifying risks and the proper way to prevent and deal with such risks; policies are clearly established and made generally available in the workplace (acknowledgement of such policies by those to whom they are directed is needed in writing); employees are properly trained in order to adequately perform their duties; the company provides all of its workers with safety and educational courses; the company ensures its compliance with legislation, generally environmental, civil, etc., regulations and official standards; and that the company has the proper permits,
authorizations, licenses and generally complies with other legal requirements to carry out its operations.

Violation of internal rules and regulations of a company by an individual is not considered criminal conduct itself, unless the activities performed constitute the commission of an offence. So, there will be a need to analyze the specific conduct to establish if a crime has been committed. For example: the misuse of a machine violating an internal rule of a company is not a crime; nevertheless, if such misuse provokes an accident causing the death of someone, then such activity may be criminally prosecuted.

Also see the response to question 6.4

It is important to analyze each particular case in order to develop a specific defense strategy.

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

Generally, no sanctions can be imposed during the investigation phase by the public prosecutor, unless the company does not respond to requests made by the prosecutor, for example: if the company does not respond to a summons for its legal representative to appear, a fine may be imposed.

However, a court may order specific preventive measures such as seizure of bank accounts.

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?**

The public prosecutor has a certain discretion to decide whether to prosecute companies and individuals. However, the prosecutor has the obligation to take into consideration the circumstances in which the criminal complaint was filed (for example, whether there is a direct complaint filed against a company) and the results of the investigation.

If the victim files a complaint directly against a company, then the public prosecutor will have to pursue the company through its legal representatives, directors, officers, etc. during the investigation. If the victim did not file a direct accusation against a company, but in accordance with the investigation, the company, through its legal representatives, directors, officers, etc., appears to be involved in the crime, then the latter might be prosecuted after the investigation concludes.
Nevertheless, once the investigation concludes, the public prosecutor will have some discretion to decide whether to prosecute a suspect, always taking into consideration the result of such investigation (if it is proven that a crime was committed and that the suspect took part in its realization).

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

As previously explained, if the victim files an accusation directly against a company, then the public prosecutor will have to pursue the company through certain individuals (legal representative, directors, officers, etc.), during the investigation as suspects in the commission of the offence.

If the victim did not file a direct accusation against a company, but from the result of the investigation the company, through the above mentioned individuals, appears to be involved in the crime, then such people will also be considered as suspects in the crime for purposes of 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?**

A company appears through its legal representative who has the right to not provide testimony and to not answer any of the questions put to him/her formulated. Later on, the legal representative of the company will have the right to formulate his/her own statement in writing.

A company can deny access to its facilities, unless there is a judicial warrant that allows entrance (“cateo”) duly justified and well-founded in law and fact.

If documentation is asked through a well-grounded, in law and fact, order by an authority, then the company will have to deliver such information.

If an investigation is followed against a company´s directors, officers, shareholders, employees, etc., he/she will also have the right, as a suspect, to not provide testimony and not answer any questions. He/she will also have the right to later on provide testimony in writing.

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

Usually suspects are notified by the public prosecutor during the investigation that there is a criminal complaint filed against them. They may then appear before the prosecutor to be informed of the terms in which the accusation was made, the person
that made it, and the legal rights of the suspects, and to have the chance to adequately defend themselves.

Unfortunately, Mexican law does not clearly establish the right of suspects to be notified by the public prosecutor of accusations against and investigations about them.

If the public prosecutor decides to prosecute a company (through individuals such as directors, managers, representatives, etc.), then the court will evaluate the case and if there is enough evidence of the commission of a crime and the participation of the suspect in it, the court will issue an arrest warrant or a notice to appear (depending on the seriousness of the offence).

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?

Anyone (including directors, managers, employees, etc.) called be witnesses in a criminal proceeding are obligated to testify about the facts being investigated, unless they can also be considered as suspects, in which case they will have the right to not testify or answer the questions.

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

It will be the same proceeding, except in the case in which a separate claim is filed against the company for payment of damages caused due to a crime. In this case, an ancillary civil proceeding in the main criminal procedure has to be filed.

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

The proceeding against both company and individual is the same although the sanctions are different, as previously mentioned.

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?

Generally, the public prosecutor may not impose sanctions, except as set out in point 3.4 above.
5.2. **Does the company, have the status of a suspect or a similar status and at what stage in proceedings?**

As previously explained, if the victim in a crime files a complaint directly against a company, then the public prosecutor will have to consider which individuals (representatives, directors, officers, etc.) should be liable for the offense. During the investigation, therefore, the probably guilty party is identified as a suspect.

If the victim does not formulate a direct accusation against a company, but from the results of the investigation, it appears that the company, through the above mentioned individuals, appears to have been possibly involved in the crime, then they will also be considered as suspects during the investigation.

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

As previously explained, the public prosecutor does not generally impose sanctions. If the court decides to issue a sanction against a company, this can only be done if there was a previous or current criminal proceeding in which the legal representative of the company took part.

If public prosecutor decides to proceed against a company during the investigation, for example, as a result of a complaint filed by the victim, it may issue a notice to the company so informing it. However, there is no clear legal obligation for the prosecution to do so. Alternatively, when a complainant submits an ancillary civil claim during the criminal proceedings, the court will notify the company so that it may defend itself against the claim.

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

The company, through its legal representatives, has the right to defend the company and the right to appeal orders made, including the final order. It will also have the right to appear upon a federal court in an “amparo” or constitutional proceedings if constitutional rights are violated.

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

As outlined above, there can be.

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

As outlined above, the company is not subject to criminal prosecution although it may be subject to penalties in the criminal prosecution.
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?

Only the individuals that commit an offence are criminally liable for their conduct. However, if it is proven that other individuals (for example, other directors, managers or employees) somehow participated in the realization of the illegal conduct, intentionally, negligently, or recklessly or with knowledge and consent, then they might also be held responsible for the commission of the crime.

Criminal liability of shareholders, directors, managers, officers and others can also arise from a failure to comply with Mexican laws, rules and regulations. The liability will be for those individuals actually responsible of the failure to comply.

Shareholders, directors, managers, officers and others are not usually vicariously responsible for the violations committed by others. Nevertheless, if there is an intentional, negligent, reckless conduct related to or consent in the offense by those directors, managers, etc., then criminal liability might arise. Similarly, if it is proven that others acted upon the orders of such directors, managers, etc., then may also be criminally liable.

Some state legislation in Mexico, for example Queretaro, deals with the commission of an offence by means of an agreement voted upon by the shareholders. In such case, those individual shareholders that gave their affirmative vote will be considered as participants in the realization of the criminal offense. The shareholders that witnessed the vote but abstained or voted in a negative way can be considered as abettors or accomplices if they do not report the criminal conduct to the authorities.

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

Generally, the only legal requirement will be to clearly prove the existence of the crime and the participation in its commission by the directors or managers. “Mens rea” is needed to be proved (intention, negligence, recklessness, consent, knowledge, etc.). If a company intends to file a criminal complaint against one of its own directors, there has to be a previous resolution of its shareholders authorizing this.

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?

Criminal liability arises from individual “mens rea” in a crime, so it will have to be proved that intention or culpable negligence, recklessness, knowledge or consent to the criminal conduct, occurred in the particular case.
The inadequate selection, non-instruction or non-supervision of an employee does not constitute a crime in itself. However, if such employee commits a criminal offence related to his or her duties or services and it is proven that the origin of that offence was the fault of the shareholders, directors, managers, or representatives, etc., who intentionally or negligently selected, failed to instruct or supervise such employee, having knowledge of the incompetence or absence of instruction or supervision, then those shareholders, directors, etc. may be prosecuted for criminally participating in the realization of the offence.

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

To reduce liability, shareholders, directors and officers should not take part in decisions either at the board level or otherwise, which would be considered as directing, authorizing or condoning a violation of laws, rules, regulations, company policies or good practice. Employees of the company, including managers and supervisors, should comply with company policies and good practice, as well as avoid negligent conduct in carrying out their duties. In the event of becoming aware of a breach, potential breach or any risks that might arise in criminal conducts, directors, managers and others ought to take such steps as are within their power to warn, avoid and remedy.
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.

The following statutes and codes are relevant to corporate criminal liability in the Netherlands:

- Dutch Penal Code (Wetboek van Strafrecht) (DPC);
- Dutch Code of Criminal Procedure (Wetboek van Strafvordering) (DCCP);
- Economic Offences Act (Wet Econmische Delicten) (EOA);
- General Tax Act (Algemene Wet inzake Rijksbelastingen) (GTA); and
- Dutch Corporate Governance Code (Tabaksblad Code).

In the Netherlands, it has been possible for a ‘legal person’ to be prosecuted for an economic offence under the EOA since 1951 and for any crime since art. 51 was introduced to the DPC in 1976. Conceptually, a legal person is treated in the same manner as a natural person: a legal person can be prosecuted for the same offences and is subject to the same sanctions.
Art. 51 of the DPC states:\textsuperscript{17}:

1. Criminal offences may be committed by natural persons and legal persons.

2. Where a criminal offence is committed by a legal person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable, may be imposed:
   (1) against the legal person
   (2) against those who have ordered the commission of the criminal offence and against those who directed such unlawful behaviour or
   (3) against the persons mentioned under (1) and (2) jointly.

3. In the application of the preceding sections, the following are deemed to be equivalent to legal persons: unincorporated companies, partnerships, shipping companies and special funds.

Private law criteria are not decisive in determining whether a company is a ‘legal person’. A defect in the establishment or structure of a company, or the liquidation of a company, does not preclude criminal liability.

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

See also 1.1. Any sanction that can be imposed on a natural person can also be imposed on a legal person, although a punishment that is impossible to impose on a legal entity (such as imprisonment) is not imposed.

A legal person is subject to the following sanctions under art. 9 of the DPC:
- a fine,
- withdrawal of certain rights,
- forfeiture,
- public disclosure of the sentence,
- compensation of the victims.

\textsuperscript{17} The Dutch text reads as follows:

1. Strafbare feiten kunnen worden begaan door natuurlijke personen en rechtspersonen.
2. Indien een strafbaar feit wordt begaan door een rechtspersoon, kan de strafvervolging worden ingesteld en kunnen de in de wet voorziene straffen en maatregelen, indien zij daarvoor in aanmerking komen, worden uitgesproken:
   1°. tegen die rechtspersoon, dan wel
   2°. tegen hen die tot het feit opdracht hebben gegeven, alsmede tegen hen die feitelijke leiding hebben gegeven aan de verboden gedraging, dan wel
   3°. tegen de onder 1° en 2° genoemden te zamen.
3. Voor de toepassing van de vorige leden wordt met de rechtspersoon gelijkgesteld: de vennootschap zonder rechtspersoonlijkheid, de maatschap, de rederij en het doelvermogen.
Sanctions such as
- closure of the business enterprise (art. 7(c) EOA) and
- legal restraint of the enterprise (art. 8(b) EOA).
- can also be imposed on a legal entity when it has been convicted for an economic crime.

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.

If the legal person itself is not criminally liable for a criminal activity committed by another, no sanction can be imposed on the legal person.

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.

See also 1.2.

The type of sanction and the maximum that can be imposed depends on the offence for which the legal person is convicted.

Criminal cases against legal persons often concern financially related offences, such as forgery, forgery of tax documents, environmental matters and other economic offences.

In addition, it has become more common to prosecute companies for criminal offences such as money laundering and participation in a criminal organisation.18

The maximum punishments for these offences are as follows:
- forgery (art. 225 DPC): 6 years imprisonment or €67,000 fine
- tax fraud (art. 68 GTA): 4 years imprisonment or €16,750 fine if proven that the offence was committed intentionally;
- money laundering (art. 420 bis DPC): 4 years imprisonment or €67,000 fine;
- participation in a criminal organisation (art. 140 DPC): 6 years imprisonment or €67,000 fine
- in case of economic offences the maximum sentence depends on the specific offence and whether the act is done intentionally.

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18 For a company to be successfully prosecuted for participation in a criminal organisation, it is by no means necessary for the company's core business goals and practices themselves to be illegitimate.
The concept of a minimum sentence is unknown to Dutch law. Under art. 9a of the DPC, the absolute minimum is a conviction without any punishment imposed at all.

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

Every sanction described in 2.1 can be imposed on a legal person. There are no additional legal requirements.

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.**

No. See 1.2.

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

Companies act through natural persons. Whether the criminal actions of a natural person can be attributed to a legal person depends on whether the company had *control* over thecriminal activity and *accepted* it.\(^\text{19}\)

This means that if the criminal activity of a natural person is part of the normal business of the company, or is part of the company’s official or unofficial policy, or is more or less accepted by the company, the criminal offence can be attributed to the company.

If the criminal actions of a natural person also violate the company's internal rules and regulations, the criminal activity can still be attributed to the company if people in control within the company knew of the activity and had the means to stop it, but refrained from doing so. Criminal activity is more than an isolated incident. A single criminal act committed by a single employee will generally not result in the company being found criminally liable.

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

A difference exists with respect to *mens rea* where it concerns more serious offences: felonies and minor offences: misdemeanours.

In the case of a felony, to establish that the legal person acted with *mens rea*, it is necessary to prove that people within the management were aware of the criminal activity itself or of the risks of such activity (in other words, *dolus eventualis* is sufficient) and recklessly neglected to take adequate measures to address the problem(s) that led to the criminal activity. Intent need not have been present

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\(^{19}\) Supreme Court 1 July 1981, NJ 1982, 80 ("The Kabeljauw case")
throughout the company, but depending on the size of the legal person the awareness of one or two persons may not be enough.

To establish mens rea in case of a misdemeanour, the requirements are very low. Intent is not required. Merely failing to see a potentially risky situation, even though no grave mistakes have been made, is sufficient for criminal liability (culpa).

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.**

No, but see the description in 2.5 of the difference in mens rea for felonies and misdemeanours.

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

No, but it may be more difficult for a prosecutor to prove that the criminal activity of a natural person is attributable to the company if the natural person is unknown.

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

See 2.5 for the legal requirements for attributing criminal activity to a legal person. A company mounting a defence should focus on:

- the general and specific measures taken to avoid criminal activity,
- the management's lack of knowledge of the criminal activity,
- if the latter is not possible, showing that adequate measurements were being taken (or about to be taken) against the criminal activity.

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?**

Due instruction of the employees and adequate exertion of control over the employees will certainly make it less likely that criminal activity can be attributed to the legal person. However, as indicated in the answers to 2.4 and 2.5 above, even if these measures are taken, it will still be possible for criminal activity to be attributed to the company if management has knowledge of the criminal activity and more or less accepted it.

Corporate Governance Code may play a role in a finding that criminal activity is attributable to the company.

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

Yes. For example, during the investigative phase, the assets, records and other goods of the company may be seized. If it is suspected that economic crimes were committed, an order to refrain from all or some business activities may be given and certain rights of the company may be suspended.

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

Yes.

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

Yes. See 2.5. The same criteria apply.

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.

Regulatory procedures and measures exist in Dutch law, but these are not imposed in criminal proceedings.

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

N/A

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

N/A

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

N/A
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?

In the Netherlands the right to prosecute is exclusively held by the public prosecutor. This right is linked to the exclusive right to decline to prosecute a case and/or to settle a case out of court. A prosecutor will take two main factors into account when deciding whether a case should be prosecuted. First, the prosecutor will estimate whether there is enough evidence to bring the case to a conviction. Second, the prosecutor will take the public interest into account.

Other factors to be taken into account are:
- the seriousness of the offence committed,
- the amount of negative publicity for a company that would come with a public trial,
- the way in which the company and its structure have evolved since the criminal activity took place or was discovered, and
- the cooperation of the company with the criminal investigation (although this factor is much less prominent than one might expect).

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

The status of a suspect starts as soon as there is - objectively considered on the basis of the facts and circumstances - a reasonable suspicion that criminal activity has taken place within the company.

There is no requirement to inform the company of this status.

A company has the suspect status irrespective of the nature of the investigation taking place (i.e. regulatory, criminal or tax).

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?

In the case of the right to remain silent upon questioning, the authorities have the obligation to inform the person representing the company and in any case the management of the company, that there is no obligation to answer questions. (Art. 29(2) DCCP) There is debate whether all employees have this right if the company is considered suspect. In any case, the directors and higher management (if not already suspect themselves) have these rights.
The principle of *nemo tenetur* is accepted in the Netherlands, but apart from art. 29(2) DCCP there is no specific provision in which it is expressly stated.

In the case of the right to refuse to hand over documents, there is no obligation on a suspect company to provide documents. However, a company may choose to comply with a request for documents as the prospect of a search of the company’s premises may not be appealing.

If there is suspicion of an economic offence, the situation is entirely different. If requested, documents must be provided. Failing to do so constitutes an offence under arts. 24a and 26 of the EOA.

It is worth noting here that various Dutch authorities are entitled to see corporate documents on various grounds. This right continues to apply when the company is the subject of a criminal investigation. If the request is legally valid, a company cannot refuse to hand over these documents even if it is foreseeable that the documents will be used in the criminal investigation.²¹

A warrant is not required under Dutch criminal procedure to *enter* or *search* a company site and a company cannot legally deny access. A public prosecutor or deputy public prosecutor must be involved in the search. The latter requires a warrant from the former to conduct the search, but in an urgent case this warrant may be obtained after the search.

For a *search* to take place, however, there must be a suspicion of a more serious felony (e.g. forgery, participating in a criminal organisation and money laundering) (art. 96c(2) DCCP) or a situation of *in flagrante delicto*.

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

In the Netherlands, there are no provisions or practices relating to this.

4.5. **Can the directors, managers or employees be witness in proceedings against a company?**

Yes, although the right to remain silent may be exercised.

4.6. **Does this also apply if the directors, managers or employees are suspects themselves?**

Yes. In addition, they have the right to refrain from answering questions if the answer would pose a potential risk of providing evidence against themselves in their own criminal investigation.

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

Often, yes.

4.8. 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?

Not yet. But a new act will come into force under which a public prosecutor may independently impose certain sanctions. It will be introduced on a gradual basis, starting at the end of 2007, for certain types of criminal offences. For the near future, it is unlikely that the act will affect companies.

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A
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?

Yes. See 1.1. Art. 51(2) DPC states that directing the criminal acts of a legal person is punishable.

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

The Dutch Supreme Court has ruled that a natural person is responsible for crimes committed by a legal person when that natural person is in a position to direct and is reasonably speaking required to do so, but fails to take action to prevent the illegal activity and/or accepts the risk of the illegal activity taking place.22

The natural person need not per se be in a position in the top of the organisation. It can even be someone outside the organisation. A legal relationship between the natural person and the legal person is not required. There must be a certain degree of power, influence and responsibility as described above.

Specific knowledge of the particular criminal activity having taken place is not necessary. It is sufficient that the person generally knows that this type of criminal activity is committed within the company.

If criminal activity cannot be attributed to the legal person itself, art. 51(2) DPC does not apply to a natural person. (However, this does not require that the legal person be convicted of the act).

Note that directors and managers are often prosecuted on a different basis than that described above. Under art. 47 of the DPC, a directors or managers can quite easily be held criminally liable as a participant or co-perpetrators without actually having physically committed the criminal act itself.

Art. 47 of the Dutch Penal Code states23:

(1) The following persons are liable as principals:

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23 The Dutch text reads as follows:

1. Als daders van een strafbaar feit worden gestraft:
   1° zij die het feit plegen, doen plegen of medeplegen;
   2° zij die door giften, beloften, misbruik van gezag, geweld, bedreiging, of misleiding of door het verschaffen van gelegenheid, middelen of inlichtingen het feit opzettelijk uitlokken.
2. Ten aanzien van de laatsten komen alleen die handelingen in aanmerking die zij opzettelijk hebben uitgelokt, benevens hun gevolgen.
i. Those who commit a criminal offence, either personally or jointly with another or others, who causes an innocent person to commit a criminal offence.

ii. Those who, through gifts, promises, abuse of authority, use of violence, threats of deception or providing the opportunity, means or information, intentionally solicit the commission of an offence.

(2) With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into account.

Criminal liability under art. 47(1)(joint commission) is based on a person contributing to the commission of an offence, either previously or simultaneously. This offence entails the person knowingly and willingly collaborating (in the broadest sense) with a view to committing the offence. Personal involvement in the offence is certainly not necessary, provided the collaboration is intimate and complete. No explicit agreements need to have been made. A person may even be deemed to have intended the joint commission of an offence by being present at its commission and not distancing himself from it.

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?

Although this is not entirely unthinkable, it is unlikely.

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

Avoid criminal activity

Companies and directors should be aware of potential risks. Areas within a company where criminal behaviour may be appealing are often easy to recognise: these are the areas where employees and management directly perceive that internal rules and regulations can work contrary to the commercial goals of the company. Examples of these rules include safety rules and reporting requirements. Adequate internal control mechanisms are important.

Avoid criminal liability

Effective action must be taken as soon as a director becomes aware of an indication of criminal conduct in the past or present or the potential of this in the future.

Have a criminal defence lawyer on standby, especially if the company operates in high risk areas or if there are signs that the company may be the subject of a criminal investigation.
Have a detailed instruction prepared for the reception staff explaining the "do’s and don’ts", in case of a visit from the police or other authorities with questions, orders or warrants.
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.

No, a company in Perú cannot be criminally prosecuted. The criminal liability and therefore the sanction are attributed directly to the individual offender. However, a company can be involved in a criminal proceeding as a third party civil liable. Moreover, in case of a guilty verdict against the offender, such company shall severally assume an eventual indemnity with the convict. In exceptional cases, the company may be sanctioned with the suspension of its operations, closing of its premises, among others. Notwithstanding, in Peru it is unusual to carry out that kind of sanctions.

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

It is left to the decision of the judge to determine if the offence was committed by the representative of the company within its line of business, or if the company was used to favor or cover that offence. If it is the case, the judge could take some of the following decisions, according to Section 105 of the Peruvian Criminal Code:

1. Temporary or definite closing of the company’s premises or establishments.
2. Dissolution of the corporation, association, foundation, cooperative or committee.
3. Suspension of all the activities of the corporation, association, foundation, cooperative or committee during a term no longer than two years.
4. Prohibition to the corporation, association, foundation, cooperative or committee for carrying out those activities which favored or covered the offence.

This prohibition may be temporary and the penalty shall not be higher than five years.

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.

In Peru governs the principle that an individual offender cannot be sanctioned twice for the same offence. Administrative sanctions as those mentioned in your question do exist in Peru, however if a company is sanctioned in the administrative proceeding by irregular actions, the same company cannot be sanctioned in the criminal proceeding for the same reason. Moreover, if a company is sanctioned in the criminal proceeding, the same company cannot be sanctioned for the same offence in the administrative proceeding, because of the “ne bis in idem” principle (the same offence cannot be sanctioned twice).

It is important to point out that in Peru, the criminal justice is considered of “ultima ratio”. It means that a criminal sanction shall be executed just only if in other kind of proceeding it is not possible the sanction for the investigated offence (e.g. the administrative sanction).

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.

N/A

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

N/A

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.

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

N/A

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

N/A

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.

N/A

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

N/A

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

N/A

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?

N/A

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

N/A

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

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

N/A

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.

In our answer to question 1.2, there were just described the sanctions which could be imposed on a company.

Before all the mentioned sanctions are to be imposed, it shall be demonstrated in the criminal proceeding if the company was fraudulently used for committing the offences or for covering them.

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

The sanctions may only be imposed on the company when the offence is realized by an individual acting in representation of the company and/or using it for committing that/those offence(s).

Some offences that may cause criminal proceedings are among others: crime against a person’s honor, crime involving theft or fraud, crime involving public instruments, crime against industrial property.

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

A third party civil liable for an offence shall be summoned and have the right to intervene in all the hearings during the criminal proceedings in which it is involved for their defense (interrogate the criminal defendant, filing arguments, file appeals, among others).

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

No they cannot. The sanctions hereinbefore mentioned may only be executed after the final judgment.
However in some cases, during the criminal procedure, the court could request an injunction over the third party property to assure the payment of the indemnity.
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?

N/A

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

N/A

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?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A
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?**

   The judges may only impose sanction to those companies which have been involved in the criminal proceeding as third party civil liable as per judicial ruling determining that.

   It is not applicable to those companies which have not been involved as third party liable for a proceeding before the issuance of the judgment.

   The judge shall take into account (within the regulations of the law) if e.g. the company was organized for committing offences, or it was used for those facts, or if the company received profits as consequence of that offences or if it was the representative or if the participation of the company thereon may have been known by third parties, and so on.

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

   No it does not. A company has not the status of a suspect or of an investigated. The judicial investigation is attributable to the accused. Notwithstanding, as the accessory consequences of the sanction and indemnity may affect the corporate assets and the operation of the company involved in a case as third party liable for, the company may file before the court the arguments of defense as well as all the briefs pertinent. The company may also be represented by a lawyer before the court.

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

   Company takes knowledge about its involvement as third party liable for an offence, at the moment it receives the judicial notice containing the summons.

   However, it is just only after the accusation that the company takes knowledge about the charges and the accessory measures against it requested by the Prosecutor. The third party civil liable may only be subject for the accessory measures described in this report.

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

   A company may object the order, by which it has been involved as third party liable, may challenge an injunction against it, may file before the court the arguments of defense and the briefs that the company consider pertinent and may be represented by a lawyer before the court.
5.5. Will there be joint proceedings against the company and the individual offender?

The criminal proceeding is filed against the accused and the third party civil liable is incorporated in it. Therefore it is considered as a sole criminal proceeding.

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

As we mentioned in our previous answer, there is just an only one criminal proceeding, therefore both are considered in the same proceeding.

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?

The general principle establishes that the liability falls on the general manager of the company. However, pursuant Section 27 of the Criminal Code the person acting as the company and as the authorized representative of the company who has a criminal behavior is responsible as perpetrator of that crime even though the special elements which grounds such penalty or the benefits of that action are not to be attributed to the perpetrator but its representative. It means that if a representative of a company commits an offence acting as such, he/she shall be liable for that action and not any other representative who has not acted in that criminal offence.

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

Among others, they are as follows:

a) Direct or indirect knowledge of an offence which has not been reported to the competent authority nor to the public.
b) Participation or taking part as per his/her functions in the denounced actions.
c) The denounced action has been committed as per his/her order or instructions.

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?

No. A criminal liability requires direct or indirect participation on the commitment of the crime, or because of a person has taken knowledge about that and has not denounced it.
6.4. What recommendations do you have to exclude or minimize criminal liability risks of directors of a company?

No. A criminal liability requires direct or indirect participation on the commitment of the crime, or because of a person has taken knowledge about that and has not denounced it.
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.

Yes. In Portugal the criminal liability of the companies is regulated by Law no. 59/2007 of 4th September 2007, which introduced the criminal liability of the companies.

The proceeding against a company does not differ from that against an individual. However, contrary to an individual, a company may not be subject to imprisonment.

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

Under Portuguese Criminal Law, there are two kinds of criminal penalties that may be applied to legal entities: main penalties and/or ancillary penalties.

The main penalties established under Portuguese Law to punish legal persons are:

a) Admonition;

b) Judicial supervision for a period of between 1 and 5 years;

c) Fine;

d) Judicial winding-up order;

e) Good behaviour caution.
The amount of the fine shall take into consideration the financial capacity of the legal person. Failure to comply with the payment of the fine, within the time limit established by the Court, may result in the assets of the legal person being sold off to pay the fine. In case of implied partnership (for example, a company that is not legally incorporated), if the fine is not paid, within the time limit established by the Court, the personal assets of the partners may also be sold.

The concrete application of a criminal fine depends on the decision of the Court: the fine is defined by a number of days and each day corresponds to a value that can go from € 100 to € 10,000. The Court may take in consideration the financial situation of the company, as well as the costs that the company has to bear with its workers.

In the case where the applicable fine is not higher than 240 days, the Court is entitled to condemn the company on a **simple admonition** only.

If the applicable fine is not higher than 600 days, the Court is entitled to replace it for a good behaviour caution, from € 1,000 to € 1,000,000, which the legal entity has to “leave” in the Court from 1 to 5 years. If the legal entity, in that period, commits the same crime, the caution reverts to the Portuguese State.

Also in the case that the applicable fine is not higher than 600 days, the Court is entitled to replace it by a judicial vigilance upon the company: a person responsible to monitor the activity of the company during a certain period of time, from 1 to 5 years, is then appointed.

On the other hand, the Court can always condemn the legal entity on doing something in order to oblige the stoppage of the criminal activity, to order the legal entity not to enter into certain agreements or to deprive the legal entity from some benefits, namely public grants or subsidies.

Furthermore, the Court may also order the legal entity not to exercise certain activities or even to close during a certain period of time, from 3 months to 5 years, in case the crime is committed within the scope of the company’s activity.

The winding-up shall only be ordered if the corporate entity was incorporated with the exclusive or predominant intention to commit the above mentioned crimes, or if it is being used, repeatedly, to commit those crimes.

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.

As ancillary penalties, Portuguese Criminal Code sets as follows:

(i) Order of the Court;

(ii) Prohibition of exercising an activity;
(iii) Prohibition of entering into certain agreements;

(iv) Prohibition of the right to receive subsidies;

(v) Closing down of the undertaking;

(vi) Advertisement of the condemning decision.

The Portuguese Criminal Code does not establish any specific legal prerequisites for each of those ancillary penalties, which means that all of them may be applied in any criminal proceeding against a company, depending on the circumstances of each case.

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.

See 1.2.

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

See 1.2.

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.

Under the Portuguese Criminal Code, the criminal liability of the companies is restricted to the following crimes:

- Non-natural and non-authorized conception and reproduction;
- Trafficking in human beings for the purposes of labour exploitation;
- Trading in human beings;
- Slavery;
- Kidnap;
- Crimes against sexual self-determination;
- Crimes against sexual freedom;
- Racial or religious discrimination;
- Computer and Telecommunications Fraud;
- Food related Crimes;
- Breaching construction technical rules;
- Fraud regarding work and employment;
- Document falsification;
- Child pornography;
- Counterfeiting of money and securities;
- Counterfeiting of weights and seals;
- Crimes against the environment;
- Criminal conspiracy;
- Trafficking of influences (illegal lobbying)
- Corruption;
- Subornation;
- Personal favourable treatment;
- Contempt of an order from an authority;
- Money laundering;

Outside the Criminal Code, current Portuguese Law provides, in some very restricted cases, and due to the special characteristics of the relevant crimes, criminal liability for corporate entities. Those crimes include the following:

- Crimes against the Economy, such as fraud in the attribution of subsidy, fraud in the attribution of bank credit to a company, forestalling the market and unlawful manipulation of the quality and composition of foodstuff;
- Crimes against the Public Health, such as illegal slaughter of animals for public consumption;
- Crimes against the Security of Computer data, systems or communication networks.
- Tax crimes, such as smuggling, tax fraud, tax embezzlement and crimes against Social Security;
Labour crimes, such as illegal employment of minors and contempt of an order of the General-Labour Inspection.

In any case, and as a general rule, only if a special rule provides for its liability, can a company be held criminally responsible.

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

According to the Portuguese Law, corporate entities may only be held liable for the crimes mentioned above if those same crimes have been committed: (i) for the benefit of the corporate entity by a person who has the authority to take decisions on behalf of the corporate entity or (ii) due to lack of control and supervision of the employees, within the corporate entity.

A corporate entity shall not be held liable for the relevant crime if the individual that acted unlawfully has violated an order or instruction given by a competent director of the corporate entity. In any case, the criminal liability of a corporate entity shall not exclude the criminal liability of the individuals who are the perpetrators, instigators or accessories of the relevant crime or of the respective directors/managers.

This means that if the criminal activity of a natural person is part of the normal business of the company, or is part of the company’s official or unofficial policy, or is more or less accepted by the company, the offence can be attributed to the company.

If the criminal actions of a natural person also violate the company’s internal rules and regulations, the criminal activity can still be attributed to the company if people in control within the company knew of the activity and had the means to stop it, but refrained from doing so.

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

It is possible to say that there is a difference with respect to mens rea where it concerns more serious offences (felonies) and minor offences (misdemeanors).

In the case of a felony, to establish that the legal person acted with mens rea, it is necessary to prove that people within management were aware of the criminal activity itself or of the risks of such activity and recklessly neglected to take adequate measures to address the problems that lead to the criminal activity.

To establish mens rea in case of a misdemeanor, the requirements are less demanding. Intent is not required. Merely failing to see a potentially risk situation, even though no grave mistakes have been made, is sufficient for criminal liability.
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.**

No, but see the description in 2.5 of the difference in *mens rea* for felonies and misdemeanors.

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

It is not necessary to convict the individual offender in order to prosecute a company. To prosecute a company it is only necessary that the relevant crime have been committed or (i) by a person who has the authority to take decisions on behalf of the corporate entity or (ii) by a person who has not the authority to take decisions due to lack of control and supervision of the employees.

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

A company mounting a defense should focus on:

- The general and specific measures taken to avoid criminal activity;
- The management’s lack of knowledge of the criminal activity;
- Showing that adequate measurements were being taken (or about to be taken) against the criminal activity;

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?**

For the analysis of criminal liability, it is generally necessary to identify the individual that committed the unlawful action. This means that, when a certain crime is committed within the context of the functioning of the company, it is necessary to identify the particular worker, director or individual that has committed such unlawful activity. This makes the position of the individual in the company structure relevant. On one hand, the law establishes the criminal liability of individuals that commit unlawful actions as their capacity as members of a corporate body or as representatives of the company, on behalf of the company. On the other hand, the existence of several spheres of administration and the division of tasks, especially when large companies are involved, frequently does not allow for the establishment of causality between the action of the individual and the violation of law. As a result of this difficulty, situations occur in which the authorities hold the members of the Board responsible for the alleged criminal action, identifying them as the company’s decision makers and, therefore, responsible for the action on behalf of the company.

An analysis of the company’s internal organization is important to assess the above mentioned risk and in certain cases, formal mechanisms of internal distribution of
responsibilities can help to identify more clearly the individuals responsible for several areas of business and, consequently, responsibility for action considered to be criminal offences.

Therefore, instruction of the employees and adequate exertion of control over the employees will certainly make it less likely that criminal activity can be attributed to the legal person. However, even if these measures are taken, it will still be possible for criminal activity to be attributed to the company if management has knowledge of the criminal activity and accepted it.

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

Criminal liability of legal persons was introduced in Portugal few months ago. The legal regime is very general and, as so, it does not provide expressly for the possibility to execute sanctions during the investigative phase. Notwithstanding, we believe that the Courts will tend to accept the execution of those sanctions, namely because they are already established for natural persons and it seems that there is no reason not to extend their application to legal entities.

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

In a criminal proceeding against a company, we believe that this tends to be the normal situation.

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

No. Under the Portuguese Criminal Law, individual or legal persons can only be prosecuted for offences committed by themselves. No one can be held criminally liable for the offences being committed by any other person.

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.

No sanctions other than criminal sanction can be imposed on a company in criminal proceedings. Please refer to 1.2 and 1.3 and be advised that the companies may also be responsible for some misdemeanors.
3.2. Is the imposition of these sanctions confined to certain types of offences? Describe the most relevant sanctions and types of offences?

N/A

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

N/A

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

N/A

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?

In Portugal the right to prosecute is exclusively held by the public prosecutor. The right is linked to the exclusive right to decline to prosecute a case and/or to settle a case out of court. A prosecutor will take two main factors into account when deciding whether a case should be prosecuted: first, the prosecutor will estimate whether there is enough evidence to bring the case to a conviction; second, the prosecutor will take the public interest into account.

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

The status of a suspect starts as soon as there is – objectively considered on the basis of the facts and circumstances – a reasonable suspicion that a company is committing or had committed any criminal activity.

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?

4.3.1. Does a company have the right to remain silent?

Yes.
4.3.2. **Does a company have the right to refuse production of documents?**

Yes, this right is the logic consequence of the right to remain silent. However, the authorities may always proceed with searches to company premises to obtain documents.

4.3.3. **Does a company have the right to refuse testimony?**

A company cannot be witness. See 4.3.1

4.3.4. **Does a company have the right to refuse to answer questions or to any other suspects rights?**

If it is suspected, the company (duly represented) has the right to refuse to answer any questions.

4.3.5. **Who exerts these rights if investigation are made against the company’s directors?**

There is no specific legal provision regulating this possibility. However, it seems that those rights may still be exerted by the representatives of the company.

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

The company will be informed that it is suspected of a crime as soon as the first action by the police or other competent is undertaken to investigate the crime.

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?**

Again, there is no specific legal disposition regulating this case. However, it seems that nothing impedes directors, managers and employees to be witness in criminal proceedings against a company. However, if directors, managers and employees are formal suspects in the same case, they can’t witness against the company (and vice-versa).

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

Often, yes.

Please note that, without prejudice to the right of recourse against the legal entity, persons occupying a leadership position within the corporate entity24 (therefore, 24 The law considers that hold a leadership position any bodies or representatives of the corporate entity and whoever has authority to exercise control over its activity.}
including directors of a legal entity) are liable, on a subsidiary basis, for the payment of the criminal fines to which the legal entity is condemned, in relation to:

(i) Crimes committed in the exercise of their duties without their express opposition;
(ii) Crimes committed prior to the exercise of their duties when the assets of the legal entity have became insufficient for the respective payment as a result of their fault; or
(iii) Crimes committed prior to the exercise of their duties when the definitive decision to apply such criminal fines has been notified during the period of time of the exercise of their duties and the non-payment is caused by them.

If there are several persons held liable under the terms of the previous paragraph, their liability is joint and several.

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?

Please see 3.1.

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

N/A

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

N/A

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

N/A

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

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

N/A

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?

In principle, directors or managers will not be held criminally liable for actions of other directors, managers or employees, unless they not comply with their duty of supervision or unless something similar is prescribed as a legal description of another crime.

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

Please see 6.1. As a general rule we can say that no one can be held criminally liable for crimes that were committed by another person. However, the law establishes the liability of individuals acting in their capacity as members of a corporate body or representatives of the company on its behalf.

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?

Criminal liability is based on an act or omission that has been specifically criminalized in law. Therefore, criminal liability does normally not arise merely from the fact that another director, manager or employee was not adequately selected, instructed, supervised or the company is not adequately organized. In truth, criminal liability for the individual director, manager or employee and the manager or director require specific criminalization and corresponding fulfillment of the statutory definition of a crime.

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

In order to minimize the risks of being subjected to criminal sanctions, companies should be diligent and employ careful supervision in their operations. Any specific supervision obligations and internal guidelines should be carefully complied with. The existence of internal guidelines is a good indication of a company’s intention to follow the law and relevant regulations. It is also important that the management can demonstrate sufficient supervision of compliance with the company’s internal
guidelines. A formal mechanism of internal distribution of responsibility also helps to identify more clearly the responsibilities of certain individuals.
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.

The Romanian law in force provides that the legal persons may be charged within a criminal trial in the same manner as the natural persons. The legal nature of the commercial companies, as subjects of law, has required the enactment of special provisions as well, applicable solely to the legal persons.

These provisions regard mainly:
- the representation of the legal person within the criminal trial;
- the precautionary measures that may be taken within the criminal trial;
- the complementary measures to be taken in order to sanction the legal person.

The representation of the legal person shall be performed in two manners:
1. if solely the legal person is held liable, it shall be represented for the fulfillment of the procedural steps by its legal representatives;
2. if for the same deed or related deeds, the criminal proceedings have been initiated against the legal representative of the legal person as well, the latter shall appoint an attorney-in-fact to represent it. In the event that the legal person fails to appoint an attorney-in-fact, such appointment shall be made by the body conducting the criminal proceedings or by the court, from among the legal practitioners in the field of insolvency procedures.
Moreover, during the criminal trial, either the judge or the court may order, for grounded reasons in order to ensure the good and proper development of the criminal trial, one or more of the following interim measures:

a) The suspension of the legal person’s winding-up or liquidation procedure;
b) The suspension of the legal person’s merger, division or reduction of the share capital;
c) The prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person’s insolvency;
d) The prohibition to execute certain legal instruments, established by the legal body;
e) The prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated.

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 main sentence for an offence perpetrated by a legal person is the fine.

The fine for an offence that may be levied on the commercial companies is generally between RON 2,500 and RON 2,000,000 (approximately EURO 750 – EURO 606,000).

In addition to the fine, the court may order the application of one or more complementary sentences, of a different nature from those applicable to the natural persons.

The complementary sentences are as follows:
  a) The legal person’s winding-up;
  b) The suspension of the legal person’s activity for a period of 3 months to one year or the suspension of one of the activities performed by the legal person, in respect of which the offence was perpetrated, for a period of 3 months to 3 years;
  c) The closing down of certain working points of the legal person for a period of 3 months to 3 years;
  d) The prohibition to take part in any tender procedure for a period of 1 to 3 years;
  e) The posting or dissemination of the conviction decision.

The service of the complementary sentences shall commence to run from the date on which the conviction sentence remains final. Moreover, by undertaking certain precautionary measures, the seizure of the assets that have been used in perpetrating the offence, as well as of those resulted from the said offence, may be ordered.

The infliction of a complementary sentence is optional, unless the text incriminating the deed provides otherwise. The single reason for inflicting a criminal sentence is the perpetration of an offence.
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.

The failure to observe the regulations commonly provided in respect of certain activities performance may represent a summary offence punishable by a fine. In addition to the fine, for each case, the infliction of certain measures intended to restore the lawfulness may be provided (i.e. pulling down a building erected without a building permit, the close down of a working point which fails to comply with the sanitary regulations).

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 Romanian criminal law provides three types of sanctions that may be inflicted on a commercial company:
   a. main sentences
   b. complementary sentences;
   c. precautionary measures.

a. Main sentences:

The single main sentence which may be inflicted on the commercial companies is the fine. The criminal fine which may be inflicted on the commercial companies is between the common limits RON 2,500 and RON 2,000,000 (approximately EURO 750 - EURO 606,000).

In the cases in which, for an offence perpetrated by a natural person, the law provides a maximum sentence of 10 years’ imprisonment or a fine, the special minimum of the fine inflicted on a legal person is of RON 5,000 and the special maximum of the fine is of RON 600,000. In the cases in which, for an offence perpetrated by a natural person, the law provides the life imprisonment or the sentence of more than 10 years’ imprisonment, the special minimum of the fine for a legal person is of RON 10,000 and the special maximum of the fine is of RON 900,000.

By means of certain mitigating or aggravating circumstances in respect of the criminal liability, the special minimum or maximum may be amended by the judge, however within the limits provided by the criminal code.

b. Complementary sentences
The court may order, in addition to the main sentence consisting of a fine, the infliction of one or more complementary sentences. Their content is different from that applicable to the natural persons.

The complementary sentences are the following:
  a) The legal person’s winding-up;
  b) The suspension of the legal person’s activity for a period of 3 months to one year or the suspension of one of the activities performed by the legal person, in respect of which the offence was perpetrated, for a period of 3 months to 3 years;
  c) The closing down of certain working points of the legal person for a period of 3 months to 3 years;
  d) The prohibition to take part in any tender procedure for a period of 1 to 3 years;
  e) The posting or dissemination of the conviction decision.

The service of the complementary sentences shall commence to run from the date on which the conviction sentence remains final. Except for the winding-up, the rest of the complementary sentences may be cumulated.

c. The precautionary measures

The precautionary measures are regulated without making any distinction either in respect of the natural persons or in respect of the legal persons. The specialized literature mentions that solely the special seizure may be ordered in respect of the commercial companies. The special seizure may be enforced solely in respect of the goods that are closely related to the perpetrated offence.

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

As regards the conditions under which the main sentences may be inflicted, it shall be mentioned that the offence constitutes the single ground for which such may be ordered.

The need of inflicting certain complementary sentences is assessed by the judge in accordance with the nature and seriousness of the offence, as well as in relation to the circumstance under which it has been perpetrated. Such sentences order is compulsory, provided that the legal text incriminating an offence provides expressly the perpetrator’s punishment by inflicting a complementary sentence as well.

With a view to ordering the precautionary measure of the special seizure, the seized goods shall meet one of the following conditions:
  a) Such goods are obtained by means of the perpetration of a deed provided by the criminal law;
  b) Such goods have been used, in any manner, for the perpetration of an offence, in case they belong to the perpetrator, or, in case they belong to another person, such person was aware of the purpose for which they have been used. Such measure may not be ordered in respect of the offences perpetrated by means of the press;
c) Such goods have been produced and adjusted with a view to perpetrating an offence, if they have been used for the said perpetration and if they belong to the perpetrator. In case such goods belong to another person, the seizure is ordered provided that their production and adjustment has been performed by the owner himself/herself or by the perpetrator and with the full awareness of the owner;
d) Such goods have been offered with a view to cause the perpetration of an offence or to reward the perpetrator;
e) Such goods have been acquired by perpetrating a deed provided by the criminal law, if they are not returned to the aggrieved person and if they do not serve as a remedy for such person;
f) It is prohibited by the law to own such goods.

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.**

No. The Romanian criminal code, by its provisions in force, establishes the system of general liability. This system assumes that a legal person may perpetrate, in principle, any offence, by means of any of its employees, irrespective of his/her position held in the company.

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

The charge of a legal person with an offence is a matter to be decided upon by the case law. The novelty of the regulation (12 July 2006) in respect of the criminal liability of a legal person provided by the Romanian legislation (in force as of October 2006) did not allow it.

Further to the interpretation of art. 19 of the Criminal Code, the specialized literature mentions three criteria pursuant to which a legal person may be charged with an offence, namely:

- a. the perpetration of the offence when performing the object of activity;
- b. the perpetration of the offence to the benefit of the legal person;
- c. the perpetration of the offence on behalf of the legal person.

a. The perpetration of the offence when performing the object of activity.

It is mentioned that the text is interpreted in the sense that the offence is closely connected to the performance of the object of activity. Such offences are related to the general policy of the company or to the activities it performs (offences related to the work safety, competition, environment protection).

b. The perpetration of the offence to the benefit of the legal person.
This case refers to those offences that fall outside the activities related to the performance of the object of activity, but considered to result in a benefit for the legal person. The benefit may take the form of a profit or of the avoidance of a loss.

c. The perpetration of the offence on behalf of the legal person

The offences perpetrated on behalf of the legal person are those offences perpetrated within the process of organizing the activity and operation of the legal person without directly connected to its object of activity.

Any breach of the internal norms of conduct by the employees, if does not constitute objectively an offence for them, fails to constitute an offence for the employing company as well. If the breach of the internal norms of conduct is the result of the perpetration of offences, the company is liable under the criminal law in case such deed is subjectively imputable to it.

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

The criminal liability of a legal person represents a direct liability; therefore a form of infringement from the part of the company shall be ascertained. The final part of art. 19 of the Criminal Code provides that a legal person may be held liable under the criminal law "where the deed has been perpetrated by means of the infringement provided by the criminal law".

The specialized literature states that firstly, the subjective position of the company officers is considered. Therefore, the offence may be the consequence of either a decision made deliberately by the legal person or of the negligence from its part, negligence which may consist of a faulty organization, insufficient safety measures of unreasonable budgetary restrictions that provided the circumstances for the perpetration of the offence. In respect of the offences perpetrated by an agent or by an attorney in fact, it is required that the company had been aware of his/her intention to perpetrate such offences or had encouraged such actions.

The formal opposition of the company officers in respect of an unlawful practice does not exonerate the legal person from the criminal liability.

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.

There is no classification established according to the offence type, the Romanian law relying on the system of the general liability.

Any deed representing an infringement constitutes an offence solely on the condition that the law provides it expressly. Any deed representing an absence of action
constitutes an offence if perpetrated either deliberately, or as a result of a breach, except for the case in which the law sanctions such deed solely if perpetrated deliberately.

Therefore, a company may be held liable under the criminal law for a variety of criminal deeds, without the need to evidence the fact that it acted in bad faith.

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

In order to hold a company liable under the criminal law it is not required to determine and sentence the perpetrator of the criminal deed.

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

Unfortunately, due to the fact that the regulation of the criminal liability of the commercial companies is new, there is no legal practice which shall reveal the possibilities of defending the companies, except for the absence of the offence.

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?

As shown at 2.5. above, charging a legal person with an offence is based on the assumption of absence of certain measures, mainly related to organization that may have prevented the perpetration of the offence by a perpetrator who is a natural person. Therefore, in case there is a thorough and real organization and any deviation from the internal code of conduct is sanctioned, the company may not be charged with the criminal deed.

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

During the criminal proceedings instituted against the legal person, a number of interim or precautionary measures may be undertaken:
The interim measures are ordered for ensuring a proper course of the criminal proceedings.

They consist of:
  a) The suspension of the legal person’s winding-up or liquidation procedure;
  b) The suspension of the legal person’s merger, division or reduction of the share capital;
  c) The prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person’s insolvency;
d) The prohibition to execute certain legal instruments, established by the legal body;

e) The prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated.

The precautionary measures may be undertaken with a view to ensuring the special seizure, the remedy of the damage caused by the offence, as well for securing the service of the sentence represented by a fine.

The precautionary measures are undertaken during the criminal proceedings by the prosecutor or by the court and consist of a distress levied on the movable and immovable assets.

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

Positive, having in view that art. 191 paragraphs 2 of the Criminal Code provide that „the criminal liability of the legal person does not exonerate the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence.”

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

In principle, pursuant to the Romanian law, the criminal liability is personal.

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.

Subsequent to the criminal trial, solely the abovementioned criminal sanctions may be ordered against the company. Moreover, upon the request of the party aggrieved by the perpetration of the offence, the perpetrator may be compelled to remedy the damage caused, as per the civil law – Civil Code.

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

N/A

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

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

N/A

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?

The prosecutor may decide whether the criminal proceedings shall commence and also whether the case should be referred to court for settlement. The instruments ordering in such respect may be challenged by any interested person to the hierarchically superior Prosecutor, and in the event the measured ordered by the latter is unsatisfactory, they may be challenged in court.

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

The first stage of the criminal trial is to institute criminal proceedings commencing on the date on which the criminal investigation authority ascertains that a deed provided by the criminal law has been perpetrated.

Prior to instituting the criminal proceedings, certain preliminary actions shall be undertaken in order to establish the fact that the criminal proceedings may be commenced.

During the preliminary actions, if they are undertaken both in rem and in personam, the perpetrator qualifies as perpetrator. The perpetrator is not a party in the criminal trial, by hypothesis the preliminary actions are undertaken outside the trial, therefore having neither rights nor criminal rights nor criminal obligations.

The criminal proceedings may be ordered even though the perpetrator has not been identified. Once the perpetrator has been identified, he/she becomes the defendant, being part in the criminal trial, having procedural rights and obligations.

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?

Any defendant is entitled not to make any statement and the criminal investigation bodies shall inform him/her of such right, as well as of the fact that any statement may be used against him/her.
The regulation of the criminal liability of the legal person has been made by the amendment of the criminal code. Therefore, the legal text regulating the search proceeding still refers solely to the residence and not to the registered office of the legal person. Although there is no legal practice in this matter due to the fact the new regulations entered into force as of October 2006, in order to observe the equality before the law, such provisions shall enforced in relation to the commercial companies as well. This would mean that in case of refusal to willingly deliver the objects and documents (irrespective of their form) required by the criminal investigation bodies or be the court, a search may be ordered, which is always grounded on a warrant issued by the judge.

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

The criminal procedure code compels the criminal investigation body to inform the defendant of such quality on the occasion of the first hearing. The advisability of the defendant’s hearing is assessed by the criminal investigation body on actual facts, separately for each case. Obviously, the criminal action may not be developed and the defendant may not be referred to court without any hearing, but the moment on which the defendant shall be informed is not established accurately by the law.

However, there is a legal obligation of the criminal investigation body of informing the authority which authorized the incorporation of the legal person and the authority which registered the legal person so that the necessary notes may be made in the public registers operated by such authorities.

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?

There are no legal provisions regulating such aspect. It may be interpreted that any person may serve as witness within the criminal trial.

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

In principle, the offences are judged separately, but having in view the connection between them, the simultaneous judgment may be chosen by the prosecutor, by the court or by the defendants.

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

The Criminal Procedure Code provides in Chapter I – The procedure for holding responsible the legal persons, art. 4791 – art. 47915 - the procedural differences related to the criminal judgment of a company.
Such special provisions regard mainly:

- the representation of the legal person within the criminal trial;
- the precautionary measures that may be taken within the criminal trial;
- the complementary sentences to be taken in order to sanction the legal person;

and have been provided at point 1.1.

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?**

Both the precautionary and the interim measures are undertaken by the judge (solely in case of the precautionary measures) or by the court/judge during the criminal trial. Irrespective of the body undertaking such measures, they may be challenged before the court. Therefore, the measures ordered by the criminal investigation bodies may be censored by the court.

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

The answer is comprised in the statements provided at point 4.2

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

As regards the precautionary measures, the defendant shall not be informed of such measures prior to their ordering, however the defendant may challenge them for the whole period of the criminal trial, irrespective of the state of the trial. The precautionary measures are ordered exclusively by the judge by summoning the parties, which requires a period of minimum 3 days in order the grant the defendant the possibility of preparing the defense.

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

The company is entitled to challenge the measure after it has been ordered.

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

The interim measures that may be taken against the two categories of defendants are different and, therefore, although there is no express regulation in this respect, the requests regarding such measures shall be judged differently.
5.6. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

Given the completely different nature of the precautionary measures that may be taken against a natural person (detainment, interim detainment, the obligation not to leave the locality/country) and those that may be ordered in respect of the legal persons, as well as the fact that for each precautionary measure which may be ordered against a natural person, a separate procedure is provided, the procedures are different and cannot be compared.

There is solely one procedure regarding the precautionary measures.

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?

N/A

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

No. As mentioned above, the principle of personal liability is consistently applied in the Romanian criminal legislation, so no other person may be held liable under the criminal law instead or jointly with the perpetrator.

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?

N/A

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

N/A
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.

Yes. The general rule is that only a natural person can perform an act, but in certain circumstances a juristic person can be liable for a crime. Section 332 of the Criminal Procedure Act 51 of 1977 ("Criminal Procedure Act") provides for the prosecution of corporations and members of associations.

Main differences between the prosecution of individuals and companies:

- Summons served on the representative of the company as opposed to a warrant of arrest on an individual.
- Certain crimes cannot be committed by a company e.g. if the statutory prohibition is directed against an individual.
- A director or servant of the company in his/her representative capacity is cited as the offender and has to stand trial.
- A director or servant can only plead guilty on behalf of a company if the company authorizes him/her to do so (with the exception of minor offences where the payment of a fine is an admission of guilt).
- The courts may only impose a fine on a company, even if the statute which created the crime does not make provision for a fine.
1.2. Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.

Yes, fines can be imposed on companies or the assets of the company may be forfeited. Even if a statute does not make provision for a fine, the courts may only impose a fine when prosecuting a company and here they would have discretion of what fine to impose. Asset forfeiture is usually used where the company has benefited financially or acquired property as a result of their unlawful activity. Items used in the furtherance of unlawful activities can also be confiscated, for example a credit card cloning machine.

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.

Yes. Companies can in certain circumstances also be liable for civil penalties over and above criminal penalties. An employer can be vicariously liable for a civil wrong committed by a servant during the course and scope of his/her employment. A company’s property can be attached and sold or a company can also be liquidated if it cannot pay an imposed fine. Additionally, s424 of the Companies Act 61 of 1973 provides that if the business of the company was being carried out recklessly or fraudulently the individuals involved may be personally liable for the debts and liabilities of the company.

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.

Fines and asset forfeiture.

It is not possible to say exactly what the minimum or maximum sanction is for some offences as the courts have discretion, for example, in instances where no specific provision is made for a fine as a form of punishment. For certain statutory offences a minimum fine must be imposed and there the courts have no discretion. Maximum fines can be stipulated, for example, in terms s68(1) of the Financial Intelligence Centre Act 38 of 2001, a person convicted of certain offences specified in the act is liable for a fine not exceeding ZAR10, 000 000. The courts do have discretion not to impose the maximum fine though.

In CIR v Emary NO 1961 (2) SA 621 it was determined that the statutory concept of a “person” includes juristic persons i.e. companies. Accordingly, where legislation refers
to a person, but the term is not defined or is not implied in the act, the presumption is that it includes a juristic person.

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

Whatever the statute prescribes or whatever the common law requirements are. For example the elements of fraud are unlawfulness, intentional misrepresentation and actual or potential prejudice to another and where it involves amounts of ZAR500 000 or more the minimum sentence for a first offender is 15 years imprisonment. As discussed above, this will translate into a fine for a company.

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.**

In theory a company can be prosecuted for any common law offences e.g. murder, culpable homicide, fraud etc. However, there are certain statutory crimes that are directed only towards individuals and a company cannot be liable for these offences. For the purposes of imposing criminal liability upon a company there is no requirement that the employee be of a specific seniority. The Criminal Procedure Act refers to any “*director or servant of that corporate body.*”

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

Section 332(1) of the Criminal Procedure Act makes provision for acts or omissions instructed by a director or servant of that corporate body during the performance of their duties to further the interests of the corporate body. The act or omission is deemed to be performed by the corporate body and no intent is required. How companies deal with the violation of internal regulations will depend on internal policies and procedures.

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

Where mens rea is a requirement for an offence the criminal intent of the director or servant is attributed to the company.

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, S 332(1) is broad enough to include crimes based on strict liability. Although fault is a requirement for the majority of crimes in South Africa, there are certain statutory offences which are an exception to the rule, where fault is not a requirement.
The majority of common law crimes (fraud, culpable homicide etc) and statutory crimes require mens rea.

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

No. The prosecutor can decide whether to prosecute only the director / servant of a company or only the company or both. Corporate liability often arises because it is very difficult to attribute the crime to a specific individual within the company. A representative of the company does have to stand trial though, where the prosecutor decides to prosecute the company.

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

Possible criminal defenses include necessity, consent, private defense and entrapment.

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?**

To some extent companies can reduce the risk of being criminally liable especially where mens rea is an element of the crime. By creating an environment where the internal policies and procedures of a company are clearly defined, so that representatives of the company have a clear idea of what powers they have and what acts they can perform on behalf of the company. If an individual then acts beyond the scope of his employment it is more likely that he/she will be personally liable, as the act is then not within the course and scope of his/her employment. However, a company can commit a crime without even knowing that they have committed a crime (usually statutory offences) and in these instances there is little a company can do, other than ensure that all representatives are aware of all current legislation that may apply to the company. In the case of *Simon N.O. and others v Mutsui and Co Ltd and others 1997 (2) SA 475 (W)* Judge Wunsh says, “it is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to a company.”

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

Assets can only be seized once a court order has been obtained. The seizure is done by the Asset Forfeiture Unit which is a division of the National Prosecuting Authority.
2.11. Can both the individual offender and the company been convicted for the same offence?

Yes, the individual and the company can be convicted for the same offence and both be punished separately.

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

Possibly, where the parent/group company is aware of an offence in the subsidiary company and has a statutory duty to report such an offence, failing which they are also criminally liable.

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.

A company can also be punished with civil penalties or interdicted from acting wrongfully. Sometimes a crime and a delict will overlap although a specific act is not necessarily both a delict and a crime.

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

Civil penalties are usually payable where private interests are protected as opposed to public interests. Civil penalties are more compensatory in nature as where criminal sanctions are more penal in nature.

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

Possible civil defenses include private defense, necessity, consent and statutory authority.

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

Yes. A company can be found civilly liable while a criminal investigation is ongoing. The two matters are dealt with independently.
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 has discretion and can decide whether to prosecute either the individual or the company or both. Furthermore section 6 of the Criminal Procedure Act provides the prosecuting authority with the power to withdraw a charge or to stop prosecution at any stage in proceedings, in regard to any offence. The prosecuting authority will consider the charges and available evidence when deciding whether to prosecute a company or not.

Section 7 of the Criminal Procedure Act provides that in instances where the prosecuting authority withdraws or declines to prosecute for an alleged offence, a private person can pursue private prosecution under certain circumstances where he has suffered harm as a result of the alleged conduct of the accused.

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

Usually once an investigation into the actions of the company is initiated.

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?

Section 332(2) of the Criminal Procedure Act provides that in the prosecution of a corporate body, a director or servant of that corporate body shall be cited as the representative of the corporate body. The representative steps into the shoes of the accused company and in these instances the representative has the same rights in respect of the company as any other accused person would have. Section 332(3) of the Criminal Procedure Act provides that in criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within his scope of activities and which was in his control or custody in his role as a director, agent or servant of the company shall be admissible as evidence against the accused. The representative of the company will exercise the rights of the company in respect of the investigations conducted.

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

When criminal charges against a company are pressed, a summons is served on the corporate body by serving it on a director or servant of the company, notifying the company of the impending proceedings.
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 in both instances.

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

The director will either be jointly liable with the corporate body or apart from the corporate body and shall be personally liable. Section 332(6) of the Criminal Procedure Act further provides that any evidence that is admissible against the company will be admissible against the individual directors or servants of the company.

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

Only slight differences, for example a director or servant cannot plead guilty on behalf of a company without the authority to do so and the director or servant cannot be arrested or jailed on behalf of the company.

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?

No, the court decides what the appropriate sanction is once the offender is found guilty of a crime, although s6 of the Criminal Procedure Act provides the prosecutor with the authority to withdraw a charge or stop a prosecution at any stage of the proceedings.

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

See 4.2 above.

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

See 4.4 above.
5.4. **Which procedural rights does a company have when it is at risk that sanctions might be imposed?**

Like an individual a company can also raise any relevant mitigating factors in relation to sentencing to the court, even though the court’s sentencing options are limited with companies.

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

See 4.6 above.

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

See 4.7 above.

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?**

In terms of section 332(5) of the Criminal Procedure Act, any directors or servants of the company will be liable to prosecution for any offences committed by the company while such persons were in fact servants or directors of the company, unless it is proved that such person did not take part in the offence and could not have prevented the offence. However, in the constitutional court case of *S v Coetzee 1997 (1) SACR 379 (CC)* this section was found to be unconstitutional as it effectively breaches the presumption of innocence. Therefore the director or servant must have been aware of the criminal conduct before they can be liable for prosecution.

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

For criminal liability the director or servant must have been aware of (or took part in) the criminal conduct and if he/she was aware then he/she must have been able to prevent the offence from occurring.

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?**

No, according to section 332(1) of the Criminal Procedure Act a company can be liable for any offence, whether under common law or in terms of a statutory provision. The section provides that any act or omission performed, with or without intent, by or on instructions or with permission, express or implied, given by a director or servant of
that company is punishable if it amounts to a common law or a statutory crime. A company can therefore be liable on a number of grounds.

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

Recommendations:

- Where important decisions need to be made on behalf of the company which may expose the company, a resolution should be taken by the directors.
- Ongoing training regarding changes in legislation which affect companies, directors etc. is very important.
- Clear policies and procedures should be in place and conveyed to all employees of a company.
- A company should have a zero tolerance approach to any form of unlawfulness.
- A company should proactively take steps to ensure that its representatives act appropriately when furthering the interests of the company.
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.

For the moment\(^\text{25}\), no.

The general rule is that when a criminal offence is committed through a company, criminal liability is attributed to its managers, not to the legal person itself. However, since 1 October 2004, legal persons may be held jointly and severally liable for payment of the fines imposed on their managers as a consequence of a criminal offence. A different thing is that in criminal proceedings, legal persons can be held vicariously liable under civil law for damages caused by the criminal behaviour. As a general rule, in Spain civil liability arising from a criminal offence is to be assessed in the same criminal proceedings.

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

Yes, the Spanish Criminal Code establishes certain measures to prevent the commission of offences through legal persons, which are particularly designed to fight against national or international criminal organisations. The Spanish Criminal Code calls these measures “ancillary consequences” ("consecuencias accesorias"). Article 129 of the Spanish Criminal Code establishes

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\(^{25}\) See Note at the end of the questionnaire.
five ancillary consequences that may be adopted by Spanish criminal courts against legal persons:

a) Temporary or permanent shutdown of the legal person’s premises or establishments. Temporary shutdowns may last no longer than five years.

b) Winding-up of the legal person.

c) Suspension of the business of the legal person for a term not exceeding five years.

d) Prohibition to conduct future business, commercial operations or dealings related to the offence committed, aided or concealed. This prohibition may be temporary or permanent. If temporary, the term of prohibition must not exceed five years.

e) Placement of the legal person under judicial administration in order to safeguard the rights of employees or creditors for however long is necessary. It must not exceed a maximum of five years.

These measures are similar to the penalties for corporate persons proposed by the European Union in several Council Framework Decisions of recent years. These five ancillary consequences can only be adopted in proceedings open for certain criminal offences which specifically foresee their adoption. For instance, all or some of these five measures may be adopted with regard to the following offences: intellectual property crimes and crimes against the market and against consumers; money laundering and related activities; environmental crimes; criminal offences against worker’s rights and against the rights of non-Spanish citizens; money forgery; corruption in international business transactions; crimes against public health and drug-related offences; unlawful association; genetic engineering; unlawful adoptions or child theft; price-fixing and bid-rigging in public auctions and child/forced prostitution, among others.

In addition to the above, article 127 of the Spanish Criminal Code provides another ancillary consequence that consists in the seizure of the assets obtained by means of any criminal offence committed with mens rea (not negligence), as well as the seizure of the subsequent earnings and of the instruments used to commit the offence (weapons, vehicles, etc.). If the seizure of these assets is not possible, the court may order the seizure of other assets of the offender, equivalent in value. Provision is also made for the court to order the confiscation of assets even where there is no criminal liability or it has lapsed when there is evidence of the unlawful ownership of assets.

Furthermore, for some particular offences, the Spanish Criminal Code allows the judge to adopt other measures against legal persons, such as a fine or the loss of the right to obtain public subsidies or tax benefits. These other measures must be considered penalties de facto, since they are not foreseen in the general part of the Criminal Code as ancillary consequences.

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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.

Certainly, there are administrative penalties foreseen by law which can be imposed on a legal person and which is related to offences committed by its directors, managers or employees. Nevertheless, as the criminal and administrative proceedings are separate, the courts of the two jurisdictions will have to adjust their judgments to avoid breaching the principle “non bis in idem” (not twice for the same).

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.

N/A

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

N/A

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.

N/A

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

N/A

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

N/A

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.

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

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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

N/A

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.

See answer to 1.2 above.

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

See answer to 1.2 above.
3.3. What defenses can a company raise against these offences?

As any other party to the proceedings, a legal person can exercise the appeals foreseen in the law.

For instance, if ancillary measures are adopted in the judgment, the general rule is that judgments in first instance can be appealed before a higher court. If ancillary measures are adopted by means of a resolution issued during a previous stage in the proceeding, these resolutions can usually be appealed before the same court (“reconsideration appeal”) or before a higher Court or both subsequently.

Please see also answer to 5.2 below.

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

Only certain measures - the temporary closure of the legal person’s premises and the suspension of certain activities of the legal person - can be adopted by a criminal investigation court as interim or precautionary measures established in the Criminal Code itself, during the investigation stage of the proceedings (art. 129.2 of the Spanish Criminal Code).

However, as the Spanish Criminal Procedure Law does not specify the interim measures that may be adopted by criminal investigation courts, the Civil Procedural law is applied on a subsidiary basis. This means in practice that during the investigation stage criminal investigation courts may adopt any measures which are reasonable and proportionate against legal persons on the basis of the situation and the risks involved (e.g., attachments, judicial deposits and judicial administration, among others).

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?

N/A

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

N/A
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?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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?

With regard to fines, the prosecution (either public or private) may request the court to impose them, but the final decision of imposing the fine and the determination of its amount will have to be decided by the Court. In the imposition of the fine, the Court must follow the rules set in article 50 of the Spanish Criminal Code, establishing the daily quota system applicable in Spain in which the “length” of the fine (number of days) depends on the seriousness of the criminal behavior and the daily quota depends on the economic situation of the convict.

As to the ancillary consequences, the prosecution may also request the court to impose an ancillary consequence on a company.
The court, after hearing the representatives of the legal persons and the Public Prosecutor\textsuperscript{27}, will decide whether or not to impose any ancillary consequence. The decision must be grounded and should take into account, in addition to the legal requirements established for each particular criminal offence, the general purpose of ancillary consequences, expressly stated in paragraph 3 of article 129 of the Spanish Criminal Code: “the purpose of the ancillary consequences provided in this article is to prevent the prolongation of a criminal activity and the consequences thereof”.

With regard to the seizure of assets established in article 127 of the Spanish Criminal Code, in principle it is an automatic decision, unless the assets have been acquired in good faith by a third party, in which case the seizure of other assets of equivalent value will be ordered. However, article 128 of the Spanish Criminal Code allows the judge to moderate the decision of seizure of assets taking into account the nature of the offence, its seriousness and the value of the assets.

Finally, concerning any other measure that a Criminal court may adopt against a legal person during the investigation stage, such as interim relief, the governing general principles in civil law are applicable: basically, the existence of a danger in the delay (“\textit{periculum in mora}”) and a prima facie case (“\textit{fumus boni iuris}”).

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

For years, the procedural status of companies in criminal proceedings was only that of vicariously liable under civil law.

The suspects must be given the opportunity to defend themselves during the investigation stage; at least, they must be summoned once by the investigating court to be questioned about the facts. Similarly to suspects, legal persons could voluntarily become a party to the proceedings during the investigation stage, but unlike suspects, only when the investigation stage is over are criminal courts legally compelled to summon them and give them the opportunity to file a defence brief (articles 623 and 784 of the Spanish Criminal Procedure Law, for ordinary and abbreviated proceedings, respectively).

After the amendment of the Spanish Criminal Code by Organic Law 15/2003 which introduced the joint and several liability of legal persons for payment of the fines imposed on their managers for the commission of a criminal offence (in force since 1 October 2004), the Chief Public Prosecutor of Spain highlighted\textsuperscript{28} the need to protect the legal person’s rights in the same way as the rights of individual suspects are protected.

\textsuperscript{27} The obligation to hear the Public Prosecutor is in force since 1 October 2004, pursuant to an amendment of article 129 of the Spanish Criminal Code by Fundamental Law 15/2003 (before, only the representatives of the legal person were heard by the Criminal court).

protected in criminal proceedings. However, to date, there is no significant case law of the Supreme Court on this matter.

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

As mentioned above, before adopting the ancillary consequences set in article 129 of the Spanish criminal Code, the court must hear the representatives of the legal person and the Public Prosecutor.

Please see also answer to question 5.2 above.

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

See answer to question 5.6 below.

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

Yes, there will be one criminal proceeding only.

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

This matter is developing in Spain, and some questions remain unanswered. As anticipated above, after the introduction of the rule establishing joint and several liability of legal persons for payment of the fines imposed on their managers (article 31.2 of the Criminal Code, in force since 1 October 2004), the Chief Public Prosecutor of Spain has stated the need of protecting legal person’s rights in the same way as the rights of individual suspects. However, in practice, there is not much experience in this field and it is difficult to see how certain essential rights of individual suspects can be exercised by legal persons.

The first and perhaps most important right of an individual suspect that springs to mind is the right not to declare against oneself. How can a legal person exercise this right? Will its representatives or employees be allowed to refuse to answer any questions that may relate to the legal person’s liability? Will the legal person be allowed to refuse to provide incriminating documents to the court? It seems unlikely.

These issues would need to be clarified urgently in Spain if there is a real intention to protect legal person’s rights in the same way as the rights of individual suspects.
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?

The basic rule of attribution of liability when an offence has been committed through a legal person (set out in article 31.1 of the Spanish Criminal Code) sheds no light on the matter. As a general principle, attribution of criminal liability to individuals is never automatic. In accordance with the so-called culpability principle, objective liability is forbidden in Spanish criminal law. Therefore evidence of criminal intent (or gross negligence, in a number of cases in the Spanish Criminal Code) is always required in order to hold somebody liable for a criminal act.

There is no particular rule that establishes who should be considered liable within a company. The individual responsible may be an officer of the legal person, a manager of a particular business area, or any other individual who can actually make decisions on behalf of the company and who participated - through act or omission - in the unlawful act committed through the legal person. In other words, the individual with the “de facto” authority to take and control decisions.

Only in connection with criminal offences against employee’s rights, there is a specific provision (article 318 of the Spanish Criminal Code) of attribution of criminal liability to the company’s directors or supervisors (health and safety officer, architect responsible for the works where an accident has occurred, etc.) and to whoever was aware of the infringements and in a position to avoid them and did not adopt any measures to do so.

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

See reply to question 6.1 above.

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?

See reply to question 6.1 above.

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

Comply with the law, encourage their subordinates to comply with the law and establish compliance control systems. If breaches of the law have already taken place, avoid participating in the unlawful concealing schemes that others may have put into practice.
Note:

On 15 January 2007 the Official Gazette of the Spanish Congress published the Spanish Government draft to amend the Spanish Criminal Code. One of the main aspects of this draft is a complete reform of the status of legal persons in criminal law.

The draft intends to introduce a new article (no. 31 “bis”) in the Spanish Criminal Code, implementing a system of specific incrimination for legal persons. The system is cumulative: both natural and legal persons can be simultaneously held criminally liable, but only regarding the offences that specifically establish this possibility. For instance, intellectual property crimes, crimes against consumers and the market, impeding audits by governmental bodies, tax fraud, social security fraud, crimes against the employees’ rights, crimes related to urban development, crimes against the environment, crimes against public health, and others.

At the same time, the draft intends to suppress the second paragraph of article 31 of the Spanish Criminal Code, which establishes direct liability of legal persons for payment of the fines imposed on their managers.

The draft to amend the Criminal Code establishes a new catalogue of penalties specifically designed for legal persons: fines, winding-up, suspension of activities, closure of premises, prohibition to develop certain activities, loss of the right to obtain public subsidies or tax benefits, and judicial administration. The list is similar to the ancillary consequences already existing in Spanish law.

According to the draft, when should criminal liability be attributed to a legal person? The draft adopts a similar wording to international texts such as the Council Framework Decision 2003/568/JHA of 22 July 2003, on combating corruption in the private sector or the Convention on Cybercrime of the Council of Europe (Budapest, 23 November 2001).

[The legal persons will be held criminally liable for] the criminal offences committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

a) a power of representation of the legal person;

b) an authority to take decisions on behalf of the legal person;

c) an authority to exercise control within the legal person.

In addition, the legal person can be held liable where the lack of supervision or control by a natural person referred to above has made possible the commission of a criminal offence for the benefit of that legal person by a natural person acting under its authority.

Clearly, the most problematic issue arising from the attribution of criminal liability to legal persons is how to determine when a legal person has acted recklessly or with mens rea. The draft to amend the Criminal Code seems to imply that the mens rea or recklessness of the managers is transferable to the mens rea or recklessness of the legal person.
The draft also establishes a set of specific extenuating circumstances for legal persons: spontaneous repentance, collaboration in the investigation of the offence, partial or total reparation of the damage caused, and the implementation of internal rules to prevent and identify future criminal behavior within the structure of the legal person.

From a procedural perspective, as anticipated in previous paragraphs, the attribution of criminal liability to legal persons will raise significant theoretical and practical problems. It is difficult to see, for instance, how the authorities can request and obtain incriminating documentation from a corporation respecting the procedural rights of the corporation, particularly the right not to plead guilty and not to declare against oneself.

To our knowledge, it appears that this initiative will not be enacted in the current legislative term.
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.

A. Yes.

B. Before October 1, 2003 the prevailing opinion in Switzerland was that only natural persons could be held criminally liable whereas enterprises cannot be accused of guilty conduct and therefore are excluded from criminal liability. As an exception to this, there existed a possibility to hold a company liable for a fine under the administrative criminal law since quite a long time: If a maximum fine of CHF 5'000.00 is considered, an administrative authority can demand the fine from the company, in which the offense has been committed, according to Article 7 of the Criminal Law of Administrative Proceedings.29

In 2003, special provisions were added to the Swiss Penal Code and now enterprises can be held criminally liable and are subject to punishment and fines. These provisions are of significant practical relevance and every enterprise doing business in Switzerland needs to be aware of them. In particular, Article 102 of the Swiss Penal Code30 (hereafter called the "SCC") defines the material

29 Bundesgesetz über das Verwaltungsstrafrecht (VStrR), SR 313.0.
30 Schweizerisches Strafgesetzbuch (StGB), SR 311.0. The full text of the Swiss Penal Code is available on "http://www.admin.ch/ch/d/sr/c311_0.html" in German, French and Italian. An excerpt in English, i.e. a translation of 65 selected articles that are significant in business is available from the Swiss-American Chamber of Commerce, Talacker 41, CH-8001 Zurich.
preconditions for punishment and Article 102a SCC provides special procedural rules for the trial of a business enterprise.

Unlike individual liability, the SCC limits corporate criminal liability by establishing a subsidiary liability: An enterprise can be held liable only if an offense is committed within the enterprise and in furtherance of business activity and if this offense cannot be attributed to a specific individual due to lack of organization (see Article 102 para. 1 SCC).

In addition to this subsidiary liability of the enterprise, the Swiss Penal Code also imposes primary criminal liability with respect to a limited number of significant offenses which are highly relevant in practice: Criminal Organization (Article 260ter), Finance of Terrorism (Article 260quinquies), Money Laundering (Article 305bis), Bribery of Swiss Public Officials (Article 322ter), Granting an Advantage (Article 322quinquies), Bribery of Foreign Public Officials (Article 322septies)\(^{31}\) or Bribery in the Private Sector (Article 4a para. 1 lit. a of the Swiss Unfair Competition Act\(^{32}\); see answer to number 1.3).

If any of these offenses are committed within an enterprise, even without the knowledge of the management, the enterprise will be held liable, provided that it has not taken all necessary and reasonable organizational prevention measures. If so, an enterprise can be held criminally liable regardless of the criminal nature of a specific individual. If a specific individual can be identified as the offender, a cumulative criminal liability of the enterprise can result: Both, the offender and the enterprise can be held liable.

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

**A. Yes.**

**B.** Under Swiss federal criminal law the only punishment that can be imposed on enterprises is a fine (see number 2.1 below) because even though the Swiss Penal Code contains an array of therapeutic\(^{33}\) and other measures (e.g. peace bond, prohibition of practicing a profession, ban on driving, publication of judgment, confiscation)\(^{34}\), therapeutic measures only apply to natural persons and cannot be imposed on enterprises.

Whether the investigating judge may order non-therapeutic measures as listed above has not been explicitly addressed yet. The prevailing opinion assumes that confiscation of the tortuous financial benefit\(^{35}\) (*Einziehung*) is the only measure

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\(^{31}\) Article 102 para. 2 of the Swiss Penal Code.

\(^{32}\) Bundesgesetz gegen den unlauteren Wettbewerb (UWG), SR 241.

\(^{33}\) Articles 56 – 65 of the Swiss Penal Code.

\(^{34}\) Articles 66 – 73 of the Swiss Penal Code.

\(^{35}\) Articles 69 ff. of the Swiss Penal Code.
that can be imposed on enterprises under Swiss criminal law. The judge can order the confiscation of assets that have either been acquired through the commission of a crime or that are intended to be used in the commission of a crime or as payment for the commission of a crime. The assets may not, however, be awarded to the person harmed for the purpose of restoring him to his prior legal position. Further, confiscation is not permitted if a third party has acquired the assets in good faith and has paid consideration (of fair market value) or if that confiscation would cause him to endure disproportionate hardship.

The criminal laws of each canton can provide for further types of sanctions.

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.

A. Yes.

B. There are numerous civil laws that contain sanctions if an offence is committed by the directors, managers or employees of an enterprise for things such as the breach of contractual obligations and unlawful acts under Article 41 of the Swiss Code of Obligations as well as other laws such as the Swiss Road Traffic Act, Swiss Products Liability Act.

Of significant financial relevance and therefore special importance for an enterprise are the potential administrative sanctions provided for in the **Swiss Antitrust Law**. Under this law coordinated behavior causing a restraint on competition or abuse of a dominant market position may be fined up to 10% of the turnover realized in Switzerland over the last three financial years.

Also, under the **Swiss tax law**, legal entities can be held criminally liable for tax delinquencies (tax fraud, attempted tax fraud, violation of procedural duties). The enterprise can be fined up to CHF 10'000 for a violation of procedural duties and triple the amount of the evaded tax in case of tax fraud. Attempted tax fraud can be fined up to two-thirds of the fine in cases of tax fraud.

Except for situations where strict liability and absolute liability are imposed—e.g. as they arise in the Swiss Road Traffic Act and the Products Liability Act—, in most cases the enterprise will be held liable for its own negligence and it will be held liable for the negligence of its directors, managers or employees if such conduct occurs as a part of their duties.

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36 Article 70 of the Swiss Penal Code.
37 Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht, OR), SR 220.
38 Article 49a of the Swiss Anti-Trust Code (Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen, SR 251).
39 Articles 174 - 176 of the Swiss Federal Act on Direct Federal Tax (Bundesgesetz über die direkte Bundessteuer; SR 642.11).
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.

Under Swiss criminal law, an enterprise can only be fined. The law does not allow the judge to prohibit a certain degree of activity of the enterprise or to order the closure of a firm under the Swiss criminal law. The Swiss Penal Code provides for a fine up to 5 million Swiss Francs for enterprises.\(^\text{40}\)

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

Art. 102 para. 1 SCC sets out the principles governing secondary criminal liability of an enterprise. It reads as follows:

\(^1\) A crime or offense shall be attributed to the enterprise if committed while it exercises a business activity within the scope if the enterprise and if, due to the deficient organization of the enterprise, such act cannot be attributed to a natural person. In such case, the enterprise shall be punished with a fine up to 5 million francs.

The following requirements must be met:

1. The "Enterprise" is a legal entity as defined in the Swiss Penal Code

Enterprises are subject to the Swiss Penal Code. Article 102 para. 4 SCC contains an exhaustive list of all of the included legal entities\(^\text{41}\), among them mainly the following:

a) legal entities created under private law (stock company, Aktiengesellschaft, AG; partnership limited by shares, Kommandit-Aktiengesellschaft; limited liability company, GmbH; association, Genossenschaft; foundation, Stiftung; society, Verein)

b) legal entities created under public law (e.g. Swiss Federal Railways, SBB; cantonal hospitals) with the exception of local authorities (Federation, Canton, Municipality)

c) partnerships (private limited partnership, Kommanditgesellschaft; general partnership, Kollektivgesellschaft; simple partnership, einfache Gesellschaft).

\(^{40}\) Article 102 para. 1 of the Swiss Penal Code.

\(^{41}\) Article 102 para. 4 of the Swiss Penal Code.
The scope of application of the provision is intended to be broad so consequently the law can also apply to foreign legal entities doing business in Switzerland.

The Swiss Penal Code does not impose on enterprises general criminal liability regarding all offences currently existing under Swiss criminal law. The criminal liability of enterprises is limited to offenses that are committed in the course of business activity. Therefore, business activity subject to the Swiss Penal Code involves the exchange of goods or services. Whether the enterprise actually serves a commercial purpose or not is not relevant. Thus, even non-profit-organizations can fall into the scope of application of the provision, assuming that they act at least to some extent as a commercial enterprise.

2. **Limitation to Crimes or Misdemeanors Committed "within an Enterprise and in Furtherance of Business Activity"**

   Corporate criminal liability is limited to offences that are committed in the exercise of a business activity within the scope of the enterprise. Hence, the enterprise can be liable for an employee's crime if committed within the scope of their employment, even if it is committed contrary to corporate orders.

   All offences not inherently connected to the business activity of the respective enterprise are excluded from corporate criminal liability of the enterprise (e.g. offences that occur in the course of business activity but that are not in accordance with the objects of the enterprise).

3. **Failure of Attribution to any Specific Individual**

   An enterprise can only be held solely liable for offenses committed within the enterprise if it is not possible to attribute the offense to a specific individual (see also number 5.1 below).

4. **"Lack of Organization" as Special Requirement for Corporate Criminal Liability**

   Intent is a required element of the crime. The intent necessary to find the enterprise guilty is found in Article 102 of the Swiss Penal Code. Under the Swiss Penal Code it is required that there be a lack of organization. Unfortunately, there is no definition of the expression “lack of organization” in Article 102 of the Swiss Penal Code. In practice this provision either refers to the fact that the offense cannot be attributed to a specific person because there is a lack of organization (para. 1) or to the failure of the enterprise to exercise all reasonable and necessary measures to prevent criminal conduct, regardless of a specific individual (para. 2).

   However, the mere fact that an offense has been committed within an enterprise is not regarded as evidence of a lack of organization. It is also not sufficient proof if the lack of organization just enables or facilitates the individual to commit an offense. The lack must rather cause the fact that an offense cannot be attributed to an individual. Further,
not every lack of organization may lead to corporate criminal liability. Liability is limited to a **serious lack of organization** (lack of a sufficient description of personnel responsibilities, confused delegations, lack of supervision for personnel, etc.).

**Art. 102 para. 2 SCC** imposes primary liability of the enterprise and states:

> In a case of a punishable act according to Articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies, or 322septies, the enterprise shall be punished independently from the punishability of natural persons if the enterprise is accused of not having taken all necessary and reasonable organizational measures to prevent such offense.

Contrary to para. 1 of the provision, para. 2 does not turn on whether a specific individual can be identified as the offender or not. Material to the liability of the enterprise is the question of good organization and therefore whether the enterprise has taken all necessary and reasonable organizational measures to prevent such criminal conduct. Once again, it has to be examined whether there was a **lack of organization** within the enterprise (see number 4 above).

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.**

**A. No**

**B.** Under Swiss laws, enterprises may be prosecuted and may be held liable for offenses committed by employees who are acting within the scope of their job duties. Affirmative support for an offense by corporate executives or managers is not required to establish corporate liability.

In general, every offense committed in the exercise of commercial activities can lead to a prosecution of the enterprise but only a limited number of significant offenses even lead to unlimited, primary liability of the enterprise (see answer to question 1.1 above).

In both cases, prosecution of the enterprise is not confined to offenses committed by certain hierarchy of company staff. All activities of the enterprise must comply with the law and the enterprise is subject to prosecution for violations regardless of who acted or should have acted inside the enterprise.
2.4. **How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions been attributed if the individual violated only internal (but not statutory) rules or regulations?**

The guiding principle of criminal liability of an enterprise is a **direct charge of guilt**. Contrary to vicarious liability, liability of the enterprise for torts committed by an enterprise and/or its employees is based on failure to establish and maintain proper organizational structures.

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

To obtain a conviction, the prosecutor must prove both the commission of the prohibited act and the requisite guilty mental state. Until special provisions regarding criminal liability of enterprises were implemented in 2003, the Swiss concept of criminal law followed the principle of *societas delinquere non potest*. Thus, enterprises were unable to be accused of guilty conduct and therefore excluded from criminal liability.

The substantive criminal law has since been changed and now there is corporate criminal liability for the enterprise's own wrongdoing. The provisions dealing with corporate criminal liability\(^{43}\) directly apply to the mens rea of the enterprise - while the mens rea of the real offender in this regard is not relevant.

Therefore, the criminally relevant accusation is not the mere fact that someone committed an offense, but that an offense could have been committed because of a lack of organization. The Swiss Penal Code uses two basic strategies to impute liability to corporations by establishing the mens rea of the enterprise itself as follows: a lack of organization that prevents an identification of the offender (Article 102 para. 1 SCC) or the lack of organization that caused the commitment of the offense (Article 102 para. 2 SCC).

In the Swiss understanding, corporate criminal liability is a question of liability for **organizational failure** and therefore a **lack of compliance**.

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.**

A. No.

B. An enterprise can be held strictly liable for some significant offenses: participation in a criminal organization, financing of terrorism, money laundering, bribery and corruption\(^{44}\). However, **mens rea** of the enterprise regarding the lack of organization is required.

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\(^{43}\) Articles 102 et. seq. of the Swiss Penal Code.

\(^{44}\) Article 102 para. 2 of the Swiss Penal Code.
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

A. No.

B. The Swiss Penal Code does not require identification or conviction of the individual offender. Article 102 para. 1 SCC allows an enterprise to be prosecuted and even requires that the individual offender cannot be identified.

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

The enterprise can only be found guilty of criminal offenses if there was a lack in its organization. The burden of proof that there was no organizational lack lies with the enterprise: it can only escape conviction if it proves that it is not due to a lack of organization that the individual offender cannot be identified (Article 102 para. 1 SCC) or that it has taken all reasonable organizational measures that were required in order to prevent such an offense (Article 102 para. 2 SCC).

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?**

A. Yes.

B. Regarding the special provisions of corporate criminal liability in the Swiss Penal Code, enterprises can avoid being punished if they **avoid a lack of organization** in the meaning of Article 102 para. 1 and 2 SCC.

The possibility of holding enterprises criminally liable may have the effect that potentially liable employees try to shift responsibility to the enterprise and allege a lack of organization. Therefore, an enterprise can quite easily be confronted with a criminal investigation. Whether such accusations can be defended or not primarily depends on evidence, especially **documentary evidence** of adequate organizational precautions having been taken.

To avoid conviction, enterprises in Switzerland are well advised to continually review and adjust their **internal organization structure**. With respect to Swiss Criminal Law, every enterprise doing business in Switzerland should implement an internal organization structure, which explicitly defines responsibilities, authorities, accountability, discretionary decision-making powers, as well as information flows. All employees on all levels must be aware of and understand their responsibilities and tasks. Further, enterprises should adopt sufficient control mechanisms to prevent its members from engaging in criminal conduct. A failure to do so will entail the risk of criminal liability. It is for these reasons that
enterprises must institute internal compliance programs that can allow reduce the possibility of culpability in the event there is criminal activity.

In assessing whether or not an enterprise is likely to be prosecuted for the criminal offenses of its employees, a main critical factor is the strength of its compliance program. What the required standard is cannot be defined: it depends on the size of the enterprise and its field of activity. However, the expectations are higher with regard to enterprises with international activities than in cases of small-sized organizations with only domestic activity. Further, compliance and corporate-governance models must be adapted to the characteristics of the specific enterprise as the degree of the internal organization depends on the size, its field of activity, its business partners, etc.

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

A. Yes.

B. Provisional or other measures can be executed during the formal judicial investigation, especially regarding the assets of the suspected person. At present, Swiss criminal procedure law is regulated by every canton individually. Some of the cantonal laws provide preliminary seizure of bank accounts, such as the Code of Criminal Procedure of the Canton of Zurich. Therefore, assets of a suspected person can be preliminarily seized provided they serve for evidence or are needed for securing costs, penalties and monetary fines as well as potential compensation.  

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

No.

See answer to questions 2.2 and 2.5 above.

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

A. No.

B. A parent/group company cannot be prosecuted for offenses committed within a subsidiary. As a rule, criminal liability primarily lays with the subsidiary where the crime is committed and where the lack of organization leads to the offense.

45 Article 83 of the Zurich Code of Penal Proceedings; Article 262 of the Swiss Code of Penal Procedure (draft).
Direct liability of the holding or other group companies for negligence or other tortuous actions of a specific group company is a question of being able to link a firm as a guarantor. The holding group must be factually or contractually liable regarding the organization of its subsidiaries or must have caused the lack of organization of the subsidiary by own misconduct. Moreover, piercing of the corporate veil requires a close connection between the different subsidiaries. They have to be economically and factually affiliated with each other and to one single entity. In such a case the corporate veil could be pierced and the activities or operations of the subsidiary could be treated as the activities and operations of the holding company.

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.**

Under the Swiss Penal Code confiscation of the tortuous financial benefit can be imposed on a company as a complement to the actual criminal punishment (see answer to question 1.2 above).

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

No.

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

See answer to question 3.2. above.

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

A. Yes.

B. See answer to question 2.10 above.

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?**

A. Yes.

B. Swiss law does not provide an automatic process where the punishment is predetermined. There are few minimum sentences and judges have a great deal of latitude to craft the appropriate sentence. The Swiss Penal Code includes assessment criteria that a court should consider in fining an enterprise: seriousness
of the offence and of the organizational inadequacies, seriousness of the loss or damage caused, as well as the financial situation of the enterprise46.

Swiss law outlines the material elements of a crime in a very general and abstract way. Therefore, a relatively insignificant behavior can be punishable according to law, even if there is no need for punishment. But, if an offense is obviously insignificant with regard to the (organizational) culpability of the perpetrator and the resulting consequences, the competent authority is obligated to renounce the opening or continuation of the criminal procedure47.

Whether the resulting consequences are insignificant depends on whether the internal organization was a marked departure from the standard of organization according to the relevant body of rules and regulations or (in case there are no regulations) to the standard of organization expected under the circumstances. With regard to the organizational failure, a decision not to seek punishment can only be considered in petty cases.

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

In Swiss law, a suspect is a person who is suspected, blamed or accused of a crime by means of a complaint, a demand for a penalty or by a criminal authority in a proceeding48. From the time the criminal authorities first communicate to the person that he has possibly committed an offense, this person acquires the status of a suspect. In the case of potential crimes in connection with Article 102 SCC, a criminal investigation or proceeding is directed against the enterprise itself. Thus, the enterprise has the status of a suspect from the beginning of the investigation and during the proceedings.

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?

A. Yes.

B. Article 102a para. 2 provides that the person representing the enterprise in the criminal proceedings has the same rights and obligations as any accused. Therefore, ordinary proceeding rules and principles must be respected also in corporate criminal proceedings, in particular presumption of innocence, the basic principle of a fair trial, nemo tenetur se ipsum accusare and due process of law.

46 Article 102 para. 3 of the Swiss Penal Code.
47 Article 52 of the Swiss Penal Code.
48 Article 109 of the Swiss Code of Penal Proceedings (SCPP, draft).
In case of a **conflict of interest** between the enterprise and its representative (e.g. in the case where the enterprise and its representing director are subject to the same criminal proceedings), the enterprise must designate a different legal or designated representative. In the event such person is not available, the investigating authority or the court may appoint a suitable third party. This decision will not be subject to any appeal. In particular, the shareholders do not have a right to request the appointment of such a legal representative.

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

In Swiss criminal law, the investigations against a suspect are not formally opened. However, every person charged with a criminal offense has the **right to be heard**\(^{49}\) by the investigating judge in the pre-trial proceedings and the trial judge during trial, including the right to present or indicate all exonerating or mitigating evidence. Therefore law enforcement agencies have to inform the suspected enterprise as soon as possible of all grounds for its being the subject of a criminal proceeding.

### 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?

A. **Yes.**

B. In principle, directors and managers as well as employees have the right to testify in proceedings against the enterprise.

According to Swiss law a witness and an accused must not be identical. Therefore, representatives may not be compelled to be a witness against the enterprise they are representing in proceedings. For the same reason representatives are a priori excluded from being a respondent\(^{50}\).

Persons with an unrestricted power to represent the enterprise - directors and managers - are not obliged to give evidence in a criminal proceeding against the enterprise\(^{51}\). Conversely, employees of the accused enterprise are obligated to testify in criminal proceedings against the enterprise they are working for.

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

A. **Yes.**

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\(^{49}\) As guaranteed by Article 29 para. 2 of the Swiss Federal Constitution and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to be heard is explicitly mentioned in Article 105 of the Swiss Code of Penal Proceedings (draft).

\(^{50}\) In the meaning of Articles 175 et seq. of the Swiss Penal Code.

\(^{51}\) Article 102a para. 2 of the Swiss Penal Code.
B. If a criminal investigation is initiated against the enterprise and a natural person based on the same or a related set of circumstances there can be a joint proceeding against both of them (see Article 110 para. 4 SCCP).

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

A. Yes.

B. As a rule, the enterprise does not act itself but only through its representatives. It therefore needs a representative in the office at the time that the proceedings are initiated.

The person representing the enterprise must have an **unrestricted power** to represent the enterprise in civil law matters\(^{52}\). The enterprise may also designate another person to represent it during the proceedings, under the condition that the powers of representation of the enterprise are delegated to this person (either by law, by the articles of incorporation or by corporate decision).

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?**

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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\(^{52}\) Article 102a para. 1 of the Swiss Penal Code.
5.6. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

N/A

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?

A. Yes with regard to employees.

B. Directors and persons responsible for the management of a company will be personally liable for their own tortuous conduct regardless of whether they are acting in the best interests of the corporation or not. Conversely, directors and managers are not liable for acts of the corporation perpetrated by other directors or managers.

As to the liability of directors and managers regarding the criminal offenses of subordinates, the Swiss Federal Criminal Court ruled in the leading case of Bührle/Oerlikon\(^{53}\) that the director was criminally liable for omission regarding offenses committed by employees. The Bührle decision effected the creation of Article 6 of the Criminal Law of Administrative Proceedings\(^{54}\) that states that the director (Geschäftsführer) can be held liable for offenses committed by employees, if he can be accused of omission (deliberately or through negligence) regarding the prevention of the relevant criminal offense (see Article 6 para. 2 SAPC). Most of the ancillary criminal laws have incorporated said provision by reference.

It should be noted that a parent company or a controlling shareholder that intervenes in the company’s management as if it were a director, can be regarded as a de facto director and may be subject to the same criminal liabilities.

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

Under current Swiss law, directors and managers can be held criminally liable for any criminal offence that they commit in the course of their duties. As election, supervision, instruction and intervention normally is a part of their duties, they can be punished for acts committed by subordinated employees if they fail to provide


\(^{54}\) Bundesgesetz über das Verwaltungsstrafrecht (VStrR), SR 313.0.
adequate election, supervision, instruction or intervention or fail to satisfy a duty imposed by a criminal statute (e.g. an ancillary criminal act). However, the personal failure of the director or manager must have enabled the committed offense.

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?

A. Yes.

B. See answer to question 6.2. above.

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

The director of an enterprise carries the responsibility for regulation, establishment, continuity and regular supervision of an internal system of control. He must be aware of his duties and responsibilities. The director can only avoid liability if he has established an internal program of control based on a systematic risk analysis and its supervision of such. Thus, the director ensures that all of the institution’s material risks are recorded mitigated and supervised and minimizes his own criminal liability risk.
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 general rule, a company is considered lacking the capacity to be held criminally liable. However, it is possible for a company to be prosecuted in a similar way as an individual offender under a number of so-called “special criminal laws” that delineate criminal sanctions on legal persons (companies) for breach of certain regulations. The principal distinction between prosecutions of companies and individuals relates to the issue of punishment. Unlike an individual offender, a company is not subject to death penalty or imprisonment. Generally, sanctions imposed on legal persons (companies) under the aforesaid special criminal laws are to pecuniary fines.

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

Besides pecuniary fine, if a company is convicted of a special criminal law violation, the criminal law sanctions of confiscation and forfeiture may also be imposed. Objects used for perpetrating a criminal offence or gains derived from a criminal offense could be confiscated or forfeited if, at the time of conviction, the perpetrator still owns or has a claim to the objects or gains.
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.

In addition to criminal sanctions as aforesaid, if a company or any of its directors, managers or employees are convicted of a special criminal offense, the company would also possibly face such administrative sanctions as forced business suspension or dissolution. The aforesaid special criminal laws stipulate different criteria for different administrative sanctions. Normally, for a less serious offence, the competent authority would first order the company to take corrective action; and only when the company fails to take corrective action, would such drastic administrative sanctions as forced business suspension or dissolution be imposed.

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 principal criminal sanctions on companies are fines. The minimum and maximum fine that can be imposed for a specific criminal offense is established by the different special criminal statutes. The court normally has the discretion to determine the appropriate fine, limited only by the statutory amount range. Under Criminal Act, the factors to be considered in deciding the amount of fine in a specific case include but are not limited to: the purpose of the offense, the method of the perpetration, the danger and damage caused by the crime, and especially in respect of discretion of fines - the economic situation and the financial advantage gained by the perpetrator. If the financial advantage gained by the perpetrator is more than the statutory maximum, the court may impose a fine beyond the statutory maximum but not to an amount exceeding the financial advantage gained by the perpetrator.

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

The premise of any criminal sanctions is that the underlying criminal offences be proven beyond a reasonable doubt. Each of the special criminal statutes as aforesaid defines its own prerequisites constituting a specific criminal offence, so there are numerous types of criminal offences that could be committed by companies in Taiwan.

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.

Each of these special criminal statutes defines its own prerequisites constituting a specific criminal offence, so there are numerous types of criminal offences that could be committed by companies in Taiwan. Most of the special criminal laws defining
criminal sanctions for legal persons require the offences being committed by the representative, the agent, the employee, or other servant of the legal person. If the activities of an employee are attributable to his employer under a special criminal law, then the “hierarchy” of the employee who perpetrates the offence would not be an important issue in deciding the criminal liability of a company in Taiwan.

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

For most special criminal statutes that stipulate criminal sanctions for legal persons in Taiwan, a company is held criminally responsible for the illegal acts of its representatives, agents, employees, or other servants only when these illegal acts are done in the performance of their duties. Thus, if the illegal acts of individuals are within the scope of the employment or are intended, at least in part to benefit the company; those acts (or omission) would be consequently attributed to the company. On the other hand, the violation of internal company rules and regulations is not a prerequisite for any special criminal statutes defining criminal sanctions for legal persons. Therefore, in a criminal case concerning the criminal liability of a company, whether the individuals violate internal rules or regulations of the company would be irrelevant in Taiwan.

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

Under Taiwanese criminal system, legal persons such as companies are deemed short of the capacity to be held criminally liable; and it is only in the situation of offense of special criminal statutes, then legal persons become eligible objects of criminal sanctions. Consequently, the *mens rea* of any culpable employee or agent is legally imputed to the company. Once the individual perpetrators are found guilty, it is not necessary to show the *mens rea* of the company to find it criminally liable.

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.**

As described above, for most special criminal offenses, mens rea on the part of the company is not necessary to hold a company criminally liable. Although Taiwan law does not imposes strict liability on a company for any criminal offence, we note that there are special criminal statutes which regard companies as the actual perpetrators of the offense and hence mens rea of any culpable employee or agent is imputed to the company.
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

Because the criminal liability of a company is generally the result of the illegal conduct of individual offenders for special criminal violations, it is necessary to “identify” the individual offender in order to prosecute and convict a company. However, since there is no law requires “consistent verdicts”, accordingly, even if the individual offender is not “prosecuted” or “convicted”, the company may nonetheless be convicted.

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

Because companies are considered legal persons under the law, any defenses available to an individual are generally available to a company. Accordingly, a company may rely on all constitutional and statutory defenses (such as jurisdictional defects or because the prosecution is barred by the statute of limitations), or assert any defense that negates *mens rea* of the culpable employee. In addition, as noted in answer to question 2.4, a company cannot be held responsible for the acts of people who are not its representatives, agents, employees, or servants. Nor shall a company be held criminally liable for any illegal acts committed not in the performance of the duties of its representatives, agents, employees, or servants.

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?**

Due organizational requirements and control would not work to avoid conviction, subject to rare exceptions (such as Money Laundering Control Law which spares a company from criminal fine for money laundering if the company has exercised due care and control to prevent illegal money laundering from occurring).

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

Yes. During the investigation stage, upon application of the prosecutor, the court may issue a search warrant to allow the police and the prosecutor to conduct a search and seize anything that could be used as evidence or is subject to confiscation or forfeiture. On the other hand, the prosecutor could also order the owner, possessor, or custodian of the property subject to seizure to surrender or deliver it.
2.11. Can both the individual offender and the company been convicted for the same offence?

In case of most special criminal offenses of legal persons, the criminal liability of a legal person is legally attributed from the illegal acts of its representatives, employees or servants. For that reason, the common practice of Taiwan is to prosecute and convict the individual offender and the company for the same offense in the same criminal proceeding.

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

The parent company and its subsidiary company are different legal entities. Except in an extreme case that an individual offender is found to be the representative, employee, or servant of both the subsidiary and the parent company, and commits the offense in the performance of his duty toward both the subsidiary and the parent company, normally the criminal offenses being committed within a subsidiary company is not imputable to its parent company.

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.

As noted in the answer to 1.3., companies can also be subject to such administrative sanctions as forced business suspension or dissolution, aside from criminal fines.

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

There are more than fifty special criminal laws that delineate criminal sanctions on legal persons for breach of certain regulations, but only a limited number of them have rules authorizing the competent authority to impose administrative sanctions on the companies for committing those special criminal offenses.

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

The possible defenses for a company to avoid the above administrative sanctions: a) arguments to the effect that the offense is not so serious as to warrant administrative sanctions, or b) compliance with the cease and desist order of the competent authority and take prompt corrective actions, etc.
3.4. **Can such sanctions been executed during the investigative phase of a criminal proceedings?**

Criminal conviction is the premise for the competent authority to impose administrative sanctions on company offenders. Therefore, during the investigative phase of a criminal proceeding concerning the criminal liability of a company, it is legally not permissible for the competent authority to impose an administrative sanction against the company for the same offense.

### 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. Pursuant to The Code of Criminal Procedure, for an offense with a maximum punishment of imprisonment for less than three years, the public prosecutor, after considering the matters specified in Criminal Code, has the discretion not to prosecute the defendant.

The relevant factors to be taken into account for this prosecutorial discretion include but not limited to: the purpose of the offense, the method of the perpetration, the degree of the violation of duty, the danger and damage caused by the crime, and remedial actions taken by the defendant.

Nonetheless, as mentioned in the answer to 2.11, the customary practice of Taiwan is to prosecute and convict the individual offender and the company for the same offense in the same criminal proceeding. Thus it is rare for a prosecutor to prosecute the individual offender but not to prosecute the company for the same criminal offense.

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

There is not a legal requirement that an accused be notified before she or he is investigated. However, under The Code of Criminal Procedure, before the police or the prosecutors take affidavits from a suspect or a defendant, they shall be informed of the information that they are suspected of committing an offense and all of the offenses they are suspected of. Hence in theory, if a company is suspected of committing a crime, after its representative, agent or employee is questioned by the police or the prosecutors, the company would be aware that it has become a suspect or a defendant in a criminal proceeding.
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?

According to The Code of Criminal Procedure, the accused has the right to remain silent and does not have to make a statement against his own will. During the investigation stage or the criminal trial, the court may issue a search warrant to allow the police and the prosecutor to conduct a search and seize anything that could be used as evidence or is subject to confiscation or forfeiture. The court and the prosecutor could also order the owner, possessor, or custodian of the property subject to seizure to surrender or deliver it.

If a company site is not a place open to the general public for business purpose, the company has the right to deny access to this site without search warrant. Commonly, it would be the representative of the company or the employees of the highest hierarchy at site to exert this right.

The responsible persons of a company, including its directors, has a right to refuse to testify if doing so would incriminate themselves personally or subject them individually to the threat of criminal prosecution.

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

A company is formally notified that it is prosecuted by an indictment.

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?

If the court examines a co-defendant on a case that another defendant is being charged, the co-defendant shall be subject mutatis mutandis to the provision governing the examination of a witness. Hence even if the directors, managers or employees are co-defendants with their company in the same legal proceeding, they still could testify against their company as a witness.

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

As discussed in 2.11 above, the customary practice of Taiwan is to prosecute and convict the individual offender and the company for the same offense in the same criminal proceeding. However, there is no rule that requires a joint prosecution and the decision is legally left to the discretion of the prosecutor.

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?

Once a criminal offense is prosecuted, the court has the discretion to decide the exact criminal sanction within the statutory minimum/maximum limitation. In accordance with §133 II of The Code of Criminal Procedure and §61 of Criminal Code, for an offense with a maximum punishment of imprisonment for less than three years, if the court considers the offence to be trivial and the circumstance extenuating, it has the discretion to remit the sanction of the defendant. However, prior to a judgment remitting punishment pursuant to Article 61 of Criminal Code, the court may, in consideration of the circumstances and by consent of the complainant, also order the accused to do the following: to apologize to the victim, to make a written statement of repentance, or to pay to the victim an appropriate sum as consolation.

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

See answer to question 4.2.

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

See answer to question 4.4.

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

As a legal person, a company is entitled to the same procedural rights as an accused individual. These rights include the right to counsel, a right to be present at all proceedings and examine the evidence, the right to present and cross-examine witnesses, and a right to a public trial by the court.

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

See answer to question 4.6.

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

No.
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?

Directors or managers cannot be criminally held liable for offences committed by other individual directors, managers or employees. Although the Tax Collection Law of Taiwan seems to provide a legal basis for the imprisonment of a company’s statutory responsible person (e.g. director) for the company’s tax law violations committed by other individuals, we are not aware of any precedent of a director or manager being imprisoned for illegal acts committed by others.

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

See answer to question 6.1

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?

See answer to question 6.1

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

It is recommended that companies operating in Taiwan work closely with local legal counsel to work out and implement adequate internal control and corporate compliance programs to prevent or minimize criminal liability risks of directors of a company.
Criminal Liability of Companies Survey

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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.

Yes, a company can be prosecuted in Thailand in a similar way as an individual offender. As a company is a juristic person, however, it cannot naturally be subject to the punishment of imprisonment.

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

A company can be fined or have its assets seized for violations of certain laws. In some cases, a company can be fined daily until the violation is corrected. In other cases, and depending on the type of company and its business purpose, a company can have its license revoked, its management replaced, or it can be dissolved entirely.

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.

With respect to certain types of companies only, in certain situations, like those under section 143 of the Securities and Exchange Act, a company can have its license revoked. Under section 144, the Office of the Securities and Exchange Commission can remove and appoint directors, managers, or those responsible in the company if
there is evidence that the condition or operation of the securities company may cause damage to public interest. Section 148 also allows the Office to dissolve and liquidate the securities company.

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 on a company are listed under 1.2 above. Maximum and minimum penalties for specific sanctions are defined by individual statute, although, it is possible that a company can receive the same sanction for different offenses. However, these sanctions may differ in severity.

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

The prosecution must prove all elements of a particular offense or prove beyond a reasonable doubt before the specified sanction can be imposed.

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.

No. The prosecution of a company is not confined to certain types of offenses or to offenses committed by certain hierarchy of company staff.

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

Acts of individuals will be attributed to the company if the acts were done in the scope of employment with the company or for the company’s benefit. In attributing such acts to the company, there is no distinction between violations of internal versus statutory rules of regulations.

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

Note that there is no concept of “Mens rea” under Thai law.
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.**

There are certain offenses under Thai law for which there is an immediate assumption of management liability. In such cases, the defendants are required to prove lack of culpability.

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

It is not necessary to identify and/or convict the individual offender in order to prosecute a company.

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

A company can raise the defense that they had taken all reasonable actions to prevent the offense as described in 2.9.

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?**

Yes, a company can avoid punishment if it is sufficiently organized, has duly instructed its directors, managers or employees, and has taken reasonable care to exert control of its directors, managers and employees. This defense indicates that the company has made all reasonable efforts to prevent an offense. The extent of these reasonable efforts depends on the circumstances.

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

Yes, certain kinds of sanctions, such as subpoena power and seizure of assets, can be executed during the investigative phase of criminal proceedings.

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

Yes, both the individual offender and the company can be convicted for the same offense.
2.12. Can a parent/group company been prosecuted for offences being committed within a subsidiary?

Generally speaking, although there are notable exceptions, a parent company cannot be prosecuted for offenses committed within a subsidiary. This corporate structure is designed to protect the parent company from actions of the subsidiary.

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.

The other available sanctions are fines or a seizure of assets. The legal requirements for this type of sanction are specified by statute.

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

These sanctions are imposed for a wide variety of offenses. Each statute defining an offense will state what types of sanctions are available and the maximum severity of the sanction.

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

The company can raise the same defenses as stated in 2.8 and 2.9.

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

Yes, such sanctions can be executed during the investigative phase of criminal proceedings.

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 prosecutor has his or her own discretion. He or she must consider whether the case has sufficient evidence for the trial.

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

The company has suspect status from the moment charges are made with the police or with the court.
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?

Yes, a company has these procedural rights. Company directors, if they are named defendants, also have the right to refuse to testify. A director called to testify as a witness is generally obliged to do so. If not he or she has to provide a reasonable explanation why he or she is unable or unwilling to do so, such as where the director is also the accused.

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

A company will be informed that it is or may be subject to prosecution at the time when the prosecutor files the charges with the court.

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, directors, managers or employees can be witnesses in a proceeding against a company. However, under Thai law, the accused also have the right not to be called as a witness for the prosecution.

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

Yes.

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

The procedure is the same with certain exceptions. In many cases the director may testify against the company. Further, a company cannot be subject to imprisonment at the sentencing phase.

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?

The prosecution has the discretion to ask the court for sanctions at the sentencing phase. However, the court makes the final decision regarding sanctions, taking into account factors such as the nature of the actions, whether there have been prior offenses and other factual considerations.
5.2. **Does the company, have the status of a suspect or a similar status and at what stage in proceedings?**

The company has suspect status from the moment charges are made with the police or with the court.

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

The company will be informed at the pleading stage that the prosecution may impose sanctions.

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

There are no specific procedural rights to protect a company from the risk of sanctions.

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

Yes.

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

The procedure is the same with certain exceptions. In many cases the director may testify against the company. Further, a company cannot be subject to imprisonment at the sentencing phase.

### 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?**

Depending on the circumstances, directors may be criminally liable for the offences committed by other directors or subordinates. For example, there are certain offenses under Thai law for which there is an immediate assumption of management liability, criminal or civil, regardless of whether the offense was committed by another director or subordinate.

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

Generally speaking, the prosecution must prove the elements of the offense or prove liability of the actor beyond a reasonable doubt. Depending on the statute, liability may
be imputed to the director, unless he or she can show to the satisfaction of the court his or her lack of culpability.

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?**

No.

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

First and foremost, directors should familiarize themselves with local laws and practice, including the Directors and Audit Committees Codes of Best Practices issued by the Stock Exchange of Thailand, and conduct themselves within such confines. Directors should also always act in good faith. Further, directors should cover their fiscal exposure with personal indemnities from the companies. Finally, the companies should purchase Directors and Officers insurance to protect directors and the company’s assets from possible liabilities and losses to claimants.
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.

First paragraph of Article 20 of the Turkish Criminal Code ("TCC") numbered 5237 sets forth that: the criminal responsibility is personal. No one shall be held responsible from the acts of another individual. In the second paragraph of the same article, it has been stated that the legal entities shall not be sentenced to criminal sanction. According to this article, it has been clearly regulated that only real persons may be criminal offenders and that only real persons may be sentenced to criminal sanction. Therefore, under Turkish law, as a company is a legal entity, it cannot be prosecuted like an individual.

On the other hand, please note that it has been provided under the TCC that the legal entities may only be sentenced to security measures which have been provided by law. As companies cannot be prosecuted, it has been provided by article 249 of the Turkish Code of Criminal Procedure numbered 5271 that in case of an investigation or prosecution with regard to the offences, conducted within the framework of the activities of a company, the organ or representative of the company has a right to attend to the hearing of such with the capacity of intervener. (Additionally, please note that the companies may be sentenced to a legal penalty under Turkish Commercial Code ("TCC") in certain situations.)
1.2. **Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.**

Yes, under TCC, the companies can be imposed to security measures which are another type of criminal sanction under certain conditions. Article 60 of the Code, entitled “Security Measures to be imposed to Legal Entities” states such conditions. Before, summarizing this Article, it shall be understood that, even though the title of the article thereof states that such measures will be imposed on the legal entities, it is clearly understood from the doctrines, interpretation and practice that the measures set forth in this article are directly imposed to the real persons who are legally connected with the legal entity. The security measures that are regulated with regard to the legal entities are the cancellation of the commercial operation license and seizure.

The prerequisites for the cancellation of the commercial operation license are; 1) Conducting an intentional crime by the participation of the organs and representatives of the legal entity and by abusing the authority which has been given by such an operation license, 2) Conducting such crime on behalf of the legal entity and, 3) the individuals, conducting such crime shall be imposed to a sentence.

With regard to the second measure, there are two types of seizures; imposing seizure on a good and imposing seizure on an earning. The prerequisites for imposing such measures are indicated in detailed by articles 53 and 54 of the same Code.

Please note that these sanctions such as seizure of the goods or earnings or cancellation of the operation license may only be imposed only for offences that are specially indicated by law. (Please refer to Answer 3.2 for detailed information regarding the types of offences that shall be sentenced to security measures.)

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.**

Under Turkish Law, the directors, managers or employees of a company will be personally liable form their own offences. In other words, in case they conduct an act against law, they will be directly sentenced to a criminal or penal sanction, not the company itself. For example, in case a representative of a company conducts an act which is inconsistent with the established rules of procedure with regard to the books, records and documents of the company, he will directly be sentenced to imprisonment, or will pay a penalty because of another act, prohibited by law. But in principle, the company will not be held liable because of an illegal act of its representative, director or etc.
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.

N/A

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

N/A

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.

N/A

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

N/A

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

N/A

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.

N/A

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

N/A

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

N/A
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?

N/A

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

N/A

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

N/A

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

N/A

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.

As mentioned above, companies may be sentenced to security measures for certain offences under TCC and penalty in certain situations under TC.

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

Yes, the offences of the companies which shall be sentenced to security measures are set forth under several articles of TCC such as; human trading, emigrant smuggling, giving harm to human body, organ trading, threatening, blackmailing, offences against private life, robbery, breach of trust, fraudulency, offences against environment, producing and trading illegal drugs, offences against public morality, offences against economy, trade and industry, offences against informatics area, offences against government and nation and etc. It has been provided under the articles of the TCC that in case companies derive unjust benefit by conducting such offences, they shall be sentenced to security measures.
3.3. **What defenses can a company raise against these offences?**

The company may claim that such offences have been conducted by other individuals beyond its own cognizance and relying on these defenses, the company may claim that it shall not be held liable because of such offences.

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

Such sanctions may be executed during the investigation which is conducted with regard to the offence.

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?**

N/A

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

N/A

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?**

N/A

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

N/A

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?**

N/A

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

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

N/A

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?**

As we have previously mentioned, the companies cannot be sentenced to any criminal sanction other than the security measures that have been reviewed in the second question of the First Section. However, please be informed that, during deciding on imposing a security measure, the prosecutor will have the discretion to impose such or not. Paragraph 3 of Article 60 thereof provides that the prosecutor may decide not to impose such security measures on a company in case it is understood that implementing such will result consequences that are having bigger effects then the conducted illegal act. This is the proportionality principle in the Criminal Law. Pursuant to this principle, the prosecutor is authorized to decide whether imposing such measure is reasonable or not. This principle takes into account the result of the conducted offense and prohibits the unreasonable results of such security measures.

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

The meaning of suspect is determined in article 2 of the T CCP. Pursuant to this article, the suspect is an individual who is suspected to be criminal. Under Turkish Law with regard to crime and penalty policy, it has been provided that a criminal or a suspect can only be a real person. Accordingly, as a company is a legal entity, it cannot have the status of suspect or criminal.

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

In case there is a necessity to immediately impose security measures against a company, the criminal sanction may be directly imposed before informing the company. Otherwise, the company will be informed about the security measure decision of the prosecutor.

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

Once the company is sentenced to a criminal sanction, it may raise an object to such a security measure and request for a re-evaluation of the sanction.
5.5. Will there be joint proceedings against the company and the individual offender?

In case the offence has been conducted jointly by the company and an individual, the company and the individual may both be sentenced to criminal sanction. In such a case while the company is sentenced to a security measure, the individual may be sentenced to a security measure or a penalty or imprisonment. (The type of the sentence will vary on the scope and type of the offence.)

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

While companies may only be sentenced to security measures, the individuals may be sentenced to other criminal sanctions such as penalty or imprisonment. (Please refer to Answer 5.5.)

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?

Article 38/7 of the Turkish Constitution and Article 20/1 of the TCC, providing that the criminal responsibility is personal and that no one shall be held responsible from the acts of another individual, clearly states that criminal responsibility is personal. Therefore, under Turkish Criminal Law, the main principle is to be personally responsible from your own crime. In order to be criminally held liable, there shall be an act, conducted by the freewill of a person, the person shall act defective and such a defective act of the person shall be determined as a crime under our Law. All these above mentioned conditions shall occur in order to be deemed criminally liable in case of an offence. Therefore, since the law provides us from not being responsible from other persons’ offences, the directors or managers cannot be held criminally liable for the offences of another director, manager or employee of the company. While this is the general principle, we realize that Under TC, it has been set forth that in specific cases, the managers of the company will be held liable for the offences that are committed by other individual directors.55

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

In case such individuals, conducting the offence, are under their own liability and control, the directors and managers will also be held liable for the offences that are conducted by such individuals. In case those individuals, conducting the offence are

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55 For example, article 305 of TC states that; “for the losses caused by the falsity of the certificate and other documents, the shareholders and those who cooperate in this issue of such documents and certificates shall be jointly and severally liable and shall be sanctioned by the TCC”. 

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not under their own control or liability, the directors or managers will not be held criminally liable for such offences.

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?**

Please refer to answer 6.2.

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

We recommend informing the directors of the companies regarding the scope of their legal and criminal responsibilities in order to minimize their potential risks. On this account, the best would be to hold periodic meetings for the directors regarding their legal responsibilities and make them clearly understand both their authorities and responsibilities.
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.

Yes.

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

N/A

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.

Sanctions that can be imposed are fines, confiscation of assets and other measures such as cancellation of the Trade License of the company, prevention or suspension from conducting business in a particular field and/or measures of an administrative nature.
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 sanctions that can be imposed are fines, confiscation of assets and other measures such as cancellation of the Trade License of the company, prevention or suspension from conducting business in a particular field and/or measures of an administrative nature.

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

N/A

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.**

No. Any criminal act committed by or on account of the company or in its name by representatives, directors or agents of the company.

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

Any criminal/illegal act committed by a director, manager, representative or agent in the company’s name or on its behalf or in the course of its business.

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

By the mens rea of the person who committed the act in the company’s name or on its behalf. His acts, conduct or words will be taken into consideration.

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.**

Various statutory offences for example, under the UAE Companies Law (violating the provisions concerning the percentage of shareholding of UAE nationals in the capital of the company), the Immigration Law (employment of a person who is not under the sponsorship of the company) etc.
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

   It is necessary to identify individual offenders in order to prosecute a company. It is not necessary to convict individual offenders in order to prosecute a company.

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

   Depends entirely on the charge.

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?**

   The law does not appear to make any exception.

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

   Generally not.

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

   Yes.

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

   Generally not.

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.**

   See the answer to 1.3.

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

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

N/A

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

Depends on the facts of each case.

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.

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

The company can be regarded as a suspect from the stage when the police/Public Prosecution investigations commence.

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?

The company may remain silent but this may have adverse implications and officials of the company who decline to provide information are likely to be apprehended. A search of company premises would require a warrant. Such warrants are easily obtained.

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

Usually after the police and the public prosecutor have completed their investigations.

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

Possible.

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?

The prosecution cannot impose a sanction i.e. a sentence. However preventive/precautionary measures can be taken (see paragraph 2.10 above)

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

The company can be regarded as a suspect from the stage when the police/ Public Prosecution investigations commence.

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

The question assumes that the prosecution can impose sanctions.

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

N/A

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

This is possible.

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

Essentially, similar procedures would be followed in relation to criminal proceedings against a company and an individual.
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?

Essentially, a person is liable for his own acts. Prima facie, directors or managers will not be held criminally liable for offences committed by other individual directors, manager or employees.

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

Mens rea and actus reus.

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?

No.

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

Avoid breaching the law.
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.

Yes, a company can be indicted under certain circumstances under federal and state laws for criminal actions by employees or agents that benefit the company.

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

Although not a sanction under criminal law a significant collateral consequence of a corporate indictment can be the corporation’s suspension or debarment from contracting with the government at the federal, state, or even local level. Some companies rely heavily upon government contracts, and, thus, a suspension or debarment could be devastating. It should also be noted, however, that in many instances, an indictment, in and of itself, whether the company has been convicted or not, can serve as a “death sentence” for the company. Vendors and other third parties are often reluctant to conduct business with a company under the microscope of an indictment (suspension on debarment) for fear of taint or the company’s inability to fulfill the terms of its arrangement.

The legal prerequisites for suspension and disbarment are derived from governmental acquisition regulations and include a conviction or indictment as a basis for pursuing suspension or debarment. Depending upon the nature of the conviction or indictment and the governmental or regulatory body involved, it may be possible to avoid
suspension or debarment through negotiations with the governmental or regulatory body, usually by agreeing to the terms and conditions of a “compliance agreement.”

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.

In addition to the above, and depending upon the specific actions of the directors, managers or employees, a key employee could be indicted or as part of a pretrial negotiation agreement with the government, that director, manager or key employee could be removed from their respective position, and the company could be precluded from further contact.

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.

There are a number of non-penal sanctions that can be imposed on a company. Those include: restitution to the victims, remediation, community service, suspension or debarment for government contracts or federal programs.

The level of the sanctions depends on the nature and circumstances of the offense, the level of the personnel involved, and the history of the company. For example, if the Court determines that the company operated for a criminal purpose, the Court could order the company to divest all of its net assets.

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

The level of the sanction is dictated by the circumstances of each case. The sanction is directly tied to whether the person(s) who directed the criminal activity was a high level personnel of the company or had substantial authority over the personnel, whether the actions were condoned by upper management, whether the person was acting within the line and scope of his/her employment, and whether the corporation obtained a benefit as a direct result of those actions.

To impose liability against the corporation – and not based upon the individual criminal liability – it has to be demonstrated by the facts and proved beyond reasonable doubt, the standard at trial, that the corporation has a “culture” that permeates throughout the corporation and is either encouraged or directed by upper management.
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.**

Since a corporation can only act through its duly authorized agents and employees, the offenses are generally related to (1) offenses in which the corporation gains a benefit, advantage or profits as a direct result of the fraudulent activity of its agents; (2) regulatory actions which, too, are related to a failure to act in accordance with certain regulatory obligations, i.e., failure to appropriately certify the accuracy of the company’s account or to conduct the appropriate testing.

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

Acts (or omissions) of individuals (directors, managers or employees) who are agents of the company and where such actions are directed or sanctioned by high level personnel and the company receives direct or indirect benefits.

Actions and omissions that are a violation of internal policies will not in and of itself rise to the level of criminal liability. Those omissions, however, can be used as circumstantial (and perhaps direct, depending on the circumstance), evidence to refute a defense of mistake, error, or unintentional omission.

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

Actions taken before and after the alleged offense. The intent is often established through information obtained by current or former employees, internal memos, emails and other inter office communications. The prosecution will often look at the length of time the transgressions took place, who was involved, and the benefits derived there from.

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.**

There is not a, per se, strict liability statute that would be applicable to a corporation. There are, however, certain regulatory certifications that could impose significant financial sanctions against the corporation and certain criminal exposure for those who have inappropriately certified compliance. In addition, there is some level of strict liability applicable to violating certain Food, Drug or Cosmetic Act regulations.
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

No. The company can be indicted, tried, and convicted separate and apart from the individual offender.

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

That the alleged actions are isolated to a rogue employee(s), that those actions were neither authorized nor sanctioned by the company, and there was only an individual benefit, not a corporate one. In limited cases, an argument could be made that the regulation lacked clarity.

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?**

An effective corporate compliance program can go a long way toward reducing criminal exposure for a corporation, or at the very least, can serve as a mitigating factor for both civil and criminal liability. In order to gain a benefit from a corporate compliance program, the corporation must demonstrate the program’s effectiveness. In other words, the program should be written and disseminated throughout the corporation; a compliance officer or compliance committee must monitor the activities of the corporation; there should be an established method by which employees at all levels can express concern and report misconduct such as through either a hotline, suggestion box, or other means that ensures the anonymity of whistleblowers; there must be a zero tolerance for fraudulent activity coming from upper management. Moreover, there must be internal controls in place in order to ensure autonomy, independence and transparency in the actions of the corporation.

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

While such actions are generally frowned upon, there could conceivably be actions perceived as transferring or eliminating assets that might prompt the prosecutor’s office to seek civil injunction to prevent the dissolution or fraudulent transfer, or destruction of assets that could conceivably be used for purposes of forfeiture and payment of fine and restitution.

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

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

As a general rule, yes. It all turns on the particulars of the facts, the relevant laws, and the responsible relations between the parent and the subsidiary. The optimum issue is whether the corporation gained a benefit. If it did, it is possible for the corporation to be prosecuted.

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.

A corporation could be convicted of manslaughter for failure to follow certain regulatory safety requirements. Depending on the circumstances, certain managers and officers could be brought into the prosecution. These types of sanctions require a higher standard such as knowingly and willfully failing to act and as a direct result of action or inaction, certain harm or death ensued.

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

Most of these cases are derived from violations of food, drug and cosmetic act, which puts a higher burden on companies to ensure that its corporation and those who act on its behalf and for its benefit are engaged in higher standards for the protection of the community.

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

Again, depending on the circumstances, a company could have acted in accordance with its understanding of the safety requirements, and harm still ensues. It could then be argued that the act was not committed knowingly, or that the regulation lacked clarity.

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

No. Sanctions such as incarceration require due process. Due process requires that in order to deprive a person of life and liberty, and that of the corporation, that one must be provided notice and given an adequate time to respond.
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?

Prosecutors generally have wide latitude in making charging decisions against a company. Some of the aspects that prosecutors take into account are: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation’s history of similar conduct; (4) the corporation’s timely and voluntary disclosure of wrongdoing and cooperation in any investigation; (5) the existence of a pre-existing compliance program; (6) the corporation’s remedial actions; (7) collateral consequences, including disproportion of harm to shareholders, pension holders and employees and the impact on the public; (8) the adequacy of prosecution of individuals responsible for the corporation’s malfeasance; and (9) the adequacy of remedies such as civil or regulation enforcement actions.

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

There is no clearly defined point within an investigation in which a company could be deemed a “subject” or “target” of the investigation. As mentioned above, one of the charging assessments is the pervasiveness of wrongdoing within the corporation, and the corporation’s history of similar conduct. In that instance, the focus could be on the company from the very beginning of the investigation. On the other hand, these factors may not be known until the investigation has proceeded beyond the formative stages, and interviews and documents reflect that the company perpetuates a culture of wrongdoing.

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?

Only an individual has the Fifth Amendment right to remain silent and not incriminate him/herself. The company does not have a Fifth Amendment right. As such, it does not have the right to refuse the production of documents on those grounds. There may be other grounds – such as the documents are protected under attorney/client privilege or under the work-product doctrine. A company does not have the right to deny access under a court-approved search warrant. In the case of the company’s directors, each director would have the right to refuse to testify if such testimony would tend to incriminate that particular director. That would, however, be on an individual basis.
4.4. **When will a company be informed that it is or can become prosecuted?**

In most cases, a company will become aware at some point that it is under investigation. In those instances, counsel will communicate with the prosecutor and may be given a time frame in which the prosecution will make a decision. During those stages, there are often negotiations taking place to resolve the matter without charging the company.

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. The directors, managers or employees could be witnesses in the proceedings against the company. The only exception would be if these individuals were subject, targets, or such testimony would violate their Fifth Amendment right not to incriminate themselves. In that case, the witness could possibly be called, but would have to assert his/her individual privilege.

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

Rules in our jurisdiction allow for such proceedings to take place.

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

No. The criminal proceeding will essentially be the same. The only difference would be that the corporation could have a corporate representative at counsel table.

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?**

Prosecutors do have discretion in charging decisions and on whether to impose sanctions against the company. If a prosecutor, for example, decides to bring criminal charges, sentencing and financial sanctions then fall within the responsibility of the court. The court can, however, take into consideration any recommendations from the prosecutor, but is not obligated to do so.

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

Once a company has been charged, it remains a defendant/party to the proceedings. That status remains from the date the charges are filed throughout the trial proceedings.
5.3. **When will the company been informed that the prosecution is considering to impose sanctions or have sanctions imposed?**

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

If criminal sanctions will be imposed, the company has the right to trial by jury, and the prosecutor must prove the elements of the crime under the standard of beyond a reasonable doubt. If criminal charges have not been filed, the company nonetheless still has the right to due process in which the civil litigant must prove their case against the company under a lesser standard.

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

That, too, is possible under civil as well as criminal sanctions.

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

No.

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?**

The only instance in which actions of one individual can be held against another individual is in a criminal conspiracy. Under the laws in this jurisdiction, an individual who voluntarily joins a criminal enterprise can be charged under conspiracy and the actions done in furtherance of the conspiracy can be held against the other co-conspirators.

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

Under the conspiracy laws, two or more persons must (1) conspire to either commit an offense against the United States or to defraud the United States, or against any agency thereof; (2) the conspiracy must be for an unlawful purpose, and (3) an overt act must be committed in furtherance of that conspiracy.
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?**

Negligent hiring, inadequate training, and lack of supervision may be factors that a prosecutor could review in making a charging decision. Such failure in and of itself would not create criminal liability against the company, unless such actions caused the criminal liability.

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

I would highly recommend the implementation of an effective corporate compliance program. While such a program may not in and of itself eliminate the criminal liability of an individual who decides to commit a crime, a compliance program would set the tone for an environment of compliance and, accordingly, establish a core value for that company. If it is done correctly, the exposure to a company that operates as a good corporate citizen could help to exclude or minimize criminal liability of a rogue employee, and, thus, reduce the risks to the directors.
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.

Yes. Companies operating in California are subject to the criminal laws of both the United States and the State of California. Under both U.S. (“federal”) and California (“state”) law, companies are considered legal “persons” and are subject to prosecution for all criminal offenses applicable to individuals (unless otherwise exempted by statute). See 18 U.S.C. § 2510(6) (federal); and CAL. PENAL CODE § 7 (state). The principal distinction between prosecutions of companies and individuals relates to the issue of punishment: unlike an individual offender, a company is not subject to imprisonment.

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

There are two major forms of punishment that can be imposed on companies after conviction: (1) a fine in an amount determined by the offense statute, see 18 U.S.C. § 3571 (federal), CAL. PENAL CODE § 672 (state); and (2) an order to make financial restitution to any victim of the criminal conduct, see 18 U.S.C. § 3663 (federal), CAL. PENAL CODE § 1202.4 (state). A company must be formally charged and convicted of

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56 “U.S.C.” stands for the “United States Code,” the uniform substantive law code of the United States applicable in all jurisdictions.

57 “Cal. Penal Code” stands for the substantive criminal code that applies exclusively within the State of California.
a crime before any criminal sanction is imposed. 18 U.S.C. § 3551 (federal); CAL. PENAL CODE § 1191 (state).

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.

In addition to these criminal sanctions, there are a number of potential collateral consequences that can result from criminal conviction. Criminal conviction may lead to “debarment,” where a company is precluded from participating in certain in federal and state-funded programs. See, e.g., 42 U.S.C. § 1320a-7(a)-(b) (allowing for mandatory and permissive exclusion from participating in federal health care programs for certain criminal convictions, including prior conviction for health care fraud) (federal). Conviction can also result in the revocation of a business license or permit. See, e.g., CAL. H&S CODE§ 11106 (authorizing revocation of a permit upon conviction of federal or state offense) (state).

The commission of a criminal offense can also result in civil liability. Many criminal offense statutes expressly provide for civil monetary penalties in addition to criminal punishment. See, e.g., 15 U.S.C. §§ 1; 12-27 (federal antitrust offenses); 42 U.S.C. §7401 (federal pollution statute); 18 U.S.C. §§ 1961 et seq. (federal racketeering offenses); CAL. BUS. & PROF. CODE, §§ 16702 et seq. (state antitrust offenses), §§ 17200 et seq. (state unfair competition offenses), §§ 17500 et seq. (false advertising offenses). However, these sanctions may only be imposed on a company after separate civil proceedings.

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.

As noted in 1.2 above, the principal criminal law sanctions on companies are fines and restitution. The maximum fine that can be imposed for a specific crime is generally established by statute. See, e.g., 18 U.S.C. § 1031 (establishing a maximum fine of $10,000,000 for conviction of multiple acts of fraud against the U.S.) (federal); and CAL. PENAL CODE § 186.10 (establishing a maximum fine of $500,000 or five times the value of the property, whichever is greater, for a second or subsequent violation of money laundering statute) (state). In the absence of any specific maximum amount specified in the offense statute, federal law provides that companies may be fined any

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58 Reference to California’s “Health & Safety Code” relating to the regulation of drugs, alcohol and certain medicines in California.

59 Reference to California’s “Business and Professions Code” relating to the regulation of business organizations in California.
amount up to twice the amount of the pecuniary gain or loss from the offense, or a maximum of $500,000 for serious crimes. 18 U.S.C. § 3571. Under state law, if there is no maximum fine set by statute, then a company is subject to a fine of up to $10,000 per offense. CAL. PENAL CODE § 672.

The court determines the amount of any fine after conviction. Under federal law, the fine is calculated based on either the victim’s loss or the company’s gain multiplied by a factor set forth in the United States Sentencing Guidelines (“U.S.S.G.”). See 18 U.S.C. §§ 3571-72 (federal statutes outlining factors to be considered). Under state law, the court in its discretion determines the appropriate fine, limited only by the statutory maximum. See, e.g., CAL. PENAL CODE § 186.11(e) (7) (imposition of fines for fraud-related crimes) (state).

The amount of restitution is determined by the pecuniary or economic loss suffered by the victim of the offense. See 18 U.S.C. §§ 3663, 3663A (federal); CAL. PENAL CODE § 1202.4 (state).

In certain circumstances, additional sanctions may be imposed on a company. For example, a company may be placed under the supervision of the court system for a specified term during which time period it can be restrained from conducting certain business activities or compelled to take certain remedial action. See 18 U.S.C. § 3563 (federal statute authorizing terms of probation); CAL. PENAL CODE § 1203 (state statute authorizing terms of probation). In addition, a company can have property forfeited if it was used in the commission of an offense, or it represents the proceeds of unlawful activity. See 18 U.S.C. § 982 (federal forfeiture statute); CAL. PENAL CODE § 186 (state forfeiture statute).

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

All criminal law sanctions require that the underlying federal or state crime be proven “beyond a reasonable doubt.” In re Winship, 397 U.S. 358, 364 (1970) (due process requires that prosecutor prove every element of the charged crime beyond a reasonable doubt). However, sentencing factors, such as the amount of loss associated with a crime for purposes of calculating a fine or restitution order, may be proven at a sentencing hearing by a lesser standard, unless doing so would increase the criminal penalty beyond the prescribed statutory maximum for the offense of conviction. Apprendi v. New Jersey, 530 U.S. 466, 490-92 (2000).

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.

No.
2.4. How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions been attributed if the individual violated only internal (but not statutory) rules or regulations?

A company can be held criminally responsible for the illegal acts of its directors, managers and employees under the common law theory of *respondeat superior*. Accordingly, a company can be prosecuted for any illegal acts of an employee that were (1) within the scope of employment and (2) intended, at least in part, to benefit the company. *See*, e.g., *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (federal), and *W.T. Grant Co. v. Superior Court*, 23 Cal. App. 3d 284, 287 (1972) (state).

The violation of internal company rules and regulations is not sufficient in and of itself to constitute a crime, unless the same violation (e.g., policy requiring disclosure of hazardous condition) also constitutes a statutory offense. *See*, e.g., *CAL. PENAL CODE* § 387 (making it a criminal offense for a company or its “manager” to conceal a danger subject to regulatory authority) (state).

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

The *mens rea* of any culpable employee or agent is imputed to the company. Under federal law, a company is presumed to possess the combined knowledge of all its individual employees under the “collective knowledge doctrine.” *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987). However, a company can only be convicted of a “specific intent crime” — i.e., a crime that requires a culpable state of mind greater than that simply required to commit the *actus reus* — if some agent of the company satisfies this heightened *mens rea* standard. *See*, e.g., *W.T. Grant Co. v. Superior Court*, 23 Cal. App. 3d 284 (1972) (state).

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.

Both federal and state law recognizes certain “strict liability” offenses that do not require a *mens rea*. These offenses are usually characterized as less serious “regulatory” crimes that involve public welfare and include offenses such as: (1) harm to wildlife and natural resources, *see*, e.g., 16 U.S.C. § 707(a) (federal strict liability crime for killing migratory birds); *CAL. F&G CODE* §§ 650, 12002 (state strict liability crimes related to discharging pollutants into waters); (2) misbranding food or medicines, *see*, e.g., 21 U.S.C. §§ 301 et seq. (federal strict liability crimes related to food and medicines); (3) business license activities. *See*, e.g., *People v. Baumgart*, 218 Cal. App. 3d 1207 (1990) (conviction for sale of unqualified securities) (state).

Most crimes, however, require proof of an intentional or “knowing” act, often coupled with a “specific intent” to defraud or harm. *See*, e.g., 18 U.S.C. § 1031 (criminalizing

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60 Refers to California’s “Fish & Game Code” relating to the regulation of wildlife within the state.
schemes executed with the intent “to defraud the United States”) (federal); **Cal. Penal Code** § 186.9 (criminalizing financial transactions with the “specific intent” to facilitate criminal activity) (state). A crime is committed “knowingly” if the offender is aware of what he is doing and does not act (or fails to act) through mistake or accident. However, the offender need not know that the acts or omissions were unlawful. *See United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir. 2001) (federal); **Cal. Penal Code** § 7 (statutory definition of “knowingly”) (state).

Convictions for tax violations require proof that the violation was “willful,” that is, that the acts were done voluntarily and intentionally and with the purpose of violating a known legal duty. *Cheek v. United States*, 498 U.S. 192, 199 (1991) (federal); *People v. Hagen*, 19 Cal. 4th 652, 666 (1998) (state).

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

No. Neither federal nor state law requires “consistent verdicts,” and accordingly, even if the individual offender is acquitted, the company may nonetheless be convicted. *See United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974, 977-78 (9th Cir. 1994) (federal); **Cal. Penal Code** §§ 970, 1160 (providing for separate verdicts in a case with multiple criminal defendants) (state).

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

Because companies are considered persons under the law, any defenses available to an individual are generally available to a company. Accordingly, a company may rely on all constitutional and statutory defenses (such as jurisdictional defects or because the prosecution is barred by the statute of limitations), or assert any defense that negates the *mens rea* of the culpable employee. In addition, as noted in answer to question 2.4, a company cannot be responsible for the acts of employees if they do not meet the agency standards of *respondeat superior*. In certain circumstances, a company can assert that it justifiably relied on administrative rulings authorizing its conduct (as in the case with certain environmental crimes).

In limited circumstances, dissolution of the company may be a defense to prosecution. However, successor corporations can be held responsible for the crimes of the predecessor company. *Melrose Distillers v. United States*, 359 U.S. 271, 274 (1959) (dissolution of subsidiaries did not abate antitrust prosecution when entities became divisions of parent corporation).
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?

No. Company policies and controls aimed at preventing illegal conduct, and even explicit instructions to employees not to engage in certain conduct, generally do not establish a legal defense to criminal charges. See, e.g., United States v. Potter, 463 F.3d 9, 25-26 (1st Cir. 2006) (federal). However, such actions may be helpful and even determinative in persuading the prosecution not to exercise its discretion to charge the company with criminal wrongdoing.

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

Yes. Upon application of the prosecutor, both federal and state courts may restrain assets *pendente lite* to preserve them for future disposition. See, e.g., 18 U.S.C. § 1963(d) (authorizing restraining orders against property subject to forfeiture under federal racketeering laws); **Cal. Penal Code** § 186.6 (authorizing restraining orders to preserve property subject to forfeiture under state profiteering laws).

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

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


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.

As noted in the answer to 1.3, companies can also be subject to civil liability. The primary sanctions are monetary penalties and injunctive relief.
3.2. **Is the imposition of these sanctions confined to certain types of offences? Describe the most relevant sanctions and types of offences?**

Yes. Civil sanctions must have a basis in statutory law. The major areas of government enforcement activity that contain both criminal punishment and civil monetary penalties include antitrust or unfair competition violations, government fraud, environmental or pollution regulations, and racketeering or criminal enterprise violations. All of these statutes provide for the imposition of civil monetary penalties in addition to potential criminal sanctions. See answer to 1.3.

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

See answer to question 2.8

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

Yes. To the extent that there are separate civil claims made against a corporation by private parties or government agencies, those proceedings can go forward during a criminal investigation. However, it is common for both government agencies and the company to request a stay in civil proceedings pending the outcome of any criminal investigation or prosecution.

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. Under both federal and state law, the decision to prosecute a corporation depends ultimately on the discretion of the prosecutor. See, e.g., *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (charging decision is discretionary); *Nader v. Saxbe*, 497 F.2d 676, 679 n. 18 & n. 19 (D.C. Cir. 1974) (discretion exists by virtue of the prosecutor’s status as a member of the Executive Branch) (federal); *People v. Municipal Court (Pellegrino)*, 27 Cal. App. 3d 193 (1972) (state).

For federal crimes, this prosecutorial discretion is guided by various policy statements issued by the U. S. Department of Justice. The most recent policy formulation identifies a number of different factors to be taken into account by prosecutors, including: (i) the strength of the evidence; (ii) the deterrent effect of a prosecution; (iii) the pervasiveness of the wrongdoing inside the company; (iv) remedial actions taken by the company; (v) the company’s history of similar conduct; (vi) the existence and

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61 *See Memorandum of Deputy Attorney General Paul J. McNulty, Principles of Federal Prosecution of Business Organizations*, December 12, 2006 (“McNulty Memo”). The McNulty Memo is a non-binding policy statement regarding the prosecution of companies that provides guidance to federal prosecutors throughout the United States.
adequacy of the company’s preexisting compliance program; (vii) collateral consequences of the prosecution, including harm to innocent shareholders; and (viii) the company’s level of cooperation with the government during the investigations.

For state crimes, the exercise of prosecutorial discretion is guided by the formal or informal policies established by the local prosecuting authority and as a result can vary significantly within the state. Nonetheless, many of the same federal policy factors play a role in the exercise of discretion by state prosecutors.

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

Neither federal nor state law recognizes a formal investigative stage of criminal proceedings, and there is therefore no legal requirement that a company be notified that it is a suspect in an investigation.

However, most federal — and some state — investigations are conducted with the aid of a Grand Jury, a group of citizens empanelled by the judiciary with the power to compel testimony and the production of documents. As a matter of policy, a federal prosecutor may notify a company that it is a “target” or “subject” of a Grand Jury investigation, but there is no legal requirement of notification. There is no equivalent state prosecution policy.

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?**

A company itself does not have a “right to remain silent” (the privilege against self-incrimination contained in the Fifth Amendment to the U.S. Constitution). *See Braswell v. United States*, 487 U.S. 99, 102 (1988) (federal); *Avant! Corp. v. Superior Court*, 79 Cal. App. 4th 876, 883-86 (2000) (state). As a consequence, a company cannot prevent its employees or agents from providing testimony and does not have a right to refuse to produce documents. However, any constituent member of a company, including its directors, has a right to refuse to testify if doing so could incriminate them personally or subject them individually to the threat of criminal prosecution.

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

A company is formally notified that it will be prosecuted by way of an official written accusatory document, called variously an “indictment,” “information,” or “complaint.” The document identifies the specific offense alleged, the identity of the accused, and is
filed with the court. See FED. R. CRIM. P. 62 7(c)(1) (an indictment or information is “a plain, concise, and definite written statement of the essential facts constituting the offense charged and [which] must be signed by an attorney for the government.”) (federal); CAL. PENAL CODE § 950 (an accusatory pleading must contain title of the court, the names of the parties and a “statement of the public offense or offenses charged therein”) (state).

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, as noted more fully in the answer to 4.3.

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

Generally, two or more parties may be jointly prosecuted in a criminal action if they participate in the same act or series of acts constituting an offense. FED. R. CRIM. P. 8(b) (federal); CAL. PENAL CODE § 1098 (state). However, there is no rule that requires a joint prosecution and the decision is generally left to the discretion of the prosecutor.

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, except that under both federal and state law, an order of restitution is required whenever a victim has suffered economic harm as a result of the crime. 18 U.S.C. § 3663A (federal); CAL. PENAL CODE § 1202.4 (state).

See also the answers to questions 2.1 and 4.1.

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

See answer to question 4.2.

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62 Refers to the “Federal Rules of Criminal Procedure” which apply to all federal criminal proceedings throughout the United States.
5.3. **When will the company been informed that the prosecution is considering to impose sanctions or have sanctions imposed?**

See answer to question 4.4.

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

As a legal “person,” a company is entitled to the same procedural rights as an accused individual. These rights include the right to counsel, a right to be present at all proceedings and examine the evidence, the right to present and cross-examine witnesses, and a right to a public, speedy and fair trial by an impartial jury.

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

See answer to question 4.6

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

See answer to question 4.7.

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?**

Yes. In certain limited circumstances, a director or manager of a company may be held criminally liable for “strict liability” or regulatory offenses committed by the company. *See United States v. Park*, 421 U.S. 658 (1975) (president and chief executive officer of a national food retailer individually charged with violations of the federal Food, Drug and Cosmetic Act) (federal); *People v. Conway*, 42 Cal. App. 3d 875 (1974) (president of automobile dealership criminally convicted for the false advertising statements of his employees) (state).

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

The manager or director of a company may be held individually responsible if by virtue of his position within the company he has responsibility or authority either to prevent or correct the violation, and yet fails to do so. *See United States v. Park*, 421 U.S. 658 (1975) (federal); *People v. Conway*, 42 Cal. App. 3d 875 (1974) (state).
California also has a statute entitled the “Corporate Criminal Liability Act” which makes it a crime for a company or a manager to conceal a danger subject to regulatory authority. **CAL. PENAL CODE § 387.**

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?**

Yes.

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

A company operating in California, particularly one that is regulated by statute qualifying as “public safety” or “regulatory law,” should work closely with counsel to plan and implement corporate compliance programs sufficient to prevent unlawful activities and to detect and remedy any violations that do occur. The prompt detection of potential offenses and swift remedial action, along with voluntary disclosure to the authorities and cooperation in any investigation, can in many circumstances minimize the risk of criminal prosecution.
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.

Under Colorado state law, a corporation may be prosecuted as an individual offender. The fundamental difference is the penalty faced. Needless to say, a corporation may not be incarcerated. It is subjected to fines.

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 principle sanction a corporation faces in Colorado is the payment of fines and restitution. Whatever the restitution in a case, fines can be quite high. Other collateral consequences (that are not truly “sanctions”) exist. For example, a corporate conviction may affect the corporation’s ability to contract with the government or to keep licenses required of it to conduct business.

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.

“Sanctions” other than criminal sanctions usually are available to the government against a corporate offender, but typically as a result of parallel civil proceedings. The most obvious civil “sanction” is quite simply a claim for damages, but other remedies are often employed, including injunctions and forfeitures.
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.

Under Colorado law, the most common potential sanction against a corporation is a fine. A fine of up to $1 million per conviction is possible, depending on the charge.

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

All that is required before a court may impose sentence of a fine is a conviction – by either a corporate plea or a conviction at trial.

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.

No. If the prosecution can prove the elements of any offense against any particular individual within a corporation, that individual will be convicted of the offense, despite “corporate hierarchy.”

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

Generally, if acts or omissions are conducted within the scope of employment, they will be considered corporate acts or omissions.

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

Mens rea of a corporation is established by the mens rea of its principals.

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.

In general, mens rea is a required element in any prosecution, including corporate prosecutions. However, a number of strict liability crimes do exist.
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

As a practical matter, the bad conduct of a corporate principal must be proven to convict a corporation. However, the principal himself need not be actually convicted as a prerequisite to a corporate conviction.

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

Under Colorado law, if a corporation reports criminal activity, it is discharged from criminal liability. The reporting of criminal activity by a corporation, where the corporation is potentially subject to liability, should be conducted in collaboration with counsel.

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?**

It is not a defense to an individual that he was working within the scope of his employment during a criminal episode. Nor is it a defense to a corporation that it is properly structured as such under Colorado law.

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

Certain “sanctions” may be imposed during the course of an investigation (i.e. before a conviction); however, these types of sanctions are often the result of parallel civil proceedings. They typically include temporary restraining orders (freezing bank accounts, for example), forfeitures of property, and the likes.

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

Yes. See 2.9 above.

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

There usually must be a tie between a parent corporation and its subsidiary, other than simple ownership, for the parent to be convicted of a crime based on the conduct of the subsidiary.
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.

The other types of “sanctions” are civil in nature. They most typically involve civil damages, injunctions and forfeiture of property. Collateral consequences to a corporate conviction also exist. For example, a conviction may affect a company’s ability to maintain certain of its licenses or permits. A conviction may also subject a corporation to debarment, preventing contracts with governmental entities.

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

Injunction is the most prevalent civil “sanction” against a corporate entity. In the securities context, the government may freeze a corporation’s accounts or prevent a corporation from conducting business in aspects material to corporate existence.

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

The defenses are both legally and factually driven, and vary greatly from case to case.

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

Yes, because they usually result from civil proceedings independent of a criminal investigation.

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?

A prosecutor does have discretion to forebear from investigating or prosecuting a case. While the factors a prosecutor will consider are many, most prosecutors want to know that the corporation’s individuals were not acting with bad intent.

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

There is no formal time at which the company is deemed “a suspect” in criminal activity.
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?

These are very complex questions that require context. In brief, corporations have fewer rights than individuals. However, because corporations act through individuals, a company may sometimes ride on coattails of an individual’s rights.

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

There is no formal point in time at which a company must be informed of an investigation, other than the point at which it is actually indicted or charged. However, as a practical matter, companies learn of criminal investigations before charges are filed. Typically, an investigation is revealed by a subpoena for documents on the company, or by the company’s employees being interviewed by law enforcement or subpoenaed to a grand jury for testimony.

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. As a practical matter, however, most individuals will exercise their 5th Amendment rights against self-incrimination when called to testify against a corporation, if they have liability themselves. Prosecutor’s often cut deals with individuals to testify against corporations to prevent this problem.

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

Whether a company and individual “targets” are tried separately or together is mainly a function of the joiner and severance rules under the Colorado Rules of Criminal Procedure. It is not atypical for a prosecutor to charge or indict a company and individuals in the same case.

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

There are no procedural differences.
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?

The prosecution’s discretion is limited upon the entry of a conviction. In normal circumstances, the court will decide the sentence upon a corporate conviction. However, in some state jurisdictions, the court will agree to be bound by sentencing stipulations or a prosecutor’s sentencing recommendations.

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

See 4.2 above.

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

See 4.2 above.

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

Usually, a company enjoys all of the rights afforded under the Rules of Criminal Procedure and the Rules of Civil Procedure. Some fact specific statutes allow an agency to proceed against a company for an injunction under more abbreviated procedural circumstances.

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

See 4.6 above.

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

See 4.7 above.

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?

Yes, although generally a director or officer must at least have some knowledge of bad conduct and must have condoned the conduct.
6.2. **What are the legal requirements for a criminal liability of directors and managers for offences committed by others?**

As with any crime, the prosecutor must be able to prove the elements of the offense charged against the director or officer beyond a reasonable doubt.

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?**

Possibly. The mens rea and actus reus required to prove the crime charged will dictate whether a failure to adequately supervise may subject the director or officer to criminal liability.

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

In general, directors and officers must stay adequately informed as to what is going on within a company, and they must act in good faith to curtail any bad conduct discovered, or to prevent future bad conduct. This area is very complex and is subject to specific rules within different fields of law. (For example, a corporate officer may be subjected to criminal liability by a failure to report certain job perks or conflicts of interest.) In brief, corporate officers and directors should work closely with counsel in all aspects of their jobs to be sure they are not “innocently” violating criminal laws.
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.

Yes, a company may be prosecuted in this jurisdiction in a similar way as an individual offender. At common law, a corporation could not face criminal charges. Corporate criminal liability, however, is a twentieth-century innovation, and by the turn of the century courts began to abandon the doctrine of corporate immunity from criminal prosecution. The current standards of corporate criminal liability have been borrowed directly from the doctrine of respondeat superior. Julie R. O’Sullivan, Federal White Collar Crimes 189 (Thomson West 2003).

In the case of New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 29 S. Ct. 304 (1909), the Supreme Court addressed the issue of whether or not a corporation could be held criminally liable for criminal offenses. The argument against such liability is that to punish the corporation for criminal offenses of its agents is in reality to punish innocent stockholders, depriving them of property without due process. The Supreme Court disagreed.

The court held that “applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him [ ], may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.” Id.
The court noted that there are some crimes which, in their nature, cannot be committed by corporations. For those wherein the crime consists in purposely doing the things prohibited by statute, though, the court could “see no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them.”\textit{Id.}

The primary difference between corporate liability and individual liability is the fact that organizations can act only through agents. \textit{See, e.g., Kuebler v. Equitable Life Assur. Soc’y of the United States}, 219 Mich. App. 1 (1996). While individuals are liable for their individual actions, organizations, such as a corporation, can only be vicariously liable for certain actions of their agents.

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

Under the Federal Sentencing Guidelines, an organization may be forced to pay restitution or remedial damages, pay fines, agree to deferred prosecution and requirements that go therewith, or be put on Organizational Probation. (Federal Sentencing Guidelines, Ch. 8, Pt. B-D).

Restitution payments, when imposed upon a corporation, are meant to be remedial, not punitive. According to the U.S. Sentencing Guidelines, convicted organizations should be required to remedy any harm caused by their offense. U.S.S.G. Ch. 8, Introductory Commentary. This generally takes the form of an order for restitution “for the full amount of the victim’s loss.”\textit{Id.} \S 8B1.1. Restitution would \textit{not} be proper “when full restitution has been made,” when the court finds that “the number of identifiable victims is so large as to make restitution impracticable,” or when “determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.”\textit{Id.} 8B1.1(b).

Fines, on the other hand, are meant to be punitive. The fine provisions begin by providing for what has been known as the “organizational death penalty.” Where a court determines that an organization “operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.”\textit{Id.} \S 8C1.1. Fines, unlike restitution and organizational probation, are only addressed in the guidelines for certain offenses. For instance, environmental offenses, food and drug violations, RICO violations, and export control violations are \textit{not} presently covered by the fine guidelines, and fines for such offenses must be determined by reference to traditional criteria.\textit{Id.} \S 8C1.1. \S 8C2.1 of the guidelines lays out the applicability of fines for covered offenses.\textit{§} 8D1.1 of the guidelines pertains to the imposition of organizational probation. This section applies to all organizations convicted of federal felonies or Class A misdemeanors. A term of organizational probation is \textit{required} in many circumstances,
the two most common being (1) where immediate payment is excused, if probation is necessary to ensure that restitutionary or remedial obligations are met or that the fine is paid or (2) if, at the time of sentencing, an organization having 50 or more employees does not have an effective compliance program in place. Id. § 8D1.1(a)(1),(2),(3).

The probationary period, in the case of a felony, must be at least one year but not more than five years. Id. § 8D1.2(a)(1). The probation must include conditions of probation barring the organization from committing further crimes and if an organization does violate its probation, the court may extend the term of probation, impose more restrictive conditions, or revoke probation and resentence. Id. § 8D1.5.

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.

As noted above in answer 1.2, fines are permissible and called for under the federal sentencing guidelines. Under the section on fines, the guidelines also call for disgorgement when appropriate. § 8C2.9 states that “[t]he court shall add to the fine . . . any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures.” Forfeiture of property is called for by §§ 8F1.1 and 5E1.4. According to these sections, forfeiture is to be imposed upon a convicted defendant as provided by statute. This could be in cases of racketeering, illegal substances, or any other statutorily provided offenses. The guidelines do not explicitly call for dissolution of a company, but, as mentioned in answer 1.2, courts can impose fines that are so weighty they effectively act as an organizational “death penalty.” This is permitted when the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means. § 8C1.1. In such instances, the fine shall be set at an amount sufficient to divest the organization of all its net assets.

A company could also be forced to conduct community service as well. § 8B1.3.

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.

Under the Federal Sentencing Guidelines, an organization may be forced to pay restitution, pay fines, or be put on community service. According to the Federal Sentencing Guidelines, fines can range from $5,000 to the extreme of $72,500,000, § 8C2.4, and can also include disgorgement for amounts that the company received unjustly but would not otherwise be divested of through fines. Organizational probation can be imposed for a period of one year through five years. If an organization then violates this probation, their sentence can be reinstated, they can be forced to pay a fine, or their probationary period may be extended. Probation is
most often imposed when immediate payment is excused, if probation is necessary to ensure that restitutionary or remedial obligations are met or that the fine is paid, or in cases in which, at the time of sentencing, an organization having 50 or more employees does not have an effective compliance program in place. Id. § 8D1.1(a)(1),(2),(3). Restitution will be limited to the amount of loss incurred by the damaged party.

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

Restitution, being remedial in nature and not punitive, will be based upon the amount of loss to the damaged party. Such a sanction requires that there be a damaged party, that that damaged party has not yet received full restitution, and that there be a clearly identifiable amount of victims that is not so large as to render restitution impracticable. The Judge must determine the amount of loss at sentencing via a preponderance of evidence standard.

Probation must include the conditions of probation barring the organization from committing further crimes during the probationary period and providing for restitution or victim notification unless it would be unreasonable to do so. Other requirements may be imposed as deemed necessary and reasonable. These permissible requirements include that the organization publicize the nature of the offense committed, the fact of conviction, and the nature of the punishment imposed, as well as the steps that will be taken to prevent the recurrence of similar offenses. U.S.S.G. § 8C3.2(a). Also, if probation is imposed to ensure that an organization meets its restitutionary or fine obligations, the court may require that certain steps are taken such as periodic submissions to the court reporting on the organization’s financial conditions and results of business operations accounting for the disposition of funds received. Id. § 8D1.4(b)(2). A court could also require that an organization develops and submits to the court an effective compliance program, to notify its employees and shareholders of its criminal behavior and new compliance program, to make periodic reports to the court or probation officer regarding the progress of the compliance program, and to submit itself to certain types of examination of accounting books and corporate records. Id. § 8D1.4(b)(2).

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.**

Liability will exist when the actor is an agent of the company acting within the scope of their employment, or their apparent authority, in order to benefit the company. The apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204–05 (3d Cir. 1970).

Further, it is not necessary that the person so acting is a high-ranking person within the corporation. A corporation may be held liable for the actions of employees at the lowest rungs of its hierarchy, so long as they are acting within the scope of their
employment. “It is the function delegated to the corporate officer or agent which determines his power to engage the corporation in a criminal transaction rather than the title or position he holds.” Kathleen F. Brickey, Corporate Criminal Liability: A Primer for Corporate Counsel, 40 BUS. LAWYER 129, 131 (1984). A corporation may be held liable for actions of its salesman, American Radiator, supra; its back hoe operators, U.S. v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975); and even its truck drivers, Steere Tank Lines v. United States, 330 F.2d 719 (5th Cir. 1963), so long as those agents are acting within the scope of their employment, or their apparent authority, for the benefit of the company.

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

Acts or omissions of individuals may be attributed to a company under the doctrines of vicarious liability and Respondeat Superior. This is done for two reasons: 1) to distribute loss, and 2) to promote better supervision of employees. Harvey L. Pitt & Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 GEO. L.J. 1559, 1562–74.

The theory of loss distribution is premised on the belief that respondeat superior has proven to be “the most convenient and efficient way of ensuring that persons injured in the course of business enterprise do not go uncompensated.” The risks of an employee’s misconduct are then properly allocated to the employer as a cost of engaging in the enterprise. Also, employers are in the best position to anticipate harm and insure against the resulting losses. Id.

Secondly, vicarious liability is linked to the control a company exercises over its employees. Id. Thus, if a company will be held liable for the actions of their employees, they will be more likely to exert control and supervision over the actions of their employees. This will promote better supervision of employees and help to mitigate losses.

A corporation will be found vicariously liable for the torts that its employees commit while acting “within the scope of [their] employment.” Therefore, the time, place, function, and purpose of the employee’s conduct must be examined to determine the applicability of vicarious liability.

As noted previously, the third circuit has stated that the test of liability is that liability will exist when the actor is an agent of the company acting within the scope of their employment, or their apparent authority, in order to benefit the company. The apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct. United States v. American Radiator & Standard Sanitary Corp., supra. This applies to all levels of agents within a corporation.
As to when individuals within a company violate only internal, but not statutory, rules or regulations, it would stand to reason that such violations of mere internal violations would not impute any criminal liability upon the company if no crimes have been committed. If those internal rules, however, implicate a statutory regulation, or if the rule merely memorializes a law into internal rules, then any criminal offences could be held against the company if the American Radiator test is met.

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

Traditionally, the early view was that corporations were incapable of having an “evil intent,” or mens rea. It is now established, however, that corporations may be liable for crimes requiring mens rea. This is accomplished by imputing both the act and the intent of the corporate agent who committed the crime onto the corporation under the principles of respondeat superior. O’Sullivan, supra at 210.

This principle is reigned in, however, by only imputing an agent’s illegal acts and intents to the corporation when the agent’s actions were done to effectuate a benefit to the corporation. It was held in the case of United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998) that “an agent’s acts will not be imputed to the principal in a criminal case unless the agent acts with the intent to benefit the principal.” *Id.* This having been said, even if an agent is motivated partly by self-interest, indeed, even “where self-interest is the predominant motive,” his actions lie within the scope of employment and may be imputed to the corporation so long as the agent is prompted to act by the principal’s business purposes to “any appreciable extent.” *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 236 & comment b (1957)).

The case of United States v. Sun-Diamond Growers of California dealt with the issue of when an agent’s intent can be imputed upon the principle company. 138 F.3d 961 (D.C. Cir. 1998). In that case the employee-agent acted illegally. In doing so he even defrauded the company he was working for. His reason for doing so was to benefit himself professionally, but also to benefit his company by aiding a client. The court implied that had Sun-Diamond, the company, been a complete victim of its client’s acts and had the acts not benefited the company at all, imputation of liability to the company would not be proper. But where the acts were done to benefit the company, even if they also defrauded the company itself in doing so, the company could still be liable. The justification for such vicarious liability was “to increase incentives for corporations to monitor and prevent illegal employee conduct.” *Id.*

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.**

Under certain circumstances, absent explicit language to the contrary, it will be interpreted that Congress intended Strict Liability to be imposed. The Supreme Court has held that where “dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is
aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.” United States v. International Minerals & Chem. Corp., 402 U.S. 558, 91 S.Ct. 1697 (1971). Such strict liability offenses generally fall within what has come to be known as the “public welfare doctrine.”

Examples of such “dangerous and deleterious devices or products” include cases dealing with illegal drugs, United States v. Balint, 258 U.S. 250, 42 S.Ct. 301 (1922); cases dealing with hand grenades, United States v. Freed, 401 U.S. 602, 91 S.Ct. 1112 (1971); and cases dealing with sulfuric acid or other “obnoxious waste materials.” United States v. International Minerals & Chem. Corp., 402 U.S. 558, 91 S.Ct. 1697 (1971).

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

It is not necessary to identify and/or convict the individual offender in order to prosecute a company. It has been stated: “Nor has it been necessary for the prosecutor to identify the actual agent who committed the crime if the prosecutor can show that some person within the corporation must have so acted. Even more significantly, inconsistent verdicts are tolerated under which the corporation is convicted but all conceivable individual agents are acquitted.” John C. Coffee, Jr., Corporate Criminal Responsibility, in Encyclopedia of Crime & Justice 253, 255–56 (S. Kadish ed., 1983). Further, “some decisions have accepted a theory of ‘collective knowledge,’ under which no single individual had the requisite knowledge to satisfy the intent requirement, but various individuals within the organization possessed all the elements of such knowledge collectively.” Id.

The above played itself out in the case of United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987). In that case, all of the employees who were indicted with the corporation-bank were acquitted of their charges, but the Bank was found guilty for the aggregate actions of those employees. The circuit court held that because of the bank’s compartmentalized structure in which the actions of several actors in different roles led to the illegal actions in question, “the [district] court’s collective knowledge instruction was not only proper but necessary.”

Further, it has been held that specific intent of employee’s can be established by circumstantial evidence, including the collective knowledge of a company or organization. Schwab v. Phillip Morris USA, Inc., 449 F.Supp. 2d 992 (E.D. N.Y. 2006).

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

A corporation may claim the defense of lack of general intent or the lack of specific intent. They may also claim a “good faith defense” in cases requiring specific intent. In cases requiring the government to prove specific intent — such as to defraud —, if the
corporation can prove that they acted in good faith, they may show that the element of intent was not present. Another variant of the “good faith defense” is the “good faith reliance on counsel defense.” If, in charges that require specific intent, the corporation can show that they acted in good faith on advice of counsel or another expert, they may show that the specific intent element was not met. See, United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994) (“A good faith defense is the affirmative converse of the government’s burden of proving . . . intent to commit a crime. Acquittal . . . is mandatory because a finding of good faith precludes a finding of fraudulent intent.”).

In cases requiring specific intent, a corporation cannot rely on the defense of lack of intent if they have employed “willful blindness,” “conscious avoidance,” or “ostrich” techniques. Therefore, if a corporation deliberately “closes their eyes” to actions going around them, or if they employ “willful blindness” so that they do not need to take action on illegal conduct, the specific intent element can be imputed upon them. O’Sullivan, supra at 114.

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?

A company may mitigate their ultimate punishment if they can establish the existence of an effective compliance and ethics program, as well as carrying out self-reporting, cooperation, or acceptance of responsibility. Introductory Commentary to Chapter 8 of the Federal Sentencing Guidelines. § 8B2.1 of the Federal Sentencing Guidelines lays out the steps needed to form an effective compliance and ethic program. These steps include, inter alia, the company exercising due diligence to prevent and detect criminal conduct, promoting an organizational culture that encourages ethical conduct and a commitment to compliance with the law, the establishment of standards and procedures to prevent and detect criminal conduct, and the establishment of effective training programs for individuals in roles responsible for compliance. Such steps could affect a company’s penalties after a conviction. The Sentencing Commission has stated that “prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.” Id. § 8b2.1, commentary.

With this said, while such organization and control may aid a corporation in their defense, it alone will likely not be preclusion to liability. “A corporation is responsible for acts and statement of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation’s stated policies.” United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

In Hilton Hotels, the president of a hotel instructed his purchasing manager not to give preferential treatment to members of a certain organization. Despite the policy of the
hotel to purchase from the lowest bidder, the purchasing manager nonetheless gave preferential treatment to a seller, and did so illegally. The court held that the corporation could still be liable despite their corporate policy against such actions and despite the fact that the employee was acting of his own volition. It was held that “liability may attach without proof that the conduct was within the agent’s actual authority, and even though it may have been contrary to express instructions.” Id. Thus, corporations can be liable for the actions of “those to whom they choose to delegate the conduct of their affairs.” Id.

Control, organization, and policies alone, therefore, will not act as a complete shelter for a corporation from the acts of an agent acting within their scope of employment and in benefit of the corporation.

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

Yes, depending upon the severity of the offense, the ability to make restitution, the likelihood of principals of corporation absconding with corporation assets, etc, the government may seek to initiate certain preliminary forms of attachment.

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

Yes. According to the Introductory Commentary of Chapter 8 of the Federal Sentencing Guidelines, “individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants.”

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

Yes, a parent company can be prosecuted for offences committed within a subsidiary under the theory or practice of piercing the corporate veil. The Sixth Circuit has held that a parent company can be held responsible for the actions of its subsidiary when “the corporate structure cause[s] fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.” Southeast Tex. Inns, Inc. v. Prime Hospitality Corp., 462 F.3d 666, 674 (6th Cir. 2006) (quoting Wallace v. Wood, 752 A.2d 1175, 1184 (Del. Ch. 1999)). “Mere dominion and control of the parent over the subsidiary,” however, “will not support alter ego liability.” Id. (quoting Outokumpu Eng’g Enters., Inc. v. Kvaerner EnviroPower, Inc., 685 A.2d 724, 729 (Del. Super. Ct. 1996)).

Thus, when a subsidiary is formed merely to carry out an illegal act or in an attempt to shield the parent from legal action, the “corporate veil” may be pierced and the parent company will be held liable.
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.

One possible alternative to criminal liability that could be imposed upon corporations guilty of criminal misconduct is a Deferred Prosecution Agreement. Deferred prosecution agreements are instances in which the government indicts a corporation for misconduct by corporate employees, but rather than pressing charges agrees not to actively pursue the prosecution and to eventually drop the charges if the corporation meets the terms of the agreement. Richard S. Gruner, *Three Painful Lessons: Corporate Experience with Deferred Prosecution Agreements*, 1536 PLI/Corp 61, 65 (2006). Such agreements are becoming increasingly more common as devices to resolve the organizational aspects of corporate misconduct. *Id. See, e.g.*, *U.S. v. Jenkins*, 1992 U.S. App. Lexis 731 (6th Cir. 1992) (describing a situation in which the government deferred prosecution upon the suspension of a defendant from certain government benefits).

The requirements that corporations may have to meet under such deferred prosecution agreements range from extensive cooperation with government investigators to broadly focused operating reforms to being monitored by outside parties. *Id. Such agreements have even required the appointment of government-approved board members to the board of directors. Id. If the requirements are met, the charges can be dropped. The government can also suspend or expel a corporation from reaping certain governmental benefits, such as Medicaid. *See, e.g.*, *Jenkins*, 1992 U.S. App. Lexis 731 (deferring prosecution upon suspending defendant from Medicaid for 30 days).


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

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

A corporation may claim the same defenses as discussed *supra* in section 2.8 for criminal liability. These defenses include lack of general intent and lack of specific intent. They may also claim a “good faith defense” in cases requiring specific intent. In cases requiring the government to prove specific intent — such as to defraud —, if the corporation can prove that they acted in good faith, they may show that the element of intent was not present. Another variant of the “good faith defense” is the “good faith
reliance on counsel defense.” If, in charges that require specific intent, the corporation can show that they acted in good faith on advice of counsel or another expert, they may show that the specific intent element was not met. The United States Court of Appeals for the Sixth Circuit has held that “The elements of a reliance on counsel defense are (1) full disclosure of all pertinent facts to counsel, and (2) good faith reliance on counsel’s advice.” U.S. v. Lindo, 18 F.3d 353 (6th Cir. 1994) (citing States v. Duncan, 850 F.2d 1104, 1115 n.9 (6th Cir. 1988)).

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

N/A

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?

According to the Memorandum from Deputy Attorney General Larry D. Thompson to United States Attorneys of Jan. 20, 2003 re: Principals of Federal Prosecution of Business Organizations [hereinafter “Thompson Memo”], prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Nine factors are laid out that prosecutors should consider in reaching a decision as to the proper treatment of a corporate target:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condemnation of, the wrongdoing by corporate management;
3. The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;
5. The existence and adequacy of the corporation’s compliance program;
6. The corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable and impact on the public arising from the prosecution
8. The adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and
9. The adequacy of remedies such as civil or regulatory enforcement actions.

Since the Thompson Memo was written a follow up memo, known as the “McCallum memo,” has been written addressing requests for waiver of attorney-client privilege. McCallum wrote that in order to "ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the Thompson Memorandum, some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection." McCallum Memo.

Calling this a "best practice," McCallum instructed all federal prosecutors to establish a written waiver review process. "Such waiver review processes may vary from district to district … so that each United States Attorney … retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete and accurate information from business organizations." This process is intended to safeguard against an influx in waiver requests, mandating that prosecutors are reviewed in some form or manner.

On December 12, 2006, Deputy Attorney General Paul McNulty issued a third memorandum entitled “Principles of Federal Prosecution of Business Organizations” [hereinafter McNulty Memo]. It represents the DOJ’s attempt to deal with criticism from judges, Congress, and the private bar over what were perceived by many to be DOJ strong-arm tactics in conducting corporate criminal investigations. This memorandum supersedes the controversial “Thompson Memorandum” and replaces the “McCallum Memorandum.” While McNulty reiterates a great deal of existing policy, it contains significant refinements in the provisions regarding privilege waiver and advancement of fees. Eric W. Sitarchuk & Gina M. Smith, New Department of Justice Guidelines on Corporate Prosecutions: Does the Song Remain the Same?, Business Law Today, 49 (July/August 2007).

McNulty made significant revisions to Thompson’s fourth factor—willingness to cooperate. In its privilege waiver provisions, the McNulty Memorandum purports to address the widespread perception that a pervasive culture of waiver requests had evolved within DOJ. The Thompson Memorandum had explicitly allowed prosecutors to consider the willingness to waive in their corporate charging decisions: “In gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness to . . . waive attorney-client and work product protection.” McNulty Memo.

McNulty, however, sets forth some limitations on the direction of federal prosecutors in making waiver requests. Preliminarily, it provides: “Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.” Whether a legitimate need exists depends on the application of four factors: (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;
(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver. McNulty Memo.

Whether the McNulty Memorandum represents true substantive change will have to await the record of its implementation. In the meantime, one message to business entities remains clear: the most important thing that a company counsel can do now to minimize risk in the future is to have a compliance program as effective in practice as it is complete on paper. Sitarchuk, supra.

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

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?

The U.S. Supreme Court has stated that “such artificial entities [as corporations] are not protected by the Fifth Amendment [of the United States Constitution, which gives criminal suspects the right to remain silent].” Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284 (1988). The Supreme Court further stated that “we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.” Id. It is, however, in the corporation’s best interest to cooperate with the government. See, e.g., Thompson Memo, supra.

Individuals, of course, do enjoy Fifth Amendment Privileges. If a corporate employee or other witness in a corporate case, however, is granted immunity for any self-incriminating testimony, they may still be compelled to testify as a witness in a corporate case. Kastigar v. United States, 406 U.S. 441 (1972).

The Attorney-Client privilege and the Work Product Doctrine do apply to corporations, just as to individuals. See Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981). As in any other context, the attorney-client privilege applies only if: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.
United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358–59 (D.Mass. 1950). The Work Product Doctrine is broader, and is not restricted to “communications” between client and counsel, but rather encompasses material “obtained or prepared by an adversary’s counsel” in the course of his legal work, provided that the work was done “with an eye toward litigation.” Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385 (1947).

Corporations are also entitled to certain discovery principles. Federal Rule of Criminal Procedure 16 states that “if the defendant is an organization, the government must disclose to the defendant any statement” that the defendant orally made in response to interrogation “if the government contends that the person making the statement . . . was legally able to bind the defendant . . . or . . . was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person’s position as the defendant’s director, officer, employee, or agent.” Fed. R. Crim. Pro. 16.

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

A Company can be informed that it is or can become prosecuted at any time during the government’s investigation.

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?

In qui tam suits False Claims Act, a corporation can be found criminally and civilly liable for defrauding the government or making false claims against the government. The act encourages private citizens, known as “relators,” to file suit on behalf of the government in order to recover civil damages from other private citizens for their frauds against the government. These relators are then entitled to a percentage of the damages and penalties recovered by the government. If the relator is himself liable, he may also receive immunity for bringing the qui tam action and cooperating. (In such cases, it has been stated that the actions “set[] a rogue to catch a rogue.” U.S. v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000) (quoting U.S ex re. Rabushka v. Crane Co., 40 F.3d 1509, 1519 (8th Cir. 1994) (Magill, J., dissenting).

The Criminal False Claims Act is governed by 18 U.S.C. § 287. The Civil False Claims Act is governed by 18 U.S.C. §§ 3729–3733. These types of litigation are also known, and perhaps more commonly known, as “whistleblower” litigation. See, e.g., Jeffrey T. Green, The Thin Line Between Civil and Criminal Proceedings, 9 BUSINESS CRIMES BULLETIN 1 (April 2002).

This may still apply to individuals if they themselves are suspects, but it is unlikely that such an individual will testify against the corporation unless they themselves are afforded immunity or are able to secure a Rule 11 Plea Agreement. Fed. R. Crim. P. 11.
4.6. **Will there be a joint proceeding against the company and the individual offender?**

As was noted, there often times will be. According to the Introductory Commentary of Chapter 8 of the Federal Sentencing Guidelines, “individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants.”

One obvious reason for having a joint proceeding is judicial and prosecutorial economy. There are obvious benefits of trying cases stemming from the same nucleus of facts in one trial rather than in multiple trials. It would be left to the prosecutor’s discretion, however, on how he wishes to build his case and shape the trial.

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

There are clear practical differences in a proceeding against a company. One is the fact that there is no distinct defendant sitting in the court room for the jury to see and judge. This could have the effect of giving the proceeding an impersonal feel. There are also procedural differences as to claims of Fifth Amendment and different privileges that can be invoked.

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. Prosecutors are given broad discretion, as mentioned in section 4.1, pursuant to the Thompson Memo. Prosecutors should apply the same factors in determining whether to apply sanctions to a corporation as they do with respect to individuals. Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. For the factors to be considered, see section 4.1, *supra*.

Discretion should be carefully considered. Sanctions may be preferable to criminal punishment because they can often achieve the same goals as criminal punishment, but do so with much more judicial economy and parsimony. Darryl Brown, *Third-Party Interests in Criminal Law*, 80 Tex. L. Rev. 1383, 1427 (2002). Sanctions can also reduce third-party injuries, such as harm to stockholders, pension holders, clients, or suppliers of a company. *See, Id.*

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

N/A
5.3. **When will the company been informed that the prosecution is considering to impose sanctions or have sanctions imposed?**

If there has been a grand jury formed and a corporation is a “target” of that grand jury, and the target has not been called to testify in front of the grand jury, the prosecutor should give the target reasonable notice that they are such in order to afford them the time to testify in front of the grand jury if they so wish. U.S.A.M. § 9-11.153 Notification of Targets.

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

N/A

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

Just as with Criminal Proceedings, there often times will be.

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

N/A

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?**

There are three generally-accepted theories under which corporate officers or agents may be held liable for criminal violations that occur during the course of their employment. First, an agent who actually performs the criminal act may be liable even though he committed the act in his official or representative capacity. Second, corporate agents and officers may be liable for crimes that they did not personally commit but which they “aid, abet, counsel, command, induce, or procure.” 18 U.S.C. § 2(a). Third, and most significantly, an officer may be liable for criminal acts if they fail to control the misconduct of others. This is known as the “responsible corporate officer” doctrine. O’Sullivan, *supra* at 281–82.

This doctrine states that “one who has control over activities that lead to a subordinate’s violation of a statute may incur liability for failure to fulfill the duty, commensurate with his position of authority in the corporate hierarchy, to prevent or correct such violations.” Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses—Another View*, 35 *VAND. L. REV.* 1337, 1338–40 (1982). Thus, a “responsible corporate officer” may be criminally sanctioned “even though he
did not personally participate in the wrongdoing and even though he had no personal knowledge of the misconduct perpetrated by his subordinates.”

The Sixth Circuit Court of Appeals has found that the “responsible corporate officer doctrine” may apply to such acts as a corporation not filing proper paperwork with the appropriate governmental entities, *U.S. v. Neal*, 93 F.2d 219 (6th Cir. 1996); a corporation not being in accord with immigration laws, *U.S. v. Van*, 931 F.2d 384 (6th Cir. 1991); or a corporation withholding tax obligations, when the responsible corporate officer was aware of that fact, *Taubman v. United States*, 499 F.Supp. 1133 (E.D. Mich. 1978).

Also, as noted above, under the theory of negligence, an officer can be held liable for actions he should have and could have stopped or prevented but did not. Jury Instructions can be given which instruct that “willful blindness,” “conscious avoidance,” or “ostrich” actions be taken as culpability of liability due to negligence. *O'Sullivan, supra* at 114–19. (See also, *United States v. Cordova Chem. Co.*, 113 F.3d 572, 595 (6th Cir. 1997) (“[A corporation’s] willful blindness can hardly be characterized as the exercise of due care.”).

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

“[T]he Government establishes a *prima facie* case [of officer liability] when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.” *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903 (1975). An officer cannot be found liable based on his corporate position alone, but rather can be so found if the officer “had a responsible relation to the situation” and “by virtue of his position . . . had . . . authority and responsibility” to deal with the situation. *Id.*

This is the “Responsible Corporate Officer Doctrine.”

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?**

No, criminal liability does not arise *only* under those circumstances. Any time an officer has the responsibility and authority to correct wrongdoing, he may be held liable if he does not utilize such authority. *See Answers 6.1, 6.2.*
6.4. **What recommendations do you have to exclude or minimize criminal liability risks of directors of a company?**

Directors can minimize their criminal liability through several steps. One step is to have an organized and structured system of oversight that keeps close oversight of a corporation’s agents. This can be done through management, reporting systems, and reviews.

Also, if an officer or director is in a position of responsibility and authority which can stop or prevent wrongdoing, they must carry out that authority. “Willful blindness” will not prevent such an officer from exposure of criminal liability. Rather, they must be diligent in their duties.

Further, if a company has an effective compliance and ethics program established, and that program is dutifully enforced by officers and directors, the directors’ ultimate punishment may be mitigated. Furthermore, self-reporting, cooperation, and acceptance of responsibility once wrongdoing has been identified will also mitigate the ultimate penalty a corporation, and possibly with it, its officers, will receive. Preventative steps are the most important, but even those steps taken after the wrongdoing can minimize liability.

Other steps that could minimize criminal liability are such features as an anonymous hotline, internal whistleblower policies, internal controls, and internal audits. These audits could also be done randomly and, when and where possible, blindly. This would not only catch more problems before they materialized, but hopefully would deter inappropriate actions.

Finally, the key thing for management to do when confronted with a possible white collar criminal law violation is to follow appropriate internal procedures, retain experienced outside counsel, to conduct an internal investigation, and to report the incident and the corporation’s response thereto to date to the appropriate governmental authorities.
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.

Yes. Under Neb. Rev. Stat § 28-109(16), a "person" can be a corporation or unincorporated association, and this definition is applicable throughout the criminal code, unless otherwise required by the context in which it is used. Companies can be punished for any crime they are capable of committing.

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 main criminal sanctions for companies are fines, forfeiture of charter, penalty for the benefit of the injured party, seizure of property and possibly jail time for certain officers, managers or directors.

All crimes in Nebraska are defined by statute, and each crime will be defined as a misdemeanor or felony of a specific class. The legal prerequisites depend on the specific charge; see answer 2.2 below.
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.

Yes. Civil penalties, including fines and loss of the ability to do business in Nebraska, can be imposed on companies for the actions of their directors, employees or other agents. See answer 3.2 below.

Neb. Rev. Stat. § 11-124 provides that any corporation that fails to pay any fine, judgment or decree against it within 90 days will lose the right to do business in Nebraska until the debt is satisfied.

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.

Most crimes are defined as a certain class of misdemeanor or felony, each of which has minimum and maximum amounts of jail time and/or fines. Other criminal sanctions include fines and loss of charter.

The maximum punishment for each class of felony and misdemeanor is listed below. The statute creating each crime will include the category into which it falls.

Punishment for felonies is as follows: Class I felonies are punishable by death. Class I A felonies are punishable by life imprisonment without parole. Class IB felonies are punishable by a maximum of life imprisonment. Class IC felonies are punishable by a maximum of 50 years imprisonment. Class ID felonies are punishable by a maximum of 50 years imprisonment. Class IE felonies are punishable by a maximum of 50 years imprisonment, a $25,000 fine, or both. Class II felonies are punishable by a maximum of 50 years imprisonment, a $10,000 fine, or both. Class IIIA felonies are punishable by a maximum of 5 years imprisonment, a $10,000 fine, or both. Class IIIA felonies are punishable by a maximum of 5 years imprisonment, a $10,000 fine, or both. Class IV felonies are punishable by up to 5 years imprisonment, a $10,000 fine, or both. Class V felonies are punishable by up to a $100 fine. Neb. Rev. Stat. § 28-105.

Punishment for misdemeanors is as follows: Class I misdemeanors are punishable by up to a $1,000 fine, one year in jail, or both. Class II misdemeanors are punishable by up to a $1,000 fine, six months in jail, or both. Class IIIA misdemeanors are punishable by up to a $1,000 fine, six months in jail, or both. Class IIIA misdemeanors are punishable by up to a $500 fine, three months in jail, or both. Class IIIA misdemeanors are punishable by up to a $500 fine, seven days in jail, or both. Class IV misdemeanors are punishable by up to a $500 fine. Class V misdemeanors are punishable by up to a $100 fine. Neb. Rev. Stat. § 28-106.
2.2. **What are the legal requirements for each type of sanction?**

The following is a list of the crimes most relevant to companies, organized by subject matter.

**Antitrust**

Neb. Rev. Stat. Ch. 59, Art. 8 deals with unlawful restraint of trade, and criminalizes many anticompetitive practices. Pursuant to Neb. Rev. Stat. § 59-801, contracts in restraint of trade or commerce are punishable as Class IV felonies. Neb. Rev. Stat. § 59-802 makes monopolizing or attempting to monopolize any area of trade or commerce a Class IV felony. For any violation of Neb. Rev. Stat. Ch. 59, Art. 8, the director, officer, member or other agent acting on behalf of the company is liable for the same crime; the company will be prohibited from conducting business in Nebraska; and the company and relevant individuals will be charged with Class IV misdemeanors.

**Banking**

Neb. Rev. Stat. § 8-107 requires banks to keep such books and accounts as required by the Department of Banking and Finance. Failure to do so brings a fine of $10 per day.

Neb. Rev. Stat. § 8-113 defines use of the word "bank" in the title of a company not organized as a bank or other qualified institution a Class V misdemeanor.

Neb. Rev. Stat. § 8-114 makes conducting business as a bank without being duly organized a Class V misdemeanor for each day such business is conducted.

Neb. Rev. Stat. § 8-118 criminalizes sale of bank stock before its charter is issued; such sale is a Class II misdemeanor.

Neb. Rev. Stat. § 8-119 requires the president or cashier of any company selling stock in itself as a bank to file a form stating that no compensation has been given to any seller of the stock; doing so untruthfully is a Class I misdemeanor.

Neb. Rev. Stat. § 8-127 requires a list of the bank's stockholders to be kept; failure to do so is a Class III misdemeanor on the part of the president, cashier or business manager.

Neb. Rev. Stat. § 8-133 defines giving any inducement for deposits in a bank, other than the standard interest rate, as a Class IV felony for the depositor, the bank, and the officer or employee responsible.

Neb. Rev. Stat. § 8-139 requires the approval of an executive officer before a bank can make a loan or investment; permitting an inappropriate person to do so is a Class III felony.

Neb. Rev. Stat. §§ 8-141 and 8-142 limit the size of loans that banks can make and set violations thereof at Class IV misdemeanors.


Neb. Rev. Stat. § 8-147 limits the amount of direct borrowing by a bank; violations result in the bank and any responsible officers or employees being guilty of a Class IV felony.

Neb. Rev. Stat. § 8-175 makes willfully or knowingly entering false statements in a bank's books a Class III felony.

Neb. Rev. Stat. § 8-1,119 punishes any violation of the Nebraska Banking Act which does not have a specified penalty as a Class III misdemeanor.

Neb. Rev. Stat. § 8-1,139 makes willful misapplication of a bank's funds or assets by an officer, director, employee or other agent a Class IV felony.

Neb. Rev. Stat. Ch. 8, Art. 2 deals with trust companies. Failing or refusing to file an annual report with the Department of Banking and Finance is punishable by a fine of $50 per day under Neb. Rev. Stat. § 8-223. Neb. Rev. Stat. § 8-224.01 deals with various prohibited acts by trust companies which are punishable as Class I misdemeanors or Class III felonies. Swearing to false statements relevant to trust companies is a Class IV felony under Neb. Rev. Stat. § 8-225. Inappropriate use of the word trust in a company's title is a Class V misdemeanor under Neb. Rev. Stat. § 8-226.

Neb. Rev. Stat. Ch. 8, Art. 3 deals with building loan associations. Neb. Rev. Stat. § 8-305 requires "building association," "savings and loan," or similar language to be in the name of such companies; failure to do so or improperly doing so is a Class V misdemeanor. Neb. Rev. Stat. § 8-332 requires the filing of an annual report with the Department of Banking and Finance; failure to do so results in a fine of $50 per day. Neb. Rev. Stat. § 8-333 punishes false statements or book entries as Class IV felonies.

Neb. Rev. Stat. Ch. 8, Art. 8 prescribes the rates of interest and fees allowed for personal loans by banks and trust companies. Violations of any provision in that section are punishable as Class V misdemeanors.

Neb. Rev. Stat. §§ 8-1103 and 8-1104, the Blue Sky statutes, require investment contracts to be registered with the SEC or with the Nebraska Department of Banking and Finance. There are exceptions for cooperatives, small issues, and private offerings. Failure to register is a Class IV felony under Neb. Rev. Stat. § 8-1117(1).

Civil Rights

Neb. Rev. Stat. § 20-124 classifies any interference with or restraint of the exercise of free speech or access to public accommodation as a misdemeanor, punishable by a fine of up to $100 or up to six months in prison, or both.

Neb. Rev. Stat. Ch. 20 classifies most other civil rights violations as Class I misdemeanors, punishable by fines of up to $100 and/or up to six months in prison.

Environmental

Neb. Rev. Stat. § 81-1506 lists various unlawful activities relating to pollution and the environment. Generally, this provision authorizes the state to enforce federally delegated environmental programs such as the Clean Air Act, the Clean Water Act and other such provisions.

Neb. Rev. Stat. § 81-1508.01 classifies any person who violates the Environmental Protection Act, the Integrated Solid Waste Management Act, the Livestock Waste Management Act, by making false statements or representations, tampering with monitoring devices, and transporting hazardous materials to an unpermitted facility as guilty of a Class IV felony. Violating certain other provisions of those laws results in a Class I misdemeanor, and any other violation of those laws is a Class III misdemeanor under Neb. Rev. Stat. § 81-1508.01.

Neb. Rev. Stat. § 81-1575 requires a permit before companies can store hazardous substances; doing so without a permit is a Class IV misdemeanor under Neb. Rev. Stat. § 81-1577.


Fraud and Theft

felony if it involved between $300 and $1,000, and as a Class I misdemeanor if it involved under $300.

Under Neb. Rev. Stat. § 28-604, criminal possession of a forged instrument is a Class IV felony, a Class II misdemeanor, or a Class I misdemeanor, depending on the circumstances.


Neb. Rev. Stat. §§ 28-611 through 28-635 criminalize false checks, false statements, bribery, tampering with a publicly exhibited contest, altering or obscuring identification numbers, receiving altered articles, unauthorized use of a financial transaction device, criminal possession or unlawful circulation of a financial transaction device, unlawful manufacture of a financial transaction device, laundering of sales forms, and various acts related to payment cards; these crimes range from Class III misdemeanors to Class II felonies.


Gambling

Neb. Rev. Stat. § 9-434 makes a first violation of the Nebraska Lottery and Raffle Act a Class I misdemeanor, unless it is specifically defined to be another crime. Subsequent violations are Class IV felonies. Section 9-434(2) defines various offences to be Class IV felonies, including bribing a public official, facilitating cheating and filing false reports under the Nebraska Lottery and Raffle Act.

Neb. Rev. Stat. §§ 28-1102 to 28-1105 make the promotion of gambling a variety of offences, ranging from Class IV misdemeanors to Class III felonies. Second and subsequent offences are punished more severely than first offences.


Insurance

Neb. Rev. Stat. § 44-135 requires all foreign insurance companies to obtain certificates of authority from the Department of Insurance before doing business in Nebraska.

Neb. Rev. Stat. §§ 44-222 and 44-222.01 bar insurers from exposing themselves to single risks of more than 10% of their surplus to policyholders, though reinsurance taking effect at the same time as the risk can be deducted from the risk. Neb. Rev. Stat.
§ 44-222.02 allows a violation of either of the preceding sections to be punished by 
revocation of the company's license to do business in Nebraska, or by prosecution as 

Neb. Rev. Stat. § 44-223 makes directors jointly and severally liable for any losses 
beyond the maximum single risks laid out in Neb. Rev. Stat. § 44-222 and for any 
losses incurred when the insurance company did not have a certificate of authority.

Neb. Rev. Stat. § 44-224.10 requires forfeiture of the company's charter if it is not 
operating on the stock plan and reinsures all of its risk and business in bulk.

Neb. Rev. Stat. §§ 44-353 to 44-356 allow fines between $20 and $100 for not 
supplying policies for inspection upon request, for giving special fees in return for any 
compensation not specified in the policy, or for not reporting the exact premium 
charged for the policy.

Neb. Rev. Stat. §§ 44-361 to 44-361.02 make it a Class V misdemeanor to promise or 
give any kind of rebate on a policy's premium or on the agent's commission. Neb. Rev. 
Stat. § 44-367 allows for the revocation of the license of any company found to have 
violated section 44-361.

Neb. Rev. Stat. §§ 44-393 and 44-394 require any insurance company knowing of a 
violation of Neb. Rev. Stat. Ch. 44 to report it, and set the violation of any provision of 
Ch. 44 that does not have a specified penalty to be a Class III misdemeanor.

insider trading, and allow for any profits made by insider trading to go to the company 
rather than to the individual conducting the trades.

Neb. Rev. Stat. § 44-3,121 makes it a Class IV felony for a member, officer, director or 
attorney in fact of an insurance company to borrow or rent securities on behalf of the 
company. Under Neb. Rev. Stat. § 44-3,122, such action by the company is punishable 
by a $10,000 fine.

Neb. Rev. Stat. § 44-3,156 makes it a Class II misdemeanor to not provide workers' 
compensation insurance for members and employees as required in Neb. Rev. Stat. §§ 
44-3,151 through 44-3,155.

Lending

Neb. Rev. Stat. §§ 45-101.05 and 45-101.07 make it a Class IV misdemeanor to 
require a borrower to establish an escrow account to assure the payment of taxes, 
insurance premiums, or other charges in excess of the amount necessary between the 
establishment of the escrow account and the first schedule payment, plus a cushion of 
one-sixth of a year's worth of such charges.
Neb. Rev. Stat. § 45-705 requires all mortgage bankers to have a license or to register with the Department of Banking and Finance. Licenses can be revoked under Neb. Rev. Stat. § 45-707 for violating the Mortgage Bankers Registration and Licensing Act (Neb. Rev. Stat. Ch. 44, Art. 7), which can happen if the banker files a misleading report; fails to maintain adequate records; or employs an individual who has been convicted of a crime involving fraud or the mortgage banking industry, or any felony.

Neb. Rev. Stat. § 45-708 makes it a Class II misdemeanor to act as or hold oneself out as a mortgage banker without being properly licensed or registered.

Neb. Rev. Stat. § 45-714 makes it a Class III misdemeanor for a mortgage banker to do a variety of acts, including assessing late charges before they are appropriate, delaying closing of a mortgage in order to increase the banker's fees, misrepresenting or concealing material facts regarding the loan, and engaging in any act not in good faith.

Neb. Rev. Stat. § 45-717.01 allows the Director of Banking and Finance to levy an administrative fine on any officer, director, partner, shareholder or member of a licensee for violations of Neb. Rev. Stat. Ch. 45, Art. 7.

Neb. Rev. Stat. § 45-814 makes it a Class II misdemeanor to violate the Credit Services Organization Act, which bars credit service organizations from performing certain services without a surety bond, charging money for an extension of credit before that credit is received, charging money for a referral to a person or company who will extend credit to the borrower, making false or misleading representations or advertisements, or engaging in fraudulent or deceptive acts.

Neb. Rev. Stat. § 45-1037 makes it a Class II misdemeanor for a company to violate the Installment Loan Act.

Other

Neb. Rev. Stat. § 28-1476 makes it unlawful to publish or distribute an advertisement with an assertion or statement of fact which is known to be untrue, deceptive or misleading. Under Neb. Rev. Stat. § 28-1478, doing so is a Class III misdemeanor.

Neb. Rev. Stat. § 53-1,100 states that manufacturing, distributing or selling alcohol without a license is guilty of a Class IV misdemeanor for the first offence and a Class II misdemeanor for all subsequent offences, and each day of engagement in the prohibited activity is a separate offence. Under Neb. Rev. Stat. § 53-194.04, confections or candy with more than 0.5% alcohol are essentially treated as alcohol.

Neb. Rev. Stat. § 28-910 punishes the filing of false reports with regulatory bodies as a Class II misdemeanor.

Neb. Rev. Stat. §§ 28-915 and 28-915.01 deal with perjury. Perjury and subornation of perjury are punishable as Class III felonies. False statements under oath, when the
person does not believe them to be true, are Class I misdemeanors unless they are not required to be given under oath, in which case they are Class II misdemeanors.

Neb. Rev. Stat. § 28-1321 punishes maintaining a nuisance, which can include junkyards, feedlots and other operations, as a Class III misdemeanor.

Neb. Rev. Stat. §§ 28-1341 through 28-1348 deal with computer-related crimes. Penetrating a computer security system is a Class IV felony, a Class I misdemeanor, or a Class II misdemeanor, depending on the circumstances. Intentional computer access without permission in order to deprive or obtain services is a Class IV felony or a Class III felony. Harming or disrupting operations is punishable as a Class IV felony or a Class III felony. Obtaining confidential information filed by the public with the state is a Class II misdemeanor for the first offence, and a Class I misdemeanor thereafter. Intentionally accessing a computer or computer system without authorization is a Class V misdemeanor for the first offence, and a Class II misdemeanor for subsequent offences.

Neb. Rev. Stat. § 28-1420 punishes sale of tobacco without a license as a Class III misdemeanor. Under Neb. Rev. Stat. § 28-1425, sale of tobacco by a licensee to someone under the age of 18 is a Class III misdemeanor; any officer, director or manager knowing of such sale can also be liable for the crime; and such sale can result in the revocation of the tobacco license.

Professions

Neb. Rev. Stat. § 1-166 classifies the unlawful use of "accountant" and related terms as a Class II misdemeanor.

Under Neb. Rev. Stat. § 7-103, attorneys admitted in other states may appear in court on a motion, after taking an oath, and with a Nebraska resident licensed attorney. Under § 7-101, a violation of this is a Class III misdemeanor.

Neb. Rev. Stat. Ch. 71 includes the Uniform Licensing Law and deals with various professions and occupations involving health. Under Neb. Rev. Stat. § 71-164.01, any person practicing without a license is subject to a temporary or permanent injunction, and under Neb. Rev. Stat. § 71-167, any person or company violating any part of Ch. 71 is guilty of a Class III misdemeanor for their first offence, and a Class II misdemeanor for any subsequent offences.

The Nebraska Department of Health regulates pharmacies and the medical and veterinary professions, and related activities. Unauthorized or unlicensed practice of these professions is criminal.
Public Service and Utilities

Neb. Rev. Stat. Ch. 75, Art. 3 lays out safety regulations for companies transporting persons or goods through motor carriers in interstate and intrastate commerce; Neb. Rev. Stat. § 75-367 makes such violations a Class III misdemeanor.

Neb. Rev. Stat. § 75-426 requires rail carriers to report serious accidents to the Public Service Commission within 24 hours; failure to do so is a Class IV misdemeanor.

Neb. Rev. Stat. § 75-723 sets any violation of Neb. Rev. Stat. §§ 75-709 through 75-724, dealing with transmission lines near railroads, highways and airports, as a Class II misdemeanor.

Neb. Rev. Stat. §§ 75-901 through 75-910 are the Grain Dealer Act, requiring grain dealers to be licensed by, and subject to the rules of, the Public Service Commission. Violations constitute Class IV felonies and are also punishable by civil fines of up to $10,000 per day, not to exceed $2 million per year.

Neb. Rev. Stat. §§ 86-130 and 86-161 define failure by a telecommunications company to file maps of where it supplies local service as a Class V misdemeanor.

Neb. Rev. Stat. § 86-162 defines failure to comply with various provisions regulating telecommunications rates as Class IV misdemeanors.

Neb. Rev. Stat. §§ 86-212 through 86-235 prohibit misrepresentations of the size or source of telemarketing prizes. Such misrepresentations are punishable as a Class I misdemeanor and/or with a civil fine of $2,000 per violation.

Neb. Rev. Stat. §§ 86-601 through 86-610 require all telegraph companies to file a form with the Secretary of State, to not delay transmission, to not disclose telegraphs' contents without authorization, and to follow rate regulations. Violations are misdemeanors of Class II or Class III.

Neb. Rev. Stat. § 88-543 deals with Class IV felonies which can be committed by grain warehouses and their licensees, partners, members, officers, and agents, including issuing receipts for grain not actually received, creating post-direct delivery storage positions without proper documentation or without sufficient grain, and recording grain as received or loaded without it being deposited in or removed from the warehouse.

Neb. Rev. Stat. § 88-549 requires warehouse licensees to send notice to everyone storing grain in their warehouse annually; failure to do so is a Class V misdemeanor.
Revenue and Taxation

Neb. Rev. Stat. § 77-1726 defines the failure or neglect of a corporation or company to pay taxes as a Class IV felony for each day the taxes go unpaid.

Neb. Rev. Stat. § 77-1783.01 allows for the personal liability of any person responsible for the payment of a corporation's taxes, if they have authority to decide whether the corporation will pay the taxes and willfully fail to do so.

Neb. Rev. Stat. § 77-2705 requires a permit from the tax commissioner for any company conducting business as a seller. Failure to file the state sales tax return and remit the tax due will result in a penalty of ten percent of the unpaid tax.

Trade Practices

Neb. Rev. Stat. Ch. 87 deals with trade practices. Improper users of trademarks and trade names, and those who engage in improper franchise practices or misappropriate trade secrets are liable for all damages caused by such use, but are not subject to extra criminal or civil penalties.

Neb. Rev. Stat. § 87-220 makes it a Class V misdemeanor to engage in or transact any business under a trade name without registering the trade name. Each day is a separate violation.

Neb. Rev. Stat. § 87-303.08 makes it a Class II misdemeanor to engage in a deceptive trade practice.

Neb. Rev. Stat. § 87-303.09 defines violations of the terms of a written injunction or declaratory judgment regarding deceptive trade practices as a Class IV felony.

Weights and Measures

Neb. Rev. Stat. §§ 89-182 through 89-1,103 deal with weights and measures. Use of incorrect weighing and measuring devices, lack of or inaccurate labeling, and other violations are Class III misdemeanors. Subsequent convictions are Class I misdemeanors.

Neb. Rev. Stat. § 89-1,108 makes it a Class IIIA misdemeanor to use grain moisture measuring devices not approved by the grain warehouse department of the Public Service Commission.

Workplace Safety

Neb. Rev. Stat. § 48-101 requires employers to provide workers' compensation to any employee injured through accident or occupational disease arising from the employment. Beyond action for the compensation itself, there do not appear to be civil
penalties for employers who fail to provide workers' compensation. Neb. Rev. Stat. § 44-3,156 make it a Class II misdemeanor to not provide workers' compensation insurance. Under Neb. Rev. Stat. § 48-103, the employer loses certain defenses if they do not have workers' compensation insurance.

Neb. Rev. Stat. §§ 48-414, 48-424 and 48-442 make it a Class II misdemeanor or Class V misdemeanor to not meet various workplace safety codes.


Neb. Rev. Stat. § 48-1005 defines a violation of the age discrimination laws in Ch. 48, Art. 10 to be a Class III misdemeanor but does not allow imprisonment for a first conviction.


Neb. Rev. Stat. § 48-1227 makes sex discrimination through different wages a Class III misdemeanor. Failing to keep records of wages, job classifications, and other terms and conditions of employment for male and female employees is a Class V misdemeanor.

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.

Prosecution is limited to certain types of offences, in that the company can only be prosecuted for offences defined by statute. When companies are charged with crimes, the mens rea requirement must be met through the actions of officers, employees, or other agents. The hierarchy of the individual is generally not relevant.

For environmental laws, a "responsible corporate officer" must certify that certain violations have not taken place, and that officer would be held liable for any violations.

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

The main distinction here is whether the individual was acting as a rogue agent or in the scope of employment. If the agent did not act within the scope of their authority, the company is not liable for their actions. 

If the individual violated only internal rules and regulations, their acts or omissions can probably not be attributed to the company; it depends on whether the internal rules are enforced. With no statutory or common law violation, there will be no charge to make.

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

The intent of its employees or agents may be imputed to the corporation, including such mens rea elements as "willfully" and "knowingly." Courts will look to the acts of natural persons in this determination.

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, to some extent. For unpaid taxes and some other charges, there is strict liability. However, these laws generally require some notice that the law is being broken (i.e., that taxes are due). Ignorance of the law is not a defense. For false representations or fraud, scienter is not necessary.

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

No.

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

The same defenses as in any other criminal situation, with the addition of the rogue agent defense and the Lincoln Dairy defense. Lincoln Dairy Company v. Finigan, 170 Neb. 777, 104 N.W.2d 227 (1960) held that the legislature may not delegate legislative power to an administrative or executive authority. Because all crimes must be defined by statute in Nebraska, a company charged with a criminal violation of rules or regulations promulgated by a group other than the legislature may be able to defend itself on constitutional grounds.

The company can raise any other defense available to natural persons, and such defenses are specific to each offense and the facts and circumstances at issue.

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?

Yes. If the company has and enforces a system of internal controls to guard against such crimes, they ordinarily will not be liable or authorities may not choose to prosecute.
2.10. Can certain kinds of sanctions been executed during the investigative phase of a criminal proceedings (e.g. preliminary seizure of bank accounts, attachment of claims)?

No. There is no authority allowing sanctions in the investigative phase of criminal proceedings.

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

Yes.

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

Yes.

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.

Civil or administrative fines, injunctions, restraining orders, and loss of the ability to do business in Nebraska are the main sanctions beyond those mentioned in section 2. For their requirements, see answer 3.2.

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

Neb. Rev. Stat. § 59-1614 allows a civil fine of up to $25,000 for violations of Neb. Rev. Stat. §§ 59-1603 and 59-1604, which prohibit contracts in restraint of trade or commerce and attempts to monopolize any area of trade or commerce; and a civil fine of up to $2,000 for violations of Neb. Rev. Stat. § 59-1602, which prohibits unfair competition and deceptive acts or practices.

Banking

Neb. Rev. Stat. Ch. 8, Art. 17 is the Commodity Code. Neb. Rev. Stat. § 8-1721 prohibits various forms of cheating, fraud, false reports, false advertisements, misappropriation of funds, and certain financing methods. Under Neb. Rev. Stat. § 8-1722, the act of any official, agent or other individual acting for any company is considered the act of that company, and any person who directly or indirectly controls another person is liable for that person's Commodity Code violations. Neb. Rev. Stat. § 8-1727 allows civil remedies for violations of the code, including restraining orders, injunctions, fines of up to $25,000 for a single violation or $100,000 for a series thereof, and restitution.
Civil Rights

Neb. Rev. Stat. § 20-148 allows civil remedies for any person whose civil rights are violated by a company.

Environmental

Neb. Rev. Stat. § 81-1508 allows for injunctions and monetary civil awards to restock waters in which the fish or wildlife stock has been depleted due to pollution.

Neb. Rev. Stat. § 81-1508.02 allows refusing entry to an environmental inspector, falsifying records, tampering with monitoring devices, violating environmental quality standards, and other violations to be punished by civil fines of up to $10,000 per day.


Neb. Rev. Stat. §§ 81-15,125 and 81-15,126 allow injunctions, permanent or temporary restraining orders, or civil fines of up to $5,000 per day per offence of the Petroleum Products and Hazardous Substances Storage and Handling Act.

Neb. Rev. Stat. § 81-15,141 punishes violations of the Wastewater Treatment Operator Certification Act with civil fines of up to $500 per day of violation.

Neb. Rev. Stat. § 81-15,230 allows for civil actions against owners or operators of facilities in which certain hazardous substances are present, without a limit to the penalty, for violations of notification provisions of the Nebraska Emergency Planning Act and Community Right to Know Act.

Neb. Rev. Stat. § 81-15,253 provides civil penalties of up to $10,000 per day per violation of the Private Onsite Wastewater Treatment System Contractors Certification and System Registration Act.

Insurance

Neb. Rev. Stat. §§ 44-3,107 through 44-3,107.04 deal with equity securities insider trading relating to insurance companies and require reports to be filed for any person who is directly or indirectly the beneficial owner of more than 10% of any equity security, and for any officer or director of the company who holds any equity security issued by the company. The penalty for failure to report is a civil fine of $100 per day.
Lending

Under Neb. Rev. Stat. § 45-1069, the Director of Banking and Finance may fine any officer, director, member, shareholder, partner or member of a company that violates the Nebraska Installment Loan Act (Neb. Rev. Stat. Ch. 45, Art. 10).

Other

Neb. Rev. Stat. § 53-1,104 allows for civil fines or the suspension of the license of any alcohol licensee who sells alcohol in violation of their license or has a gambling device on their premises.

Neb. Rev. Stat. § 21-20,168 requires all foreign corporations to obtain a certificate of authority from the Secretary of State before transacting business in Nebraska; "transacting business" does not cover all activities a corporation may engage in, such as maintaining bank accounts, selling through independent contractors, creating mortgages or other securities, transacting business in interstate commerce, and owning real property. Section 21-20,169 allows for proceedings started by foreign corporations which have transacted business without a certificate of authority to be thrown out; the corporations can also be fined up to $10,000 per year.


Professions

Neb. Rev. Stat. § 1-138 stops an accountancy company from being permitted to practice if a partner or member has their license suspended or revoked.

Neb. Rev. Stat. § 1-148 allows for the censure, probation, revocation or limitation of an accounting corporation's license, or a civil penalty of up to $10,000.

Neb. Rev. Stat. § 1-165 allows for injunctions or restraining orders for violations of the statute by accountants or accounting corporations.

Public Service and Utilities

Neb. Rev. Stat. Ch. 75, Art. 3 lays out safety regulations for companies transporting persons or goods through motor carriers in interstate and intrastate commerce; Neb. Rev. Stat. § 75-369.03 allows civil penalties of up to $10,000 for such violations.

Neb. Rev. Stat. §§ 75-901 through 75-910 are the Grain Dealer Act, requiring grain dealers to be licensed by, and subject to the rules of, the Public Service Commission. Violations constitute Class IV felonies and are also punishable by civil fines of up to $10,000 per day, not to exceed $2 million per year.
Neb. Rev. Stat. § 75-1011 allows civil fines of between $50 and $1,000 per violation per day for violations of Neb. Rev. Stat. Ch. 75, Art. 10, the Water Service Regulation Act. Violations include charging excessive rates and not following Public Service Commission regulations.

Neb. Rev. Stat. § 86-125 requires all wireless telecommunications carriers to file certain information with the Public Service Commission and keep it up-to-date; failure to do so can result in an administrative fine.

Neb. Rev. Stat. § 86-160 allows violations of the Nebraska Telecommunications Act (Ch. 86, Art. 1) to be punished by administrative fines.

Neb. Rev. Stat. § 86-209 allows fines of $2,000 per violation of Neb. Rev. Stat. § 86-205, which bars telecommunications companies from switching a subscriber's local service provider without the subscriber's approval.

Neb. Rev. Stat. §§ 86-212 through 86-235 prohibit misrepresentations of the size or source of telemarketing prizes, punishable as a Class I misdemeanor and/or with a civil fine of $2,000 per violation.

Neb. Rev. Stat. §§ 86-236 through 86-257 allow for administrative fines against companies using automatic dialing devices, using sequential dialing techniques, or sending unsolicited faxes.

Neb. Rev. Stat. § 88-543.01 allows civil penalties of up to $10,000 per day, not to exceed $2 million per year, for violations of the Grain Warehouse Act (Ch. 88, Art. 5). Any company licensed under the United States Warehouse Act is exempt from this section.

Trade Practices

Neb. Rev. Stat. § 87-303.11 allows civil fines of up to $2,000 for each violation of the terms of a written injunction or declaratory judgment regarding deceptive trade practices.

Workplace Safety

Neb. Rev. Stat. §§ 48-443 and 48-444 require employers to have a workplace safety commission; failure to do so after notification of the requirement results in a civil fine of $1,000 per day.
3.3. What defenses can a company raise against these offences?

The defenses available to a company against these offences are the same as those available to individuals charged with them, with the addition of the rogue agent defense.

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

There is no statute or other authority for such sanctions to be executed during the investigatory phase.

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. No particular aspects are specified, but prosecutorial discretion applies to companies in the same way it generally does to individuals. Such aspects include: the seriousness of the offense; the efforts made to avoid the offense and comply with the law; whether the offense was self-reported; the degree of negligence involved, if any; and what harm was caused as a result of the offense.

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

Status as a suspect does not alter their rights. Companies will be considered suspects when they are suspected of having committed a crime.

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?

Yes. They have the same such rights as natural persons.

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

It varies, but generally when they are charged with the crime, i.e., the filing of a criminal complaint. There is no formal notification procedure. However, in some instances, the company will be given a notice of violation of regulations by an administrative agency that will be an early sign of being charged with an offense.
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, and if they are suspects themselves, they are generally given immunity. For example, under Neb. Rev. Stat. § 44-396, witnesses against insurance companies or directors thereof receive immunity from all related charges except perjury.

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

Very often, but not always.

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

Yes, in that the company cannot go to jail.

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. No particular aspects are specified, but prosecutorial discretion applies to companies in the same way as it generally does to individuals. These factors are often the same issues weighed in whether to prosecute in the first instance.

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

Status as a suspect does not alter their rights. Companies will be considered suspects when they are suspected of having committed a crime.

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

It varies, but generally when they are charged with the crime. There is no formal notification procedure.

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

Companies have the same right to due process as do all individuals facing sanctions.
5.5. **Will there be joint proceedings against the company and the individual offender?**

Very often, but not always.

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

Yes. The company cannot serve jail time, and any mens rea of the company must be inferred from the actions of individuals.

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?**

Yes, in certain situations where the statute makes it clear. Generally, the mens rea requirement will prevent such a situation.

Neb. Rev. Stat. § 21-2612 generally does not allow members or directors of the company to be personally liable for judgments against the company.

In Neb. Rev. Stat. Ch. 67, Art. 4, Nebraska adopted the Uniform Partnership Act of 1998. In Neb. Rev. Stat. § 67-417, partnerships are liable for a partner's actionable conduct when it takes place in the course of the partnership's business or with the partnership's authority. In Neb. Rev. Stat. § 67-418, any obligation of a limited liability partnership is solely that of the partnership, and partners of non-limited-liability partnerships are liable jointly and severally for the obligations of the partnerships.

Neb. Rev. Stat. § 25-316 allows the individual property of members of companies, unincorporated associations and partnerships to be subject to judgment if the plaintiff files a bill of equity showing that the assets of the company, unincorporated association or partnership are insufficient to satisfy the judgment.

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

It is rare for them to face such liability. Examples of when they automatically face criminal charges for acts of the company include several banking offences, which generally require culpable action by the individual, and the following:

Neb. Rev. Stat. Ch. 59, Art. 8, dealing with unlawful restraint of trade, criminalizes many anticompetitive practices. For any violation of that article, the director, officer, member or other agent acting on behalf of the company is liable for the same crime; the company will be prohibited from conducting business in Nebraska;
and the company and relevant individuals will be charged with Class IV misdemeanors.

Neb. Rev. Stat. § 77-1783.01 allows for the personal liability of any person responsible for the payment of a corporation's taxes, if they have authority to decide whether the corporation will pay the taxes and willfully fail to do so.

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?**

Only if the relevant internal policies are nonexistent, not enforced, or enforced so loosely that some mens rea can be inferred (such as knowing indifference).

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

The most important way to minimize criminal liability risks of a company, especially for its directors, is to have and enforce an effective internal policy for all behaviors and areas of business than can lead to sanctions, and to periodically audit the company.
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.

Yes, a corporation may be prosecuted in New Jersey in a similar manner to individual offenders because under New Jersey law, and more specifically under New Jersey Criminal law, a corporation is a "legal person." The general definition of person under the New Jersey Statutes provides that a person includes "corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals." N.J. STAT. ANN. §1:1-2. The definition of "person" is further defined by the criminal section of the statute, which provides that the term "person" includes any "natural person" and where relevant, a corporation or an unincorporated association. N.J. STAT. ANN. §2C:1-14. The commentary to criminal section 2C, further explains that New Jersey law recognizes "virtually no crimes, including those requiring a criminal intent or a corruptive motive, of which a corporation may not be found guilty." 1971 Commentary to R. 2C:2-7 [1].

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

Corporations, like "natural persons," must be convicted beyond a reasonable doubt. If they are found guilty by this standard, corporations can be sanctioned in much the same way as a natural person—except that corporations cannot be imprisoned. Accordingly, New Jersey has implemented six primary sanctions against corporations
convicted of criminal acts. The six primary sanctions are Eines, restitution, probation, dissolution, forfeiture of charter, and revocation of franchises. See N.J. STAT. ANN. §2C:43-4. These punishments are discussed in more detail in 2.1.

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.

Other areas of law, such as those governed by administrative agencies, may subject corporations to different sanctions which are more specifically targeted to address the criminal offence. For example, the Division of Alcoholic Beverage Control may revoke or suspend a corporation's license to sell alcohol if the licensee (corporation) has violated either a New Jersey criminal or administrative law. Likewise, corporations who violate the Clean Water Act may be subjected to fines and other punishments such as being held economically responsible for cleaning up the water source that they illegally contaminated.

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.

- **Fines:** New Jersey law provides that courts may fine a corporation convicted of committing a criminal offense. N.J. STAT. ANN §2C:43-3. New Jersey law provides that a court may order the corporation to pay a fine if three conditions are met. N.J. STAT. ANN. §2C:44-2(A). First, the corporation must have derived a pecuniary gain from the offense or, in the alternative; the particular offense will be deterred by the imposition of the fine. Id. Second, the corporation must be able, or given a fair opportunity, will be able, to pay the fine. Id. The third requirement for imposing a fine is that the fine will not prevent the defendant from making restitution to the victim of the offense. Id. In determining the proper amount for the fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose. N.J. STAT. ANN. §2C:44-2(c). The fine imposed may reach upwards of $600,000 depending on the seriousness of the crime committed.

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63 Other sanctions may be imposed upon a corporation that are not the result of statute. For example, corporations may be subject to debarment, which is not authorized by statute, but rather by Executive Order.
64 See e.g., In re C. Schmidt & Sons, Inc., 79 N.J. 344, 348-349 (n.J. 1979).
65 N.J. 2C: 43-3 permits a fine of upwards of 200k depending on the seriousness of the crime. N.J. 2 c: 43-3 permits the courts to as much as triple that fine. Subsection (f) and (g) provide exceptions permitting higher fines based on other statutory limits and subsequent tax convictions.
• **Restitution:** New Jersey law provides that the court shall sentence the convicted person to pay restitution if both the victim, or in the case of a homicide, the nearest relative of the victim suffered a loss and the defendant is able to pay or, given a fair opportunity, will be able to pay restitution. N.J. STAT. ANN. §2C:44-2(b). The court shall calculate the amount to be paid in restitution after considering the convicted person's financial resources, including financial earnings, and shall set the amount of the restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay. N.J. STAT. ANN. §2C:44-2(c).

• **Probation:** New Jersey law permits a corporation to be placed on probation, subject to conditional penalties should it violate the probation terms. N.J. STAT. ANN. 2C:43-2.

• **Dissolution, Forfeiture of Charter, Revocation of Franchises:** New Jersey law provides that a corporation convicted of an offence, or a high managerial agent of a corporation convicted of an offence in conducting the affairs of the corporation, may be subject to serious punishment at the hands of the New Jersey Attorney General. N.J. STAT. ANN. §43-4. The court may request that the Attorney General institute appropriate proceedings to (1) dissolve the corporation, (2) forfeit its charter, (3) revoke any franchises held by it or (4) revoke the certificate authorizing the corporation to do business in the state. Id. Actions for these crimes should be brought on the grounds that the corporation has "repeatedly conducted its business in an unlawful manner." N.J. STAT. ANN. §14a:12-6c.

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

New Jersey law provides two standards for legal sanctions, depending on the offense committed and the punishment being enforced. As with all criminal violations, any criminal conduct of the corporation must be determined "beyond a reasonable doubt" before any sanction may be enforced. Where the crime is not "criminal," and the threatened sanction is revocation of a license (Such as a license revocation by the Division of Alcoholic Beverage Control), the violation is determined by a "preponderance of the evidence."

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.**

As discussed in question 1.1, New Jersey law provides that a corporation may be found guilty of virtually any crime. In New Jersey, a corporation's criminal culpability is not limited by the crime, but rather by who may impute the crime to the corporation. New Jersey law permits a corporation to be convicted of a criminal offense for three reasons. N.J. STAT. ANN. §2C:2-7. The first way in which a corporation may be
found criminally culpable if the crime was committed by an agent 66 of the corporation, acting within the scope of his employment, and on behalf of the corporation. The second way in which a corporation may be convicted is if the offense is an "omission to discharge a specific duty of affirmative performance imposed on [the] corporations by law." Finally, the corporation may be convicted of an offense if the conduct constituting the offense is: engaged in, authorized, solicited, requested, commanded or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and on behalf of the corporation. If any of these three conditions are met, a corporation may be found criminally liable.

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

Acts (or omissions) are attributed to corporations and the theory of respondeat superior which stands for the proposition that a master is responsible for the wrongful acts of his servant and a principal for those of his agent. In the criminal context, respondeat superior has the effect of holding a corporation responsible for the criminal acts of "even the lowliest employee or agent," provided that the employees/agents acted within the scope of their employment and that their actions in some way benefited the corporation. Courts have held that as little as an employee's desire to further a career will support the requirement of "benefiting the corporation."

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

As discussed above, in New Jersey there are "virtually no crimes, including those requiring a criminal intent or a corruptive motive, of which a corporation may not be guilty." 1971 Commentary for N.J. STAT. ANN. §2C:2-7. Using the principle of Respondeat Superior, the courts have held that, for purposes of establishing the mens rea of the corporation, "the guilty intent of corporate officers may be imputed to a corporation to prove the corporation's guilt." State v. Graziani, 60 N.J. Super. 1, 17 (App. Div. 1959). The courts have not, however, concluded definitively how highly ranked in the corporation the agent must be to impute his mens rea to the corporation. See id.

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.

New Jersey has adopted some legislation which holds corporations strictly liable for the actions of their employees. For example, N.J. Stat. Ann. § 13:1E-62, provides that every owner or Operator of a major hazardous waste facility shall be strictly liable, without regard to fault for all damages resulting from the operations of the facility.

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66 In some instances, the particular statute will designate whether a person is "an agent" for purposes of creating corporate liability. Otherwise, the statute defines "agent" as any director, officer, servant employee or other person authorized to act on behalf of the corporation.
Similarly, violators of the Clean Water Act will be held strictly liable for the damages resulting from illegal emissions.

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

No, it is not necessary to identify and/or convict the individual offender in order to prosecute a corporation. See Richard S. Gruner, *Corporate Criminal Liability & Preventions*, §5.06 [3] Pg. 5-3.

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

There are several defenses that may be employed by a corporation to avoid criminal liability for the actions of one of its agents. The corporation defends itself by demonstrating that: (1) the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission, (2) the criminal actions were the result of a "rogue employee," (3) there was not sufficient causation between the corporation and the criminal act, or (4) the corporation had in place sufficient compliance programs to negate the required mens rea.

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?**

New Jersey law seems to favour companies that take precautionary measures. As discussed above, a compliance program is one way in which a corporation can severely limit its criminal culpability. Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws. However, the mere existence of a compliance program does not absolve the corporation of criminal liability. Rather, the compliance program must be adequately designed to effectively prevent and detect employee wrongdoing and management must enforce the compliance program. A compliance program will be deemed ineffective if the managers of the corporation are tacitly encouraging or pressuring employees to engage in misconduct to meet business objectives.

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

Yes, in some instances, the courts are authorized to seize bank accounts, freeze assets, and reclaim franchises during the investigative phase of criminal proceedings.
2.11. Can both the individual offender and the company been convicted for the same offence?

Yes, both the individual offender and the corporation may be convicted for the same offense. This point is exemplified in *State v. Lawn King*, in which the trial court convicted and sentenced both the corporate defendant and the individual defendant (majority shareholder) for several violations of the New Jersey anti-trust laws. *State v. Lawn King, Inc.*, 84 N.J. 179, (N.J. 1980).

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

Yes, a parent/group corporation may be prosecuted for offenses being committed within a subsidiary although a parent or affiliate corporation is not automatically liable for the criminal conduct of its subsidiary. New Jersey law provides that just because one corporation owns all the stock of another does not, in itself, render the parent liable for the wrongs of the other. Rather, the parent will be held liable only when the subsidiaries acts are used as an instrumentality to abuse the corporate privilege. In such a situation, the corporate veil will be pierced, and the parent held liable for the wrongdoings of the subsidiary.

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.

Debarment, disqualification and suspension from government contracting are the primary sanctions that may result from the commission of a crime, though not technically criminal punishment. Debarment, disqualification and suspension were first introduced by Governor Brendan Byrne in 1977, to guarantee that companies contracting with the state "meet some standard of responsibility—both competing and performing honestly in their dealings. New Jersey Executive Order 34 (1977). The three sanctions differ slightly. The sanction of debarment, is the most serious, and calls for the exclusion of the corporation from federal or state contracting based on their commission of a criminal offense—reasoning that the commission of such an act indicates a lack of trustworthiness. *Id*. The second sanction, suspension, is defined as the exclusion from state contracting for a temporary period of time, pending the completion of an investigation or legal proceeding. *Id*. The third sanction, disqualification, is defined as a debarment or a suspension which denies or revokes a qualification to bid or otherwise engage in state contracting which has been granted or applied. The rules regarding the application of these sanctions are codified under agency law, and may differ slightly depending on the agency. See *e.g.* NEW JERSEY ADMIN CODE 17:19-3.1.
3.2. Is the imposition of these sanctions confined to certain types of offences? Describe the most relevant sanctions and types of offences?

Executive Order 34 outlines numerous grounds for debarment, suspension or disqualification, many of which were subsequently adopted by the agencies in their New Jersey Administrative Code. The criminal grounds giving rise to potential debarment, suspension or disqualification include:

- Those incident to obtaining or attempting to obtain a public or private contract
- Offenses indicating lack of business integrity or honesty such as embezzlement, theft, forgery, bribery, falsification or destruction of records, perjury, false swearing, receiving stolen property, obstruction of justice
- Violations of the federal or state antitrust statutes
- Violations of any of the laws governing the conduct of elections of New Jersey
- Violations of the Law Against Discrimination
- Violations of any laws governing labor laws and standards
- Violations of any laws governing the conduct of occupations or professions or regulated industries

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

The primary defense to avoid debarment, suspension or disqualification is that the offense committed does not indicate "a lack of trustworthiness." Because debarment, suspension and disqualification are not "automatic" sanctions, the agency may choose not to impose them—even if a qualifying crime was committed. Defendants trying to avoid these sanctions may argue that that these sanctions are inappropriate because the criminal offense is not indicative of the corporation's trustworthiness. For example, in situations where the violation is committed by a rogue employee or is obviously an isolated incident, the corporation would have a strong argument that although they could be debarred, suspended or disqualified, the corporation has not indicated that it cannot be trusted.

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

As discussed above, the sanction of suspension may be imposed at the investigative phase of a criminal proceeding. Suspension is defined as the exclusion from state contracting for a temporary period of time, pending the completion of an investigation or legal proceedings. The sanctions of debarment and disqualification are not applicable at the investigative phase.
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?

The prosecution has discretion when determining whether to prosecute a corporation. In re Ringwood Fact Finding Committee, 65 N.J. 512, 516 (1974). Arguably, the real power of prosecutors lies in their ability to exercise this discretion and choose whom they would like to prosecute. Prosecutors will consider whether they are able to prove guilt beyond a reasonable doubt; in other words, could the prosecutor obtain and sustain a conviction. United States Attorneys’ Manual, §9-27.200 (2007). In addition to this basic consideration, there are many other factors that prosecutors may consider in determining whether to prosecute a corporation.

In 2003, Deputy Attorney General Larry Thompson released a memorandum, "Principles of Federal Prosecution of Business Organizations," explaining nine factors that may be considered when determining whether to charge a corporation. In 2006, Deputy Attorney General Paul McNulty released a superseding version of the memorandum that specifically adjusted aspects of the policy addressing the extent to which prosecutors could consider a corporation's waiver of attorney-client and work product protections. Acting in accordance with the McNulty memo, a prosecutor will likely consider some combination of the following factors when determining whether to prosecute:

1. Nature and seriousness of the offense.
2. Pervasiveness of the wrongdoing within the corporation, including the complicity in, or condemnation of, the wrongdoing by corporate management.
3. Corporation's criminal, civil and regulatory history. 67
4. Corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate in the investigation of its agents.
5. Adequacy of the corporation's pre-existing compliance program.
6. Corporation's remedial actions.
7. Collateral consequences (e.g. disproportionate harm to those not proven personally culpable).
8. Adequacy of the prosecution of individuals responsible for the corporation's malfeasance.
9. Adequacy of remedies such as civil or regulatory enforcement actions.

Previously, a corporation's waiver of the attorney client privilege and work product protection could be included in a prosecutor's assessment of a

67 Although the term “corporation” is used, the factors apply to all types of business organizations.
6 The current policy requires that a prosecutor establish a "legitimate need" for the privileged information before seeking a waiver to access records from a corporation. A legitimate need is established by a balancing of policy considerations, not just the desire or convenience of obtaining privileged information. Once a prosecutor determines that there is a legitimate need he or she must obtain the requisite permission before asking the corporation to turn over privileged information. Prosecutors may not consider a corporation's denying production of privileged documents as a strike against the corporation in their decision to charge the corporation. However, the McNulty memo notes that prosecutors "may always favorably consider a corporation's acquiescence to the government's waiver request" when assessing the corporation's level of cooperation.
corporation's "willingness to cooperate." The McNulty Memo amended the guidelines based on concerns that this practice, using the lack of a waiver of privileged documents as a factor in determining whether to prosecute, discouraged open communication between corporate employees and legal counsel.6

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

A corporation's status as a target, subject, or witness can change based on the government's information. During the initial stages of an investigation or a proceeding, a person or corporation may be considered a "subject." A "subject of an investigation is a person whose conduct is within the scope of the grand jury's investigation." United States Attorneys' Manual, §9-11.151 (2007). A target is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." United States Attorneys' Manual, §9-11.151 (2007).

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?

The Fifth Amendment is not generally held to apply to corporations. Richard S. Gruner, Corporate Criminal Liability and Prevention, §5.06[4], 5-35 (2007). A public corporation speaks to its shareholders in the form of documentation, which is subject to subpoena. In private corporations and partnerships, to the extent that they keep records, their documents are also subject to subpoena. The representative of the corporation and individuals that are not specifically the target of an investigation do not have the privilege of asserting the Fifth Amendment. However, a sole proprietor, as an individual, is able to plead the Fifth Amendment as a protection against producing incriminating testimony by virtue of coercion or improper force. Richard S. Gruner, Corporate Criminal Liability and Prevention, §5.06[4], 5-35 (2007). An exception for all types of companies regarding their ability to remain silent is that they do not need to turn over documents protected by the (1) attorney client privilege, (2) work product protection, and (3) documents relating to self-critical or self-evaluation analysis. Wylie v. Mills, 195 N.J. Super. 332, 338 (1984).

An individual in a corporation that may be held personally liable is able to plead the Fifth Amendment. However, individuals that are not personally liable may be charged with obstruction of justice if they refuse to answer the government's questions. The Fourth Amendment protects companies from search and seizure. Richard S. Gruner, Corporate Criminal Liability and Prevention, §5.06[3], 5-34 (2007). Although a corporation can usually deny the government entry if they do not have a search warrant, it is not a generally advisable practice. Instead, the corporation should ask the inspector for their reasons and objectives and limit the inspection to areas necessary to
accomplish those objectives. The government may enter any premises without a search warrant if there is eminent danger or there is a felony occurring. While lawfully on the premises, the government may observe and then prosecute any illegal behavior they encounter.

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

There are no specific guidelines as to when the government needs to inform a corporation of possible prosecution. At a minimum, a corporation will be alerted to an investigation when they receive a subpoena or a letter stating the corporation is considered the target of an investigation. However, the government may decide to subpoena people associated with the corporation before actually subpoenaing the company itself. If a corporation does not comply with the subpoena the government may issue a search warrant.

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?**

A corporation may designate a company representative to work with the government. The representative may speak on behalf of the corporation and may be the custodian of the records. The corporation may also determine which employees are in the sphere of management and provide those individuals with counsel. The employees that are usually represented by the corporation's lawyers are generally those people that are responsible for making critical decisions.

Anyone from the corporation, including directors, managers and employees, may be a witness in proceedings against the corporation. In fact, an employee can testify against the corporation and maintain job security within the corporation because of New Jersey's whistleblower statute. N.J.S.A. 34:19-4 (2007). Anyone within the corporation may be called as a witness as long as they are not "subjects" or "targets" of an investigation.

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

There is a preference to prosecute the corporation and individual offenders together. An individual may be held liable for the actions of the corporation if the individual was within the sphere of management control. Other employees may also be held "personally liable for crimes committed in their corporate capacities," as an additional means of deterring illegal behavior. Richard S. Gruner, *Corporate Criminal Liability and Prevention*, §13.12[1], 13-81 (2007). Alternatively, the corporation may be held liable for the actions of an individual. N.J. Stat. § 2C:2-7 (2007). The three elements necessary to hold a corporation liable for the actions of individual employees are: (1) the employee was acting within the scope and nature of their employment, (2) the actions of the employees were designed to benefit the corporation and (3) the court can impute the intent of the individual to the corporation. *Corporate Criminal Liability*, 39
Am. Crim. L. Rev. 327, 33132 (2002). The wilful blindness doctrine prevents a corporation "from deliberately disregarding criminal activity." Corporate Criminal Liability, 39 Am. Crim. L. Rev. 327, 333 (2002). In other words, the corporation may be liable for the criminal actions of an individual if the corporation knew of or should have known about certain illegal conduct.

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

Corporations are not supposed to be treated any more harshly or leniently than individuals. An individual, however, may face additional criminal liability in connection with the corporate offense for a variety of reasons, including aiding or concealing the offense, witness tampering or obstructing justice. Richard S. Gruner, Corporate Criminal Liability and Prevention, § 13.12, 13-81 (2007). Individual criminal liability requires a "showing of fault or blame on the part of the wrongdoer," which is arguably a higher burden of proof than required to prosecute corporate criminal liability. Jennifer Arlen, Evolution of Corporate Criminal Liability: Implications for Managers, in LEADERSHIP AND GOVERNANCE FROM THE INSIDE OUT 4 (Robert Gandossy & Jeffrey Sonnenfeld, eds. 2004).

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?

The prosecution has broad discretion at both the state and federal levels to impose a sanction rather than prosecute a company. Paul J. McNulty, Principles of Federal Prosecution of Business Organizations, 6 (2007). The prosecutor may elect to impose sanctions as a means to achieve the primary goals of deterrence, punishment, and rehabilitation of the corporation. In determining whether to impose sanctions, the McNulty memorandum suggests that the prosecutor or court consider the following factors:

1. The sanctions available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed; and 3. The effect of non-criminal disposition on Federal law enforcement interests.

Id. at 17. The McNulty memorandum further provides that sanctions may not be appropriate in certain situations. This includes cases where the corporation has engaged in an "egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation." Id.

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

A corporation's status as a target, subject, or witness can change based on the government's information. During the initial stages of an investigation or a proceeding,
a person or company may be considered a "subject." A "subject of an investigation is a person whose conduct is within the scope of the grand jury's investigation." *United States Attorneys' Manual*, §9-11.151 (2007). A target is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." *Id.*

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

Because the prosecution often has an incentive to "induce companies to monitor, report, and cooperate," corporations are normally informed during negotiations of the prosecution's intent to impose sanctions. Jennifer Arlen, *Evolution of Corporate Criminal Liability Implications for Managers*, in *LEADERSHIP AND GOVERNANCE FROM THE INSIDE OUT* 8 (Robert Gandossy & Jeffrey Sonnenfeld, eds. 2004). Accordingly, the Department of Justice policy encourages prosecutors to refrain from indicting a corporation for the unlawful actions of its employees "if the corporation had an effective [deterrence] program, reported detected wrongdoing to the government, and cooperated fully." *Id.* Corporations are encouraged to institute such policies and programs, in exchange for "the promise of insulation from criminal sanctions," and "firms must expect to be better off if they engage in such policing measures than if they do not." *Id.* Companies may also be made aware of the prosecution's intent to impose sanctions during sentencing. Pursuant to *United States Attorneys' Manual*, §9-27.730, a government attorney may make sentencing recommendations in the following scenarios:

1. The terms of a plea agreement so require it;
2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

The Comment to this Principle suggests that, when deciding whether to recommend a sentence, prosecutors consider both "the attitude of the court toward sentencing recommendations by the government" and "the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation." Further, prosecutors should consider how best to serve both the defendant and the public interest. The Comment provides that prosecutors who "anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs[] may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation." *United States Attorneys' Manual*, §9-27.730 cmt. (2007).

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

A company has a right to a hearing when it is at risk that sanctions might be imposed.
5.5. **Will there be joint proceedings against the company and the individual offender?**

Prosecutors often prefer to join the proceedings against the corporate and individual offenders. *See State v. Lawn King, Inc.*, 84 N.J. 179, 212 (N.J. 1980) (joining criminal proceedings against a corporation and its owner regarding counts of illegal restraint of trade in operating a franchise). In *Lawn King*, the Supreme Court of New Jersey affirmed the imposition of sanctions against both the individual and corporate defendant in a single action. *Id.*

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

Individuals may be subject to criminal liability for their role in a corporate offense. For example, corporate employees may be held individually liable for any crime committed in their capacity as a corporate employee. Richard S. Gruner, *Corporate Criminal Liability and Prevention*, §13.12[1], 13-81 (2007). Similar to the inquiry addressed in Question 5.1, prosecutors should take the following factors into consideration when determining whether to prosecute or impose sanctions on an individual:

1. The sanctions available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed; and 3. The effect of non-criminal disposition on Federal law enforcement interests. *United States Attorneys' Manual*, §9-27.250.

Individual liability differs from corporate liability in that individuals are subject to sanction for accomplice liability, wherein the employee aids or conceals the corporate offense, or conspiracy liability for an act committed in furtherance of an unlawful objective. Gruner at §13.12[2-3], 13-82, 90. Moreover, executives may incur individual liability based on their "responsible share" in overseeing the business activities of offending subordinates. *Id.* at §13.12[4], 13-91.

Another fundamental difference is that the prosecution bears a higher evidentiary burden for establishing individual criminal liability than corporate criminal liability: "Individual criminal liability generally requires a showing of fault or blame on the part of the wrongdoer (i.e., mens rea) [whereas] corporate criminal liability requires a showing that an [agent] committed a crime in the course of performing [his/her] job for the firm, ostensibly on the firm's behalf." *Arien* at 4. fn 8.

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?**

Yes, courts use a three part test to determine whether corporate directors or managers can be held criminally liable for the offenses of their individual employees. *See*
generally Annie Geraghty, Corporate Criminal Liability, 39 Am. Crim. L. Rev. 327, 333 (2002); Larry D. Thompson, Principles of Federal Prosecution of Business Organizations, at 2 (January 20, 2003). First, the individual employee must act within the scope of his or her employment. See Geraghty, supra at 329. Second, the employee must commit the business crime to benefit the corporation. See id. Third, the individual employee's act and intent, or mens rea, must be imputed to the corporation. See id.

For the first element, courts use the civil law doctrine of respondeat superior to establish that corporate directors or manages may be held criminally liable for the illegal acts of their individual employees. See Geraghty, supra, at 328. Under the doctrine of respondeat superior, an employer is held liable for the wrongful acts of its agents or employees if the employees commit criminal acts within the scope of their employment or agency. See id. at n2. Determining whether an employee acted within the scope of his or her employment is a fact specific inquiry. See id. at 330. However, this requirement is satisfied if (1) a third party could reasonably believe the employee had the authority to perform the alleged crime or (2) the employee explicitly received authority from the corporation's managers or directors to perform the alleged crime. See id.

Under the second element of corporate criminal liability, the employee must act to benefit the corporation. See id. at 331-32. Courts have held, however, that a corporation does not need to actually profit from its agent's business crime to be found criminally liable. See Thompson, supra, at 2. (noting that whether the agent acted with the intent to benefit the corporation is more important than whether the corporation actually benefited from its employees action). Nevertheless, employee actions that expressly contradict the corporation's interests absolve the corporation from criminal liability. See Geraghty, supra, at 332.

Under the third element, courts determine whether the corporation's agent committed the business crime intending to benefit the corporation. See id. at 328-29. In other words, under this element, the government must prove the agent's criminal act and intent can be imputed to the corporation. See id. at 333. Imputing intent from the employee to the corporation is important since a corporation mainly acts through its employees, and thus cannot have the requisite intent to commit a crime. See Geraghty, supra, at 328-29. The "wilful blindness" doctrine helps courts establish an employee's intentions to commit a business crime hoping to benefit the company. See id at 333. The "wilful blindness" doctrine applies when corporate directors or managers have some knowledge of potential criminal activity and deliberately fail to prevent it. See id. The definition of "wilful blindness" also supports the fact that corporations may generally act as accomplices under these circumstances. See N.J. STAT. ANN. §2C:2-6(c) (West 2007) 68

Corporations may be criminally liable for their employee's business crimes through the established principles of accomplice liability. See id. In addition to being an

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64 Under New Jersey law a person is an accomplice to another person's crime if he or she promotes or facilitates the offence by (1) soliciting someone to commit the offense, (2) aiding, agreeing, or attempting to aid someone plan or commit the offense, or (3) failing to make a proper effort to prevent the commission of the offence while having a legal duty to do so. See N.J. Stat. Ann. § 2C:2-6(c)
accomplice to a crime, under both federal and New Jersey law a corporation may also
be guilty of criminal conspiracy.

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

As previously noted, the civil law doctrine of respondeat superior facilitates a
corporation's prosecution for the criminal liability of its employee's actions. See
Geraghty, supra, at 330-31. Under New Jersey law, to prove a corporation is
criminally liable for its employees actions the prosecution must prove beyond a
reasonable doubt that: (1) the agent acted within the scope of his or her employment
but that this action is not one "defined by a statute which indicates a legislative purpose
not to impose criminal liability on corporations," (2) the agent acted in a way that
failed to "discharge a specific duty of affirmative performance imposed on
corporations by law," and (3) the agent acted in a way that was "authorized, solicited,
requested, commanded, or recklessly tolerated" by the corporation's board of directors
or other high managerial agents. §2C:2-7.

Prosecutors must impute the intent of a corporation's employees because a corporation
is a legal, rather than, an actual entity. See Geraghty, supra, at 328-29. To impute the
actor's intent to the corporation, and thus establish the mens rea, of the crime,
prosecutors often charge corporations with conspiracy. See id. at 333-34. Under federal
law, a corporate employee violates the federal conspiracy statute when he or she enters
an agreement with others to commit a federal crime, while acting within the scope of
his or her employment and for the corporation's benefit. See 18 U.S.C. §371 (2007);
see also Richard S. Gruner, Corporate Criminal Liability and Prevention, §5.01 [1], 5-
2 (2007) (explaining the federal conspiracy statute and citing seminal cases
interpreting it.). Directors and managers with direct supervision of the offending
corporate act who knew or should have known about it, or turned a willful blind eye to
it, may be held criminally liable as accomplices or as aiders and abettors of such
conduct. See id.

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?

Yes. Despite the varied reasons corporate employees commit business crimes,
corporations are held liable for these actions as long as "one motivation of its agent is
to benefit the corporation." Thompson, supra, at 2. Prosecutors will likely use the
inadequate selection, instruction or supervision of employees to substantiate a
corporation's (1) willful blindness, (2) conspiracy or (3) criminal complicity in the
business crime. See id. Indeed, under the Organizational Guidelines a corporation
reduces its culpability by cooperating with the investigation or promptly reporting the
wrongdoing. See Geraghty, supra, at 350-51.

In addition to overseeing the daily operations of their corporation, directors and
managers of corporations are responsible for monitoring their organization's culture. If
established, the "wilful blindness" doctrine presents a case where corporate managers and directors failed to adequately instruct their employees to stop their illegal activity. "Wilful blindness," or the tacit or overt acceptance of an employee's criminal action, weighs heavily against corporation's and its directors and managers under the Organizational Guidelines. See id at 5 (explaining how the United States Sentencing Guidelines treat pervasive corporate wrongdoing). Moreover, prosecutors could also use the "wilful blindness" doctrine to establish a corporation knowingly hired an employee with suspect intentions.

Prosecutors may also use the inadequate selection, instruction or supervision of employees to substantiate conspiracy charges. Under New Jersey law, to establish a conspiracy conviction, the prosecution must prove that (1) two or more individuals agreed to or attempted to commit a crime, or solicited someone else to commit the offense or that (2) one individual aided another person in planning, committing, soliciting, or attempting to commit the crime. See § N.J. STAT. ANN. §2C:5-2(a).

Courts will likely use the time period a conspiracy either developed or existed without managerial interference against a corporation during sentencing. See Geraghty, supra, at 333-34; Thompson, supra, at 5. Criminal complicity in the business crime will likewise weigh against a corporation's favor at sentencing. See id.

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

By holding corporations criminally liable for business crimes, the government seeks to deter criminal activity in such a way that forces directors and managers to mandate their corporate agents to follow the relevant federal and state criminal statutes governing their work. See Gruner § 3.03 [3] at 3.15. As a result, corporations have several ways they can minimize the risks of criminal liability for their managers and directors.

First, corporations should establish strong corporate compliance and self-audit programs. See generally Gruner § 14.01 (discussing the benefits of law compliance programs and providing seminal cases on the subject). Corporate compliance programs benefit corporations by (1) detecting and preventing criminal offenses, (2) furthering a corporation's interests by keeping their litigation costs down and (3) establishing stringent ethical standards for their daily business operations. See id. at 14-3. Effective law compliance programs give employees incentives for adopting company policy and monitor their adherence to company standards. See id. at 14-4. Corporate compliance programs should conform to all applicable criminal and civil laws, regulations and rules. See Thompson, supra, at 8. Corporate compliance programs also help reduce corporate liability under the Organizational Guidelines. See Geraghty, supra, at 347. Even though compliance programs cannot fully prevent all criminal activity within a corporation, prosecutors look favorably upon compliance programs that directors actually enforce. Thompson, supra, at 9-10.
Second, corporations should establish strong corporate governance standards. Corporate managers and directors have a duty to both their employees and the corporation's stockholders. As a result, the creation of internal disciplinary programs both promotes accountability within the corporation and assures stockholders the corporation values their business. See Gruner §14.01[7], at 14-28.6-7 (discussing corporate governance obligations and the importance of ethical values within a corporation).

Lastly, corporations should cooperate with government investigations when necessary and report any suspicious wrongdoing in order to minimize future criminal liability. See Geraghty, supra, at 350-51
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.

Pursuant to the Commonwealth of Puerto Rico’s Penal Code,(hereinafter referred to as “the Code”), a company can be prosecuted in a similar way as an individual offender. The Code specifies that corporations and other collective entities, such as unincorporated associations, are “persons” for the purposes of criminal law. However, due to the fictional nature of a legal entity, sanctions prescribed by the Code are limited to those set forth below -see answer to question 1.2-, which are different to those that can be imposed to individual offenders.

(See P.R. Laws Ann. tit. 33 §§ 4642 and 4674)

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

1. Fine

The penalty of a fine consists of the obligation of the legal entity to pay an amount of money as sentenced by the courts of the Commonwealth of Puerto Rico. The fines to be imposed will be determined based on the gross annual income of the company in the year in which the crime was committed, according to the classification of the crime. In addition, the court may consider the legal entity’s state of business and its financial standing during sentencing. The nature and consequences of the offense and
other material facts, such as any applicable aggravating or extenuating circumstances, may also affect the amount of the fine.

The court may impose a fine to be selected according to the classification of the offense for which the legal entity has been convicted, as follows:

Felony - First Degree: Fine equivalent to ten percent (10%) of legal entity’s annual income at the time the crime was committed. (Example: Murder, Production of biological weapons).

Felony - Second Degree: Fine equivalent to eight percent (8%) of legal entity’s annual income at the time the crime was committed. (Example: Human cloning, Contamination of public water with malice aforethought).

Felony - Third Degree: Fine equivalent to six percent (6%) of legal entity’s annual income at the time the crime was committed. (Example: Money laundering, Contamination of public water by means of negligence).

Felony - Fourth Degree: Fine equivalent to four percent (4%) of legal entity’s annual income at the time the crime was committed. (Example: Aggravated battery, Fraud, Forgery, Concealment).

Misdemeanor: Fine equivalent to two percent (2%) of legal entity’s annual income at the time the crime was committed. (Example: Simple battery).

(See P.R. Laws Ann. tit. 33 §§ 4711-4712).

2. **Suspension of Activities**

   It consists in the paralysis of all activities of the entity, except for those of strict compliance, during such time as is determined by the court which is not to exceed six (6) months. Furthermore, suspension also entails the payment of a fine. This penalty is only available when the company is convicted for a second offense (recidivism). (Example: Human cloning, Production of biological weapons).

(See P.R. Laws Ann. tit. 33 §§ 4711 and 4713).

3. **Probation**

   It entails the supervision of a company’s activities by a person or entity named by the court. Supervision is subject to terms and conditions imposed by the court. The period is not to exceed one (1) year. In addition, probation also includes the payment of a fine. This penalty is only available when the company is convicted for a second offense (recidivism).

(See P.R. Laws Ann. tit. 33 §§ 4711 and 4714).
4. **Suspension or revocation of license, permit or authorization**

When, in committing an offense, a company violates the requirements provided by law for the issuance of a license, permit or authorization for the first time, in addition to any fine imposed, a suspension thereof may be decreed by the court for a term that cannot exceed one (1) year.

If the entity violates the requirements provided by law for the issuance of a license, permit or authorization more than once, the court may revoke them permanently. (Example: Human cloning, Production of biological weapons, Aggravated environmental contamination).

(See P.R. Laws Ann. tit. 33 §§ 4711 and 4715).

5. **Cancellation of certificate of incorporation or dissolution**

This penalty is available only when a company commits a new felony, after being imposed a final sentence for previous felonies -two (2) or more convictions for offenses of the same nature committed in different time periods-, and the court can reasonably conclude that the entity follows a persistent course of criminal conduct. The aforementioned punishment, also entails the payment of a fine.

(See P.R. Laws Ann. tit. 33 §§ 4711, 4716 and 4718).

6. **Penalty of restitution**

It consists of the obligation imposed by the court upon the juridical person to pay the aggrieved party for damages and losses to his/her person or to his/her property as a consequence of the criminal act. To determine the amount of this penalty, the court will take into account the capital stock of the entity, the status of its business, the nature and consequences of the crime, and any other relevant circumstance.

(See P.R. Laws Ann. tit. 33 §§ 4711, 4717).

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.**

Other sanctions may be imposed to a company in other fields of law. There are administrative sanctions which are imposed by a variety of governmental regulatory agencies. These penalties commonly entail the payment of fines, and in some cases may include a penal element. Although not categorized as sanctions, there are civil remedies, which include injunctions, and the award of damages. Civil remedies are predicated on principles of vicarious liability. Under this doctrine, the company is liable for the conduct of its employees in the course of employment. This is justified on
the ground that since the employer benefits from the employee’s work, it should also carry the burdens. Punitive damages are not awarded in our jurisdiction.

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.

Each offense defined in the Code encompasses a sanction, according to its classification and nature -see answer to question 1.2-

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

The basic requirement is for the company to be convicted for the offense.

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.

In theory, a company can commit any crime outlined in the Code. Puerto Rico statues specify that companies are “persons” for the purposes of criminal law. Juridical entities legally constituted in the Commonwealth of Puerto Rico or authorized to act as such that are not incorporated may be criminally liable when their agents or employees commit criminal acts.

(See P.R. Laws Ann. tit. 33 §§ 4642 and 4674)

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

The Code holds a company legally accountable for the conduct of its agents who act in its behalf. The conduct of the employee is imputed to the company when acts, omissions, and the knowledge of the employees can be attributed to the company -see answer to question 2.3-. A director or official of a corporation is not responsible for a crime committed by the corporation, except when the official has participated with the company in the illegal act.

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

Mens rea is a required element in criminal offenses. The central issue that arises from the imposition of criminal liability to an abstract entity, such as a company, is that of attributing a culpable mental state or mens rea. Nevertheless, in our jurisdiction, a company can be convicted of crimes requiring a mental state. The conduct of the
employee is imputed to the company. Employee’s state of mind is established with circumstantial evidence.

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.**

Pursuant to the Code a company cannot be sanctioned for a criminal act or omission unless the same is done with intent or criminal negligence. Mens rea has to be proven. This regulation is not based on constitutional grounds; therefore, the legislature can, at any time, establish an offense for which mens rea is not required.

(See P.R. Laws Ann. tit. 33 §§ 4642 and 4674)

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

There is no need to identify or convict the individual offender in order to prosecute a company. The criminal liability of a juridical person is not contingent upon conviction of the company’s agent.

(See P.R. Laws Ann. tit. 33 § 4674)

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

A company can raise any defense listed in the Code, including self defense, state of necessity, exercise of a right or performance of duty, hierarchical obedience, entrapment, intimidation or violence, and consent of the victim (only when lack of consent constitutes an essential element of the crime).

(See P.R. Laws Ann. tit. 33 §§ 4653 - 4662)

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?**

According to the Code, the company may be criminally liable if the criminal acts performed by its agent can be attributable to it. See answers to questions 2.3 and 2.4. There is no statutory provision prescribing that a company can avoid punishment by establishing that it is sufficiently organized or that it has taken care to exert control on its directors, managers or employees. However, these facts can be taken into consideration by a prosecutor when determining whether to indict a company.
2.10. Can certain kinds of sanctions been executed during the investigative phase of a criminal proceedings (e.g. preliminary seizure of bank accounts, attachment of claims)?

Certain sanctions, such as preliminary seizures of bank accounts, can be executed during the investigative phase of a criminal proceeding.

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

The individual offender and the company can be convicted for the same offense. The liability of the legal entity does not exclude the individual liability of directors or representatives of the juridical person which take part in the criminal act.

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

Subsidiaries may act as agents of the parent company; therefore, a parent company may be criminally liable if the acts performed by its agents -subsidiaries- can be attributed to it. See answers to questions 2.3 and 2.4.

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.

See answer to question 1.3.

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

See answer to question 2.1.

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

See answer to question 2.8.

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

See answer to question 2.10.
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?

The prosecutor has discretion to arraign the company. The district attorney has broad authority to decide whether to investigate, to determine whether to bring charges, what charges to bring, and when to bring charges. The prosecutor will take into consideration, among other things, whether there is sufficient evidence to attribute the criminal act to the company, and the company’s disposition to cooperate during the investigation.

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

There is no specific stage in which a company can be considered as a suspect. It will depend on the evidence available.

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?

The company has a right to remain silent, to refuse production of documents, to deny access to company site without a search warrant, to refuse testimony, to answer questions or to any other suspect’s rights. These rights are exercised by company’s owners, board of directors, or any authorized officer.

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

The company will be informed that it is or can become prosecuted at any moment during the investigation.

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?

Directors, managers or employees can served as witnesses in proceedings against a company, regardless if they are suspects themselves.

(See P.R. Laws Ann. tit. 32 Ap. IV, R.36)
4.6. **Will there be a joint proceeding against the company and the individual offender?**

From a procedural standpoint, it is possible that there be a joint proceeding against the company and the individual offender. However, generally, they are held separately.

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

A proceeding against a company does not differ from that against an individual suspect.

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?**

The discretion of whether to impose a sanction on a company or not lies with the court or the pertinent administrative agency. They will take into consideration the nature of the offense, its effects, and others factors such as the entity’s cooperation throughout the process.

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

See answer to question 4.2.

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

See answer to question 4.4.

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

See answer to question 2.8.

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

See answer to question 4.6.

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

See answer to question 4.7.
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?

Directors or managers can be criminally liable for offenses committed by other individual directors, managers or employees, only when there has been conspiracy or when the person assisted in the commission of the offense, even though said assistance was not necessary for the accomplishment of the crime. Under the Code, this is term “cooperation”. Furthermore, a director or manager may be liable as an accomplice for the conduct of his/her subordinate, provided that he/she aided or abetted his/her conduct as specified in the law of complicity.

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

N/A

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?

There is not a categorical answer to this question. It will depend on the evidence available and the crimes committed.

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

To exclude or minimize criminal liability risks of directors of a company, the organization should establish an internal program to educate officers, owners, and employees in all areas of compliance. Internal investigations should be conducted periodically to ensure that management is properly informed of potential problems. Employers should take all the necessary steps to ensure that all of their employees are acting in a lawful manner and avoiding any appearance of impropriety. Having the continuing advice of a law firm or an in-house counsel is strongly suggested.

Note:

An English version of the Code is available at the website of the Office of Legislative Services, www.oslpr.org
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.

No, there are no specific criminal laws that allow the prosecution of companies in a way similar to individuals. Moreover, scholars understand that it is not possible to apply the existing criminal legislation to companies, only natural persons may be subject to criminal laws.

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

According to Uruguayan law no criminal sanctions may be imposed on a company or legal entity. However other sanctions may be imposed, as described in question 1.3 below.

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.

Provided the directors, managers, employees etc. are acting on behalf of the company, other penalties may be imposed as described in question 3.1 below.

If such persons are not acting on behalf of the company, they will be personally liable, but no sanction will be imposed on the company.
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.

N/A

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

N/A

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.

N/A

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

N/A

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

N/A

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.

N/A

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

N/A

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

N/A
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?

N/A

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

N/A

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

N/A

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

N/A

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.

There is a wide variety of administrative sanctions in the Uruguayan legislation. The most common administrative sanctions are a) warning, b) observation, c) fine and d) temporary or definitive closure. These sanctions are applied in a gradual way by the competent authorities depending on the breached law or regulation.

In cases in which a government authorization is necessary to carry out certain activity (for example radio, banking, etc.); the competent authority may revoke the same as a consequence of the breach of applicable laws and regulations.

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

Yes, applicable laws and regulations define the possible sanctions for each kind of offence.

As a general rule all companies (corporations and limited liability partnerships) are subject to the control and supervision of the Executive Power. According to Decree N°
486/001 the Executive Power (through the “Auditoría Interna de la Nación”) may impose different sanctions depending on the different offences.

The most common sanctions are the imposition of fines and warnings. The most common offences are the failure of companies to submit information to the Auditoría Interna de la Nación within the applicable terms and parameters (failure to communicate increase in capital, failure to inform bylaws modification, etc).

Also applicable to all companies are sanctions related to breach of tax laws and regulations. In such case, there are more specific sanctions: a) penalty interest in the case of late payments; b) fines in the case of contravention (the breach of laws or regulations that impose formal duties), c) payment of one to fifteen times the amounts omitted in case of tax evasion (any fraudulent act done with the intention of obtaining an undue enrichment for oneself or a third party at the expense of the rights of the State to receive a tax). Any occultation or deception that induces public agents to accept as payment a lower amount than the applicable one is regarded to be a fraudulent act, d) payment of one to five times the amounts omitted omission of payment (any unlawful act other than the ones referred to in letters a, b and c which represents a decrease in the amount of taxes paid).

Additionally, the same general sanctions referred to in 3.1 apply in certain areas of activities (banking, consumer defense, etc.) in the case of breach of the laws and regulations applicable to them.

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

The defenses a company can arise vary from case to case. However, as a general rule, a company can argue that it has abided by the applicable laws and regulations. Another common defense is prescription, which can be alleged in administrative and judicial proceedings.

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

As stated in our answer to question 1.1 no criminal proceedings can be initiated against companies.

In relation to administrative proceedings, please note the following.

Whenever an administrative procedure that can result in the application of a sanction has been initiated, there is an obligation to inform the company of the same. After notification the private party is offered a term in which it can provide evidence and all information it deems relevant to the investigation. After this stage is concluded, the administrative area adopts a decision on the issue, which can result on the application of a sanction. When this happens the company is offered a 10 day term, after the
notification of the sanction, so as to reject the decision and file for an administrative appeal.

The administrative appeal can have up to three stages depending on who has imposed the sanction in question.

After the administrative recourses are concluded, the company is offered a 60 day term after the notification of denial or expiration of the term in which the administration must act in which it can file for the annulment of the administrative act that imposes the sanction, before the Tribunal de lo Contencioso Administrativo (hereinafter “TCA”). It is important to mention that this is an autonomous body different form the Judicial Power. The TCA can only annul administrative decisions which are in violation of the law or have been adopted by abuse of power. Thus, the TCA cannot modify or reduce sanctions; it can only declare null the administrative decision by which the sanction was imposed.

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?

N/A

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

N/A

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?

N/A

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

N/A

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?

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

N/A

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

N/A

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?

As explained in our answer to question 3.3 no criminal sanctions may be imposed on companies.

In relation to administrative sanctions, the government has discretion to analyze the facts and decide with respect to the sanctions, acting, however, within the maximums and minimums set by the laws and regulations.

When deciding on the application of a sanction the administration will normally analyze the importance of the law or regulation violated, intention, previous violations, the amount of the damage (in cases in which a damage results of the breach), etc.

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

N/A

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

No prosecution applies in respect of companies.

In relation to administrative liability, as stated in question 3.3, before adopting any measure that can result in the application of sanctions to a private party, the administration must inform this situation to the company, who is given the opportunity to present all the evidence it deems necessary.

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

Please see 3.4. above.
5.5. **Will there be joint proceedings against the company and the individual offender?**

Since no criminal proceedings may be initiated against a company, there are no joint criminal proceedings.

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

N/A

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?**

Directors or managers cannot, in principle, be criminally held liable for offences committed by other individual directors, managers or employees.

In the matter of criminal conduct, and as a consequence of the application of general principles, the liability of the members of the directors or managers arises from their personal and individual involvement in the criminal act. In this case the general provisions on criminal felonies are applicable, notwithstanding the fact that there is a specific legal provision dealing with directors which have fraudulently transferred or emptied the company of all its assets (Law Nr. 14095).

Directors, who may sufficiently prove that they had no intervention in illicit acts or had no knowledge of such act or expressed their opposition to the same, shall be exempted from such responsibility.

The only specific provision regarding directors’ or administrators’ criminal liability is set forth in law 2230 which applies to a corporation’s bankruptcy. Such law establishes as a crime the fraud or fraudulent alteration of the balance sheet of the company, committed by the directors of a corporation in bankruptcy or judicial liquidation. This provision only applies when the company is in a bankruptcy procedure or reorganization.

The only possible way in which a director or manager may be found criminally liable for the actions of an employee is if such employee was used as a means to commit a crime. That is, the actual author of the crime would be the director which for example gave orders to the employee who physically carried out the actions which constitute the criminal conduct.
6.2. **What are the legal requirements for a criminal liability of directors and managers for offences committed by others?**

There are no legal requirements established in Uruguay. As we have stated in 6.1 directors are criminally liable for their own conduct.

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?**

No.

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

Directors must oppose (with such opposition being evidenced if possible in the relevant minutes of directors’ meetings or if not, in other written means) to any decision that may derive in criminal liability.

As criminal responsibility may derive from not acting diligently as a director, it is advisable that directors have adequate control over the company so as to avoid criminal liability due to negligence. In order to do this they must be able to prove they have conducted their office with due diligence. They must ensure to perform all activities necessary to protect the interests of the corporation, especially when the same contradict the interests of the shareholders.
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.

In principle, the Venezuelan Criminal Code (Código Penal Venezolano) does not expressly refer to the prosecution of companies for the perpetration of criminal offenses. Traditionally collective persons were not subject to criminal prosecution, on one hand because most criminal offenses carry prison sentences, clearly inapplicable to companies, and on the other hand because it was considered that criminal acts fell outside the scope of commercial activities and were the sole responsibility of the individual persons that performed them. As collective persons have no means of acting or expressing themselves but through individual persons, there is always a liable individual in any company illicit act or omission.

With the influence of foreign laws and the creations of new forms of crime a new branch of the Law is arising –Economic Criminal Law-, of which one of the main objectives is to establish what’s referred to as the third way in the criminal responsibility that would impose economic sanctions to juridical persons involved in criminal offences. In this sense a considerable number of Special Acts currently in force have established sanctions corporate sanctions that go from economic sanctions (i.e. fines), to severe sanctions such as the closure of the company’s establishment.

Because these new laws are recent, there are no general rules regarding the criminality of company acts and it is therefore difficult to establish all encompassing parameters.
1.2. **Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.**

As it was explained in the previous question, there are Special Laws that set up sanctions specifically for the cases of commission of offences carried out by collective persons. Examples for these sanctions will be given further in the Questionnaire as well as the prerequisites for their applicability.

Nonetheless, it must also be indicated that whether a company is or is not found liable under criminal law; it could always be liable for damages for acts and omissions of its representatives and even other employees. This civil liability could include: restitution, repair of the damage caused, or compensation for profits lost, as long as the damages are a direct consequence of the illegal behavior.

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.**

Special types of companies can be subject to sanctions for illegal acts or omissions, e.g.: banks and insurance companies can be intervened and managed by public appointees or they can be fined or closed down; publicly traded companies can be excluded from trade of their shares; general warehouses may be closed down or restricted in their activities, etc..

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.**

Normally sanctions are expressed in the Law as maximum and minimum severity and the judge or sanctioning body will chose a severity according to the circumstances of the case, but in some cases the sanction is expressed as fixed, with no gradations.

Some examples of these punishments are:

a) In the case of the Criminal Act of the Environment, fines can be imposed depending on the severity of the damage caused as a result of the crime committed; a prohibition of carrying out the activity that caused the contamination can be established from 3 months to 3 years; and in the most severe case, the company’s factory or establishment can be closed or the mentioned prohibition can be declared as definitive; not to mention that in any case the obligation to pay the fine would still subsist.
b) Under the Act against Foreign Exchange Illicit, the sanctions consist mainly on fines that rise up to the double of the amount of the illicit exchange operation.

c) The Act Against Corruption does not expressly envision companies, thus punishing every illicit act with the sanction of prison. Nevertheless it does distinguish the case when the illicit act is committed by a representative of a juridical person, in whom it is the person or persons that have acted in representation of the juridical person that will be imposed the sanction of 2 to 10 years of prison. Seizure of illicit assets is possible when the company profited.

d) According to the Act of Consumer Protection, the goods or services provider (defined as the natural or juridical person –company- that carries out activities of production, importation, distribution or commercialization of products or provision of services to users or consumers) is obligated to replace the damaged product commercialized, or the repair of the damage in case replacement is impossible.

e) The Act against Informatics Crimes sets up fines collective persons that commit acts in violation of its provisions that double the amount of fines established for the acts were carried out by a natural persons. These fines range from a minimum of 10 Tax Units (Tax Units are adjusted periodically and presently are 17.51 US Dollars at the official exchange rate) up to a maximum of 1000 Tax Units; for natural persons. Companies may be fined then from US$ 350.20 up to $35,020.

f) The Act Against Organized Crime includes specific sanctions against juridical persons which are referred to below under 4.1

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

The requirements that need to be fulfilled in order for the sanction to be applicable depend on what’s established in each special Act. Nevertheless, as a general rule it is generally required that the punishable act be committed by the company’s directors, executives, representatives or employees, related to its activity, or with its assets or in its exclusive or preferential interest.

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.

The Venezuelan law does not distinguish the prosecution depending on any particular place of the offender in the hierarchy company staff.

The prosecution and imposition of sanctions of regulatory offences may be made the administrative or regulatory entity, whereas prosecution of criminal offences, except in the case of libel, may be made solely by the Public Prosecutor and following the
procedures established in the Organic Criminal Procedures Code and the imposition of sanctions may only be made by Criminal Judges.

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

Although the Acts that impose sanctions for the commission of crimes carried out by collective persons that are currently in force do not specifically establish when acts (in general, including omissions) can be attributed to the collective person itself; it is generally considered to be so attributed when the offender act within his scope of work in the company or in a manner closely related to it.

For the individual employee or officer of a collective person to be criminally prosecuted, the individual must have violated a disposition of a Law (whether General or Special); since following the principle of legality (that forms part of the basics of Venezuelan Law), there cannot be a punishment for an action that’s not specifically stated as punishable according to a formal Act. Therefore, a person cannot be prosecuted for the violation of internal regulations, or for that of a statutory regulation that’s not specifically established as a punishable action by a Venezuelan Law.

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

Since companies are considered collective beings they’re not considered to have an intention, which would in any case determine the establishment of *mens rea*. Therefore the criminal responsibility of a company would be thought as an Objective Responsibility that arises every time that there is the commission of an action that violated any Criminal disposition that fulfills the mentioned prerequisites for the company to be held responsible under criminal law. The intention of the acting individual or individuals is not important. For example: if a crime is committed by the President of a Company for personal reasons but by acts related to his representation, the company will be held responsible under criminal law if that crime carries a sanction for companies as established in the Law.

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.**

As stated before, since collective persons are not considered to have intention, in the case of any offence where such a person is to be sanctioned, *mens rea* is not necessary in order to prosecute it. Whether this results in strict liability depends on the sanctioning law, which may establish differences according to the circumstances in which the individual committing actually carrying out the crime has acted.
2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

Although it is not expressly stated in the Acts that punish collective persons for the commission of offences, it could be inferred that it is not strictly necessary; as long as it is within normal company activities which should be under supervision of company officials.

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

In any case, whether the offence is committed by an individual or by a collective person, the defenses it can raise, according to the Venezuelan Criminal Code, include:

1. The compliance of a duty or the legitimate exercise of a right, authority, job or occupation, without exceeding the legal limits to it.

2. The acting following a legitimate and due obedience. In this case, if the action constitutes a crime, the order will not generally be considered legitimate, unless circumstances make it appear so. Whoever gave the illicit order in the name of the company will be liable and make the company itself liable.

3. The acting in self defense or exercising a personal right, as long as any other circumstance—listed in the Criminal Code—also concurs.

4. A force majeure, which is to say a force that could not be foreseen nor opposed, which includes acts of the government.

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?**

A duty of care is placed upon the company by most of these Acts and exercising such care should avoid most cases of criminal liability. For instance, the company must avoid hazards in the work place and provide its work force of protective gear adequate to the task assigned to them, or a company must investigate the impact upon the environment of its waste and effluvia, and act to avoid environmental impact, etc…

The organization necessary for such vigilance is generally in place in most organizations, but must be closely overseen by the executives and officers that have an oversight duty.

A foreign company that does business in Venezuela is held liable just the same as a Venezuelan company and therefore must know the Venezuelan law and comply with these regulations to ensure that they will not be held culpable for their staff’s actions.
2.10. Can certain kinds of sanctions been executed during the investigative phase of a criminal proceedings (e.g. preliminary seizure of bank accounts, attachment of claims)?

Not as sanctions, however preventative measures can be executed during the preparation phase of the proceedings. These preventative measures would be designed to protect the victim and also guarantee the outcome of the proceedings. They must normally issue from a Court or the administrative body regulating the activity.

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

Yes, both can be held responsible for the same acts if the company and the offender are reasonably related in committing the offence.

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

Yes, under some circumstances a parent company can be held liable for the offences committed by their subsidiary company. Piercing the corporate veil is possible in cases of complicity or fraud.

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.

In Venezuela sanctions (pena) are taken to include not only personal restraint or prison, but also fines, restrictions of rights, closing of business and any other action that courts or administrative authority can take, aside from reparation of damages.

The Act Against Organized Crime provides for specific sanctions against companies as follows:

1. Definitive closing of the Company
2. Prohibition to continue with commercial industrial, technical or scientific activities.
3. Confiscation of the instruments that were used in committing the offence, of the illicit goods and of the product of the offence in all cases.
4. Publication of the judgment in one of the main daily newspaper of national coverage at the cost of the company in all cases.
5. Fine equivalent to the value of the capitals, assets or funds in case of money laundering or of the capitals, assets or funds product of the offence.

6. Revocation of the concessions, licenses or permits granted by the State.

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

Each law has to express the sanctions it proposes for a given crime. The principle is *Nullum Crimen Nulla Poena Sine Lege* which is taken to mean that the crime itself must be properly defined in the law and the criminal liability it carries must also be clearly defined in then law.

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

The defenses that the company chooses to raise will depend largely on the specific circumstances surrounding the commission of the offence, but these are in general those mentioned above under 2.8.

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

No, sanctions cannot be imposed until after the proceeding has been completed, and a final ruling has been issued. However, as mentioned above, preventive measures can be imposed during the investigative or preparatory phase of the criminal proceeding by the court or administrative authority, according to criteria established expressly in the law. For example, the company could be prevented from making transactions from certain bank accounts, or transferring or selling any assets or property during the proceeding.

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?**

No, in Venezuela, if a crime has been reported, Public Prosecutor must act, and is obligated to investigate and prosecute the offender. In this case, the state does not have discretion to prosecute or not prosecute the offender. However, there are offences which require action by the victim in order to start prosecution in which the victim has a choice of whether or not to report the crime as is the case of libel. But normally, if the crime is reported it must be prosecuted.
4.2. **At what stage during an investigation/proceeding does a company have the status as a suspect or similar status?**

The company will have the status of a suspect or charged (“imputado”) when the preparation phase (“fase preparatoria”) is over. The company becomes a suspect when the Public Prosecutor presents its charges (“acusación”) to the Criminal Control Court (“Tribunal Penal de Primera Instancia en Función de Control”).

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?**

If a company has been accused of a crime, and a court has authorized the investigation of the company, the company does not have the right to deny access, or refuse to cooperate with the investigation. As to testimony, the company cannot provide testimony because it is not an individual, it can make statements through its representatives, but it is the representatives themselves who are testifying. They have the individual constitutional right to remain silent if their testimony would personally implicate them in the commission of the crime under investigation or any other crime.

Court orders and prosecutor functions cannot be thwarted by officials on the basis of confidentiality or refusal to answer questions (except in cases of self-incrimination of the individual himself) and such actions may result in criminal prosecution of the refusing individuals.

Constitutional right to demand a warrant for access is limited to the domicile of physical persons and does not apply to premises of collective persons. Natural people who are members of the board of directors enjoy the constitutional right to not assume culpability for their own actions and to provide self-incriminating evidence. As a result, these people are not obligated to testify against themselves.

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

At the latest when charges are brought to the court by the prosecutor, the court will serve the company with papers informing it of the proceeding, its status as a suspect, and demanding that the company’s representatives appear in court on a certain date.

Before that, the company will know it is under investigation by the actions of the prosecutor or the judicial police: questionnaires, requests for papers, visitations, etc.
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, there is no law in Venezuela that would prevent the company’s directors, managers or employees from appearing as witnesses in a criminal proceeding against anybody. They cannot refuse such duty except when their next of kin are on trial. This applies even if the directors, managers or employees that are suspect themselves.

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

Yes, there could be a joint proceeding against the company and the individual offender. In Venezuela, if there are multiple suspects who committed the same offence, the suspects can be joined in one proceeding. It is irrelevant if one of the suspects is an individual and one is a company.

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

The proceeding against a company is the same as that against an individual. The procedure is established in the Criminal Procedures Code (Código Orgánico Procesal Penal).

5. Procedural Issues on Other Criminal Sanctions

Note to the reader: In reference to this section, Venezuelan legislation does not differentiate between the procedural issues for other criminal sanctions and the procedural issues for corporate liabilities. Consequently, the procedural issues on other criminal sanctions answers refer to the answers from the corporate liabilities section.

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?

Please see answer 4.1

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

Please see answer 4.2

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

Please see answer 4.4
5.4. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

Please see answer 4.3

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

Please see answer 4.6

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

Please see answer 4.7

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?

Yes, in some cases. Directors are jointly liable with other administrators for the fulfillment of legal duties, they must oversee performance of all legal duties, even if the corresponding matter is not within their immediate scope of responsibilities, and they may further oppose such actions that may eventually make them liable. Therefore, company directorships under Venezuelan law carry liabilities which are only avoidable through the presence and diligence of the director himself.

To avoid this joint and several responsibility, the law (article 268 of the Venezuelan Commercial Code) excludes the civil liability of Directors in those company decisions and act that:

a) Are not a result of their fault, that is to say their negligence, imprudence or intentionally harmful act (dolus), and only
b) Inasmuch as those decisions and acts have been opposed by the administrator explicitly in the signed minutes of a Board of Directors meetings (which must be transcribed and signed in a special book prescribed by the law) and further
c) That such opposition has been notified to the company Comptroller (Comisario).

It is very likable that under similar circumstances the criminal liability of Directors is also excluded, though that would depend on circumstances.

Certain laws establish criminal liability on directors such as the Organic Act on Prevention and Labor Conditions and Environment and also the Criminal Act of the Environment; criminal liability of the directors may arise not only from their actions but also from their omissions as directors are held responsible and have the duty to
oversee the operations and take the appropriate measures to avoid personal injuries to
the personnel or grave damages to the environment.

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

Directors decide collectively for the company and executive officers represent it. Both
are considered Administrators by the law and generally considered to have joint
liability. If the offence could not be subjected by oversight and prevented through
diligence, most probably the directors and managers would not be criminally liable.
Such burden of proof would normally fall on the directors themselves.

For instance some acts, such as those referring to labor safety and environment
preservation, presume that the directors are effectively directing and overseeing the
actions of company officials and employees, and evidence to the contrary will be hard
to present.

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?

For jobs that require degrees of training, the selection of the company of untrained or
unqualified personnel is certainly culpable. This is specially applicable in the case that
the result of such lack of qualifications are accidents or damages considered criminal
the Organic Act on Prevention and Labor Conditions and Environment and also the
Criminal Act of the Environment as mentioned above.

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

None, aside from fulfilling reasonably their duties to supervise officials and
employees, providing adequate installations and safety gears, determining the
environmental impact of the company’s activities, seeing that taxes are regularly and
honestly declared and all prudence and diligence expected of a good administrator.