

Corporate Criminal Liability

UNCAC

Article 26. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

UNCAC

Pasal 26 Tanggung jawab badan hukum

1. Negara Pihak wajib mengambil tindakan-tindakan yang perlu, sesuai dengan prinsip-prinsip hukumnya, untuk menetapkan tanggung jawab badan hukum yang berpartisipasi dalam kejahatan menurut Konvensi ini.
2. Dengan memperhatikan prinsip-prinsip hukum Negara Pihak, tanggung jawab badan hukum dapat bersifat pidana, perdata atau administratif.
3. Tanggung jawab tersebut tidak mengurangi tanggung jawab pidana orang-perorangan yang melakukan kejahatan.
4. Negara Pihak wajib, pada khususnya, mengusahakan agar badan hukum yang bertanggungjawab menurut pasal ini dikenakan sanksi pidana atau non-pidana yang efektif, proporsional dan bersifat larangan, termasuk sanksi keuangan.

Options for criminalising corporations

1. Identification doctrine (+ identification vs aggregation)
2. Vicarious liability / *respondeat superior*
3. No general criminal liability for corporations but:
 - (i) Specific provisions imposing liability on corporations
 - (ii) Specific provisions imposing personal criminal liability upon managers
 - (iii) General (or specific) 'failure to prevent' offences

Tesco v Nattrass [1971] UKHL 1; [1972]
AC 153

Trade Descriptions Act 1968 S 11 (2):

“If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.”

House of Lords (Supreme Court) holds

Company not liable because there had been no decision by the 'controlling mind' of the company to commit the offence.

Aggregation vs personal identification

Crime has mental elements a, b, c, &c

No individual employee of company had all of ,
b, c & at relevant time,

But

A had a, B b, &c.

Enough? (No (UK)).

Another variation – corporate killing

1. (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

(a) causes a person's death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

(2) The organisations to which this section applies are—

(a) a corporation;

(b) a department or other body listed in Schedule 1;

(c) a police force;

(d) a partnership, or a trade union or employers' association, that is an employer.

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

(4) For the purposes of this Act—

(a) “relevant duty of care” has the meaning given by section 2, read with sections 3 to 7;

(b) a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

(c) “senior management”, in relation to an organisation, means the persons who play significant roles in—

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities.

Identification doctrine

Advantages

1. Clear
2. If corporate criminal liability bad ...

Disadvantages

1. Very difficult to prove guilt especially where crime requires specific *mens rea*. *Only possible in cases like R v Smith & Ouzman Ltd* (2015, but under pre-2011 law) – printers, small company.
2. Incentives to fragment power within organisation (esp where no aggregation doctrine).
3. Compliance costs fall disproportionately upon smaller companies.

Vicarious liability

Respondeat superior (US federal model)

Corporate liability and personal liability (both essentially vicarious) at high level in company.

3.i and 3.ii Specific Offences imposing (vicarious) liability upon managers

Eg (UK) Trade Descriptions Act 1968 s 20 'Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.' (having regard to ss 23 & 24.)

3.iii An offence of failing to prevent employees (&c) from committing or taking part in ... (and see Supreme Court Reg Article 4 c)

Bribery - Bribery Act 2010 s.7

Tax Evasion - Criminal Finances Bill 2017 Part 3

Bribery Act 2010 s.7

7 Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

Consequences?

- Convictions?
- Activity to put in place adequate procedures
- DPAs