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TRUST, BUSINESS ETHICS AND CRIME PREVENTION – CORPORATE CRIMINAL LIABILITY IN FINLAND

Matti Tolvanen

University of Joensuu
P.O.Box 111 80101 Joensuu, Finland
Tel.: +358 50 550 8092
E-mail: matti.j.tolvanen@joensuu.fi
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Summary. *According to the Finnish Penal Code a corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein 1) has been an accomplice in an offence or allowed the commission of the offence, or 2) if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation. Criminal liability of legal persons is based on the intentional or negligent acts of individuals who are in a certain relationship with the corporation. The Finnish legal doctrine clearly rejects the identification theory according to which an individual is considered as acting not for a company but as a company. According to Finnish scholarly writings, the acts of an individual offender could be attributed to the legal person under certain conditions not as acts of the legal person but as acts of the individual for the company. Nonetheless, Finnish law does not abandon the fault requirement. In this respect, Finnish law differs from the traditional common law theory of vicarious liability. From the policy point of view the central mechanism is not*

deterrence but trust. By punishing the corporation, the state tries to tell citizens that no one can violate law without consequences. Social life is crucially based on mutual trust. If someone betrays that trust, a sanctioning system is needed. The punishment demonstrates that anyone acting against the common rules has to pay for this action. The courts have imposed rather modest corporation fines. It is perhaps reasonable to ask what the criminal policy effects of such very lenient sanctions could be. If the fines are low, one could reasonably describe them as little more than "a public morality tax". This may also contribute to the marginalisation of offences where corporate liability is applied. The use of alternative sanctions (corporate probation, community service) when punishing corporations in Finland has not been discussed so far.

***Keywords*:** *criminal law, corporate criminal liability, theories and ideology, policy aspects, crime prevention, general prevention, trust, fault requirements, due diligence, fair trial.*

Introduction

Corporate criminal liability has become a reality in many European states, especially as a consequence of international initiatives. Corporate liability was introduced into Finnish penal law as part of the total reform of the penal code in 1995. Criminal law has developed as a mechanism for responding to individual wrongdoing. There is always a strong moral label attached to criminal liability. We cannot fully achieve this by means of jurisprudence, but nonetheless it exists and needs attention. Criminal liability requires fault and causes harm to the accused person. Fault is something personal, while criminal liability is in fact culpability. How is it possible to establish fault by punishing corporations? I begin this article by describing theories behind corporate criminal liability. Then I discuss how the theories are applied in Finnish penal law. I further consider other criminal policy aspects, especially the relationship between trust and general prevention. I also deal with the relationship between the company and the offender. It is also reasonable to take a look at how the rules have been applied by the criminal courts in Finland.

1. Legal theory of corporate criminal liability

In legal scholarly writings it is possible to identify six theories of corporate criminal liability.[1]

1.1. The Identification doctrine

This approach considers that a corporate offence occurs when an individual commits all the elements of the offence and he is sufficiently senior to be seen as the *controlling mind* of the corporation. Under the identification theory an employee is assumed to be acting as the company and not for the company.

The identification or "alter ego" theory of corporate criminal liability suffers from two related and fundamental sins. The first is that the basis or rationale for imposing corporate criminal liability in this way is far from clear. The second, and perhaps a resulting problem, is that it is far from clear exactly which officers, agents or employees of the company act *as* the company.

1.2. The Aggregation doctrine

This approach aggregates all the acts and mental elements of various company employees and finds the offence if all the elements of a crime are made out, though not necessarily within a single *controlling mind*.

This model of corporate criminal liability extends the identification and vicarious liability doctrines by "aggregating" into one criminal whole the conduct of two or more individuals acting as the company (or for whom the corporation is vicariously liable) in order to impose corporate criminal liability on the corporation where the acts combined establish that liability but each act is in itself insufficient to do so. Aggregation can involve matching the conduct, the state of mind or the culpability of one individual with any one of these aspects of behaviour of another individual. Thus, where an offence requires a particular level of knowledge or negligence, this can be found in an aggregation of the knowledge or negligence of several individuals.

Aggregation is said to be most useful in negligence cases: a series of minor failures by relevant officers of the company might add to a gross breach by the company of its duty of care. There is, however, ongoing debate as to whether the

1 Cunningham, S. R.; Keating, H.m.; Clarkson, C.M.V. *Clarkson and Keating Criminal Law. Text and Materials.* 5th ed. Sweet & Maxwell, 2003, p.246-264. *Also see* Law Reform Commission for New South Wales, Report 102 (2003), available at: http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r102chp02 [last accessed on 5 February 2009].

principle applies to, and is an adequate test of, liability in those forms of corporate crime that require proof of will or intent.

The aggregation doctrine expands the identification and vicarious liability models of corporate criminal liability by enabling them to deal with cases involving events that result from complex processes and structures in corporations where decisions are made by a number of individuals at different levels of management, and where the act of one individual is innocent but when combined with others' acts facilitates proof of the corporation's failure to comply with the law. In itself, the aggregation model provides no justification for this expansion of corporate criminal liability. That justification is found in broader considerations of corporate blameworthiness or fault.

1.3. Reactive corporate fault

The idea behind this theory is that where an individual has committed the e.g. *actus reus* of manslaughter, a court should have the power to order the employing corporation to institute measures to prevent further recurrence and should face criminal prosecution should they fail to do so.

Corporations need to be proactive in addressing health and safety concerns. Accordingly, positive steps need to be taken to reduce the potential for liability under the impending Criminal Code provisions. Most importantly, corporations need to have an adequate corporate compliance program in place. The program must target health and safety concerns in the context of the particular corporation. Assigning a compliance officer as well as educating employees on steps they need to take to ensure health and safety obligations are fulfilled should also be included.

Although the existence of the program will not exempt corporations from liability, it will provide directives to employees to ensure they are aware of their health and safety obligations, and the proper steps required to ensure these obligations are met. Additionally, the compliance program demonstrates due diligence in fulfilling corporation's responsibilities under occupational health and safety legislation as well as the Criminal Code. In the event that a corporation is charged with a health and safety offence, an adequate compliance program may be viewed as a mitigating factor.

1.4. Vicarious liability

The broader principle of vicarious liability is often invoked to establish corporate manslaughter. Where an employee commits a crime within the sphere of his employment and with the intention of benefiting the corporation, his crimina-

lity can be imputed to the company. According to vicarious liability, the person acts for the company, but his acts are attributed to the company. Since criminal responsibility is attributed to the company in this manner, whether or not the company was at fault in any way or not, vicarious liability was seen as unjust, and lacking in defensible penal rationale.

Vicarious liability imposes liability upon corporations for the acts of its employees, agents, and any other persons for which the corporation is responsible. Upon the performance of an unlawful act by one of these individuals, the theory automatically attributes guilt to the corporation. Accordingly, under the theory corporations can be held liable for acts of which they were not aware, and had no control over. On this basis, critics of the theory maintain that it improperly ignores the essential element of the guilty mind for those upon whom liability is imposed.

However, the theory has its limits. The individual who committed the act must have done so with a guilty mind. In other words, he/she must have had the intent of committing the unlawful act. Additionally, the individual must have committed the unlawful act in the course of his/her employment with the corporation. The final element is that the individual must have intended to benefit the corporation.

1.5. Management failure model

In this context, liability may be imposed where it is found that the individual who committed the unlawful act had reasonable basis for believing that an authoritative member of the corporation would have "authorized or permitted the commission of the offence". Accordingly, under the corporate culture model it is not necessary to find an individual responsible for the unlawful act in order to impose liability upon the corporation. On the contrary, the approach suggests that the corporation as a whole is responsible for the unlawful act, not simply the individual who may have independently carried it out.

The notion of "management failure" is akin to the theory of the "directing mind". However, the proposals do not require that an individual be found liable prior to imposing liability upon a corporation. Critics note that the proposals will have a limited effect as they only address the circumstances which result in death. Accordingly, corporations in which workers have been seriously injured but not killed will not be subject to the proposed provisions.

A corporation may also be found guilty of negligence if it engages in conduct that constitutes such a great falling short of the standard of care that a reasonable person would exercise in the circumstances. Where it is found that a high

risk existed to the extent that criminal punishment is warranted, liability will be imposed.

1.6. Corporate *mens rea*

A further approach is to accept the legal fiction of corporate personality and to extend it to the possibility of corporate *mens rea*, to be found in corporate practices and policies. This approach has been widely advocated in the U.S., as the *corporate ethos standard.*

Unlike other models of corporate criminal liability, this model attempts to discover a touchstone of liability in the behaviour of the corporation itself rather than in the attribution to the corporation of the conduct or mental states of individuals within the corporation. That touchstone is the blameworthy "organisational conduct" (the "fault") of the corporation, such as the failure to take precautions or to exercise due diligence to avoid the commission of a criminal offence. The determination of liability focuses on the role that a company's structures, policies, practices, procedures, and culture (the "corporate culture") play in the commission of an offence. These reveal the collective "will" of the company.

This model recognises that corporations have distinct public personae and possess collective knowledge. It considers corporations as quite capable of committing crimes in their own right, that is, through their personnel. Its premise is that corporate criminal liability should no longer be seen simply as an offshoot of personal criminal liability, but that separate principles ought to govern these legal entities. Its proponents view traditional criminal law concepts with their "human moorings" as neither appropriate nor useful in the corporate context. The fundamental shift in the conception of corporate criminal liability, that is, the "transition from derivative to organizational liability", has come about because of the increasing acceptance of the notion that corporations are moral and responsible agents.

The major assumption of this model is that a corporation, especially a large one, is not only a collection of people who shape and activate it, but is also a set of attitudes, positions and expectations, which determine or influence the modes of thinking and behaviour of the people who operate the corporation. This basis for imposing liability is attractive because it is better equipped to regulate the modern corporation, especially a large one, which is typically decentralised. It has been observed that harm from corporate crime may have, in many situations, less to do with misconduct by or incompetence of individuals and more to do with systems that fail to address problems of risk.

2. Corporate criminal liability in the Finnish penal law system

Corporate liability was introduced into Finnish penal law as part of the total reform of the Penal Code in 1995. The rules concerning corporate sanctions are included in the Finnish Penal Code (Chapter 9). In Finland, all criminal sanctions are regulated by criminal law, i.e. there is no administrative criminal law.

In Finland, the doctrine of corporate criminal liability is formed by borrowing elements from tort law. This kind of view has caused some problems when enacting precise penal provisions. Tort law and criminal law are in many ways almost identical (e.g. the concept of negligence or *culpa*), although criminal law differs in certain aspects.[2]

As I wrote in introduction, criminal law has developed as a mechanism for responding to individual wrongdoing.[3] There is always a strong moral label attached to criminal liability. We cannot fully achieve this by means of jurisprudence, but all the same it exists and needs attention. Criminal liability requires blame and negatively affects the position of the accused person. Blame is something personal, while criminal liability is in fact culpability. How is it possible to cast blame by punishing corporations? Perhaps there is some sense in combining personal culpability with corporate liability. The sanctions system makes individuals responsible for criminalised acts and defines the prerequisites for such responsibility. The criminal liability of legal persons is based on the intentional or negligent acts of individuals who are in a certain relationship with the corporation. The Finnish legal doctrine clearly rejects the identification theory according to which the individual who acts is not acting for the company but acting *as* the company. According to Finnish legal writing, the acts of the individual offender are under certain conditions attributed to the legal person, not as acts of the legal person but as acts of the individual for the company. Nonetheless, the Finnish law does not abandon the fault requirement. In this respect, the Finnish law differs from the traditional common law theory of vicarious liability.

In some countries where the offences of *strict liability* and negligence exist, a company can be vicariously liable for the acts of its employees in the course of their duties. The doctrine of vicarious liability is applied in English law in relation to strict liability offences connected with matters such as pollution, food and drugs, and health and safety at work. Vicarious liability does not, however, apply

2 Jaatinen, H. Corporate Criminal Liability and Neo-Classical Criminal Policy. *Turku Law Journal.* 1999. 1: 103–108.

3 Cunningham, S. R. et al. p. 259.

to all offences of strict liability.[4] As far as Finnish law is concerned, the Constitution of Finland is interpreted in judicial doctrine in a manner that should prohibit strict criminal liability. The fault prerequisite is derived from the first section of the Constitution according to which the Constitution guarantees the *inviolability of human dignity*, the freedom and rights of the individual, and promotes justice in society. It has been argued in doctrine that strict liability should constitute a breach of human dignity.[5] For this reason, Finnish law does not include provisions based on strict criminal liability.

The imposition of criminal punishment is only one means of regulating corporations. The Penal Code (Chapter 10) contains provisions of forfeiture (confiscation). According to Section 2, the proceeds of crime shall be forfeited to the State. The forfeiture is ordered on the offender, a participant or a person on whose behalf or *to whose advantage* the offence has been committed, where these have *benefited* from the offence.

3. Aspects of criminal policy behind corporate criminal liability[6]

By criminal policy we mean social decision-making concerning crime and related discussions. Criminal policy is a form of guidance by means of which we attempt to promote the reach of the goals of other policies accepted in a given society. Criminal policy considerations and the general principles of criminal law may restrict the usage of criminal justice as an instrument of economic policy, for example, even though all the tools would be effective as far as economic policy is concerned.

The goals of criminal policy can be defined as follows: 1) to minimise the harm and other costs of crime and of the control of crime, and 2) to share the costs of protecting basic rights and justice in general. The basis is the fact that behaviour deviating from the norm cannot be completely abolished at reasonable cost. When reducing the costs, we have to consider the goal and the objectives of, for example, economic policy on one hand, and the costs of making the economy more effective and the costs incurred when regulations are broken on the other.

4 Cunningham, S. R. p. 248–250.

5 Tolvanen, M. *Johdatus kriminaalipolitiikan teoriaan* (An introduction to the theory of criminal Policy). Joensuu, 2005, p. 189–190; *also see* Weissmann, A.; Newman, D. Rethinking Criminal Corporate Liability. *Indiana Law Journal.* 2007, 82: 411–451, p. 427–441.

6 *See* Tolvanen, p. 72–115.

Both preventive measures and the breaking of the regulations impose significant costs on society.

Derived from basic human rights, the state has the obligation to protect its citizens from violations of their rights. On one hand, in the process of criminalisation, the state has to respect basic rights by refraining from imposing too extensive restrictions on the freedom to act. In a wider perspective, the state has to guarantee the exercise of basic rights. The principles of criminalisation have to be defined on the basis of basic human rights.

Reducing crime is a means of cutting and sharing the costs caused by crime. It is possible to try to reduce crime by attempting to influence potential criminals in order to deter them from committing crimes. The overall influence of society on citizens is known as the general preventive effect; but when the objective of a preventive act is the individual, this is called the special preventive effect. Generally, preventive influence can be deterrence (negative influence) or influence that creates, maintains and strengthens morals or behaviour through the internalisation of norms (positive influence). The special preventive influence can be created through a warning, application of the law or internment.

The channels of preventive influence can be combined. Immediate influence can be localised mainly on the surface of justice, and indirect influence on the level of the culture of jurisprudence or even on its profound structure. The function of criminal justice as a tamer of social control also defines the normative contents of the jurisprudential culture and the superficial phenomena. Especially in morally colourless crimes, typical of economic offences where the offender can expect considerable, easily measurable advantages, an essential role is played by the deterrent effect of punishment. The deterrent effect does *not* have to be seen as *contradictory* to the creation, strengthening and maintaining of morals or moral behaviour. The deterrent effect does not prevent an effect arising which builds morals and moral behaviour if the penal system is considered just and humane. The deterrent effect can be insignificant for those who, after internalising the norms or after making the norms part of their behaviour, would in any case act according to the norms. The deterrent effect is thus necessary for those who have not internalised the norms.

The symbolic quality of the penal provision *per se* does not reduce the deterrent effect of the threat of punishment. The attempt to express the opinion of society on the varying qualities of the reprehensibility of the act by grading the punishment according to injuriousness is a good starting point in principle. Graded penal threats raise awareness that the costs caused by observing and deviating from the norms are distributed equally and fairly in society. Through concrete punishments, the state shows its readiness to guarantee justice and equality in

practice. Citizens must experience criminal law as a *real* instrument, not only as a *symbol*. The condition for the desired effects can be the fact that the system is considered legitimate.

Even though punishment in certain instances may be presumed not to have any effect on the risk of a repetition of the offence, the penalty is nonetheless justified for the maintenance of general obedience to the law. If punishment in concrete cases always had to be justified by special preventive reasons, we would have to give up punishing at least when the penalty is likely to increase the risk of repetition. In these cases, punishment could be considered justified only if general prevention were also accepted as the goal of punishment in individual cases.

The starting point in Finnish criminal policy is the pragmatic-rational justification of criminal law. Criminal law is necessary to safeguard organised society, safety and our life together in general. Criminal law can be used a) only to protect rightful advantages, b) on the assumption that no other mechanism, more morally acceptable, nearly as effective as criminal law and as viable at more moderate cost, is available, and c) the advantages obtainable by punishments are greater than the disadvantages brought by them. The criminalisation principles are criminal political gauges by which an attempt is made to define the factual criteria of behaviour threatened by punishment. The question about the criminalisation principles is both when to prescribe something as punishable and how the conditions of penal responsibility are generally defined. The starting point of criminalisation should thus be the protection of rightful advantages. If it can be proved that there is no need for rightful protection, criminalisation should be abandoned.

Secondly we have to ask whether the protection of rightful advantages that are considered necessary would be obtainable by measures other than criminalisation. If, for instance, pollution of the environment could be prevented by other measures of an economic or environmental policy, according to the *ultima ratio* principle these measures should be employed instead of criminalisation. Yet, it is already necessary to assess the costs at this stage. It is by no means clear that other means should be employed at any cost before turning to criminalisation. Criminalisation and other measures do not generally exclude one another, since they can be complementary.

A cost/benefit calculation is necessary even at the stage when, by means of the *ultima ratio* principle, criminalisation has been justified through a comparison with other official means in respect of effectiveness, efficiency and cost. Still, at this stage we have to ask if there is any sense in considering criminalisation in the light of costs and benefits, even if no other means are available to react to the phenomenon that must be considered harmful as such. In a cost/benefit analysis,

the question in general is not just whether there should be any punishment, but what kind of penalty there should be.

The principles of criminalisation can ultimately be derived from basic rights. The principle of guilt and the question of the constitutionality of strict liability and one dimension of the legality or prohibition of ambiguity of criminal law are essential in this case. The essential element of responsibility is the perpetrator's recklessness or negligence.

What is the criminal law ideology behind corporate liability in Finland? As mentioned above, the criminal liability of corporations has borrowed its essential features from tort law. It has been recognised that corporate policies often depend on the organisational structure and lines of authority within a corporation. This also means responsibility for standard procedures relating to safety and internal control throughout the corporation. Corporate acts and policies are thus not seen as an aggregation of individual choices, but as the acts and policies of the company itself. It has been argued in Finland that corporate liability should be available only where individual criminal responsibility is ineffective or where no individual can be said fairly to be responsible for the crime. For my part, I am ready to share this policy argument.

It remains an open issue whether a corporate fine is, in fact, suitable to ensure that companies revise their internal operational procedures to guard against repetition of the offence.[7] The central point is perhaps not deterrence but trust. By punishing the corporation, the state tries to tell citizens that no one can act against legal rules without consequences. Social life is crucially based on mutual trust. If someone betrays that trust, a sanctioning system is needed. The punishment demonstrates that anyone acting against the common rules has to pay for this action.

4. Scope of application

According to the Penal Code (Chapter 9, Section 1), a corporation, foundation or other legal entity in whose operations an offence has been committed may be sentenced to a corporate fine if such a sanction has been provided in the Penal Code. The definition is quite open. It applies to several kinds of registered companies or entities which are defined as being able to bear legal rights and responsibilities independently. The corporation is thus defined according to the

7 Cunningham et al., p. 268.

rules prevailing in civil law.[8] The sanction can be ordered only on the request of the public prosecutor.

The provisions concerning corporate liability do not apply to offences committed in the exercise of public authority. This means that the state cannot be sentenced to a corporate fine, for example because of wrong decisions made by the police, by prosecutors, by judges or by the execution officers. It is, however, possible to apply provisions concerning corporate liability to, for example, industrial or construction management driven by the state or by a community. In one case, the court held a municipality responsible for having kept unsafely a used tank containing dangerous helium gas and sentenced the municipality to pay a corporation fine of EUR 8,000.

5. Prerequisites for liability

There are two conditions for liability according to Chapter 9 of the Penal Code. A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein 1) has been an accomplice in an offence or allowed the commission of the offence, or 2) if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.

Legal persons are held liable when the acts and omissions, and the knowledge of the employees, can be attributed to the corporation. It is quite easy to define corporate liability if the representative of the corporation has been an accomplice (offender, abettor, assistant) in an offence. However, it is difficult to understand what the legislator meant by the words "allowed the commission of the offence". Allowing may mean both positive knowledge of the offence and negligence in ensuring that practices and policies followed in the corporation do not offend against legal norms and regulations.

The second ground emphasises the responsibility of a corporation for its organisational structures.[9] In many cases, the real essence of the wrongdoing is perhaps not the culpability of any individual, but that the corporation had neglected to develop its organisational structure to prevent individual wrongdoing. If a corporation fails to take precautions or fails to show due diligence to avoid committing a criminal offence, this comes from its culture since attitudes and beliefs are shown through the corporation's structures, policies, practices, and

8 Frände, D. *Yleinen rikosoikeus* (General Criminal Law). Helsinki, 2005. p. 404.

9 Frände, p. 406, Jaatinen, H. *Oikeushenkilön rangaistusvastuu* (Corporate Criminal Liability). Jyväskylä, 2000, p. 98–101.

procedures. This reflects the structures of modern corporations which are more often decentralised and where crime is less to do with the misconduct or incompetence of individuals, and more to do with systems that fail to address problems of monitoring and controlling risk. In principle, it is possible to impose a corporate fine based on anonymous culpa, without finding individual fault. In practice, however, it is very difficult to assess whether due diligence for the prevention of offences has been observed if the prosecutor cannot also prove individual fault in the case.

The lack of due diligence has at least three dimensions. The corporation may be careless when choosing employees for key positions of its organisation (*culpa in eligendo*). The corporation may neglect its responsibility to instruct and inform the employees, for example about regulations concerning environmental protection or health and safety at work (*culpa in instruendo*). The negligence of a legal person may also manifest itself in the lack of precautionary control (*culpa in inspiciendo*).[10]

No corporate fine shall 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 the bringing of charges. Most offences are subject to public prosecution, i.e. the police can investigate them, and a prosecutor can bring charges even if the injured party does not demand punishment. However, complainant offences, for example defamation and breach of domestic peace, can only be investigated by the police in cases where the injured party has notified the police or a prosecutor that he/she demands punishment for the offender. If the injured party withdraws his/her demand for punishment during the pre-trial investigation, the police will discontinue the investigation. Provisions on offences whose prosecution rests with the injured party are laid down in the Penal Code. Generally, complainant offences are petty offences where there is little public interest in prosecution, and where only the victim is in a position to know if his/her interests have been violated (e.g., defamation and trespassing). More serious offences are included in this group when the complainant might suffer considerable psychological harm from prosecution, for example some sexual and violent offences. In other words, the grounds are partly procedural-economic and partly in respect of an individual's autonomy.

For certain complainant offences, for example domestic violence, the prosecutor is entitled to prefer charges, even if the injured party does not demand punishment, if this is judged to be in the public interest. There are also situations where the injured party requires proof that the offence took place in order to pur-

10 Jaatinen, 2000, p. 100.

sue some further action or receive some particular benefit. A pre-trial investigation is thus undertaken even though the injured party does not demand punishment of the guilty party.

6. The relationship between the company and the offender

It is possible to view the relationship between the offender and the company in three ways. Corporate liability may in most cases be based on the *identification* of the offender with the corporation if the offender has acted as a member of the board of directors or as a manager of the company. The second ground for corporate liability is the responsibility of an *employer* for the acts of its employees. Thirdly, according to the Finnish Penal Code, it is possible in principle to impose a corporate fine based on *anonymous* culpa, without finding individual fault.

The offence is deemed to have been committed in the operations of a corporation if the offender has acted on behalf of or for the benefit of the corporation, and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation. This definition is also quite broad. The key element is that the individual operates as a representative of the corporation. If someone acts without such consent, he/she does not act on behalf or for the benefit of the corporation.

As said before, it is in principle possible to impose a corporate fine based on *anonymous* culpa, without finding individual fault. A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished (Penal Code, Chapter 9, Section 2.2).

It is not intended that corporate liability should *replace* individual liability. In many cases it is the *individual only* who shall be prosecuted, even if the individual has acted on behalf of the corporation and even if the corporation has profited from the illegal act committed by its representative. Culpable people are not (by law) allowed to hide behind the corporate facade.

The argument in favour of prosecuting only individuals is that they are the ones who are to blame and who deserve punishment. An individual manager, in order to secure promotion or a higher salary may, for example, implement a policy of short-term rewards that are contrary to the long-term interests of the corporation. In such cases, it is clear that only the individual should be punished.[11] However, in some cases it is justified to prosecute *both* the individual and the company. Prosecuting the company does not prevent the prosecutor from se-

11 Cunningham et al., p. 269.

eking the individual's punishment. On the contrary, a request for a corporate fine is not to be decided, without a special reason, before the decision on the charge on which the request is based (Criminal Procedure Act, Chapter 11, Section 5.2). This means that individual responsibility is in most cases the principal function of the procedure. Normally, simultaneous charges are brought against an individual and the company.

If the offender can not be punished due to the statute of limitations, neither can the corporation on whose behalf he/she has acted. However, the minimum period of limitations with regard to corporate fines is five years.

A corporation does not have a right to compensation from an offender for a corporate fine that it has paid, unless such liability is based on separate provisions on corporations and foundations (Penal Code, Chapter 9, Section 3.2). Responsibility to pay compensation may be based, for example, on provisions in company laws. It is thus possible to order a board of directors or the general manager of a company to pay compensation to the legal person for a corporate fine. On the other hand, it is not legal to make an ordinary employee pay compensation even if he/she has acted intentionally against the law.

7. Corporate fine

Corporate fine is imposed as a lump sum. It shall be at least EUR 850 and at most EUR 850,000. The courts have imposed rather modest corporation fines. The average fine in 2005 was only EUR 6,813. It is perhaps reasonable to ask what the criminal policy effects of such very lenient sanctions could be. If the fines are low, one could reasonably describe them as little more than "a public morality tax".[12] This may also contribute to the marginalisation of offences where corporate liability is applied. There has not been any discussion in Finland to consider the use of alternative sanctions (corporate probation, community service) when punishing corporations.

According to Chapter 9, Section 6, the amount of corporate fine is determined in accordance with the nature and extent of the neglect, the participation of the management, and the financial standing of the corporation.

When assessing significance of neglect and participation of management, the court takes into account the nature and seriousness of the offence, the status of the offender as a member of the organs of the corporation, whether the violation of the duties of the corporation involves heedlessness of the law or the orders of the authorities, as well as grounds for sentencing provided elsewhere in the law. If

12 Cunningham et al., p, 266.

a corporation is to be sentenced for two or more offences at a time, the court will pass a joint sentence of a corporate fine.

There are, in fact, three main criteria for measuring the amount of corporate fine as expressed above. The court first takes into account the harm or danger caused by the crime. Permissible and prohibited risks are primarily defined in the regulations, for example with respect to preventing environmental damage or defining permissible management in economic life. Comparing interests is useful when specifying them.

The second ground is based on the position of the wrongdoer in the organs of the corporation. The higher the position of the individual, the more likely his conduct would lead to a sentence of a corporate fine.

The third criterion points to the blameworthiness of the criminal act. Crimes committed deliberately are by their virtue more blameworthy than crimes of negligence. It should be stressed that a corporate fine is a possible punishment for many crimes of negligence. The grade of subjective *culpa* is, however, a central element when the court determinates the amount of corporate fine. The essential element of responsibility is the perpetrator's recklessness or negligence. The act is not attributed to the perpetrator if he/she, within the framework of his/her individual qualities, had no chance to act differently. This principle is called the principle of conformity, behind which lies the idea of an individual capable of rational choice. Special knowledge and special skills can tighten the scale, and so can circumstances. The presence of gross negligence is decided by *normative over-all evaluation* where, on one hand, the negligence of the act and, on the other, the negligence of the perpetrator are considered. The negligence of both the act and the perpetrator go together in that a very negligent act indicates the perpetrator's negligence to be greater than ordinary. If the act is grossly negligent when both the act and the perpetrator are considered, the conclusion arrived at in the overall assessment will, of course, be the same. In cases where the negligence of both the act and the perpetrator are of "different levels" in relation to each other, an assessment will be given emphasising one element more than the other. The same principles also apply when the court assesses whether the violation of the duties of the corporation manifests heedlessness of the law or the orders of the authorities.[13]

When evaluating the financial standing of the corporation, the following is taken into account: the size of the corporation, its solvency, as well as the earnings and other essential indicators of the financial standing of the corporation. The fine should not be so large as to imperil the earnings of employees or to cre-

13 Frände, 2005, p. 229–231; Jaatinen, 2000, p. 101–114.

ate a risk of bankruptcy. On the contrary, the corporate fine shall be a reasonable punishment in comparison with the corporation's solvency. It is impossible to lay down any tariff or to say that the fine should bear any specific relationship to the turnover or net profit of the corporation. Each case is dealt with according to its own particular circumstances.[14]

8. Waiving of charges and punishment

The Finnish legal system is based on the principle of legality as far as the bringing of charges is concerned. The same rule applies for passing a corporate sentence. However, the law leaves some room for discretion.

The *public prosecutor* may waive the bringing of charges against a corporation if the corporate neglect or the participation of the management or of the person exercising actual decision-making power in the corporation has been of minor significance in the offence, or if only minor damage or danger has been caused by the offence committed in the operations of the corporation, and if the corporation has voluntarily taken the necessary measures to prevent new offences.

The bringing of charges may be waived also if the offender has already been sentenced to a punishment and it is to be anticipated that the corporation for this reason is not to be sentenced to a corporate fine.

A court is allowed to waive the imposition of a corporate fine on a corporation if the omission by the corporation is slight, or if participation in the offence by the management or by the person who exercises actual decision-making authority in the corporation is slight, or if the offence committed in the operations of the corporation is slight.

The court may also waive the corporate fine when the punishment is deemed unreasonable, taking into consideration the consequences of the offence to the corporation, the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the neglect or offence. Waiving of punishment is also possible when a member of the management of the corporation is sentenced to a punishment, when the corporation is small, and when the offender owns a large share of the corporation or his/her personal liability for the liabilities of the corporation is significant. A corporate fine causes problems especially when small companies are concerned. The financial situation of a small company is often identified with the financial situation of the owner, and the owner is usually personally responsible for the duties and

14 Clarkson–Keating, 2003, p. 267.

debts of the company. In such cases, the principle of *ne bis in idem* may prevent the court from imposing a corporate fine.[15]

9. Corporate liability crimes in the Finnish Penal Code

A corporation may be sentenced to a corporate fine if such a sanction has been provided in the Penal Code. There are several provisions in the Penal Code which provide for corporate liability. These provisions and their contents are summarised below.

According to Chapter 16, Section 18 of the Penal Code, the provisions on corporate criminal liability apply to bribery, aggravated bribery, and bribery of a Member of Parliament. Bribery is a very uncommon crime in Finland. Criminal statistics include only a few bribery cases each year. Hitherto corporate criminal liability has not arisen in any case of bribery.

The provisions laid down on the criminal liability of a legal person apply to participation in activity of a criminal organisation, arrangement of illegal immigration, aggravated arrangement of illegal immigration, an animal welfare offence, organised gambling, distribution of depictions of violence, distribution of sexually obscene pictures, aggravated distribution of sexually obscene pictures depicting children, possession of sexually obscene pictures depicting children and unlawful marketing of obscene material (Chapter 17, Section 24). These crimes are very serious, and crimes against children are not at all rare. Nevertheless, corporate fines have not been applied to these crimes. The main reason may be that these kinds of crimes are not typically committed by legal entities.

The provisions on criminal liability of a legal person apply to pandering and aggravated pandering (Chapter 20, Section 13). According to Chapter 25, Section 10 of the Penal Code, the provisions laid down on the criminal liability of a corporation also apply to trafficking in human beings and aggravated trafficking in human beings.

The provisions on corporate criminal liability are applicable to tax fraud, aggravated tax fraud and to subsidy fraud, aggravated subsidy fraud and misuse of a subsidy (Chapter 29, Section 10), marketing offences, unfair competition offences, business espionage, misuse of a business secret and bribery in business (Chapter 30, Section 13).

The provisions on corporate criminal liability also apply to a receiving offence, an aggravated receiving offence, a professional receiving offence, money

15 The Supreme Court of Finland has argued in one case in favour of not passing the sentence of a corporate fine when the company and the individual offender are in fact identical as far as finances and financial duties are concerned (KKO 2002:39).

laundering and aggravated money laundering (Chapter 32, Section 14), to forgery, aggravated forgery and possession of forgery instruments (Chapter 33, Section 7).

According to Chapter 34, Section 9 of the Penal Code, a person who, in order to commit a nuclear device offence, is in possession of a bomb, other explosives or a dangerous instrument or substance and a person who, in order to commit a nuclear device offence, procures instruments or substances, or formulas or plans used for the production of nuclear devices, shall be sentenced for the preparation of endangerment. The provisions of corporate liability also cover these very serious crimes.

After September 11th 2001 there has been a strong international effort to tackle organised criminal groups and terrorism. The provisions on the criminal liability of legal persons apply to so-called terrorist offences, as defined by the Member States of the European Union. Terrorist offences have been incorporated in a part of the Finnish Penal Code. The provisions on corporate criminal liability apply even to robbery, aggravated robbery, extortion or aggravated extortion and forgery or aggravated forgery committed in order to commit a terrorist offence (Chapter 34a, Section 8).

The provisions on corporate criminal liability cover fraud and aggravated fraud when they are committed via data processing (Chapter 36, Section 9). According to Chapter 36, Section 1.2, this is defined as fraud if by entering, altering, destroying or deleting data or by otherwise interfering with the operation of a data system a person falsifies the end result of data processing and in this way causes another person economic loss.

The provisions on corporate criminal liability apply to crimes defined as counterfeiting, aggravated counterfeiting, petty counterfeiting, preparation of counterfeiting, use of counterfeit money, means of payment fraud and preparation of means of payment fraud (Chapter 37, Section 14).

The provisions on corporate criminal liability apply to regulation offences, aggravated regulation offences and smuggling (Chapter 46, Section 14).

The provisions on corporate criminal liability are aimed especially to prevent work safety offences (Chapter 47, Section 9). An employer or a representative thereof is deemed to be guilty of a work safety offence if he intentionally or negligently violates work safety regulations or causes a defect or fault that is contrary to work safety regulations or makes possible the continuation of a situation contrary to work safety regulations by failing to monitor compliance with them in the work he/she supervises, or by failing to provide for the financial, organisational or other prerequisites for work safety. There have been some cases in practice where the courts have sentenced the corporation to a corporate fine for the crimes mentioned here.

The provisions on corporate liability apply to environmental offences (Chapter 48, Section 9) and to securities markets offences (Chapter 51, Section 8). The main area for imposing corporate liability has been for environmental offences. However, the total number of cases has not been high (5–6 cases per year). On average, corporate fines imposed for environmental offences have ranged between EUR 5,000 and 10,000.

10. Corporate fine in practice

Corporate liability has not been a very common phenomenon in Finnish penal system in practice. In 2005 there were only 15 cases in Finland where the public prosecutor urged criminal sanction to corporations. The courts sentenced corporations to pay a corporation fine in eight criminal cases, the average amount of fines was 6813 euros. The claim was dismissed in five cases and in two cases the court decided to waive the charges.[16] A typical case for corporate liability seems to be a case concerning environmental crime. Here I present three typical cases from the practice of the Finnish Supreme Court.

A case of Supreme Court precedent KKO 2002:3:

The district court. A was a managing director of the company *X* (Limited Liability Company). During the time 1998−1999 *A* had taken several dozens of square meters of various sorts of waste to a land held in the possession of the company *X*. This land that was used for taking of gravel was located in a ground water area. *A* had not had a required permission for transporting waste to the land. Also, *A* had burnt part of the waste in the area without permission and part of the waste *A* had covered with gravel and sand. The district court sentenced *A* to nine months of conditional imprisonment and the company *X* was sentenced to pay a corporate fine of 50 000 Finnish marks (about 8500 euros) for damaging the environment.

The appeal court. The court of appeal reduced the conditional imprisonment sentence to *A* from nine months to three months. On the part of the corporate fine, the court of appeal stressed the financial position of the company *X* which was considered to be weak. Consequently, the corporate fine could not be as heavy as the district court had decided − regardless of the strong impact on the crime of the company management. However, because of the seriousness of the crime the corporate fine of 10 000 Finnish marks (about 1700 euros) was seen as a justified punishment.

16 See: http://www.tilastokeskus.fi/til/syyttr/2005/syyttr_2005_2006-10-06_tau_004.xls (site last accessed on March 3, 2009).

The Supreme Court. The Supreme Court considered the conditional imprisonment sentence of the court of appeal too lenient and found the punishment of the district court to be a proper sanction for *A*. In its assessment about the corporate fine, the Supreme Court considered the actual position of *A* in the company *X*. The Supreme Court assessed that this position indicated that the consequences of the corporate fine as well as the conditional imprisonment would concentrate to one and the same person − to *A* − which could not be seen as being in accordance with the aim of the corporate fine. The Supreme Court found this ground to be more important than the grounds that spoke for imposing of the corporate fine to the company *X*. Thus, it rejected the charge concerning the corporate fine.

A case of Supreme Court precedent KKO 2008:33:

A was an employee of company *F* (LLC). Out of gross negligence he spilled oil causing great environmental damage. Overall, about 300 000 litres of oil were spilled to the soil. Besides *A*, employees of the company *L*, *M* and *R* neglected their duties to take care of the safety of the tasks that *A* was carrying out at the time of the oil leak .

The district court. After the accident the company tried to solve the cause of the oil leak and it also took part in the restoration works. Neither the company nor its workers had purposely neglected their responsibilities nor tried to obtain unjust financial advantage. Based on these grounds the district court dismissed the charge of corporate fine. A fine from 1800 to 720 euros was imposed individually to *A*, *L*, *M* and *R*.

The appeal court. The appeal court assessed that based on the quality of negligence, seriousness and scope of the damage a corporate fine should be imposed to the company *F*. However, the compensation paid by the company, the investments that the company had made after the accident to prevent such an oil leak from happening in the future as well as the cleaning measures which the company took were factors that were against imposing a corporate fine on the company. The appeal court did not change the judgment of the district court.

The Supreme Court. The Supreme Court evaluated the facts of the case otherwise than the lower courts. Assessing the corporate fine it considered first the scale of damage and its widespread nature. The Supreme Court emphasized that the company had an opportunity to develop a system which would have eliminated the possibility of human error, without unreasonable costs. The investments the company had made after the accident to prevent oil leak from reoccurring could have been easily carried out even before the accident. The extent of negligence was significant and it caused serious damage to the environment. The Supreme Court sentenced the company to a corporate fine of 500 000 euros. When evaluating the amount of the corporate fine the Supreme Court considered on the one hand the nature and extent of the neglect and on the other the solvency and good financial status of the company. The turnover of the company was over 7

billion euros, the solvency indicators seemed very good and the business was profitable.

A case of Supreme Court precedent KKO 2008:61

The district court. A worked as a foreman and B as a production manager by a slaughter-house which was owned by a company C. A and B had negligently violated work safety regulations. The violation of the regulations had led to an accident by which one of the employees had lost his forefinger. The machine used to cut flesh had been out of order and A and B did not instruct the employee on the basic methods of working with this machine. A fine was imposed individually to A and B. The district court also sentenced the company to pay a corporate fine of 20 000 euros.

The appeal court. The appeal court waived the corporate fine. It stated that the offence committed in the operations of the company was slight. Appeal court deemed the punishment to be unreasonable taking into consideration the measures taken by the company to prevent new offences as well as to prevent and remedy the effects of the offence.

The Supreme Court. The Supreme Court concluded that A and B violated basic work safety regulations. The turnover of the company was over 116 million euros and profits over 300 000 euros a year. There were approximately 721 employees working for the company. The Supreme Court maintained the sentence imposed by the district court.

Conclusions

As discussed above, corporate liability has not been a very common phenomenon in Finnish penal system in practice. It has been recognised that corporate policies often depend on the organisational structure and lines of authority within a corporation. This also means responsibility for standard procedures relating to safety and internal control throughout the corporation. Corporate acts and policies are thus not seen as an aggregation of individual choices, but as the acts and policies of the company itself. It has been argued in Finland that corporate liability should be available only where individual criminal responsibility is ineffective or where no individual can be said fairly to be responsible for the crime. For my part, I am ready to share this policy argument.

It remains an open issue whether a corporate fine is, in fact, suitable to ensure that companies revise their internal operational procedures to guard against repetition of the offence. The central point is perhaps not deterrence but trust. By punishing the corporation, the state tries to tell citizens that no one can act against legal rules without consequences. Social life is crucially based on mutual trust.

If someone betrays that trust, a sanctioning system is needed. The punishment demonstrates that anyone acting against the common rules has to pay for this action.

As for now any major problems have not occurred when the courts have applied the rules concerning corporate criminal liability. It seems to me that corporate criminal liability, as applied in Finland, fulfils the requirements of fault, general prevention and fair trial.

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PASITIKĖJIMAS, VERSLO ETIKA IR NUSIKALTIMŲ PREVENCIJA – ĮMONIŲ BAUDŽIAMOJI ATSAKOMYBĖ PAGAL SUOMIJOS TEISĘ

Matti Tolvanen

Joensuu universitetas, Suomija

Santrauka. *Suomijos baudžiamojoje teisėje įmonių baudžiamosios atsakomybės institutas buvo įvestas reformuojant visą baudžiamąją teisę priėmus 1995 m. baudžiamąjį kodeksą. Įmonių baudžiamoji atsakomybė reglamentuojama Suomijos baudžiamojo kodekso devintajame skyriuje. Suomijoje nėra administracinės atsakomybės, visas bausmes įtvirtintos Baudžiamajame kodekse.*

Suomijos baudžiamasis kodeksas numato galimybę skirti baudas įmonėms, jei asmuo, dalyvaujantis įmonės valdyme, yra a) nusikaltimo bendrininkas ar nesutrukdė padaryti pažeidimą arba b) įmonės veikloje nesiimta deramų veiksmų siekiant užkirsti kelią panašiems pažeidimams.

Juridinio asmens baudžiamoji atsakomybė kyla remiantis asmenų, turinčių atitinkamus santykius su tuo asmeniu, tyčia. Suomijos teisės doktrina aiškiai nepripažįsta identifikacijos teorijos, pagal kurią asmuo laikomas veikiantis ne už juridinį asmenį, o kaip juridinis asmuo. Suomijos teisininkų darbuose reiškiama nuomonė, kad kai kuriais atvejais individualaus asmens elgesys gali būti priskiriamas juridiniam asmeniui lyg asmuo būtų veikęs juridinio asmens interesais. Tačiau Suomijos teisėje išliko kaltės reikalavimas. Šia prasme ji skiriasi nuo tradicinės bendrosios teisės sistemoje pripažįstamos papildomos atsakomybės doktrinos.

Ir toliau yra diskutuotina, ar įmonei skiriama bauda yra tinkama priemonė užtikrinti, kad įmonės imtųsi deramų veiksmų užtikrinti, kad pažeidimas daugiau nepasikartotų. Svarbiausia yra ne kelio pažeidimams užkirtimas, o pasitikėjimas. Bausdama įmonę valstybė mėgina pasakyti piliečiams, kad negalima pažeidinėti įstatymo ir likti už tai nenubaustam. Visuomenės egzistavimas yra pagrįstas abipusiu pasitikėjimu. Jei kas pažeidžia pasitikėjimą, būtina sankcijų sistema. Bausmė užtikrina, kad normų pažeidėjai gauna atlygį už savo veiksmus.

Suomijos baudžiamojoje teisėje įmonių atsakomybė nėra labai dažnas reiškinys. 2005 m. Suomijoje buvo iškeltos tik 15 bylų, kuriose prokurorai siūlė skirti įmonėms baudas. Galimybę skirti baudas įmonėms numato keletas Baudžiamojo kodekso nuostatų. Tipiškas atvejis – įmonės atsakomybė už nusikaltimus aplinkai.

Bauda įmonei skiriama kaip vienkartinis mokestis nuo 850 iki 850 000 eurų. Teismų praktikoje skiriamos santykinai mažos baudos. Vidutinė bauda įmonėms 2005 m. buvo tik 6 813 euro. Pagrįstai galima kelti klausimą, koks būtų tokių švelnių sankcijų poveikis siekiant bausmių politikos tikslų. Jei baudos yra mažos, jas būtų galima apibūdinti viso labo kaip „visuomenės moralės mokestį“. Galimas to padarinys – nusikaltimų, kuriuos daro įmonės, vertinimas kaip mažareikšmių. Klausimas, kad baudžiant įmones reikėtų taikyti alternatyvias sankcijas (įmonės viešieji darbai, nuteisimas lygtinai), Suomijoje nėra aptarinėjamas.

***Reikšminiai žodžiai**: baudžiamoji teisė, įmonių baudžiamoji atsakomybė, teorijos ir ideologija, politiniai aspektai, nusikaltimų prevencija, bendroji prevencija, pasitikėjimas, kaltės kriterijai, deramas rūpestingumas, teisingas teismas.*

Matti Tolvanen, Joensuu universiteto Teisės fakulteto dekanas, profesorius. Mokslinių tyrimų kryptys: baudžiamoji teisė, baudžiamojo proceso teisė.

Matti Tolvanen, University of Joensuu, Faculty of Law, dean, professor. Research interests: criminal law, criminal procedure law.