

CORPORATE CRIMINAL LIABILITY

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Models of Corporate Liability

- Identification doctrine
 - UK experience shows that the identification doctrine fails to hold corporates to account for wrong doing
 - unfair and creates perverse incentives
- Vicarious liability
 - overly inclusive – company liable whether or not it has good corporate governance systems
 - unfair and creates perverse incentives
- Organisational model
 - equates bad governance with a separate criminal offence which may not always be appropriate

Control Liability

- Control liability
 - (eg section 7 of the UK Bribery Act 2010)
- Separate offence
 - criminalises failing to prevent crime in certain circumstances
 - strict liability
 - due diligence
- Disadvantage
 - does not resolve difficulty of how to attribute liability for primary offence to corporate entity

Control Liability

- General Scheme of the Criminal Justice (Corruption) Bill 2012

Head 13 - Offences by Bodies Corporate and Unincorporated Bodies

Provide that-

(1) Where an offence under this Act has been committed by a director, manager, secretary, officer, employee, subsidiary or agent of a body corporate with the intention of obtaining or retaining business for the body corporate or to obtain or retain an advantage in the conduct of business for the body corporate, that body corporate shall also be guilty of an offence.

(4) It is a defence to an offence under subhead (1) for the defendant body corporate to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

Leading Person Liability

- EU (Market Abuse) Regulations 2016 (section 9)
 - A legal person will be liable for a market abuse offence committed for its benefit by any person having a leading position within the legal person based on
 - a power of representation of the legal person
 - an authority to take decisions on behalf of the legal person
 - an authority to exercise control within the legal person
 - A legal person will also be liable for a market abuse offence committed for its benefit by any person where the commission of the offence has been made possible by the lack of supervision or control by a person having a leading position within the legal person

Some Comments

- When deciding how to criminalise corporate behaviour need to ensure the decision reflects the harm principle
 - Criminal law should only be used to sanction behaviour which has caused or risks causing harm
- When devising the criminal offence it is crucial to identify the relevant underlying harm

Some Comments

- In the case of a corporate entity harm may arise from
 - its direct involvement in the commission of offence (A)
 - inadequate governance systems
- Harm caused by inadequate governance is not necessarily the same as harm caused by the commission of offence (A)
- Where the harm differs, it is difficult to see how holding the corporate liable for the commission of offence (A) is justified under the harm principle

Some Comments

- May be more appropriate to hold corporate entity directly liable for inadequate governance as this more accurately reflects the underlying harm
- There are a number of different possible options
 - a specific offence of failing to put in place appropriate corporate governance procedures
 - an offence of failing to prevent crime by an associated individual with a reasonable procedures defence
 - an offence of failing to prevent crime where an associated individual commits an offence which benefits the corporate entity with reasonable procedures defence

Some Comments

- In some circumstances, choice of corporate liability model may be constrained by international/EU law
- Legislative action is the best way of clarifying the law regarding the model for attributing liability to a corporate entity
- Legislation frequently contains a specific provision dealing with derivative managerial responsibility – could use same approach for attributing liability to a corporate entity
- Other issues – importance of self-reporting