# Corporate Criminal Liability in Sweden – On the way to an alternative criminal liability in summary procedure

**Dr. *Ari-Matti Nuutila***

## 1. History of Corporate Criminal Liability in Sweden

The provisions on corporate fine were imposed in Sweden 1986. The legislation was based on a Law Commission Proposal (Ju 1982:05) against Economic Crime and the Government Proposal (Prop. 1985/86: JuU13). The new legislation (Law 1986:1007) entered into force *1 January 1987*. Corporate fine was in the beginning imposed on entrepreneurs for serious crimes committed in the course of trade. The crime had to involve a serious breach of the special obligations associated with the operations or otherwise of a serious nature. The entrepreneur had not done what was reasonably necessary to prevent the crime. On the other hand, all crimes could in principle lead to corporate criminal liability. The offences in question were not enumerated.

The new sanction was motivated by the existing system of sanctions which was inadequate when it came to tackling economic criminality. According to the critics there was hardly any *proportion* between the sentence imposed on the individual and the economic interests that may be at stake for a company. The sentences appeared to be inadequate from the standpoint of *prevention*. Another deficiency was stated to be that the forfeiture could only be used for eliminating the profits of the crime already received. Because forfeiture could not be used to eliminate the *prospect* of economical profits, the criminal sanctions system invited the corporations to gamble with the law.

There was therefore considered to be a need for sanctions against companies with significantly repressive elements. Corporate fine was constructed not as a criminal sanction but as "*another legal consequence of crime*", which would usually be used besides individual criminal liability, not instead of individual liability.

The system with a corporate fine has from the first beginning been criticized of, e.g., inefficiency. The government appointed therefore in 1995 a Law Commission to investigate questions about the penalties for criminal offences in business. The Commission delivered their report, Criminal Liability for Legal Persons (SOU 1997:127), in late *1997*. The report contained a review and analysis of sanctions for breaches of law and other violations committed in the context of legal persons activity.

The report suggested that the rules on corporate fine should be reformed and that legal persons instead of natural persons could be sentenced to punishment for crimes which individuals committed in the legal person's business. Individual entrepreneurs could also be punished accordingly. Furthermore, State and local government should be subject to regulation, except for crimes committed in using of public power. The proposal did not breach the concept of crime. As in the past, only natural persons could commit crimes and criminal liability

of legal persons would assume that a natural person had committed a crime in the context of the legal person's business.

In the proposal, the scope of criminal liability of legal persons was confined to certain selected crimes. The main idea was that the corporate criminal liability would in the first place only cover penal provisions in the area of economic criminality. Only under certain conditions it would be possible to hold a legal person criminally liable for other kinds of crimes. The offender had to belong to the management of the corporation or had to have a special duty to take care of its activities to trigger criminal liability for the legal person. Furthermore, the offence must have involved a serious breach of the obligations associated with the business. In the case of less serious offenses in the area of economic criminality the Law Commission found that it usually was enough to punish the legal person only.

Although the proposal received in many respects positive response, it did not lead to amendments in the Criminal Code. A number of commentators criticized the Law Commission not to have been studying enough the possibilities of the 1987 legislation, rather than introducing a completely new system. The Law Commissions proposal of punishing a corporation besides economic crimes also of other crimes under certain circumstances was criticized of lack of legal certainty and problems with the principle of legality. Against this background more limited changes in the current system were preferred to overcome the weaknesses associated with corporate criminal liability.

The new Government Proposal (Prop. 2005/06:59) put forward proposals aimed at streamlining the system with corporate criminal liability and increasing the practical use of a corporate fine for violations in business. Corporate criminal liability remained *general in nature* and can be applied to nearly all offences. This *sanction should be incentive* for an entrepreneur to organize activities in a manner that prevents violations, which would also be of significance in terms of fair competition in the market. For some *less serious crime in business* the *corporate criminal liability was made primary* in relation to individual responsibility. This was meant to promote the principle of justice. It also helps to make a corporation to a more central part of the criminal justice system. The amendments (Law 2006:283) to the Swedish Criminal Code, Chapter 36, Sections 7 – 10 a, came into force on *1 July 2006*.

The reform aimed at *making it easier to prosecute and convict a legal person to a corporate fine*. The former requirement that the crime must have involved a serious breach of the special obligations arising from business operations or otherwise be of a serious nature was abolished. The only restriction is that corporate fine shall not be imposed for crimes for which only a fine is prescribed. The requirement that the trader has not done what is reasonably required for the prevention of crime was supplemented with a provision according to which it is enough for a corporate fine when the crime was committed by a person in a leading position or a person who otherwise had a special responsibility for overseeing or control of the business.

The penalty range of a corporate fine was adjusted from 10.000 – 3.000.000 to 5.000 – 10.000 Swedish crowns. The *new latitude* is approximately 550 – 1.100.000 Euros. Rules and principles for sentencing were clarified. Grounds for reducing and mitigating punishment were modified and clarified.

The *entrepreneur's responsibility is to some extent primary* in relation to individual responsibility in the case of negligent breach of the business regulations where fines would be appropriate punishment for an individual offender. If the crime is committed by negligence and

it is not likely to entail a sanction other than a fine, the individual offender may be prosecuted by a prosecutor only if prosecution is warranted in the general interest.

A *simplified procedure* was introduced also to corporate fines. An order for summary penalty means that the suspect is – subject to his approval – ordered to pay a fine according to what the prosecutor considers that the offence deserves. A corporate fine may be ordered by summary penalty order if the fine does not exceed 500.000 Swedish crowns.

In practice, Swedish Economic Crime Authority (*Ekobrottsmyndigheten*) demanded 189 million Swedish crowns (20,8 million Euros) in 2009 of corporate fines and forfeiture. The amount for the year 2010 was 89 million Swedish crowns (9,8 million Euros). Most of the cases concern environmental crimes, work safety offences, book keeping offences, tax fraud and bankruptcy crimes, but also violations of food and restaurant legislation, animal welfare offences, alcohol and cigarettes offences, lottery offences and professional road traffic violations. Also traditional crimes such as fraud have led to corporate criminal liability.

The corporate fine is usually around 5.000 – 50.000 Swedish crowns (550 – 5.500 Euros). Fines exceeding 100.000 Swedish crowns (11.000 Euros) are exceptional and fines over 500.000 Swedish crowns (55.000 Euros) can be convicted only by the Court of law. Such corporate fines have so far been convicted only for a few work safety offences.

In practice it is nowadays easier to establish the requirements of a corporate fine than those of individual criminal responsibility. This has led the police and the prosecutors to i*nvestigate the offence only so far that it is possible to convict the legal person to a corporate fine and leave the investigation of individual criminal responsibility aside*. With an order of summary penalty of maximum 500.000 Swedish crowns to the corporation, the prosecutor can avoid a long and time consuming criminal procedure in the Court of law.

## 2. Scope of Application of Corporate Criminal Liability (Section 7)

According to Section 7, the rules of corporate fine are limited in scope only in that the sanction can be imposed an entrepreneur for a crime committed in the exercise of business activities. The term *entrepreneur* has the same broad meaning as elsewhere in the Swedish legislation. An entrepreneur means any natural or legal person who professionally conducts business of a financial nature, whether the activity is focused on profit or not.

The term refers primarily to *legal persons that have been formed for the purpose*, e.g. partnership, limited liability companies and economic associations. The provision, however, is *equally applicable to individuals and nonprofit organizations* engaged in activities of an economic nature in a way that can be described as professional. Also *State and municipals* can fall under the business concept. The same applies to *state and municipal utilities and SOE's* (State controlled enterprises) running business.

The reason for this is that municipalities and the State have much choice when it comes to determining whether a given activity must be operated by the municipality or in an independent company and that it would not be appropriate if a corporate fine should be eligible for certain activities in a municipality where the activities are run by a company, but at the same time be excluded for the same type of business in another municipality where the activities are run directly by the municipality.

One issue that was not taken up for discussion in 1986 but has been discussed later is how to proceed, when the entrepreneur has sold the business activities in question during the time between the crime and the prosecution. The fact that *an entrepreneur has transferred or ceased the activity* in which the crime was committed should not prevent a corporate fine imposed on him for crimes committed in the operation beforehand. Has the crime been committed in a legal person's activities and this has new owners, the action for a corporate fine can of course be successful. Likewise, if the legal person has changed shape – when e.g. an individual business has changed into a limited liability company – the responsibilities of the individual entrepreneur may follow to the company.

Corporate fine may be appropriate only if a *crime* has been committed in the course of business activities regardless whether the regulation is in the Criminal Code or elsewhere in legislation. All objective and subjective elements of a crime must therefore be satisfied. There is no requirement that the individual offender is prosecuted for the crime or even identified, but it must be clear that a crime has been committed. Criminal intentionality is usually impossible to identify if the perpetrator is unidentified. Concerning negligence, it is quite possible that a crime can be deemed to be done even if the perpetrator would be unknown.

Further, in order to impose a corporate fine, *the punishment prescribed* for the crime must be *more severe than a fine*. This excludes policy violations of criminal character and petty offences that otherwise are of trivial nature, such as speeding, for which only a fine is prescribed. Where the penal provision prescribes a more severe penalty under aggravating circumstances, the entire range of penalties is counted. In contrast, if the crime is divided into several grades, only the possible penalty in the offence in question is relevant. The same applies to sentences that can only follow when some specific circumstance exists.

For the provision to be applicable the crime must be committed *in the exercise of business activities*. Crime in the exercise of business activities cannot be committed by persons other than the entrepreneur, the employees of it or those working at the request of the entrepreneur. The criminal act or omission must typically have a close connection with the activities of the offender in his capacity as entrepreneur or as representative of or employed by the operator of the business.

When an employee of a company has committed a crime and the offense has a clear link to the business activities in question, the rule is in principle applicable even if the management would not have known of the crime. The fact that the crime has taken place without management's knowledge or even contrary to its express orders may however waive liability according to Section 10.

A large number of provisions in special criminal law contain either *general regulations applicable to the wider business community* – such as Working Hours Act (Law 1982:673) and the Work Environment Act (Law 1977:1160) – or *special provisions* that apply to certain types of business activities – such as Food Act (Law 1971:511) or Act (Law 1982:821) on the transport of dangerous goods and Commercial Road Traffic Act (Law 1998:490). When someone at a company violates such obvious regulatory provisions, there should be no doubt that the crime is committed in the course of business activities.

Also if the act in itself means that the provisions of an economic regulatory statute are violated but the liability should be imposed under a provision of the Criminal Code, the crime is committed in business activities. This can be the case if, e.g., the violation of business regulations has led to *causing of someone's death of bodily harm*.

Violations of *key criminal provisions in the Criminal Code* may also be considered as crimes in the course of business, both crimes that take direct aim at economic activity (such as book keeping offence) and other crimes (such as fraud) that cannot be said to be of pronounced economic criminality in nature. As an example, if an oil company sells low-octane gasoline as high-octane, the act falls under the general provision concerning fraud. While it is also clear that this fraud has been committed in the company's business activities, a corporate fine has to be considered besides individual criminal responsibility.

In legal literature and motives of the legislation there are several statements which are providing *support for an even broader interpretation* of the concept of business activities. For example drug smuggling can be done in the exercise of a trucking company's activities, as well as thefts committed by industrial guardians who are employees of a guard company. The legal situation is, however, somewhat unclear.

It is, however, also clear that all violations of business regulations do not fall under the definition of the crime being committed in the exercise of business activities. If the crime is not at all related to the business activities of the entrepreneur, it falls outside the scope of corporate fine.

The case can be more difficult when public activities are at stake. Environment Supreme Court has in three rulings taken a position on whether certain public activities have been business activities. The Court has paid particular attention to *the sufficient link between performance of public duties and their economic aspects* (MÖD 2001:21, 2001:22 and 2001:23).

> Likewise, the Court of Appeals of Western Sweden dismissed in the decision RH 1999:84 the action for a corporate fine on the ground that a sufficient link between the performance of public duties and their economic aspects was lacking. A municipality owned a riding school and rented out an indoor arena for a riding club. During construction work, a riding instructor fell down and was injured. According to Work Environment Act the municipality was responsible for preventing risks of falling with, e.g., rails.
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> The Court pointed out that the municipality may be deemed to engage in business activities when it rents an arena to a riding club, even if the rent is subsidized to promote recreational activities within the municipality. Here, however, the accident was a single one. Construction activities could not be regarded as having such a connection to the rental of indoor riding arena that a corporate fine would have been justified. The action for a corporate fine against the municipality was dismissed.

A general condition for the imposition of a corporate fine is that *the entrepreneur has not done what could reasonably be required of him for prevention of the crime* (Paragraph 1), or that the crime has been committed by a person in a leading position, which is based on a capacity to represent the entrepreneur or to make decisions on behalf of the entrepreneur or by a person who otherwise has had a special responsibility to inspect or control the business activities (Paragraph 2).

Paragraph 1 focuses on the cases where the entrepreneur as such can be held liable for the crime, such as because he has had inadequate procedures and controls for the prevention of crime. The demands placed on companies have to be seen against the background of corporate criminal liability. One of the main aims of the regulation is to achieve an improved monitoring of regulatory compliance or to clarify crime prevention measures within the business. The idea is that the conditions for a corporate fine do not exist if *the entrepreneur has made what is reasonably possible to prevent precisely the current crime from being committed*. A

general rule that employees must comply with the provisions and regulations applicable in the field should not exempt the corporation from criminal liability. *The regulations must be sufficiently specific and precise* in order to be considered serious. They must be *communicated precisely to prevent the kind of crimes in question*. It is also required that the *regulations were effective with regard to their purpose* and that the controls required are maintained. Regardless of the specific regulations or instructions issued, it should further be required that the activities have been organized in such a way that *a reasonable degree of control of lawfulness is exercised*. If it turns out that safety has been systematically neglected in business because of lack of control, a corporate should be eligible even though it has given the required regulations.

Generally an entrepreneur's ability to take reasonable measures to prevent crime includes the *offense* and offender's relationship to the particular business activities, i.e. *the entrepreneur's nature, the main focus, organization and similar circumstances*. It must therefore be established that the entrepreneur should have been able to count on that there was a certain risk that the offense – or a similar crime – could be committed in the business and the entrepreneur had a reasonable opportunity to eliminate that risk. The corporate fine is not imposed if, e.g., the crime appears to be too peripheral or temporary in respect of the entrepreneur's ordinary activities, or the liability of the entrepreneur for the perpetrator's offences appears otherwise weaker than normal.

Paragraph 2 focuses on cases in which the entrepreneur has perhaps fully acceptable procedures for preventing crime, but where persons with a leading position or special responsibility within the company have committed the crime. The entrepreneur has a greater responsibility for a particular circle of people. "Corporate negligence" is not required if the crime has been committed by *a person in a leading position*, which is *based on a capacity to represent* the entrepreneur or *to make decisions* on behalf of the entrepreneur or by a person who *otherwise has had a special responsibility to inspect or control* the business activities.

One reason for such an extension has been that *people in leading positions in many cases can be said to be outside the control and supervision* that may exist in a company. Procedures and controls must always be designed and maintained by individuals. The regulation aims also to situations where defects occur in those who are set to inspect and control the business activities even if they are not, e.g., Members of the Board of Directors. Persons in leading positions often *have such powers and functions* that make it reasonable to impose a greater responsibility. They can include greater opportunities to exploit the company and achieve personal gain of violations.

The above said does not mean that a trader should be subject to liability for abnormal acts or offenses committed against the entrepreneur. Such offences are taken into account partly by the restriction that the crime must have been committed in business activities, and partly by the exception of an offense committed against the trader (see Section 7(2) below).

The concept of *person in a leading position refers to managerial responsibilities*. A person can be part of the company's management or independently responsible for reporting directly to management. He can easily be said to have a particular responsibility for ensuring that business operations are conducted in a lawful manner.

The term *person who otherwise had a special responsibility for the inspection or control* is aimed at persons responsible for controlling and supervising the rules – both official and the entrepreneur's own – or procedures and safety regulations. Because the responsibility must

be qualified as a *special* one, employees responsible for the ongoing operations in business activities are not covered by the provision. Such persons can have, e.g., an ongoing responsibility for a particular machine's maintenance and operations. However, their foreman or supervisor typically can have special responsibilities under this provision.

Section 7(2) states that a corporate fine shall not be imposed if the *crime was directed against the entrepreneur*. In these cases the entrepreneur occupies the position of victim in criminal proceedings. The rule does not necessarily exclude corporate criminal liability if the crime affects the business in a more indirect way. One example is the situation if an employee commits a crime in his own interest – such as theft or fraud – against some of the trader's business contacts. Such a procedure can obviously have negative consequences for the entrepreneur. The situation should discharge corporate criminal liability already on the ground that it is not reasonable to require that the entrepreneur should have prevented the crime. Furthermore, the prosecution can usually be waived according to Section 10.

### 3. Corporate fine (Section 8)

Through the legislative changes which came into force on 1 July 2006, both the minimum and the maximum amount for a corporate change were amended. The lowest amount was reduced from 10.000 to *5.000 Swedish crowns*. The reason for this was that the previously existing requirement – that the crime must have involved a serious breach of the special obligations associated with the business operations or otherwise be of a serious nature – was abolished. The reform meant that a corporate is liable for corporate fine even for crimes with a low penal value.

With regard to the maximum amount, the increase from three to *ten million Swedish crowns* allows a more tactile and real sanction even for large multinational companies. One main reason for the increase was also Sweden's international commitments in the area.

Corporate fine may, in accordance with Chapter 48 Sections 4 and 5 of the Swedish Code of Judicial Procedure (Law 1942:740), be submitted to an entrepreneur with an order of summary penalty. This applies only if the fine does not exceed 500.000 Swedish crowns and if the entrepreneur gives his consent.

### 4. Sentencing Corporations (Section 9)

Section 9 provides that in determining the amount of a corporate fine, taking into account the penal range of penalties for the crime, special consideration shall be given to the damage or danger which the crime has implied, as well as to the extent of the criminal activity and to its relation to the business activity. In addition, special attention shall also be given to whether the entrepreneur has previously been convicted to pay a corporate fine.

*The harm or danger that the crime has caused* is meant, according to Law Commission, to be fundamental to the determination of the corporate fine. The amount of the fine should be *primarily business-related* rather than person-related. Subjective factors such as intentionality of the offence has a less prominent role in relation to more objective factors such as – besides

the extent of the criminal activity – the damage or danger caused by the offence. The reference to the range of penalties for the crime was introduced to highlight such a more objective assessment.

In addition, *the extent of the criminal activity* must be given due weight. Generally there is reason to look more seriously at such a crime which has been carried out systematically and extensively than at single violations of law. The scale should in principle be assessed regardless of company size. E.g. spilling of the same amount of waste oil should in this respect be assessed equally regardless of whether the spill occurred in a large or small company. However, it is often the case that a small standard deviation in a large enterprise naturally leads to crime of a greater extent than an equivalent deviation in a small business.

*The relation of the criminal activity to the business activity* refers primarily to the extent to which the entrepreneur can be blamed for that crime. In this context the level of disregard of the professional responsibilities plays a role. E.g. obvious disregard of important safety regulations in a particularly risky activity must be assessed as an aggravating circumstance. Further consideration should be given to the offender's position in the company and whether the crime has in any way been accepted or even commanded by management or otherwise by any person in comparable positions. That crime is known or even rewarded by the management should be a factor to consider in sentencing the corporation.

Special attention shall also be given to whether *the entrepreneur has previously been convicted* to pay a corporate fine. As the Government pointed out, continued criminal activity should normally be a more important factor in determining a sanction against a legal person than in sentencing of an individual. Recidivism of individuals can be considered in the conditional sentencing and otherwise in the sentencing. For legal entities, recidivism can only be given due weight in determining the amount of corporate fine.

In regard to recidivism the size of the corporation must be taken into account. In the case of larger companies, where risks of new violations of law are greater, a previous crime in business operations cannot always be taken into account in sentencing. In larger companies recidivism should be taken into account if there has occurred similar kinds of violations that relate to the same part of the business. A previously imposed corporate fine can be taken into account only in aggravating direction. The provision should be, as stated in the legislative motives of the provision, applied with some caution.

The entrepreneur’s ability to pay may be considered under the application of Section 10 and therefore should not be taken into account under this provision.

## 5. Grounds reducing, mitigating and waiving of punishment (Section 10)

Section 10 provides for the adjustment and waiving of corporate fine. A corporate fine may be set at less than it should have been (1) if the crime involves some other payment liability or a special legal effect for the entrepreneur and the total reaction to the crime would be unreasonable, (2) if the entrepreneur has attempted so far as he has been able to prevent, repair or restrict the damages of the crime, (3) if the entrepreneur has voluntarily reported the crime, or (4) if there are otherwise special grounds for mitigation. If it is especially justified, taken into account any of these mitigating grounds, the imposition of a corporate fine may even be waived.

The system is based on the idea that the decision of an appropriately balanced corporate fine should be done in three steps. First, an assessment of the conditions to impose a corporate fine has to be satisfied under Section 7. Second, the amount of corporate fine is determined in accordance with Section 9. Finally, an assessment must be made of whether there are grounds to reduce, mitigate or waive the corporate fine under Section 10.

According to Paragraph 1, corporate fine may be mitigated if the crime results in *another payment liability* or a special legal effect *for the entrepreneur* and the *overall response to crime would be disproportionately severe*. This refers, inter alia, cases where the company in respect of infringement has been imposed or will be imposed an *administrative fee*. Charges of this nature fill in many respects the same functions as a corporate fine and there is therefore in such cases no need for double penalties against the company. If the fee is not yet imposed when the court determines the issue of corporate fine, the court may make an assessment of whether a charge will be imposed and how large it can be expected to be. In some cases it may be proper to obtain the opinion of the administrative authority that decides later on the issue of an environmental fee or tax increase.

Even *liability for damages* can be taken into account under this provision. An example that can arise is when the profits of a crime correspond to the detriment of victims who claim compensation from the entrepreneur. Even in the case of adjustment of compensation, the Court may make a probability assessment of whether the entrepreneur can and will fulfill its payment obligations.

Space to mitigate corporate fine considering *special legal effects to the entrepreneur* should be relatively limited. The fact that the profits raised by the company as a result of the crime are subject to *forfeiture* is an expected "legal effect" of a crime, and will therefore normally not be taken into account. The system is based on the idea that profits always can and will be confiscated, while corporate fine should serve as a punishment. There are, however, situations where the forfeiture rules include features of punishment. For example in some cases forfeiture is calculated as gross benefits – without taking into account the costs associated in the criminal business activities. There are also some rules of forfeiture which mean that all goods or products – like food, alcohol or cigarettes – that were the subject of illicit business activities shall be forfeited. In such cases the value of the confiscated goods is often substantially higher than the profits made by the crime. Such forfeiture may, in some cases hit very hard and should be considered when determining the corporate fine.

Paragraphs 2 and 3 indicate that *the entrepreneur has – so far as he has been able to – prevented, repaired or restricted the damages* of the crime or has *voluntarily reported the crime*. These points have corresponding models concerning individual criminal liability. The criterion "voluntarily reported the crime" means that the entrepreneur reports his own crime. There is no plea bargaining in Sweden – not even in corporate criminal liability. Furthermore, reporting of one's own crime must be voluntary and not take place after the entrepreneur has otherwise been caught.

According to Paragraph 4, mitigation of corporate fine may take place if there are *special grounds* for it. The requirement for special reasons means that it is not enough that there are other reasons for mitigation, but it requires that these elements have particular importance. Specific reasons for adjustment may include be that it appears to be manifestly unreasonable to impose a full corporate fine, e.g., because *the crime is indirectly directed against the entrepreneur himself*. For example, an employee of an industrial guard company can have

committed a crime, such as theft or fraud against some of the entrepreneur's business contacts. In these kinds of cases usually already the link between the crime and the business activities is missing and corporate criminal liability is ruled out on the basis of Section 7.

The *entrepreneur's ability to pay the corporate fine* can be assessed under this provision. The defendant's ability to pay should, however, be considered with some caution in mitigation.

If it is *especially justified*, taken into account any of these mitigating grounds, *the imposition of a corporate fine may even be totally waived*. There has to exist at least one of the above mentioned factors that can form the basis for mitigation and this factor is of such gravity that the adjustment of corporate fine is not sufficient. Furthermore, in exceptional cases, there must be room to waive a corporate fine if, for example, even though the crime is attributable to a person in the management of the company, is seems unreasonable to burden the corporation with the individual's behavior. Waiving of punishment should, as stated in the Government proposal, be applied strictly.

## 6. Waiving of prosecution (Section 10 a)

Section 10 a includes a rule prescribing waiving of prosecution. If the crime, which can lead to initiating of proceedings of a corporate fine, has been *committed through negligence*, and *cannot be assumed to prompt sanctions other than fines*, the prosecutor may bring charges only if prosecution is warranted in the general interest.

The reform in 2006 expanded the scope of the corporate criminal liability to include less serious crimes and the question of whether to impose a corporate fine arises for any offenses in business activities for which a more severe punishment than a fine is prescribed. The starting point has been that for more serious offences both individual criminal liability and corporate criminal liability are enforced at the same time. The broadening of the scope of application of corporate criminal liability has brought up the question whether there is a need for parallel criminal liability in cases of a less serious crime in business operations or whether the responsibility to some extent should be transferred to the entrepreneur. After all, corporate fine is a repressive sanction which basically serves the same purposes as punishment.

A system of parallel sanctions would, according to the motives of regulation, result in an overall significantly disproportionate intervention by public authorities to less serious crime in business. This risk is particularly apparent in the case of sole entrepreneur who could face both a corporate fine and individual fine. Also equitable arguments have been made for such a restriction. Corporate criminal liability in addition to individual liability in respect to less serious crimes can appear as if the responsibility is approaching rigorous or strict liability, i.e. a system where someone is convicted because of someone else's offence without consideration intentionality or negligence. Corporate criminal liability can mean that an individual, who in practice did not have particularly great potential to influence the situation, may be responsible for defects that ultimately relate to the company and its structure and organization rather than individual negligence. Particularly in the case of a minor negligent offence, the company may be said to be more responsible for the violation of law than the individual, who usually does not even gain any financial profit of the offence.

Waiving of prosecution means that the entrepreneur's responsibility is made primarily in relation to individual responsibility in the case of negligent offences in business operations where the normal individual punishment would be fines. The prosecution should, however, not be waived if *prosecution is warranted in the general interest*. Prosecution may be warranted in the general interest if the crime is approaching to such penal value where other sentence than a fine should be considered. Prosecutions may also called for in the general interest where an offence in business operations is committed with deliberate risk taking, although the offence cannot be said to have been committed intentionally.

Prosecution is also warranted in the general interest in situations where it is *a priori clear that an action for a corporate fine cannot be entered or enforced* against the entrepreneur. The corporation may be a foreign one or it can be bankrupt or otherwise have ceased to exist as a legal person against which an appeal of a corporate may be enforced.

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## *ANNEX 1.* Unofficial translations of Swedish Legislation

## The Swedish Criminal Code (Law 1962:700) (updated to July 2011)

### *Chapter 36 – On Forfeiture of Property, Corporate Fines and Other Special Legal Effects of Crime*
### *Corporate fines*

*Section 7*

For a crime committed in the exercise of business activities the entrepreneur shall, at the instance of a public prosecutor, be ordered to pay a corporate fine if the most severe penalty provided by the law is not a fine and if:

(1) the entrepreneur has not done what could reasonably be required of him for prevention of the crime, or
(2) the crime has been committed by
    (a) a person in a leading position, which is based on a capacity to represent the entrepreneur or to make decisions on behalf of the entrepreneur, or
    (b) a person who otherwise has had a special responsibility to inspect or control the business activities.

The provisions of the first paragraph shall not apply if the crime was directed against the entrepreneur. (Law 2006:283)

*Section 8*

A corporate fine shall consist of at least five thousand Swedish crowns and at most ten million Swedish crowns. (Law 2006:283)

*Section 9*

In determining the amount of a corporate fine, taking into account the range of penalties for the crime, special consideration shall be given to the damage or danger which the crime has implied, as well as to the extent of the criminal activity and to its relation to the business activity.

Special consideration shall also be given to whether the entrepreneur has previously been convicted to pay a corporate fine. (Law 2006:283)

*Section 10*

A corporate fine may be set at less than it should have been under the provisions of Section 9:

(1) if the crime involves some other payment liability or a special legal effect for the entrepreneur and the total reaction to the crime would be unreasonable,
(2) if the entrepreneur has attempted so far as he has been able to prevent, repair or restrict the damages of the crime,
(3) if the entrepreneur has voluntarily reported the crime, or
(4) if there are otherwise special grounds for mitigation.

If it is especially justified, taken into account any of the mitigating grounds specified in Subsection 1, the imposition of a corporate fine may be waived. (Law 2006:283)

*Section 10 a*

If the crime, which can lead to initiating of proceedings of a corporate fine,

(1) has been committed through negligence, and
(2) cannot be assumed to prompt sanctions other than fines,

the prosecutor may bring charges only if prosecution is warranted in the general interest. (Law 2006:283)

## The Swedish Code of Judicial Procedure (Law 1942:740) (updated to July 2011)

***Chapter 48 – Orders for Summary Penalty and Orders for Breach-Of-Regulations Fine (Law 1968:193)***

***General provisions – Section 2***

An order for summary penalty pursuant to this chapter means that the suspect is, subject to his approval immediately or within a specified period, ordered to pay a fine according to what the prosecutor considers that the offence deserves. - - - - -

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When the offence calls for a corporate fine, also this shall be submitted to the suspect for approval. (Law 2010:575)

***Order for summary penalties – Section 4***

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A corporate fine may be ordered by summary penalty order if the fine does not exceed 500.000 Swedish crowns. (Law 2006:284)

***Order for summary penalties – Section 5***

Orders for summary penalty may not be issued,

(1) if the preconditions for public prosecution do not exist,
(2) if the order does not include all offences committed by the suspect that are under consideration according to the knowledge of the prosecutor, or
(3) if the aggrieved person has declared that he intends to institute an action for a private claim in consequence of the offence relating to other than an obligation to pay. (Law 2006:284)

## The Swedish Code of Procedure in Certain Cases of Forfeiture etc. (Law 1942:740) (updated to July 2011)

*Section 5*
Corporate fine may be ordered to an entrepreneur by summary penalty order. In these cases, the Sections 2-5, 6-8, 10 and 12 a of Chapter 48 in the Swedish Code of Judicial Procedure are applied when

applicable, and what is said there of the suspect applies instead to the one who is ordered a corporate fine.

An order for summary penalty of a corporate fine is approved when the entrepreneur

(1) signs a declaration in which he admits the circumstances forming the basis for the order and accepts the corporate fine brought up in the order; and
(2) leaves the declaration to an authority competent to receive it according to Government Ordinances.

An order can also be approved by paying the whole amount to a competent authority according to Government Ordinances. This kind of payment shall not be regarded as an approval, if it is evident that the entrepreneur has not meant to approve the order.

An approval has no effect if it has been given after the prosecutor has brought criminal actions on corporate fine. (Law 2006:285)