

CORPORATE CRIMINAL LIABILITY IN SWEDEN – CORPORATE FINES FROM A CRITICAL PERSPECTIVE

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ABSTRACT

Swedish criminal law does not allow for corporate criminal liability as it is built on the basic principle of personal criminal liability, meaning that only private individuals are considered able to possess criminal liability and consequently commit crimes. However, a corporation may be subject to corporate fines and other sanctions if a crime has been committed during the corporation's operations. Corporate fines are the closest equivalent to corporate criminal liability under Swedish law, which sole purposes is punitive although it has been deemed impossible to categorize corporate fines as a punishment in the strictest sense. This article will further explain the design of corporate fines today, the problems resulting from corporations not being able to possess criminal liability as well as the proposed changes to corporate fines from a critical perspective.

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I. INTRODUCTION TO CORPORATE CRIMINAL LIABILITY IN SWEDEN

Swedish criminal law is built on the idea of personal criminal liability and only private individuals are considered able to possess criminal liability and consequently commit crimes, which is why Swedish law does not allow for corporate criminal liability.¹ However, if a crime is committed during the corporation's operations, criminal liability may apply to the representatives or employees of the corporation who committed the offence. In conjunction with the individual criminal liability, the corporation may be subject to corporate fines (*Sw. företagsbot*), administrative sanctions and risks having to pay damages as a result of a crime. Corporate liability may also arise as a special administrative sanction from acts violating provisions in certain regulations, such as the Environmental Protection Act (*Sw. Miljöbalken*). Other examples of potential sanctions are administrative fines due to breaches of the General Data Protection Regulation, competition law fines (*Sw. konkurrensskadeavgift*) due to breaches of the Competition Act (*Sw. Konkurrenslag*) and being excluded from participating in public procurements under the Public Procurement Act (*Sw. Lag om offentlig upphandling*). In addition, any proceed of a crime may be declared forfeited (*Sw. förverkad*) under the Swedish Criminal Code.² In the following, focus is on corporate fines since it is the closest equivalent to corporate criminal liability in its strictest sense under Swedish Criminal Law.

II. CORPORATE FINES TODAY

Although corporate criminal liability where legal entities would be subject to punishment was discussed several times before the implementation of corporate fines, the proposals faced too much criticism and were never implemented.³ The criticism was mostly based on fundamental and practical issues in changing the basics of Swedish criminal law.⁴ Instead, corporate fines were introduced in Swedish criminal law in 1986.⁵ Since corporations cannot possess criminal liability and commit crimes, they cannot be subject to punishments according to the Penal Code.⁶ Hence, corporate fines are not deemed a criminal

¹ PETER ASP, MAGNUS ULVÅNG & NILS JAREBORG, KRIMINALRÄTTENS GRUNDER 73 (2nd ed. 2013), NILS JAREBORG & JOSEF ZILA, STRAFFRÄTTENS PÅFÖLJDSLÄRA, 54 (5th ed. 2017), PROPOSITION 1985/86:23, OM ÄNDRING I BROTTSBALKEN M.M. (FÖRETAGSBOT) 19, TOMMY ISESKOG, FÖRETAGSBOT – EN SANKTION VID BROTT I NÄRINGSVERKSAMHET, 7 (2006).

² Chapter 36 Sections 1-6 of the Swedish Criminal Code.

³ Prop. 1981/82:142, Om ändring i brottsbalken (ekonomiska sanktioner vid brott i näringsverksamhet); Report No.5 of the Ministry of Justice 1978, *Företagsböter – En kartläggande undersökning av korporativt ansvar*; Report No.10 of the Ministry of Justice 1979, *Företagsböter – förslag till lagtexter*; Report No.3 of the Ministry of Justice 1981, Ekonomiska sanktioner vid brott i näringsverksamhet.

⁴ Prop. 1981/82:142, om ändring i brottsbalken (ekonomiska sanktioner vid brott i näringsverksamhet) 4-5.

⁵ Prop. 1985/86:23, Om ändring i brottsbalken m.m. (företagsbot) 1.

⁶ Chapter 1 Sections 3 and 8 of the Swedish Criminal Code (1962:700) (*Sw. Brottsbalk*); Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot), 19.

sanction but instead a so called special legal effect with the character of a criminal sanction, although the intended purpose of imposing a corporate fine is strictly punitive and does not include a profit-reducing purpose.⁷ Since the introduction of corporate fines, the Swedish legislator has numerous times investigated and considered changing the fundamentals of Swedish Criminal Law so as to enable legal entities to be subject to criminal liability in line with legal developments globally. However, the conclusion has repeatedly been that the difference between corporate fines being deemed as punishment or a special legal effect is mostly of a formal nature and does not in itself impact the corporate fines' efficiency and functionality. Corporate fines will as a result continue to be categorized as a special legal effect of a crime and not as a punishment in the strictest sense as defined by Swedish Criminal law.⁸ It should, however, be noted that corporate fines most likely are to be categorized as punishment under the definitions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.⁹

Depending on the severity of the criminal action triggering the rules on corporate fines as further explained below, corporate fines are often applied together in tandem with individual criminal liability and not instead of individual criminal liability. In some cases, the corporation's responsibility may be primary in relation to the individual criminal responsibility in case of negligent breach of the business regulations, where fines would be an 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 only if prosecution is called for in the public interest.¹⁰

Any crime committed during a corporation's business activities may lead to the issuance of corporate fines provided that the crime is punishable with a penalty greater than pecuniary fines (*Sw. penningböter*).¹¹ 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.¹² There is no requirement that the individual offender is prosecuted for the crime or even identified or prosecuted for it. It is however required that the crime itself is identified and that it has been committed with some form of personal criminal liability.¹³ Criminal intent is generally impossible to ascertain if the perpetrator is unidentified except in very special situations. For negligence however, it is quite possible that a crime can

⁷ Chapter 1 Section 8 of the Swedish Criminal Code; Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 107–108.

⁸ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot); SOU 1997:127 Straffansvar för juridiska personer; Ds 2001:69 Företagsbot, Prop. 2005/06:59 Företagsbot p. 19; Prop. 2018/19:164 Skärpta straffrättsliga sanktioner mot företag pp. 14–15.

⁹ SOU 2016:82 En översyn av lagstiftningen om företagsbot, 108.

¹⁰ Chapter 36, Section 10 and 10a of the Swedish Criminal Code, prop. 2005/06:59, 41–50.

¹¹ Chapter 36 Section 10 of the Swedish Criminal Code.

¹² Section 1 of the Act on Penalties for Certain Traffic Offences (1951:649) (Sw: Lag om straff för vissa trafikbrott).

¹³ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 62; prop. 2005/06:59, Företagsbot 41.

be deemed to have been committed even if the perpetrator is unknown, although the assessment on the subjective requirements may to some extent become schematic.¹⁴

The crime must be committed in the exercise of business activities, meaning that the crime cannot be committed by individuals other than employees or others working on behalf of a corporation.¹⁵ A large number of provisions in special criminal law contain either general regulations applicable to the wider business community such as the Working Hours Act (*Sw. Arbetstidslagen*) and the Work Environment Act (*Sw. Arbetsmiljölagen*) or special provisions that apply to certain types of business activities such as the Food Act (*Sw. Livsmedelslag*). When someone at a company violates obvious regulatory provisions such as these examples, there should be no doubt that the crime has been committed in the course of business activities. In addition, violations of key criminal provisions in the Swedish Criminal Code may also be considered as crimes in the course of business. This includes crimes that take direct aim at economic activity such as bookkeeping offences as well as other crimes that are not of a pronounced economic criminality nature such as fraud. When an employee of a company has committed a crime and the offence has a clear link to the business activities in question, the rule is in principle applicable irrespective of whether the management did have knowledge of the crime or not.¹⁶ The fact that the crime has taken place without the management's knowledge or even contrary to its express orders may however lead to the liability being waived.¹⁷

In Chapter 36 Section 7, there are three alternative grounds for when a corporate fine can be imposed on a corporation. It is, however, important to note that even if one of the legal grounds is fulfilled, corporate fines are not to be imposed if the crime was directed against the corporation itself.¹⁸ The first ground states that a corporation is liable if it has not done what can be appropriately reasonable to demand to prevent the crime.¹⁹ This ground focuses on actions or omissions of the corporation itself and ultimately the corporation's own liability, for example where it has not had adequate procedures and controls for the prevention of crime. Regulations from the corporation must be sufficiently specific and precise in order to be considered serious, meaning that a general rule that all employees must comply with applicable provisions and regulations is not sufficient. The regulations must also be communicated precisely to prevent the particular kind of crime in question, the regulations must be effective with respect to their purpose and the controls required must be maintained. Regardless of the specific regulations or instructions issued, it should further be required that the activities have been organized so that a reasonable degree of control of lawfulness is exercised by the corporation. If it turns out that

¹⁴ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 62-63; case NJA 2014, 139 (I-IV).

¹⁵ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 28-29.

¹⁶ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 28-29.

¹⁷ Chapter 36 Section 10 of the Swedish Criminal Code.

¹⁸ Chapter 36, Section 7, paragraph 2 of the Swedish Criminal Code.

¹⁹ Chapter 36, Section 7, paragraph 1 (1) of the Swedish Criminal Code.

safety has been systematically neglected in the business because of lack of control, a corporation should still be liable even though it has issued the required regulations.²⁰

The second ground states that a corporation is liable if the crime has been committed by a leading representative of the corporation.²¹ That means persons who have a capacity to represent the corporation or to make decisions on behalf of it or otherwise by a person who has had a special responsibility to inspect or control the business' activities. In these cases, the corporation may have fully acceptable procedures and regulations in place for the prevention of crime but despite this, someone in a leading position or special responsibility within the corporation has committed the crime. The underlying thought is that the corporation has a greater responsibility for a particular circle of people since they are often outside the system of control and supervision in a company. Also, people in leading positions often have authorities and tasks which makes it reasonable to place a greater responsibility on them.²²

The third and last ground for imposing a corporate fine is that a corporation is liable if the crime has been committed by a person who otherwise has had a responsibility for supervision or control of the business operation, such as a foreman or a work leader.²³ In these cases, someone responsible for controlling and supervising the rules or procedures and safety regulations has committed a crime. Since the responsibility of the employee must be qualified, employees merely responsible for the ongoing operations in business activities or similarly are not supposed to be covered by the provision.²⁴

Corporate fines may be set between SEK 5,000 (approx. EUR 470) and SEK 10 million (approx. EUR 940,000).²⁵ The size of the fine is decided based on the severity of the crime committed and its connection to the company's business.²⁶ A corporate fine can also be imposed through an order of summary punishment (*Sw. strafföreläggande*) if the fine does not exceed SEK 500,000 (approx. EUR 47,000) and the company accepts the summary punishment.²⁷ Although plea bargains are not recognized under Swedish criminal law, a corporate fine may be set at less than it should have been. This is possible if the crime involves some other payment obligation or a special legal effect for the corporation and the total reaction to the crime would be unreasonable, the corporation has attempted

²⁰ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 66-68, Prop. 2005/06:5, Företagsbot 24.

²¹ Chapter 36, Section 7, paragraph 1 (2a) of the Swedish Criminal Code.

²² Prop. 2005/06:59, Företagsbot, 25-26, 60-61.

²³ Chapter 36, Section 7, paragraph 1 (2b) of the Swedish Criminal Code.

²⁴ Prop. 1985/86:23, om ändring i brottsbalken m.m. (företagsbot) 61.

²⁵ Chapter 36, Section 8 of the Swedish Criminal Code.

²⁶ Chapter 36, Section 9 of the Swedish Criminal Code.

²⁷ Section 5 of the Procedure in Certain Cases of Confiscation etc. Act (1986:1009) (*Sw. Lag om förfarandet i vissa fall vid förverkande m.m.*) and Chapter 48 Sections 2-5 of the Code of Judicial Procedure (1942:740) (*Sw. Rättegångsbalk*).

so far as it has been able to prevent, repair or restrict the damages of the crime, the corporation has voluntarily reported the crime or if there are otherwise special grounds for mitigation.²⁸ If it is specially justified taking into account any of these mitigating grounds, the imposition of a corporate fine may even be waived.²⁹

In summary, the Swedish system is based on the idea that the decision of an appropriately balanced corporate fine should be done in three steps. Firstly, an assessment of the conditions to impose a corporate fine has to be met. Secondly, the amount of the corporate fine must be determined. Lastly, an assessment must be made of whether there are grounds to reduce, mitigate or waive the corporate fine.

III. PROPOSED CHANGES TO THE CORPORATE FINE

The Swedish Government has recently submitted a proposal to the Parliament proposing a number of changes to the rules on corporate fines.³⁰ One important proposed change in this context is that the company's financial position must be taken into account when determining the size of the corporate fine in relation to larger companies and if the crime is particularly culpable. In these cases, the maximum amount is proposed to be increased from SEK 10 million (approx. EUR 940,000) to SEK 500 million (approx. EUR 47 million), which is a significant increase of the maximum amount.³¹ In addition, the maximum amount of summary punishment is proposed to be increased from SEK 500,000 (approx. EUR 47,000) to SEK 3 million (approx. EUR 280,000).³²

The increased corporate fine is proposed to only be applicable to larger companies for crimes of a certain degree of severity. As a result, less serious crimes with a sanction value below SEK 500,000 (approx. EUR 47,000) will be fined to the same amount for all companies irrespective of their financial position. The limit is proposed in order to avoid a system where companies' ability to pay must be assessed in each case, leading to extensive and resource-intensive investigations. Hence, the Swedish government assesses that these increased and practical issues involved when assessing a company's financial position can be avoided in the vast majority of cases and can be limited to more severe crimes.³³

The proposed increase of the maximum amounts is a response to the criticism that the Swedish corporate fines institute has faced, which has focused on the maximum amount being too low and that the corporate fines institute does not meet the requirements that sanctions imposed for crimes committed within the company's business must be efficient,

²⁸ Chapter 36, Section 10, paragraph 1 of the Swedish Criminal Code.

²⁹ Chapter 36, Section 10, paragraph 2 of the Swedish Criminal Code.

³⁰ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag.

³¹ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag, 33-42.

³² Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag, 56-58.

³³ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 34-35.

proportionate and deterrent. Both the OECD and the EU have recommended that the maximum amount for corporate fines is increased within the framework of international bribery. It is also noted in the preparatory materials that the current maximum amount appears to be low by international standards.³⁴

As described previously, corporate fines are under current law determined based on the severity of the crime committed and its connection to the company's business without taking into consideration the company's financial position. Hence, a corporate fine of a certain amount may constitute a considerable amount for a smaller company while the same amount may be insignificant to a larger company. The proposal to implement a legal basis for the Swedish courts to take the company's financial position into consideration when deciding on the amount of corporate fines is supposed to ensure that the result of the corporate fine to a greater extent is as noticeable for larger companies as for smaller companies. This change is further thought to be conceived as rather self-explanatory in other countries by the Swedish Government. Lastly, the credibility of the corporate fine should be increased since an increase of the amount for larger companies may be perceived as sufficiently interventional for larger companies as well, which may not be the case under the current rules.³⁵

When assessing whether a company is deemed as a larger company, only the legal entity of the company and not the financial position of its company group is to be taken into account. This has been criticized by the Swedish Bar Association since it may create problems from a fairness perspective.³⁶ In one case, a particular business with multiple branches may be conducted within one single legal entity, while in another case, a similar type of business can be divided into several companies within a group structure. The effect of the rules of increased corporate fines may therefore be that the business in the first case but not in the second case will be assessed according to the rules for larger companies and the increased corporate fine.³⁷ However, the legislator has stated that taking the company group's financial position into consideration is associated with significant difficulties and may lead to the rules being difficult to understand and apply, which is why it was not included in the proposal.³⁸

According to the preparatory materials, if the proposed changes would be implemented the corporate fine amount is to be determined in three steps. Firstly, the sanction value (*Sw. sanktionsvärde*) is to be determined, which marks the extent of reprehension that the

³⁴ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 27.

³⁵ Prop. 2018/19:164, En ny beteckning för kommuner på regional nivå och vissa frågor om regionindelning 27-28.

³⁶ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 38-39, the Swedish Bar Association Consultation Response R-2017/0003 pp. 4-5.

³⁷ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 38, the Swedish Bar Association Consultation Response R-2017/0003 pp. 4-7.

³⁸ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 38-39.

company deserves. During this assessment, the overall crime is to be taken into consideration in case of multiple crimes being committed. Secondly, the amount of corporate fines in case of particularly reprehensible criminality may be increased taking the company's financial position into consideration, triggering the rules on increased corporate fines. Thirdly, the court must consider if there are any grounds for mitigating or even waiving the corporate fine all together.³⁹

IV. A CRITICAL PERSPECTIVE ON CORPORATE FINES AND THE PROPOSED CHANGES

As shown above, the fact that Swedish criminal law is based on the basis that only private individuals are considered to be able to possess criminal liability and consequently commit crimes has become a problem as to how to include corporate fines into the existing system. The rules are complicated and require an assessment divided into many steps as to ensure that all necessary requirements are met in order to impose corporate fines. Despite the fact that its only purpose is punitive and that the imposing of a corporate fine can have serious consequences for the company, it is not likely that the corporate fines' nature of a special legal effect is to change any time soon due to the extensive work that such a change would require.

One result of corporate fines not being deemed as a punishment as such but rather a special legal effect of crime is that there is no requirement that the company has possessed criminal liability. Since corporate fines may be imposed based on the fact that the crime was committed by a person of a certain position in the company, the prosecutor does not have to prove that the company has acted negligently. As a result, there are situations where a company has done what reasonably would be expected in order to prevent the crime in question and despite this will be imposed a corporate fine. This is not in line with the fundamental principles of conformity and of criminal liability. The principle of conformity entails that punishment or other criminal sanctions should only affect the person who has been able to comply with the law, meaning that the person has had the ability and opportunity to comply. The principle of criminal liability implies that persons who have manifested criminal liability through acting with intent or negligence are to be held criminally responsible.⁴⁰ As a result, strict liability for other persons' actions are as a main rule forbidden under Swedish law. By not categorizing the corporate fine as a punishment, these basic principles thus seem to have been avoided by the legislator to a certain extent.

Another aspect of the corporate fine not being deemed as a special legal effect of a crime and not as a punishment is that a company is not expressly given the same procedural rights in the Swedish Code of Judicial Procedure, where currently there are no regulations

³⁹ Prop. 2018/19:164, En ny beteckning för kommuner på regional nivå och vissa frågor om regionindelning 28.

⁴⁰ Asp et al., *Kriminalrättens grunder* p. 48 (2nd ed. 2013), Leijonhufvud et al., *Straffansvar* pp. 35–36 (9th ed. 2015).

on the corporate fines procedure in particular, nor are there any procedural rights for corporations.⁴¹ This has been criticized by the Swedish Bar Association since although the company's procedural rights and the requirements of legal certainty are usually upheld despite it being deemed a special legal effect of crime, there are many cases where companies are treated differently. The Swedish Bar Association further states that there are situations where law enforcement agencies do not defend the companies' and their representatives' legal certainty during an ongoing criminal investigation and other investigations. The Swedish Bar Association therefore expressed that it would be welcomed to review and assess whether companies' procedural rights should be expressed in the Code of Judicial Procedure. This was in its opinion necessary in order to clarify that companies who run the risk of being imposed corporate fines should be equated with individuals who risk criminal penalties, since corporate fines as a special legal effect of crime is to be considered as a punishment under the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.⁴² This criticism was mentioned in the preparatory materials, however, it is stated that it is not necessary to review companies' procedural rights during criminal investigations and trial.⁴³

The possibility for prosecutors to impose corporate fines through summary punishment is a result of the legislator's intent to ensure that the corporate fines are an efficient legal remedy when crimes have been committed within a company's business. There was indeed an issue in the corporate fines not being imposed to the extent that was intended previously and it is often in both the prosecutor's and the company's best interest to avoid having to take the case to court if both parties agree that a crime has in fact been committed in the course of the company's business.⁴⁴ However, it should be noted that in cases where for example the perpetrator has not been possible to identify, it may not be as clear to the company that a crime has been committed. A requirement for imposing a corporate fine is that a crime has in fact been committed and that the perpetrator has fulfilled both the objective and the subjective requisites. However, since the prosecutor does not have to be able to identify the perpetrator, it is more difficult to assess whether the perpetrator has fulfilled the requirement of criminal liability through intent or negligence. As a result, it may be difficult for the company to assess whether a crime in fact has been committed. From an economic perspective, it may not be economically viable to take the risk of having to pay lawyers' fees and endure a longer trial period by not agreeing to the prosecutor's summary punishment. This leads to a risk that the company agrees to pay the corporate fine in cases of legal uncertainty, which also leads to the courts not being able to publish precedents for similar cases.

As for the proposed change to allow the courts to take the company's financial position into consideration in cases of increased corporate fines, it appears to be an important step

⁴¹ Chapter 23 of the Swedish Code of Judicial Procedure.

⁴² The Swedish Bar Association, consultation response R-2017/0003 p. 3.

⁴³ Prop. 2018/19:164, Skärpta straffrättsliga sanktioner mot företag 15.

⁴⁴ Prop. 2005/06:59, Företagsbot 51.

to further ensure that corporate fines are efficient, proportionate and deterrent and live up to the international standards for corporate criminal liability and fulfill Sweden's international commitments. Having a system where more trivial crimes are punished equally for all companies irrespective of their financial position while more serious crimes are punished differently depending on the financial position of the company is in line with how private individuals are punished in terms of fines. However, as the Swedish Bar Association has shown, there may be cases where the corporate fines amount may appear unfair due to the company group's division of its operations between different legal entities.

It is evident that the design of Swedish corporate fines is rather complicated, mainly due to historical reasons and fundamental prerequisites, resulting in corporate fines not being deemed as a punishment. As of now, it appears that the design of corporate fines will not be simplified in the near future, nor will it be categorized as a punishment in the strictest sense of the word given the nature of the most recent proposal to changes of corporate fines. Since its design is mostly a result of national fundamentals, it may be difficult and perhaps even undesirable to draw inspiration from the Swedish equivalent to corporate criminal liability in other countries.