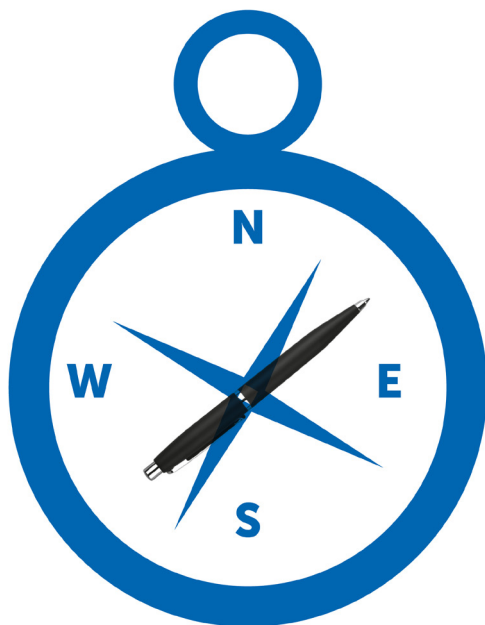


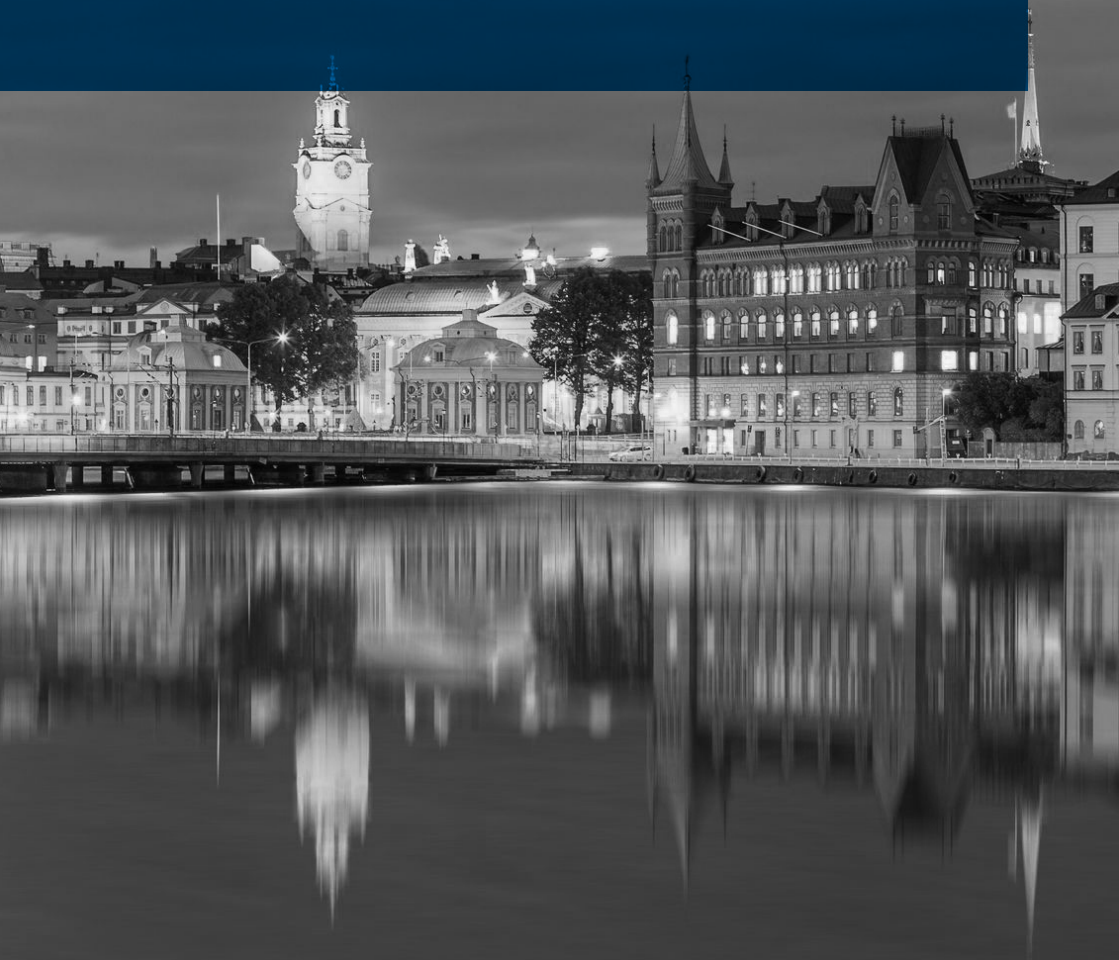
Navigating legal risk

A guide to corporate liability
in Sweden



Contents

Introduction, disclaimer and copyright notice	4
Crime and corporate liability	5
Liability for directors etc	6
Corporate fines and other sanctions	10





Introduction, disclaimer and copyright notice

The purpose of this booklet is to provide a general overview of regulations concerning corporate liability in Sweden. The idea is not to give answers to all questions related to corporate liability, but something that is easily accessible and gives an answer to the most fundamental issues.

The materials in this handbook are up-to-date as of November 2017 (except where noted otherwise) and are designed to provide a convenient reference for our clients. It goes without saying that this booklet contains advice of a general nature only. It is not legal advice or a substitute for legal advice regarding any particular circumstance and cannot be relied upon in lieu of legal advice. You should consult with qualified counsel in Sweden for legal advice about a particular situation.

Crime and corporate liability

Introduction

Swedish criminal law is, as in many countries, built on the idea of personal guilt. Only persons are considered able to possess guilt and consequently commit crimes. For this reason, Swedish law does not allow for corporate criminal liability.

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 and the corporation may, in conjunction, be subject to corporate fines (*Sw. företagsbot*) and administrative sanctions. In addition, there is the risk of damages.

Corporate liability may also arise as a special administrative sanction from acts violating provisions in certain regulations, such as for instance the Environmental Protection Act (*Sw. Miljöbalken*).

Criminal legislation

Under the Companies Act (*Sw. aktiebolagslagen*), only a very limited number of rules are sanctioned by criminal penalties. One example is that a company is prohibited to grant loans to, inter alia, its board members or certain group companies. The liability targets people involved in the decision to grant the loan. The obligation for the board to maintain the company's share ledger is further sanctioned by criminal liability.

Other crimes are punishable either by the Swedish Criminal Code (*Sw. brottsbalken*) or by special provisions. Examples of such criminal legislation are corruption, fraud, bookkeeping crimes and crimes against creditors.

The Swedish Criminal Code provides for the application of Swedish law to crimes committed abroad if, inter alia:

- i. the offender is a Swedish citizen or a resident of Sweden
- ii. he or she is a foreigner who became a citizen or a resident of Sweden after committing the crime in question, or is Danish, Finnish, Icelandic or Norwegian
- iii. he or she is a foreigner who is currently in Sweden and the crime committed, according to Swedish law, may lead to prison time of more than six months
- iv. the crimes are related to the operations of the Swedish Armed Forces abroad

If the crime is not punishable in the country where it was committed, it cannot be tried under Swedish law. If the crime is punishable in the country where it was committed, it cannot be punished more strictly in Sweden than allowed by the applicable law in the country where the crime was committed. There are however exceptions to the said rules; amongst others, if the lowest possible punishment by Swedish law is four years of imprisonment or if the crime has been committed against the state of Sweden.

Liability for directors etc

Introduction

As a general rule, board members, the managing director and other employees are not personally liable for contracts or other commitments entered into by a limited liability company (Sw. *aktiebolag*). However, if a representative commits a crime during the corporation's operations, criminal liability may apply to them.

The starting point is that for more serious offences both individual criminal liability and corporate liability are enforced at the same time. This means that there is a parallel liability in cases of a more serious crime in business operations. However, for less serious crimes, the corporation's liability shall be primary in relation to the individual liability (typically in the case of negligent offences in business operations where the normal individual punishment would be fines). Chapter 36, Article 10 of the Swedish Criminal Code includes a rule prescribing waiving prosecution if the crime, which can lead to initiating of proceedings of a corporate fine, has:

- been committed through negligence
- cannot be assumed to prompt sanctions other than fines
- may only be brought by the prosecutor if prosecution is warranted in the general interest

Prosecution may be warranted in the general interest if the crime is approaching a penal value where a sentence other than a fine should be considered.

Prosecutions may also be 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 clear that an action for a corporate fine cannot be entered or enforced against the corporation. The corporation may for instance be a foreign one or it can be bankrupt or otherwise have ceased to exist as a legal entity.

Legal grounds for liability

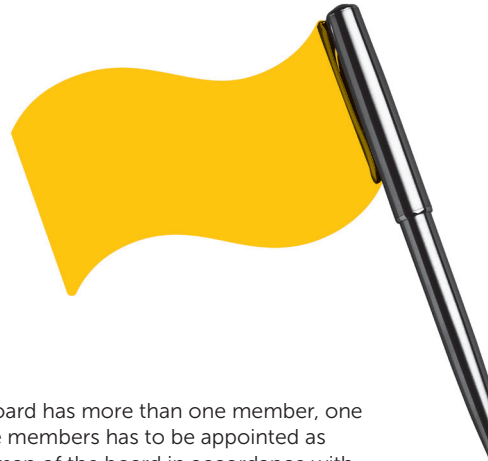
Introduction

For an offence to be considered to have happened, a deed must have been committed. A deed is either (i) an active act or (ii) a failure to act. Legal entities, including limited liability companies, are considered not to be able to commit deeds per se, hence that any act committed by a legal entity always must be considered to be an act made by a person for it to have relevance in terms of criminal liability.

To determine whether a person within a company may have a criminal liability, you must normally examine whether any failure to act on the company's behalf exists on that person's part. A person is considered within the criminal law to have failed to act only if that person did not undertake a specific action when there was reason to expect that that person would undertake such an action.

Navigating legal risk

A guide to corporate liability in Sweden



From a criminal law point, it is the person's failure to act even though he should have acted that creates the criminal liability.

If the expectation on a person is such that you would expect that person to have taken a certain action, that person is considered within the criminal law to be "the guarantor" (*Sw. garant*) for the specific act to be carried out. That person is also considered to have a "guarantor position" (*Sw. garantställning*). To establish whether a person has a criminal liability for a failure to act, you need to confirm whether that person has the position of a guarantor. Consequently, the significance of a person holding a position of a guarantor, is that the person can be punished for their failure to take a certain action if the failure to act is equivalent to a crime.

Responsibility of the board and the CEO

Who is considered to have a position of a guarantor within a limited liability company? To begin with, it is stated in the Companies Act Chapter 8, Article 4, Paragraph 3, that the board shall ensure that the company is incorporated with a management that satisfactorily controls the company's accounts, cash management and financial situation. This stipulates that the board is responsible for the company's organization. Hence, each board member can be considered as a guarantor of the actions related to the company's management. Thus, each board member has a criminal liability for failure to manage or carry out these actions if the failure to act is equivalent to a crime.

If a board has more than one member, one of the members has to be appointed as chairman of the board in accordance with the Companies Act Chapter 8, Article 17, Paragraph 1. The chairman shall manage the board and ensure that the board fulfills the deeds it has been appointed to fulfill. The chairman's broader supervisory duties normally mean that the prudential requirements of the chairman can be set higher than that of the other board members, which may be relevant in relation to criminal liability under the penal offences that include negligent acts as well. Thus, the chairman should have a more substantial criminal liability for negligently failing to undertake actions for the company compared to the other board members.

If the company has an appointed CEO (*Sw. verkställande direktör*), he or she has, under the Companies Act Chapter 8, Article 29, the responsibility to, manage the operational administration in accordance with the board's guidelines and instructions. The board's appointment of a CEO thus results in the CEO becoming a guarantor of the actions related to the operational administration, which in turn results in a criminal liability for failure to manage or carry out these actions if the failure to act is equivalent to a crime. Those actions that may be considered attributable to the operational administration are consequently crucial for the determination of the extent of the CEO's criminal liability for failure.

Navigating legal risk

A guide to corporate liability in Sweden

By appointing a CEO, the board waives part of its extensive management responsibility for the benefit of the CEO. Because of the board's superior position in relation to the CEO, the board may, however, always reclaim the delegation of management responsibility and take decisions in administrative matters relating to the operational administration. This means that the scope of the board members' positions as guarantors does not change by the appointment of a CEO.

A board member's potential actions of neglect, prior to an appointment of the CEO, usually relates to the management of the control over details. After the appointment of a CEO, the neglect instead relates to whether or not the CEO has received adequate instructions - and necessary resources - to manage the operational administration of the company. It also covers the monitoring (supervision and control) of whether the CEO can manage the operational matters relating to the management of the company.

Delegation

For operational efficiency it is, in most larger companies, necessary for the CEO and other representatives to delegate matters to other people in the company's organization. How does the responsibility and liability for failure to act for the corporate representatives change if a matter has been delegated?

Although the Swedish legislation does not provide a general statutory regulation, delegation is generally considered to be allowed and may even affect the criminal liability. Legal literature and case law suggests that a delegation, according to the so-called delegation doctrine, does affect the criminal liability if:


- i. there is a clear and unequivocal need for the delegator to be released from his/her responsibility to monitor
- ii. the delegate assumes a relatively independent position towards the superior manager (the delegator)
- iii. the delegate is competent enough to handle the delegated matter
- iv. the delegation is distinct in the sense that it is clear to the delegate what it consists of

A delegation of matters may thus, having been empowered to control certain matters, create a position of a guarantor for the delegate and thereby also a criminal liability for failure to act within the scope of his/her delegated powers. Hence, a properly executed delegation may transfer the criminal liability from the delegator to the delegate.

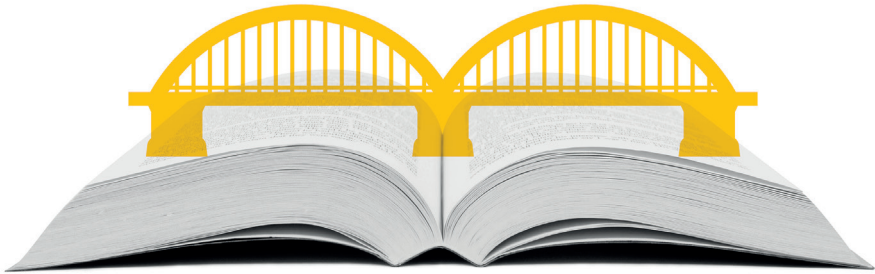
Administrative sanctions

Administrative sanctions can be made against individuals, such as the senior management within a bank or credit company that violates the law.

The penalty may consist of being banned from being an executive or a managing director of a credit institution or securities company, such as a bank, for a period of three to ten years. The penalty may also consist of a fine.

An aerial photograph of a city, likely Stockholm, Sweden, showing a mix of historic and modern architecture. A prominent white cylindrical tower is visible in the foreground. A semi-transparent blue rectangle is overlaid on the upper half of the image, containing white text.

Although the Swedish legislation does not provide a general statutory regulation regarding delegation, delegation is generally considered to be allowed, even to some extent so that the delegation may affect the criminal liability.



Corporate fines and other sanctions

Corporate fines

Introduction

A corporate fine is not a criminal sanction but a special legal effect with the character of a criminal sanction that targets corporations for not following the law. Corporate fines carry severe penalties and are usually applied in tandem with individual criminal liability, not instead of individual criminal liability.

Notwithstanding the above, a corporation'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 (see also Section 3.1 above).

Legal grounds for corporate fines

Any crime committed during a corporations' business activities may lead to the issuance of corporate fines as long as the crime is punishable with a penalty greater than pecuniary fines (*Sw. penningböter*). 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.

There is no requirement that the individual offender is prosecuted for the crime or even identified or, consequently, prosecuted for it. What is necessary is that the crime itself is identified and that it has been committed with some form of personal guilt. Criminal intentionality is usually impossible to identify if the perpetrator is unidentified. Concerning negligence, it is however quite possible that a crime can be deemed to be done even if the perpetrator would be unknown.

Navigating legal risk

A guide to corporate liability in Sweden

As follows from above, the crime must be committed in the exercise of business activities. Crime in the exercise of business activities cannot be committed by people other than employees or others working at the request of a corporation. 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. 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.

Violations of key criminal provisions in the Swedish Criminal Code may also be considered as crimes in the course of business. That includes crimes that take direct aim at economic activity (such as book keeping offences) and other crimes (such as fraud) that cannot be said to be of pronounced economic criminality in nature.

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 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 lead to that the liability is waived.

Basically, a corporate fine can be imposed on a corporation on three different grounds:

- i. Chapter 36, Article 7, Paragraph 1 (1) of the Swedish Criminal Code states that a corporation is liable if it has not done what can be appropriately reasonable to demand to prevent the crime. This paragraph focuses on the cases where the corporation as such can be held liable for the crime, such as, because it has had inadequate procedures and controls for the prevention of crime. The idea is that the conditions for a corporate fine do not exist if the corporation has done what is reasonably possible to prevent a 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 further 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 also 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 the business because of lack of control, a corporation should be liable even though it has given the required regulations

“Corporate negligence” is not required if the crime has been committed by a person in a leading position.

Navigating legal risk

A guide to corporate liability in Sweden

ii. Chapter 36, Article 7, Paragraph 1(2a) of the Swedish Criminal Code makes a corporation liable if the crime has been committed by a leading representative of the corporation. This paragraph focuses on cases in which the corporation has perhaps fully acceptable procedures for preventing crime, but where someone with a leading position or special responsibility within the company has committed the crime. The corporation 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. That means someone who has a capacity to represent the corporation or to make decisions on behalf of the corporation or by a person who otherwise has had a special responsibility to inspect or control the business' activities

iii. Chapter 36, Article 7, Paragraph 1(2b) of the Swedish Criminal Code states that a corporation is liable if the crime has been committed by a person who has otherwise had a responsibility for supervision or control of the business operation (like a foreman or a work leader). In this instance, that means someone responsible for controlling and supervising the rules or procedures and safety regulations. Because the responsibility must be "qualified," employees only responsible for the ongoing operations in business activities or the like are not supposed to be covered by the provision

Even if the grounds as such are fulfilled, corporate fines shall not be imposed if the crime was directed against the corporation.

Reduced liability; plea bargains

Plea bargains are alien to Swedish criminal law. A corporate fine may however be set at less than it should have been if:

- the crime involves some other payment liability or a special legal effect for the corporation and the total reaction to the crime would be unreasonable
- the corporation has attempted so far as it has been able to prevent, repair or restrict the damages of the crime
- the corporation has voluntarily reported the crime
- there are otherwise special grounds for mitigation

If it is specially justified, taking 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. Firstly, an assessment of the conditions to impose a corporate fine has to be satisfied. Second, the amount of corporate fine is determined. Finally, an assessment must be made of whether there are grounds to reduce, mitigate or waive the corporate fine.

Navigating legal risk

A guide to corporate liability in Sweden

Size of the fines

The corporate fines may be between SEK 5,000 and SEK 10 million. The size of the fine is decided on the basis of the severity of the crime committed and the connection to the company's business. A corporate fine can also be imposed through an order of summary punishment (*Sw. strafföreläggande*) if the fine does not exceed SEK 500,000.

Confiscation

The rule of confiscation (*Sw. förverkande*) may be used to forfeit a corporation's gains if the source is unlawful, i.e., where a corporation has generated financial benefits from illegal activities. The amount confiscated does not have to be equal to profits resulting from the crimes but amounts corresponding to savings or increased profitability may also be targeted for confiscation if they are a result of illegal activities.

Administrative sanctions

Only the most serious offences are normally subject to criminal liability and corporate fines. The less serious offences are subject to special administrative sanctions, which are decided by the relevant authority or a court.

A corporation that has violated the rules does not have to have done it intentionally or negligently and for an administrative sanction to apply, it is not necessary to find a person who has behaved unlawfully. Administrative sanctions can apply provided only that violation can be objectively observed. Further, a corporation does not need to have benefited economically from the infringement for administrative sanctions to apply.

Examples of administrative sanctions targeting corporations are the provisions in legislation relating to environmental laws, construction laws, transport laws and product security laws.

The amounts vary widely, partly because of conditions in different areas. It is possible to adopt measures which can prevent the application of the sanctions. If it would be unreasonable to apply the sanction, considering what the corporation has done to prevent the infringement, the measure may be deemed sufficient and the charge may therefore be prevented. However, whether the measures taken are sufficient has to be assessed in each particular case.

Debarment

A corporation or individual who neglects their obligations in the course of conducting business can also be subject to various kinds of debarment:

- the Trading Prohibition Act (*Sw. Lag om näringsförbud*) makes it possible to impose trading injunctions against Swedish entrepreneurs. Such injunctions can also be imposed against leading representatives of companies and other associations. The necessary conditions for the imposition of a trading injunction is that the entrepreneur has grossly neglected his obligations in the course of conducting business activities and is, thereby, guilty of criminal acts which are not insignificant. Furthermore, the injunction has to be warranted in the public interest. In assessing whether an injunction against trading is necessitated in the public interest, special consideration shall be given as to whether the conduct was systematic or intended to produce significant personal gain, whether such conduct caused or was intended to cause significant harm, or whether the entrepreneur has previously been convicted of crimes in conducting business activities. Systematic bribe-giving on a commercial scale should by way of example, in general, result in a trading injunction. As can be seen above, a trading injunction can only be imposed against an

Navigating legal risk

A guide to corporate liability in Sweden

individual. Nonetheless it might be difficult in some cases for a corporation to continue with business operations if a leading representative for such corporation is not allowed to run a business, or be a board member, or be employed in the corporation because of a trading injunction

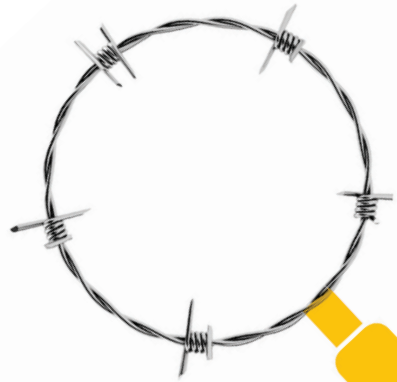
- another form of debarment is exclusion from public procurement. Suppliers with representatives convicted of bribe giving can be debarred from participating in the procurement. Debarment can also occur for other crimes if representatives of the supplier are guilty of grave professional misconduct.. A public procurement authority does not have to investigate if representatives of a participating supplier have been convicted according to the above. Such an investigation only needs to take place when “motivated”

Damages

According to the Tort Liability Act (Sw. *skadeståndslagen*) Chapter 3, the liability to pay damages for crimes committed by employees or representatives, the so-called vicarious liability (Sw. *principalansvar*), may be triggered if certain conditions are met.

A company may be liable to pay damages for property damage, personal injury and in some situations, pure economic loss (Sw. *ren förmögenhetsskada*). As a general rule, the damage must have been caused in the company's business activities and by a representative or employee of the company.

In addition, a general exposure to potential damage claims exists if a representative or an employee of a company intentionally or negligently causes damage to a third party. In such event there may be no special exemptions applicable.



Change of ownership etc

Corporate liability is connected to the legal entity itself and not to the owners of the company. Therefore, liability may be imposed even after if there is a crime committed before the change in the ownership structure. This could also apply to a situation where the entity has changed its form, for instance from a partnership (Sw. *handelsbolag*) to a limited company. If a transfer of assets has been made in order to avoid liability for crimes committed within the legal entity, there is a risk that the liability could be transferred to the acquiring company.

Liability of parent companies

According to Swedish law, every legal entity (or person) is judged individually. However, a parent company may theoretically become liable for its subsidiary's activities if it is proven that the parent company conducted the activities through the subsidiary, or has constructed a corporation scheme in order to avoid liability.

Contact us

Michael Nyman

Partner

T: +46 70 838 82 08

E: michaelnyman@eversheds-sutherland.se

Jonas Bratt

Partner

T: +46 70 625 80 24

E: jonasbratt@eversheds-sutherland.se

Jan Österman

Senior Associate

T: +46 70 636 14 84

E: janosterman@eversheds-sutherland.se

Isabelle Sundström

Associate

T: +46 72 239 37 00

E: isabellesundstrom@eversheds-sutherland.se

eversheds-sutherland.com

© Eversheds Sutherland 2017. All rights reserved.

Eversheds Sutherland (International) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

DTUK001246_11/17