

## **Sentencing Corporate Defendants: A Comparative Study among Kuwaiti and Britain Law**

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### **Abstract**

This study began with the hypothesis that British law has an advantage in regulation over Kuwaiti law regarding penalties related to companies or legal persons. This study raised several questions regarding several penalties and measures (fines, compensation orders, corrective orders, restitution orders, publication orders, Judicial rulings, submitting periodic financial reports, and dismissing company directors). To answer its questions, this study used the analytical approach by analyzing the texts of British law and how they are applied before the courts. The study compared that with the texts currently existing in the Kuwaiti legal system and the extent to which the penalties found in British law can be applied. In the State of Kuwait. Indeed, it became clear from this study that there is an advantage, but it is partial. This study found that there are penalties regulated by the British legislator that the Kuwaiti legislator did not know about, and there are penalties regulated by the British legislator in a more detailed and deeper manner than Kuwaiti law in a manner consistent with the nature of the legal person (companies). Finally, the study concluded that the Kuwaiti legislator should benefit from the experience of the British legislator about criminal corporate penalties.

**Keywords:** Fine - Compensation – Restitution – Britain – Corporate – Penalties – Kuwaiti Legislature.

### **Introduction**

An effective punitive legislative philosophy is based on balancing the principles of justice and achieving the goals of punishment, the most important of which is deterrence (Al-Dhafiri, 2022). The recognition of legal entities has been an important step in the development of many countries. The prevailing thought was that civil liability only comes through recourse against the members or organs of the company through the responsibility of the subordinate for the actions of his subordinate. Because the latter is merely a legal entity that cannot invoke direct responsibility except through the responsibility of the natural person. Then the

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legal systems developed, and direct liability on the company became possible from a civil standpoint at the beginning, and soon the criminal law caught up with it (Al-Rashidi, 2023).

The difficulty increases in formulating a criminal punitive philosophy for companies. Especially in legal systems that do not establish a general theory of corporate criminal liability, including the Kuwaiti legislator, as this legislator did not address corporate criminal liability from the imagination of an integrated organization that defines the dimensions, pillars, and conditions of this responsibility (Al-Mana, 2023). Therefore, we find that the Kuwaiti legislator has regulated this responsibility by stating its penalties only in some special criminal laws complementary to the Environmental Protection Law, the Capital Markets Authority Law, the Companies Law, the Terrorist Financing Law, and Money Laundering Law (Ali et al., 2023).

Hence, the importance of this study is given that the punitive philosophy of the Kuwaiti legislator regarding companies is not consistent among these special legal texts. Therefore, there has become an urgent need to find a general, fixed, and unified theory of penalties for companies at the level of Kuwaiti legislation in a way that achieves justice on the one hand and the goals of punishment on the other hand.

While there are other countries, such as Britain, that are considered more developed in the field of criminal penalties imposed on companies. There are well-known purposes of sentencing and any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences (Homad, 1983).

When sentencing, a court is obliged to take into account the principles set out above and, where appropriate, any guidance for specific offences provided by the Sentencing Council.<sup>i</sup> There has been an increasing move towards the tighter prescription of sentencing to provide more consistency and to conform to general principles. The court is obliged to give reasons for the sentence passed and, if relevant, specify why it has not followed the guidance provided.<sup>ii</sup> Save in the case of corporate manslaughter and health and safety offences causing death,<sup>iii</sup> there are still no guidelines specifically about corporate offending but, according to the Sentencing Council Annual Report, these will be addressed in 2013.<sup>iv</sup>

As a result, this paper sought to take Britain as a new and proposed system of Kuwaiti law as a means of developing and addressing the deficiencies and defects existing in the current penal system in the State of Kuwait. It should

be noted that the punitive system in Britain and the State of Kuwait combines many corporate penalties, and there are penalties in British law that do not exist in Kuwaiti law. Therefore, this paper studied the penalties that do not exist in Kuwaiti law as they are easier for the Kuwaiti system. It also selected some of the penalties that exist in both two systems, but there is a difference between them in the details, in order to develop the existing penalties in the Kuwaiti legal system. As a final goal, this study aims to evaluate the Kuwaiti legislator's position and ways to develop penalties for legal persons (companies).

This paper suggests that the following should all be considered when sentencing a corporate defendant: the seriousness of the offence; aggravating and mitigating circumstances; the nature, financial organization and resources of the company; the consequences of the fine; compensation, ancillary orders and costs.<sup>v</sup> It goes almost without saying that a corporation cannot be imprisoned. At present in Britain, corporate defendants can be sentenced<sup>vi</sup> in the following ways: Fine, Compensation order, Restitution order, Remedial orders, Publicity orders, Financial reporting orders, and Directors' disqualification orders.

Each of these penalties is discussed in the following pages. It should be noted that although only directly relevant to manslaughter and health and safety offences using death, in Britain the Sentencing Guideline<sup>vii</sup> sets out principles some of which apply to other areas of corporate offending.

### **Methodology**

To answer its questions, this study used the analytical approach by analyzing the texts of British law and how they are applied before the courts. The study compared that with the texts currently existing in the Kuwaiti legal system and the extent to which the penalties found in British law can be applied.

#### **a. Fines**

In both legal systems, every crime of which a corporation can be convicted can be punished by a fine.<sup>viii</sup> Fines are easily the most common type of sentence passed on to a corporate defendant (Alia, 2020). In England, before fixing the amount of the fine the court must take into account the seriousness of the offence and the financial circumstances of the offender.<sup>ix</sup> While, when estimating the fine, the Kuwaiti courts do not take into account the financial situation of the legal person (Attia, 2019), and this may be due to the absence of a legal text requiring it to take the element of financial solvency when estimating the fine, whether severe or lenient, (Nasrallah, 2010) as British law did through the guidelines. The means of the offender may increase as well as reduce the level of the fine.<sup>x</sup>

Unlike the situation with the Kuwaiti legislator (Al-Rajhi, 2020), in Britain, the means of the offender, and particularly a corporate defendant, are relevant to the level of fine imposed by a court, but the court in *F. Howe and Son (Engineers) Ltd* did not accept that the fine should bear any specific relationship to the turnover or net profit of the defendant.<sup>xi</sup> In *R. v Jarvis Facilities Ltd*<sup>xii</sup> Hedley J. indicated that where there was a conflict between achieving consistency of sentence and ensuring that a fine was commensurate with the means of the offender, it was the means of the offender which should have priority.

In the magistrates' court, there is a standard scale of fines. Many statutes express the maximum penalty for an offence as "not exceeding" a particular level. In addition, certain statutes impose maximum fines expressly for offences tried summarily. For example, the Health and Safety at Work Act 1974 (as amended) (HSWA); empowers the magistrates' court to impose a maximum fine of £20,000 for breach of the duties under ss.2\_6 of the Act.

The level of fines has grown considerably in the last few years. The most

Level on the scale	Maximum fine
1	£200
2	£500
3	£1,000
4	£2,500
5	£5,000

serious health and safety prosecutions have repeatedly resulted in fines of millions of pounds even after a plea of guilty. Great Western Trains were fined £1.5 million in respect of the Southall rail disaster in which seven people died in 1997, after a guilty plea to s.3 of the HSWA. Since then in a Scottish case, *R. v Transco*, a gas company, was fined £15 million for very serious breaches of health and safety legislation and, in England, following the Hatfield rail disaster which led to the deaths of 4 passengers and the injury of 102 in 2000, Balfour Beatty was fined £7.5 million (reduced on appeal from £10 million).<sup>xiii</sup> In *Innospec*, the company was fined the Sterling equivalent of \$12.7m for corruption offences under the old law, before the Bribery Act 2010 came into force. The court made it

clear that had it not been constrained by the global plea agreement, the fines would have been “measured in tens of millions”.<sup>xiv</sup>

The court is now required to follow the Sentencing Council Definitive Guidelines, but it is nonetheless useful to refer, for general application, to Scott Baker L.J. ‘s identification of relevant factors in HSWA prosecutions:<sup>xv</sup>

- (i) In assessing the gravity of the breach the court should look at how far short of the “reasonably practicable” standard the company fell.
- (ii) Whether the breach was an isolated incident or committed over some time.
- (iii) Whether the breach resulted from the company deliberately running a risk to save money or to profit.
- (iv) A fatality would usually be an aggravating feature.
- (v) The degree of risk and extent of the danger created by the offence.
- (vi) The company’s resources and the effect of the fine on the business.

**Mitigating features included:**

- (i) A prompt admission of guilt and an early plea of guilty.
- (ii) The taking of steps to remedy deficiencies drawn to the company’s attention.
- (iii) A good safety record and/or no previous convictions or warnings.

**Aggravating features included:**

- (i) A failure to heed warnings.
- (ii) A deliberate breach of the health and safety legislation with a view to profit.

Further guidance as to the best practice to be adopted in such sentencing hearings was provided by the Court of Appeal in *R. v Friskies Petcare (UK) Ltd.*<sup>xvi</sup> The prosecution should set out in documentary form the facts of the case and the aggravating features.<sup>xvii</sup> The document should be served on the court and the defense. Although these features are specific to HSWA prosecutions, and the remarks were made for guidance in an area where it was generally considered that fines were far too low, it is submitted that they assist generally in setting the level of financial penalties for corporate defendants.<sup>xviii</sup>

Fines at the top end of the scale are now imposed frequently by the courts, indicating intolerance of safety breaches, but considering the size and profitability of the defendant corporation.<sup>xix</sup> Where the brunt of the fine may fall on the general public or reduce the funds available for safety improvements, the courts have typically imposed lower penalties, although still sufficient to mark disapproval of the defendant’s method of operating. However, an overarching principle seems to

emerge that courts are entitled to take a more severe view of breaches of health and safety where there is a significant public element; as the Court of Appeal observed in *Jarvis*.<sup>xx</sup>

At the other end of the scale, there will be cases where the corporate defendant is not criminally culpable in any meaningful sense. Where a defendant is convicted of a strict liability offence it may not even have acted negligently. It may, at one extreme, be the victim of the blameworthy behavior for which it must accept liability.<sup>xxi</sup> Such circumstances will neither deter a prosecution nor prevent a conviction, but the court will take them into account in sentencing.<sup>xxii</sup>

#### **b. Compensation Orders**

Orders for compensation may be issued in lieu of or in addition to other available options for sentencing (Aleifan, et al., 2021). Such an order may be made "for funeral expenses or bereavement in respect of a death resulting from any such offence" or "[f]or any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining the sentence."<sup>xxiii</sup> According to Kuwaiti law, compensation may be awarded to legal persons as a result of their commission of a crime, and this compensation is called punitive compensation, (Nasrallah, et al., 2011) which is stipulated in Article 115 of the Kuwaiti Code of Criminal Procedure, which the court rules on its initiative upon convicting the accused to oblige him to compensate for the damages resulting from the crime.<sup>xxiv</sup>

Only in cases where the position is unambiguous regarding liability, causation, and the amount that must be agreed upon, proven, or capable of assessment, should compensation orders be granted.<sup>xxv</sup> Even in cases where the loss or damage in question is not actionable in civil law or against the defendant, a compensation order may nonetheless be granted. In *R. v. Chappell*, the defendant—a director of the company—was found guilty of filing VAT returns carelessly, which caused the business to pay less in VAT than it should have. The company was dissolved before the trial, so the underpayment could not be pursued.

It should be noted that according to the Kuwaiti Civil Code, legal persons can be ordered to compensate for their illegal work because of the damage they caused,<sup>xxvi</sup> whether it was material or moral damage. This is what Article 231 of the Civil Code expressed in its statement: "Compensation for illegal work deals with Damage, even if it is moral..." From a civil perspective, liability for an illegal act exists when the wrongful act and the damage resulting from it are present, regardless of the type of damage. The legislator did not limit it to a specific type and not the other. Accordingly, the damage for which compensation is required is

determined by the loss that occurred and the gain that was lost as a result of this illegal action.<sup>xxvii</sup>

Emotional distress resulting from, say, a brochure's misrepresentation leading to a vacation lacking the amenities that were promised may be compensated.<sup>xxviii</sup> In cases where the victim of the loss has passed away, it may also be mandated.<sup>xxix</sup> Such an order's compensation for the loser is its goal.<sup>xxx</sup>

Compensation in the magistrates' court is capped at £5,000 for each offense. Crimes taken into account may also result in an order that cannot be greater than the difference between the total amount that can be awarded for all of the crimes for which a defendant has been found guilty and the amount that has already been mandated for payment.<sup>xxxi</sup> For auto accidents, there are specific guidelines.<sup>xxxii</sup> As for Kuwaiti law, there are no legislative restrictions related to the amount of compensation that must be awarded by each court, and therefore the amount awarded in compensation does not affect the jurisdiction of the courts even if the damages subject to compensation are multiple. Only in situations when the defendant is able to pay may compensation be granted.

A compensation order may include an amount to account for interest loss, provided that the computation process is not overly onerous.<sup>xxxiii</sup> As a general rule, when the amount of compensation is relatively large, there is a significant amount of time between the damage and the sentencing hearing,<sup>xxxiv</sup> and there is no doubt that the defendant can pay, the sentencing judge is quite entitled to make such an order rather than leave the claim to be litigated in the civil courts. The order need not even be an exact amount, as the legislation gives the court some discretion (for example, on what rate of interest to apply). The case of *R v. Stapylton*<sup>xxxv</sup> clearly lays out the current perspective on granting compensation. In complex cases, the compensation issue is typically postponed until the confiscation hearing.

As for Kuwaiti law, it does not explicitly stipulate that the interest factor derived from the crime committed by the legal person must be taken into account when estimating the value of the compensation awarded to the victim. According to Clause 2 of Article 247 of the Civil Code, the Kuwaiti legislator gave the judge the possibility of postponing the ruling on compensation if he was not able at the time of ruling to determine the amount of compensation in a final manner. He may later reconsider the estimate. This matter is very logical. Some damages may be delayed in their occurrence, so the judge may In this case, it must be re-estimated at another time when all the damages become clear, finally and decisively. This is in addition to the legislator obliging the judge to take into account the defendant's circumstances when determining the amount of compensation. It also allows the judge to order the defendant to pay compensation for the damage in installments or the form of a salary for life.<sup>xxxvi</sup>

In conclusion of the above, we call on the Kuwaiti legislator to adopt the idea of adopting the criterion of interests and profits when determining the criminal judge the amount of punitive compensation and linking it to the gravity of the behavior committed.

**c. Restitution Orders**

In England, if goods are stolen and someone is found guilty of any crime related to the theft or any other crime, a restitution order may be issued; however, the sentencing process will consider any crimes related to the theft. The primary goal of issuing the penalty of restitution is to restore the situation to what it was before the crime was committed, as it is since the offender has embezzled or seized money, benefit, or profit.<sup>xxxvii</sup>

A restitution order may be made in England either:

- a) by ordering anyone having control or possession of the stolen goods to restore them to anyone entitled to recover them from him; or
- b) on the application of a person who is entitled to recover from the person convicted any goods representing the stolen goods (being the proceeds of disposal or realization of them), by ordering that those goods be transferred or delivered to the applicant; or
- c) by ordering the payment of a sum of money, out of money taken from his possession on his apprehension, not being greater than the value of the stolen goods to a person who, if the goods were in the possession of the convicted person would be entitled to recover them from him.<sup>xxxviii</sup>

Like with compensation orders, such an order may only be granted considering the evidence presented or admissions made, and only under specific, straightforward circumstances. No order should be issued if there was a chance that parties who were not allowed to intervene in the proceedings might be harmed or if there were complicated ownership issues:

“On the other hand, in appropriate cases where the evidence is clear, it is important that the court should make proper use of the power to order restitution since this can frequently avoid unnecessary expense and delay in the victim receiving the return of his property.”<sup>xxxix</sup>

In order to prevent the court from making a restitution order for the value of the goods in the event that a stolen item is recovered, the order, no matter how fictitious, should only be for the value of the items that were actually stolen and not recovered. The court may combine another sentence with a restitution order.<sup>xl</sup>



According to the general rules in the Kuwaiti Penal Code, the legislator did not stipulate the existence of penalties for a legal person, and this entails excluding the penalty of restitution from this general department for the penalties stipulated for a natural person (Aleifan, et al., 2022). However, this penalty was mentioned in two places in the complementary special penal laws that can be applied to persons. The legality of these two laws recognizes his responsibility and therefore the permissibility of applying that punishment to him.<sup>xli</sup> Although restitution raised several issues and challenges (Kostruba, 2023), according to the response, according to the Capital Markets Authority Law, it is a mandatory supplementary penalty, unlike that stipulated in the Anti-Corruption Law, which is considered a permissible supplementary penalty.

In conclusion of the above, we suggest that the Kuwaiti legislator must include this penalty in its penal laws, which are devoid of this penalty despite the importance of its presence in them. Perhaps the most prominent of these laws is the law on combating money laundering and financing of terrorism, the law on combating trafficking in persons and smuggling of immigrants, in addition to the law on combating information technology crimes. (Al-Mulla, 2019).

#### **d. Remedial Orders**

Remedial work can be ordered as a sentencing option by the courts in England under certain regulatory statutes. A case in point is Section 42 of the HSWA 1974.

“(1) where a person is convicted of an offence under any of the relevant statutory provisions in respect of any matters which appear to the court to be matters which it is in his power to remedy, the court may, in addition to or instead of imposing any punishment, order him, within such time as may be fixed by the order, to take such steps as may be specified in the order for remedying the said matters.”

Any other available punishment may be applied in addition to or instead of the remedial order. The person subject to the order shall not be liable under any statutory provision concerning the matters to be remedied while the time for complying with the order runs.<sup>xliii</sup> Any party, including the person who is subject to the order, may request an extension of the time to comply with the order.<sup>xliiii</sup> The act of disobeying a remedial order is a crime in and of itself,<sup>xliiv</sup> punishable by a maximum fine of £20,000 (plus/or six months in jail) in magistrate court, an indictment carrying an unlimited fine, or two years in jail.<sup>xliv</sup>

The Definitive Guideline sets out this option as follows:

“H34. A defendant ought by the time of sentencing to have remedied any specific failings involved in the offence and if it has not will be deprived of significant mitigation.

H35. If, however, it has not, a remedial order should be considered if it can be made sufficiently specific to be enforceable. The prosecution is required by s.9(2) of CMCHA to give notice of the form of any such order sought; although there is no equivalent stipulation in the HSWA it is good practice to require the same notice. The Judge should personally endorse the final form of such an order.”

The CPS can prosecute an individual for violating an order as a separate crime. Should the company be found guilty, it could face an indefinite fine. The guidelines state that when determining the appropriate level of fine, the court should not consider the costs associated with compliance. This could be the case because the court would anticipate that a contrite and diligent defendant would have implemented corrective actions prior to sentencing.

This kind of clause serves two beneficial purposes: first, it makes sentencing a proactive measure that aims to enhance the offender's functioning systems; second, it gives the court the authority to monitor the progress made in adhering to the remedial order and to enforce it by imposing the final penalty that noncompliance will result in the commission of a completely different criminal offence with harsh sentencing guidelines.

Considering the absence of a corresponding text in the general rules related to penalties in the Kuwaiti Penal Code, this type of penalty was stipulated in the Companies Law and the Environmental Law in particular, considering that failure to comply with correcting a specific matter is considered a violation of the law and a criminal in itself.

On the other hand, the provisions of the Environmental Protection Law have arranged this issue by punishing the legal person who violates some of the provisions of this law with a financial fine and obliging him to remove the traces of the violation within a specific period, and if he does not do so, he will remove it at his own expense.<sup>xlvi</sup> The provisions of this law also give the Director General or his authorized representative the right to give the violator a period to correct his violation within 30 days. If the violation continues, the Authority can take legal measures to stop the violating activity.<sup>xlvii</sup>

#### **e. Publicity Order**

According to Section 10 of the Corporate Manslaughter and Corporate Homicide Act of 2007,<sup>xlviii</sup> a defendant found guilty of corporate manslaughter or homicide may be required to disclose the facts of their conviction, the nature of

their sentencing, and the outcome of their trial. The Act gives the court the authority to determine the timing and mode of publicity after hearing from the prosecution and defense and consulting with any relevant regulatory bodies. The order's non-compliance is a crime that can be indicted and carry an unlimited fine. The Sentencing Council Guideline states that the order's goals are punishment and deterrence.<sup>xlix</sup>

Thomas L.J. condemned in *Innospec* the notion that the defense and the SFO would collaborate on a press release:

“There was at some stage a suggestion that a press notice in a form approved could be issued by *Innospec*. This is not a practice which should be adopted in England and Wales. Publicity Orders are very different as they are made under the direction of the Court to ensure that in appropriate cases the conviction of the company is properly publicized. It would be inconceivable for a prosecutor to approve a press statement to be made by a person convicted of burglary or rape; companies who are guilty of corruption should be treated no differently to others who commit serious crimes.<sup>l</sup>

Although the penalty of publication is not among the complementary and consequential penalties stipulated in the general rules of the Kuwaiti Penal Code, it has been included in some penal laws supplemented by special provisions. The idea of the publication order in Kuwaiti law is based on publishing the judgment issued to convict the legal person in places specified by the law and varies from one law to another. It also depends on the existence of an explicit text that gives the court this right after sentencing him to convict.

The main purpose of this penalty, in our opinion, is to expose the legal person before the public as a result of committing a crime of money laundering, terrorist financing, corruption crimes, or environmental crimes (Homad, 1995). According to the first two laws, the court orders a legal person to publish the ruling obligatorily upon conviction in the Official Gazette, as it is a complementary and obligatory punishment.<sup>li</sup> As for the ruling of conviction in one of the environmental crimes, the ruling imposing the penalty of publication is permissible for the court and it has the right to publish it in full or a summary thereof in the newspapers specified by the court or Through audio and visual means of communication, or by posting a copy of the ruling or a photocopy thereof in places specified by the court for a period not exceeding one month at the expense of the convicted person. The penalty for publication here is a permissible supplementary penalty.<sup>lii</sup>

We call with others (Kamel, 1997) on the Kuwaiti legislator to expand the scope of application of this penalty to include crimes of trafficking in persons,

smuggling of migrants, and information technology crimes committed by a legal person, by introducing an amendment to the Penal Code related to penalties for a legal person, which is currently applied to corruption crimes only, to include the proposed crimes as well, in order to avoid amending every law in several occasions.

#### **f. Financial Reporting Orders**

According to s.76 of the Serious Organized Crime and Police Act 2005, a court may impose a financial reporting order on a person found guilty of one of the offenses listed in subsection (3). The person could be a business or an individual. A person covered by the order is required to submit a report detailing his financial situation and providing the required supporting documentation. A convicted person may be required by the order to submit their financial information regularly. For a corporation, this could last for a maximum of 15 years.<sup>liii</sup> This order pertains to the following categories of offenses: tax evasion, money laundering (Al-Dhafiri, 2004), funding terrorism, bribery, and fraud, and other dishonesty offenses. A table of current Financial Reporting Orders, together with the terms and duration of each order, can be found on the SOCA website.<sup>liv</sup> It includes the personal information of those who are subject to these orders. There were more than 70 of these orders listed as of the end of 2012.

Financial reporting orders are a supplementary penalty imposed on a legal person when he is convicted of committing a crime to monitor him, which the Kuwaiti legislator did not stipulate as a penalty in its penal law.

#### **g. Disqualification Of Company Directors**

Both an individual and a corporate defendant may be subject to an order disqualifying someone from serving as a director (Aleifan, et al., 2023). Any individual (including corporate entities) found guilty of an indictable offense (whether through an indictment or a summary trial) concerning the establishment, administration, liquidation, or striking-off of a business, with the receipt of a business's assets, or with their role as an administrative receiver of a business, may be barred from serving as a director, among other positions, or from being involved in any capacity, directly or indirectly, in the establishment, management, or promotion of a business.<sup>lv</sup>

The indictable offense need not be directed specifically at businesses; it could be insider dealing or obtaining by deception, for instance.<sup>lvi</sup> It has been suggested that the intentionally ambiguous phrase "in connection with the management of a company" means that "the offence must have some relevant factual connection with the management of the company."<sup>lvii</sup> It is therefore

appropriate to have imposed disqualification orders (of eight and four years, respectively) in cases where defendants were found guilty of a missing trader VAT fraud through the use of their otherwise legitimate companies as "buffers."<sup>lviii</sup> The broad scope is intended to deter criminal activity by corporations for a predetermined amount of time.

The person will be disqualified from holding any position as a director of a company, from receiving property belonging to a company, from being involved in the formation or management of a company, whether directly or indirectly, or from practicing insolvency.<sup>lix</sup> During the period of disqualification, the disqualified person may petition the court for permission to act in a specific manner. It is an all-encompassing disqualification that forbids several activities; the court should not limit its restrictions to just one or two of them.<sup>lx</sup>

The maximum disqualification period in the magistrates' court is five years, whereas in the crown court, it is fifteen.<sup>lxi</sup> A defendant who has already been disqualified may be eligible for the top bracket, which is reserved for exceptionally serious cases. Serious cases that do not qualify for the top bracket should go into the middle bracket, which is 6–10 years, and less serious cases should go into the minimum bracket, which is 2–5 years.<sup>lxii</sup>

Disqualification is a punishment even though its goal is to safeguard the public. Therefore, it is improper to remove a person from the office whom the court has decided is appropriate for conditional discharge.<sup>lxiii</sup> It has been decided that it is improper to both disqualify someone and order them to pay compensation in cases where their capacity to do so depends on operating a new business, as the imposition of the disqualification order was likely to make it more difficult for them to comply with the compensation order.<sup>lxiv</sup> The court should be aware that a disqualification may severely limit the type of employment that an individual covered by it can lawfully pursue while the order is in effect.

If a corporate defendant has committed a criminal offense while serving as a director of another corporation, a disqualification order may be issued against it. Two people and their nominee Jersey companies were all barred from directorships in a Chancery Division decision.<sup>lxv</sup> The Jersey companies' directors failed, and Jacob J. provided grounds for disqualifying a corporation after it was determined that corporations could be disqualified under the Company Directors Disqualification Act 1986 and could be handled similarly to individual directors.

“As a matter of practice, there may be a useful purpose in being able to disqualify companies as well as the individuals behind them. It means that one of the tools used by people who are unfit to be company directors can be attacked. It may be in some cases this has advantages about costs.

There may be a host of other advantages. You may not be able to find the individuals behind the controlling director.”

Each of the companies received a maximum 15-year disqualification. Though no such orders have been documented, there is no reason why the ability to disqualify a corporation could not also be used in criminal cases.

### **Conclusion**

This study began with the hypothesis that British law has better regulation than Kuwaiti law in its topic, and indeed it became clear through this study that there is an advantage, but it is partial. This study found that there are penalties regulated by the British legislator that the Kuwaiti legislator did not know about, and there are penalties regulated by the British legislator in a more detailed and deeper manner than Kuwaiti law in a manner consistent with the nature of the legal person (companies).

There is no doubt that it appears from this paper that there is a serious flaw in the current legislative organization of the State of Kuwait regarding penalties for legal persons (companies). Previous studies called for adopting a general and integrated theory of the criminal responsibility of a legal person, but they did not address the details of this theory and its features, at least in the punitive aspect.

This study provided those interested in the affairs of Kuwaiti criminal law and the laws of other countries that share a similar position on criminal penalties for legal persons, with important recommendations and results that must be adopted in their countries. There is no doubt that the recommendations of this study require future review in terms of practical application and thus an evaluation of the experience of adopting such recommendations (penalties). Finally, it is in no way possible to assume completeness in the results and recommendations of this and other studies, so the issue of criminal penalties for companies remains a subject that can develop and be renewed over time.

### **Recommendations**

- We call on the Kuwaiti legislator to unify the punitive policy used for legal persons, by including general texts in the punishments section of the Kuwaiti Penal Code, so that it can be referred to when criminalizing legal persons in special texts, as it is the main reference for its punishments, instead of having punishments in this scattered manner.
- We suggest that the Kuwaiti legislator regulate the penalty of a fine in more detail, as it is one of the most important penalties that can be applied to a legal entity, specifying the factors that influence and contribute to the judge's

stricter or lesser ruling when determining the amount of the fine between its upper and lower limits.

- We recommend that the Kuwaiti legislator specify several criteria that the judge must pay attention to when ruling on the amount of punitive compensation, especially the interest and profits received, while linking this to the gravity of the behavior committed.
- We suggest that the Kuwaiti legislator include the crimes of trafficking in persons, smuggling of migrants, and information technology crimes with the penalty of publishing the conviction ruling issued against the legal person.
- We call on the Kuwaiti legislator to include the penalty of corrective orders in all special texts that criminalize the legal person, especially since they currently include only environmental crimes and nothing else.
- About restitution orders, we recommend that the Kuwaiti legislator should adopt them in his laws due to their importance, particularly in crimes of money laundering and financing of terrorism and the law on crimes of trafficking in persons and smuggling of migrants, which are not applied to them according to the current situation.
- Finally, we recommend that the Kuwaiti legislator should intervene to expand the scope of application of the penalty of dismissal of company directors to include crimes of human trafficking, migrant smuggling, money laundering, and terrorist financing crimes, and the law on combating information technology crimes and corporate crimes.

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**Notes:**

- <sup>i</sup> <http://sentencingcouncil.judiciary.gov.uk/sentencing-guidelines.htm>.. The court must “have regard to” the guidance for offences committed before April 6, 2010.
- <sup>ii</sup> CJA 2003 s.174 as amended; Coroners and Justice Act 2009 s.121 et seq.
- <sup>iii</sup> Definitive Guideline, in force February 15, 2010
- <sup>iv</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Annual\\_report\\_2011-12\\_final\\_web.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Annual_report_2011-12_final_web.pdf).
- <sup>v</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_guideline\\_on\\_corporate\\_manslaughter\\_accessible.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_guideline_on_corporate_manslaughter_accessible.pdf) at I.
- <sup>vi</sup> A corporate defendant can be made the subject of a confiscation order in addition to any sentence passed.
- <sup>vii</sup> at fn.3.
- <sup>viii</sup> CJA 2003 s.163.
- <sup>ix</sup> CJA 2003 s.164 (3).
- <sup>x</sup> CJA 2003 s.164 (4).
- <sup>xi</sup> at 43. Now endorsed in the Corporate Manslaughter guidance 10.1 at C.15.
- <sup>xii</sup> [2005] EWCA Crim 1409.
- <sup>xiii</sup> *R. v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586.
- <sup>xiv</sup> at [41].
- <sup>xv</sup> Many of which are mirrored in the Definitive Guideline.
- <sup>xvi</sup> [2000] 2 Cr. App. R. (S.) 401.
- <sup>xvii</sup> Now endorsed in the Corporate Manslaughter Guidance at B11.
- <sup>xviii</sup> In *R. v Merlin Attractions Operations Ltd* [2012] EWCA Crim 2670 both the Guidelines and case law including *Friskies Petcare* were referred to.
- <sup>xix</sup> Although see the remarks of Scott Baker J. in *R. v Howe and Sons (Engineers)* (1999)2 Cr. App. R.(S.) 37

<sup>xx</sup> This is so particularly in cases (like the railway) where public safety is entrusted to companies in the work that they do and where the general public simply has to trust in the competence and efficiency of such companies. Moreover where the failures are such that (as here) it is fortuitous that the risks thereby generated were not greater in the sense that these failures could have happened anywhere, the court is entitled to take account of that as well. Accordingly in our view, public service cases will often be treated more seriously than those in which the breaches are confined within the private sector even where there is comparability between gravity of breach and economic strength of defendant. [2005] EWCA Crim 1409 at [11].

<sup>xxi</sup> See e.g. *R. v Tropical Express Ltd* [2002] 1 Cr. App. R. (S.) 27.

<sup>xxii</sup> In *St Margaret Trust Ltd* other defendants had fraudulently conspired to induce the defendant finance company to advance more than it was lawfully permitted to. The company executed a transaction prohibited by a postwar hire-purchase Order, although it had acted quite innocently throughout. Whereas the defendants convicted of the conspiracy were morally to blame and fined £50 on each charge, *St Margaret's Trust Ltd* was fined £5 on each. The company appealed against conviction on the basis that it had acted entirely innocently. The Court of Appeal found the offence to be one of strict liability. [1958] A.C. 183.

<sup>xxiii</sup> Other than a death due to an accident arising out of the presence of a motor vehicle on a road.

<sup>xxiv</sup> This was confirmed by the Civil Chamber of the Kuwaiti Court of Cassation in the session of September 27, 2006 in Appeal No. 689 of 2005 in its ruling requiring compensation for material and moral damage for a single act that the respondent company unintentionally caused to the appellants with the injuries shown in the medical reports, through What they bought from the company, which was proven to be unfit for human consumption, stating that: "It is considered harm that would affect their right to the safety of their bodies, which is guaranteed to them by the Constitution and the law. Physical harm is achieved by simply attacking it, and it is also likely to cause them grief and sorrow, insofar as the harm is present." Literary as well.

<sup>xxv</sup> PCC(S) A 2000 s.130 (4).

<sup>xxvi</sup> Article 227 of the Kuwaiti Civil Code.

<sup>xxvii</sup> Article 230 of the Kuwaiti Civil Code.

<sup>xxviii</sup> *R. v Thomson Holidays Ltd* (1974) 58 Cr. App. R. 429.

<sup>xxix</sup> *Holt v DPP* (1996)2 Cr. App. R. (S.) 314.

<sup>xxx</sup> *R. v Copley* (1979) 1 Cr. App. R. (S.) 55.

<sup>xxxi</sup> PCC(S)A 2000 s.131

<sup>xxxii</sup> PCC(S) A 2000 s. 130(6) and the provisions relating to the Motor insurers' Bureau.

<sup>xxxiii</sup> *R. v Schofield* (1978) 67 Cr. App. R. 282.

<sup>xxxiv</sup> In *R. v Schofield*, the time lapse was one of approximately four years.

<sup>xxxv</sup> [2012] EWCA Crim 728

<sup>xxxvi</sup> Article 252 of the Kuwaiti Civil Code.

<sup>xxxvii</sup> Meshari Aleifan and Hussein Bouaraki, *Mediator in the Kuwaiti Code of Criminal Procedures and Trials, Part 2: Trial Procedures, Second Edition*, Kuwait, 2017, pp. 19 et seq.

<sup>xxxviii</sup> PCCA(S) A 2000 ss.148 and 149.

<sup>xxxix</sup> *R. v Calcutt and Varty* (1985) 7 Cr. App. R. (S.) 385,

<sup>xl</sup> *R. v Parker* (1970) 54 Cr. App. R. 339

<sup>xli</sup> Article 128 of the Capital Markets Authority Law No. 7 of 2010 stipulates that: "In all cases, the offender shall be sentenced, in addition to the original penalty, to return the value of the financial benefit he achieved or the value of the losses that were avoided as a result of his committing an act in violation of the provisions of this law." Article 55 of the Law No. 2 of 2016 establishing the Public Authority for Combating Corruption stipulates: "The court may enter into the lawsuit any natural or legal person that it deems to have benefited seriously from illicit gain, and the ruling of restitution or confiscation shall be effective in respect of his property to the extent that he has benefited."

<sup>xlii</sup> HSWA 1974 s.42 (3).

<sup>xliii</sup> s.42 (2).

<sup>xliv</sup> s.33 (1) (o).

<sup>xlvi</sup> s.33 (2) (A).

<sup>xlvii</sup> Article 134 of Law No. 99 of 2015 amending some provisions of Law No. 42 of 2014 regarding environmental protection.

<sup>xlviii</sup> Article 174 of Law No. 99 of 2015 amending some provisions of Law No. 42 of 2014 regarding environmental protection.

<sup>xlix</sup> In force April 6, 2008.

<sup>l</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_guideline\\_on\\_corporate\\_manslaughter\\_accessible.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_guideline_on_corporate_manslaughter_accessible.pdf) at G32.

<sup>li</sup> at para.31.

<sup>lii</sup> The second paragraph of Article 32 of 2013 of the Anti-Money Laundering and Terrorism Financing Law and the last paragraph of Article 59 of Law No. 2 of 2023 amending Law No. 31 of 1970 amending some provisions of the Penal Code promulgated by Law No. 16 of 1960.

<sup>liii</sup> Article 157 of Law No. 99 of 2015 amending some provisions of Law No. 42 of 2014 regarding environmental protection. The same article also stipulates a

penalty for anyone who removes, hides, or destroys a suspended judgment “with imprisonment for a period not exceeding three months and a fine not exceeding one thousand dinars, or one of these two penalties. If the perpetrator is one of those responsible for the management of the business or one of its workers, he shall be punished with imprisonment for a period not exceeding six months.”

<sup>liii</sup> If an individual is sentenced to life imprisonment, the maximum is 20 years.

<sup>liv</sup> Serious Organized Crime Agency

<sup>lv</sup> See Company Directors Disqualification Act 1986 (“CDDA 1986”) ss.1 and 2.

<sup>lvi</sup> e.g. *R. v Corbin* (1984) 6 Cr. App. R. (S.) 17.

<sup>lvii</sup> *R. v Goodman* (1993) 14 Cr. App. R. (S.) 147 per Staughton L.J.

<sup>lviii</sup> *Att-Gen Reference (No. 88 of 2006) (R. v Meehan)* (2007) 2 Cr. App. R. (S.) 28.

<sup>lix</sup> CDDA s.1.

<sup>lx</sup> *R. v Ward and Howarth*, *The Times*, August 10, 2001.

<sup>lxi</sup> CDDA s.1 (3).

<sup>lxii</sup> See *Re Sevenoaks Stationery (Retail) Ltd* [1991] Ch. D. 164; *R. v Millard* (1994) 15 Cr. App. R. (S.) 445, 448.

<sup>lxiii</sup> *R. v Young (S.K.)* (1990) 12 Cr. App. R. (S.) 262.

<sup>lxiv</sup> *R. v Holmes* (1992) 13 Cr. App. R. (S.) 29 where the compensation order was revoked on appeal, the disqualification order remained.

<sup>lxv</sup> *Official Receiver v Brady* [1999] B.C.C. 258.