CHAPTER 49

Crimes of Embezzlement · Breach of Trust

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- Amended on December 6, 2021. Effective on March 1, 2022.
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This guideline applies to adult offenders (nineteen years of age or older) who committed any offenses of Embezzlement (Criminal Act, Article 355, paragraph 1), Breach of Trust (Criminal Act, Article 355, paragraph 2), Occupational Embezzlement and Breach of Trust in the Conduct of Business (Criminal Act, Article 356), and Embezzlement and Breach of Trust under the Act on the Aggravated Punishment of Specific Economic Crimes, Article 3, paragraph 1).

PART A

TYPES OF OFFENSES AND SENTENCING RANGE

TYPE	CLASSIFICATION	MITIGATED SENTENCING RANGE	STANDARD SENTENCING RANGE	AGGRAVATED SENTENCING RANGE
1	Less than 100 million	– 10 mos.	4 mos. – 1 yr. 4 mos.	10 mos. – 2 yrs. 6 mos.
2	100 million or more, but less than 500 million	6 mos. – 2 yrs.	1 yr. – 3 yrs.	2 yrs. – 5 yrs.
3	500 million or more, but less than 5 billion	1 yr. 6 mos. – 3 yrs.	2 yrs. – 5 yrs.	3 yrs. – 6 yrs.
4	5 billion or more, but less than 30 billion	2 yrs. 6 mos. – 5 yrs.	4 yrs. – 7 yrs.	5 yrs. – 8 yrs.
5	30 billion or more	4 yrs. – 7 yrs.	5 yrs. – 8 yrs.	7 yrs. – 11 yrs.

(unit: KRW)

CLASSIFICATION		MITIGATING FACTOR	AGGRAVATING FACTOR
Special Sentencing Factor	Conduct	• Offender's minor participation under external pressure • In cases where the risk of damages by the offense did not materialize • *De facto* single-ownership or a family-owned business • Offense committed for the sole benefit of the company • Minor violation of duties	• Multiple victims including employees, shareholders, or creditors, or inflicting serious harm to the victim • Deliberate concealment of profits gained from the offense • Highly egregious conduct or methods • Instigating the subordinate to commit the offense
	Offender /Etc.	• Hearing and/or speech disabilities • Diminished mental capacity (without fault) • Voluntary surrender to investigative authorities or internal whistle-blowing • Victim expresses the intent of non-punishment of the offender or substantial restitution	• Same-offense recidivism within the statutory recidivism period

CLASSIFICATION		MITIGATING FACTOR	AGGRAVATING FACTOR
General Sentencing Factor	Conduct	• Offense committed out of economic necessity or hospital expenses, and the like • Cases where the offender failed to spend or retain most of the profit from the crime • Minor participation • Non-occupational crime (involving embezzlement or breach of trust cases) • Where the offender has a significant equity stake in the victim company	• Cases where the offense was committed in exchange for a promised or accepted reward • Offense committed with a purpose to reinforce control or the secure the position within the company • Embezzlement offenses
	Offender /Etc.	• Diminished mental capacity (with fault) • Sincere remorse • No prior criminal convictions • Considerable restitution	• Post-offense evidence tampering or attempt to conceal or destroy evidence • Different-offense recidivism within the statutory recidivism period. Prior convictions for the same-offense or a crime of fraud resulting in imprisonment that do not constitute statutory recidivism (within ten years after the completion of the sentence) • Causing harm in the course of attempted settlement (excluding cases where separate crimes such as coercion are established)

DEFINITION OF OFFENSES

1. TYPE 1

- This applies where the amount of gain from embezzlement or breach of trust involved is less than 100 million KRW.
- "Amount of Gain" refers to the acquired property or financial gain by the commission of the offense to the offender or the third party (hereinafter the same).

2. TYPE 2

- This indicates cases in which the amount of gain from embezzlement or breach of trust involved is 100 million KRW or more, but is less than 500 million KRW.

3. TYPE 3

- This indicates cases in which the amount of gain from embezzlement or breach of trust involved is 500 million KRW or more, but is less than 5 billion KRW.

4. TYPE 4

- This indicates cases in which the amount of gain from embezzlement or breach of trust involved is 5 billion KRW or more, but is less than 30 billion KRW.

5. TYPE 5

- This indicates cases in which the amount of gain from embezzlement or breach of trust involved is 30 billion KRW or more.

DEFINITION OF SENTENCING FACTORS

1. DAMAGES ACTUALIZED BY OFFENSE WERE RELATIVELY SMALL

- This indicates cases in which less than $\frac{1}{3}$ of the potential damage actualized through the offense.

2. *DE FACTO* SINGLE-OWNERSHIP OR A FAMILY-OWNED BUSINESS

- This indicates cases in which the company subject of the offense is under single ownership or a family-owned business.
- However, this does not apply in cases involving one or more factors set forth below:
  - When an adversely affected third party (such as a creditor) as a result of the offense is involved
  - When a petition from a shareholder family member is involved

3. OFFENSE COMMITTED ONLY FOR BENEFIT OF THE COMPANY

- This indicates cases in which the offense was committed for the sole benefit of the company and not for personal interests and involves cases where one or more of the following factors apply:
  - When the offender provided unlawful aid to an affiliate company for the purpose of preventing bankruptcy
  - When the damage upon the company was a result of reckless investment
  - Where the offender caused excessive debt to the company in the course of merger and acquisition
  - Other cases with comparable factors

4. MINOR VIOLATION OF DUTIES

- This applies where one or more of the following are present:
  - When an employee of a financial institution, without an exchange for a benefit, provides loans without properly checking the debtor's repaying abilities or violates the internal policies to provide convenience to the debtor
  - When refusing to return the property held in possession

- When the offender improperly disposed of the property, which exceeded the entrusted purpose, but the offender has the intent to reimburse the property and is capable thereof
- When the offense was not clearly recognized as prohibited conduct by prior case law or through generally accepted legal principles, or in cases in which changes to prior case law caused the conduct to be recognized as a prohibited offense
- Other cases with comparable factors

5. INFLICTING SERIOUS HARM TO THE VICTIM

- This applies where one or more of the following are present:
  - Financial or management crisis of the company as a result of the offense
  - Collapse of company's stocks due to a damaged reputation as a result of the offense
  - Multiple bankruptcies induced as a result of the offense
  - Victims suffer from losses of nearly all assets due to the offense
  - Shareholders, employees, and creditors of the company (such as offense committed with impending bankruptcy) as well as the company is significantly adversely affected as a result of the offense
  - Other cases with comparable factors

6. DELIBERATE CONCEALMENT OF PROFITS GAINED FROM THE OFFENSE

- This applies when profits from the offense were deliberately concealed by the offender, thereby causing delayed damage recovery or absence of recovery.

7. HIGHLY EGREGIOUS CONDUCT OR METHODS

- This applies where one or more of the following are present:
  - The means and methods for the commission of the offense was meticulously done in advance
  - There were multiple persons involved in an organized manner for the purpose of committing the offense
  - The use of the scope of employment as professionals involved in business such as finance, stock markets, trading, accounting

- Methods such as falsifying accounts, engaging in fraudulent accounting, forgery of documents used in the commission of the offense
- Using highly intelligent schemes to commit the offense
- Using new professional schemes previously unknown
- Deliberately evading responsibilities prescribed under the law to commit the offense
- Other cases with comparable factors

8. INTERNAL WHISTLE-BLOWING

- This means the investigation was initiated with a voluntary report by a former participant of structural corruption with the intent to end the offense.

9. VICTIM EXPRESSES THE INTENT OF NON-PUNISHMENT

- This indicates cases in which the offender shows sincere remorse with genuine efforts to reach a settlement with the victim; the victim or the family of the victim (in the case of a deceased victim) fully understands the legal and social implications of opposing punishment and clearly expresses the intent not to seek punishment of the offender. However, this should not apply in the following cases:
  - (1) in cases in which the victim or the family of the deceased opposes punishment as a result of *de facto* coercion or deceit by the offender against the victim's will, or
  - (2) where there is no reasonable or convincing basis for the victim or their legal representative to express no desire for punishment.
- This applies only to cases in which, upon careful and thorough examination and assessment of the victim's or legal representative's age, intelligence, and ability to fully understand the meaning, content, and legal implications of expressing an intent not to seek punishment, it is determined that such expression is both informed and genuine.

10. SUBSTANTIAL RESTITUTION TO THE VICTIM

- This refers to cases in which the offender, through genuine and sustained efforts, has restored the damage to a degree comparable to a formal settlement (generally amounting to at least two-thirds of the total loss in cases involving only property damage), or in which restitution of such degree is reasonably assured.
- In the case of a court deposit, it constitutes substantial recovery of damages only when such a determination is made after carefully examining and assessing the opinions of the victim of the underlying offense or their legal representative (including the spouse, lineal relatives, and siblings if the victim is deceased) regarding the deposit, whether the offender is legally permitted to retrieve, or intends to retrieve the deposited funds, the nature of the infringed legal interests, and the scale and extent of the damage.

11. CAUSING HARM IN THE COURSE OF ATTEMPTED SETTLEMENT (EXCLUDING CASES WHERE SEPARATE CRIMES SUCH AS COERCION ARE ESTABLISHED)

- This indicates cases in which the offender consistently harassed the victim while attempting to reach settlement, or put undue pressure on the victim by means of implying tangible or intangible disadvantages, otherwise causing harm through comparable means in response to refusal of settlement.

12. SINCERE REMORSE

- This indicates cases in which the offender is deemed to express genuine remorse for the crime after examining and assessing the specific circumstances under which the offender admitted and voluntary efforts made toward the victim restitution and/or prevention of re-offending.

13. NO PRIOR CRIMINAL CONVICTIONS

- It means that the offender has no previous criminal conviction. However, this does not apply to cases in which the offense was committed repeatedly over an extended period.

PRINCIPLES APPLICABLE TO SENTENCING FACTORS

1 DETERMINING THE SENTENCING RANGE

- When determining the appropriate sentencing range, judges must consider only the Special Sentencing Factors.
- However, where multiple Special Sentencing Factors are present, the applicable sentencing range shall be determined after assessing the factors in accordance with the following principles:
  - ❶ Greater weight is accorded to Conduct Factors than to Offender/Etc. Factors of equal number. However, where a victim expresses the intent of non-punishment, such wishes may be treated on a par with a Conduct Factor.
  - ❷ Conduct Factors *inter se*, and Offender/Etc. Factors *inter se*, shall be treated as equivalent.
  - ❸ If the sentencing range applicable cannot be determined by the aforementioned principles in ❶ and ❷, judges are to decide the sentencing range by a comprehensive comparison and assessment of Special Sentencing Factors based on the principles set forth in ❶ and ❷.
- After the assessment of sentencing factors, where aggravating factors outweigh mitigating factors, the aggravating sentencing range is recommended; where mitigating factors outweigh aggravating factors, the mitigating sentencing range is recommended; and in all other cases, the standard sentencing range is recommended.

2 DETERMINING THE SENTENCE APPLICABLE

- In determining the sentence, the court should consider comprehensively both the general and special sentencing determinants that are within the sentencing range as determined under paragraph 1 above.

GENERAL APPLICATION PRINCIPLES

1 SPECIAL ADJUSTMENTS TO THE RECOMMENDED SENTENCING RANGE

❶ After the assessment of Special Sentencing Factors, if a case falls within the Aggravating Sentencing Range and either i) two or more Special Aggravating Factors exist alone, or ii) Special Aggravating Factors outnumber Special Mitigating Factors by two or more, the upper limit of the recommended sentencing range may be increased by up to 1/2.[1)]

❷ After the assessment of Special Sentencing Factors, if a case falls within the Mitigating Sentencing Range and either i) two or more Special Mitigating Factors exist alone, or ii) Special Mitigating Factors outnumber Special Aggravating Factors by two or more, the lower limit of the recommended sentencing range may be reduced by up to 1/2.

2 RELATION BETWEEN THE RECOMMENDED SENTENCING RANGE UNDER THE SENTENCING GUIDELINES AND THE APPLICABLE SENTENCING RANGE BY LAW

- Where the sentencing range recommended under this guideline conflicts with the statutory applicable aggravated/mitigated sentencing range, the upper or lower limit of the applicable sentencing range by law shall govern.

3 APPLICATION OF DISCRETIONARY MITIGATING FACTORS BY LAW

- Where a judge declines to apply discretionary statutory mitigating factors listed in the Sentencing Factor Table of this guideline, such factors shall be considered as extenuating circumstances among mitigating factors.

1) Amended on April 15, 2011.

GUIDELINES ON SENTENCING MULTIPLE OFFENSES

1 APPLICABLE RANGE

- This section applies to concurrent crimes prescribed in the first part of Article 37 of the Criminal Act. However, when concurrent crimes under the first part of Article 37 of the Criminal Act include both an offense set forth in the sentencing guidelines and an offense not covered by the sentencing guidelines, then the minimum level should be the minimum of the sentencing range of the offense that is set forth in this sentencing guideline.

2 DETERMINING THE BASE OFFENSE

- The "base offense" refers to the offense subject to the most severe punishment after selecting the type of punishment and applying any statutory aggravation and/or mitigation thereto. However, where the upper end of the sentencing range under the sentencing guidelines for an offense covered by this chapter is lower than the upper end of the sentencing range under the sentencing guidelines for the other concurrent offense, the other concurrent offense shall become the base offense.

3 DETERMINING THE SENTENCING RANGE FOR THE CONCURRENT MULTIPLE SAME-OFFENSES

- For concurrent same-offense, the following method of aggravation for multiple offenses shall apply:
  - ❶ The Type of offense shall be determined based on the aggregate amount of criminal gain or profit. Within that Type, the sentencing range shall be selected by the judges taking into account all relevant circumstances.
  - ❷ (1) Where the aggregation of criminal gain results in an offense Type one level higher than that of the most severe single offense among offenses of the

same Type, the lower end of the sentencing range shall be reduced by 1/3. (2) Where the aggregation of criminal gain results in an offense Type two levels or more higher than that of the most severe single offense, the lower end of the sentencing range shall be reduced by 1/2. However, the reduced lower end of the sentencing range shall not fall below the lower end of the sentencing range of the offense Type applicable to the most severe single offense.

4 DETERMINING THE SENTENCING RANGE FOR THE CONCURRENT MULTIPLE DIFFERENT-OFFENSES

- Except for concurrent different-offenses that are treated as a single offense under the sentencing guidelines, the following method of aggravation for multiple offenses shall apply.
  - ❶ The sentencing range for multiple offenses involving two offenses shall be determined by adding 1/2 of the upper end of the sentencing range of the other offense to the upper end of the sentencing range of the base offense.
  - ❷ For multiple offenses involving three or more offenses, the upper end of the sentencing range shall be determined by adding the following three figures: (1) the upper end of the sentencing range of the base offense, (2) 1/2 of the upper end of the sentencing range of the offense with the highest upper end of the sentencing range among the other offenses, and (3) 1/3 of the upper end of the sentencing range of the offense with the second highest upper end of the sentencing range among the other offenses.
  - ❸ For multiple offenses where the lower end of the sentencing range of the other offense is higher than the lower end of the sentencing range of the base offense, the lower end of the sentencing range after applying the method of aggravation for multiple offenses shall be the lower end of the sentencing range of the other offense.
- However, where the multiple offenses include concurrent same-offenses of the Embezzlement or Breach of Trust, the sentencing range shall first be determined by applying the method for concurrent same-offenses involving Embezzlement or Breach of Trust, and the method of aggravation for multiple different-offenses set out above shall then be applied to that sentencing range.

PART B

GUIDELINE ON SUSPENDING A SENTENCE

CLASSIFICATION		ADVERSE	AFFIRMATIVE
Primary Circumstance	Risk of Recidivism, etc.	• Prior convictions for the same-offense [suspended sentence of imprisonment without labor or a more severe punishment imposed within the past five years, or three or more fines (including suspended fine)] • Deliberate concealment of profits gained from the offense • Highly egregious methods	• Offender's minor participation under external pressure • Minor violation of duties • Voluntary surrender to investigative authorities or internal whistle-blowing
	Others	• Failed agreement with the victim • Cases where the actual damage is substantial • Inflicting serious damages to the victim	• *De facto* single-ownership or a family-owned business • Cases where the actual damage is minor • Victim expresses the intent of non-punishment of the offender or substantial restitution to the victim
General Circumstance	Risk of Recidivism, etc.	• Prior conviction for the same-offense, or two or more prior convictions resulting in a suspended sentence of imprisonment without labor or a heavier punishment • Repeated crimes • Condemnable motives • Lack of family/social ties • Absence of sincere remorse	• Offense committed for economic necessities or hospital expenses and the like • Stable family/social ties • Sincere remorse • No prior convictions resulting in a suspended sentence of imprisonment without labor or a heavier punishment • Special circumstances mitigating the offender's motives to commit the offense
	Others	• Playing a leading role as a co-offender • Multiple victims including employees, shareholders, or creditors, or inflicting serious harm to the victim	• Offender's minor participation as a co-offender • Cases where the offender failed to spend or retain most of the profit from the crime

CLASSIFICATION		ADVERSE	AFFIRMATIVE
		• Cases where the offense was committed in exchange for a promised or accepted reward • Post-offense evidence tampering or attempt to conceal or destroy evidence • Offense committed with the purpose to reinforce control or to secure position within the company • Absence of efforts to recover damages • Causing harm in the course of attempting to reach a settlement (excepting cases where the act constitutes a crime of coercion)	• In cases where the risk of damages by the offense did not materialize • Offense committed for the sole benefit of the company • The offender's physical condition is severely impaired • Cases where detaining the offender would impose excessive hardship on dependent family members • Where the offender has a significant equity stake in the victim company • Considerable restitution

DEFINITIONS OF CIRCUMSTANCES TO CONSIDER WHEN SUSPENDING A SENTENCE

- For identical factors in both Sentencing Factors and the Circumstances for Suspending a Sentence, refer to the definitions set forth in the Definition of Sentencing Factors.
- Calculation of the Period of Prior Criminal Convictions
  - For cases where a suspended sentence of imprisonment or a fine was imposed, the period of a prior conviction is calculated from the date on which the judgment became final to the date of the commission of the offense.
  - For cases where a sentence of imprisonment was executed, the period of a prior conviction is calculated from the date on which the sentence was fully served to the date of the commission of the offense.
- Cases where the actual damage is substantial
  - This indicates cases in which the offense does not constitute serious harm to the victim, but the total unrecovered damages are more than 300 million won.
  - However, in determining whether to suspend a sentence, this indicates cases in which the total unrecovered damages are more than 500 million won.
- Cases where the actual damage is slight
  - This means cases in which the total unrecovered damages are less than 20 million won.
  - However, for imposing imprisonment, this indicates cases in which the total unrecovered damages are less than 50 million won.

PRINCIPLES APPLICABLE TO CIRCUMSTANCES WHEN SUSPENDING A SENTENCE

- When the recommended sentence is imprisonment with labor and judges decide to suspend execution of the sentence, they must give greater weight to the Primary Circumstances than to the General Circumstances, and the following principles should be considered:
  - ❶ When two or more Primary Affirmative Circumstances exist alone, or when Primary Affirmative Circumstances outnumber Primary Adverse Circumstances by two or more, it is recommended to suspend the sentence.
  - ❷ When two or more Primary Adverse Circumstances exist alone, or when Primary Adverse Circumstances outnumber Primary Affirmative Circumstances by two or more, imprisonment is recommended.
  - ❸ In cases in which ❶ or ❷ apply, but the difference between the number of General Adverse (Affirmative) Circumstances and General Affirmative (Adverse) Circumstances is greater than the difference between the number of Primary Affirmative (Adverse) Circumstances and Primary Adverse (Affirmative) Circumstances, or in cases other than ❶ or ❷, the judges shall decide whether to suspend the sentence after comparing and assessing all the Circumstances comprehensively.[2)]

2) Amended on April 15, 2011