

LEGAL ENTITIES AND CRIMINAL LAW – PRINCIPLES OF SANCTIONING

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Abstract

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The article deals with the issue of sanctioning of legal entities in connection with corporate criminal liability introduced after 1 January 2012. It provides a characterization of the sanctioning system provided for under the Act No. 418/2011 Coll. on the Criminal Liability of Legal Entities and on Proceedings against Them, and deals with the crucial principles governing the imposition of punishments and the protective measure. It further discusses the modifications of the sanctions with respect to legal entities, mainly as regards the principles of legality, purposefulness, adequacy, personality and subsidiarity of criminal repression.

legal entities, criminal liability, corporate liability, sanctioning, punishments, protective measures, fundamental principles

I INTRODUCTION

Until recently, legal entities¹ were criminally relevant only from the point of view of Criminal Procedure. They were thus able to initiate the commencement of criminal proceedings by filing an information, to act in the position of the injured party in criminal proceedings. They were also obliged to cooperate with investigative, prosecuting and adjudicating bodies. However, the role of legal entities changed significantly on 1 January 2012, when a new law came into effect – the Act No. 418/2011 Coll. on the Criminal Liability of Legal Entities and on Proceedings against Them (abbreviated as “TOPOZ”). By passing the act, the

Czech Republic joined all other EU member states that had introduced criminal liability of legal persons in the form of either genuine criminal liability (e.g. Denmark, Finland, France, Hungary, Netherlands, Poland, Slovenia, Austria) or non-genuine criminal liability consisting in the possibility of imposing upon a legal entity a criminal law sanction or some similar criminal sanction even though a given country does not regulate criminal liability under criminal law (Spain, Sweden, Slovakia).² The Czech Republic decided to adopt genuine criminal liability – a model that constitutes a major interference (or even a breakthrough) into principles traditionally present in continental criminal law, both on the level of fault (the principles of individual³ and

1 For more details on the notion of ‘legal entity’, see FENYK, J., SMEJKAL, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, s. 2–6, ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck., pp. 55–61.

2 KALVODOVÁ, V., 2011: *Principy sankcionování právnických osob (Evropa a Česká republika)*. In: Fryšták, M. (ed). *Nové jevy v hospodářské a finanční kriminalitě*. Brno: Masarykova univerzita, <http://www.law.muni.cz/content/cs/proceeding>, p. 70.

3 Cf., for instance, FENYK, J., SMEJKAL, L., 2012, *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, p. XIII, KALVODOVÁ, V., 2011: *Principy sankcionování právnických osob (Evropa a Česká republika)*. In: Fryšták, M. (ed). *Nové jevy v hospodářské a finanční kriminalitě*. Brno: Masarykova univerzita, <http://www.law.muni.cz/content/cs/proceeding>, p. 70. For a different opinion, cf. MUSIL, J., 2012: In: Šámal, P. a kol.. *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck. 2012, pp. 1–2.

subjective liability) and on the level of punishment (see below). Inevitably, this also affects the field of Criminal Procedure, i.e. the criminal proceedings.

TOPOZ is not an entirely independent law. It relates to the regulations of substantive and procedural criminal law, namely the Criminal Code, Rules of Criminal Procedure and marginally also the Act on Judicial Matters Affecting Minors.⁴ The relation between TOPOZ and the other acts is expressed in the provisions of Section 1, subsection 2, as follows: *unless provided otherwise by this act, then the Criminal Code or some other law defining criminal offences and responsibility shall be applied. The Rules of Criminal Procedure shall be applied in proceedings against legal entities, unless such an application is excluded by the nature of the matter.* This is clearly the relation of speciality, where the Criminal Code and the Rules of Criminal Procedure – as general legal regulations – shall apply only where TOPOZ does not contain a particular legal regulation. Moreover, it is a highly selective situation because not all of the provisions of the Criminal Code and the Rules of Criminal Procedure may be applied to legal entities. It is also necessary to emphasize that criminal liability of legal entities does not exclude criminal liability of natural person acted on behalf of legal entity as for example statutory organ (Section 9, subsection 3 of TOPOZ). On the other hand, it is no obstacle to the criminal liability of legal persons if it cannot be determined what specific natural person acted on behalf of the legal person (Section 8, subsection 3 of TOPOZ).

The following sections will consider the system of sanctions for legal entities under the new legal regulation. The aim is to point out the specific nature of imposing sanctions on legal entities and the possible problems arising from the new legal regulation.

II CHARACTERISTICS OF THE SANCTIONING SYSTEM OF LEGAL ENTITIES

The system of sanctions for legal entities is based on the dualism of criminal sanctions. That means that two types of criminal sanctions are distinguished: punishments and protective measures (of which there is only one, in fact). The term ‘sanctioning of legal entities’ is used here with the purpose of expressing the said dualism of criminal sanctions. In this connection, Jelínek

says that the expression ‘sanctioning of legal entities’ is a more precise term for describing the consequences of criminal offences committed by legal persons than ‘punishments of legal entities’, because punishments can be issued only to natural persons and are tied to the offender’s individual guilt. It would therefore be more appropriate to say that sanctions imposed upon legal entities are not punishments but sanctions of a special kind.⁵ However, if we accept the term ‘criminal liability of legal entities’, then it is not necessary, in my opinion, to shun such terms as ‘punishment’ or ‘punishing’, because a criminal offence and a punishment represent two fundamental elements of criminal liability.⁶

The core of the sanctioning system of legal entities consists of the punishment understood as a reaction to some criminal offence committed by a legal person. The aim of the punishment is to cause substantial injury to the offender – the legal person – that is meant to combine with the entity’s public social and ethical denouncement. The protective measure of *seizing a thing or some other property value* serves solely for the purpose of prevention.⁷ Punishments and protective measures can be modified to suit the nature of a given legal entity and, in addition to prevention, are directed to affect mainly those areas of the company’s activities where they can be most effective.⁸

The enumeration of punishments is listed in Section 15, subsection 1 of TOPOZ. The following punishments may be imposed upon a legal entity that commits criminal offences: winding-up of the company, confiscation of property, pecuniary punishment, confiscation of a thing or some other property value, a ban on activities, a ban on performance of public contracts, a ban on participation in concession proceedings or other public tenders; a ban on acceptance of subsidies, and the publication of the judgment. As regards protective measures, TOPOZ provides for a single measure, namely the above-mentioned seizure of a thing or some other property value (Section 15, subsection of TOPOZ). It is evident that legal entities may be subject to the same sanctions as natural persons (i.e. a pecuniary punishment, a ban on activity, confiscation of property or confiscation or seizure of a thing or some other property value), or to sanctions that are quite specific. The sanctions may be imposed individually or simultaneously. The only exception that is explicitly banned (Section 15,

4 FENYK, J., SMEKAL, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, p. 6.

5 JELÍNEK, J., 2007: *Trestní odpovědnost právnických osob*. Linde Praha, a. s. p. 75. See also Jelínek, J., Herzceg, J.: *Zákon o trestní odpovědnosti právnických osob, Komentář s judikaturou*. 2. Vydání. Praha: Leges. 2013, p. 31.

6 KALVODOVÁ, V., 2011: *Principy sankcionování právnických osob (Evropa a Česká republika)*. In: Fryšták, M. (ed). *Nové jevy v hospodářské a finanční kriminalitě*. Brno: Masarykova univerzita, <http://www.law.muni.cz/content/cs/proceeding>, p. 71.

7 ŠÁMAL, P. a kol., 2012, *Trestní odpovědnost právnických osob. Komentář*. 1. vydání. Praha: C. H. Beck, p. 61

8 FENYK, J., SMEKAL, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, p. 63.

subsection 3 of TOPOZ) is the concurrent imposition of a pecuniary punishment and the confiscation of property, and the punishment of the confiscation of a thing or some other property value and the seizure of the same thing or property value.

TOPOZ also provides statutory requirements for the imposition of the individual types of punishments and the protective measure. Some problems in interpretation and application may arise from the fact that while TOPOZ expressly requires an adequate application of the Criminal Code in some cases (cf. Section 19 of TOPOZ), it does not do so in other cases (cf. Section 18 of TOPOZ). With reference to the above-mentioned Section 1, subsection 2 of TOPOZ, one may reach the conclusion that the Criminal Code will be used as a general regulation even where such use is not explicitly provided for because TOPOZ contains only a partial regulation. That will be the case with pecuniary punishment – the legal regulation of this sanction is very brief and lacks any reference to the adequate application of the Criminal Code, e.g. as far as the non-imposition of that kind of sanction where it is evident that the pecuniary punishment would be uncollectible (Section 68, subsection 6 of the Criminal Code), or when the monetary amounts are paid to the state (Section 68, subsection 7), or as regards the manner of determination of the daily rate of the pecuniary punishment (see below). Fenyk and Smejkal argue that the Criminal Code must be used in such cases on account of subsidiarity.⁹ An identical opinion is held by Šámal, Dědič and Půry.¹⁰

Punishments can be divided into several groups. The most serious punishment is the winding-up of the legal person, which means its liquidation and the definitive termination of its further activities. Another group is formed by property punishments, which include the confiscation of property, pecuniary punishment and the confiscation of a thing or some other property value (including the confiscation of an alternative value). Yet another group consists of punishments prohibiting or limiting the company's activities, i.e. a ban on activity, a ban on performance of public contracts, a ban on participation in concession proceedings and public tenders, and a ban on the acceptance of subsidies. The last type of punishment is the

publication of the judgment.¹¹ Let us selectively address some of those groups of punishments.

The most important sanction for legal entities is undoubtedly *pecuniary punishment*. The sanctioning of legal persons by means of pecuniary punishment (a fine) is principally required by EU Framework Decisions as well as EC Directives.¹² This penalty is used in all countries that have introduced corporate criminal liability. Thanks to its property nature, the pecuniary punishment is a suitable means for affecting the offending legal entity and protecting the society mainly where the legal entity commits a property-oriented crime.¹³ It may thus be anticipated that pecuniary punishment will be the most frequently imposed type of penalty.¹⁴

Under Section 18, subsection 1 of TOPOZ, pecuniary punishment may be imposed for all criminal offences that a legal entity may commit. The only limiting factor is the consideration of the rights of the injured party because the imposition of pecuniary punishment may not cause any detriment to the injured party's rights. This precondition is meant to prevent the frustration of the injured party's claim to satisfaction through damages. In concrete cases, this may mean that – after considering all relevant circumstances (the property of the legal entity, the number of injured parties, and the amounts of their claims) – pecuniary punishment is either not imposed at all or its amount is reduced.¹⁵ As regards the amount of pecuniary punishment, the calculation follows the same pattern as with natural persons, i.e. according to daily rates. TOPOZ specifies a different amount of the daily rate for legal entities in the amount of no less than CZK 1,000 and no more than CZK 2,000,000.¹⁶ The precise amount is set with view to the offender's property (Section 18, subsection 2 of TOPOZ). Since the minimum and maximum numbers of the daily rate is not expressly stated, the legal regulation contained in Section 68, subsection 4 of the Criminal Code shall apply, i.e. no less than 20 and no more than 730 full daily rates. The precise number is set according to the nature and seriousness of the criminal offence.

Although pecuniary punishment is, without any doubt, a suitable sanction for legal entities and it leaves space for judicial discretion in individual

9 FENYK, J., MEJKAL, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, p. 76.

10 ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck, pp. 63–67, p. 368 and subsequent pages.

11 Cf. Explanatory note to the bill on the criminal liability of legal persons and proceedings against them, p. 23.

12 Explanatory note to the bill on the criminal liability of legal persons and proceedings against them, p. 13.

13 ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck, p. 368.

14 Coincidentally FENYK, J., SMEJKAL, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, p. 76.

15 For more details, see, e.g. ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck, p. 369, 330–331.

16 The range of daily rates is CZK 100 to CZK 50,000 in case of natural persons.

cases, the sanctioning of legal entities cannot be based solely on this type of penalty.¹⁷ Quite on the contrary; the sanctioning system must provide as broad a range of sanctions and measures as possible – it is their mutual combination that can bring the desired effect.¹⁸ The sanctioning system provided for by TOPOZ fulfils such a requirement.

The winding up of the legal person (Section 16 of TOPOZ) is, as stated above, the strictest penalty that can be imposed upon a legal entity. It is applicable only to legal entities that, while having their registered offices in the Czech Republic, perform such activities that entirely or predominantly consist of committing criminal offences, and where the imposition of such a penalty is not ruled out by the nature of the legal entity.¹⁹ Where such a legal entity is a bank, a prior approval from the Czech National Bank needs to be sought for the consideration of the possibilities and the consequences of such a punishment. In case of a commodity exchange, the penalty is preconditioned by the approval of the relevant body of state administration that issues the state approval for the operation of the exchange. The explanatory note specifies that this punishment will be considered mainly where the legal entity gets involved in organized crime, for instance. The legal entities may thus actually be criminal organizations founded for the purposes of legalizing the proceeds of crime, producing and distributing intoxicating and psychotropic substances, people trafficking, etc., even though they may externally announce company objects that are lawful. There may also be legal entities that gradually change their activities from lawful to criminal.²⁰ The purpose of the punishment of winding up the company is to ultimately prevent the legal entity from performing any further activity that consists in the continuous commission of crime.

The publication of the judgment (Section 23 of TOPOZ) is a new type of punishment in Czech law. It is a penalty intended exclusively for legal entities.

It can be imposed where it is necessary to inform the public of a judgment of conviction, mainly because of the nature and the seriousness of the criminal offence, or where required by the interest of protecting the safety of people, property or society. Those conditions indicate a strong preventive nature of this punishment: the publication of the judgment warns other people against legal entities that commit serious crime that could harm their life, health or property or put them at risk. The penalty forces the legal entity to publicize, at its own cost, the final and conclusive judgment or some part thereof determined by the judge. The publication will appear in some public medium channel determined by the judge and will include data about the legal entity convicted (its business name and registered office). Any data relating to third legal or natural persons will be made anonymous. This penalty affects the good name of the legal entity convicted. It has a significant defamatory effect and can indirectly affect the assets of the legal entity, e.g. by causing some of its customers and sponsors to turn away from the company.²¹

The specific punishments for legal entities that have a primarily blocking purpose include the ban on performance of public contracts, the ban on participation in concession proceedings or public tenders (Section 21 of TOPOZ) and the ban on acceptance of subsidies (Section 22 of TOPOZ). Both punishments may be imposed in the length ranging from one to twenty years for criminal activities committed by the legal entity in connection with concession proceedings, public contracts or public tenders or in connection with the provision of subsidies.

The remaining prohibitions, i.e. the ban on activity, confiscation of property and confiscation of a thing or some other property value are punishments imposed upon natural person as well. Their prerequisites and purposes are essentially the same for both natural and legal persons.

17 The above-mentioned framework decisions and directives often contain some additional recommended sanctions. The sanctioning systems of individual countries are also different. For an overview, cf. FENYK, J., 2012: *Právní následky trestného činu právnické osoby*. In: Kratochvíl, V. a kol.: *Trestní právo hmotné. Obecná část. 2. vydání*. Praha: C. H. Beck, pp. 820–823, JELÍNEK, J., 2007: *Trestní odpovědnost právnických osob*. Linde Praha, a. s., p. 153 and subsequent pages.

18 For more details on this issue, see FENYK, J., 2012: *Právní následky trestného činu právnické osoby*. In: Kratochvíl, V. a kol.: *Trestní právo hmotné. Obecná část. 2. vydání*. Praha: C. H. Beck, p. 82, JELÍNEK, J., 2007: *Trestní odpovědnost právnických osob*. Linde Praha, a. s., p. 153.

19 For the kinds of legal persons whose nature rules out the imposition of the punishment of winding-up the company, see ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck, p. 351 and subsequent pages. This applies, among other, to the Czech National Bank, the General Health Insurance Company, the Czech Rail, etc.

20 FENYK, J., SMEJKAL, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, s. 71–72, ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck, p. 351.

21 For more details on this punishment, see ŠÁMAL, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář. 1. vydání*. Praha: C. H. Beck, 2012, p. 437 and subsequent pages.

III PRINCIPLES OF SANCTIONING²²

As regards the principles of sanctioning, TOPOZ expressly regulates only the principle of adequacy of the punishment and the protective measure (Section 14 of TOPOZ). This means that the punishment can be modified – as opposed to the general regulation contained in the Criminal Code – to suit the specific nature of the legal person. However, other principles set by the Criminal Code or established in criminal law practice need to be respected as well, although some of them need to be modified in order to take into account the specific character of the legal person committing an offence.

The *principle of legality* must apply to legal entities without any exception, i.e. *nulla poena sine lege*. This concerns both the type of sanctions and the prerequisites for imposing them.

Another fundamental principle that must apply to legal entities is the *subsidiarity of criminal repression*, both in the criminal law sense as the *ultima ratio* expressed in Section 12, subsection 2 of the Criminal Code. This means not only looking outside of criminal law and applying the means available in other legal disciplines, but also pursuing the economy of criminal law, i.e. seeking minimal repression through punishment and achieving maximum protective effect. The proof that it is absolutely important to respect this principle is that one of the arguments against the introduction of genuine criminal liability is that criminal law should be *ultima ratio* – it is thus useless and criminally – as well as politically – undesirable to use it where other means of social regulation are available or where the means of other branches of law will suffice, i.e. where the existing and time-tested means of administrative sanctioning can be relied on.²³

The *principle of purposefulness of sanctioning* relates to the actual delimitation of the purpose of criminal sanctions for legal entities. Just as in the case of natural persons, the purpose is not expressly set. It is therefore necessary to seek it in the purpose of punishment provided for by the theory of criminal law, namely the protection of society. That reflects the fundamental function of criminal law

as a whole. The protective aim is then meant to be achieved by means of individual repression, individual prevention and general prevention.²⁴ All three partial aims directed at the protection of the society may be applied to legal entities as well, though not in the full extent.²⁵ It is evident from the nature of the matter that, in comparison with natural persons, there is less space for individual prevention in case of legal entities. What is practically excluded are positive, i.e. educational methods. Individual prevention can, however, rely on individual repression that rests mainly in the aim of preventing the offender (in this case the legal entity) from committing further criminal activities but also deterring him from committing crime in the future. General prevention with respect to other potential offenders from among legal entities is also significant. Various authors who research the purpose of sanctions concerning legal entities emphasize that the sanctioning of legal entities should have a strong preventive effect.²⁶ This requirement is aptly formulated by Wells, according to whom the purpose of punishment is, above all, to deter the legal entity from violating the law and to encourage good practice.²⁷ The requirement for sanctions to serve as a deterrent is contained, among other, in EU framework decisions and EC directives, as well as in international treaties. It may thus be concluded that the purpose of the sanctioning of legal entities is the protection of the society from criminal offences committed by legal entities. The protection should be achieved mainly through general and individual prevention and the use of means of individual preventive repression.

The introduction of criminal liability and the criminal sanctioning of legal entities is inevitably connected with a breach into the principle of *personality of punishment*. That principle represents, on the level of punishment, a certain equivalent to the principle of individual criminal liability of natural persons on the level of guilt.²⁸ The principle is based on the requirement that the punishment – regardless of its type, length and actual service – affects only the offender and no one else.²⁹ Of course, the side-effects of a punishment on other

22 Modified and extended part of the following paper: KALVODOVÁ, V., 2011: *Principy sankcionování právnických osob (Evropa a Česká republika)*. In: Fryšták, M. (ed). *Nové jevy v hospodářské a finanční kriminalitě*. Brno: Masarykova univerzita, 2011, <http://www.law.muni.cz/content/cs/proceeding>, pp. 69–78.

23 MUSIL, J., In: Šámal, P. a kol., 2012: *Trestní odpovědnost právnických osob. Komentář*. 1. vydání. Praha: C. H. Beck, p. 16.

24 For more details, see KALVODOVÁ, V., 2012: *Právní následky trestného činu a činu jinak trestného, trestněprávní alternativy*. In: Kratochvíl, V. a kol.: *Trestní právo hmotné. Obecná část*. 2. vydání. Praha: C. H. Beck, p. 552 and subsequent pages.

25 For more details on this issue, cf. JELÍNEK, J., 2007: *Trestní odpovědnost právnických osob*. Linde Praha, a. s., pp. 151–152.

26 Cf., e.g. JELÍNEK, J., *Trestní odpovědnost právnických osob*. Linde Praha, a. s., s. 152, ŠÁMAL, P., 2000: *K trestní odpovědnosti právnických osob*. In: *Koncepce nové kodifikace trestního práva hmotného České republiky*. Brno: Masarykova univerzita, pp. 214–215, ŠTEFÁNIK, O., 2008: *Problematika sankcionování právnických osob*. Neckář, J., Radvan, M., Sehnálek, D., Valdhans, J. (eds): *Dny práva – 2008 – Days of Law*, Brno: Masarykova univerzita, pp. 4–5.

27 WELLS, C., 2009: *Corporation and Criminal Liability*, Oxford. 2001, reprinted 2005, p. 31–32, quoted of Fenyk, J.: *Právní následky trestného činu právnické osoby*. In: Kratochvíl, V. a kol.: *Kurz trestního práva. Trestní právo hmotné. Obecná část*. 1. vydání. Praha: C. H. Beck, 2009, p. 727.

28 KRATOCHVÍL, V., 2012: In: Kratochvíl, V. et al.: *Trestní právo hmotné. Obecná část*. 2. vydání. Praha: C. H. Beck, p. 62.

29 Cf. KRATOCHVÍL, V., 2012: In: Kratochvíl, V. et al., *Trestní právo hmotné. Obecná část*. 2. vydání. Praha: C. H. Beck, p. 62.

persons, mainly those in the offender's immediate vicinity, cannot be entirely eliminated, although they are not intentional. When individualizing the punishment, courts should therefore take into account the alleviation of side-effects, which is also provided for by one of the criteria for the imposition of punishments that says that a punishment should reflect the personal, property and other situation of the offender (cf. Section 39, subsection 1 of the Criminal Code). With legal entities, however, punishment is essentially based on the principle of collective responsibility. It thus anticipates the negative impact of a sanction on all persons that make up the legal entity regardless of whether they have some relation to the criminal activity committed by the legal entity or not. It can then affect also persons beyond the legal entity. One can oppose by claiming that the impact of the sanction can be taken into account in the process of the sanction's individualization by the court.³⁰ The possibility of alleviating the negative effects is, however, rather limited because of the types of sanctions available for legal entities. Except for the publication of the judgment, the sanctions imply either some financial penalty (or some other financial impact), or the ban on activities and even the winding-up of the legal entity. The only possibility for some mitigation thus appears to be in the consideration of the amount of the pecuniary penalty.

The *principle of adequacy of the punishment and the protective measure* and the related process of individualization of the punishment are regulated by Section 14 of TOPOZ, which contains criteria for the setting of the type and extent of punishment. The criteria include: the nature and the seriousness of the crime; the situation of the legal person including its previous activities and property relations; whether the activities are performed in the public interest; whether the legal person has a strategic (or hardly replaceable) importance for the national economy, defence or safety; the operation of the legal entity after the offence – particularly its potential efforts to effectively replace the damage caused or remove the harmful results of the act; and the effects and consequences that the punishment may be expected to have for the future operation of the legal entity.

Two basic criteria need to be followed when imposing a *protective measure*: the nature and the seriousness of the crime committed and the situation of the legal entity. That means the protective measure cannot be imposed upon the legal entity unless it is reasonable with respect to the nature and seriousness of the crime committed and its company's situation.

Another criterion applied in *both types of criminal sanctions* are the consequences they can have with respect to third parties. The decision on the punishment should take into consideration the interests, protected by law, of the persons injured and the legal entity's creditors whose claims against the criminally liable legal entity are incurred in good faith and do not originate in (or are related to) the criminal offence of the legal entity.

In connection with the discussion of the personality of the punishment, such criteria as above can provide a certain limitation to the negative impact of criminal sanctions both on those who form a part of the legal entity and on third persons. However, as stated above, that limitation is, with view to the nature of most of the sanctions, only of marginal importance.

The phrase 'nature and seriousness of a criminal offence' is not defined in TOPOZ. For that purpose, the delimitation contained in Section 39, subsection 2 of the Criminal Code shall partially apply to meet the sense of Section 1, subsection 2 of TOPOZ. However, because of the nature of the matter, some criteria will not be used, such as the extent of the offender's fault, motive, intention and goal, i.e. the elements of the subjective part of a criminal offence. The person of the offender will have a limited application, e.g. as regards repeated offences. It is questionable whether the imposition of the punishment can reasonably apply also provisions on mitigating and aggravating circumstances. When regulating the principle of reasonableness and the criteria of judicial individualization, Section 14, subsection 1 of TOPOZ neither mentions such circumstances explicitly nor refers to the Criminal Code. Moreover, it can be inferred from the diction of the provision that the list of criteria is taxative rather than demonstrative. However, it may be stated – in connection with the discussion above on the application of the Criminal Code – that there is some space available for the application of the general legal regulation of the Criminal Code in the sense of Section 1, subsection 2 of TOPOZ. There will be the possibility to apply to legal entities most of the mitigating and aggravating circumstances, e.g. the amount of damage, the amount of benefit, the commission of multiple offences, repeated offences, etc. Some circumstances, such as the leading of proper life, will apply reasonably. In spite of that, the notion of 'nature and seriousness of a criminal offence', as well as the system of mitigating and aggravating circumstances, should be defined directly in TOPOZ because of the possible vagueness and the different nature of criminal offences committed by legal and natural persons.

30 For the issue of the protection of third party rights, see KOCINA, J., 2008: Trestní odpovědnost právnických osob a práva třetích osob. In: Neckář, J., Radvan, M., Sehnálek, D., Valdhans, J. (eds): Dny práva – 2008 – Days of Law, Brno: Masarykova univerzita.

IV CONCLUSION

Corporate criminal liability remains a controversial issue, despite the increasing number of countries introducing it into their legal systems in its genuine or non-genuine forms.³¹ Regardless of this fact, legal entities have been criminally liable in the Czech Republic since 1 January 2012. The legal regulation and its gradual implementation will certainly not be free of any problems. The question is how legal practice will deal with the problems in the application of this innovation. Corporate criminal liability also brings a new dimension to the activities of the legal entities themselves.

The sanctioning system applied to legal persons may be considered as essentially acceptable and corresponding to the standards found in other European countries. It would also be useful

to consider the introduction of some form of supervision over the activities of legal entities, as is the case in France. This form of punishment could be a suitable supplement to, for instance, pecuniary punishment.³² One could also consider the introduction of a conditional ban on further activities, which would eliminate the negative impact of this punishment and also work positively as a form of prevention and motivation, reflecting the principle of personality of punishments. According to intended law, it would also be useful to “tune up” the prerequisites for the imposition of the individual types of punishment so that it is entirely clear when the general legal regulation contained in the Criminal Code should be used. The same holds for the adequacy principle, the criteria and the imposition of sanctions.

SUMMARY

The role of legal entities changed significantly on 1 January 2012, when a new law came into effect – the Act No. 418/2011 Coll. on the Criminal Liability of Legal Entities and on Proceedings against Them (abbreviated as “TOPOZ”). The Czech Republic decided to adopt genuine criminal liability – a model that constitutes a major interference (or even a breakthrough) into principles traditionally present in continental criminal law, both on the level of fault (the principles of individual and subjective liability) and on the level of punishment. The system of sanctions for legal entities is based on the dualism of criminal sanctions. That means that two types of criminal sanctions are distinguished: punishments and protective measures. The core of the sanctioning system of legal entities consists of the punishment understood as a reaction to some criminal offence committed by a legal person. The enumeration of punishments is listed in Section 15, subsection 1 of TOPOZ. The most important sanction for legal entities is undoubtedly pecuniary punishment. The sanctioning of legal persons by means of pecuniary punishment (a fine) is principally required by EU Framework Decisions as well as EC Directives. As regards the principles of sanctioning, TOPOZ expressly regulates only the principle of adequacy of the punishment and the protective measure (Section 14 of TOPOZ). This means that the punishment can be modified – as opposed to the general regulation contained in the Criminal Code – to suit the specific nature of the legal person. However, other principles set by the Criminal Code or established in criminal law practice need to be respected as well, although some of them need to be modified in order to take into account the specific character of the legal person committing an offence – the principle of legality, subsidiarity of criminal repression, principle of purposefulness. Corporate criminal liability remains a controversial issue. The legal regulation and its gradual implementation will certainly not be free of any problems. The question is how legal practice will deal with the problems in the application of this innovation.

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- 31 In: Jelínek's view, this is one of the most contested issues in criminal law theory. Cf. JELÍNEK, J., 2007: Trestní odpovědnost právnických osob. Linde Praha, a. s., p. 7. See also Jelínek, J., Herzceg, J.: *Zákon o trestní odpovědnosti právnických osob, Komentář s judikaturou*. 2. vydání. Praha: Leges. 2013, p. 12.
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