

SELECTED ASPECTS OF CRIMINAL LIABILITY OF LEGAL PERSONS

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Abstract

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This paper will address issues of corporate criminal liability in terms of enterprises. Criminal liability of legal persons is now a major problem that must deal the enterprises with. The contribution points out the major issues associated with this topic when the legal person may be held criminally responsible and how we can prevent such criminal liability. This issue arises with several questions that need to be pointed out. For example, what are the conditions of the criminal liability of the enterprises, which criminal offenses can be committed, or is it possible to prevent such criminal responsibility, etc. These issues will be the subject of discussion and contribution to current findings. The issue is very new; we have the new act on criminal liability of legal persons effective from 1st January 2012, so the author hopes this paper brings some new solutions and possible matters for discussions.

criminal liability, legal persons, crimes, imputability of enterprises, preventive measures

1 INTRODUCTION

The issue of criminal liability of legal entities is a hotly debated topic not only in the Czech Republic but also in other countries. The issue is highly controversial because it marks a retreat from the concept of individual criminal liability. It erodes the principle – acknowledged in European continental law for centuries – that criminal liability constitutes the individual liability of specific natural persons. It was only with the appearance of modern legal entities that a new issue needed to be addressed, namely whether legal entities should be directly subject to criminal liability. This idea was strictly refused by the German legal theorist Malblanc in

the 18th century on the premises that legal entities may not be assigned culpability and are incapable of accepting the effects of sanctions.¹ Malblanc's ideas, which were later accepted in the whole of continental Europe, served as the basis for all of the large codifications of criminal law in the 19th century. The crucial dogma at that time became the Roman principle of “societas delinquere non potest”, i.e. companies (legal persons, corporations) cannot act unlawfully.² This principle was considered as one of the fundamental values of European legal culture.

However, since the mid-1950s, that dogma started to be replaced with a pragmatic principle common in countries with the Anglo-American legal system.³

- 1 Janda, P.: *Trestní odpovědnost právnických osob*. [Criminal liability of legal entities] Právní fórum, Vol. 2006, č. 5, p. 168 and subsequent pages.
- 2 Compare Leigh, L. H. *The Criminal Liability of Corporations and Other Groups: A Comparative View*. 80 Mich. L. Rev. 1508 1981–1982, HeinOnline (<http://heinonline.org>) cited 28. 3. 2013.
- 3 A lot of articles were Published in the States. Compare for example Buell, Samuel W., *The Blaming Function of Entity Criminal Liability*. Indiana Law Journal, Vol. 81, p. 473, 2006; U of Texas Law, Public Law Research Paper No. 95; Washington U. School of Law Working Paper No. 06-04-01. Available at SSRN: <http://ssrn.com/abstract=897790>, cited 28. 3. 2013. Hefendhel, R. *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*. 4 Buff. Crim. L. Rev. 283 2000–2001, HeinOnline (<http://heinonline.org>) cited 28. 3. 2013.

As a consequence, genuine criminal liability started to be introduced in many continental law countries, mainly because they were witnessing the exponential rise in crime rate, particularly in the areas of economic and property crime.⁴

The Czech Republic introduced the so-called genuine criminal liability as well.⁵ Under the Act No. 418/2011 Coll. on Criminal Liability of Legal Entities and on Proceedings against Them, as subsequently amended (referred to as ACLLE below), in effect from 1 January 2012, legal entities may also be subject to criminal prosecution – a situation that had previously been quite unthinkable. The present paper aims to answer the following questions: What is the current situation concerning criminal liability in the Czech Republic? What must legal entities be aware of in this area? And how can legal entities exonerate themselves, if at all?

2 THE RIGHT TO ENGAGE IN COMMERCIAL AND ECONOMIC ACTIVITY

The right to engage in commercial and economic activity is one of the fundamental economic rights guaranteed under Article 26, section 1 of the Charter of Fundamental Rights and Freedoms.⁶

Because the right was directly implemented into constitutional regulations, every person is entitled to a full and undisturbed exercise of this right, as long as the statutory conditions are met. In democratic societies, we can find many legal regulations and other instruments that provide for some penalty, i.e. punishment, in case of violations of various norms.

Why do legal entities commit criminal activities? The answer is relatively straightforward. The provision of Section 2, subsection 1 of the Act No. 513/1991 Coll., the Commercial Code, as subsequently amended, provides that:

“Business activity is understood to be systematic activity which is independently carried out for the purpose of making a profit by an entrepreneur in his own name, and at his own liability”. When that statement is applied to legal entities, then it may be stated that the most frequent impetus for forming legal entities is some entrepreneurial intention. That, however, does not hold for non-profit legal entities.⁷ It cannot be adduced that legal entities are formed solely for the purpose of generating profits because they can be established also for non-profit purposes – e.g. scientific, artistic, or public benefit purposes.⁸ Legal entities usually strive to generate profit and thus achieve their own economic aims. They also try to obtain a better economic position, bringing financial means to their members (founders, etc.) or improving the economic position in natura.

The commission of criminal activities by legal persons is thus motivated mainly by their attempt to achieve maximum profits. Corporations have ideal conditions for achieving success in their entrepreneurial activities. Corporations can do that much faster than natural persons because they can rely on their material resources, employees, etc. The employees can perform criminal activities of their own accord or act under the duress of their superiors by having to fulfil their instructions. Before the ACLLE came into effect, penalties could

4 Jelínek, J., 2007: *Trestní odpovědnost právnických osob jako předmět zkoumání*. [Criminal liability of legal entities as a field of research] Praha: Ministerstvo vnitra ČR. (<http://www.mvcr.cz/clanek/trestni-odpovednost-pravnickych-osob-jako-predmet-zkoumani.aspx> cited 3. 3. 2013).

5 Legal theory distinguishes between various types of criminal liability, such as genuine, non-genuine, hybrid, administrative, etc. Since there is no uniform regulation or explanation of what those terms designate, one can come across different interpretations of the terms in various legal systems.

Genuine criminal liability of legal persons concerns those situations when criminal liability is regulated in the Criminal Code or some other special law regulating criminal liability of legal entities. In this case, standard criminal prosecution is started against a legal entity, resulting in the imposition of sanctions that can be called punishments.

Non-genuine criminal liability of legal persons concerns those situations when criminal liability of legal entities is not explicitly regulated – neither in the Criminal Code nor in any other special act on criminal liability of legal entities. However, legal entities are, under certain circumstances, subject to sanctions under criminal law. Such sanctions will be referred to differently than punishments – e.g., as consequences. For more details, see, for instance Jelínek, J., 2007: *Trestní odpovědnost právnických osob jako předmět zkoumání*. Praha: Ministerstvo vnitra ČR. pp. 13–14. (<http://www.mvcr.cz/clanek/trestni-odpovednost-pravnickych-osob-jako-predmet-zkoumani.aspx> cited 3. 3. 2013)

Hybrid liability of legal persons concerns those situations when liability under administrative law and liability under criminal law are combined. While the substantive aspects are regulated under administrative law, the procedural aspects are dealt with in the regime of criminal law. This concerns administrative infractions that are decided by courts. Administrative liability of legal entities is based on situations regulated under the systems of administrative law valid in individual countries. This regulates, above all, the position of legal entities in the proceedings and formulates new qualified facts of administrative infractions. This is related to the necessity of creating special procedural legal regulations with many institutes of criminal procedure. Pavelka, I. *Opravdu nelze účinně řešit postih právnických osob za jednání, jež u fyzických osob zakládá jejich trestněprávní odpovědnost, prostředky správního práva?* Právní rozhledy 2011. No. 3. 90–91 pp.

6 Act No. 2/1993 Coll., on the declaration of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as subsequently amended.

7 Hurdík, J., 2009. *Právníké osoby a jejich typologie*. 2. edition. Praha: C. H. Beck, 67 pp. ISBN 978-80-7400-1680.

8 Commentary to Section 18 of the Civil Code – ASPI – accessed on 22. 2. 2013.

be issued only under administrative law and such procedure appeared not to be effective. The contrast between the possible sanction that the company could suffer for its violation of law and the fast and high returns from the company's illegal activities would always give the evident outcome: the benefit from committing criminal activities prevailed over the fear of possible detection. The adoption of ACLLE can thus certainly contribute to an increase in general prevention.

3 SPECIAL LAW ON CRIMINAL LIABILITY OF ENTERPRISES

ACLEL is considered as a special law to the Criminal Code and the Code of Criminal Procedure. It regulates only the specific issues of criminal liability of legal persons and the proceedings led against them. General issues are governed by general legal regulations, unless the nature of the matter excludes their application. However, this has resulted in the exclusion of objective liability of legal entities irrespective of fault, as the concept is known from the provisions of administrative law.⁹

The applicable criminal offences are limited as far as legal persons are concerned. Section 7 of ACLLE provides for not only property and economic crimes but also those that concern the activities of organized groups and whose prosecution is enforced by various international obligations within the EU and the Council of Europe.¹⁰

On its own initiative, the Czech Republic also added the criminal liability of legal entities for **tax-related criminal offences**. This was meant by legislators to help to achieve the proper performance of tax duties. It is expected that the linking of the tax and criminal proceedings will result in a greater efficiency by removing the harmful effects of one's failure to pay or failure to inform of the tax duty on the part of legal entities.¹¹

The conception of criminal liability of legal entities is provided for in Sections 7 to 13 of the ACLLE, where it is dealt with independently of criminal liability of natural persons. This may result in the situation that legal and natural persons are prosecuted at the same time¹², even though it is not impossible that a criminal sanction may be imposed

on legal persons only. That will be the case when some secondary or tertiary party cannot be found guilty, although such a party is suspected of the crime committed.

The argument that was used to support the introduction of criminal liability of legal entities revolved around the insufficient level of individual criminal liability of natural persons in case of complex corporate structures, mainly when collective decision-making was involved. Non-transparent property and competence relations inside corporations led to the impossibility of proving the responsibility of particular individuals for the specific faults. Legal theory sometimes describes this as "an organized lack of liability".¹³ A situation may also arise when the liability of a legal entity is given priority over the liability of a specific natural person in the interest of cost-effectiveness and speed of proceedings.¹⁴

Section 8, subsection 2 of the ACLLE introduced **the principle of attribution**. This has led to the refusal of the objective liability of natural persons for criminal offences known from administrative law. It is based on the theory of the fiction of legal entities, under which legal persons are different from natural persons and are created artificially for some particular reason.

The subject of a criminal offence may be a legal person. It is **the primary subject** when the act of the natural person is attributed to the legal person. It is **the secondary subject** when, under Section 8, subsection 1(a) to (c), the statutory body is authorized to act on behalf of the legal entity. It is **the tertiary subject** in case of an employee, as specified in Section 8, subsection 1(a) to (c), or some other person acting in a similar position when performing employment obligations.

For the **subjective aspect** of a criminal offence to be met, there must be some form of **fault** present. However, legal persons themselves cannot be at fault. This aspect thus has to be assessed indirectly through the natural person, both as regards its intention and negligence.

The criminal liability of legal persons also depends on a set of objective conditions, both omissive and commissive. The former involve, for instance, the situation when the representatives of

9 Forejt, P. a kol., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim s komentářem*. Praha: Linde, ISBN 978-80-7201-875-8, 15 pp.

10 The criminal offences of participation in a criminal conspiracy, terrorism, people trafficking, sexual abuse of children and child pornography, illicit trade in intoxicating and psychotropic substances, illicit trade in arms, ammunition and explosives, corruption, legalization of the proceeds of crime, money forgery and counterfeiting, computer crime, environmental crime, etc. are excluded from the condition of the mutual recognition of criminal nature in case of the European Arrest Warrant on the basis of an agreement between countries. It is thus obvious that they are also included in ACLLE.

11 Explanatory note to the bill on the criminal liability of legal persons and proceedings led against them. Chamber print No.285/0, part 1/2. source: <http://www.psp.cz/sqw/text/text2.sqw?idd=69428>.

12 This derives from the principle of a parallel relation of liability. For more details, see Forejt, P. a kol. 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim s komentářem*. Praha: Linde, ISBN 978-80-7201-875-8. 93 pp.

13 Musil, J. et al., 2001: *Úvahy o trestní odpovědnosti právnických osob de lege ferenda*. Trestní právo, 2001, No. 3, 11 pp.

14 Vidrna, J., 2012: *Dvě poznámky k trestní odpovědnosti právnických osob*. Bulletin advokacie Vol. 2012, No. 10. 35 pp.

a legal person fail to carry out some measure, while the latter includes decisions approved upon order.

Where an offence is committed by an employee, ACLLE makes it possible for the employee to exonerate himself from criminal liability when it is proved that the legal entity performed some measure that can be justly expected and as long as it was impossible to prevent the employee's act. That concerns, above all, the adoption by the legal entity of certain control measures aimed at forestalling the commission of criminal activities by its employees and acting properly whenever any breach of employees' duty is found. Let us illustrate the situation by considering the issue of computer crime, which has recently experienced a substantial rise. Some very disconcerting information has emerged from a recent survey focusing on computer crime (the survey was carried out by the PwC company under the title of **Worldwide Survey of Economic Crime 2011**).¹⁵ The survey says: "71 per cent of respondents stated that their companies have **their own means for the prevention and detection of computer crime and half of them** believe that they are able to launch successful internal investigations into computer crime. Those skills are seen to reside in their IT departments, which are, however, simultaneously seen as the biggest internal threat as regards computer crime. It is therefore very worrying that 69 per cent of Czech companies either **do not cooperate with any specialists in the field of forensic technologies or do not know about the possibility of such cooperation.**" It was also found that **"only 20 per cent of Czech corporations make reassessments of the risks of computer crime more often than once a year.** Despite the fact that corporations in Central and Eastern Europe and elsewhere in the world have comparable results, that frequency need not be sufficient for keeping pace with the development of risks in the area of information technologies." That is most likely to be the case also as far as employee control and control mechanisms on all levels of legal entities are concerned. Frequent control mechanisms are the only way of preventing the threat coming from inside the legal entity. Legal entities must prepare adequate control mechanisms and measures – that way, they can eliminate criminal liability when their employees act unlawfully.

To sum up briefly, a legal entity may exonerate itself from criminal liability for criminal activity committed by its employees as long as it carries out two primary measures: (1) it provides training for employees and (2) creates an internal system of control. All employees must know that they have to communicate with each other. All persons

must be trained so that they know what their tasks and duties within the corporation are. Whenever some employee acts beyond his powers, suitable checks and sanctions for such transgressions must be provided for. In this way, preventive regulation will be formed among employees. Some positive experience from other countries shows that it is ideal if the company management gets involved in the system: it must know as much as possible about how the company is running. The management should not merely see to the company's financial means and good name; it must also monitor the operation of the internal measures, make sure that the measures are sufficient and seek their changes, where necessary. As the above-mentioned survey into economic computer crime indicates, internal and external risks must be assessed and adequate preventive measures must be created – that is the only way in which the potential risks of criminal liability may be reduced.¹⁶

Section 10 of the ACLLE introduces the legal **institute of the passage of criminal liability**, which is not recognized by the Czech legal system in the case of natural persons. This is one of the fundamental principles forming the base of the entire ACLLE. The moment of the passage of criminal liability is connected with the effective time of legal succession. Since transformations (e.g. splits) of business corporations need not lead to the termination of existence of the original legal entity, it is provided that criminal liability applies not only to the legal successor but also to the original legal entity. The provision is intended to prevent the evasion of punishments of the original legal entity.¹⁷ This fact must be taken into account during mergers, etc. Nevertheless, it may be expected that the new feature will probably cause many practical problems.

This will involve, above all, the duty of investigating, prosecuting and adjudicating bodies to establish whether the legal person to which some property was assigned goes on committing criminal activities even after the transformation, or what amount of the proceeds from criminal activities was assigned to the entity. The court must take into account the extent of the proceeds passed and whether some of the subjects continue the criminal activity after the termination of the original corporation. As regards companies, they will need to establish the legality of their profits and check the good name of the company they intend to merge with or be involved with through transformation. Otherwise, the companies could be deprived of their lawfully acquired assets or be banned from performing their activities. That is the result of the

15 http://www.pwc.com/cz/en/hospodarska-kriminalita/assets/Crime_survey_CR_czech_ele.pdf accessed on 25.2.2013

16 For more details, see Fenýk, J. Smejkal, L., 2012: *Zákon o trestní odpovědnosti právnických osob a řízení proti nim. Komentář*. Praha: Wolters Kluwer ČR, ISBN 978-80-7357-720-9, pp. 146–154.

17 Explanatory note to the bill on the criminal liability of legal persons and proceedings held against them. Chamber print No.285/0, part 1/2. source: Source: <http://www.psp.cz/sqw/text/text2.sqw?idd=69428>.

application of Section 10 of the ACLLE: even if a company does not commit any criminal activity after its transformation, it could still be criminally liable because it acquired its assets from criminal activities – regardless of whether it was involved in committing them or not.

4 CONCLUSION

What can be recommended by way of concluding? Where a company and its statutory bodies do not

commit any criminal activities, the company must make sufficient measures to prevent its employees from committing any activities for which the company could be held criminally liable under Section 8 of ACLLE. In cases of company transformations, when a company is assigned some assets, it must establish the legal origin of such resources. In the contrary situation, the company could be held criminally liable because ACLLE operates with the so-called principle of attribution of legal entities.

SUMMARY

This paper addresses issues of corporate criminal liability in terms of enterprises. Criminal liability of legal persons is now a major problem that must deal the enterprises with. The contribution points out the major issues associated with this topic when the legal person may be held criminally responsible and how we can prevent such criminal liability. This paper points out the conditions of the criminal liability of the enterprises, which criminal offenses can be committed by the enterprises, how is it possible to prevent such criminal responsibility, etc. To sum up briefly, a legal entity may exonerate itself from criminal liability for criminal activity committed by its employees as long as it carries out two primary measures: (1) it provides training for employees and (2) creates an internal system of control. Some positive experience from other countries shows that it is ideal if the company management gets involved in the system: it must know as much as possible about how the company is running. The management should not merely see to the company's financial means and good name; it must also monitor the operation of the internal measures, make sure that the measures are sufficient and seek their changes, where necessary.

Where a company and its statutory bodies do not commit any criminal activities, the company must make sufficient measures to prevent its employees from committing any activities for which the company could be held criminally liable. In cases of company transformations, when a company is assigned some assets, it must establish the legal origin of such resources. In the contrary situation, the company could be held criminally liable because the special law operates with the so-called principle of attribution of legal entities.

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