

JAROSLAV KLÁTIK

PUNISHING OF LEGAL ENTITIES UNDER THE SLOVAK CRIMINAL LAW

Abstract:

Relatively wide-ranging debate about implementing the introduction of criminal liability of legal persons in Slovak, but also in Czech legal system has been going on since the end of the year 1990, and however this discussion does not stop, which is benefit to criminal jurisprudence. Author in his article interprets this aspect positively and assesses that it is important above all to look for leading arguments and needs of application praxis that would require implementation of criminal liability of legal persons. It characterizes possible accordance of individual criminal responsibility with criminal liability of legal persons. In article author drafted also possible worries of its implementation, mostly if it deals with criminalization of business environment within competitive fight and security of third persons.

Keywords:

individual criminal responsibility, criminal responsibility of legal persons, collective responsibility, identification theory, statutory penalty, sanction, inflictionnuisance fine, administrative liability, organizational fault

Introduction

The theory of criminal law has been concerned with an issue of criminal liability basically since the origin of its existence – as it is associated with one of the basic philosophical questions whether a man's decision to act or refrain from acting, or act in a certain way is determined by something or not.¹⁾ Currently, criminal liability of legal entities is in conditions of both the Slovak criminal law and the Czech criminal law one of the most frequently discussed topics. There are arguments why the criminal liability of legal entities should not be regulated by our legal code and about the same number of arguments which are in favour of introduction of the criminal liability of legal entities whether it is in the form of a true or false criminal liability.

1 Criminal liability of legal entities

Criminal legislation is currently based on the principle of an individual criminal liability. Criminal liability of legal entities would mean breaking of one of the determining principles of the criminal law which is a principle of an individual criminal liability of a natural person – perpetrator of a criminal

¹⁾ MADLIAK, J.: Právnická osoba – subjekt trestného činu v návrhu rekodifikovaného trestného zákona. [Legal person - subject to a criminal act in the proposal of recodified Criminal Code]. *Bulletin slovenskej advokácie*, Vol. XI, No. 1, 2005, p. 15.

offence for fault. However, from the dogmatic and legal standpoint it concerns an issue which is perceived sceptically by part of professional public referring to the fact that our criminal law stands historically on the principle of a thorough application of individual liability for fault, therefore excludes collective liability. Provision of section 19 paragraphs 1 and 2 of Act No. 300/2005 Coll. as amended (hereinafter referred to as „Criminal Code - CC“) refuses to recognise a legal entity as a subject of a criminal act since an offender may only be a person who committed an offence himself or herself, therefore it only could be a natural person. However, paragraph 2 of this provision fails, from the point of terminological interpretation, to be of obligatory nature and from the point of exact determination of individual liability it would be reasonable to modify such provision with supplementing the expression „ ... only a natural person“, i.e., as follows: „*Perpetrator of an offence may only be a natural person*“, since provision formulated in this way would provide no other option of consideration. Eventual introduction of such criminal liability would also be in conflict with the principle of punishment personality according to which the only affected person should be the perpetrator of an offence.²⁾ Therefore, introduction of criminal liability of legal entities is in my opinion not admissible related to the principle of individual liability for fault, especially due to the impossibility of a legal entity to have delictual capacity, i.e. capacity to bear consequences for one's own unlawful acting and also due to the fault as a sign of a subjective quality of an offence. Fault is then internal psychical relation of an offender to objective signs of an offence; it concerns a sign related to the psychics of an offender. Therefore, legal entities are not persons with mental and volitive basis. Basic tendency of introduction of such liability is to avoid the state that no one shall be affected if the offender fails to be affected since it is not possible to ascertain him/her due to complex managerial structures of business companies. Reality of a current social life causes greater range of socially harmful consequences originating in the sphere of competence of legal entities. In this was the criminal liability of legal entities is to be the solution of inability or impossibility to identify the perpetrator of an offence committed within a legal entity. It may happen in practice that offenders within a legal entity use certain methods how to avoid constituting criminal offences. However, from the point of branches of private law it is very unlikely since the legal code of the Slovak republic clearly distinguishes who may act on behalf of a legal entity, who may sign contracts or make obligatory decisions. To hide behind the fact that a certain decision was adopted by a general meeting and an executive only fulfilled the decision is irrelevant since this code explicitly determines the rules and com-

²⁾ ČENTĚŠ, J. – PRIKRYL, O.: *Úvahy o trestnej zodpovednosti právnických osôb v Trestnom zákone*. [Contemplations over the criminal responsibility of legal persons in the Criminal Code]. In.: *Dny práva – 2008 – Days of Law*. 2. ročník mezinárodnej konferencie pořadanej Právnickou fakultou Masarykovy univerzity. Brno: Masarykova univerzita, 2008, p. 1689 – 1698.

petencies. This was also an argument of the proposal of the Ministry of Justice of the Slovak Republic in April 2008 regarding the amendment of the Criminal Act which counted on so called false criminal liability and two protective measures. Imposition of protective measures would be proposed by a prosecutor through a motion for its imposition filed with a criminal court. Prosecutor's motion would not be conditioned by any relation to criminal prosecution of natural persons, so it would be filed upon the moment if the result of investigation was the finding that executives were negligent of supervision and control and due to this negligence an offence was committed by persons subordinate to the legal entity or that the executives committed an offence. In such case the liability need not be conditioned by ascertainment of liability of a particular natural person. Of course, that would only be a plaster on the mentioned international obligations. After all, each legal entity is owned by natural persons. Imposition of e.g. pecuniary punishment on legal entity which was proposed by previous proposals would finally affect its owners – shareholders or partners regarding the fact that by covering financial penalty there comes the decrease in company property and therefore such punishment may relate also to innocent persons in relation to the offence in question. Similarly sanctioned would be other persons directly connected with the affected legal entity, i.e. their employees who had nothing to do with commission of an offence but also for instance creditors by the fact that due to the covering of a pecuniary punishment may be endangered solvency of a company to pay its obligations towards employees and creditors and by that also endangered may be the existence of a business company. In addition, pecuniary punishments proceeds would not be intended for the injured but would represent a state budgeted income.

2 Approaches in establishing of criminal liability of legal entities

From a historical point of view two different approaches may be observed related to the introduction of criminal liability of legal entities. In Anglo-Saxon legal tradition so called identification theory is being used for theoretical justification of fault of legal persons under criminal law. According to this theory, certain carriers of decisions within the legal entity may from the legal standpoint be considered identical with this legal entity. The legal entity is then liable for unlawful action of their workers, if this action falls within the scope of such legal entity. A number of supporters of introduction of criminal liability of legal entities for instance in Germany justify the need of such legislative change by the fact that a legal entity is able to act even in a figurative sense. It is so called derived ability to act since a company representative acts on its behalf. Out of it a conclusion is reached that if a legal entity is able to act, they may violate their duties for which this person must be hold responsible. So this person is able of guilt while it does not concern the guilt in an ordinary sense but it is so called organisational guilt that has no psychological content. According to German theoreticians a subjective part of an offence of a legal person is constituted by

so called “guilt of an enterprise management”, which the guilt content is an erroneous handling of so called risk management, i.e. erroneous management of the risk resulting from the enterprise operation which leads to social defects.³⁾ Talking about Anglo-Saxon apprehension, it presupposes that if so far a legal entity could act with impunity, in future the acting of a legal entity should be also punishable which should enable e.g. prohibition of corruptive acting in public tenders. Therefore, it will be a significant breakthrough into the current theoretical concept of liability for fault. Penalties, which should be of economic nature, aimed against legal entities should predominantly lead to more effective protection of significant social interests. This should be reached by a threat and performance of criminal penalties which will be able to have an impact on conduct of legal entities in a desired way. It should be a kind of warning for executives, directors or other responsible staff so that they would within their capacity influence operation of the company in a correct way. Accumulation of both the individual and collective liability is being justified by an intention to increase regulative effect of the criminal law.⁴⁾ Regulative effect is predominantly determined by administrative-legal liability which is on the contrary ineffective according to other opinions. However, administrative law in our conditions reacts sufficiently to anti-social activities of legal entities and contains special facts of a case of so called administrative delicts which may also be committed by legal entities. Penalties for such delicts are most frequently financial penalties, often very high and exceeding the amount of pecuniary punishments under the Criminal Act. It is a generally known fact that on the European continent there has recently been enforced liability of legal entities especially in the area of administrative law.

3 Legal regulation *de lege lata* in Slovakia

Act No. 224/2010 Coll., which amends and supplements Act No. 300/2005 Coll. the Criminal Act in the wording of later regulations and on amendment and supplement of certain laws in effect as of 1 September 2010 set forth was the applicability of the Criminal Act to impose protective measures. Such more exact determination of applicability of the Criminal Act was requested by implementation of new protective measures and conditions of their imposition on legal entities or application of the Criminal Act upon their imposition. Protective measure under the Criminal Act may be imposed if this protective measure is followed in judging criminality of an act in relation to which the protective measure is to be imposed (section 7(a) para 1 of the CC). Such protective measures are related to their abuse for commission of criminal activity by natural persons. Conception of sanctioning of legal persons in criminal

³⁾ ČENTĚŠ, J. – PALKOVIČ, J. – ŠTOFFOVÁ, Z.: Trestná zodpovednosť právnických osôb. [Criminal responsibility of legal persons]. *Justičná revue*, Vol. 53, No. 4, 2001, p. 422 – 423.

⁴⁾ SEGEŠ, I.: Konceptia trestnej zodpovednosti právnických osôb v slovenskom trestnom práve. [The concept of legal responsibility of legal persons in Slovakia's criminal law]. *Právny obzor*: Vol. 85, No. 4, 2002, p. 327.

proceedings results in defining of possible penalties from the character of the protective measure, i.e. a certain permitted loss allowed by statute, in this case the loss related to property, in order of protecting the society against criminal acts or acts criminal otherwise. Competence to impose protective measures is predominantly specified by applicability of the Criminal Act for imposition of confiscation of a pecuniary sum under section 83(a) of the CC and confiscation of property under section 83(a) of the CC of legal persons which were misused for commission of a particular criminal offence. Confiscation of a pecuniary sum is facultative while if the conditions under section 83(b) of the CC are met the court shall impose protective measure of property confiscation obligatorily while in this case a bankruptcy proceedings is declared within the execution of the decision even without the motion under the Bankruptcy and Restructuralisation Act No. 7/2005 Coll. as amended. Confiscated property becomes the property of the state within the range that belongs to the legal entity after the closing of the bankruptcy proceedings. Purpose of this regulation is not to affect third persons – creditors of the legal persons that failed to participate in commission of criminal activity including their employees. Protective measure of confiscation of a pecuniary sum is a state's claim from such confiscation which is being settled or recovered by the procedure stipulated by the Criminal Code. Imposition of protective measure is bound to the activities related to the legal person set forth in section 83(a) para 1 of the CC and section 83(b) para 1 of the CC which this relation is bound to the commission of a criminal act also in the state of attempt and on all form of accomplicity. In criminal proceedings the motion to impose protective measure by the prosecutor may be filed separately or as part of the complaint if this is being filed related to a particular person charged. Imposition of protective measure under 83(a) of the CC and section 83 (b) of the CC is therefore not bound to sentencing of a natural person for the commission of a criminal act, however, such penalties may not be imposed alongside. Also on this basis, protective measure may also be imposed if the perpetrator of an act criminal otherwise is not criminally responsible or if it concerns a person who may not be prosecuted or sentenced (section 7(a) para 2 of the CC). That means that even if a person has both the substantive and procedural exemption or the wrongdoer is adjudged insane based on the medical examination (§ 23 TZ), this has not impact on imposition of the protective measure.

Statutory conditions for imposition of protective measures:

- a) in section 83(a) para 1 and section 83(b) para 1 the defined are positive (basic) conditions when a protective measure may be imposed on a legal entity. It concerns a positive formulation of implementation of penalties against legal entities for criminal acts of natural persons committed within competencies or subordination related to the legal entity. A significant difference in the construction of both provisions is in the nature of the penalty – confiscation of a pecuniary sum may be imposed by a court

(facultative imposition), property confiscation a court imposes (obligatory imposition), if statutory conditions shall arise,

- b) in section 83(a) para 2 and section 83(b) para 2 the defined are negative conditions of imposition of both protective measures. That means that determined are legal entities on which the proposed protective measures may not be imposed (it concerns legal entities enjoying so called bankruptcy immunity (section 2 of Act No. 7/2005 Coll.) and on the other hand, the determined is impossibility to impose protective measures depending on the property nature, the property that would be affected by this decision – the property of a state, European Union, bodies of a foreign country or international organisation of public law.

The reason for implementation of protective measures into the Slovak legislation is provided in the explanatory report to Act No. 224/2010 Coll., by which amended and supplemented is Act No. 300/2005 Coll., the Criminal Act in the wording of later regulations and on amendment and supplement of certain laws. According to it, the obligation of legal liability of legal entities for criminal acts of natural persons with representative, decision-making and control competencies or in which such natural persons with representative, decision-making and control competencies neglected a due supervision or control against natural persons which committed such criminal acts and subordinate to the legal entity in commission of a criminal act and acting on behalf of this person fails to request introduction of criminal liability of legal entities; however the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005, Council Framework Decision on the application of the principle of mutual recognition to financial penalties of 2005, Council Framework Decision on the application of the principle of mutual recognition to confiscation orders of 2006, all request recognition of decisions of foreign bodies of criminal nature in matters of financial penalties and forfeiture of property against legal entities by the bodies of the Slovak Republic. In one case it concerns foreign decisions issued by contracting states of the Council of Europe Convention on Laundering, in two other cases it concerns foreign decisions issued by member states of the European Union. Regarding such international obligations it was necessary, not only for the Slovak Republic, to introduce execution of such penalties of criminal nature against legal entities and subsequently applicability of the Criminal Act to impose protective measures since by failing to implement it there would arise an unjustified disproportion, from the point of the state law, resting in the fact that the execution of penalties of criminal nature against legal entities could only be done if they were imposed by foreign bodies. A legitimate intention in imposition of protective measures on legal entities for criminal acts of natural persons is a general prevention. However, an absence of will in a legal entity, the free will to break law, prevents the option to construct criminal liability of

legal entities. An issue of criminal liability of legal entities may not be perceived as an isolated matter, only in intentions of the subject of the criminal legislation. Bringing of legal liability against legal entity undoubtedly causes impacts on private law relations of which subject such legal entity is. Since the purpose of such protective measures is society protection against criminal acts or acts criminal otherwise and are associated with property loss on the side of the injured party, presupposed may be secondary demonstrations of such loss also in third persons. Said in other words, cohesion of criminal law and public law legislation predominantly in protective measure of property confiscation (also in the case of the punishment of property forfeiture in natural persons) is more than just apparent. Purpose of the competence to impose protective measures is therefore not to affect third persons – creditors of the legal entity who failed to participate in commission of criminal activity including their employees. Therefore in order to protect rights and by virtue of the right of protected third persons that would normally be in a private law relationship with the legal entity (e.g. creditors) whose property shall be affected by the protective measure it is proposed that logical consequence of imposition of such protective measure would be adjudication of bankruptcy proceedings regarding the property of such legal entity. Respected is the purpose of the bankruptcy proceedings which is generally handling the bankruptcy of creditor and statutory settlement of creditors' claims. Protective measure of property confiscation shall only affect the property of which owner shall be the convict or the legal entity (as participating party) after closing of bankruptcy proceedings. In this case the legislation will prefer primary settlement of the creditors' claims of the affected person and only subsequently the intent of the state to cause property loss to the affected legal entity.⁵⁾

4 Legal entities in Criminal Code

Despite the absence of the true criminal liability of legal entities in the Slovak criminal law, the Criminal Code enables to execute legal consequences against business companies. Pursuant to section 3 para 1 of Act No. 301/2005 Coll. of the Criminal Code as amended (hereinafter also referred to as the „CC“), a legal entity is obliged to provide cooperation with prosecuting and adjudicating bodies and court in fulfilment of their duties related to the criminal proceedings. If a legal entity fails to provide such cooperation on request, prosecuting and adjudicating bodies may impose a procedural fine under section 70 para 1 of the CC. A procedural fine is a traditional way of sanctioning persons who act offensively against a court or prosecuting and adjudicating bodies in criminal proceedings or who fail to obey a notice or issued order.⁶⁾ The procedural fine

⁵⁾ MAŠLANYOVÁ, D. a kol.: *Trestné právo hmotné. Všeobecná a osobitná časť*. [Substantive criminal law. General and special parts]. Plzeň: Aleš Čeněk, 2011, p. 49.

⁶⁾ MINÁRIK, Š. a kol.: *Trestný poriadok. Stručný komentár*. [Criminal Code. Brief comment]. Bratislava: Iura Edition, 2006, p. 229.

may be imposed up to 16 590 €. In the provision of section 50 of the CC the injured is entitled for the compensation for the loss sustained related to property rights of the defendant in a legal entity. If there was a reasonable concern that the settlement of the claim of the injured for the compensation for the loss sustained due to a criminal act would be obstructed or the obstacles will arise, the claim may be secured up to some probable amount of the loss through for instance property rights of the defendant in a legal entity in which the defendant has property interest; through property rights of a legal entity in which the defendant has either property interest or is a statutory body, member of a statutory body, member of another body, proctor, head of organisational part of the enterprise that is registered with the Companies Register or head of an enterprise of a foreign person that is registered with the Companies Register, if on the basis of the ascertained fact there is a sufficiently reasonable conclusion that a criminal act for which the defendant is prosecuted was committed on behalf or in favour of such legal entity; through property rights of a legal entity in which the legal entity has direct or indirect property interest, in which the defendant has either property interest or is a statutory body, member of a statutory body, member of another body, proctor, head of organisational part of the enterprise that is registered with the Companies Register or head of an enterprise of a foreign person that is registered with the Companies Register, if on the basis of the ascertained fact there is a sufficiently reasonable conclusion that a criminal act for which the defendant is prosecuted was committed on behalf or in favour of such legal entity.

Conclusion

believe that criminal liability of legal entities may not be constituted without individual guilt of the offender since from the point of fault any criminal offence of a legal entity would always be only a criminal act of their member or bodies, i.e. individual natural persons. After all, also Karl Friedrich von Savigny in his work the System of Modern Roman Law of 1840 stated his thought that „anything that is considered a criminal offence of a legal entity is always only a criminal offence of their members or bodies, that means individual natural persons...“. In my opinion, the Slovak legal code before its amendment No. 224/2010 Coll. contained sufficiently the penalties against legal entities, especially through the administrative law. Whether it was effective against companies was not a deficiency of a criminal law but of the area of administrative law that was supposed to search for more effective way of imposing penalties. Pro futuro, after two protective measures there may not be excluded also adoption of a certain penalty, e.g. in the form of a punishment of property forfeiture that would become valid after the bankruptcy and composition proceedings if there would be unambiguously proved that the company participated in the commission of taxatively determined criminal offences. Also in this case such penalty should be *ultima ratio*, that means be used as a final stage if the means of other legal branches show absolutely ineffective. In such case it would

be necessary to specify acting of what person or persons would the liability in question be constituted. Under section 15 of the Commercial Code a person authorised to act for an entrepreneur is also anyone who was delegated some activity in the operation of the enterprise. Such person is authorised for all acts that are usually performed in such activity – this category includes also all ordinary employees. Despite this fact there is still a concern whether in potential introduction of such liability there arises a space for criminalisation of entrepreneurial environment and purposeful abuse in the form of filing a report of the commission of a crime as the means of competition fight within which a wide space is open for free consideration of the police or prosecution office. A key problem would also be protection of the right of third persons who in no way participated in criminal activity but are related to the legal entity and each property penalty for acting of persons authorised to act for the company would affect directly such persons. It may happen that a small shareholder of a joint-stock company, but also a member of a limited liability company who failed to lodge a claim in the bankruptcy proceedings in time would be affected by such penalty for the company by inability to assert a claim, by decrease of their shares or even by the total confiscation of the property if a member of statutory or supervisory body or any other employee commits taxatively determined criminal offence in relation to their activity on behalf of the company. Even if there was an action held against legal entities, the punishment finally falls on the natural persons who are the company's owners or employees, so the persons who may not have participated in any way in the commission of the criminal act.