

## ON SELECTED ASPECTS OF CRIMINAL LIABILITY OF LEGAL ENTITIES IN THE LEGAL SYSTEMS OF VARIOUS EUROPEAN COUNTRIES

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**Abstract:** Criminal liability of legal entities has been a modern and topical institution as well as a controversial issue at legal, political and social levels not only in the Czech Republic but also in other European countries. This article briefly describes selected aspects of criminal liability of legal entities – questions of the extent of criminalization and sanctioning of criminal liability of legal entities – and focuses on the regulation of this institution in the legal systems of selected European countries. It also outlines the above-mentioned questions as they are treated in the proposed draft law to regulate criminal liability of legal entities and proceedings against them in the Czech Republic introduced in the Czech Republic in 2011.

**Keywords:** criminal liability of legal entities, sanctioning, scope of criminalization, punishments, protective measures.

### 1 Introduction

Criminal liability of legal entities (or corporate criminal liability), not only in the Czech Republic but also in other European countries creating, adopting and regulating this concept of liability in various forms and modes, has been a modern and up-to-date topic, which appears to be controversial at various levels, particularly in legal, political and social fields. After elections to the Chamber of Deputies of the Parliament of the Czech Republic in 2010, a strong political demand for incorporating criminal liability of legal entities into the Czech legal order within a so-called anti-corruption package can be traced. The Czech legislature is the last within the European Union which has not included the institution of criminal liability of legal entities into the legal order in any form although it is bound to do so by many international treaties and European legislation.

### 2 On the sanctioning of Criminal Liability of Legal Entities

The provision for delictual liability of legal entities to be included in national law is required by dozens of international treaties and laws of the European Union. These documents fail to strictly request that so-called genuine criminal liability be introduced. International treaties generally provide that sanctions applied to legal entities should be effective, proportionate and dissuasive, but they do not explicitly determine that such sanctions should be imposed within criminal proceedings. It should be noted however, that these sanctions in their harshness equal similar sanctions imposed within criminal proceedings; as a result it is sometimes inferred that their imposition may be pursued only at the platform of criminal law.<sup>1</sup> Some international treaties provide for an exemplary list of sanctions. For example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions concluded in Paris on 17 December 1997 and promulgated in the Czech Republic as communication of the Ministry of Foreign Affairs (MFA) No. 25/2000 Sb.m.s., requires in its Art. 3 (3) that the proceeds of crime should be subject to seizure and confiscation. The International Convention for the Suppression of the Financing of Terrorism, adopted by Resolution of the UN General Assembly of 9 December 1999 and promulgated as MFA communication No. 18/2006 Sb.m.s., in its Art. 5 (3) provides a financial penalty as an example of punishment. Art. 8 provides for the obligation of states to adopt rules enabling the seizure and confiscation of funds used and allocated for, and the proceeds from, the commission of offence.<sup>2</sup> The Criminal Law

Convention on Corruption signed in Strasbourg on 27 January 1999 and promulgated by MFA communication No. 70/2002 Sb.m.s., as amended by MFA communication No. 43/2009 Sb.m.s., requires the adoption of financial penalties (Art. 19 (2)) and a possibility for confiscation and other measures regarding the means and proceeds from criminal activities (Art. 19 (3)). Legislation of the European Union provides in various instruments for the sanctioning of legal entities for committing acts against society. These laws stipulate the duty of Member States to adopt necessary measures to impose upon a legal entity effective, proportionate and dissuasive sanctions, and to provide an exemplary list of such acts. For example, Second Protocol to the EU Convention on the protection of the European Communities' financial interests of 19 June 1997 provides for criminal punishments and other financial sanctions and measures, which must be effective, proportionate and dissuasive (Art. 4). Alternative financial sanctions may include exclusion from entitlement to public benefits or aid, permanent or temporary disqualification from the practice of commercial activities, placement under judicial supervision, judicial winding-up order, seizure and removal of instruments and proceeds of an offence, or confiscation of property the value of which corresponds to such proceeds. The Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), in Art. 5, stipulates the sanctions as follows: *Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 4 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:*

- (a) exclusion from entitlement to public benefits or aid, or
- (b) temporary or permanent disqualification from the practice of commercial activities, or
- (c) placing under judicial supervision, or
- (d) a judicial winding-up order, or
- (e) temporary or permanent closure of establishments which have been used for committing the offence.<sup>3</sup>

The Recommendation of the Committee of Ministers of EC No. 88 (18) of 20 October 1988<sup>4</sup> should be mentioned in this context as it provides for an extensive list of sanctions to be considered by Member States against enterprises; special attention is drawn to the prevention of further commission of crimes. The Recommendation includes the following sanctions and measures:

- warning, reprimand, recognisance;
- a decision declaratory of responsibility, but no sanction;
- fine or other pecuniary sanction;
- confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;
- prohibition of certain activities, in particular exclusion from doing business with public authorities;
- exclusion from fiscal advantages and subsidies;
- prohibition upon advertising goods or services;
- annulment of licences;
- removal of managers;
- appointment of a provisional caretaker management by the judicial authority;
- closure of the enterprise;

<sup>3</sup> Lists of similar types of sanctions are contained in other Council framework decisions, such as Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA), Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA), or the Framework Decision of 27 January 2003 on the protection of the environment through criminal law (2003/80/JHA).

<sup>4</sup> Recommendation No. R (88) 18 of the Committee of Ministers to member states concerning liability of enterprises having legal personality for offences committed in the exercise of their activities.

<sup>1</sup> Král, V.: K trestní odpovědnosti právnických osob – východiska, obsah a systematika zákonné úpravy. In: *Trestněprávní revue*. Praha: C.H. Beck, No. 8, 2002.

<sup>2</sup> These conventions are examples of documents that are binding on the Czech Republic and require the introduction of corporate delictual liability into Czech law.

- winding-up of the enterprise;
- compensation and/or restitution to the victim;
- restoration of the former state;
- publication of the decision imposing a sanction or measure.

These sanctions and measures may be taken alone or in combination, with or without suspensive effect, as main or as subsidiary orders.

### 3 The conception of the scope of criminalization of Corporate Criminal Liability

One of the basic issues arising in connection with the institution of criminal liability of legal entities is the various approaches to, and conceptions of, its criminalization, i.e. to what extent legal entities should be held criminally liable for their offences. I do not consider it appropriate to consider basic alternatives suggesting that a legal entity is liable for all crimes as is a natural person, or that it should be held liable only for offences expressly listed in a criminal code or other laws. I argue that the scope of criminalization of criminal liability of legal entities should be subdivided into the following categories where, according to the conception selected, a legal entity is held liable for:

- (a) all crimes;
- (b) all crimes where the nature of their fault and physical elements permits so;
- (c) specially listed crimes, whether included in a criminal code or other laws;
- (d) specially listed crimes where the requirement of punishment results from international treaties of European law; and
- (e) specially listed crimes with modification of certain elements.

Where the construction of a legal entity being held liable for all crimes is chosen, the primary advantage is that no crime would be omitted. In case further legislative amendments are envisaged the provisions listing the crimes need not be changed or modified. Jelínek correctly points out that the positive value of such alternative subsists in the fact that the chosen concept of corporate legal liability is an integrated one and corresponds to the concept of criminal liability of individuals.<sup>5</sup>

Should the legislature opt for the alternative that a legal entity may be held liable for all crimes, an entity can be found in a position of being criminally liable for acts which it is unable to commit due to the nature of its form (such as bigamy, rape, intercourse between relatives – incest, etc.). What can be considered a downside regarding this alternative is the fact that legal certainty may be weakened as it can be justifiably assumed that bodies responsible for criminal proceedings (the police, prosecution and courts) would have to, at least in the initial stage of application of this alternative, consider whether the legal entity could, or could not, have committed the crime at issue. The weakening of the principle *nullum crimen sine lege* will also arise, particularly in the beginning of the application of the alternative, that a legal entity shall be held criminally liable for all crimes whose nature permits so. Vantuch<sup>6</sup> considers this to be no obstacle since any potential application problems could be solved through case-law. Král considers impractical and redundant the creation of any special lists of crimes for which a legal entity may be held criminally liable.<sup>7</sup>

## 4 Regulation of the scope of criminalization and sanctioning of Corporate Criminal Liability in the legal orders of various European countries

### 4.1 Denmark

<sup>5</sup> Jelínek, J.: *Trestní odpovědnost právnických osob*. Praha: Linde, 2007, p. 48.

<sup>6</sup> Vantuch, P.: K návrhu zákona o trestní odpovědnosti právnických osob. In: *Trestní právo*. Praha: C. H. Beck. No. 10, 2003, p. 3.

<sup>7</sup> Král, V.: K trestní odpovědnosti právnických osob- východiska, obsah a systematická zákonné úpravy. In: *Trestněprávní revue*. Praha: C. H. Beck, No. 8, 2002, p. 222.

The regulation of corporate criminal liability in the Danish Criminal Code of 1995 is contained primarily in sections 25-27. Under s. 25 of the Criminal Code a legal entity is punished with a fine where the imposition of this punishment is allowed by the Code or relating legislation. Criminalization of legal entities is provided for in s. 306 stipulating that legal entities are criminally liable for its breach under Title V of the Criminal Code, which systematically subsumes the provision for corporate criminal liability, i.e. including s. 25. In addition to liability for crimes regulated by the Criminal Code, legal entities in Denmark are criminally liable also for breaches of tax assessment laws, the law regulating approved and registered public accounting books, the law regulating measures to prevent the funding of terrorism and money-laundering and dozens of other laws.<sup>8</sup> The amount of the fine to be imposed under the Criminal Code is within the discretion of court as the court is not bound by a minimum or maximum rate stated by the law. Another option allowed by s. 75 (1) of the Criminal Code is to impose a protective measure subsisting in the confiscation of proceeds of any crime or of an amount corresponding to the amount of proceeds either fully or partially. If the amount cannot be sufficiently proved, it is allowed to confiscate such amount, which is likely to equal the proceeds of criminal activities. Under s. 75 (2) it is allowed to seize objects used, or alleged to have been used, for the commission of a crime in order to prevent further criminal activities or where special circumstances of the case suggest so. Instead of confiscating objects, it is permitted by s. 75 (3) of the Code to seize an amount of money, or its part, equalling the value of such objects.

### 4.2 Estonia

The Estonian Criminal Code, adopted in 2001, expressly designates 133 crimes that can be committed by a legal entity.<sup>9</sup> Where a legal entity can be liable for a particular offence this possibility is stipulated in the last subsection of a section defining the crime at issue, along with the type of punishment that may be imposed upon the legal entity. The Criminal Code allows for a penalty in the form of compulsory dissolution (termination of its existence). Under s. 44 (8) the court may impose upon a legal entity financial penalty between €3,200 and 16,000,000 for a crime committed. The financial penalty may be imposed upon a legal/ entity also as a complementary punishment along with compulsory dissolution. The court, or a special judicial body, may impose upon a legal entity a fine in an amount between €32 and 32,000 for the commission of a less serious crime (s. 47 (2)).<sup>10</sup> Regulation of compulsory dissolution (termination of existence) of a legal entity can be found in s. 46. The court opts for this penalty where the process of committing such offence became part of the regular activities of the legal entity. Sections 83-86 of the Estonian Criminal Code provide for another type of penalty, namely a forfeiture of items of property used for the commission of a crime, or forfeiture of gains from such crime.

### 4.3 Finland

The regulation of corporate criminal liability can be found in titles 11 - 50 of the Finnish Criminal Code No. 39/1889. Offences for which legal entities may be held liable are listed in the last clause of twenty titles called "Criminal Liability of Legal Entities". Rules of sentencing with respect to corporate criminal liability are stipulated in Title Nine. Sec. 5 allows for a so-called

<sup>8</sup> Tøftegaard Nielsen, G.: Criminal Liability of Companies in Denmark. Eighty years of experience. In: Adam, S., Colette- Basecqz N., Nithout M.: *La responsabilité pénale des personnes morales en Europe / Corporate Criminal Liability in Europe*. Bruges: La Chartre, 2008, p. 110.

<sup>9</sup> On problematics of the Criminal Liability of Corporations in Estonia Ginter, J.: *Criminal Liability of Legal Persons in Estonia* available at: <[http://www.juridicainternational.eu/public/pdf/ji\\_2009\\_1\\_151.pdf](http://www.juridicainternational.eu/public/pdf/ji_2009_1_151.pdf)> or on the scope of criminalization the Criminal Liability of Corporations in Estonia Ginter, J.: *Criminal Liability of Legal Persons in Estonia*. A working system still subject to improvement. In: Adam, S., Colette- Basecqz N., Nithout M.: *La responsabilité pénale des personnes morales en Europe / Corporate Criminal Liability in Europe*. Bruges: La Chartre, 2008, p. 148.

<sup>10</sup> The division of crimes can be found in s. 3 of the Estonian Criminal Code.

corporate fine to be imposed in Finnish crowns; the minimum amount is 5,000 and the maximum 5,000,000 Finnish crowns (approx. €850-850,000). The particular amount of the fine, as is provided in sec. 6, will depend upon the nature and scope of culpability and participation of the company management (criteria are the nature and seriousness of an offence and the position of the perpetrator of the offence as member of corporate bodies) as well as upon the economic situation of the legal entity (i.e. how big the company is, whether it is solvent, what its income is and other basic indicators of the financial soundness of the company). The Code permits that a so-called common corporate fine be imposed upon a legal entity having committed more than two offences. Sec. 16 Title Two of the Finnish Criminal Code provides that a legal entity can be subject to the punishment of forfeiting financial benefits from, or property used for, the commission of an offence.

#### 4.4 Lithuania

The Lithuanian Criminal Code of 2000 regulates the issue of what crimes may be committed by legal entities in a way similar to that in the Estonian Criminal Code. Corporate criminal liability is explicitly indicated in the last subsection of a respective section defining a particular offence. Today corporate criminal liability extends to, and penalty may be imposed upon legal entities for, some 103 offences. The commission of one offence is subject to just one punishment (sec. 43(3)). Under sec. 43(1) the penalties can be a fine, the amount of which may not exceed 50,000 times the amount of the living minimum (sec. 47(4)), restrictions upon the activities of a legal entity, subsisting in the ban on the performance of a particular activity including the closing down of the entity for one to five years (sec. 52), and the dissolution of a legal entity (sec. 53). In addition to one of these penalties, the court may decide on another type of sanction, namely the publishing of the respective judgment of conviction in mass media (sec. 43(2)) or the protective measure of seizing property (sec. 72).

#### 4.5 Latvia

Corporate criminal liability in Latvian law is regulated by the Criminal Code of 1998 in provisions stipulating punishment for legal entities. Criminal liability of legal entities is not explicitly defined but it is derived from so-called compelling measures<sup>11</sup>, which govern in detail the way of punishing legal entities. Under s. 70.2(1) a legal entity may be subject to the following compelling measures: liquidation, restrictions on its rights, forfeiture of its property and financial penalty. An entity may also be subject to so-called complementary compelling measures (sec. 70.2(2)), i.e. forfeiture of property and compensation of damage. The Latvian Criminal Code defines liquidation of a legal entity (sec. 70.3) as its compulsory dissolution, dissolution of its branch, agency or any other organizational unit. This punishment will be imposed if the company, or any of its units, was founded in order to pursue criminal activities, or if the company committed a serious or very serious crime. In such situation, assets of the company are forfeited to the state except for assets necessary to satisfy the claims of its employees and creditors and the state. Restrictions on the rights of a legal entity are defined by the Criminal Code (sec. 70.4) as deprivation of a right to carry out business activities, for which a specific state licence or permission is needed under legislation, or a ban on the pursuance of a certain type of activity for a period longer than one and shorter than five years. Forfeiture of property (sec. 70.5(1)) may be imposed by the decision of court and may be specified as forfeiture of the whole property of a company or only of its part. Forfeiture is not applicable to property necessary to satisfy debts of the company against employees, creditors and the state. Forfeiture by its function can be either the main compelling measure or a complementary compelling measure. The fourth compelling measure provided for by the Latvian Criminal Code is a financial penalty (sec. 70.6), the amount of which varies between one to ten thousand times the amount of

the statutory minimum wages at the moment of the judgment delivery. If a legal entity commits a serious or extremely serious offence the punishment of liquidation, restrictions on the rights of the entity, forfeiture of its property or a fine may be imposed. In all other cases only a fine may be imposed by court (sec. 70.2 (3) and (4)). Forfeiture as a complementary measure may be imposed where an entity obtained a property benefit as a result of its criminal activity, and the restriction on its rights or financial penalty have been imposed as a basic sanction (sec. 70.5). The court must expressly define in its judgment what assets are subject to forfeiture (subsection (2)). Where the whole property of a legal entity is to be forfeited, claims of its employees, the state and creditors must be satisfied first (subsection (3)). Forfeiture affects also property transmitted to another legal entity or individual (subsection (4)). Compensation of damage caused (sec. 70.7) is described as compensation of physical damage caused as a result of an offence as well as restoration of other interests protected by the law or endangered rights (subsection (1)). Damage must be compensated or restored with the means of the legal entity. Under sec. 70.8, the court considering what compelling measure should be imposed takes into account the nature of the offence committed and the damage caused (subsection (1)). Other factors are provided in subsection (2) as follows: particular conduct of the legal entity, the position of an individual within the bodies of the legal entity, the nature and consequences of conduct of the legal entity, measures taken by a legal entity to prevent the commission of new offences, and the size, type of activity and financial situation of the legal entity.

#### 4.6 Luxemburg

The Luxemburg Criminal Code provides for corporate criminal liability as a result of its amendment passed on 3<sup>rd</sup> May 2010. Luxemburg and Slovakia are as yet the last Member States of the European Union having passed the relevant legislation. The scope of criminal liability of legal entities covers all types of crime, "crime" or "délit", i.e. more serious or less serious crimes respectively (sec. 34). Certain crimes are explicitly listed under sec. 37 and are subject to special criminalization of up to five times a financial penalty imposed in case of other crimes. The following offences fall into that group: crimes against the security of the state, terrorism, funding terrorism, violation of laws on prohibited weapons in connection with criminal conspiracy or criminal organization, trafficking in human beings and procurement, drug trafficking in connection with criminal conspiracy or criminal organization, money laundering, embezzlement, bribery and corruption in connection with both public interest or so-called private corruption, and assisting in getting unlawful entry or stay in connection with criminal conspiracy or criminal organization.

#### 4.7 Norway

The Norwegian Criminal Code of 1902 regulates criminal liability of legal entities in its Title Three, in particular in sections 48a and 48b. Where it is impossible to punish an individual for a breach of the Criminal Code, a relevant legal entity may be convicted and subject to punishment, namely a fine, or deprivation of the right to undertake business or restriction on such right. The amount of a fine depends, under sec. 48b, on the preventive effect of the punishment, seriousness of the offence committed, whether the legal entity could prevent the commission of the crime through its instructions, training or any other measures, whether the crime was committed in order to enforce some interests of a legal entity, whether the legal entity was awarded, or could have been awarded, any benefit for the commission of the crime; it will also depend upon its economic potential, whether the legal entity, or any other person acting on its behalf, has been punished by some other sanctions as a result of the crime committed including punishment imposed upon an individual. Sec. 48a in fact provides that a legal entity is liable for all crimes. Where an individual acting on behalf of a legal entity violates provisions of the Criminal Code the legal entity on whose behalf the individual acts is subject to

<sup>11</sup> Rone, D.: On Institute of Criminal Liability of Legal Entities in Eight Countries- Nordic Countries and Baltic Countries, p. 7. 2006. This article is available at: <[http://www.at.gov.lv/files/docs\\_en/LEGAL%20SCIENTIFIC%20RESEARCH.doc](http://www.at.gov.lv/files/docs_en/LEGAL%20SCIENTIFIC%20RESEARCH.doc)>

the imposition of punishment. This provision applies also in cases where no individual can be subject to punishment for such violation of the Code.

#### 4.8 Poland

Criminal liability of legal entities under Polish law is regulated by Act No. 197/2002 Dz.U. on the liability of collective bodies for acts prohibited and subject to punishment ("OPZK").<sup>12</sup> The Act regulates criminal liability of collective bodies (podmiot zbiorowy in Polish). Under Art. 2 OPZK, a collective entity is a legal entity or an organization without legal personality if it is permitted to have legal capacity under special legislation, except for the Fund of National Property, organizations of local self-government or their unions, state bodies and bodies of local self-government. The concept of a collective entity under the Act covers business companies with a state share, with a share of a local self-government organization or their unions, a limited liability company (public or private), an entity under liquidation, an entrepreneur who is not an individual, and an organizational unit of a foreign legal entity.<sup>13</sup> Articles 7-14 provide for a wide range of penalties applicable to a collective entity. Art. 7 OPZK provides for a fine (kara pieniężna) of between PLZ 1,000 and 20,000,000 but not more than 10% of the income earned in the relevant fiscal year when unlawful activity giving rise to criminal liability of a collective entity was performed.

Under Art. 8 OPZK, forfeiture may apply to: (1) an item of property directly or indirectly resulting from unlawful conduct, or an item serving, or intended to serve, for the commission of unlawful activity; (2) a property benefit directly or indirectly resulting from unlawful conduct; or (3) an equivalent of the value of an item or property benefit directly or indirectly resulting from unlawful conduct.

Art. 9 OPZK lists 6 other types of penalty that may be imposed for a term of one to five years, except for the punishment of publishing a judgment of conviction. These are: (1) ban on the promotion or advertisement of the activity pursued; (2) ban on obtaining subsidies, grants and any other form of financial assistance from public funds; (3) ban on obtaining assistance from international organizations to which Poland is a party; (4) ban on applying for government contracts; (5) ban on operating the main or subsidiary lines of activities – this penalty may not be imposed should it result in the liquidation or bankruptcy of a collective entity, or in the lay-off of employees; and (6) publishing the judgment of conviction. Art. 10 OPZK regulates criteria to be considered by the court in decision-making with respect to the imposition of a fine, bans or publishing.

Art. 12 OPZK provides for a possibility, in specially justified cases, of not imposing a fine or the punishment to publish a judgment of conviction. Art. 13 OPZK provides that a financial penalty may be increased by up to one half where the collective entity commits a new unlawful act within 5 years of sentencing.

Art. 16 provides that a legal entity is criminally liable for the offences listed in the Act and for the violation of provisions in specified legislation, i.e. in the total of 16 other laws listed in this Article. These laws cover, for example, the Banking Act, the Bond Act, the Act regulating public trading in securities, etc.

#### 4.9 Austria

Criminal liability of legal entities was introduced in Austrian law by the federal Act on the liability of associations No. 151/2005 BGBl<sup>14</sup> („VBGB“). Sec. 1(1) stipulates that legal entities are liable for any offence defined in the Criminal Code and in so-called subsidiary laws. Any conduct is a crime for which a criminal punishment may be imposed under land or federal legislation.<sup>15</sup> The Austrian regulation of punishing associations (Verband), which encompass, under sec. 1(2) VbVG, legal

entities such as stock corporations and limited liability companies, partnerships, registered trading associations, and European economic interest groups, is based upon the monism of criminal sanctions since the only applicable criminal penalty is a fine (Verbandsgeldbuße). The fine is assessed in daily rates (Tagessätze), starting with a one day rate. Sec. 4(3) VbVG determines the number of daily rates (from 40 to 180) depending on the seriousness of an offence expressed as the duration of a term of imprisonment. The number of daily rates is regulated as follows: 180 – punishment will be life imprisonment or imprisonment for the term of up to 20 years; 155 – a term of imprisonment of up to 15 years; 130 – a term of imprisonment of up to 10 years; 100 – a term of imprisonment of up to 5 years; 85 – a term of imprisonment of up to 3 years; 70 – a term of imprisonment of up to 2 years; 55 – a term of imprisonment of up to 1 year; 40 – in all other cases. Provisions of sec. 5 VbVG also provide for an increase (subsection (2)) or decrease (subsection (3)), depending upon aggravating or mitigating circumstances respectively. A daily rate under sec. 4(4) VbVG is determined according to the gains of an entity with regard to its economic efficiency. The rate is set in the amount corresponding to 1/360 of yearly gains, but it may, as suggested earlier, be increased or decreased. The lowest amount determined by court is €50, the maximum being €10,000. Should an association serve community interests, humanitarian, religious or other non-profit purposes, its daily rate is between €2-500.

Sec. 6 VbVG regulates conditional suspension of a fine. If an entity is punished by a fine not exceeding 70 daily rates, a probationary period may be imposed for the duration of one to three years with a possibility to impose other duties (such as the duty to compensate damage caused by the entity, unless the entity has done so; a duty to arrange for technical, organizational and personal measures in order to prevent the commission of other crimes for which the entity may be held liable provided the entity agrees so), where it may be reasonably assumed that the conditional suspension of a fine will suffice to prevent the entity from committing further crime, and that there is no need to execute the fine in order to prevent the crime in relation to activities of other entities. If the entity observes imposed duties and instructions, the fine will be conditionally discharged. Sec. 7 VbVG provides for conditional discharge of part of the fine. Such an amount of the fine will be at least one third of the initial amount but no more than five sixths. The provision for a probationary period of one up to three years and the imposition of duties applies (sec. 8 VbVG). Sec. 9 regulates the withdrawal of a conditional discharge of the fine if an entity commits other criminal activities during the probationary period, or fails to obey instructions and fulfil duties imposed under sec. 8. In such cases the court either cancels the conditional discharge of a fine or imposes a new probationary period not exceeding five years along with new instructions and duties.

#### 4.10 Slovakia

Slovakia incorporated a so-called quasi-model of criminal liability of legal entities into its legal order in 2010. Initially, corporate criminal liability should have been included in the Criminal Code No. 300/2005 Z.z. within its recodification. This alternative was later abandoned and the legislature intended to adopt a separate law on criminal liability of legal entities in 2006. There were two draft laws introduced within the legislative procedure to the Slovak Parliament – the National Assembly – but neither was passed.<sup>16</sup> However, Act No. 224/2010 Z.z. was passed on 27<sup>th</sup> April 2010 amending the Criminal Code No. 300/2005 Z.z. The amendment introduces so-called quasi corporate criminal liability: it is assumed that, as a result of an offence committed by an individual, a protective

<sup>12</sup> Ustawa z 27 września 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary (Dz.U. Nr 197, poz. 1661, ze zm.).

<sup>13</sup> Jelínek, J.: *Trestní odpovědnost právnických osob*. Praha: Linde, 2007, p. 181.

<sup>14</sup> Verbandsverantwortlichkeitsgesetz.

<sup>15</sup> On Austrian regulation of the scope of the criminal liability of corporations Jelínek, J.: *Trestní odpovědnost právnických osob*. Praha: Linde, 2007, p. 198 or Pribelský, P.: *Trestná zodpovednosť právnických osôb v Rakúsku*. In: *Trestnéprávní revue*. Praha: C. H. Beck, No. 1, 2007, p. 13.

<sup>16</sup> Both the private member's bill (print No. 1523/2006) and the Government bill (print No. 1507/2006) regulated a wide range of punishments in more or less the same manner. The following sanctions were proposed: financial penalty between SK 50,000 and 500,000,000, dissolution of a legal entity, forfeiture of property, forfeiture of an item of property, ban on specified activities, ban or restriction on obtaining public subsidies or grants and ban on the participation in public tenders, publishing the judgment of conviction; protective measures were also proposed, such as the forfeiture of an item of property and the court supervision over the activities of a legal entity.

measure may be imposed on a legal entity if the commission of such offence is linked with the activities of the legal entity. The first protective measure under sec. 83a is forfeiture of money in the amount between €800 and 1,660,000. The second measure is forfeiture of property under sec. 83b.

## 5 The latest development of the issue of Corporate Criminal Liability in the Czech Republic

### 5.1 Brief comment on the legislative development

The Czech Republic has not introduced criminal liability of legal entities into its legal order. In 2004 a Government bill on criminal liability of legal entities and proceedings against them was unsuccessfully introduced to Parliament;<sup>17</sup> four years later in 2009, the Government passed a resolution entitled "An analysis and international comparison of legal regulation of legal entities and their conduct subject to punishment under international treaties",<sup>18</sup> which formed the basis for the preparation of a draft law to regulate criminal liability of legal entities and proceedings against them<sup>19</sup> on the platform of criminal law. The draft was slightly modified by the Ministry of Justice and reintroduced at the end of 2010.<sup>20</sup> The Government approved the draft law regulating criminal liability of legal entities and proceedings against them on 23<sup>rd</sup> February 2011; the bill is now in the Chamber of Deputies of Parliament of the Czech Republic as Print No. 285 of 2011. The effect of the bill is proposed to commence on 1<sup>st</sup> January 2012.

### 5.2 On the issue of punishment as proposed in the draft law regulating criminal liability of legal entities and proceedings against them of 2011

Sanctions, as proposed by the bill ("zTOPO"), are punishments and protective measures; they are provided in Part Three in sections 14-23. Sec. 14 zTOPO defines criteria under which types and rates of punishments are determined; a negative definition of the imposition of a protective measure can also be found there. The bill allows for the imposition of the following wide range of eight types of punishment:

- a) dissolution of a legal entity,
- b) forfeiture of property,
- c) financial penalty,
- d) forfeiture of an item of property or any other property value,
- e) ban on pursuing specified activities,
- f) ban on participation in government contracts, licensing procedure or public tenders,
- g) ban on obtaining subsidies and grants, and
- h) the publication of the judgment of conviction.

Protective measures are seizure of an item of property or any other property value (sec. 15). Under sec. 15(3), punishments and protective measures may be imposed simultaneously except for a financial penalty in combination with forfeiture of property, and the punishment of forfeiture of an item of property or any other property value in combination with the protective measure of seizure of a property item or other property value. Dissolution of a legal entity is proposed to be imposed upon a legal entity having its registered office in the Czech Republic where its activities subsisted fully or primarily in the commission of one or more crimes. However, this punishment is proposed not to be imposed upon political parties or political movements. Requirements for the forfeiture of property are defined in sec. 17; this punishment is proposed to be imposed upon a legal entity for the commission of a very serious offence by which the entity sought to gain property benefit for itself or for another (subsection (1)). These requirements are not obligatory only in case the Criminal Code expressly provides for the imposition of such punishment (subsection (2)). Sec. 18 provides for a

financial penalty whose imposition may not be detrimental to the rights of the injured (subsection (1)). It sets a daily rate between CZK 1,000 and 2,000,000. In order to properly determine the amount of a daily rate the court should take into account the property circumstances of a legal entity, in particular what things or means are absolutely necessary for carrying out its activities (subsection (2)). The court may, under sec. 19, decide on the imposition of forfeiture of a property item or other property value including substitute value in compliance with the requirements stipulated by the Criminal Code. The ban on pursuing specified activities of a legal entity may be imposed for a term between one and twenty years if the crime committed was linked with these activities (sec. 20). The ban on participation in government contracts, licensing procedure or public tenders may be imposed if the legal entity committed a crime in the course of making or performing such contracts and procedures or in the course of its participation in public tenders (sec. 21); the ban on obtaining subsidies and grants maybe imposed where the legal entity committed a crime in connection with its application for, disposing of, using or providing grants, subsidies or financial assistance (sec. 22). The publishing of a judgment of conviction is stipulated in sec. 23; the court decides so if it appears necessary that the public be aware of conviction. The court specifies the type of media where the legally effective judgment of conviction should be published (subsection (1)) at the expense of the legal entity (subsection (2)).

### 5.3 The scope of criminalization as proposed in the Bill on criminal liability of legal entities and proceedings against them of 2011

Consideration of the extent and scope of criminalization of corporate criminal liability was quite extensive; at the end, the alternative of liability for listed crimes was chosen in the bill. Originally, two alternatives were debated. *Alternative I* – finally selected – provides for a list of crimes which may be committed by a legal entity (sec. 8 zTOPO); the list is reduced to crimes required to be covered by delictual liability of legal entities by international treaties and EU legislation. The total number of 74 crimes is extended with tax crimes.<sup>21</sup> The choice of this alternative can find its support in academic literature.<sup>22</sup> The model containing a list of selected crimes with a certain modification of their elements is considered appropriate by Král<sup>23</sup> and is supported by Jelínek.<sup>24</sup> Such modification can be presumed with respect to certain crimes, for example, due to the violation of public interest. *Alternative II*, which was not chosen, considered as crimes for the purposes of zTOPO felonies and misdemeanours regulated by the Criminal Code unless their commission by a legal entity was excluded due to the nature of the legal entity. The bill contains two groups of opinions on the scope of criminalization of criminal liability of legal entities; however, at the time of submission of this article it was unclear which of them would be selected and preferred in support of the alternative chosen.

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<sup>17</sup> Print No. 745 of 2004.

<sup>18</sup> Government Resolution No. 1451 of 30<sup>th</sup> November 2009.

<sup>19</sup> The draft was submitted under Resolution No. 1451 of 30<sup>th</sup> November 2009 and can be retrieved in the Czech language from <http://eklep.vlada.cz> under reference number of the sponsor of the bill 700/09-I, which is the Ministry of Justice.

<sup>20</sup> This article describes the circumstances of the bill as applicable on the day of its submission, i.e. after the bill successfully went through the legislative procedure in the Government and is awaiting its consideration by Parliament.

<sup>21</sup> See the Explanatory Report on the Bill on criminal liability of legal entities and proceedings against them of 2011. The bill can be retrieved from <http://eklep.vlada.cz> under the sponsor's reference no. 700/2009-II.

<sup>22</sup> See, for example, Musil, J., Prášková, H., Faldyna F.: Úvahy o trestní odpovědnosti právnických osob de lege ferenda. In: *Trestní právo*. Praha: C. H. Beck, No. 3, 2001, p. 13.

<sup>23</sup> Král, V.: K trestní odpovědnosti právnických osob - východiska, obsah a systematika zákonné úpravy. In: *Trestněprávní revue*. Praha: C. H. Beck, No. 8, 2002, p. 223.

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