

ON THE ENFORCEMENT OF CRIMINAL LAW AGAINST LEGAL ENTITIES

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Abstract in original language

The paper examines the possibilities in the enforcement of criminal law against legal entities. It discusses the evolution of the theory of criminal liability regarding legal entities as well as related problems. Further, it addresses issues in connection with the prosecution of criminal offenses involving legal entities (e.g. when legal entities provided the vehicle for the commission of such offenses). Finally, it reviews the enforcement of criminal sanctions imposed upon legal entities.

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1. INTRODUCTION

The liability of legal entities as such was subject to dispute and controversy from the early medieval age. In the course of the development of law both in continental and common law systems, theory and practice started to recognize. It was acknowledged that legal entities, although theoretically fictitious in nature, may be held liable under a number of fields of law. However, since legal entities are, by their very nature, unable to act on their own, they are held liable for actions of others, namely, persons acting on their behalf in some way or other.

In today's legal systems, few people would question the liability of a company for breach of contract, tort, or the company's liability under employment law or administrative law. It seems that the development of liability of legal entities under criminal law has not arrived at this point in many jurisdictions.

After the advent of large privately owned corporations, legal entities became active participants in the system of criminal activities. Corporations became an effective tool to conceal different types of criminal offenses and to shelter perpetrators from being investigated and tried.

In an inscrutable system of hierarchy levels and management decisions, it is easy to hide the person responsible for a crime – whether for bribery in connection with a public procurement procedure, environmental damage due to negligence or jeopardizing of the health of consumers due to mismanagement or just the greed to slice off additional profit. Also, law enforcement bodies might not be aware whether the individual accused of an offense perpetrated in connection with the activity of the legal entity is actually the person responsible for the offense. It might be merely an employee e.g. of the first-line management level who is thrown to the authorities and sacrificed (sometimes even in return of payments or other benefits) to help higher management evade investigation and trial.

Legislation sought an effective tool to address the problem worldwide but encountered several difficulties in the course of finding a proper solution. While legal systems have accepted that legal entities can be held liable in other areas of law, many have raised the issue of criminal liability of such entities.

In the beginning there was the principle "*societas delinquere non potest*". As the end of the 20th century approached, it became clear that the dogmatic application of this principle is untenable. Legal entities mushroomed and became primary participants of economic operations in virtually every market. In parallel with this tendency, the number of criminal committed in connection with offenses also grew.

Besides demonstrating the current legal framework (with special regard to Hungary), the main focus of this paper is to highlight certain theoretical issues arising from the concept of criminal liability of legal entities, and issues in respect of the enforceability of criminal law sanctions against legal entities. The paper also addresses the question of effectiveness of these sanctions as a response to criminal offenses committed in connection with the operation of legal entities.

2. COMMON LAW STATES

Long before countries of continental Europe, common law states recognized legal entities as entities separate from the natural persons founding or operating them. Accordingly, in these states (in particular, the United Kingdom and the United States) theory and practice of criminal liability of legal entities found legal grounds in court practice as well.

While in most continental law jurisdictions legal entities cannot be "perpetrators" of criminal offenses, some common law criminal statutes expressly provide that corporations and other collective entities are "persons" for the purposes of the criminal law.¹

Although common law states differ in their approach as to the theoretical background of the criminal liability of legal entities, they share certain aspects which later became the basis of such liability in continental Europe as well.²

A detailed description of the common law system relating to the criminal law liability of legal entities would go beyond the scope and limits of this paper. Nevertheless, it is useful to briefly review at least one system of laws in this respect, here, the system of the United States.³

In the system of liability of legal entities under criminal law, the courts of the United States apply two main doctrines: the "*Model Penal Code*" and the "*respondeat superior*" approach. Under both doctrines, the liability of certain natural persons holding positions in or acting on behalf of the legal entity is imputed to the legal entity.

¹ For Canada see e.g. Ferguson, Gerry: Corruption and corporate criminal liability. Seminar on New Global and Canadian Standard on Corruption and Bribery in Foreign Business Transactions, February 4-5, 1998, Vancouver, British Columbia

² Summarized, *inter alia*, by Tiedemann, Klaus: Wirtschaftsstrafrecht. Köln, 2004, Carl Heymanns Verlag, p. 121 et seq.

³ For further descriptions see e.g. Wells, Celia: Corporations and criminal responsibility, Clarendon Press, Oxford 1994. For an overview of the history and criticism of corporate criminal responsibility, see e.g. the articles hosted under <http://law.jrank.org/pages/743> et seq.

Under the Model Penal Code approach, the legal entity is held liable for offenses "*authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment.*"⁴ In contrast, the "*respondeat superior*" principle (derived from tort law where it had been used for long before it found application in criminal matters) is broader in a sense that it allows a legal entity to be held liable for offenses committed by any of its agents. In case of both approaches, it is required that the offense be committed with intent to benefit the corporation.

Both of the above principles were subject to criticism, the main point of which was that these principles are too broad and allow courts to establish criminal liability of the legal entity even in cases where the relevant offense was perpetrated by a low level employee or agent or in cases where no actual benefit was received by the relevant legal entity.

3. INTERNATIONAL LAW

In 1988, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (88) 18 concerning liability of enterprises having legal personality for offences committed in the exercise of their activities ("Recommendation"). According to section I.1. of the Appendix of the Recommendation, "*Enterprises should be able to be made liable for offences committed in the exercise of their activities*".

The principles and recommendations set out in the Appendix of the Recommendation served as guidelines for national law-making throughout Europe and at EU level and appear in every piece of community legislation related to offenses to which the EU considers the application of criminal law sanctions necessary and appropriate.

In 1997 the Negotiating Conference of the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention").

According to Article 2 of the OECD Convention, "*Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.*" However, according to the commentary to Article 2 of the OECD Convention, if "*under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.*"

Although the OECD Convention did not actually force the Parties to introduce the responsibility of legal persons under criminal law,

⁴ Model Penal Code, Section 2.07 para (1) (c)

nevertheless, it served as a guideline for many countries in that it introduced the theme of liability of legal persons in connection with bribery.

To date, 38 countries are party to the OECD Convention. Thus, its scope extends beyond that of the documents adopted under the egis of the European Union, as we shall see below.

4. EU LAW

4.1 DEVELOPMENT OF EC AND EU LEGISLATION

In parallel to the OECD Convention (and even prior to the adoption of the OECD Convention), a number of acts of community level legislation included provisions which ordered the Member States to provide for effective sanctions applicable against perpetrators of certain offenses, included provisions on the liability of legal entities.

The first act on EU level to introduce the liability of legal entities for criminal offenses was the Second Protocol to the Convention on the protection of the European Communities' financial interests.⁵ This Protocol required that the Members States put into place proper rules under which legal entities may be held liable for fraud, active corruption and money laundering.

Within the framework of development of an effective system of law enforcement to combat criminal offenses against the financial interests of the European Communities, a group of experts, under the guidance of Mireille Delmas-Marty, drew up the so-called Corpus Juris⁶ in 1997. In this relatively short, codex-like draft the group proposed the introduction of uniform criminal law provisions for the protection of the European Communities' financial interests, including the responsibility of legal entities. Later, the same group of experts prepared a study on the implementation and possible effects of the 1997 version and a newer draft of the Corpus Juris, which became known as the Corpus Juris Florence.⁷

Legal acts of secondary community law adopted subsequently include, among others, framework decisions and directives in the following areas (in reverse chronological order):

⁵ Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests. OJ C 221, 19.7.1997, p. 12–22

⁶ Delmas-Marty, Mireille (ed.): *Corpus Juris*, introducing penal provisions for the purpose of the financial interests of the European Union. Paris, Economica, 1997

⁷ Delmas-Marty, M.; Vervaele, J.A.E (ed.): *Implementation of the Corpus Juris in the Member States*. Mortsels, Intersentia, 2001.

- Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA⁸
- Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law⁹
- Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime¹⁰
- Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems¹¹
- Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography¹²
- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector¹³

4.2 THE CORE RULE

In each of the above legal acts (and all legal acts adopted by the European Union that contain provisions on the liability of legal entities under criminal law) the core rule is as follows:

1. Each Member State takes necessary measures to ensure that legal persons can be held liable for the offense(s) regulated by the relevant legal act, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on (a) a power of representation of the legal person, or (b) an authority to take decisions on behalf of the legal person, or (c) an authority to exercise control within the legal person.

⁸ OJ L 101, 15.4.2011, p. 1–11

⁹ OJ L 328, 6.12.2008, p. 28–37

¹⁰ OJ L 300, 11.11.2008, p. 42–45

¹¹ OJ L 69, 16.3.2005, p. 67–71

¹² OJ L 13, 20.1.2004, p. 44–48

¹³ OJ L 192, 31.7.2003, p. 54–56

2. Apart from the cases described above, Member States need to ensure that a legal person can be held liable where the lack of supervision or control by a responsible person has made possible the commission of the relevant offense for the benefit of that legal person by a person under its authority.
3. The liability of a legal person does not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in the commission of the relevant offense.

4.3 THE CURRENT PROGRESS OF EU LEGISLATION

Currently, EU bodies are preparing some legal acts which widen the scope of the responsibility of legal entities under criminal law. For example, the Commission submitted proposals for directives on combating the sexual abuse, sexual exploitation of children and child pornography¹⁴ and on attacks against information systems¹⁵ in March and September 2010, respectively. The finalization of both acts is in progress. Once adopted, these acts will replace the framework decisions on the same topics that are already in force.

In contrast to the treaty framework under the EU and EC Treaties,¹⁶ the entry into force of the Lisbon Treaty has enabled the European Union to enhance its legislation activity in the field of criminal law. Although the EU still has no competence to create "European criminal law", it may adopt directives to establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross-border dimension.¹⁷

5. HUNGARIAN LAW

Hungarian legislation, following the tendency of several European states, introduced criminal law sanctions against legal entities into the Hungarian legal system by the act on the criminal law sanctions applicable against legal entities (the "Act").¹⁸

¹⁴ COM (2010) 94 final

¹⁵ COM (2010) 517 final

¹⁶ See e.g. Satzger, Helmut: Internationales und Europäisches Strafrecht. Baden-Baden, Nomos, 2009, p. 96 et seq.

¹⁷ Article 83 of the Treaty on the Functioning of the European Union. OJ C 83, 30.3.2010, p. 47–200

¹⁸ Act CIV of 2001, adopted by the Hungarian Parliament on December 11, 2001 and published in Hungarian Official Journal No. 2001/153 (XII. 24.).

The Act was promulgated on December 24, 2001 and entered into force on the date of the eastern enlargement of the European Union on May 1, 2004. It implements and complies with relevant provisions of EU law and the OECD Convention as a separate mini-code. It contains both provisions of material law and provisions related to the criminal procedure.

5.1 THE UNDERLYING CONCEPT OF THE ACT

Similarly to other countries, the subject of criminal liability of legal entities was and is still subject to discussion among scholars in Hungary as well. The main point made by those opposing the introduction of this concept is that the structure of Hungarian criminal law did not and does not allow for the liability of legal entities.¹⁹

The Act is based on the concept that the legal entity has no separate legal personality for the purposes of criminal law, that is, the legal entity does not become a perpetrator for the purposes of the Criminal Code. Procedural provisions of the Act had to be aligned with this principle, that is, the legal entity is not an accused (defendant) according to the law of criminal procedure.

The Act created a concept which was new to the system of criminal law and penal law. It recognizes the fact that the legal entity can only be involved in legal relationships of any kind by way of a representative, and thus vests rights and obligations in the representative or an attorney acting as its counsel.

As a general rule of the Act, the criminal liability of the legal entity is not independent but derived from the liability of the person who commits an offense in connection with the activities of the legal entity. Thus, criminal law sanctions may only be applied against the legal entity if there is a natural person against whom the criminal procedure may be conducted and the sanctioning of the legal entity under criminal law is linked to the traditional criminal law liability of the natural person concerned.

As a result, the subject of the criminal procedure is still the natural person. Although the legal entity is not an accused person (defendant) for the purposes of the criminal procedure, as a general rule, the legal entity shares the procedural status of the natural person with regard to whom the necessity or possibility of applying criminal law sanctions against a legal entity arises. If, for any reason, the criminal procedure against the natural

¹⁹ For more detailed theoretical analyses, see e.g. Sántha, Ferenc: *A jogi személy büntetőjogi felelősségéről*. Budapest, KJK-Kerszöv, 2002; Kondorosi, Ferenc – Ligeti, Katalin: *Az európai büntetőjog kézikönyve*. Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2008

person ends, the criminal procedure may not be continued in connection with the legal entity either.

The scope of the Act covers, in brief:

- organizations (or organizational units) recognized as legal persons, and
- organizations which may be individual subjects of civil law relationships and possess capital distinct from their members.

Thus, the Act can be applied to a variety of legal entities ranging from companies to non-profit organizations and other specific entities.

In accordance with the second protocol to the Convention on the protection of the European Communities' financial interests, the scope of the Act does not extend to the States or other public bodies in the exercise of State authority and for public international organizations.²⁰

5.2 CONDITIONS OF IMPOSING SANCTIONS ON LEGAL ENTITIES

According to the Act, the conditions of imposing sanctions on a legal entity are as follows:²¹

1. a willful offense was perpetrated which resulted in (or was intended for) gaining an advantage for the benefit of the legal entity, and the offense was perpetrated by (i) a director, a member/shareholder authorized to represent the legal entity, employee, executive or company manager or supervisory board member of the legal entity or the agent of these persons within the scope of activities of the legal entity; or (ii) a member/shareholder or employee of the legal entity within the scope of activities of the legal entity and the executive, company manager or supervisory board member could have prevented the perpetration of the offense by duly fulfilling their controlling or supervising duties; or
2. the perpetration of the offense resulted in gaining an advantage for the benefit of the legal entity and the director, member/shareholder authorized to represent the legal entity, employee, executive or company manager or supervisory board member of the legal entity was aware of the perpetration of the offense;

²⁰ Section 1 para (1) 1. and para (2) of the Act

²¹ Section 2 of the Act

3. in the case of either 1. or 2. above, the natural person acting on behalf of the legal entity is punished, reprimanded or put on probation for the relevant offence.

There are two exceptions to this rule, in case of which criminal law sanctions may be applied against the legal entity if the committed offense resulted in a gain for the benefit of the legal entity, but the natural person who perpetrated the offense (i) may not be punished due to mental disorders excluding criminal responsibility, or (ii) dies and therefore the case is dismissed.

5.3 SANCTIONS APPLICABLE AGAINST LEGAL ENTITIES UNDER HUNGARIAN LAW

If the conditions described above three specific types of criminal law sanctions may be applied against legal entities under Hungarian law.²²

- fine
- limitation of activities
- dissolution of the entity

1) Fine:²³ The maximum amount of the fine that may be imposed upon a legal entity is three times the amount of the financial gain achieved (or aimed at) by the offense, but at least HUF 500,000 (approx. EUR 1,900). The court may establish the amount of the financial gain by way of estimation if the amount of the financial gain achieved (or aimed at) cannot be established (or can only be established with unreasonable effort).

If the gain achieved (or aimed at) is not financial in nature, the court establishes the amount of the fine considering the financial status of the legal entity. However, the amount of the fine cannot be less than HUF 500,000 (approx. EUR 1,900).

If the legal entity fails to pay the fine, it must be collected according to the rules of judicial forfeiture.

2) Limitation of activities:²⁴ The court may limit the activities of the legal entity for a term of one to three years in one or more of the following areas:

- collection of deposits on the basis of public calls

²² Section 3 of the Act

²³ Section 6 of the Act

²⁴ Section 5 of the Act

- participation in public procurement procedures
- conclusion of concession agreements
- classification as an organization performing activities of public interest
- receipt of targeted subsidies granted from the central budget, budgets of local governments, separated state funds, or by foreign states, the European Union or other international organization
- other activities, depending on the judgment

Depending on the operative part of the judgment of the court, the following legal consequences come into effect on the date when the judgment becomes final and binding:

- termination of the contract concluded on the basis of a public procurement procedure with immediate effect
- termination of the concession agreement with immediate effect
- termination of the procedure to classify the legal entity as an organization performing activities of public interest and deletion of the legal entity from the register of such organizations
- termination of the procedure for the award of the subsidies described above and repayment of subsidies awarded in connection with the offense

3) Dissolution of the entity:²⁵ The court dissolves the legal entity if the legal entity has been established for the purposes of concealing the commitment of criminal offenses or if the actual activities of the legal entity are performed for the purposes of concealing the commitment of criminal offenses. The court may dissolve the legal entity regardless of whether it performs regular business activities or not.

However, if the legal entity performs regular business activities the court may not dissolve the legal entity if, as a result of this sanction, a task to be performed by the state or a local government would be jeopardized or the legal entity (i) is a public utility provider operating countrywide, or (ii) is classified as one of strategic importance in terms of the national economy, or (iii) serves defense or other special purposes or performs such tasks.

²⁵ Section 4 of the Act

In addition to the above, the assets of the legal entity may be subject to confiscation and/or forfeiture of collateral profits of the relevant offense, as may be applicable according to the general provisions of the Criminal Code.

It is important to note that the scope of offenses allowing the application of criminal law sanctions against legal entities is not limited to corruption or any other specific type of offense, but basically includes any willful offense.

For example, the court found two persons guilty of violation of industrial property rights and false marking of goods because their companies placed the protected "EUR" mark on transportation pallets made of wood without the license of the railway company holding the exclusive right to authorize the use of the mark. The court confiscated the counterfeit pallets and also imposed a fine on two legal entities (both managed by the defendants) which had profited from the illicit activity.²⁶

6. THEORETICAL ISSUES

While it can be well argued that the introduction of legal entities as subjects of criminal law is indispensable, there is a number of issues which the lawmaker has to identify and address in order to create a proper and effective system of liability and enforcement with regard to legal entities in the field of criminal law.

The concept of criminal liability of legal entities, the involvement of legal entities in criminal proceedings or the application of criminal law sanctions against legal entities might be inconsistent with the traditional system of criminal law in many countries (including EU Member States, even if all legal acts of the EU that include rules concerning the liability of legal entities for criminal offenses provide that each "*Member State shall take the necessary measures to ensure that legal persons can be held liable*" for the relevant offence on which the framework decision or directive was adopted). In this respect, the following three main aspects should be considered:

First, the nature of liability under criminal law is an individual liability based on mens rea, or "guilt". In most of the systems introducing some kind of liability of legal entities into criminal law, the liability is an imputed, vicarious, secondary liability depending on the liability of others. The precondition of establishing the criminal liability of the legal entity (or, where this is not possible, the application of criminal sanctions against the entity) is the criminal liability of a natural person, namely, an officer, agent, employee, shareholder or other similar person. The liability of the legal

²⁶ Town Court of Nyíregyháza, case no. 10.B.2041/2007. The judgment was later upheld by the courts of second and third instance.

entity is objective in nature as it is not possible that legal entities themselves act willfully, negligently etc.

The second main issue lies within the very nature of the procedure. In many jurisdictions the procedure aimed at establishing the criminal liability of the legal entity or the basis for application of criminal sanctions against the entity is different from an ordinary criminal procedure (even if the entity is "tried" in the same case as the natural person whose offense creates the basis of the liability of the legal entity). For example, the status of the legal entity is not that of an accused in the traditional sense. The legal entity cannot be subject to the same procedural measures as an accused. As in the course of its ordinary activities, the entity can only act through a representative (e.g. an executive officer). The situation becomes complicated in cases where the only representative of the legal entity is the accused person in the matter or in cases where similar conflicts of interest arise.

Finally, the nature of sanctions applied against legal entities is specific and differs from the sanctions traditionally applied under criminal law. While modern penal systems are based on the deprivation of liberty (in some form or other) as their most fundamental punishment, the sanctions applicable against legal entities are more administrative in nature (considering, for example, the three main sanctions applicable under Hungarian law according to the Act, namely: fines, limitation of activities and dissolution).

7. ENFORCEMENT ISSUES

The aim of enforcing criminal law sanctions against legal entities is manifold. Firstly, the legal entity should be deprived of any gains or advantages derived from the relevant offense. Secondly, the sanction should be appropriate to have preventive effect on the legal entity and/or the persons operating the legal entity; the legal entity and/or the persons operating the legal entity should refrain from engaging in similar activities in the future. Thirdly, general prevention aspects also need to be considered.

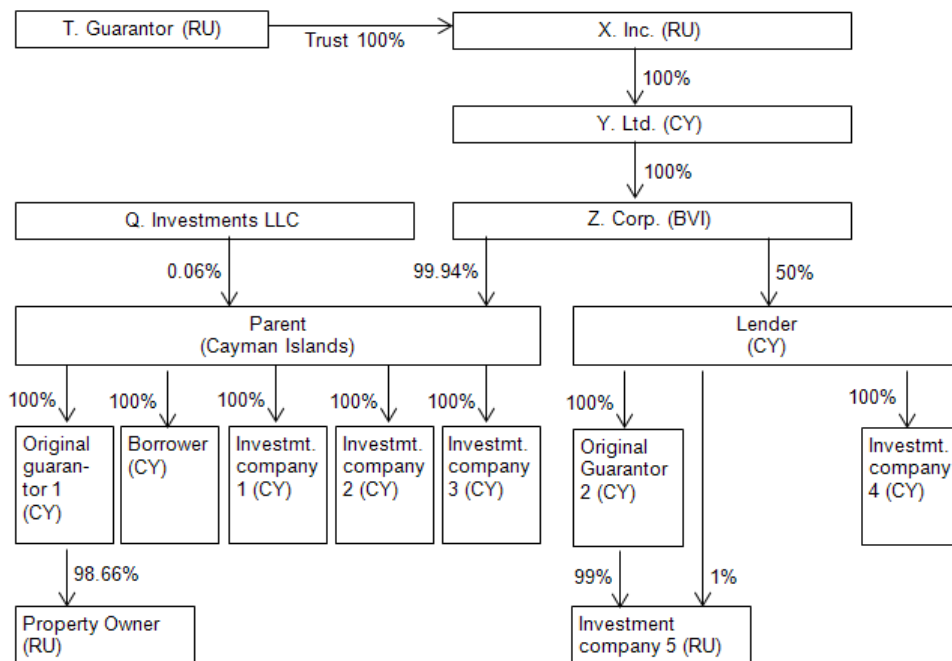
Now, the principles of criminal liability of legal entities and the enforcement of criminal law sanctions of any kind entail a number of problems inherent in the system of criminal law as it developed in most continental law countries.

The liability under criminal law is an individual liability. This principle also applies to sanctions imposed against legal entities. As a general rule, the court will only apply criminal law sanctions against one legal entity, namely, the one in respect of which the natural person accused committed the offense.

For example, it might be appropriate to ban the legal entity from performing certain activities or to otherwise limit its operations, in particular if the corporate structure is not complicated. In such cases, even the threat that

e.g. state or EU subsidies may have to be repaid or concessions granted to the legal entity may be revoked might prove effective to prevent officers or members/shareholders from considering the commitment of an offense for the benefit of the company.

However, let us examine the following structure chart showing part of a hypothetical corporate group with medium complexity, operating in various jurisdictions (for the purposes of the demonstration: Russia, Cyprus, the British Virgin Islands and the Cayman Islands).



In case of a large group of companies like the one above, imposing sanctions against a lower level project company or letterbox company of the group will not bring about the results aimed at by the authorities. The project company or letterbox company may or may not be dissolved after the case and the rest of the company group continues its operations undisturbed. In addition to the above, a large number of project companies are set up with a minimal amount of capital which makes it difficult to enforce pecuniary sanctions against the legal entity.

Even in cases where the company seems to have sufficient assets to pay the fines imposed against it or enable forfeiture of collateral profits of the underlying offense, officers and other persons having an interest to prevent the enforcement of the judgment may easily divest money from the relevant legal entity unless proper measures are taken to freeze all assets of the entity. This measure, however, could be an unnecessary interference with the rights of the legal entity and, in some cases, could prevent the legal

entity from continuing its normal business activities enabling it to pay the fine or enable the forfeiture of collateral profits of the underlying offense.

In cases where offshore companies are involved in the group of companies – and they are, in a very large number of company groups – tracing the profits gained through the offense might encounter serious difficulties. It may even be impossible to trace the beneficial owner of a large corporate chain that ends somewhere in the Cayman Islands or the British Virgin Islands and, on top of that, is held by a trustee for the benefit of a person whose identity would not be disclosed in accordance with the rules of the relevant jurisdiction.

In case of dissolution of the legal entity, the persons operating the relevant entity (whether natural persons or legal entities themselves) may directly or indirectly set up a new legal entity and continue their operation undisturbed. Even if a director of a company is banned from holding such office in one country, the effects of the sentence may not be applied in other countries (particularly in countries outside the EU). Thus there is little or no hindrance standing in the way of such a director who wants to run a mother company in a safe haven and indirectly operate subsidiaries in the country where he was banned.

In any case, the achievement of the prevention aspect falls short as well if the authorities are only able to impose criminal law sanctions against a legal entity located at a lower level of a group of entities.

In addition to the above considerations, in some jurisdictions bankruptcy or insolvency proceedings may not be initiated or have to be suspended if the public prosecutor notifies the court that criminal law sanctions might be applied against the legal entity. The length of such proceedings, added to the duration of the criminal procedure (which may even in more simple cases take several years, let alone those where complicated investigations had to be carried out, all possible legal remedies are used during the procedure and/or the accused hinder the relevant authority in performing its tasks or otherwise obstruct the procedure), raises concerns in respect of the effectiveness of this system.

In addition to the problem of prosecuting the persons who committed the relevant offense in connection with the activity of the legal entity, creditors may have to face almost certain loss of their claims against the legal entity. If bankruptcy proceedings have to be suspended due to the criminal procedure, the legal entity and its creditors are deprived of their rights under bankruptcy law allowing them to reach a settlement that could save the legal entity from insolvency.

Finally, the imposition of criminal law sanctions against a legal entity may cause unnecessary harm to the legal entity itself. For example, the restriction of activities and the imposition of fines may hinder the licit business

activities of a corporation leading to unwanted results in connection with creditors and/or innocent shareholders, employees etc.

8. CONCLUSION

The problems and concerns described above may imply that the prosecution and sanctions against legal entities using criminal means is barely effective. While this may be true in some cases, in others it might be the only tool to prevent persons from abusing their position held in legal entities, in particular if the legal entity provides limited liability for its members/shareholders.

Legislation had to respond to the problem of crime committed within the framework of corporate operations and/or in connection with the activities of legal entities. Therefore, in my opinion, the application of criminal law sanctions against legal entities is inevitable and the system should be developed to provide for appropriate responses to criminal activities in connection with the operation of legal entities, the abuse of positions held in such entities.

On the other hand, I believe that a key point in making use of possibilities provided by the relevant legislation effectively is to put the emphasis on the investigation and prosecution stage in criminal procedures involving legal entities. In some cases, the lack of expertise and/or information regarding complex business structures combined with the problems arising with cross-border cases may make it difficult to effectively combat offenses in connection with legal entities. These issues need to be addressed as well when developing the system of criminal enforcement against legal entities.

I believe that the three most crucial elements of an effective system of investigating offences where the application of criminal law sanctions against legal entities might come into consideration are speed, co-ordination and the proper application of criminal procedural measures.

Rapid action from the side of the investigation and prosecution authorities is even more essential in such cases than in "regular" criminal matters. Intensive co-ordination is required in a sense that there is a need for effective gathering and exchange of information (with the involvement of a number of other authorities, financial institutions etc.). The proper application of measures provided by criminal procedure related legal regulations, e.g. freezing, seizures and covert operations may facilitate the discovery of the relevant criminal activity and the preservation of evidence.

In my opinion, legislation and law enforcement should have special regard to the high level training of personnel involved in the investigation, prosecution and trial of such offenses. Also, the regular and pro-active exchange of information between authorities is crucial to identify issues and develop best practices in connection with the underlying criminal activity

and the appropriate response from the states' side. The approach of the EU, continuously searching for opportunities to enhance cross-border cooperation between Member States in criminal matters, is to be welcomed in this respect.

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