

ABOUT THE PROBLEM OF THE CRIMINAL LIABILITY OF LEGAL PERSONS IN SOME STATES OF THE EU (GERMANY AND CZECH REPUBLIC)

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Abstract in original language

В статье рассмотрены аспекты уголовной ответственности юридических лиц в ряде государств-членов Европейского союза. Особое внимание посвящено нормам международного права в вопросах регулирования ответственности юридических лиц.

Key words in original language

Юридические лица, уголовная ответственность, коррупционные преступления

Abstract

The article deals with the problems of criminal liability of legal persons in some countries-members of the EU (Austria, Slovenia, and Slovakia). The main attention is paid to international law norms in questions of legal persons criminal liability.

Key words

legal persons, criminal liability, corruption crimes

1. INGERMANY

Legislation of Germany does not establish criminal liability of legal persons. However, administrative and civil liability of legal persons for criminal offences exist. In particular, articles 30 and 130 of the Act on Administrative/Regulatory Offences¹ (hereafter OWiG) allow to sanction administrative and criminal offences committed by legal persons through fines and apply also to corruption offences pursuant to the Criminal Code. Trading in influence is not punishable under German law. The OWiG applies not only to legal persons, but also to associations without legal capacity, as well as to all types of partnerships.

Article 30 (2) of the OWiG states that — the regulatory fine shall amount 1) in the case of a criminal offence committed with intent, to not more than one million Euros; 2) in the case of a criminal offence committed negligently, to not more than five hundred thousand Euros.“

¹ Gesetz über Ordnungswidrigkeiten 1968 // www.gesetze-im-internet.de/owig_1968/BJNR004810968.html

In addition, article 17 of the OWiG states that — The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from the commission of the regulatory offence“. This implies that the one million euros maximum fine provided for under in Section 30 (2) no 1 can only be exceeded when a financial gain can be proved. Even in serious cases where the financial benefit gained by legal persons involved in corrupt activity is difficult to calculate/prove, the applicable fine would be limited to a maximum of one million Euros. The serious and damaging nature of corruption cases, even when there is no proof of a financial benefit derived from the offence, should not be overlooked.

Legal entities may be held liable whenever a — person “in a leading position within the organisation — a list of such positions is contained in article 30 (1) of the OWiG — has committed a crime or an administrative offence by means of which duties incumbent upon the legal entity have been violated or the legal entity has effectively gained, or was supposed to have potentially gained, a profit. In addition, pursuant to article 130 of the OWiG, the liability regime is also applicable whenever lack of supervision or control by a natural person in a leading position has occurred. It is possible to assign liability to the legal person even if no natural person has been convicted or identified, but it must be proved that a natural person within the leading structures of the organisation has either committed the offence or violated a supervisory duty.

Regarding the civil liability of legal persons, articles 31 and 278 of the Civil Code² apply whenever damages occur following an action of a natural person who holds a leading or managerial position within the business concerned; this also includes cases where a so-called — vicarious agent“ (Erfüllungsgehilfe) exploits his/her position within the business to obtain a personal advantage.

Administrative fines may reach 1.000.000 euros for intentional criminal offences and 500,000 euros for negligent criminal offences. This limit may and should be exceeded in order to cover all the economic profit gained by the offender. Fines may be imposed on the legal person even if criminal or administrative proceedings have not been initiated in respect of the natural person who committed the offence, the procedure has been discontinued or if the natural person has not been convicted. According to jurisprudence of the Federal Supreme Court, institutional changes within a company cannot be used to circumvent the execution of the sanctions imposed. In addition to the pecuniary fines, sanctions such as the prohibition of engagement in a profession (articles 61 and 70 CC) or the dissolution of a company in cases of endangerment of public welfare (article 396

² Bürgerliches Gesetzbuch 1896 // www.gesetze-im-internet.de/bgb/BJNR001950896.html

Stock Corporation Act³) may exceptionally apply. Statistics relating to proceedings instituted against legal persons for corruption are not systematically collated at central level, although the Public Prosecution Offices of Bavaria and North Rhine-Westphalia have provided certain figures concerning levels of sanctions imposed until 2002. Most fines range from 20,000 to 175,000 Euros (most of the cases where these fines were applied concerned small and medium sized companies) and in some cases went up to 500,000 and after September 2006 and 2 million Euros in a corruption case.

Although there have been several initiatives to establish a register of companies found liable for acts of corruption, none of these have succeeded yet at federal level. The Federal Government still pursues the adoption of a law to establish a central register. A draft law was under consideration at the time of the visit. Several Laender (Bavaria, Berlin, North Rhine-Westphalia, Hesse, Baden-Württemberg, Rhineland-Palatinate, Hamburg, Lower Saxony and Bremen) have established their own registers; some other Laender are currently in the process of developing such records (Saarland, Brandenburg, Schleswig-Holstein). Furthermore, it is envisaged to establish a special procedure at federal level for awarding a — prequalification certificate“ to those companies which have given proof of their expert know-how, reliability and performance in the context of previous contracts. Only those companies which have declared inter alia that they are not recorded in a black-list at Laender level will be able to obtain such a prequalification certificate.

The Chamber of the Laender was preparing a draft law, which would extend the scope of application article 76 (3) of the Stock Corporation Act by including offences such as fraud, computer fraud, subsidy fraud, capital investment fraud, breach of trust and withholding and embezzlement of wages or salaries. The offences of false information, false presentation and deliberate breach of duty in case of loss, excessive indebtedness or insolvency are also to be included. According to this draft, shareholders or managers of limited liability companies can also be barred if found guilty of making wilfully false statements related to the establishment of a company or in connection with the increase or decrease of the nominal capital of a company.

Parliament of Germany must establish at Federal level a central register (blacklist) of companies which have previously been found untrustworthy in bids for public contracts“.

Czech Republic

Czech legislation did not provide for criminal liability of legal persons. A draft act introducing this concept was rejected by

³ Aktiengesetz 1965 // www.gesetze-im-internet.de/aktg/BJNR010890965.html

Parliament in November 2004 under strong pressure from the business community. The government did not propose to amend current provisions on legal persons to provide for adequate liability of legal persons. Czech legislation provides for liability under administrative law but not in respect of corruption, money laundering and trading in influence, and under civil law for damages incurred as a result of a criminal offence or unfair competition. No sanctions can be taken against legal persons concerning cases of corruption, money laundering or trading in influence.

Tax authorities of Czech Republic are required to report suspected fiscal offences to law enforcement bodies and suspicious transactions to the Financial Intelligence Unit. Corruption is not mentioned in the list of the criminal offences to be reported to the financial police, tax authorities appeared to be sufficiently aware of their role in the investigation of corruption offences when asked by the police to provide information or data contained in files of taxpayers. However, even in the absence of specific requests by the police, tax authorities clearly play an active role in the detection of corruption. The Czech authorities should introduce an obligation for tax authorities to report corruption offences.

The opinion of introducing corporate liability was reiterated by the Government in November 2009, in Accordance to international treaties of the Czech Republic. The Government adopted a resolution № 1451, authorising the Minister of Justice to prepare a draft bill on corporate liability for situations where international treaties and other legal instruments require such liability. The Ministry of Justice has prepared a draft law on criminal liability of legal persons, which is currently subject to amendments following its circulation to parties concerned (ministries and other state institutions) for comments. It is planned to submit a bill to Parliament during the second half of 2010.

The Internal and Office Rule for District, Regional and High Court of 3 December 2001 (Article 77) imposes an obligation to inform the authority competent to register commercial persons about a final judgment involving a disqualification sanction. These Rules provide that information on the outcome of criminal proceedings involving business-related crimes shall be sent to the Registry Court. The Commercial Registry (the Registry Court) will initiate the procedures for deleting such a person from the Commercial Registry.

The intention to provide for criminal liability of legal persons has not materialized. There is political consensus not to introduce corporate criminal liability. The Ministry of the Interior is now preparing a draft law, which would provide for administrative liability of legal persons for criminal offences, including bribery, money laundering and trading in influence. However, the difficulties of the proposed draft act are that, as liability of legal persons would be governed by administrative procedures, mutual legal assistance in criminal matters in respect of legal persons would not be possible and — as the administrative proceedings would only commence after the

criminal proceedings against the natural person who committed the crime in the name or interest of the legal person has been realized. Although it would seem that steps have been taken since then to draft a law on liability of legal persons, the drafting of this law appears to be fraught with difficulties.

So the Criminal law convention on corruption 1999 and the UN-Convention 2003 has not been implemented by Germany and Czech Republic. They oblige to establish criminal liability of legal persons in accordance with the Conventions

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