

PROCEDURAL ISSUES REGARDING THE CRIMINAL LIABILITY OF LEGAL PERSONS IN HUNGARY

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Abstract in original language

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Abstract

The Hungarian legal system never provided for the criminal liability of legal persons before. Legal persons were to be fined for their violations of law with civil or administrative law measures, but nothing more could be done before act CIV of 2001 entered into force. Criminal law cannot interpret this concept; even though we cannot be sure of the contrary even today.

Key words

legal persons, criminal liability, corporation, Hungary, European Union

1. HISTORICAL OVERVIEW

The Hungarian legal system never provided for the criminal liability of legal persons before. Legal persons were to be fined for their violations of law with civil or administrative law measures, but nothing more could be done before act CIV of 2001 entered into force.¹ Criminal law cannot interpret this concept; even though we cannot be sure of the contrary even today. Legal literature considered the introduction of this institution necessary since the 18th century, but it was realised only eight years ago.

The most often cited reason for introducing the criminal liability of legal persons is the obligation coming from the European Union.²

¹ The new regulations entered into force on 1 May 2004, on the day when Hungary joined the European Union

² SÁRKÖZY, TAMÁS: *Büntetőjogi intézkedés szervezetekkel szemben?* [Criminal law sanctions against organisations?] In. Sárközy Tamás: *Kormányzás, civil társadalom, jog*. Budapest, 2004. pp 194-205

However, after thorough investigation we may observe that the EU has never imposed any obligation, only made some recommendations for its members to punish the illegal activities of legal persons in some ways other than civil and administrative procedures – for example with criminal law tools. None of the documents set forth explicit obligation.³ The frequent mentioning of this, however, in itself gave proper and generally accepted reason for the preparation of the regulations the relevance of which otherwise is difficult to reason, explain and put into practice.

In addition to the formulation of criminal law provisions the establishment of criminal procedural rules also imposed great difficulties. It is obvious that no matter how good a criminal law rule is, the establishment of a similarly appropriate procedural regime is at least as important, because even the best criminal law rules are impossible to execute without a proper procedural framework.

It seems that in the issue of the criminal law sanctioning of legal persons – proving the worries expressed earlier in legal literature⁴ – the legislator did not manage to establish efficient procedural rules. The regulation is incomplete, imprecise and disregards the fact that the present criminal procedure law regime may be interpreted primarily with regard to a natural person accused. It results from the subsidiary nature of act IV of 2001 on measures applicable against legal entities in criminal proceedings (hereinafter referred to as: Jszt.) that in addition to its rules the provisions of act XIX of 1998 on criminal procedure (hereinafter referred to as: CPC), as background legislation shall also be observed, which may cause great difficulties if certain rules are related exclusively to natural persons.

The rights of the legal person during the procedure, the scope of principles and guarantees protecting the organisations are vague. Even though the Jszt. orders the application of the CPC, this does not provide help in defining the position of the legal person in the procedure, to determine whether the generally accepted fundamental principles, among others the presumption of innocence, the prohibition of self-incrimination shall entitle the legal person and how the rule of the burden of proof shall be properly interpreted. Due to the deficiencies of procedural regulations its right to good reputation may be harmed and its interests may be violated due to the enforcement of the principle of publicity. In addition to problems related to procedural rule further regulations of the procedure are also imperfect, which all together hamper the realisation of efficient and fair procedure.

³ Sárközy Tamás: Büntetőjogi intézkedés szervezetekkel szemben? In. Sárközy Tamás: Kormányzás, civil társadalom, jog. Budapest, 2004 p 194

⁴ See Erdei Árpád: Hogyan lehet terhelt a jogi személyből avagy a jogi felfogás változásának ára, Békés Imre Ünnepi kötet (szerk.: Gellér Balázs) ELTE ÁJK Budapest, 2000, 251. oldal

The Jszt. contains the rules of the criminal law sanctioning of the legal persons in one act, it is a „code-like” regulation. It contains criminal law and procedural law rules and regulates all aspects of this special procedure.

2. INTERNATIONAL OVERVIEW

No. R (88) 18. recommendation of the European Council published in 1988 expressly favours the introduction of rules for the criminal law liability of legal persons. It mentions possibilities to solve problems of criminal law but lacks any ideas for procedural solutions. The European model code, the Corpus Juris Europae published in 1997 formulated criminal law rules and related procedural provisions for the protection of financial interests of the European Union.⁵

For the members of the European Union the EU prescribed the establishment of the system for the criminal law sanctioning of legal persons as „obligation”⁶ Some countries – due to their traditions and dogmatic background – has not introduced such regulations, despite the fact that majority of legal scholars favour the criminal law liability of legal persons.⁷ Other countries have had – for the same reason – well established and properly operating system for long.

Procedural approach to the criminal liability of legal persons

The legal person, as entity cannot have liability of its own as consequence of its actions, as it does not have the necessary will and ability to act. In its case it is only possible to consider abstract ways of responsibility. This statement is true for all cases when the court sanctions the legal person, let its responsibility be inherited or objective. The officials, employees of the legal person are natural persons who may be punished for their actions – the organisation itself cannot be subject to criminal responsibility.

The legal person may be included into the criminal procedure and finally may be sanctioned – among other possibilities – if a natural person accused is found guilty for the commission of a deliberate offence which caused any kind of advantage for the legal person. The perpetrator shall be connected to the legal person in any ways described in the Jszt. According to the main idea of the legislator, the

⁵ DELMAS-MARTY, MIREILLE-VERVAELE, J.A.E.: The Implementation of the Corpus Juris in the Member States. Vol. 1. Foreword Intersentia, 2000, Antwerpen, Groningen, Oxford

⁶ Second Protocol on the liability of legal persons, confiscation, money laundering and cooperation between member states drawn up by Council Act of 19 June 1997 – OJ C22 of 19.7.97

⁷ HEFENDEHL, ROLAND: Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems. Buffalo Criminal Law Review. Vol 4:283/2000. pp 283-300

fate of the legal person shall be tied to that of the natural person accused. In exceptional cases also objective form of responsibility may be applied if the accused dies before the end of the procedure or is considered to be insane. In such cases it may be sanctioned in lack of the determination of the criminal responsibility of the accused.

In Europe majority of those countries which provide for the criminal law sanctioning of legal persons applies the rules of the procedure against natural person perpetrators also for legal persons. This is a simple solution, obviously some rules applicable for natural persons – such as personal presence at evidence procedures, declaration in person, etc. – cannot be interpreted with regard to legal persons (or in some cases are exercised by the legal representative of the legal person). This approach, however, raises several questions which fundamentally influence the position, rights of the legal person and the execution of procedural guarantees, and for which this solution does not provide proper answer.

However, there are some exceptions, there are some European countries in which the legislator considered the special procedural requirements of legal persons and tried to reflect these in the regulations, with more or less success. The main issues are the position of the legal person, the definition and execution of its procedural rights. Like the Hungarian legislator, also the foreign lawmakers tried to regulate upon the peculiarities. But no specific procedural regime has been made especially for legal persons.

In France the legal person may proceed as accused with its own rights, therefore the French criminal procedure code contains some – though not many – rules regarding the legal persons, primarily about competence, subpoena, the representation of the legal person, the filing of changes and the delivery of sentence.⁸

The regulation does not go into details in the Netherlands, the criminal procedure code contains specific provisions regarding the representation of the legal person and the delivery of court decisions.⁹

In Denmark the criminal procedure code – like to before mentioned ones – contains only few provisions regarding legal persons. It only provides for the representation and subpoena of the legal person.¹⁰

⁸ Chapter XVIII of the French CPC regulates special procedural rules applicable in procedures against legal persons as special procedure (Article 706-41 – 706-46.)

⁹ Fantoly Zsanett: A jogi személyek büntetőjogi felelőssége. Budapest, HVG-ORAC, 2008 p 215

¹⁰ Fantoly Zsanett: A jogi személyek büntetőjogi felelőssége. Budapest, HVG-ORAC, 2008 p 218

The German criminal procedure code has some provisions about procedural rules applicable for legal persons if administrative measures shall be applied against the legal person. It contains rules about competence and presence at evidence procedures.¹¹

The Estonian criminal procedure code, which was modified in 2012, states in its article 36 that the legal person accused shall participate in the criminal procedure via a member of the board of directors (or its similar organ) and this person may fully exercise the rights of the accused defined in law, including the right to confession in the name of the legal person.¹²

In Norway the criminal procedure code only contains few regulations about the legal person accused, it says that if the accused is a legal person, the rights of the accused defined in law shall be exercised by its legal representative.¹³

3. PROCEDURAL PROBLEMS IN THE HUNGARIAN REGULATION

In Hungary criminal procedure cannot be conducted directly against the legal person, but only against a natural person accused, and the legal person may participate in the procedure due to the „criminal relationship” between the accused and the organisation, required by law. In the past few years, however, not many procedures have been initiated against legal persons, there is no relevant practice. The main reason for this on the one hand, is that the criminal liability of legal persons does not fit into the legal system, and, on the other hand is that even though it has been introduced, the related procedural regulations are rather vague, and they do not provide proper guidance about the initiation and conduct of the procedure. The position and rights of the legal person are not clear, therefore the uncertainties of law enforcers are understandable.

3.1 The initiation of the procedure

1. According to article 12 para (1) of the Jszt. the legal person may be included into the procedure if „measures may be applied” against it. The court does not provide any guidelines regarding the level of certainty which shall be necessary for the prosecutor (or the court) to include the legal person into the procedure. The existence of the conditions is difficult to prove, sometimes it is impossible. The notion

¹¹ Strafprozeßordnung (StPO), Vierter Abschnitt Verfahren bei Festsetzung von Geldbuße gegen juristische Personen und Personenvereinigungen

¹² <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022>

¹³ Act of 22 May 1981 No. 25 relating to Legal Procedure in Criminal Cases (Straffeprosessloven, The Criminal Procedure Act with subsequent amendments, most recently by Act of 17 July 1998 No. 56), Chapter 8, Art. 84.a

of „suspicion” is clear, but it is a question where the threshold of it is in case of legal persons. There is no element of crime the existence of which should be proven, there is no guilt about which certainty shall be reached. The conditions of including the legal person into the criminal procedure are not clarified as much as in cases of natural persons.

2. According to the reasoning of the Jszt. the legal person does not stand in the position of the accused in the procedure, its position is different from that of the accused, it only shares its fate. The reasoning points out correctly that the Jszt. does not make attempt to define the procedural position of the legal person, but it declares the procedural position of its defender and its rights.¹⁴

Therefore, it is necessary to define the procedural position of the legal person. It is absurd that a participant of the criminal procedure who may be eventually sanctioned has vague procedural position. According to the provisions of the CPC it is not an accused but it is also not „other participant”¹⁵ of the procedure, as it is excluded by the law.

The Jszt. does not go into details about the rights of the legal person, and the general provisions of the CPC – partly due to the ambiguity of the procedural position, partly because of problems of terminology – cannot be used, as those entitle only natural persons participating in the procedure.

Furthermore, it is not clear from the act what rights entitle and obligations burden the organisation and its representative during the procedure.

3.2 The presumption of innocence and the prohibition of self-incrimination

According to civil law which contains the basic provisions regarding the existence of the legal person it shall have the same rights as natural persons, except for those rights which are related to the specific nature of the natural person. This approach shall be followed also in criminal procedure. However, some principles – among others guarantees of deprivation of personal freedom defined in the Fundamental Law – cannot be properly interpreted. At the same time, however, the right to defence, to fair trial, to the use of the mother tongue, the presumption of innocence and the prohibition of self-incrimination. In lack of the necessary criminal procedural provisions, and in lack of analogy in criminal law, the mentioned rights cannot be interpreted.

¹⁴ See: the general part of the ministerial reasoning of the act.

¹⁵ Other participant is the person whose rights or interests are or may be affected by any decision made during the criminal procedure.

The latter requirement basically means that the accused shall not be forced to provide evidence against itself. In case of the legal person this would mean mainly the declarations of the legal person's representative, as other means of evidence may be collected through legal ways (e.g. house search, seizure, secret information gathering, etc.). However, it does not turn out clearly from the provisions of the Jszt. whether this prohibition shall be enforce also regarding the legal person, whether the presumption of innocence may be interpreted about the legal person and whether the requirement of *in dubio pro reo* shall be applied in its cases.

If the legal person may be sanctioned in the criminal procedure it shall be entitled to rights with which it can protect its position. The Jszt. does not state whether the legal and procedural representative of the legal person shall be obliged to hand over evidences carrying information which may be detrimental to the legal person. Neither of them shall be entitled to refuse participation as witness – with regard to information about the legal person, maybe forming basis of its sanctioning – because the Jszt. does not provide any regulations about this and the rules of the CPC cannot be applied. It is a rather significant deficiency, because the obligation to participate as witness places both the legal person and its legal representative into exigency, and questions the fairness of the procedure.¹⁶ It is also not clear whether the representative of the legal person is entitled to use its own mother tongue in the procedure, the lack of which may be detrimental. In the era of multinational companies it may be assumed that the representative of the legal person does not speak Hungarian.

As result of the above mentioned questions emerge regarding the contents and framework of the obligation to provide data about the legal person. It is not clear whether the legal person – in case of its actual or possible inclusion into the procedure – shall be obliged to provide any evidence, document or data. Obviously, the public, accessible documents of the legal persons are available also for the authorities. However, it is a question whether the legal persons shall be obliged to provide evidence in support of the procedure against the accused which may endanger and worsen its own position in case of its participation.

There is another aspect which may be also considered. If the prohibition of self-incrimination is enforceable for legal persons, it shall not be obliged to provide data, or it can decide which information it wishes to share with the authorities. This may result in the possibility that the legal person does not provide useful information in the procedure against the accused, moreover, it may withhold some which could prove the guilt of the accused. Therefore the legal person may become a determinative player of the procedure,

¹⁶ In the previously mentioned German and Dutch procedural model the representative is not obliged to participate as witness.

as it may happen that the (legally) withheld information may lead to the acquittal of the accused.

With regard to the presumption of innocence another remark is that regardless of the above mentioned the Jszt. shows that the presumption of innocence shall not be taken too seriously. Article 10 obliges the prosecutor to inform the court of registration about the initiation and conduct of the criminal procedure, as well as about the indictment. The court registers the content of the notification into the public register, and does this in the phase of the procedure when it is still questionable whether the legal person is really connected to the case and will be sentenced at all. In this sense the information obligation of the prosecutor is not in harmony with the presumption of innocence.

Nevertheless the contradiction of the above mentioned situation is obvious. In lack of information obligation „innocent and naive” people trusting the court register would get into business relationship with the legal person and could suffer damages later as result of the sanctioning. It is not possible to choose the right approach, only to weigh interests related to the formulation of the regulations. However, the above mentioned system is doubtful, as it completely disregards the obvious interests of the (not yet sanctioned) legal person.

3.3 The right to good reputation

In case of legal persons the protection of good reputation mainly means the protection of the trust and impressions regarding the business reputation of the legal person. If the legal person is included into the criminal procedure but it proves to be unsuccessful and the legal person is not sanctioned, the procedure shall be terminated. The legal person is not sanctioned but it shall bear all difficulties and consequences of the procedure. This is not the same in case of natural persons accused and acquitted.

If the court terminates the procedure because the legal person cannot or shall not be sanctioned, the legal person may carry on its activities as earlier. If it is able to do so. Because the fact of the procedure may harm the reputation of the legal person so much that it might not be able to continue its activities any more. Moreover, the court does not state that the legal person did not participate in the commission of the crime, it does not acquit the legal person, just terminates the procedure against it quietly. The legal person is not able to seek any remedy for the harm caused by the procedure, as the CPC does not allow for indemnification, even though in some cases it would be reasonable, like in the case of the accused.¹⁷

¹⁷ Even though the CPC is background legislation, similarly to several provisions the rules on indemnification cannot be used by legal persons, because their terminology and notions all refer to the natural person accused.

3.4 Right to defence and the position of the legal representative

The Jszt. does not oblige the legal representative of the legal person to be present at every court hearing. The legal person cannot protect its interests on its own, it needs its representative to proceed on its behalf. In lack of the „defender” of the legal person its representative may act on behalf of the legal person, but it may happen – as also the law mentions it – that the legal representative of the legal person is the accused in the criminal procedure, and shall not act in relation with the legal person at all. In such cases – in lack of „defender” – the legal person may be left alone in the courtroom.

3.5 Principle of publicity

The court hearing is public, regardless of the participation of legal persons in the procedure. As result of the principle of publicity the members of society may follow the procedure and may get to know the evidences. This, however, may greatly harm the interests of the legal person, as business secrets, confidential information may also be published, and during the evidence procedure the members of the public may get to know information which should not be disclosed to them under general circumstances.

Despite this the legal person may not request the exclusion of the public. The Jszt. does not deal with this issue, while the provisions of the CPC do not list the legal person (and its representatives) among those who are entitled to request closed hearing.

3.6 Unfinished procedures

The criminal procedure affects the fundamental rights of the accused, this is why the procedure shall be held among limits. One of the guarantees ensuring this is the rule of law, which is declared in the Fundamental Law, regardless of the criminal procedure. This also provides for legal certainty through the notion of legal force, which ensures the final closure of the procedure. This is how the completion of the procedure in time may be ensured, as well as the final nature of decisions.

However, in some cases the Jszt. forgets about the closure of the procedure against the legal person. Article 18 para (2) states that in case of the acquittal of the accused the court does not have to make any statements about the legal person. It is a strange situation, because the procedure against the legal person is not closed at all. The Jszt. practically forgets about the legal person.

4. SOME SUGGESTIONS

1) The definition of the position of the legal person

The defining of a position is a difficult task, but it is certainly necessary in order to properly place the legal person in the procedure aiming at its sanctioning. The legal person is a client in the procedure,

who may be sanctioned, but it is not an accused, therefore the rights of the accused do not entitle the legal person. According to the present regulations the legal person cannot exercise any rights which are not listed in the Jszt., because the CPC does not contain any provisions about legal persons and criminal law prohibits analogy. Unless legal person receives its own position in the procedure, its rights and obligations cannot be clearly defined.

2) Exclusion of the public

It is obvious that just like in cases of other persons participating in the procedure secrets and confidential information may be touched upon the publication of which would be against the interests of the legal person. Therefore it would be reasonable to add the legal representative of the legal person to the list of people defined in the CPC, who are entitled to initiate the exclusion of the public, or to insert a line about it into the Jszt.

3) Regulation of the participation of the representative as witness and the obligation of handing over evidence

It shall be stated clearly whether the (defender or legal) representative of the legal person may refuse to participate as witness. Regarding the „defender” the answer is definitely positive, as the defender of the accused shall not be heard as witness about information which it received during its work with the accused. The representative of the legal person can perform its tasks properly, in line with its conscience and the professional rules if there is no obligation to act as witness.

The situation of the legal representative of the legal person is somewhat different, as it will be probably affected by the criminal procedure as accused, and as such it cannot be obliged to give statement. It is not clear whether it can withhold also information related to the legal person, or only those which are directly related to its own situation. The best solution would be to exempt the legal representative of the legal person from acting as witness and answering questions related to the role of the legal person in the crime. The employees, workers, partners of the legal person would be obliged to act as witnesses according to the general rules, naturally.

4) Closing of the procedure and the contents of the judgment

The requirement of legal security requests that the procedure against the legal person shall be terminated by the court even if it does not apply any sanctions despite those set forth in the indictment. It is important also for the protection of the rights and interests of the legal person, because this way the final decision of the court will prove that no sanctions were applied against it in the criminal procedure. Moreover, the indictment contains the reference of the prosecutor to the application of a sanction, therefore – as it is bound by the indictment – the court shall not remain silent about it.

5) The harmonisation of related laws

Even though the regulations regarding the legal persons are not new any more, it seems that some fields have not been harmonised with the criminal law and criminal procedure law regulations. Perhaps upon the criticism¹⁸ formulated in the past years among the provisions about the transformation of legal persons now there are some new regulations prohibiting the dissolution of the legal person if there is an ongoing criminal procedure against it.

There are some more problems – as examples – regarding the CPC:

a) The Jszt. does not refer to the rules of exclusion of the CPC, which results in the fact that the rules of exclusion do not apply to the representative, employees of the legal person or their relatives. Therefore the legal representative of the legal person, its employees, partners of the legal person, their relatives may proceed as judge, prosecutor or member of the investigation authority. The exclusion of such persons shall be regulated among the objective reasons for exclusion.

b) According to the Jszt. the legal representative of the legal persons shall be subject to provisions relevant for defenders. However, majority of articles 44-50 cannot be interpreted with regard to legal persons, because they define rights in the relationship of the defender and the accused. It is not clear whether these are applicable also for the legal representative of the legal person.

A good law in itself cannot guarantee proper procedure, but a bad one cannot do so for sure. If the Jszt. wanted to draw parallel between the situation and the rights of the accused and the legal person it could have done so with one sentence. It did not do so, therefore the provisions of the Jszt. and the CPC shall be interpreted and applied in themselves.

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¹⁸ Vö. DOBROCSI, SZILVIA: *Bizonytalanságok és kérdőjelek – A jogi személy a büntetőeljárásban. [Uncertainties and questions – The legal person in criminal procedure.]* Eötvös Loránd Tudományegyetem, Állam-és Jogtudományi Doktori Iskola Ph.D Kiadványa. 2006

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