

SOME PROBLEMS OF THE CRIMINAL LIABILITY OF LEGAL ENTITY IN CRIMINAL DOGMATICS

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Abstract

The criminal lawyers, theoretical experts get used to priority and the necessity (the needs) of the legal practice. The Act 2001:CIV of Criminal Measures against Legal Entity was composed in 2001, in Hungary in a supplementary act. It's called Measures-Model act in Hungary.

The problems of criminal liability of legal entity are:

- Foreign body in classic system of criminal liability.
- The sanctions (winding up, or limiting activity of the legal entity etc.) against the legal entities are they can be called criminal sanctions actually sanctions of civil law.

But there are benefits of the criminal liability of legal entities in practice.

Key words

The Act 2001:CIV; Measures-Model act; Problems and benefits of criminal liability of legal entity.

The criminal lawyers, theoretical experts get used to priority and the necessity (the needs) of the legal practice. The Act 2001:CIV of Criminal Measures against Legal Entity was composed in 2001, in Hungary in a supplementary act. The problems of criminal liability of legal entity are: - Foreign body in classic system of criminal liability. - The sanctions (winding up, or limiting activity of the legal entity etc.) against the legal entities are they can be called criminal sanctions actually sanctions of civil law. But there are benefits of the criminal liability of legal entities in practice

The criminal lawyers, theoretical experts get used to priority and the necessity (the needs) of the legal practice. Inter alia the creating of the criminal liability of a legal entities (in addition presence and spreading of the objective responsibility in criminal law, not only in case of committing crime under the influence of alcohol, but in cases of contraventions [motoring offences] against the safety of traffic, e.g. in Hungary).

But it can be belong here the committing crime of covered detective, the plea bargaining, protected witness etc. in the criminal proceeding.

After several precedents in legal history, in Europe – like in France (Criminal Ordinance of 1670), Italy and the German areas – has been generally accepted the practice of criminal sanctions against towns, villages, local church, guilds and universities in the 16-17th century. The French Penal Code (1810.), which is a model for a lot of penal (criminal) codes restricted the criminal liability to individual (natural) persons only.

In England in 1940's, and the rest of Europe after the II. WW. has arisen the issue of the criminal liability of a legal entities. Except Denmark, when the Butter Act (1926) criminalized some offences of legal entitis against the health of individual (natural) persons.

It has appeared on the agenda in many jurisdictions and the different level of international legal documents such Council of Europe, European Union, or OECD too.

There are some precedents of the international legal documents:

- The Recommendation of Council of Europe R. No 12/1988 (On econimical crime)
- The Recommendation of Council of Europe R. No 18/1988 (On corporate criminal liability).
- The Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests. (97/C/ 221/02)
- Human Beings and Sexual Exploitation of Children. (97/154/JHA).

Notable the regulation of the first attempt at common (or it a part of) criminal code of Europe the „Corpus Juris Europae” (1997-2000).

The CJE accepts as a principle of individual culpability. But the „individual liability” means the criminal liability of natural person and legal person (entity) too.

The sort of criminal liabality are CJE:

Individual criminal liability, (it adheres to natural person).

Criminal liabililty of the head of the business, (it adheres to natural person too).

Criminal liabililty of organisations (it adheres to legal person).

So the CJE admits the criminal culpability of legal entities, as an individual person. But, it can be seen in CJE the head of business can not hide behind the collective decision (e.g. resolutions of shareoulders meeting or board of directors), he (she) has a self-liability. It is important in terms of sanction.

Nowadays the law orders the inflictim of punishment of the legal entities committing the act of crimes is generally admitted, not only in Europe, but in other countries of the World (e.g. USA, India). The regulation of criminal liability of legal entites can be found inside of criminal code (e.g. Denmark, France, Finnland, Belgie) or in other (supplementary) code (act) (e.g. Greece, Hungary).

Individual (natural) persons commit crimes by having the necessary mental elements (in Anglo-saxo dogmatics that means "mens rea": usually criminal intent to perform an act or omission) and having performed the act or omission [if the concrete omission is criminalized in the criminal law of country] (in Anglo-saxo dogmatics that means: "actus reus") which completes the crime.

The most important of traditional principle of criminal law, namely the individual responsiblity based on the person's guilt, and the criminal law as an ultima ratio.

Individual (natural) persons can commit anykind of offences defined in Special Part of Criminal Code. Even there are some offences which are committed by natural person (for example crime against sexuality, rape, assault against decency.

Legal entities or legal persons:

“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre.”¹ The basic of this opinion was rised the authoritative decision: „The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. „²

In case of unlawful act of legal entity the in addition to criminal sanction, it usually is imposed a sanction on civil law.

The defined criminal sanctions against legal entitis (legal persons) – eo ipso – are not a classical criminal sanctions (except: fine, or penalty).

Corporations, legal entities can be held criminally responsible for a wide variety of crimes:

Contempt in disobeying decrees and other court orders, directed to it.

Conspiracy.

Bribery or conspiracy to bribe public officials.

The illegal practice of medicine.

Maintaining public nuisance.

Violations of licensing and regulatory statutes.

Violations of consumer protection laws

Antitrust law violations.

Liquor law violations.

Larceny, if corporate officers authorized or acquiesced in criminal act.

Extortion, assuming that it was authorized, requested or commanded by a managerial agent having supervisory responsibility.

Obtaining money by false pretenses.

Selling or exhibiting obscene matter.

¹ <http://www.takeovers.gov.au/display.asp?ContentID=542> [10.28.2008.].

² <http://www.nationmaster.com/encyclopedia/Corporate-liability> [10.28.2008.].

Statutory federal crimes and such as violations of the Occupational Safety and Health Act.³

Some criminological aspect of crimes of legal entities, for example the aim of committing crime the unlawful profit, gain, or disguising of own responsibility, unlawful act.

The decision of unlawful act is based on „typically” collective resolution.

The history of criminalizing of criminal liability of a legal entities and the Hungarian law

The discussion about the criminal liability of a legal entities was intensified after 1990's in Hungary. There are some motives for the spreading discussion after the (too?) fast economical privatization in Hungary.

a. „The industrial and economic development necessarily has gone and go hand in hand with the increasing number of crimes committed in the frame of corporations and the growing of power of these organizations.

b. The impulse of the reaction of criminal law againsts economic organization has been primarily the new type of criminality. The fight againsts this criminality and „criminal organizations” needs new solutions and legal instruments in criminal substantial and criminal procedural law as well: the criminal liability of legal entities is considered as one of these new instruments.”⁴

But the refusal answer of criminal dogmatics was „societas delinquere non potest”, (companies cannot commit an offence) referred to Savigny, or Feuerbach, who declined this, because the legal entity can't behave criminal culpability.

In the history of Hungarian criminal law history we found only one precedent of the criminal liability of a legal entities. The Act 1881:39. punished, as (only) contravention the representatives corps of the cities, the church districts etc., if they omitted the renovations of them historic monuments, statues, buildings. I think – nowadays -, it can be current and necessary ths regulations too.

The the politics decided the the matter at issue in criminal dogmatics, the enjoying the European Union (EU).

The Hungarian law create the possibility the criminal liability of a legal entities.

The Hungarian legislation implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force on 1 March 1999.

The Act 2001:CIV of Criminal Measures against Legal Entity was composed in 2001, but enacted on May 1st 2002.

Until the Act 2001:CIV is enacted in 2004., only individuals or (natural) persons may be held criminally liable, whereas a legal entity may not incur criminal sanctions.

³ http://www.legalserviceindia.com/articles/cor_dr.htm [10.28.2008.].

⁴ http://kvt99.lib.uni-miskolc.hu:8080/servlet/eleMEK.server.fs.DocReader?id=215&file=tz_eredeti1360.pdf [10.28.2008.].

The criminal sanction-system is consist of two sanctions in Hungarian Criminal Code:

punishment,

measures (CC. 38.§ and 70.§).

There are an elements of concept of act of crime:

- dangerous for society,

- infliction of punishment,

- culpability (CC. 10.§)

The condition of sentencing of punishment comitting act of crime involving the three elements (see above).

As we can see the culpability essential element of act of crime, not only in criminal dogmatics, but in written law (in the Criminal Code 10.§) too.

Companies which are only in the course of being incorporated are, however, excluded, since they have not yet acquired any legal personality.

The Act aims to implement general criminal liability applying to all the offences which currently exist under Hungarian Criminal Code.

A legal entity may thus be punished if it commits any of these offences, which are defined in Hungarian CC. According to this Act, legal entities are criminally liable in the cases stipulated by the law, for crimen committed in their bodies or representatives.

The sanctions applicable to legal persons:

Winding up the legal entity.

Limiting the activity of the legal entity.

Imposing a fine.

The Act lays down that the measures to limit the activity and impose a fine may be ordered independently or jointly, but winding up the legal entity may not be combined with other sanctions.

Ad 1. Limiting the activity:

The court may sentence a legal entity to refrain from one or more of the following activities for a period of 1 to 3 years:

a) issuing public offerings;

b) participating in public procurement procedures;

c) entering into concession contracts;

d) benefiting from non-profit status;

e) obtaining public subsidies from local or central governments, foreign states, the European Union or other international organisations;

f) engaging in any other activity prohibited by the court. Furthermore, if a legal entity has been sentenced to limit its activities, once the judgement has become final, any public procurement and concession contracts that it has been awarded are rescinded and it is deprived of its non-profit status. In addition, it may no longer receive the public funds mentioned in item

e) above, and will be required to reimburse any such funds already received in connection with the offence.

Ad 2. Fine: The maximum fine is equal to three times the amount of the financial advantage gained or intended to be gained through the criminal act, and at least 500 000 Hungarian forints (cca. 2.000.- euros).

Ad 3. Winding up : A legal entity engaging in activities, whether legal or illegal, established for the purpose of covering up criminal activities, or in actual activities covering up criminal activities, may be wound up by the court, unless the legal entity running legal activities is recognised as acting in the public interest, is considered as being of strategic importance to the national economy, or performs national defence-related or other special tasks. (Act 2001:CIV. 3.§)

The criminal liability of a legal entity does not exclude the criminal liability of the individual person, who has committed the crime.

The Act 2001:CIV of Criminal Measures against Legal Entity is called the „Measures-model act” (measures-founded act). The „measures model act” means, the definition of act of crime can be found in Special Part of Criminal Code, and the sanctions (= measures) are in a supplementary act. The reason of this characteristic regulation, can be faced to another problems (?) within criminal law.

Since the Hungarian legislator established the possibility of the criminal reaction against legal persons and companies in a separate act, the theoretical and practical problems of legislation created by the Hungarian is controversial issue, but only in criminal dogmatics.⁵

The problem is, there are real doubts about using legal solutions established in England and in the United States in our legal system.

The criminal liability of legal entities is „foreign body” in classic system of criminal liability, in criminal dogmatics.

The sanctions against the legal entities are – they can be called criminal sanctions – actually sanctions of civil or economical law.

It is necessary to adopt a foreign instruments in criminal law, because

⁵ <http://jesz.ajk.elte.hu/fantoly8.html> [2008.10.28]

- The proof of the unlawful act is easier in relation a legal entities in criminal proceeding.
- The civil proceedings quite long for the reparation of the victims, and
- other „weakness” of civil or economical law.

But the benefits of the criminal liability of legal entities are practicals:

- The economical crime has been increased in number committing corporates, legal entities.
- Easier to proof the crime, - no investigation how and by whom issued a resolution in board of directors, or in shareholders meeting.
- Criminal proceedings start officially on the strenght of mainrule (principle of officially).
- The burden of the proof load with authorities, and not with clients, as in civil proceedings (principle of onus probandi). The criminal proceeding seems to more efficient, and faster.
- A legal entites can easier pay the fine to the victims.
- A criminal proceedings usually faster than civil proceedings, thus injured get in soon the compensation etc.⁶

It can be seen, the large number of benefits are is worth to break the classical criminal principle.

But it is possible too, we have to rethink some principles, a number of law establishments, solutions of the criminal law, which are rooted in 19th and 20th centuries.

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