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CORPORATE CRIMINAL LIABILITY

(in the Czech Republic, Slovakia and Poland)

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INTRODUCTION

“Legal entities are not made of flesh and bones, yet they have organs. They do not have any feelings, still they have a will. They seem invisible, nevertheless they act and can be summoned to be held liable for their actions. They do not have a domicile but still they have a place of business. For over a century other branches of law except criminal law acknowledge legal existence of these individuals that are not human beings. Criminal law reacted hesitantly and once it accepted criminal liability of legal entities it did so only in restricted range and under condition of meeting special requirements.”¹

New social and economic changes that struck Europe during 20th century and escalated in its last decade and at turn of the century inconspicuously started to brush away and undermine exclusiveness of principle of individual criminal liability of natural persons. Discussions and considerations over this topic spared none of the continental states. It was so because present legal instruments used to protect society from malicious and illicit actions of legal entities became ineffective and did not comply with its repressive and preventive purpose. Each of the states thus had to decide whether to desert old and established system of principles connected with individual criminal liability of natural persons (that continental criminal law was built upon) and present genuine or pseudo criminal liability of legal entities² or to choose other approach (for instance strengthening of administrative liability of legal entities). Frequently there were - and still are - many arguments for and against each of both ways.

From what was said above it is more than evident that introduction of corporate criminal liability is very contestable, complicated and also controversial issue. And path of genuine criminal liability of legal entities is the most of all. It is because that adoption of genuine criminal liability undermines principle of individual criminal liability of natural person

¹ DREYER, E. *Droit pénal général*. Champs Université: Flammarion, 2002, p. 78. In: JELÍNEK, J. *Criminal Liability of Legal Entities*. Prague: Linde, 2007, p. 28.

² KRATOCHVÍL, V. Trestní odpovědnost právnických osob a jednání za jiného (Stav de lege lata, de lege ferenda v České republice a Slovenské republice). *Právní obzor*. 2002, issue 4, p. 366.

which was the foundation stone of continental criminal law for many centuries. Continental criminal law worked with concept of offender/human being³, as it was said before - an individual who thinks, feels, an individual who has its own will - not immaterial or invisible being. Corporate criminal liability (or the criminal liability of legal entities if you please) represents a step away from the principle of individual criminal liability. As indicated before an adoption of genuine criminal liability of legal entities is in direct contradiction with the very foundations of criminal liability in continental legal system and thus represents a breach of integrity of stable classical system of criminal liability. As any other substantial interference to any system it may cause its weakening, instability or even collapse.⁴

When considering whether to adopt genuine or false criminal liability of legal entities we have to take a step back to date 26th July 1995. On this very day a Convention on the protection of the European Communities' financial interests was adopted and signed in Brussels. Among the signing states were all former members of European Communities and also some of candidate countries - especially the Czech Republic, Slovakia and Poland. This Convention was later amended by first and second protocol which were adopted and signed on 27th November 1996 in Dublin and on 19th June 1997 in Brussels also by aforementioned candidate countries.

Article 3 of the second protocol to Convention puts an emphasis on obligation of every member state to take the necessary measures to ensure that legal entity can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has (generally) a leading position within the legal entity. According to article 4 of the second protocol the member states shall take necessary measures to ensure that legal entities shall be punishable (for above mentioned actions) by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such exclusion from

³ At least for last four centuries. See ŠÁMAL, P., DĚDIČ, J., GRIVNA, T. et al. *Trestní odpovědnost právnických osob. Komentář*. Prague: C. H. Beck, 2012, p. 1–2.

⁴ JELÍNEK, J. Trestní odpovědnost právnických osob jako předmět zkoumání [online]. *Kriminalistika*. 2008, issue 1. [cited 26. 8. 2016]. Available at: <<http://www.mvcr.cz/clanek/trestni-odpovednost-pravnickych-osob-jako-predmet-zkoumani.aspx>>.

entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placing under judicial supervision or a judicial winding-up order.⁵

Requirement for adoption of criminal liability of legal entities also appeared (among other documents) in Council Framework Decision 2005/214/JHA of 24th February 2008 on the application of the principle of mutual recognition to financial penalties and in Council Framework Decision 2006/783/JHA of 6th October 2006 on the application of the principle of mutual recognition to confiscation orders. Both of these framework decisions are based on principle of mutual recognition and demand that member states shall recognize and execute orders issued by other member states (and imposed) against legal entity.

With adoption of criminal liability of legal entities is also connected Directive 2008/99/EC of the European Parliament and of the Council of 19th November 2008 on the protection of the environment through criminal law and Directive 2009/52/ES of the European Parliament and of the Council of 18th June 2009 on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

It is necessary to point out, that nor Convention neither its protocols nor other international documents do not categorically stipulate the necessity of adoption of genuine criminal liability of legal entities. They only oblige contracting parties to present liability of legal entities for their malicious actions and leave decision whether character of this liability will be criminal or administrative, genuine or false strictly within discretion of each contracting state.

The foregoing became an impulse to create a monograph - which now lies in your hands - as an outcome from cooperation of collectives of authors from the Faculty of Law of Masaryk University in Brno (Czech Republic), the Faculty of Law of Comenius University in Bratislava (Slovakia) and the Faculty of Law and Administration of University of Warmia and Mazury in Olsztyn (Poland) which was written in order to present to its

⁵ FENYK, J., FRYŠTÁK, M. Protection of the financial interests of the European Communities in the Czech Republic. In: *European Law and National Criminal Legislation*. Prague: Faculty of Law of Charles University, 2007, p. 116–117.

readers in which ways the Czech Republic, Slovakia and Poland dealt within their national legislations with demand of European Union to adopt liability of legal entities and whether they choose genuine or false criminal liability of legal entities or they just remained with administrative liability.

The collective of authors also believes that this monograph will provide enough useful information and ensure basic orientation in this subject-matter not just for theory but also for application practice and will become inspiration for further contemplations over this topic.

For the collective of authors

doc. JUDr. Marek Fryšták, Ph.D.

CZECH REPUBLIC