

Chapter 12

Corporate Criminal Liability in Hungary

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12.1 Introduction

The Act CIV of 2001 on Criminal Measures Applicable to Legal Persons (Act CIV 2001)¹ was adopted in 2001 by the Hungarian Parliament and has been effective since May 1, 2004, when Hungary became a member of the European Union (EU). The legislator decided to enact a separate act instead of placing the relevant provisions in Act IV 1978 on the Hungarian Criminal Code (Criminal Code).² The relationship between Act CIV 2001 and the Criminal Code is established by s. 70 Criminal Code, which enumerates criminal “measures”³ in Hungarian law, lists “measures applicable to legal persons”, and refers to the separate Act CIV in the footnotes. Act CIV 2001 itself is divided into two parts: the first six articles are entitled “Criminal Law Provisions” and the next twenty are entitled “Provisions on Criminal Procedure” and are followed by some closing provisions. The provisions of Act XIX 1998 on Criminal Procedure (Criminal Procedure Code)⁴ are applicable with some differences as defined in Act CIV 2001.

The aim of this chapter is to examine the present criminal liability of legal persons in Hungary. First, the historical background and the codification process of Act CIV 2001 is shortly outlined. Second, a possible theoretical model of Hungarian corporate liability principles and its substantive features are introduced and discussed. Third, the questions of sanctioning and finally the issues of procedure will be analysed with regard to the problems that have arisen in applying this special form of liability in practice.

12.2 Background

12.2.1 Traditional Principles

One of the traditional principles of criminal law in Hungary is that only natural persons may incur criminal responsibility as culpability and other

¹Act CIV 2001 on Measures Applicable to Legal Persons under Criminal Law, in force May 1, 2004.

²Act IV 1978 on the Criminal Code, in force July 1, 1979 (Criminal Code).

³Hungarian criminal law recognizes two forms of sanction. In the official English version of the Hungarian Criminal Code, one is referred to as “punishment” (e.g., imprisonment or community service) and the other is called a “measure” (e.g., a reprimand or forced medical treatment). The unofficial English text of Act CIV 2001 uses the same terms to translate the name of the sanctions against corporations.

⁴Act XIX 1998 on the Criminal Procedure (Criminal Procedure Code), in force July 1, 2003.

elements of criminal responsibility are only possible in relation to human beings. Consequently, the criminal responsibility of legal persons was unfamiliar to our criminal justice system until the 2001 reforms just discussed.

When the present Hungarian Criminal Code was being prepared (it has been in existence since 1978), the general view was unambiguous: only natural persons could commit crimes because criminal culpability was a blameworthy psychological connection between the offender and his/her offense. In keeping with this traditional principle, Hungarian criminal law rejected the idea of corporate criminal responsibility – right up to the end of the twentieth century. The only (limited) exception in Hungarian legal history was Act XIV 1939 on the Abuse of Legal Currencies, which made it possible for a judge to obligate a corporation to pay financial compensation jointly with an employee or agent who committed a crime on the corporation's behalf.⁵

12.2.2 Law Reform

The adoption of rules providing for corporate criminal liability was part of the harmonization program that was a prerequisite for EU membership. Legal acts of the EU and other international organizations obligate states to take the appropriate measures to ensure that legal persons may be held accountable for criminal offenses committed within their institutional frameworks.⁶

There was no international obligation on Hungary to introduce a form of corporate responsibility for criminal offenses that were specifically *criminal* in nature, however: EU sources stated that sanctions against legal persons should (merely) be effective, proportionate, and dissuasive,⁷ and there is no doubt that an administrative sanction, such as a large fine, could also be effective and dissuasive. Moreover, in Hungary, legal persons could already be held liable in other areas of law. Several acts in the area of administrative and civil law contained such provisions and rather severe sanctions. For example, the regulatory fine was introduced by Act LIII 1995 on Environmental Protection⁸ and Act CLV 1997 on Consumer Protection,⁹ the exclusion of legal persons from public procurement processes and the

⁵In fact, the act established an objective criminal liability for corporations separately from the natural person's culpability. Nevertheless, its sanction was unquestionably criminal because it could be imposed within the framework of a criminal proceeding as a result of the commission of a criminal offense.

⁶See further Pieth/Ivory (this volume).

⁷See, e.g., Council Framework Decision 2002/475/JHA of June 13, 2002 on combating terrorism, OJ No. L 164, June 22, 2002, Art. 8.

⁸Act LIII 1995 on the Environmental Protection, in force December 19, 1995, art. 106.

⁹Act CLV 1997 on the Consumer Protection, in force March 1, 1998, art. 47(1)(i).

publication of sanctioning decisions were possible under Act CXXIX 2003 on Public Procurement,¹⁰ and the winding-up of entities was foreseen by Act II 1989 on the Right of Public Meeting.¹¹ Consequently, organizational sanctions were not unknown legal institutions in Hungarian law. The Hungarian legislator had the possibility of choosing between two types of sanctions and two types of responsibility. Some experts in Hungary were of the opinion that these administrative and civil sanctions should also have been applied in relation to offenses committed within the framework of legal persons instead of criminal measures. But in December 2001 a (criminal justice) policy decision was taken in Hungary in favor of criminal liability and so Act CIV 2001 was adopted.

12.3 The Hungarian Concept of Corporate Liability

Several theoretical models were developed in connection with the liability and guilt of the legal person in continental European, British, and American criminal law, including the identification theory, the doctrine of *respondeat superior*, other principles of vicarious liability, and theories of collective knowledge (i.e., the “aggregation” and “corporate culture” theories). Common to all these models are explanations of organizational action and fault that are very different to the concepts applied to natural persons. It should be emphasized that all of these models are well-constructed and logical and all have been accepted by national legal systems. But, in Hungary, there are real doubts about the wisdom of mechanically using legal solutions developed abroad, particularly those of common law legal systems. These solutions may be irreconcilably opposed to the traditional principle of Hungarian criminal law that a crime is a human act and culpability is a psychological state: at least on one view of corporate personality, a legal person has no mind and is incapable of acting immorally and committing an offense.

Consequently, in our opinion, the concept of corporate liability in Act CIV 2001 should be explained differently and the act understood as establishing a special category criminal liability for legal persons. As legal persons may be legally “responsible” or “liable”, there is nothing to prevent us from accepting that they may be legally responsible in the area of criminal law without invoking the concept of culpability. The form of liability in Act CIV 2001 should be considered within the unified system of criminal law. Its elements, under the provisions of the act, are:

¹⁰Act CXXIX 2003 on Public Procurement, in force May 1, 2004, arts. 340(3)(d) and 343(2).

¹¹Act II 1989 on the Right of Public Meeting, in force January 24, 1989, art. 16(2)(d).

- an illegal human act (crime) by a leading person of the legal entity, one of its employees or members, or a third party;¹²
- a financial (or other) advantage that results from the commission of the offense and that appears as a profit for the legal person;¹³ and
- a blameworthy act on the part of a leading person, including a failure to take necessary steps to prevent criminal conduct by an employee or officer or knowledge of a crime committed by a third party.¹⁴

This liability is indirect because the offense alleged to have been committed by the legal person must actually have been committed by one or more natural persons within or external to the legal entity. There are two exceptions to this rule; however, these only apply if the defendant dies before the proceeding ends or becomes mentally ill. In such cases, the proceeding may be conducted solely against the legal entity and the application of measures is not based on the criminal responsibility of the natural person. In these circumstances, Hungarian law does recognize the objective liability of legal entities.

Since there is no room in Hungarian law for an organizational criminal guilt for legal entities, in our opinion, the punishment for the legal person is not based on its guilty mental state and the adequate sanctions in this area are criminal measures. This model satisfies Hungary's international obligations and leaves the dogmatic structure of Hungarian criminal law intact.¹⁵

12.4 Substantive Features of Corporate Liability in Hungarian Law

12.4.1 *The Entities that May Be Held Criminally Liable*

According to Act CIV 2001, criminal responsibility may be attributed to "legal persons" for which a definition is provided in the Act:

Legal persons shall be understood to be any organization or organizational units thereof vested with rights of individual representation, which the governing rules of law recognize as legal persons, as well as organizations that may be subject to legal relationship in civil law in their own right and possess assets distinct from that of their member, including companies active prior to registration pursuant to the Act on Economic Associations.¹⁶

¹²Act CIV 2001, art. 2(1).

¹³Act CIV 2001, art. 1(1).

¹⁴Act CIV 2001, art. 2(1)(b).

¹⁵Ligeti 2003, 20.

¹⁶Act CIV 2001, art. 1(1).

Hence, “legal persons”, in this criminal law sense, are almost any kind of legal person that exists in civil law, i.e., share companies and limited liability companies, as well as other legal persons with economic activities and financial rights and obligations, such as foundations and social organizations. Both de jure and de facto legal persons are covered and, as the Act CIV of 2001 does not distinguish between Hungarian and foreign legal persons, foreign legal persons may be subject to Hungary’s corporate criminal liability principles as well.

At the same time, it is apparent that states or state organs or representative organizations are not subject to criminal responsibility. Article 1(2) Act CIV of 2001 provides:

This act shall not apply to the state of Hungary, foreign states, the institutions listed in the Constitution of the Republic of Hungary, the Office of the National Assembly, the Office of the President of the Republic, the Constitutional Court, the Office of the Ombudsmen, and any bodies which are, according to the law, responsible for tasks of governance, public administration, and local government administration, and international organizations established under international agreements.

It is an open question whether public law organizations, such as municipalities, are to be covered by this exclusion. In our submission, this question should be answered in light of the sanctions applicable to corporate offenders: some criminal measures, such as winding-up or the suspension of corporate operations, should not be interpreted to apply to legal persons of this type. This interpretation is supported by the fact that municipalities only have the right to perform business activities indirectly and are legally obliged to create economic enterprises, which could then be subject directly to criminal liability. Therefore, local governments should never be held liable for crimes.

12.4.2 The Offenses for Which Legal Persons May Be Liable

Act CIV 2001 aims to introduce a kind of general criminal liability for legal persons since it does not list the offenses to which it applies: criminal measures against legal persons are applicable in the event that a relevant person in the relevant circumstances commits an intentional crime as defined in the Criminal Code.

12.4.3 The Persons Who Engage Corporate Criminal Liability

Since Hungarian legal theory only recognizes natural persons as able to commit crimes and it is obvious that Act CIV 2001 did not intend to make

radical departures from our traditional principles, organizational responsibility under Act CIV 2001 is an indirect responsibility for the criminal conduct of a natural person. The provisions of Act CIV 2001 that deal with the natural persons who trigger organizational responsibility are rather complicated, however. Under art. 2(1), the organization is liable if the crime was committed:

- within the scope of the legal person's activities by a member or officer of the legal person who was authorized to represent the legal person or belongs to its management (leading officer), or a member or agent of the board of supervisors;
- within the scope of the legal person's activities by a member or employee of the legal person and the omission of a leading officer who has authority to control or supervise it rendered the commission of the crime possible; or
- by any person if a member or officer of the legal person who is authorized to represent the legal person or is part of its management had knowledge of the commission of the crime.

12.4.3.1 Managers and Representatives

In the first case, the offender is (1) a member or officer who is also part of the legal person's management or is its authorized representative; (2) an agent of these persons; or (3) a member and agent of the Board of Supervisors. Read with relevant provision of Hungarian civil and company law, this includes practically any senior officer of a legal entity. Notably, the term "member" includes natural or legal persons who hold a share in the subscribed capital of the legal person. Whatever the position, he/she (or it) must have acted on behalf of the legal person in committing the offense before the organization will be liable.

12.4.3.2 Members and Employees

In the second case, the organization is criminally liable for the act of any member or employee. The commission of the crime within the scope of an organization's activities and for its benefit, as well as an omission by a leading officer of the corporation, are mandatory criteria, however. The crucial element of liability would seem to be the blameworthy act on the part of the leading officer, i.e., a failure to fulfill a duty of control or supervision.

The requirement of an omission must be examined extremely carefully since the very fact that an offense was committed within the framework of the organization may be seen as an indication of defects in that organization. At the same time, it is very important to avoid an approach that would treat the mere fact of the offense as the basis for a presumption of defects

in processes of control and supervision. Therefore, in each case, it is necessary to scrutinize and compare the actual breach of duty on the part of the leading person and its relationship to the crime committed by the member or employee. As to the duties of leading persons, Wiener distinguishes between high-level leaders and other leaders. The tasks of the high-level leaders include developing and operating a system of control and supervision with the aim of preventing the commission of crimes,¹⁷ and (we would add) the duty to control the activities of lower-level leaders. For lower-level leaders, the fulfillment or breach of a personal duty held by that particular leader is to be examined.

If it is established that the leader failed to fulfill his/her duty to control and supervise, it must then be proved that the fulfillment of this duty would have prevented the offense. It seems appropriate to examine whether the leading person accurately determined the offending employee's or member's competences and ensured the performance of his/her functions, as well as whether the flow of information to the employees and members was satisfactory. As far as larger commercial organizations are concerned, it may be necessary to show that they elaborated written internal regulations, orders, and procedures that could have prevented the commission of the crime when followed. Further, it is obviously not enough to merely issue such orders and make regulations. Only the leader who took care to implement these internal rules and procedures and make sure that they were known to lower-level personnel – whether in writing or through on-the-job training – may be able to positively state that he/she could not do anything more to prevent the crime. In our view, if the leader learns in time about the fact that his employee is about to commit an offense, he/she is in most cases responsible because the crime may have been prevented, at least by informing the authorities. In the end, judges will make use of their discretionary powers in deciding on these points and will need to conduct a thorough examination of the evidence.

Finally, it should be noted that the controlling officer's omission may be intentional or negligent.

12.4.3.3 Third Parties

In the third case, the offender is an “outsider”, i.e., a person who is not associated with the legal person in any of the ways mentioned in the other provisions. In such cases, a further criterion is knowledge of the commission of the crime by a member or leading officer of the corporation. It may be knowledge, actual or constructive, without anything more, or permission for, or approval of, the crime. In any case, the purpose of this provision is

¹⁷Wiener 2003, 706.

to prevent the legal person from avoiding criminal liability and gaining a financial advantage by using a third person who has no “visible” contact with the legal person (e.g., a de facto manager) to commit an offense. Thus, if a legal person obtains an advantage through the commission of an offense, the courts may apply sanctions to this legal person, subject, however, to the important condition of awareness by a relevant member or officer.

12.4.4 Further Conditions of Liability

12.4.4.1 Benefit to the Legal Person

Measures can only be ordered against the organization if the crime was aimed at, or resulted in, the legal entity gaining an advantage. Conversely, if the human offender committed the crime for his/her own benefit, the organization is not responsible in criminal law. Advantage is defined in art. 1(1) as “any object, right of pecuniary value, claim, or preference irrespective of whether they have been registered pursuant to the Act on Accounting, as well as cases where the legal entity is exempt from expenditure according to an obligation arising from a rule of law or contract or according to the rules of reasonable business management.” The fact that the legal person obtained or retained business, has a financial value and could be qualified as a preference (advantage), whether or not the enterprise was actually the most qualified bidder.¹⁸ However, where the act has been committed by a third party, the advantage must have been actually obtained – and not only sought – by the legal person.

12.4.4.2 The Conviction of a Natural Person

As in other European jurisdictions, Act CIV 2001 provides for both the legal person and the human offender to be prosecuted. Additionally, under Act CIV 2001, the invocation of corporate criminal liability is preconditioned on the sanctioning of a natural person. Article 3(1) Act CIV 2001 states: “if the court has imposed punishment or applied reprimand or probation on the person committing the criminal act defined in [art. 2 Act CIV 2001], it may take the following measures against the legal entity. . .”. Thus, if the natural person is not identified or is identified and charged but not convicted and sentenced, no sanction can be ordered against the legal person. There is one exception, which applies if the crime has caused the legal entity to gain a financial advantage and either the perpetrator is not punishable due to his mental illness or death, or the perpetrator became mentally ill after the commission of the offense and the criminal proceeding was

¹⁸See OECD 2003, 6.

suspended. In such cases, the legal person may still be criminally responsible even though no natural person was convicted and sentenced.¹⁹

12.4.5 Defenses to Liability

Act CIV 2001 does not provide any express defenses. In other areas of Hungarian criminal law, there are precedents of criminal defenses being established through court practice, though such a process usually takes a long time. Due to the lack of corporate criminal prosecutions, the question of whether corporate governance could be taken into consideration as a mitigating circumstance is unclear. For now, sanctions should be imposed by the court on a corporation if the substantive conditions for liability are fulfilled.²⁰

12.5 Sanctions

Three types of criminal “measure” are applicable to legal persons under Act CIV 2001: dissolution (compulsory winding-up), injunctions (restriction of the legal person’s activities), and fines. Forfeiture of property, a “traditional measure” in the Criminal Code, may also be applied.

Act CIV 2001 is silent on the question of which principles apply to sanctioning decisions. Presumably, the courts are to develop these principles through practice. In Hungarian legal literature, at least, analysis of sanctioning principles and the possible mitigating and aggravating circumstances has been based on foreign examples and sources; however, the real Hungarian situation is still unclear.

12.5.1 Fines

It is well-known that fines are the traditional sanction against corporate offenders in many legal systems. Hungary is no exception. Fines of between Ft500 000 and an amount which is three times the financial advantage resulting from the offense may be imposed.²¹ The court may estimate the rate

¹⁹It is worth noting that the OECD has recommended the *complete* elimination of the requirement that a natural person be convicted as a prerequisite to the liability of the legal person. See OECD 2005, para. 145.

²⁰There is one exception, which applies if the sanction would entail an unreasonable burden to the legal person. In this case, sanctions may be foregone, but this is not a defense. See Act CIV 2001, art. 18(1)(c).

²¹Act CIV 2001, art. 6(1).

of the financial advantage gained or intended to be gained if this amount cannot be established or only established at an unreasonably high cost. Unpaid fines shall be recovered in accordance with the general rules on collection by court order.²²

In general, an appropriate and fair fine is calculated by careful consideration of sentencing factors. Applying this principle to legal persons, both the highest and lowest extremes should be avoided. The former may affect the financial standing of the legal person and, in the worst case, could induce insolvency, winding-up, and further serious consequences, including for the legal person's employees and customers. However, a low fine could minimize the fact of the crime and undermine the deterrent effect of the sanction. It is an open question whether the Ft500 000 (approximately €2 000) minimum has any deterrent effect; however, if we accept that there are stigmatic effects associated with a criminal conviction, even a relatively low fine, such as this, may cause the legal person considerable disadvantage, especially if it were combined with the publication of the judgment.

12.5.2 Forfeiture and Confiscation of Illicit Gains

Under art. 77B Criminal Code, the court must order the forfeiture of any property that:

- resulted from a criminal offense and was obtained by the perpetrator in the course of, or in connection with, the commission of the offense;
- obtained by the perpetrator when he/she took part in a criminal organization;
- was the subject of a pecuniary advantage; or
- was used to replace the property obtained by the offender in the course of, or in connection with, the commission of a crime.

The forfeiture of property stemming from the commission of a crime must also be ordered if it served to enrich another person. If the "other person" is a "business organization," forfeiture must be ordered against the organization; the *transfer of ownership or dissolution* of the business organization does not prevent the application of this sanction. It should be noted, however, that the term "business organization" is narrower than the definition of "legal person" in Act CIV 2001.

²²Act CIV 2001, art. 6(3).

12.5.3 Non-financial Sanctions

12.5.3.1 Restriction of a Legal Person's Activities

Under art. 5(2) Act CIV 2001, the court may prohibit a legal person from carrying out certain activities, namely, from participating in a public procurement process, entering into a concession agreement, becoming a non-profit organization, or obtaining subsidies from the EU, the state of Hungary, or any foreign country, and from pursuing any other activity that has been prohibited by the court. The prohibition may last from between 1 and 3 years. Though it does not involve the payment of money or winding-up, a prohibition is not necessarily a “light” sanction. For example, the loss of a subsidy may lead to the closure of a legal person if its operations depended on external budgetary sources.

12.5.3.2 Winding-Up

Winding-up is capital punishment for legal persons, i.e., the most severe sanction for the purpose of defending society. In Hungary, the court must order the winding-up of a legal person that was engaged in an illegal economic activity that was established for the purpose of concealing a crime or the actual activities of which serve the purpose of concealing a crime. In such cases, the court may even wind-up a legal person that also has legal economic activities; however, in this situation, the sanction should not be imposed on organizations that have strategic importance from the point of view of the national economy or national defense, national utility companies, or other legal persons, the dissolution of which would jeopardize the realization of state or local government goals.

12.5.3.3 A New Form of Sanction?

In our opinion, the legal consequences for corporate offenders are different to Hungary's traditional sanctions for human beings and should be considered as a third, new type of criminal sanction. Not only has the Hungarian legislator placed the sanctioning provisions in a separate act, but the aim of corporate sanctions is clearly to promote an attitude of compliance amongst organizations, i.e., to influence the behavior of natural persons working within organizational frameworks to abide by the law. The fact that the sanctions have that effect itself justifies, among other things, the introduction of criminal responsibility. Further, the result or effects of the sanctions include damage to the organization's reputation. In other words, the stigmatic effects of conviction may be very significant.²³

²³Santha 2005, 237.

The aims and functions of criminal sanctions can be formulated in various ways, including the defense of society, the re-establishment of a violated legal normative system, and the prevention of future criminality. However, the main function of criminal responsibility and criminal sanctions for legal persons is to promote a *law-abiding attitude in that corporation and other legal entities*.

12.5.4 Publication of the Judgment – A Missing Sanction

Hence, there would seem to be a broad spectrum of criminal sanctions available against legal persons under Hungarian law, the essence of which is not the subsequent reaction to the committed offense but the prevention or deterrence of future occurrences of harmful, criminal conduct.²⁴ However, of the three sanctions established by the Hungarian Act CIV 2001, publication of the judgment, an ideal sanction against legal entities, is not one. This is regrettable for the main effect of corporate prosecutions would seem to be negative publicity.

Publicity can have various disadvantages for legal persons, from the loss of income and prestige for commercial corporations, to the decrease in public support for foundations. According to a United States survey, corporate managers do not believe that legislation stops crimes but they do believe that publicity has a considerable deterrent effect.²⁵ In Hungary, the sanction could be defined as an obligation on the legal person to publish, at its own expense, an article in a daily paper or industry magazine, which gives information about the offense committed, the sanctions imposed on the legal person and its managers or employees, and the legal person's efforts to prevent further offenses and rectify the consequences of the past offense. In our view, the publication of the judgment is one of the best responses to corporate criminality, and its introduction as a criminal sanction within the framework of criminal procedure is worth considering.

12.5.5 Sanctioning Principles

As noted above, sanctioning principles will be developed through court practice. In the future, courts would be advised to limit the use of sanctions that could endanger the existence of the legal person (i.e., large fines, harsh prohibitions, publication of sensitive judgments, and compulsory dissolution) to the most serious cases where the fact of the commission of the crime is so symptomatic of the organization's activities and internal operations that other legal consequences would seem insufficient. Courts should

²⁴Heine 1999, 238.

²⁵Clinard/Yeager 1980, 318. In certain cases, the publication of the judgment could be more effective than the other "traditional" sanctions available to the courts.

be careful since the closure of one company may trigger a chain-reaction in others. Moreover, in relation to winding up, there is nothing, in principle, to prevent the members of the defunct company from reorganizing and continuing their illegal activities in a new structure. For the sake of impeding such a strategy, it would be advisable to sanction the members in such a way as to make the effective reconstitution of the legal person impossible.

12.6 Procedure

12.6.1 Prosecutorial Discretion

In certain cases, a prosecutor in Hungary has discretion whether or not to prosecute a natural person.²⁶ There are not many reasons for denying prosecution but the Criminal Procedure Code does offer a few (e.g., for covert agents and less serious offenses). Regarding legal entities, prosecutors do not seem to have this same discretion. Article 12(1) Act CIV 2001 states that “if, during the investigation, data is found according to which measures may be applied against a legal entity during the criminal proceeding, the investigative authority shall extend the investigation to the clarification of the relationship between the crime subject to the proceeding and the legal entity.” It shall also “notify the prosecutor without delay”.²⁷

From this provision it is apparent that prosecuting agencies have no such discretion regarding legal entities. The lack of prosecutorial discretion with regard to legal persons was not originally part of corporate criminal liability rules in Hungary, however. Four years after the Hungarian Act CIV 2001 came into force in May 2004, only two prosecutions had been brought against legal persons and only one of these cases (the “red pepper forgery case”, which involved the marketing of contaminated spice pepper by a corporation) resulted in a fine. The lack of court practice was apparent to the representatives of the Hungarian criminal justice system and the Organization for Economic Cooperation and Development (OECD).²⁸ The roots of the problem may be found in the procedural provisions of Act CIV 2001, which provided a great deal of discretion to the prosecutor in initiating and continuing the proceeding against the legal person. It read as follows:

If any evidence is found in the course of the investigation to the effect that measures may be taken against the legal person in the course of the criminal proceeding, the investigative authority shall immediately notify the prosecutor of the fact. The prosecutor shall decide whether the investigation should extend to exposing connections between the crime investigated and the legal person.

²⁶See, generally, Dobrocsi 2006.

²⁷Act CIV 2001, art. 12(1).

²⁸OECD 2005, para. 145.

This discretion was not problematic in itself but became so because of the legislator's failure to define the conditions of its exercise. Since the office of the prosecutor is usually overburdened in Hungary, it was obvious that individual prosecutors would not extend an investigation to a legal person given a choice.

The problem was recognized by the legislator and a modification of Act CIV 2001 was accepted by Parliament in 2008. According to the new art. 12, if any evidence is found in the course of the investigation that indicates measures could be taken against the legal person, the investigative authority is obliged to extend the investigation to this legal person. This rule should not be taken to mean that the prosecutor loses his/her freedom to decide whether to charge the legal person. Rather, he/she loses the possibility of hindering the prosecution of the legal person in the initial stage of the investigation. Once the prosecutor is in full possession of the information resulting from the investigation, he/she will be able to make a well-informed decision to prosecute or not. The role of the investigative authorities has also become more important as a result of the amendment since they now have a right and an obligation to investigate legal persons.

The positive effects of this modification are already perceptible: in the second half of 2008 and the first half of 2009 twelve indictments contained a motion by the public prosecutor for the application of sanctions to a legal person.

12.6.2 Jurisdiction

Hungary's jurisdiction over corporate offenses, according to Act CIV 2001, is based on the legal person's place of incorporation. So, a Hungarian court may still hear a case against a legal entity that was incorporated in Hungary but is owned, operated, and managed by foreign nationals and performs activities related to foreign countries provided that all other material and formal conditions for criminal proceedings against the legal person are met.

12.6.3 Provisional Measures

Provisional measures may be applied to legal entities, provided that such measures – due to their very nature – are not only applicable to natural persons. So, prosecuting authorities may search an organization's premises and obtain orders for the confiscation and seizure of electronic data against legal entities, amongst other things.

12.6.4 Procedural Rights and Principles

The emergence of basic procedural principles regarding legal entities is a difficult issue in Hungarian law. The main problem is that the legal entity,

when involved in the procedure, lacks a well-defined position: as it is not a defendant, it should not be entitled to the rights of the defendant; but, at the same time, it cannot be put into any other category of participant. The scope of its rights is rather uncertain and awaits clarification.

For now, it would seem that the legal representative of the legal person (not the defendant, of course) exercises the rights of the counsel for the defendant in the Criminal Procedure Code. Other procedural rights, such as the right to a legal remedy and access to information and documents, also give legal entities entitlements. The right to be heard may be interpreted, in relation to legal entities, as the right of representatives of the corporation to make statements and declarations and may enhance the running of the proceeding. The freedom from self-incrimination is not mentioned as a particular right of legal entities, however, and the detailed regulations create the impression that legal entities are not protected in this way; otherwise this concept is generally available to all participants in a criminal proceeding.

Similarly, the rule *nemo tenetur se ipsum accusare*, which applies to all natural persons involved in a criminal proceeding in any way, is not applicable to legal entities. Legal entities may be obliged to provide certain documents and electronic data in the proceeding against the natural person, even if it is also involved in the proceeding and the information could be used to determine its liability. As the fate of the defendant and of the legal entity are linked, in certain cases, the legal entity may be obliged to provide information against itself. From this perspective, it may be said that a human defendant is in a more advantageous position than a legal person in criminal proceedings. Fundamentally, their position is rather similar to that of defendant natural persons since they also face proceedings aimed at establishing liability; however, legal entities have a less well-defined role and so lack most of the guarantees and rights that benefit human beings who are defendants.

12.6.5 Witnesses

It follows that executive officers of the legal entity may be treated as witnesses when they are not involved in criminal proceedings as defendants. It is quite likely, in fact, that a legal person will be involved in a proceeding against one of its executive officers. The main rule in Act CIV 2001 is that a legal entity may be involved in a proceeding if there is a certain link between the human defendant – the main protagonist – and the legal entity. One such link may be the defendant's position within the legal entity; therefore, it should be common for legal entities to be involved in a criminal proceeding in which one of its executive officers is defending charges.

12.6.6 Special Procedures

Notably, special procedures aimed at shortening or speeding up criminal proceedings, such as hearings outside of trial and waivers of rights to hearings, are not to be initiated by the prosecutor or applied in any way to a legal entity that is involved in a criminal proceeding.

12.6.7 Termination of Proceedings Against the Natural Person or Acquittal

If the proceeding against the natural person is terminated or the defendant is acquitted (and therefore the legal entity is not able to be sanctioned), Act CIV 2001 does not require the court to settle the situation of the legal entity as well. From the provisions of Act CIV 2001, it seems that the court is supposed to “forget about” the legal entity since it does not have to declare the procedure against the legal entity at an end. In fact, its decision need not contain a single word about the legal entity. Article 18(2) CIV Act 2001 states that, “if the court terminates the proceedings in relation to the defendant with regard to whom the legal entity is included in the procedure, or acquits the defendant, it is not under obligation to deliver a decision about the termination of proceedings against the legal entity, nor shall it make statement about this in the judgment or final summons.” This is a rather remarkable provision. The legal entity may have suffered harm from being part of the criminal proceeding, at the end of which the lack of sanction against it is not mentioned at all. The 2008 amendments to the CIV Act clarified art. 15(2)(b) and concluded that the court’s decision on the application of measures or its refusal or exclusion should be included in the operative part of the final decision.²⁹ Article 18(2), on the other hand, remained unchanged. Therefore, the ambiguity awaits clarification.

12.6.8 Equal Procedural Status Amongst Legal Persons

As noted above, certain legal entities (such as the Hungarian state) are exempt from criminal responsibility. All other entities may be prosecuted and, if they are, they all have the same rights and obligations; none has a particular position.

²⁹Act XXVI 2008 on the Amending of Act CIV 2001 on the Application of Measures against Legal Entities in Criminal Proceedings, art. 9.

12.7 Conclusions

The introduction of corporate criminal liability was one of the most radical changes in the history of Hungarian criminal law. The decisive motive of the codification was the push for legal harmonization within Europe and it required an abandonment or reconceptualization of certain traditional principles. Nevertheless, criminal responsibility of legal persons became a reality in Hungary with the entry into force of Act CIV 2001 in 2004, which made general, effective, and deterrent sanctions against legal persons available. From this point, in our view, three main challenges are (1) the development of a model of corporate criminal liability; (2) the application of the theory and the provisions of the act into (court) practice; and (3) the development of appropriate rules of criminal procedure.

The first problem is seldom considered by scholars of Hungarian criminal law in spite of the fact that, in our view, doctrinal questions of any legal institution should be made clear and the theoretical basis of a new type of liability be worked through in a detailed manner. The model implicit in the act is called an “imputation model” in the Explanation to Act CIV 2001 since a natural person’s criminal offense is imputed to a legal person. Another essential element of this theory are special corporate criminal measures which are, unlike criminal “punishments”, not tied to the element of fault. On the basis of the Explanation to the Act, some scholars argue, that legal person could not be held criminally responsible, only criminal sanctions can be imposed against them,³⁰ and another rejects the idea that sanctions provided for in the act are “real” criminal sanctions, describing them instead as administrative or civil sanctions imposed by the criminal court.³¹ In contrast to these scholars, we are convinced that legal responsibility is a unified system into which corporate criminal liability principles should be integrated. In our view, responsibility or the declaration of somebody’s responsibility is the precondition for imposing a legal sanction; therefore, sanctions cannot exist without responsibility. The sanctions established by the act are real criminal sanctions imposed by a criminal court as a result of a criminal procedure. The “Hungarian model” is thus a special type of criminal responsibility and, if we intend to use phrases from common law, it could be defined as a mixture of the identification and vicarious liability models.³²

Concerning the second issue, the existence of legal rule in itself has a considerable deterrent effect but in Hungary it is expected that new provisions of Act CIV 2001 will be of significant practical relevance. Since

³⁰Fantoly 2007, 152.

³¹Sárközi 2002, 452 et seq.

³²Pieth/Ivory (this volume).

corporate criminal liability constitutes a new legal institution for authorities dealing with criminal cases, the courts will need time to be in a position to apply these new provisions. The major reason for the lack of practice – the original regulation of prosecutorial discretion – was addressed with the modification of the act in 2008. The number of criminal investigations against corporation has risen since then and it is to be hoped that this number will increase in the future as well.

Hence, the third problem is the establishment of appropriate procedural rules. The legislator should define the position of the legal entity in the criminal proceedings and assign rights to it, respectively. The ambiguous rules defining the obligations of authorities and the courts need to be clarified. Some modifications were made in 2008 but more are necessary, for even the best substantive regulations cannot be enforced without efficient procedural rules.

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