Chapter 13
Why the Czech Republic Does Not (Yet) Recognize Corporate Criminal Liability: A Description of Unsuccessful Law Reforms

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13.1 Introduction

This chapter aims to describe recent efforts to introduce corporate criminal liability rules in the Czech Republic. The structure of the chapter was supposed to follow a questionnaire sent to all national reporters to the 2010 International Congress of Comparative Law on that topic. If we had strictly adhered to the questionnaire, however, our report and this chapter would have contained just one paragraph with the following response: No, Czech law does not recognize corporate criminal or quasi-criminal liability; it is hard to predict whether corporate criminal or quasi-criminal liability legislation will be adopted in the foreseeable future; and, thus, questions about the concept of liability and the structure of liability principles are inapplicable.

Such an approach would have been tempting from an author's point of view, but the reader would not have learnt much. That is why we have chosen to describe attempts at introducing corporate criminal liability rules in the Czech Republic and the legislative proposals that would have effected this change. As the attempts have been unsuccessful so far, this chapter includes many conditional statements. Most of the questions posed by the questionnaire can be answered only from the perspective of what would or could have happened if the law had actually been reformed.

Thoughts about the introduction of corporate criminal liability were given voice at the end of the 1990s when the first expert studies and articles were published (primarily) on corporate criminal liability and future developments in Czech criminal law. Those articles dealt with individuals who could trigger the criminal liability of legal persons, the sanctioning principles for legal persons, the history of unsuccessful legislative projects, and foreign laws on corporate criminal liability. Jiří Jelínek, a co-author of this chapter, published a book in 2007 summarizing the expert discussion about the introduction of corporate criminal liability into the Czech law and discussing similar foreign laws, particularly in continental legal systems.[1]

Apart from describing the legislative efforts in the area of corporate criminal liability, this article should also indicate *why* the efforts to introduce such liability have been unsuccessful to date and how the legislator could possibly solve this matter. The article first deals with the failure

[1] Čečot/Segeš 2001; Čentéš/Palkovič/Štoffová 2001; Čentéš/Palkovič/Štoffová 2002; Čentéš/Štoffová 2001; Doelder de 1994; Huber 2000; Hurdík 1996; Jalč 2005; Janda 2006; Jelínek 2007; Král 2002; Kratochvíl 1999; Kratochvíl 2002; Kratochvíl/Löff 2003; Madliak/Porada/Bruna 2006; Musil 1995; Musil 1998; Musil 2000; Musil/Prášková/Faldyna 2001; Novotný 1997; Pipek 2004; Pipek/Bartošíková 1999; Príbelský 2007; Šámal 2002; Šámal/Púry/Sotolář/Štenglová 2001; Solnař/Fenyk/Císařová 2003; Teryngel 1996a; Teryngel 1996b; Vaníček 2006; Vantuch 2003.

of the Corporate Criminal Liability Bill of 2004,[2] second, with the basic features of corporate criminal liability in the proposed bill, and, third, with the legislative efforts to introduce an administrative or a combined administrative-criminal liability of legal persons into Czech law and the subsequent return to corporate criminal liability.

13.2 The Corporate Criminal Liability Bill

Czech law currently recognizes corporate liability only in the areas of civil and administrative law. Neither of these forms of liability, however, can be regarded as equivalent to the criminal or alternative forms of liability that the Czech Republic is obliged to introduce under international treaties to which it is party.[3] The current administrative liability of legal persons covers areas such as the environment, health, and safety and consists of regulatory offenses, which are distinct from the offenses for which natural persons may be prosecuted within criminal proceedings. Corporate civil liability, for its part, covers only legal disputes between legal persons and private actors.

The lack of corporate criminal liability or comparable administrative liability rules in the Czech Republic prompted the Czech Government to draft and submit to Czech Parliament the Corporate Criminal Liability Bill in 2004 (or CCL Bill). The bill was part of a large re-codification of the substantive rules of Czech criminal law and (to a more limited extent) the rules of Czech criminal procedure. The re-codification included the new Criminal Code, the Corporate Criminal Liability Bill, and a bill amending acts affected by the adoption of the new Criminal Code. The Corporate Criminal Liability Bill reflected the international and European requests

[2]Corporate Criminal Liability Bill 2004 (House Print No. 745), House of Deputies, Parliament of the Czech Republic.

[3]E.g., Criminal Law Convention on Corruption, January 27, 1999, in force July 1, 2002, 173 ETS (COE Criminal Law Convention on Corruption), Art. 18; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, in force February 15, 1999 (OECD Convention on Foreign Bribery), Art. 2; Directive 2007/66/EC of the European Parliament and of the Council of December 11, 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (text with EEA relevance), OJ No. L 335, December 12, 2007, 31 (EU Remedies Directive); Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests – Joint Declaration on Article 13(2) – Commission Declaration on Article 7, July 26, 1995, in force October 17, 2002, OJ No. C 316, November 27, 1995, 49; Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests, June 6, 1997, in force May 16, 2009, OJ No. C 221, July 19, 1997, 12 (Second Protocol to the EU Convention on the Protection of the ECs' Financial Interest), Art. 3.

for the introduction of corporate criminal liability rules.[4] At that time, only a few countries in Central Europe had adopted such legislation.

The Corporate Criminal Liability Bill was supposed to be *lex specialis* in relation to the Criminal Code and the Code of Criminal Procedure. Had the CCL Bill been passed into law, it would have contained provisions dealing with differences in the criminal liability of legal persons, sanctions for legal persons, and procedures for investigating and prosecuting legal persons. Thus, the Criminal Code and the Code of Criminal Procedure would have been subsidiary legislation.

The House of Deputies of the Czech Parliament debated the bill during its first reading on November 2, 2004. Unlike the other two bills, the Corporate Criminal Liability Bill was heavily criticized by both coalition and opposition members of the Parliament (MPs). Finally, at the end of the first reading, it was rejected by sixty-nine of the 125 MPs present.[5]

The Corporate Criminal Liability Bill was based on the criminal liability of legal persons and the criminal sanctions that tried to introduce were similar to those for natural persons with the exception of imprisonment. The CCL Bill, thus, was not inspired by the current Swedish or (now changing) Spanish models in which the criminal liability of the legal person depends on a breach of the criminal law norm but the corresponding sanctions are not called penalties.[6]

13.2.1 The Bill's Concept of Liability

As regards the liability concept in the Corporate Criminal Liability Bill, it was based on a combination of the vicarious liability model and certain components of the objective liability model.[7] Article 5(1) provided that such acts should be imputed to the legal person as were committed in its name, in its interests, or in the interests of another entity including, but not limited to, statutory or top management bodies (hereafter "statutory bodies"). In addition, acts committed by representatives of the legal person

[4]E.g., OECD Convention on Foreign Bribery (in force for the Czech Republic March 21, 2000); COE Criminal Law Convention on Corruption (in force for the Czech Republic July 1, 2002); International Convention for the Suppression of the Financing of Terrorism, January 10, 2000, in force April 10, 2002, 2178 UNTS 197 (Terrorist Financing Convention); EU Remedies Directive; EU Convention on the Protection of the ECs' Financial Interest.

[5]Only forty-three MPs in fact supported the bill, whereas the total number of MPs in the House of Deputies of the Parliament of the Czech Republic is 200.

[6]Kratochvíl 2002, 366.

[7]Pieth 2007, 7 et seq.

and by those with supervisory or management tasks were to be imputed to the legal person provided, in the latter case, that such acts were part of a chain of causation between the manager's or supervisor's conduct and the subsequent criminal offense.

Thus, had it been passed into law, the bill would have introduced a form of corporate criminal liability so wide as to make legal persons criminally liable even for acts committed by their employees. Article 5(2) Corporate Criminal Liability Bill, nevertheless, partially mitigated this principle by imputing such acts to legal persons only if the legal person or its bodies or officers made a decision to commit a criminal offense, approved or ordered its commission, neglected their supervisory duties, or failed to adopt measures to prevent the criminal offense from being committed.

Article 5(1) of the bill was therefore a typical manifestation of the vicarious liability model since acts committed by natural persons (not only by the directing mind, but also by any individual employee) would have been imputed to the legal person. Article 5(2) contained the components of a form of original liability for legal persons, which would have been triggered only by an accumulation of acts committed by a natural person (an employee of the legal person) and acts of negligence committed by the legal person or its bodies or officers through insufficient supervision or management. Thus, it is apparent that the Corporate Criminal Liability Bill was not based on any form of strict liability from which legal persons would have been unable to exonerate themselves.

13.2.2 The Jurisdictional Scope of the Corporate Criminal Liability Bill

As regards the jurisdictional scope of the Corporate Criminal Liability Bill, the active principle of personality used for natural persons was modified to reflect the fact of incorporation and combined with the territorial principle. If passed into law, the art. 2(1) of the bill would have enabled the prosecution of "criminal offenses committed on Czech territory by any legal person based in the Czech Republic or with a subsidiary or part thereof on the Czech Republic's territory or which conducts business or owns property in the Czech Republic." It called such legal persons "Czech legal persons."

However, the CCL Bill also contained provisions allowing for the prosecution of legal persons for criminal offenses committed or having effects outside the Czech Republic's territory. These so-called "distant offenses" could have been prosecuted in the Czech Republic provided they were committed by a Czech legal person either on Czech territory and their consequences affected the territory of a foreign state or on foreign territory and their consequences affected the Czech Republic. The distant offense provisions of the bill were identical to the Criminal Code's provisions on natural persons.

Article 2(6) of the bill also stipulated that, if an international treaty binding on the Czech Republic so provided, a criminal offense committed on foreign territory by a foreign legal person would be punishable.[8]

13.2.3 The Scope of the Corporate Criminal Liability Bill Ratione Personae

A number of state or state-related entities were exempted from the scope of the bill *ratione personae*. They were the Czech Republic,[9] the Czech administrative regions and municipalities, and the Czech National Bank. These exemptions appear to be fully justified as it can hardly be imagined that a state would prosecute itself or the territorial entities that make it up.[10] These exemptions would not have applied to legal persons established by, or administering the property of, exempted entities.

Though the Corporate Criminal Liability Bill excluded some entities, it nevertheless omitted a definition of "legal person". It would therefore have been necessary to rely on the definitions provided in arts. 18 et seq. Civil Code 1964 (Act No. 40 of 1964) and art. 56 Commercial Code 1991 (Act No. 513 of 1991). The bill even presumed the potential criminal liability of non-entities since its provisions on the imputation of acts committed by natural persons to legal persons would have applied even if a criminal offense had been committed prior to a legal person's creation or registration. The imputation provisions would also have applied when an act creating a legal person or appointing a legal person's representative was later found to be invalid or ineffective.

The bill also contained provisions on the criminal liability of legal successors to legal persons (art. 7): so long as the legal successor was aware of the criminal offense or, in the circumstances, could have been aware of the offense when it became the successor, he/she (or it) would be liable. If there were more than one legal successor, the CCL Bill would have authorized courts to consider "to what extent each of the legal successors benefited from the proceeds, benefits, and other advantages resulting from a committed criminal offense" (art. 7(2)) when deciding the type of sanctions. In addition, the bill explicitly stipulated that a declaration of bankruptcy or the dissolution of a legal person could not rid it of criminal liability. These provisions were supposed to provide a safeguard against attempts to avoid criminal liability through controlled dissolutions.

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[8]Due to its priority in application, an international treaty could also exclude the application of the Czech law on certain legal persons.

[9]Beran 2006a, 255.

[10]See Beran 2006b.

The bill also provided that any person (legal or natural) who organized, participated in, gave instructions for, and/or assisted in the commission of criminal activities would have been punishable under the Criminal Code.

13.2.4 Criminal Offenses Covered by the Corporate Criminal Liability Bill

The Corporate Criminal Liability Bill did not contain any special part with the definitions of the criminal offenses that could have been committed by legal persons; rather, it confined itself to a reference to the Criminal Code and the offenses defined therein. As prepared by the government, the bill contained three alternative references to the Criminal Code and criminal offenses imputable to legal persons. One of them deemed some seventy criminal offenses to be capable of commission by legal persons. This alternative covered only those criminal offenses that the Czech Republic was obliged to prosecute under the international treaties mentioned above. The second alternative contained only a general reference to the Criminal Code and a stipulation that "legal persons are liable for criminal offenses unless the nature of a criminal offense excludes such liability". This alternative would have been advantageous from the point of view of possible future amendments to the Criminal Code as new criminal offenses would have been automatically included in the Corporate Criminal Liability Bill. At the same time, this alternative would have resulted in some uncertainty about the criminal offenses with which legal persons could be charged.

The government, however, finally selected the third and, in fact, broadest alternative, which deemed some 130 criminal offenses as being able to be committed by legal persons. These included rape, sexual assault, and poaching, as well as environmental and economic crimes. The number of criminal offenses that could have been imputed to legal persons thus far exceeded the number of offenses that the Czech Republic was obliged to prosecute under its international commitments in relation to legal persons. The selection of this extensive version turned out to be a mistake when the bill was submitted to, and discussed in, Parliament.

13.2.5 Natural Persons Triggering Corporate Liability, Their Acts, and Imputation

Since a legal person always acts by means of a natural person who creates and demonstrates its will, the Corporate Criminal Liability Bill determined whose acts constituted the acts of a legal person and when such acts would be considered acts or omission of the legal person. The bill would thus have established that acts of a legal person included, not only direct acts

of its statutory bodies or members thereof, but also acts of other corporate representatives, typically authorized employees or third parties with a power-of-attorney. The bill did not distinguish between direct acts of a legal person and acts of its representatives and criminalized both types of acts. As for acts of commission and omission, the bill did not distinguish between these two categories either. Consequently, it was irrelevant whether a criminal offense was actively committed for the benefit of a legal person or whether its commission was made possible by a lack of supervision or management. That said, sound internal rules, an effective supervision and management system, and/or active cooperation in uncovering illegal activities could have been considered mitigating circumstances at sentencing according to the subsidiary legislation. The CCL Bill also reckoned with the possibility that an individual natural person, through whom the legal person had acted, might not be discovered. In such cases, the legal person could have been prosecuted anyway.

Also of importance were the imputation provisions of the bill, particularly those provisions that determined when a legal person could be said to possess the subjective elements of a criminal offense (i.e., the fault or mental elements as opposed to the so-called objective elements of a criminal offense). Only if a criminal act is imputable to a legal person, is it an offense for which the legal person is criminally liable. Article 5(2) Corporate Criminal Liability Bill, therefore stipulated that a criminal offense could be imputed to a legal person:

> (a) If that criminal offense was committed on the basis of a decision, approval, or order of the statutory bodies of the legal person or of persons whose acts are considered to be the acts of that legal person; or
> (b) If the criminal offense was committed because the statutory bodies of the legal person or persons whose acts are considered to be the acts of that legal person failed to adopt such measures as they were obliged to adopt according to the law or as could be justly required of them, particularly if they failed to conduct obligatory or necessary supervision of the activities of their employees or other persons whose superiors they are, or if they failed to adopt the necessary measures to prevent the consequences of a committed criminal offense.

The imputation principle established in para. (a) was analogous to fault in the form of intent – insofar as a decision, order, or approval may be considered to show intent. The form of imputation defined in para. (b) was analogous to negligence since a person creating and demonstrating the will of the legal person would have neglected his/her supervisory duties or his/her duties to prevent the commission of criminal offenses.

Either way, art. 5 confirms that the Corporate Criminal Liability Bill was not based on the principle of so-called "strict liability" since the legal person would only have been liable for criminal offenses committed

with something akin to intent or negligence. The explanatory report, which accompanied the bill, explained that,

> [t]his type of liability based on the imputation of criminal offenses to legal persons should be considered a special kind of fault-based liability [which is] different from the expression of fault as used for natural persons but which is not strict liability. In fact, this kind of liability is similar to the liability for quasi-misdemeanors defined in Article 337 of the Criminal Code Bill on the criminal offense of inebriation or in Article 201a of the current Criminal Code on the same criminal offense. This kind of liability requires a link to the committed criminal offense and the nature of the legal person, the interests of which may differ from those of an individual, is taken into account.

Due to the special nature of criminal offenses committed by legal persons, the Corporate Criminal Liability Bill contained a special definition of the author of, and accomplices in, an offense as well as the forms of participation in criminal activities. Article 6 defined the perpetrator of a criminal offense as the legal person to which the breach of, or threat to, an interest protected by the Criminal Code can be imputed "in a manner defined herein". If a criminal offense had been committed by more than one legal person or by a legal person and a natural person, it would have been committed through complicity. Each of the accomplices would have been liable as if it/he/she had committed the criminal offense itself/himself/herself.

From this provision, it is apparent that the criminal liability of a natural person acting in the name of a legal person would not have been affected by the criminal liability of the legal person. A finding of complicity between the legal and natural person would thus have been the rule rather than the exception in corporate criminal prosecutions, though the concurrent prosecution of legal and natural persons was by no means a precondition to corporate criminal liability under the bill. In other words, a legal person could have been criminally liable even if the natural person acting on its behalf had not been criminally liable. Similarly, the criminal liability of a legal person would not have depended on its benefit from the crime.

13.2.6 The Penalties in the Corporate Criminal Liability Bill

Part III of the Corporate Criminal Liability Bill dealt with penalties and other sanctions. The bill (art. 9) stipulated that courts were required to take into account, inter alia, "the internal as well as external circumstances of the legal person including its activities and financial situation". The expression "external circumstances of the legal person" could mean, for example, its importance for the employment rate in the region where it was based or the fact that certain of its activities were conducted for the public benefit. From this provision, it is apparent that, when determining the sentence,

the court would have had to consider matters that cannot be considered in cases involving natural persons.

The CCL Bill also contained an exhaustive list of penalties, namely: (a) the dissolution of the legal person; (b) the forfeiture of property; (c) financial sanctions; (d) the forfeiture of specific items; (e) prohibitory injunctions on business activities; (f) prohibitory injunctions on participation in public tenders; (g) prohibitory injunctions or restrictions on the acceptance of public assistance or subsidies; and (h) the publication of the guilty verdict.

Penalties (a), (e) to (g), and (h) could only have been ordered against legal persons whilst the other penalties could have been imposed on both legal and natural persons. The forfeiture of property and the forfeiture of individual items of property could, nevertheless, have caused certain problems had they been imposed on a legal person. They would have led to a conflict between the interests of the legal person's creditors and the government's interest in preventing proceeds of crime from being used to pay off a corporate offender's debts. That was why the bill expressly stipulated that, if the legal person had been adjudged bankrupt, only "narcotics or other items which jeopardize the safety of persons or property" could be forfeited as part of a sentence involving the forfeiture of individual items. At the time the Corporate Criminal Liability Bill was drafted, it was also suggested that it could contain a provision preventing the forfeiture of property that was not obtained as a result of criminal activities. So, these could then have been used to satisfy creditors in a bankruptcy proceeding. Finally, however, the Government decided against such a provision.

Financial sanctions could have been awarded on condition that the legal person "[had] financially benefited from the criminal offense or [had] caused property damage to another person." This condition was somewhat curious as it would probably have been the rule rather than the exception for a legal person to financially benefit from criminal activities. At least in the case of commercial enterprises, it is hard to imagine a legal person committing a criminal offense that was not at least potentially profitable. The fine would have been between CZK 1 000 and 1 000 000 per day without any limits as to the length of such a sanction.

The injunction prohibiting business activities would have had much more serious consequences for legal persons. Unlike natural persons, legal persons often need permits or licenses to carry out the activities that justify their existence. For that reason, the bill stipulated that courts were to take into account the position of the relevant state regulatory body that granted licenses or permits for the business activities of banks, insurance companies, reinsurance companies, and other legal persons active on the capital markets, if they intended to award such a sentence against a capital market entity.

The dissolution of a legal person could have been ordered by courts, if the business activities of the legal person were built completely, or to a large extent, on criminal activities. Such provision, nevertheless, could not have been applied to legal persons established under a provision of a statutory instrument.

13.2.7 Criminal Procedure

Like the substantive provisions, the procedural provisions of the Corporate Criminal Liability Bill dealt only with criminal procedural matters specific to legal persons. They stipulated how the corporate defendant should be designated so that it could not be mistaken for another legal person with the same name (art. 20); which court had jurisdiction over the case, if it could not be tried by the court in the jurisdiction where the criminal offense had been committed (art. 21); and how the state was to proceed against legal and natural persons charged with interlinked criminal offenses (art. 22). The joint procedure in such cases would have been mandatory even though the criminal liability of the legal and natural persons in question would have been considered separately. As with natural persons, the prosecuting agencies would have been obliged to prosecute legal persons if they suspected that a legal person had committed a criminal offense (art. 22). The bill contained no special rules on documentary evidence.

The Corporate Criminal Liability Bill also contained detailed provisions about the dissolution and termination of a corporate offender. The dissolution of the legal person would have been possible only with the consent of the public prosecutor in the preliminary procedure or of the judge during trial. The CCL Bill stipulated that "the dissolution, termination, or transformation of the legal person shall be invalid without such consent". The bill made it possible to issue the consent only after the payment into court of bail set at the amount of the expected financial sanction. Additionally, the bill allowed for "the suspension of one or more business activities of the legal person or the restriction of its right to dispose of its property".

As the legal person must always be represented by a natural person before the court, the CCL Bill also specified whom the court should consider the legal person's representative. It stipulated that the public prosecutor or the court should appoint a sole representative on the application of the prosecuted entity. It was not absolutely clear from the text of the bill whether the proposal of the legal person was binding on the public prosecutor or court or whether either could have appointed a different person instead. The natural person who had been accused of the offense and witnesses in the case could not be appointed as the legal person's

representative, save to the extent that the legal person was owned, operated, and managed by only one person.[11]

When representing the accused legal person, the representative was to have had all procedural rights accorded to human defendants under the Code of Criminal Procedure 1961 (Act No. 141 of 1961). The general criminal procedure principle of *nemo tenetur se ipsum accusare* would thus have applied only partially to the legal person itself since it would have applied, in full, to its representatives. Other natural persons through whom the accused legal person acted[12] would only have had the procedural rights of an accused if they had been prosecuted simultaneously as accomplices; normally, they would have been treated as witnesses during trial. This approach was justified by the fact that different approaches would frequently have resulted in a lack of evidence. Czech criminal procedure does not use a formal burden of proof, which transfers – at least partially – the burden of proof to the legal person, and is based on the evidence seeking and *in dubio pro reo* principles.

Apart from the mandatory appointment of a legal person's representative, the bill also entitled the legal person to be represented by defense counsel. The defense counsel would have been selected by the corporation's statutory body. The Corporate Criminal Liability Bill nonetheless stipulated, at art. 26(2), that the provisions of subsidiary legislation that required a defense counsel to participate in all criminal proceedings did not apply to legal persons. Consequently, it would have been possible for courts to convict a legal person that had not been assisted by legal counsel even in the most serious criminal cases.

The bill also determined the processes for serving writs of summons on the legal person and apprehending its representative, as well as the amounts that the representative could be fined for failing to appear before the court. In the case of a joint criminal procedure against legal and natural persons, the CCL Bill determined the order of questioning in the main hearing and of the final speeches; it stipulated that the accused natural person always spoke last.

Finally, the Corporate Criminal Liability Bill also determined the enforcement procedures and focused, in particular, on the penalty of dissolution. Thus, it contained detailed procedures for the appointment of a company liquidator, though, surprisingly, it said nothing about how the appointed company liquidator was to dissolve the legal person. This deficiency could have made the penalty of dissolution an acceptable form of punishment for the legal person concerned as the court-appointed liquidator could have sold the entire convicted company to its shareholders. The

[11] Typically, so-called one-member limited companies.

[12] E.g., members of statutory body members or representatives with powers of attorney, or similar forms of authority.

bill certainly did not prohibit this and it can be presumed that this option would have been used had the CCL Bill become law.

13.2.8 The Defeat of the Corporate Criminal Liability Bill in the House of Deputies

The Czech Government submitted the Corporate Criminal Liability Bill to the Czech Parliament on July 21, 2004. The first reading in the House of Deputies took place on November 2, 2004. At that time, only a third of the EU member states had introduced corporate criminal liability rules into their national law and only Poland and Slovenia had done so in Central Europe. Moreover, imputation rules in the Polish law were much more heavily qualified than the proposed Czech rules; amongst other things, the criminal liability of a legal person in Poland depended on the conviction of the natural person who committed the act or omission.[13]

Eleven members of the Parliament contributed to the debate and most of them called for the rejection of the bill on its first reading. Their arguments against the CCL Bill can be divided into two groups; (1) systematic arguments against the introduction of corporate criminal liability in general; and (2) specific objections to the approach taken in the proposed bill.

The fundamental arguments against the introduction of corporate criminal liability into the Czech law focused on the principal need for the Czech Republic to abandon its traditional system built on individual criminal liability and applying solely to natural persons. Mr. Jiří Pospíšil, MP and future Minister of Justice, argued that there would have to be robust and convincing reasons for the Czech Republic to abandon the existing tried and tested traditional principles. He found those reasons neither in the bill itself nor in its explanatory report. Moreover, he believed that the introduction of corporate criminal liability would, in fact, result in the collective responsibility of company shareholders, who had little, if any, chance to influence the commission of criminal offenses by the legal person but who would be impacted on, in full, by corporate sanctions.[14] This argument was further developed by Mr. David Šeich MP, who insisted that the introduction of corporate criminal liability was "a legalized form of criminalizing business activities", which violated the *ne bis in idem* principle. In short, he believed that if the perpetrator – a natural person – was punished for an act, no legal person could be punished for the same act.[15] Other members of the

[13] See Legal Entity Criminal Liability Act 2002 (Act. No. 197 of 2002), arts. 3 and 4.

[14] See Parliament of the Czech Republic, House of Deputies (4th Electoral Term of the House, 37th Session, November 2, 2004), <www.psp.cz/eknih/2002ps/stenprot/037schuz/s037044.htm>.

[15] Ibid.

Parliament emphasized that European law did not require the introduction of corporate criminal liability and a majority of European states had not introduced it at that time.[16]

The other arguments concerned the CCL Bill as such. A number of MPs criticized the fact that only public corporations making up the state and the Czech National Bank were exempt from the jurisdiction of the bill. They proposed that certain other public legal persons that were closely linked to rights and freedoms guaranteed by the state should also be exempt: e.g., the Czech National Theater, the Czech National Museum, the Czech Philharmonic Orchestra, as well as public hospitals, public universities, and other public service institutions. Many MPs also criticized the bill's long list of criminal offenses. Some MPs believed that 130 criminal offenses was an excessive number for legal persons to be able to commit. In their opinion, it was absurd that a legal person could commit the criminal offense of rape or sexual assault. According to some MPs, like Mrs. Vlasta Parkanová and Mr. Marek Benda, a suitable solution would be to introduce corporate criminal liability only for those criminal offenses that the Czech Republic had international commitments to prosecute in relation to legal persons.[17]

The imputation of criminal offenses to legal persons was of equal concern to MPs who believed that it would have amounted to the introduction of strict corporate criminal liability, which would have barred all defenses to legal persons. For example, according to Mr. Ivan Langer MP, an employee could be planted in a legal person by its competitor and then commit a criminal offense, which would then be imputed to the corporate employer. Another representative, Mrs. Eva Dundáčková MP, thought that legal persons could be held accountable even if an employee committed rape whilst checking the gas meter in a private house or "poached a hare" during an official journey through a forest. It was apparent from the debate that only the imputation of criminal offenses committed by members of corporate statutory bodies or top managers would have been acceptable to the deputies and, even then, only subject to exceptions.[18]

The outcome of the debate was clearly negative and sometimes emotional. Mr. Ivan Langer MP and a number of other MPs insisted that the aim of the bill was "to criminalize legal persons… and found a system of sanctions that will allow access to the property of legal persons". Mrs. Parkanová agreed and said that the CCL Bill was "an easy tool with which to forfeit the property of people who have not committed anything". Mr. Šeich even believed that "this bill would be a superb tool for destroying competitors… and a businessman's whip". Speaker of the House of

[16] Ibid.
[17] Ibid.
[18] Ibid.

Deputies, Mrs. Miroslava Němcová, thought that "the authors of the bill intended to create a poorly concealed tool to hobble the business community rather than a proper law".[19]

Consequently, a majority of MPs shared Mr. Langer's view: "The idea of corporate criminal liability as embodied in this bill is dubious. The quality of the bill is even more doubtful. The bill as such cannot be improved and is completely unnecessary."[20] Thus, the Corporate Criminal Liability Bill was rejected by the House of Deputies already at its first reading, with sixty-nine MPs voting for its rejection, forty-three MPs voting against its rejection, and thirteen MPs abstaining out of the 125 MPs present.[21] Had the House of Deputies voted on the CCL Bill after the adoption of a similar law in Austria, the wave of resistance may have been less robust (the Austrian law makes legal persons criminally liable for all criminal offenses and the extent of imputation is similar to that contained in the Czech bill).[22] However, the rejection of the bill means that the Czech law continues to recognize only a general civil liability of legal persons[23] and an administrative form of liability, which is dispersed amongst a myriad of special laws. Corporate persons and cooperatives have a particular liability insofar as they may be dissolved in some cases, if they commit a serious breach of the law.[24] These forms of corporate liability definitely do not meet the European legislative standard, however, nor do they satisfy the Czech Republic's obligations under international law.[25]

13.3 The Basic Principles of Quasi-Criminal Corporate Liability

Following the Parliamentary defeat of the Corporate Criminal Liability Bill, the introduction of corporate criminal liability was shelved for some time. As a result, corporate criminal liability was not included in the recodification of substantive criminal law: the new Criminal Code,[26] adopted in 2009, does not presume any principles of corporate criminal liability.

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[19] Ibid.

[20] Ibid.

[21] As mentioned above, the House of Deputies of the Parliament of the Czech Republic consists of 200 MPs.

[22] See Legal Entity Liability Act 2005 (Act No. 151 of 2005), arts. 1 and 2.

[23] For caused damage, faults etc.

[24] See Commercial Code 1991 (Act No. 513 of 1991), art. 68(3)(d) and (6) or art. 254(2)(c) and art. 257(1).

[25] See OECD 2009.

[26] New Criminal Code 2009 (Act No. 40 of 2009), in force January 1, 2010.

The Czech Republic's international commitments to adopt effective, proportionate, and dissuasive criminal, administrative, financial, or other sanctions thus remain the main reason for the introduction of corporate criminal liability into the Czech law.

In its Resolution No. 64 dated on January 23, 2008,[27] and entitled "On the Conception of the Fight against Organized Crime", the Government of the Czech Republic imposed on the Minister of the Interior a duty to submit, by December 31, 2008, an outline of the subject of introducing into the Czech legal system an administrative liability of legal entities for wrongful conduct, prosecution of which is required by international treaties on the fight against organized crime. On December 16, 2008, the Ministry of the Interior submitted for interdepartmental comment "The Outline of the Law on the Liability of Legal Entities for Administrative Misdemeanors caused by Conduct Punished as a Crime if Perpetrated by Natural Person and the Punishment of which is Required by International Treaties or the Legislation of the European Communities" (hereafter, "outline"). The outline proposed three methods by which the Czech Republic might fulfill its international commitments and sanction legal persons: (1) corporate criminal liability, (2) corporate administrative liability, and (3) a combination of corporate criminal and administrative liability.[28]

13.3.1 Corporate Criminal Liability

The introduction of corporate criminal liability would undoubtedly satisfy all international commitments of the Czech Republic. However, due to the earlier defeat of the Corporate Criminal Liability Bill, the outline focused on the other two alternatives in the area of administrative law and the combination of administrative and criminal law (so-called "quasi-criminal liability").

13.3.2 Corporate Administrative Liability

To introduce corporate administrative liability, it would be necessary first to define "administrative liability". It is apparent from a document prepared by the Ministry of the Interior that "administrative liability is based upon sanctions awarded by administrative bodies or authorities against

[27] Government Resolution on the Conception of the Fight against Organized Crime (Government Resolution No. 64 of January 23, 2008).

[28] Ministry of the Interior 2008, The Outline of the Law on the Liability of Legal Entities for Administrative Misdemeanors caused by Conduct Punished as a Crime if Perpetrated by Natural Person and the Punishment of which is Required by International Treaties or the Legislation of the European Communities (Outline of December 16, 2008), 2 et seq.

natural and legal persons for illegal acts defined by law as administrative offenses."[29] Prior to the introduction of corporate administrative liability, the following problems would have to be solved:[30]

- What will be legal persons punished for?
- Which administrative body or agency will award sanctions?
- What procedural rules will be applied?

There is currently no single Czech statute that exhaustively describes the administrative liability of legal persons; rather, provisions scattered throughout more than 200 separate instruments define the administrative offenses that a legal person can commit.[31] In addition, the range of administrative offenses currently capable of commission by a legal person[32] is not coextensive with the list of offenses for which legal persons could be sanctioned according to the Ministry of the Interior's outline. Hence, corporate administrative offenses would need to be newly defined in a separate law before they would reflect the Czech Republic's international commitments. The Ministry of the Interior has already warned that the terminology used in international treaties may not be compatible with that used in the Czech law and that offense definitions in one international treaty sometimes overlap with those in other treaties. These problems could be eliminated by making use of those offenses defined in the Criminal Code. The future corporate administrative liability law could then simply refer to a list of criminal offenses to which administrative liability principles would apply; but, this solution would not differ much from the approach taken in the rejected Corporate Criminal Liability Bill.

The current practice on sanctioning legal persons for administrative offenses is likewise inapplicable. The administrative authorities that currently award sanctions for breaches of administrative rules are specialized agencies, which supervise only certain areas of activity and are unable to act generally by awarding sanctions for all corporate contraventions of administrative laws. Moreover, broad procedural rights would be necessary to investigate whether a legal person has committed an illegal act as the administrative body responsible for imposing the sanction would first have to prove that an illegal act has really been committed. To be able to do this, the administrative agency would have to be entitled to safeguard evidence,

[29] Ministry of the Interior 2008, 5.

[30] Ministry of the Interior 2008, 7.

[31] E.g., Misdemeanor Act 1990 (Act No. 200 of 1990); National Payment System Act 2009 (Act No. 284 of 2009); Building Act 2006 (Act No. 183 of 2006); Anti-Money Laundering and Cash Payment Act 2004 (Act No. 254 of 2004).

[32] E.g., offenses relating to fire prevention.

question persons, and use special investigative powers. Apart from the Czech Police Force, only the Customs Office has such procedural powers.

Further, if corporate administrative liability were introduced, it would result in procedural duality in cases in which a natural person was prosecuted for a criminal offense and a legal person for an administrative offense. The police would safeguard evidence for the criminal suit, whereas the administrative agency, e.g., customs, would safeguard evidence for the administrative procedure. This would be highly ineffective.

Mutual legal assistance is another serious problem associated with administrative liability for legal persons. International treaties[33] binding the Czech Republic require Czech legal persons to be liable, not only for acts committed on Czech territory, but also for acts committed abroad. Consequently, the administrative agency in charge of the administrative procedure against legal persons could not carry on such work without legal assistance from foreign states when investigating a case. However, international legal assistance may be limited to procedures in which the case may ultimately be heard by a criminal court. The corporate administrative liability described by the Ministry of the Interior could have no such consequences; that is why international cooperation would be extremely difficult. A provision allowing the sanctioned legal person to appeal against the administrative agency's decision to a criminal court might resolve this procedural problem. But, it would not resolve problems with the recognition and enforcement of rulings within the EU, since most EC/EU legislation requires the ruling to have been issued by a judicial body or even a court. The ruling of an administrative agency could not be considered equivalent to a ruling of a court and therefore would be unrecognizable and unenforceable abroad.

Other problems with the Ministry of the Interior's document include the fact that the rules on imputation of offenses to legal persons and corresponding sanctions are very similar to those in the rejected Corporate Criminal Liability Bill.

13.3.3 A Combination of Corporate Criminal and Administrative Liability

The third option offered by the Ministry of the Interior was inspired by the German approach and combines the criminal and administrative liability of

[33] E.g., COE Criminal Law Convention on Corruption; OECD Convention on Foreign Bribery; a number of framework decisions of the EC/EU, such as the Directive 2008/99/EC of the European Parliament and of the Council of November 19, 2008 on the protection of the environment through criminal law (text with EEA relevance), OJ No. L 328, December 6, 2008, 28.

legal persons. With this quasi-criminal option, legal persons would be subject to administrative sanctions in criminal proceedings and the offenses they could commit would be defined either in the Criminal Code or a separate law. This option would enable international cooperation and differs from the first option in the following ways:

- offense provisions would probably appear in a separate law and would be restricted to those offenses which the Czech Republic is bound to prosecute in relation to legal persons under international treaties;
- the sanctioning procedure would be administrative although the decision to impose sanctions would be made by a criminal court in a criminal procedure;[34] and
- administrative liability and sanctions would not carry those negative connotations associated with criminal liability and would not appear as a previous conviction in the company's record.

13.4 Conclusions and Suggestions

Having analyzed all three options, the Ministry of the Interior came to the conclusion that the third option should be the core of a new corporate liability bill. The Ministry of Finance had also rejected the idea that Customs Office should be the administrative agency dealing with the administrative liability of legal persons (the Ministry thought this would overburden the Customs Office). But other government ministries rejected the idea of a quasi-criminal liability on the basis that the differences between this option and the first corporate criminal liability option are superficial; its selection would have been motivated by fears that the future bill might again be rejected by the Czech Parliament. Instead, they have recommended the first option – corporate criminal liability – as the basis of future reform.[35]

For these reasons, the Czech government decided in November 2009 that the preparatory legislative works should return to the concept of corporate criminal liability. The Minister of Justice was authorized by the Czech Government's Resolution No. 1451 (November 30, 2009) to "prepare and submit" a draft bill no later than by May 31, 2010 (This term was later postponed to December 30, 2010). The first draft of the new bill was actually prepared and the internal ministerial consultations on that draft were

[34] This solution would be similar to the adhesion procedure in which courts decide about compensation for damage caused by a criminal offense.

[35] According to correspondence and comments of the Ministry of the Interior, this view is shared by the Chief Justice of the Supreme Administrative Court; the Chairman of the Criminal Division of the Czech Republic's Supreme Court; the Minister presiding the Legislative Council of the Government; the former Minister for Human Rights and Ethnic Minorities; the Minister of Foreign Affairs; and the Governor of the Czech National Bank.

completed in May 2010. Currently the Ministry of Justice is working on the final version. At this time (beginning of January 2011) it is impossible to comment more concretely on this draft because it will be the object of comments and changes until the end of the year 2011. Generally, it may be said that the current draft of the new bill is substantively very similar to the rejected bill of 2004. The main change is the limitation of the proposed scope of liability to those offenses which the Czech Republic is obliged to prosecute, when committed in a corporate context, under the international treaties and EC/EU legislation.

It is very probable that the Czech government will approve the draft by the end of March 2011. The government is very motivated to approve such a bill in order to reduce international pressure on the Czech Republic. This pressure is, in fact, increasing as other states pass their own corporate criminal liability statutes and leave the Czech Republic as one of the last states in the EU to fulfill its international commitment in this area. As the requirement to introduce corporate liability is set out in EU framework decisions and directives, the possible failure to implement some sort of corporate criminal liability into the Czech law might eventually result in the Czech Republic being fined.

It is to be presumed that the submission of the new Corporate Criminal Liability Bill to the Czech Parliament will occur at the beginning of 2011; however, its fate is absolutely unforeseeable. The general election in May 2010 has not dramatically changed the political landscape in the Czech Republic. From this perspective, it is noteworthy that the previous and current Minister of Justice, Pospíšil MP, was one of the 2004 bill's leading critics and believed it was "unnecessary and detrimental". The question is whether the conservative Parliamentary majority will favor corporate impunity. Conservative politicians most probably fear that the introduction of corporate criminal liability and criminal sanctions for legal persons would worsen the business environment in the Czech Republic by making potential foreign investors reluctant to establish Czech entities and Czech entrepreneurs more likely to transfer their businesses abroad.

Further, even if this bill is passed, it may be incomplete. A general proposal regarding corporate criminal liability is the use of *internal* corporate justice systems to secure future compliance and address past breaches. The idea, as developed by Fisse and Braithwaite,[36] is to find the real perpetrator, i.e., the natural person/s responsible for the commission of the criminal offense. For this to happen it must be in the interest of the legal person, the legal person must be encouraged to actively cooperate in the investigation, or placed in charge of the investigation itself. The legal person is then only punished in a criminal proceeding if the real perpetrator is not found. At

[36] Fisse/Braithwaite 1993, 193.

the time of writing, this suggestion has not been reflected in the new draft the Czech corporate criminal liability bill.

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