



Criminal and administrative liability of legal persons in the Czech Republic

Trestní a správní odpovědnost právnických osob v České republice

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Abstract:

The issue of liability of legal persons for criminal acts and for offenses is relatively new. The liability of legal persons for criminal acts is based on the so-called imputability of the fault of the natural person who acted for the legal person. However, the liability of legal persons for the offense is merely imputable in terms of conduct, not in fault, as the liability of legal persons is an objective liability. Both regulations are similar in some respects and different in others. The objective is to point out the differences.

Keywords: legal person, criminal act, offense, imputability, fault.

Abstrakt:

Problematika odpovědnosti právnických osob za trestné činy a za přestupky je poměrně nová. Odpovědnost právnických osob za trestné činy je postavena na tzv. přičitatelnosti zavinění fyzické osoby, která za právnickou osobu jednala. U odpovědnosti právnických osob za přestupek jde však pouze o přičitatelnost co do jednání, nikoliv co do zavinění, neboť odpovědnost právnických osob je odpovědností objektivní. Obě právní úpravy jsou v určitých aspektech podobné, v jiných rozdílné. Smyslem je poukázat především na rozdílnosti.

KPůčové slová: právnická osoba, trestný čin, přestupek, přičitatelnost, zavinění



Introduction

The objective of this paper is to compare legal regulations of liability of legal persons for criminal acts and the liability of these persons for offenses in the Czech Republic. In particular, to point out how these regulations differ, what is characteristic of them and how they are similar.

The new legislation on criminal liability of legal persons for criminal acts came into effect on 1st January 2012 and the liability of legal persons for offenses since 1st July 2017. Criminal law may have been inspiration for addressing liability of legal persons also for offenses. As Kühn points out, the new regulation on the liability of legal persons for offenses has been inspired to some extent by the logic of criminal liability of legal persons. It is based on the fictional theory of a legal person that does not act on its own and whose burden may be (misdemeanor liability) of natural persons acting on its behalf or for its benefit. Thus, in the spirit of the criminal liability of legal persons, the law constructs the imputability of the conduct of certain natural persons to a legal entity [1].

1. Liability of legal persons for criminal acts

The liability of legal persons for a criminal act must be based on the notion of criminal act, similarly to the liability of natural persons, but with some deviations. Pursuant to Section 13 (1) of Act No. 40/2009 Coll. of the Criminal Code, as amended (hereinafter the “Criminal Code”), a criminal act is an unlawful act identified by the Criminal Code as criminal and which shows the features specified in such Act, which is expressed as formal characters. Its material corrective is specified in Section 12 (2) of the Criminal Code, where it is stipulated that the criminal liability of the offender and the associated criminal consequences can be applied only in socially harmful cases in which the application of liability under another legal regulation is not sufficient. With regard to “features specified in such law”, we mean object, objective, subject, and subjective. The subjective side includes the trait of fault, but also facultative traits - motivation and aim. We will be particularly interested in the fault. Culpability, as stated in perhaps all criminal law textbooks, is an intrinsic psychological relationship of the offender to certain facts constituting the offense, built on the knowledge component and the will component, thus it can only be associated with a natural person [2]. We can also express culpability as a psychological state of the perpetrator of a criminal act for violating or endangering the interest protected by the Criminal Code caused in the manner specified in the Criminal Code [3].

In order to fulfill the subjective side of a crime, a form of fault is necessary, but a legal person is not able to create such an internal relationship or a criminal consequence to the criminal act. Therefore, according to Act No. 418/2011 Coll., on the criminal liability of legal persons and proceedings against them, as amended (hereinafter referred to as ZTOPO), the fulfillment of a subjective sign is proven indirectly through the fault of natural persons acting on behalf of a legal person. According to Šámal, this is the so-called special subjective responsibility of a legal person [4]. The derivation of the fault of legal persons from the fault of natural persons is called attribution. Article 8 of the ZTOPO is clearly based on material grounds of liability of a legal person for the offenses committed, which consist of two types of imputability (referred to in Section 8 (2) (a), (b) of the ZTOPO, and subject to an objective consequence of a legal person outwardly. Thus, this is considered to be a specific subjective responsibility for a legal person that

follows the fault of a natural person referred to in Section 8 (1) of the TOPO, but is in principle different from the concept of guilt (fault) for a natural person. This is due to the fact that, as has been repeatedly stated, legal persons are artificial organizational units on whose behalf natural persons act. Therefore, as stated by Šámal, it is correct if imputability within the meaning of Section 8 (1), (2) of the ZTOPO is considered to be a definition of the specific subjective responsibility of a legal person following the fault of a natural person, which in principle is different from the classical concept of fault [5].

In essence, most authors who deal with the issue of imputing criminal liability of legal persons assume that some form of legal person's fault is needed. However, the legal entity itself is not able to create such an internal relationship to a criminal act or a consequence. Therefore, according to the Act on the Criminal Liability of Legal Persons, the fulfillment of the subjective sign is proven indirectly through the fault of natural persons acting for a legal entity.

2. Liability of a legal person for offenses

As regards the liability of legal persons for offenses, the situation here is quite different. Based on the concept of offence, according to Section 5 of Act No. 250/2016 Coll., On liability for offences and proceedings on them, as amended (hereinafter referred to as “ZOP”), an offence is considered a socially harmful unlawful act, which is expressly marked as offence in the law, and has the features stipulated by law, unless it is a criminal act. Regarding conceptual signs, as in the case of criminal acts, it is an unlawful act. Moreover it states that it must be expressly identified in the law as an offence and then the features specified in the relevant law must be fulfilled. These characteristics are object, objective sides, and subject. But, as far as the subjective side is concerned, it only concerns offenses committed only by natural persons. This results from the provision of Section 13 (1) of the ZOP, from which natural person is the perpetrator if they have committed or have attempted to commit an offense in case it is punishable. Section 15 (1) of the ZOP adds that a natural person's liability for the offense requires their fault. The fault of negligence is sufficient, unless the law expressly states that intentional fault is required.

For offenses, in contrast with criminal acts, we recognize offenses that can be committed only by natural persons or only by legal persons (natural persons doing business) or both natural and legal persons (natural persons doing business). However, only natural persons are to be blamed. For legal persons (natural persons doing business) this is not required, so it is an objective liability. In this case, as opposed to the liability of legal persons for criminal acts, the fault of the legal person need not be derived from the fault of a natural person who has breached a legal obligation imposed on a legal person in the legal person's activity or in its interest. It can be summarized that, unlike a natural person's liability for an offence, such as the responsibility for a culpable misconduct committed by a specific individual, no fault can be attributed to the legal person responsible for an offence, meaning that a legal person has no actual (original) knowledge and will, and without will there is no guilt either. Blame is not an obligatory feature of the merits of the case of the offense of a legal person.

3. Criminal acts - persons acting on behalf of legal persons

As mentioned above, in order to infer a legal person's fault, it derives from certain persons. This issue is governed by Section 8 (1) of the ZTOPO, stating that an offense committed by a legal person is an offense committed in its interest or in the course of its activity, if it was done so by

- a) a statutory body or a member of a statutory body, or another person in a leading position within a legal person who is authorized to act on behalf of or for the legal person,
- b) a person in a senior position within a legal person who carries out management or control activities with that legal person, even if he/she is not a person referred to in point a),
- c) a person who exercises decisive influence over the management of the legal person, provided that his/her conduct was at least one of the conditions giving rise to the consequence conferring criminal liability on the legal person, or
- d) an employee or a similar person (hereinafter referred to as "employee") performing work tasks, even if he/she is not a person referred to in points a) to c), if it can be attributed to him/her under paragraph 2.

Thus, Section 8 (1) of the ZTOPO expresses the so-called formal condition of criminal liability, since it defines the nature of unlawful conduct of a legal person.

4. Offenses - persons acting on behalf of legal persons

Section 20 (2) of the ZOP explicitly mentions persons whose conduct is attributable to a legal person, and for the purpose of assessing the liability of a legal person for an offense, such person is considered to be

- a) a statutory body or a member of a statutory body,
- b) another body of the legal person or its member,
- c) an employee or a person in a similar capacity in the performance of their duties,
- d) a natural person who carries out the tasks of a legal person,
- e) a natural person used by the legal person in its activity, or
- f) a natural person who has acted on behalf of a legal person if the legal person has benefited from the outcome of such conduct.

The ZOP introduces an explicit delimitation of the group of entities whose actions may create the legal liability of a legal person. It is clear that in comparison with the regulation in ZTOPO, it is mostly a broader concept, since it covers both members of all bodies of a legal person (not only persons in leading positions authorized to act on behalf of a legal entity or carrying out management or control activities) and employees and persons in a similar position who perform tasks arising from their position, respectively, other natural persons carrying out the tasks of a legal person, used by a legal person, or acting for a legal person, without requiring in such cases the cumulative application of the condition known from Section 8 (2) of the ZTOPO. Thus, from the administrative point of view, it is imputable to a legal person the punishment of the conduct of its employees and other persons in a similar position, without having to examine whether

the act was committed by decision, approval or instruction of the legal bodies or as a result of their failure to take the necessary measures (in particular due diligence).

According to Brim, this distinction is justified by the position of criminal law as an instrument of subsidiary protection of legal relations against the most serious infringements of legally protected values, and the role of administrative liability, which must cover and effectively sanction a much wider range of (usually less serious) offenses. It is therefore justifiable that the conditions for imputing the conduct of natural persons to legal persons in the context of administrative punishment should also be set more freely [6].

According to Grygar, the list of persons referred to above is by definition to be exhaustive. Thus, for the purposes of the administrative liability for an offense, a legal person will not be attributed, for example, to the conduct of a third party acting in its name on its behalf without an appropriate authorization (typically a “false chief”). The list of natural persons whose conduct is attributed to a legal person is partly based on the Civil Code, partly on the law on criminal liability of legal persons and partly on the practice of assessing the administrative liability of legal persons by domestic courts [7].

5. Criminal acts – attributability

Pursuant to Section 8 (2) of the ZTOPO on attributability, the criminal act referred to in Section 7 may be imputed to a legal person if it was committed by the persons referred to in paragraph 1 of that Section, namely

- a) by the conduct of the bodies of a legal person or persons referred to in paragraph 1 (a) to (c), or
- b) by an employee referred to in paragraph 1 (a); (d) by decision, approval or instruction of the authorities of the legal person or persons referred to in paragraph 1 (a); (a) to (c) or because the authorities of the legal person or persons referred to in paragraph 1 (a) to (c) failed to take such measures that they should have taken under other legislation or which may be fairly required, in particular if they have not exercised mandatory or necessary control over the activities of employees or other persons to whom they are superior, in order to prevent or avoid or the consequences of the criminal offense.

Section 8 (2) of the ZTOPO expresses to us the so-called material condition of the requirement of imputability of a crime to a legal person.

The issue of fault of a legal person was resolved through the construction of attribution. Its essence lies in the fact that a legal person is attributed an unlawful act committed in its interest, or in the course of its activity by one of the persons referred to in Section 8 (a) to (d) of the ZTOPO, in the case of persons referred to in Section 8 (a) to (c) of the ZTOPO. In the case of an employee of a legal person or a person in a similar position under the conditions specified in Section 8 (b) of the ZTOPO, it is also taken into account that management and internal control activities should also be considered as part of the activity in which the legal person's liability for criminal offense can be found. In this context, it should be considered that internal control cannot be limited to measures to which control and other management bodies are required by law. In accordance with the principles applicable to criminal penalties for natural persons, it must also apply to such control measures and other measures whose implementation may

be fairly required in accordance with the general principles of the exercise or control of a legal person.

Czech states that, especially in the case of the second of the criteria listed in Section 8 (b) of the ZTOPO, we can recognize a partial inspiration by foreign legislation, when a legal person is in fact responsible for neglecting, or openly resigning, to the creation of an environment that would prevent perpetrating a crime. It is thus a partial analogy of considering the existence of the culture of benevolence against crime, in which it is possible to identify fault on the part of a legal person in its genuine form as presented by the doctrine of the responsibility of an organization [8].

The persons referred to above may commit an unlawful act on their own or may commit it together or in succession, either simultaneously or sequentially. In practice, this will be particularly the case where each of those persons, concurrently or gradually, carries out certain acts until they produce a criminally relevant act which fulfils the characteristics of an illegal offense committed either in the interests of a legal person or in the course of their activities (e.g. several members of the statutory body - board of directors of a joint stock company imposes by its decision to conclude a certain contract or perform a certain operation, which is then carried out by a designated director and several employees of the company) [9].

It may be more complicated to solve the issue how the collective body acted at fault /according to Section 152 of the Civil Code, a legal person creates one member bodies (individual) or more member bodies (collective), most often it will be a statutory collective body/. If it is a statutory body whose conduct constitutes action by a legal person, it may be difficult to determine the exact form of the fault of the “team” voting in favour of a criminal intent, especially where the vote is recorded only schematically, not individually [10]. As J. Fenyk points out, if the fault of a natural person is often due to the manner of the execution or the consequence, professionally demanding decisions of a team will have to be assessed similarly and the result will also have to be judged by the number of the votes of individually unidentified accomplices in favour of the criminal act. In case of an individual's conduct, the taking of evidence shall be the same as that of any other natural person [11].

Šámal summarizes that under Section 8 (2) of the ZTOPO, a criminal offense referred to in Section 7 of the ZTOPO can be attributed to a legal person if the criminal offense was committed:

- a) by actions of the bodies or persons referred to in Section 8 (1) (a) to (c) of the ZTOPO, in all cases of their conduct pursuant to Section 8 (1) (including, but not limited to, the introductory part of this section, provided that such conduct was carried out in its interest or in the course of its activity), or
- b) by actions of an employee referred to in Section 8 (d) of the ZTOPO, which, is further limited by the correction that it occurred by a decision, approval or instruction of the bodies of a legal person or persons referred to in Section 8 (a) to (c) of the ZTOPO or because the bodies of a legal person or a person referred to in Section 8 (a) to (c) of the ZTOPO failed to implement such measures which they were supposed to take under other legislation or which could be fairly required, in particular, did not carry out mandatory or necessary control over the activities of employees or other

persons who they are superior to, or the neglected measures to avoid the consequences of the criminal offense [12].

6. Offenses – attribution

The imputability of the acts of natural persons to legal persons responsible for the offense is described in Section 20 (1) of the ZOP, where it is stipulated that a natural person has breached a legal obligation imposed on a legal entity in direct connection with the activity of a legal person or for the benefit of a legal person or in its interest. A breach of a legal obligation imposed on a legal entity shall also be deemed to be a breach of a legal obligation imposed on an organizational unit or other department that is part of the legal person.

The Explanatory Memorandum to Section 20 of the ZOP states that liability for an offense of a legal person will not be based on the principle of imputability. However, this is not imputability in the sense of fault, but imputability in terms of the behaviour of a natural person in relation to a legal person. We can say that "imputability" has two meanings. Firstly, it is imputability for the conduct of a natural person to a legal person in the case of imputing the liability of a legal person for an offense. Secondly, the term additionally means that it is imputable to a legal person in case of a criminal act. Thus, in the case of criminal acts, imputability is used in both ways of its meaning, it means in relation to the conduct and in relation to the fault.

Grygar states that the new offense law is in fact based on the imputability (even of a fault) of a naturally defined person to a legal person. The fault of a natural person is not necessary for establishing the liability of a legal person. In this sense, it is indeed the inferred (original) liability of the legal person [13].

7. Discussion – summary

Regarding the approaches in criminal vs. offense liability of legal persons, the criminal legislation based on the notion of criminal offense, which can be committed only by fault, uses the solution that a fault which the legal person cannot cause is derived from the fault of natural persons acting on behalf of the legal person. That is the so-called imputability. On the other hand, in the case of the liability of legal persons for an offense, this attribution of fault is not asserted, since the fault is required only for those which can only be committed by natural persons in case of offenses. Legal persons (natural persons doing business) can only commit offenses for which no fault is required.

Regarding the authorities that act in connection with the liability of legal persons, the extent of liability for offenses is greater than that of legal persons for criminal acts. As Brim points out, this is because the distinction is justified by the position of criminal law as an instrument of subsidiary protection of legal relations against the most serious infringements of legally protected values and, on the contrary, the role of administrative liability which has to cover and effectively sanction a much broader scope of (usually less serious) unlawful acts, so it is justifiable that the conditions for imputing the conduct of natural persons to legal persons, in the context of administrative punishment, should also be set more freely [14].

Conclusion

We can summarize that the purpose of this paper was - by using the comparison and analysis of literary sources and legislation - to point out the differences in the approaches to deducing the liability of legal persons for criminal acts versus the liability of these persons for offenses. The approach of regulating the liability of legal persons for offenses was inspired by regulating the liability of legal persons for criminal offenses. Both identical and different approaches were pointed out in relation with solving the most important legal areas of criminal law vs. administrative law.

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