

Criminally liable legal persons already in Slovakia

Besides other changes to expect (especially) by Slovak legal community in early July 2016 will enter in the force the Act. No. 91/2016 Coll. on Criminal Liability of Legal Entities and on Amendments and Supplements of Certain Acts (hereinafter the "Act"). The Act was adopted by the National Parliament of the Slovak Republic on 13 November 2015. Provision 1 of the Act introduces the direct¹ criminal liability of legal entities to the Slovak legal system for the first time, while in other provisions the Act amends its associated regulations (together this includes approximately 80 Acts, which do not contain necessary changes in subordinate legislation).

Since the Slovak Republic is a full member of international organisations (particularly the European Union, the OECD and the Council of Europe), the expectations expressed by these communities need to be reflected in legal enactments. One of those expectations was and is the imposition of criminal liability of legal persons. By implementing this Act, the Slovak Republic acts as a Party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, particularly on the regular review in the Plenum WGB / OECD. The most serious default identified was the missing criminal liability of legal persons.²

Below we examine the Act in detail, in particular the concept of direct criminal liability of legal persons, effective from 1 July 2016.

1. Scope of the Act

Before we identify the subjects and cases in which the Act will regulate criminal liability, it is important to note that criminal liability of legal persons may be inferred only in respect of acts which occur after the effective date of the Act. Therefore, it cannot prosecute this legal entity under the Act for its/their actions that occurred before 1 July 2016.

To ensure effective prosecution of legal entities, the territorial and personal scope of the Act shows necessary diversions from the scope of the Act No. 300/2005 Coll. Criminal Code as amended (hereinafter the "CC").

It is essential to commit the crime on the territory of the Slovak Republic. Offences are considered as committed in the territory of the Slovak Republic if:

- The legal person committed the offense at least partly on the territory of the Slovak Republic, although the violation or threat to an interest protected by the CC took place or should take place wholly or partly outside the territory of the Slovak Republic; or
- Violation or threat to an interest protected by the CC at least partly occurred or should occur in the Slovak Republic, although the legal entity committed the offense outside the territory of the Slovak Republic.

Another determinant is how to assess the criminality of an act committed outside the territory of the Slovak Republic committed by a legal entity having its registered office in the Slovak Republic. For the purposes of the Act, a legal entity is an entity which will have a branch with its registered seat in the Slovak Republic if the offense is committed within its activities. The Act will also regulate actions committed outside the territory of the Slovak Republic by a legal entity whose seat is not on the territory of the Slovak Republic if they will be committed for the benefit of the person having its registered office in the Slovak Republic.

¹ Since 2010 the Slovak Republic was applying (for the continental system of law typically) the so-called indirect criminal liability of legal persons. The criminal liability of legal persons is not expressed and only natural persons acting on behalf of the legal person are criminally liable. However, the law allows imposing on legal persons certain criminal sanctions in criminal proceedings, which are not defined as penalties. We talk about spill over effects of the offense of a natural person which are attributable to the legal persons.

² Only a brief introduction, we would like to remind you that even before 1 July 2016 (ie into force of the Act), Slovak law recognizes i.a. mentioned indirect criminal liability of legal persons, so-called. administrative law liability of legal persons. (This type of sanction entities peculiar to Germany.) This kind of / access to the understanding of corporate misconduct is punishing them through administrative legal norms, not criminal.

The Act will also apply to and sanction the criminality of an offense committed outside the territory of the Slovak Republic by a legal person without its registered seat in the Slovak Republic, provided that the damage was caused to a legal entity who has residency in the territory of the Slovak Republic (or a natural person who is a Slovak citizen, even a foreigner who has permanent residence here), and in the place of the offence it is a crime punishable by the State, or if the place of the offence is not subject to any criminal jurisdiction.

2. Criminal offences committed by a legal entity

Criminal offences committed by a legal entity pursuant to the Act are specified in special section of the CC, *in concrete*:

- 2.1 Illicit Manufacturing and Possession of Narcotic and Psychotropic Substances, Poisons or Precursors and Trafficking in them according to Sections 172 and 173 of the CC;
- 2.2 Illicit Distribution of Drugs according to Section 174 of the CC;
- 2.3 Trafficking in Human Beings according to Section 179 of the CC;
- 2.4 Sexual Violence according to Section 200 of the CC;
- 2.5 Sexual Abuse according to Sections 201 – 202 of the CC;
- 2.6 Corrupting Morals of Youth according to Section 211 of the CC;
- 2.7 Sharing according to Sections 231 and 232 of the CC;
- 2.8 Legalisation of the Proceeds of Crime according to Sections 233 and 234 of the CC;
- 2.9 Usury according to Section 235 of the CC;
- 2.10 Harm done to and Abuse of an Information Carrier according to Section § 247 of the CC;
- 2.11 Unauthorized interference with the computer system according to Section 247a of the CC;
- 2.12 Unauthorised interference with the computer data according to Section 247b of the CC;
- 2.13 Unauthorised capture of computer data according to Section 247c of the CC;
- 2.14 Production and possession of access devices, passwords to computer system or other data according to Section 247d of the CC;
- 2.15 Unauthorised employment according to Section 251a of the CC;
- 2.16 Damaging Financial Interests of the European Communities according to Sections 261 - 263 of the CC;
- 2.17 Damage caused to a Consumer according to Section 269 of the CC;
- 2.18 Unfair Trade Practices Directed towards a Consumer according to Section 269a of the CC;
- 2.19 Forgery, Fraudulent Alteration and Illicit Manufacturing of Money and Securities according to Section 270 of the CC;
- 2.20 Uttering Counterfeit, Fraudulently Altered and Illicitly Manufactured Money and Securities according to Section 271 of the CC;
- 2.21 Manufacturing and Possession of Instruments for Counterfeiting and Forgery according to Section 272 of the CC;
- 2.22 Tax and Insurance Evasion according to Section 276 of the CC;
- 2.23 Failure to Pay Tax and Insurance according to Section 277 of the CC;
- 2.24 Tax fraud according to Section 277a of the CC;
- 2.25 Failure to pay taxes and insurance according to Section 278 of the CC;
- 2.26 Obstruction of tax administration according to Section 278a of the CC;
- 2.27 Endangering Public Safety according to Sections 284 and 285 of the CC;
- 2.28 Prohibited Acquisition and Possession of Firearms and Trafficking in them according to Sections 294 and 295 of the CC;
- 2.29 Establishing, Masterminding and Supporting a Criminal Group according to Section 296 of the CC;
- 2.30 Establishing, Masterminding and Supporting a Terrorist Group according to Section § 297 of the CC;
- 2.31 Illicit Manufacturing and Possession of Nuclear Materials, Radioactive Substances, Hazardous Chemicals and Hazardous Biological Agents and Toxins according to Sections 298 and 299 of the CC;
- 2.32 Endangering and Damaging the Environment according to Section 300 and 301 of the CC;
- 2.33 Unauthorised Handling of Waste according to Section 302 of the CC;
- 2.34 Unauthorized discharges of pollutants according to Section 302a of the CC;
- 2.35 Breach of Water and Air Protection Regulations according to Section 303 and 304 of the CC;
- 2.36 Breach of Plant and Animal Species Protection Regulations according to Section 305 of the CC;
- 2.37 Breach of Trees and Shrubbery Protection Regulations according to Section 306 of the CC;

- 2.38 Terror according to Section 313 and 314 of the CC;
- 2.39 Passive Bribery according to Sections 328 - 331 of the CC;
- 2.40 Active Bribery according to Sections 332 - 335 of the CC;
- 2.41 Trading in Influence according to Section 336 of the CC;
- 2.42 Human Smuggling according to Sections 355 and 356 of the CC;
- 2.43 Procuring and Soliciting Prostitution according to Section 367 of the CC;
- 2.44 Manufacturing of Child Pornography according to Section 368 of the CC;
- 2.45 Dissemination of Child Pornography according to Section 369 of the CC;
- 2.46 Possession of child pornography and participation in children's pornographic performances according to Section 370 of the CC;
- 2.47 Corrupting Morals according to Sections 371 and 372 of the CC;
- 2.48 Terrorism and some forms of participation in terrorism according to Section 419 of the CC;
- 2.49 Supporting and Promoting Groups Aimed at Suppression of Fundamental Rights and Freedoms according to Sections 421 and 422 of the CC;
- 2.50 Manufacturing of Extremist Materials according to Section 422a of the CC;
- 2.51 Dissemination of Extremist Materials according to Section 422b of the CC;
- 2.52 Possession of Extremist Materials according to Section 422c of the CC;
- 2.53 Denial and approval of the Holocaust and crimes of political regimes according to Section 422d of the CC;
- 2.54 Defamation of Nation, Race and Belief according to Section 423 of the CC;
- 2.55 Incitement of National, Racial and Ethnic Hatred according to Section 424 of the CC; and
- 2.56 Incitement, Defamation and Threatening to Persons because of their Affiliation to Race, Nation, Nationality, Complexion, Ethnic Group or Family Origin according to Section 424a of the CC.

This exhaustive list presents all criminal offenses for which a legal person can be sanctioned under the Act. Since this is an extensive list (56 offenses).³

3. Criminal law liability of a legal person

The basis for criminal liability is the commission of the above mentioned offenses by the person responsible, and that such offences have been committed on behalf of the legal entity within the activities of the legal person or through a legal entity. The Act regulates who may be considered to act on behalf of / for the legal entity, since the regulation included in the Civil Code (Act. No. 40/1964 Coll. as amended) or in the Commercial Code (Act No. 513/1991 Coll. as amended) with regard to the specificities of criminal liability is not sufficient. Therefore, the Act establishes the following as persons liable:

- a) statutory body (in the case of a limited company - Ltd. –the Sole Manager/ or Executive Directors as a collective body);
- b) person exercising control or supervision activities within the legal person, even though he had no other legal relationship to the legal person. This is not only about supervisory authorities provided directly by legislation, e.g. Board of Supervisors, but also controlling bodies legally established outside the legislation. There is an essential requirement in acting in the interest of legal persons;
- c) person authorised to represent or to decide for the legal person. In this case it will again be either the statutory body (its members), or so-called "shadow" managers - persons de facto controlling / managing the legal entity, or those persons who de facto negotiate contracts on behalf of the legal entity, although the statutory body de facto signs or concludes these contracts. Please note that the essential condition is to act for the benefit of a legal person.

A criminal act sanctionable under the Act also includes actions of defective supervision or control activities committed by the persons mentioned above that were its obligations, or if the person negligently allowed committing an offense by person acting under the given authority entrusted by the

³ specifically to individual crimes, the CC as amended by the Act: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/20160101?ucinnost=01.07.2016> (note: legally binding text available only in Slovak language)

legal personality. Again, the criminal liability of legal persons does not arise in the case of excess committed by the person liable acting on their own behalf.

Criminal liability of legal persons is not conditioned before drawing criminal liability against the specific natural person mentioned above, and is not conditioned on finding whether the person acts in a manner set out above. Identification of the natural person is relevant, for example, if we would like to prove conduct contrary to the interests of the legal entity.

Criminal liability applies in the cases where:

- a) the criminal offence was committed during the time from establishment of the legal entity till its creation (the so called pre-company);
- b) the legal person was created, but the court has ruled on its invalidity;
- c) the legal action which should set up an authorisation to act on behalf of the legal person, is invalid or ineffective; or
- d) the natural person who is acting on behalf of legal entity is not criminally liable for such an offense.

We note that, in the case of legal succession, in the meaning that the original legal person has been dissolved, criminal liability is transferred to (all) its successors. The Act specifies the following changes of the company: mergers, acquisitions and divisions of the legal entity, transfer of its assets to its partner, change of legal form of the legal entity or transfer of the registered office of the legal entity abroad.

This transition of criminal liability does not apply if the successor is a natural person.

Legal action against offenders or participation in and complicity on committing crimes is reflected mainly in the Act for the details of the legal entity which are not included in the CC. According to the Act, an offender of a criminal offence is the legal person to whom is attributed the violation or threat to an interest protected and provided under the CC. If the offense is committed by several offenders (two or more) and at least one of them is a legal entity, each person has the same criminal liability as the single person who would commit such a criminal offence. Pursuant to the Act, an abettor to a completed or attempted criminal offence is such a legal person who intentionally used another natural or legal person.

4. Exclusion and extinction of criminal liability

The Act has excluded the following legal entities from the competence of criminal procedure authorities:

- a) the Slovak Republic and its institutions;
- b) other states and their authorities;
- c) international organisations established on the basis of international law and their institutions;
- d) municipalities and territorial units;
- e) legal persons who are at the time of the offense established by law;
- f) other legal entities whose financial circumstances as the borrower cannot be organised by a special regulation governing insolvency proceedings.

The ownership interest in the legal person held by these bodies does not exclude the criminal liability of these legal persons.

The criminal liability is extinguished:

- a) in the case of extinction of punishability of the criminal offence according to the provisions of effective regret (see above);
- b) the legal entity voluntarily stops performing the action leading to the commission of a criminal offence and prevents or repairs the harmful effects of the criminal offence; or
- c) the legal entity voluntarily stops performing the action leading to the commission of a criminal offence and notifies the Police Corps about it at such time when it is still possible to remove the threat to an interest protected under this Act, or to prevent the harmful effects of criminal offence.

The following circumstances do not result in the extinction of punishability for criminal offences:

- 1. filing for bankruptcy
- 2. liquidation
- 3. winding-up of the legal person
- 4. an imposition of forced administration; and
- 5. one of the criminal offences was committed, such as corruption (criminal offence of accepting a bribe pursuant to Sections 328 – 331 of the CC; trading in influence pursuant to Section 336 of the CC) or damaging the financial interests of the European Communities pursuant to Section 261 of the CC.

5. Penalty

Only the type and degree of penalty specified in the Act may be imposed on an offender:

- a) winding-up penalty
- b) forfeiture of property
- c) forfeiture of an object
- d) pecuniary penalty
- e) disqualification from the practice of activities
- f) prohibition to receive grants or subsidies
- g) prohibition to benefit from receiving aid for and support provided from EU funds
- h) a prohibition to participate in public procurement; and
- i) publication of the judgement penalty

Calculation of penalties represents an exhaustive list, therefore it cannot be ordered for other than the above mentioned penalty in the case of criminal liability. At the same time, the Act along with certain provisions of the general part of the CC, regulates the conditions and basic principles for ordering these penalties. The penalty is the only and inevitable legal consequence for the legal person which committed a criminal offence.

In the event of a sentence being imposed the court sends a copy of the judgement to the Commercial Register, and to another statutorily-designated register in which the legal entity is registered or managed.

Below we briefly describe separate penalties.

5.1 Winding-up penalty

The strictest penalty mandatorily imposed on a legal entity with its registered office in the Slovak Republic for criminal activities, wholly or mainly used for criminal activities. Compared to similar legislation in the Czech Republic⁴, where criminal liability has been in force since 1 January 2012, this penalty has been validly imposed in two cases. This represents 8% of the total number of lawful penalties⁵. It can be assumed that this penalty will not belong to frequently imposed penalties. Of course its application in practice will indicate more.

The final decision on imposing the penalty enters a legal entity into liquidation; *ex lege*. (There are also separate procedures for some legal persons supervised by financial markets, for example.)

5.2 Forfeiture of property and the object

This type of penalty affects the property of the legal entity. The nature of such penalty is deprivation of property rights (according to a final decision) towards the assets/objects that are in a certain relation to a crime. Property is transferred to the Slovak Republic under the final judgement. The primary purpose for imposing such penalties should be to destroy objects which could be used or assist in committing other crimes, even the withdrawal of benefit which was acquired by a criminal offence. Only the property of the punished legal entity can be subject to the forfeiture of property. The ownership is determined when the judgement is announced. Further, revenue, profit, interest and any other benefits (simplified assets of the legal entity) resulting from criminal activities are objects in the meaning of the Act.

There are four types of property/object which are subject to forfeiture:

- a) Used in order to commit the crime
- b) Designated to commit the offense
- c) Obtained from the criminal offence, or as remuneration for the criminal offence. In case of obtaining just a part of such an object Slovak law does not allow forfeiture of the object, and/or
- d) Acquired through the criminal offence

The Act refers to the regulations provided in the CC- Section 58 et seq.

Assets / objects must be sufficiently individualized (specified) to ensure that confusion with other objects is not possible. In the case of unattainable, unidentified and mixed with other assets the object belonging directly to the legal entity or to another person, which was obtained in accordance with the law, the court is authorised to order forfeiture in such a value which is equal to the value of the object.

This penalty is not imposed if:

- a) The injured party is entitled to damages and forfeiture of the object would make satisfying the claim impossible;
- b) The value of the object is significantly disproportionate to the seriousness of the criminal offense; or
- c) The court refrains from the imposing penalties on the offender.

5.3 Pecuniary penalty

⁴ Act No. 418/2011 Coll. on the criminal liability of legal persons and proceedings against them

⁵ Tibitanzlová A., ZÁKON O TRESTNÍ ODPOVĚDNOSTI PRÁVNICKÝCH OSOB A ŘÍZENÍ PROTI NIM: POHLED NA SANKCIONOVÁNÍ PRÁVNICKÝCH OSOB V PRAXI ČESKÝCH SOUDŮ, 2015, available on <http://www.epravo.cz/top/clanky/zakon-o-trestni-odpovednosti-pravnicky-ch-osob-a-rizeni-proti-nim-pohled-na-sankcionovani-pravnicky-ch-osob-v-praxi-ceskych-soudu-98726.html>

The Act establishes a precise limit for a cash penalty. The limit is set from EUR 1,500 to EUR 1,600,000. The CC specifies the conditions of enforcement of the decision. It is thus clear that unless the legal entity is not able to pay the cash penalty (even a certain amount), this penalty will not be imposed. Maturity should normally be on a one-off basis, but this does not exclude the possibility of monthly instalments (Section 56 of the CC). The recovered amount accrues to the State.

5.4 Disqualification from the practice of activities

Courts will be able to impose this penalty in case and for activities when the legal entity committed a criminal act, in some cases in connection with this criminal act. The disqualification from the practice of activities can be imposed for a period of between one month and up to 10 years. In determining the length of the penalty the court must take in account the consequence of the imposition of this sentence – impact on the existence, activity and functioning of the legal entity.

5.5 Prohibition on receiving grants or subsidies

As mentioned above in disqualification from the practice of activities, the length for imposing the decision ranges from one to 10 years, and the penalty is imposed in connection with the particular request of budget grants, subsidies or other compliance from the government, public institution financed from the government budget etc. in connection with their utilisation and provision. The intention of this is to mainly limit the participation/application for the grant and the receipt of grants and other contributions for the legal entity by this kind of punishment. Together with the Act other standards were also revised which also have some procedural impact, as the Act implemented an obligation in those standards for the grant applicant to declare that there is no such decision imposed on him.

5.6 Prohibition on receiving aid for and support provided from EU funds

As in the previous group of penalties, the length of imposing the sentence can from be one to 10 years. This is imposed for a criminal act committed in connection with the application according to Act No. 528/2008 Coll. on aid and support provided from European Community funds as later amended, in connection with application of other support from the funds of the European Union, in connection with providing or using of this support /aid.

The breach of this punishment establishes the criminal liability of the legal entity for the criminal offence of obstruction of an official decision.

Through the imposition of this penalty the corporate entity cannot obtain any support and assistance from European Union funds or any other similar support.

5.7 Prohibition on participating in public procurement

The court can impose this penalty for a period of one to 10 years in case of a criminal act of a corporate entity in connection with public procurement. It is imposed mainly for criminal acts connected with public procurement. Therefore, there was an amendment to the Act on Public Procurement and presentation of the personal situation of procurement applicant in public procurement.

Further, the breach of this punishment establishes the criminal liability of the legal entity for the criminal offence of obstruction of an official decision.

During almost three months after similar legislation was introduced in the Czech Republic not such punishment has yet been imposed.

5.8 Publication of conviction judgement

This penalty is imposed in cases where the circumstances of this case, the severity of the crime, public order or security, in some cases protection of human health, animals or property will be required to make the public aware of the alienating judgment.

The Business Journal is the primary source of communication, but this does not preclude the publication of the alienating judgment in other media – periodical press, the Internet and directly at the premises of the convicted legal entity. At the same time it can be selected from among a number of communication channels / media.

The court determines the scope and manner of publication of the judgment. The publication costs are paid by the convicted corporate entity.

Legally binding text of the Act available only in Slovak language: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2016/91/20160701>