

The theories and regulation of criminal liability of legal persons in Hungary

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Abstract

The aim of the article is to give a general overview of the criminal liability of legal persons in Hungary. The first part of the study introduces the theories of the criminal liability of legal persons in Hungary. In the next chapter of the essay, analyses the in force regulation with a descriptive method. The contribution also deals with the compliance of the Hungarian regulation with the EU legal sources. The final substantial chapter briefly introduces the practice of the liability of legal persons with statistics and single case. This study only analyses the substantive criminal law and not deals with the criminal procedure regarding this topic.

Keywords: criminal liability, legal person, legal theory.

I. Introduction

The criminal liability of legal persons is a controversial area. Is it right to hold responsible a legal person for a criminal act committed by a natural person? Is it necessary? What kind of sanctions shall be applied? Many questions arise from this topic.

In the first part of the study I will introduce legal theories of the criminal liability of legal persons in Hungary. The second part of the contribution analyses the in force regulation with a descriptive method. The third part deals with the compliance with the EU legislation. The aim of the article is to give a general overview of the criminal liability of legal persons in Hungary. The current study only analyses the substantive criminal law and not deals with the criminal procedure regarding this topic.

II. Theories in the beginning in Hungary

At the beginning the Hungarian literature did not have big interest towards the topic of criminal liability of legal corporations. The most important monograph in the 20th century was written in 1922 by Ervin Hacker titled „The associations capacity and criminal liability”¹. The monograph had a positive review over the time. His proposals

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¹ Ervin Hacker, *Az egyesületek büntetőjogi cselekvőképessége és felelőssége - Tanulmány az anyagi büntetőjog köréből* [The associations capacity and criminal liability – Study within the substantive criminal law]. Grill Cs. és Kir. Udvari könyvkereskedése, Pécs. 1922.

are still actual today. According to his views the legal persons shall be punishable² for legal dogmatic and legal political aspects.

The most important legal political reasons are the following according to Hacker:

- the effective protection against the big capital bloc. The protection of the legal order is more complicate against organizations that collect many assets and have a big membership. It is an actual fact that there are several crimes which can be mostly committed with a corporation³.

- It gives the option in many types of crimes to hold responsible the real offender. It is not necessary to punish the innocent who only acted for the order of the legal entity and the real sinner can't avoid punishment. It is not breaching the principle of „*ne bis in idem*.” We are not holding responsible the same person but a legal entity and a natural person⁴.

- The difficulties of the investigation of the offender natural person. On many occasions it is hard to find the offender. In these cases the criminal punishment won't be avoided if the legal person can take the responsibility⁵.

- Every sanction can punish innocents. It is an unjust situation when innocent members from the legal entity suffer the punishment indirectly but this can't be avoided. The person who enters into a company has the privilege to enjoy the profits but should also bear the risks as well⁶.

- The balance of the rights and duties are equal. On one hand the natural persons are granted with additional rights but on the other hand duties as well which shall be equal according to their scope of rights. It would be inequitable if we grant them only rights but not sanctions from certain legal relations.

Hacker not argues with the fact that there are difficulties with the guilt of the legal entity. The psychological relation between the criminal act and the offender is a prerequisite of the accountability. Only after this can we talk about criminal liability and imputation. The natural person has the qualified will which is required to declare guilt under the criminal law. Is the same possible with legal persons? Hacker says the answer is no. The legal persons have no qualified will it is not possible to declare guilt⁷.

III. Newer theories of criminal liability of legal persons

From the 90s many new articles were published in the legal literature which dealt with the criminal liability of legal persons. The hope for joining the European Union also brought the interest towards to this topic⁸. I would like to highlight the work of Sándor Fülöp. The title of his article is „The criminal legal subject of legal persons”⁹.

According to Fülöp the individual responsibility can be hard to clarify. There are three reasons for this. First is the so-called problem of the bad network. Under this he

² See Laura Stănilă, *To punish or to torture? About inhuman treatment in the recent view of the Strassbourg Court*, in Journal of Eastern European Criminal Law Nr. 2/2017. pp. 257-261.

³ E.Hacker, Op. cit. p. 118.

⁴ E.Hacker, Op. cit. p. 124.

⁵ E.Hacker, Op. cit. p. 127.

⁶ E.Hacker, Op. cit. p. 118.

⁷ E.Hacker, Op. cit. p. 136.

⁸ See Laura Stănilă, *The legal person and the tax evasion offenses. From theory to practice*, in Journal of Eastern European Criminal Law Nr. 2/2015, pp. 153-157.

⁹ Sándor Fülöp, *A jogi személyek büntető jogalanyisága [The criminal legal subject of legal persons]*, in Magyar Jog 1993/6. pp. 343-351.

means that due to the technical development of production units it is hard to define who is responsible for working and decision mechanism. It is very complicated and hard to control. Sometimes it is impossible to find the real person who was responsible for making the decision. The second problem comes in the case of the so called double omission. For example, environmental crimes (like polluting the air or water) can last for years. It is easier to hold responsible an organization. We can expect from the collective to know and follow the law. Fülöp says that we should follow the so called strict liability which is known in the English law. In this criminal procedure the prosecutor has to only prove the breach of an obligation by the defendant, but not the guiltiness in aspect of the result. Also we can mention here the possibility of a guilty plea which is a cost effective way of solving the case¹⁰.

The civil law and administrative sanctions have low effectiveness. It is well known that the duration of the civil procedure can be delayed with several methods and it is also well known that many administrative sanction – such as fine – eventually are passed on the consumers by the corporations. Compared to these procedures the criminal procedures are relatively fast and a condemnatory verdict can cause great reputation or goodwill loss for the legal person¹¹.

The legal person can be immoral too and the morality of the legal person can be influenced by the criminal law¹². The morality philosophy has a concept where they say that legal persons have similar morality levels as natural persons furthermore many urges – due to the abuses of many corporations – the collective legal entities for legal compliance with the criminal law which includes moral aspects¹³.

Professor Mihály Tóth in his „Economic crimes and offenses”¹⁴ titled monograph writes that „acknowledging the exceptional justifiability of the breakthrough of the principle of individual responsibility, I think the question can be solved through the acknowledgement of a „limited collective responsibility” having some criminal aspect mostly, but regulated independently on the basis of the following standpoints:

1. in case of an offence committed in the frame of an association we have to strive to define the individual responsibility with all means;
2. with or without it, against a legal person it is possible to apply sanctions ranked in the circle of subject and object defined clearly and precisely in law and listed there;
3. the prejudices are to be applied independently of guilt, considering the company's dangerous activity hurting financial interests and in proportion of this disadvantage; in my view the procedure should be regulated through special administrative proceedings, if possible ensuring the judicial way, guaranteeing the possibilities of excuse and legal remedy.”

In the first decade of the 21st century two monographs were written solely about this topic: one from Ferenc Sántha¹⁵ and one from Zsanett Fantoly¹⁶.

¹⁰ S.Fülöp, cited, p. 343.

¹¹ S.Fülöp, cited, p. 344.

¹² See László István Gál, *The criminal law protection of the stock market in Hungary*, in *Journal of Eastern-European Criminal Law* 2015.2. pp. 43-47.

¹³ S.Fülöp, Op. cit. p. 344.

¹⁴ Mihály Tóth, *Gazdasági bűnözés és bűncselekmények [Economic crime and offenses]*. KJK-Kerszöv Jogi és Üzleti Kiadó Kft, Budapest 2000. pp. 46-47.

¹⁵ Ferenc Sántha, *A jogi személyek büntetőjogi felelősségéről [About the criminal liability of legal persons]*. KJK-Kerszöv Kiadó, Budapest. 2002.

¹⁶ Zsanett Fantoly, *A jogi személyek büntetőjogi felelőssége [The criminal liability of legal persons]*. HVG-Orac Kiadó, Budapest 2008.

According to Sántha the sanctions applied against organizations can be considered a special field. „The extension of criminal responsibility onto legal persons can only be justified if the legal behavior can be promoted and increased in this way...” theoretically the introduction of criminal responsibility has no sense if we cannot expect the increase of efficiency: if the criminal sanctions are not more effective than the administrative, civil legal consequences, they are useless in this field.” In his opinion when forming the system of sanctions, the following must be considered: In accordance with the Hungarian criminal law penalties suggest guilt, so if we disregard the recognition of the special concept relating to the organizations guilt. These cannot be used against organizations. Thus the problem can be solved by means of either ranging the sanctions applicable against organizations with the circle of provisions or codifying a special, new type of criminal legal consequences. The criminal sanctions have to be clearly separated from the administrative sanctions... In the case of codifying the criminal responsibility of organizations it is more effective to form a system of sanctions consisting of more elements...”¹⁷.

Zsanett Fantoly view is that we need to use criminal law measures against legal persons. The centre of the criminological examination of the criminal liability of legal person is the legal person's crime commitment. These crime consists of the criminal conducts committed for the benefit of the legal person or within the organizational structure and the cases where the legal entity is not the victim¹⁸.

According to László Kóhalmi, The punishability of a legal entity is right regarding legal policy in that case if the commitment of the crime resulted in gaining property advantage in favour of the legal person and member or officer entitled acting or it was committed by its member/employee in the sphere of activity of legal person and the managing director or representative was aware of the crime¹⁹.

IV. The regulation of criminal liability of legal persons in Hungary

1. General provisions

According to Professor Tóth²⁰ there are three forms of the criminal liability of legal persons in the practice in general:

- The so called objective liability of the organization. This is also called result liability.
- The second when the leader of the organizations takes responsibility,
- and the third liability system when the collective leadership will be held liable for the crime committed with the legal person.

These 3 systems can be combined. The Hungarian criminal law mostly follows the third option²¹.

There are two important sources of law regarding criminal liability of legal persons in Hungary. On one hand the Criminal Code of Hungary (Act C of 2012) and on the other hand the Act on measures applicable to legal entities under criminal law (Act CIV of

¹⁷ Ferenc Sántha, *A jogi személyekkel szemben alkalmazható büntetőjogi jogkövetkezmények* [Criminal legal consequences applicable against legal persons]. Jogtudományi Közlöny 2000/6. p. 240.

¹⁸ Z.Fantoly, cited, p. 13.

¹⁹ László Kóhalmi, *A jogi személyekkel szemben alkalmazható büntetőjogi intézkedések* [The applicable criminal law measures against legal persons] In: Jura 2006/1. p. 56.

²⁰ Mihály Tóth, *Az egyes jogkövetkezmények* [The sanctions one by one]. in: Balogh Ágnes – Tóth Mihály (editors): Magyar Büntetőjog Általános rész. Osiris Kiadó, Budapest. 2015. p. 368.

²¹ See Flóra Józán, László Kóhalmi: *Rule of Law and Criminal Law Thoughts about the criminal justice of the Millennium Era*. in Journal of Eastern-European Criminal Law 2017.1. p. 216.

2001). The Criminal Code only states in Chapter VIII that measures can be used against legal person and refers to the above mentioned separate Act which contains the detailed regulation. The Act CIV of 2001 came into effect in May 1st of 2004 when Hungary joined the European Union. The reason for draft of the law was the legal harmonization with the EU legislation.

Under the Act CIV of 2001 legal entities shall be understood as any organization or organizational units thereof vested with rights of individual representation, which the governing rules of law recognize as legal entities, as well as organizations that can be subject to conditions of civil law in their own right and possess assets distinct from that of their members, including companies active prior to registration pursuant to the Civil Code²².

It is important to note that legal entities under the Hungarian criminal law can't

- be liable for a crime
- be perpetrators
- be sanctioned with penalties
- and finally can't commit an offense.

The measures can be only applied when someone (a natural person) committed an intentional crime under the Hungarian Criminal Code and a further condition is that the perpetration of such an act was aimed at or has resulted in the legal entity gaining benefit, and lastly the criminal act was committed by

- the legal entity's executive officer, its duly authorized member, employee, officer, managing clerk entitled to represent it, its supervisory board member and/or their representatives, within the legal entity's scope of activity,
- its member or employee within the legal entity's scope of activity, and it could have been prevented by the executive officer, the managing clerk or the supervisory board by fulfilling his or her or its supervisory or control obligations²³.

Other than these cases measures against legal entities shall be applicable even if committing the criminal act resulted in the legal entity gaining benefit, or the crime was committed with the use of the legal entity and the legal entity's executive officer, its member, employee, officer, managing clerk entitled to represent it, its supervisory board member, had a knowledge on the commission of the criminal act.

If these conditions are fulfilled the following measures can be applied:

1. winding up the legal entity,
2. limiting the activity of the legal entity,
3. imposing a fine.

According to Fantoly these sanctions are not within the criminal law. They are civil and administrative law type of sanctions applied by the criminal court on an objective basis. This is different than the traditional criminal law due the separate regulation²⁴.

Miklós Hollán – in his review²⁵ of Fantoly's monograph – opinion is that this statement is not well grounded. He thinks that the possible explanation for this statement is that the three above mentioned sanctions do not fit in the scientific definition of the criminal law sanction²⁶.

²² Act CIV of 2001 Section (1) 1.

²³ Act CIV of 2001 Section 2 (1) a, b.

²⁴ Z. Fantoly, cited, p. 193.

²⁵ Miklós Hollán, *Új monográfia a jogi személyek büntetőjogi felelősségéről* [New monograph on the criminal liability of legal persons]. in Magyar jog 2009/3. pp. 180-181.

²⁶ M. Hollán, *op. cit.*, p. 193.

2. Winding up the Legal Entity

There winding has two obligatory case and one facultative case. The court shall wind up the legal entity if, it is not running legal economic²⁷ activity and

- the legal entity was established for the purpose of covering up a criminal act, or
- the actual activity of the legal entity serves the purpose of covering up a criminal act.

The typical example²⁸ of these cases when they create a phantom firm or an offshore company and it is obvious in these cases that the court has no discretionary about the winding²⁹.

According to the facultative case the court may wind up the legal entity in the cases mentioned above even if, it is running legal economic activity. Even though the legal entity shall not be wound up in this case by the court if this would jeopardize the completion of state or local government tasks, or the legal entity

- is a national utility company,
- is considered to be of strategic importance in terms of the national economy,
- carries out national defense related or other special tasks or serves such purposes.

The winding up of the legal entity results in the dissolution of legal person without succession³⁰.

3. Limiting the activity of the legal entity

The court may limit the activities of the legal entity for one to three years. The duration shall be defined in years. Limitation may extend to the pursuit of all or some of the activities listed. For the duration of the prohibition, the legal entity shall not

- collect deposits based on a public invitation,
- participate in public procurement procedures,
- enter into concession contracts,
- be classified as a public benefit organization,
- receive funding from central or local government budgets, earmarked state funds or targeted support from foreign states, the European Community or other international organizations,
- pursue any other activities, which have been prohibited by the court.

In case the activity is limited, the following shall prevail on the date the court judgment becomes final, subject to the provisions of the court:

- the legal consequences of immediate rescission of contract concluded with legal entity under public procurement procedure,
- the legal consequences of immediate rescission of concession contract concluded with legal entity,
- the procedure involving classification as a public benefit organization is considered terminated, and the legal entity is considered deleted from the registry of public benefit organizations,

²⁷ See László István Gál *Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption*. Journal of Eastern-European Criminal Law 2014.1., pp. 22-25.

²⁸ See Csaba Szilovics: *About the causes of corruption in the hungarian public procurement system*. in: Journal of Eastern-European Criminal Law 2014.2., pp. 101-103.

²⁹ M. Tóth, cited, 2015. p. 370.

³⁰ Miklós Hollán, *Az intézkedések [The measures]*. In: Kis Norbert – Hollán Miklós, *Büntetőjog I. Általános rész*. Dialóg Campus Kiadó, Budapest. 2013, p. 335.

- the procedure involving the granting of subsidies under paragraph (2) point e) is considered terminated, and any subsidy received in conjunction with the criminal act shall be repaid.

4. Imposing a fine

Fine is a pecuniary sanction and within that is a payment obligation. The highest fine that can be imposed on the legal entity shall be three times the financial advantage gained or intended to be gained through the criminal act, but at least 500,000 Hungarian Forints. The Court may estimate the rate of the financial advantage if the financial advantage gained or intended to be gained could only be established at unreasonably high cost or not at all.

If the benefit gained or intended to be gained through the criminal act is not financial advantage, the court imposes the fine considering the financial situation of the legal entity, but at least HUF 500,000 (Which is around 1609 Euros when the article was written). The fine is recovered according to the rules of the court order in the case the fine is not paid.

V. Compliance of the Hungarian regulation to the EU legislation.

The European Union requires from the Member States to ensure the possibility of sanctioning legal persons involved crimes. Many EU legal sources (directives and council framework) contains the criminal liability of legal persons with very similar regulation. The regulated crime types are such as:

1. Counterfeiting;
2. Fraud and counterfeiting non-cash means of payment;
3. Environmental offenses etc.

In my current study I will compare the Hungarian regulation with the Directive³¹ regarding counterfeiting for as an example.

The Directive prescribes that the Member States shall take the necessary measures to ensure that legal persons can be held liable for the counterfeiting offences committed for their benefit by any person acting either individually or as part of an organ of the legal person who has a leading position within the legal person based on

- a power of representation of the legal person;
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person³².

The Directive also requires from the Member States that to ensure that the legal person can be held liable where the lack of supervision or control by a person... has made possible the commission of an offence... for the benefit of that legal person by a person under its authority³³.

It is also important to note that the liability of a legal person shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the counterfeiting offences³⁴.

³¹ Directive 2014/62/EU Of The European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA.

³² Directive article 6. 1.

³³ Directive article 6. 2.

³⁴ Directive article 6. 3.

As for the sanctions against legal entities the Directive prescribes that Member States shall take the necessary measures to ensure that a legal person held liable with effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines. The Directive also contains facultative sanctions with examples like:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- judicial winding-up;
- temporary or permanent closure of establishments which have been used for committing the offence³⁵.

The Hungarian regulation complies with the EU Directive in both aspects. Firstly it gives the option to sanction legal persons. Secondly the Hungarian regulation contains the one compulsory sanction: fine. The sanctions contained in the legal sources are summarized in the following table:

The Hungarian regulation (Act CIV of 2001)	The EU Directive on counterfeiting currency (2014/62/EU)
imposing a fine.	criminal or non-criminal fines (compulsory)
winding up the legal entity,	judicial winding-up (facultative)
limiting the activity of the legal entity,	temporary or permanent disqualification from the practice of commercial activities (facultative)
	exclusion from entitlement to public benefits or aid (facultative)
	placing under judicial supervision (facultative)
	temporary or permanent closure of establishments which have been used for committing the offence. (facultative)

In my opinion the Hungarian regulation should have more sanctions than the existing ones so the courts have more discretionary in these cases. All of the facultative sanctions should be considered in the future legislation.

VI. The Szegedi Paprika case and statistics

Since the criminal law measures were introduced there were not many cases where the legal persons were actually sanctioned. The following table contains the statistic³⁶ where the prosecutor office proposed sanction against legal persons from 2007 to 2013:

³⁵ Directive article 7.

³⁶ <http://kimittud.atlatszo.hu/request/2642/response/4308/attach/3/attachment2.pdf> (accessed on 30.10.2017).

	In the indictment the prosecutor proposed criminal law measures against legal persons						
	2007	2008	2009	2010	2011	2012	2013
Total Number	1	6	6	8	4	4	8

The next table³⁷ consists the yearly numbers where the court decided to sanction the legal person from 2007 to 2013:

	The court applied a criminal law measure against legal persons in the conviction						
	2007	2008	2009	2010	2011	2012	2013
Number of convictions	0	3	1	1	0	3	2

We can conclude from the figures that the numbers are very low it is almost close to non-existent statistically.

Until the essay was written one of the most famous of these few cases was the Szegedi Paprika case.

The case³⁸ can be summed up as the following. The accused natural persons of the case were convicted of misuse of harmful consumer goods and was awarded with a fine penalty. The legal person was also fined by 15 million Forints by the Szegedi Törvényszék (Szeged Regional Court). The crime can be accomplished when a person who prepares or possesses any consumer goods for the purpose of distribution that is harmful to health.

As legal persons the main actors of the case were the Szegedi Paprika firm and the Kotányi GmbH firm. These two firms were in a business relationship. The Kotányi GmbH bought 20 ton of spicy pepper (paprika) from the Szegedi Paprika firm in 2004. The paprika contained more than 5 micrograms per kilogram aflatoxin which is a poisonous carcinogen that are produced by certain molds. This number exceeded the permissible level and can be harmful to humans when its consumed. The Kotányi GmbH noticed this to Szegedi Paprika and the assistant from it transmitted these to the Quality Control Department. The Department confirmed this claim and reported this to the company leaders as well. They bought back the 20 ton of spicy pepper and after that they sold more than 3.5 ton of these as gourmet meal. They also sold the other parts of the paprika as so called diluted meal.

The accused natural persons, the leaders of the Szegedi Paprika firm decided over the resale of the spicy pepper. With this decision they put back harmful to human health goods on the market.

The Szegedi Paprika firm also gave a deceptive information about the origin of the spicy pepper and they were not allowed to use the label „Szegedi” which means from the

³⁷ <http://kimitud.atlatszo.hu/request/2642/response/4308/attach/3/attachment2.pdf> (accessed on 30.10.2017).

³⁸ <http://szegeditorvenyszek.birosag.hu/targyalasi-jegyzek/20140616/artalmas-kozfogyaszatasi-cikkkel-visszaeles-buntette-es-mas-buncselekmeny> (accessed on 30.10.2017).

Hungarian city of Szeged due to the fact that most of the spicy pepper were from Spain. It was solely an imported good. In some goods they also labelled with a trademark as „Perfect Hungarian Food” or „Grand Prize Winning Hungarian Product” which was also misleading.

The second instance court increased the sanctions compared to the first instance court due to the crime dangerous nature and the accused personal circumstances.

VI. Summary and conclusions

According to Professor Tóth³⁹ the obligatory conditions for applying criminal law measures against legal persons are:

1. the crime committed with intent.
2. The criminal act resulted or aimed to gain assets for the legal person or was committed with the legal person or with the use of the legal person.
3. A natural person was liable for the crime. or the offender was not (or not yet) identified.
4. Not the accused or suspected committed the crime or this cannot be declared.
5. The offender could not hold liable due to death; or his or her mental disorder; or clemency, or duress or threat.
6. The procedure was suspended due to absence sickness.

Facultative conditions:

1. the leader committed the crime as the leader of organization or as operative a member committed the crime and the offender could be stopped by the leader.
2. An outsider (*extraneus*) committed the crime for assets and the leader know about.

The possible measures:

1. winding up the legal entity,
2. limiting the activity of the legal entity,
3. imposing a fine.

The criminal legislature and the science of criminal law had long fights and debates and possibly there will be more in the future to improve the legislation.

Overall the Hungarian regulation complies with the EU legislation by giving the option of sanctioning and containing the sanction of fine.

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³⁹ M.Tóth, cited, 2015. pp. 368-369.

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