

In this special issue of Rands Business Bulletin, you will find information and tips regarding the upcoming **Act on Criminal Liability of Corporations and on Proceedings against them**. The new act provides **conditions of criminal liability** of corporations, **punishments** that can be imposed upon them and **procedure of their prosecution**. Unlike the current regulation, where corporations face no criminal liability at all, the Act on Criminal Liability of Corporations introduces **substantial changes**. **Corporations must act in accordance with this act, as well as with the Criminal Code**, otherwise they are criminally liable for their actions and **criminal punishments** may be imposed on them. The criminal punishment shall have impacts both on a **person acting on behalf of a corporation** and on the corporation itself. However, the acting persons may no longer “hide” behind the corporation and they will continue being individually liable. At the end of this special issue, a brief overview is given on models of criminal liability of corporations in other states and examples of situations when corporations can be held liable for their **actions outside the Czech Republic**.

## HISTORY AND PRESENCE

Criminal liability of corporations is possibility of **prosecuting corporations for criminal offences committed in their name or in their interest**. Unlike in Common Law, which has a long tradition of criminal liability of corporations, this is a relatively new instrument in the so-called continental legal culture, comprising, in particular, European states including the Czech Republic. A principle of so-called individual criminal liability, i.e. the exclusive liability of a natural person, prevailed here for centuries. Implementation of the criminal liability of corporations in Member States’ legislation has been recommended by international organizations (including the UN, OECD, Council of Europe) for many years. There is a wide range of **international treaties** concerning criminal liability of corporations; the Czech Republic is bound three of them. Introduction of criminal liability of corporations is actively promoted by the European Union as well. The Council of the European Union has issued many **framework decisions** relating to this matter and has called for implementation thereof in Member States’ legislation. An Act on Criminal Liability of Corporations was proposed previously in 2004. At that time, the bill **was rejected** by the Chamber of Deputies of the Czech Republic. **The current bill is very similar** to the 2004 bill and its aim is to redress the undesirable situation in Czech legislation, as it is the **only country in the EU which does not allow the prosecution of crimes committed by corporations**.

## THE BILL – FAQ

### When will the new act become effective?

The bill is planned to become effective on September 1, 2011. With regards to the fact that the bill is only in the second reading in the Chamber of Deputies of the Czech Republic, it can be expected to become effective later than that date.

### Who is the new act applicable to?

The act is applicable to any corporation with its registered office in the Czech Republic or which has an enterprise or a branch in the territory of the Czech Republic, or, at least, performs its activity or has property here.

### When is a corporation criminally liable?

A corporation is liable for a crime committed in its name or within its business activity or for a crime committed in its interest. A corporation may commit a crime by a statutory organ (or its member), a manager, an

employee or a person exercising a decisive influence on the corporation’s management (e.g. a shareholder).

### What crimes can be committed by a corporation?

There is a full list of criminal offences in the act which can be perpetrated by a corporation. Some include, for example, crimes against property (such as fraud, money laundering), economic crimes (tax evasion, counterfeiting), but also a wide range of other criminal offences (e.g. bribery, environmental crimes).

### Under what terms can extinguish criminal liability of corporations?

Under the act, a corporation cannot be liberated from its criminal liability. Criminal liability even passes to its legal successor. However, the criminal conduct can be undone through so-called “effective repentance”. It means that a corporation voluntarily ceases to continue in the criminal conduct and removes the wrongful effects thereof or announces the imminent danger in time. Nevertheless, criminal offences relating to bribery cannot be rectified through “effective repentance”.

### What types of punishments can be imposed upon a corporation?

The following punishments may be imposed for criminal offences committed by a corporation:

- the winding-up of a corporation,
- forfeiture of property, forfeiture of an object or other property value,
- pecuniary punishment,
- prohibition of activity,
- prohibition of performance in public tenders, concession proceedings or in a public contest,
- prohibition against accepting subsidies and subventions and
- publishing a judgment.

### What is the maximum pecuniary punishment?

A court may impose a pecuniary punishment upon a corporation at a daily rate within the range of CZK 1 000 up to CZK 2 000 000. Unlike in case of natural persons, the number of daily fines is not limited in the bill. Therefore, the amount of the pecuniary punishment is dependent only on the judge’s deliberation and is not limited by law.

### When is it possible to impose the punishment of the winding-up a corporation?

According to the bill, the punishment of winding-up may be imposed provided that the corporation’s primary activity was a criminal conduct. If imposed, the corporation enters into compulsory liquidation on the day the convicting judgment becomes final and, subsequently, is dissolved.

### When can a corporation be punished by a prohibition of performance in public tenders, concession proceedings or in a public contest?

This punishment can be imposed on a corporation which committed a crime in relation with the conclusion of contracts or performance under contracts arising from public tenders, concession proceedings or a public contest. This punishment may be imposed for a term of a maximum of 20 years.

#### **How does a corporation act in criminal proceedings and who represents it?**

Its statutory organ, authorized employee, a director of an organizational component or a proxy act on behalf of a corporation in criminal proceedings. Such persons may choose a representative or a Defense Counsel. However, such persons cannot act on behalf of a corporation if they are witnesses or the accused in the same proceeding.

#### **What is the relation between proceedings on an administrative offence of a corporation and criminal proceedings?**

It is not possible to use both proceedings for the same criminal conduct. Moreover the criminal proceedings cannot be instituted, if proceedings on an administrative offence have been commenced and vice versa. If a decision has been made in administrative proceedings, criminal proceedings may not be brought on the same matter.

#### **Can a foreign decision against a Czech corporation and a decision of a Czech court against a foreign corporation be recognized and enforced?**

The act allows for recognition and enforcement of foreign decisions. A foreign decision may be recognized and enforced under certain terms (particularly if the crime would be punishable also under Czech laws) through an application to a foreign state's authority submitted to the Ministry of Justice. The act also provides enforcement of Czech decisions abroad under terms provided by an international treaty or, if applicable, under the foreign state's laws.

### FUNDAMENTAL CHANGES FOR STATUTORY BODIES

As follows from the above-mentioned, the proposed act will fundamentally **change the exercise of function of statutory body**. Members of statutory bodies of corporations with their registered office on the territory of the Czech Republic shall duly exercise their functions and carry out control within the corporation also with regards to possible **criminal impacts on the whole corporation**.

Hence, with the adoption of the act:

- A member of statutory body may commit a **crime accountable not only to himself, but also to the corporation** he exercises his function in.
- A member of statutory body or a manager must **control the employee's work and prevent damage** arising from possible criminal conduct.

The new act enables proceedings to be brought against both a member of statutory body and a corporation, while both such proceedings shall be joined into one so-called **joint proceeding**. In such case, however, the member of statutory body may not represent the company before the court.

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### FOREIGN LEGISLATION

#### **Great Britain – extritorial jurisdiction**

Criminal liability of corporation is typical under Common Law. British law provides culpability of corporations, as well, while the intention is accounted to the corporation on the basis of an intention of a corporation's manager who represents it. According to Common Law, a corporation is seen as a person – the Board of Directors is the corporation's brain, executive bodies carry out mechanical operations. In addition, typical liability for culpability exists also under so-called *strict liability*, which does not require either intention or negligence, and so-called *vicarious liability*, which is a corporation's liability for its employee's conduct. Strict liability, known in the Czech law as so-called objective liability, will be applied under the new British Bribery Act which shall become effective this year. This act can also be applicable to foreign corporations that have a close link to Great Britain; thus, a British court will be empowered to convict a Czech corporation as well. Corruption shall be punishable under this act, if it is committed in relation with a public office, employment or business and if the corporation fails to prove that such deed was a mere excess from already adopted in-house anticorruption measures.

#### **Continental law**

Traditionally, continental law honored the principle that criminal liability may be applied to natural persons only. However, this principle has gradually evolved in most European states. The first state where this happened was the Netherlands in 1976, which introduced so-called genuine liability of corporations. In the Netherlands, this form of liability is of great importance particularly in the field of environmental criminality. A similar regulation has also been implemented in other continental countries such as France, Poland and Austria. The latter two countries have special acts on criminal liability of corporations, as proposed similarly in the Czech Republic. In Sweden and Spain, there is no way to convict a corporation for a crime, but it is, however, possible to impose accessory measures, such as confiscation of a profit, closure of enterprises, liquidation, suspension of activities or judicial administration of a corporation. The last type of criminal liability of corporations is the German model relying on administrative liability of corporations on the basis of the Misdemeanor Act.

### CONCLUSION

Due to the fact that the criminal liability of corporations is new to Czech legislation and has many opponents even among proposers of the Act, only practice will show the extent to which the new Act will be enforced by authorities and whether it helps to fight corporate criminality or if the system only becomes chaotic with a marginal impact on the criminal activities of corporations.

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