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COMPARATIVE ANALYSIS OF THE CRIMINAL LIABILITY FOR LEGAL ENTITIES IN EUROPEAN COUNTRIES AND IN RUSSIA

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“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre.”¹ The basic of this opinion was raised the authoritative decision: „The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company”

— Lord Denning LJ [1].

Today there is an increasing number of criminal offences in which an individual as the perpetrator is pushed into the background, and the legal entity comes into the fore as the centre of power and the real perpetrator of a criminal activity. The criminal institute is urged to create the effective instrument of fight against the growing real power of corporations and expansion of their illegal activities.

Criminal responsibility is the state of one who is bound in law and justice to do something, which may be enforced by action. This liability may arise from contracts either expressed or implied, or in consequence of torts committed [2].

According to the Featuring Black's Law Dictionary, legal entity is a lawful or legally standing association, corporation, partnership, trust, or individual that has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, sue and be suing in its own right, and to be accountable for illegal activities [3].

However, we consider a legal entity to be a legal institution with certain rights and responsibilities through which the law allows a group of natural persons to act as if they were a single person with certain purposes.

Prior to the late twentieth century, criminal liability of legal persons (companies) was largely ignored. In the past two decades, however, European States, one-by-one, have enacted laws that allow for the prosecution of corporations for criminal offences. Nowadays it is generally admitted, not only in Europe, but in other countries of the World (e.g. USA, India). The regulation of criminal liability of legal entities can be found inside of criminal code (e.g. Finland, Denmark, Belgium, France) or in other supplementary acts (e.g. Greece, Hungary) [4].

Criminal liability of a legal entity has acquired a new dimension in Europe especially after the International Congress of Compared Penal Law held in Budapest in 1978, as well as following the debates dedicated especially to economic financial or competitive criminality.

Based on the Recommendation R (88) on 20 October 1988 of the Committee of Ministers of the Council of Europe by which states were invited to admit criminal liability of legal entities, several states (Ireland, Norway, Finland, France, etc.), have decided to provide for this institution at the legislative level [5].

The first attempt at common criminal code of Europe was the „Corpus Juris Europae” (1997-2000). The CJE accepts as a principle of individual culpability:

- Individual criminal liability, (it adheres to natural person);
- Criminal liability of the head of the business, (it adheres to natural person);
- Criminal liability of organizations (it adheres to legal person);
- A legal entity can be held responsible for a criminal offence committed in its name or for its benefit:

- by its managing body or representatives;
- by a person who is under the authority of the person who runs, represents and administers the legal entity;
- the person that runs, represents and administers the legal entity [6].

The topic is very interesting and rather disputable nowadays. It has been implemented in several European countries. In the research we have chosen some of them for thorough analysis and comparison. Spain is the first country under consideration.

In 2010, the Spanish legislator enacted Organic Law 5/2010, of June 22, introducing for the first time into the Spanish Criminal Code the criminal liability of legal entities. The main feature of the new law is the establishment of potential criminal liability for legal entities. Accordingly, when the new law enters into force, legal entities can be held criminally liable for different types of crimes, regardless of whether the criminal behavior is attributable to employees, executives or directors of the legal entity. The penalties that may be imposed upon legal entities are different. They can be fines; suspension of the legal entity's activities for a maximum period of five years; closure of the legal entity's premises and establishments for a maximum period of five years, a prohibition on the legal entity to continue engaging in the same activities in the course of which the offence was committed. Sometimes it can be an ineligibility of the legal entity for subsidies and other public grants, public sector contracts, and tax/Social Security rebates and incentives, for up to fifteen year [5].

The next country to be considered is Belgium. Traditionally, legal entities were not criminally liable under Belgian law. In the case of an offence committed by a corporate, only those persons who were responsible for the corporate and who had the duty to prevent the offence could be punished. The situation changed radically with the adoption of the law of 4 May 1999, which came into force on 2 July 1999, on the criminal liability of legal entities. This law enables corporate entities to be prosecuted, with some limited exceptions. Under Belgian law, corporate entities are mainly exposed to the risk of criminal investigation or prosecution in the fields of environmental law and regulation, labour law, road traffic offences, consumer protection, aggravated tax fraud, market manipulation and money laundering.

There are several penalties that corporate entities are determined by the Belgian Criminal Code. In cases where imprisonment is the proposed penalty for a particular offence, this is automatically converted into a fine. The amount of the fine is determined according to a formula based on the number of months' imprisonment imposed. For specific offences, such as market abuse or insider trading, the defendant may be required, in addition to the penalty, to pay an amount of two or three times the profit made from the offence. Corporate entities can also face confiscation of assets, prohibition from conducting a specific activity and/or public censure. The corporate entity may also be dissolved if it is found that it was set up for the purpose of committing criminal offences. Additionally, corporate entities which have been convicted of specific criminal offences may be prohibited from participating in public procurement tenders [9].

Now we should have a look at The Penal Code of 1994 that introduced the concept of corporate criminal liability in French law. Initially applicable to a limited number of offences, the principle has been extended to all offences as from 31 December 2005 (Law No 2004-204 of 9 March 2004). A corporate entity can commit offences for which imprisonment is the only penalty provided by law. In such cases, the company may be fined up to EUR 1 million. The maximum fine applicable to a corporate entity is five times the fine applicable to individuals. As well as that, some additional penalties may be imposed. They include: dissolution, where the corporate entity was created to commit a felony; or, where the felony or misdemeanor carries a sentence of imprisonment of three years or more, where the corporate entity was diverted from its objectives in order to commit the crime; prohibition to exercise, directly or indirectly, one or more social or professional activities, either permanently or for a maximum period of five years; permanent closure or closure for up to five years of one or more of the premises of the company that were used to commit the offences in question; disqualification from public tenders, either permanently or for a maximum period of five years; confiscation of the object which was used or intended to be used for the commission of the offence, or of the assets which are the product of it; and publication of the judgment. Possible legal consequences for a legal representative, director, or employee of a corporate entity to whom powers have been delegated include imprisonment, fines and a prohibition on exercising a commercial profession and/or on managing or controlling a commercial company [7].

Criminal liability for legal entities is also imposed in Italy. Administrative vicarious liability for corporate entities for crimes committed by their employees was first introduced by Decreto Legislativo no. 231 of 2001 ("Law 231"). It is stated that legal entities can be held criminally liable for different types of crimes: fraud for the purpose of receiving public funding or subsidies, fraud against the Italian Government, municipalities or government agencies, computer fraud against the Italian Government or a Government entity; cyber crimes and breach of data protection; extortion and corruption; counterfeit of cash, treasury bonds or stamp duties; trade fraud; terrorism; manslaughter and breaches of health and safety legislation; money laundering; copyright offences. The maximum penalty differs for each offence. The highest fine is EUR 1.549 million. The court will also impose a fine sufficiently large to have an impact on the corporate entity. In addition to pecuniary penalties, corporate entities can be sentenced to: suspension of licenses and authorizations; prohibitions from carrying out a business activity, from obtaining government contracts and from advertising products. The liability of individuals is completely independent of the corporate entity's liability and is determined under the Italian law and according to the applicable rules [8].

The Netherlands have a long tradition of holding corporate entities to account for every kind of criminal offence. Since 1976, as a general rule in the Dutch Criminal Code, every criminal offence can be committed by a legal entity and can be prosecuted to the same extent as natural persons. Furthermore, persons supervising the unlawful conduct or the persons ordering the misconduct are liable, alongside the perpetrators themselves. Although most criminal prosecutions are instigated against natural persons, a growing number of corporate entities have been prosecuted in the last twenty years.

In a landmark ruling of 21 October 2003 (Zijpe-arrest) the Supreme Court held that an offence can be attributed to a legal entity depending on the circumstances of the case and whether such attribution is reasonable. A corporate entity can be held liable for all kinds of offences provided the offence can be reasonably attributed to the entity, for example if the offence has been committed within the working environment of the corporate entity. It is noted that factors relevant to such attribution include, but are not limited to, the following: the conduct constituting the offence falls within the scope of the corporate entity; the corporate entity's conduct benefitted from the offence; the offence was committed by an employee of, or a person working on behalf of, the cor-

porate entity; the corporate entity could have prevented the conduct but did not do so and "accepted" it. The maximum fines in the Dutch criminal law system are defined according to the category of offence. In general the maximum fines for corporate entities are one category higher they would be for natural persons. The overall maximum is EUR 760,000 per offence, which can accumulate indefinitely where there are a number of individual offences. For fiscal offences the maximum fine is 100% of the evaded taxes. As with all offenders, corporate entities can face forfeiture. Furthermore, special measures can also be imposed, such as closing the business activities of the corporate entity for a maximum period of one year. Dissolution of the corporate entity is a separate civil procedure that can be started by the Public Prosecution Office. However, this is not considered to be a sanction; it is not part of the criminal prosecution as such and is rarely sought by the Public Prosecution Office. The same approach applies to regulators in administrative law. In general administrative fines are much higher than criminal fines [6].

Thus, we can admit that legal entities in the considered countries can be held criminally responsible for a wide variety of crimes. They are:

- contempt in disobeying decrees and other court orders, directed to it;
- conspiracy;
- bribery or conspiracy to bribe public officials;
- the illegal practice of medicine;
- maintaining public nuisance;
- violations of licensing and regulatory statutes;
- violations of consumer protection laws;
- antitrust law violations;
- larceny, if corporate officers authorized or acquiesced in criminal act [11].

A legal entity can be subject of criminal offence starting from the date of its registration by the state, until its removal from the state register of legal entities. Criminal liability of a legal entity does not exclude the liability of the natural person for the committed crime. This means that for the same offence both the legal entity as well as natural person employed by such legal entity may be held criminally liable. Such natural person could be company's director, chief accountant, and any other employee. Legal persons may be exempt from criminal liability in connection with a voluntary waiver of commission of the crime before the illegal acts, or with active repentance. In the second case, the guilty person shall be released from responsibility, while respecting certain conditions, such as an act for the first time, and his assignment to the category of small or moderate. In addition, the person must self report the crime to the authorities before the criminal case was opened and repair the damage caused.

Thus, our comparative analysis of the countries under consideration can be presented in the following chart:

Chart 1.

Countries Criteria	Spain	Belgium	France	Italy	The Netherland
I. Name of the law	Organic law 5/2010	Belgian law	French law, Law NO 2004-204	Decreto Le- gistativo no. 231 of 2001	Deutch Crime Code
II. Date of the intro- duction	22 July 2010	2 July 1999	31 December 2005	8 June 2001	21 October 2003
III. Types of punish- ment:					
a) Fine	+	+	+	+	+
b) Suspension of the activities	+	-	+	+	+
c) A prohibition of activities	+	+	+	+	+
d) Confiscation of assets	-	+	+	-	-
e) Liquidation	+	-	+	-	-
f) Imprisonment	-	+	+	-	-

Having considered some European countries we should pay close attention to this question in the Russian Federation. It should be stated that nowadays we do not have such experience in the Russian legal area. Nevertheless, on 23 March, 2015, Alexander Remezov, a Deputy Chairman of the Duma Committee on civil, criminal, arbitration and procedural legislation, has introduced a bill on criminal liability of legal persons to the Lower House of the Parliament. It is suggested that criminal responsibility will be extended to Legal Entities. According to the magnitude and the type of crimes, the sanctions will be targeted at the company as well as the company managers or the employees committing crimes. Responsibility will be extended to the managers who do not enforce control measures to prevent the crimes. The legal entity will be considered responsible for offences committed on its behalf and for its benefit by its representatives, as well as crimes due to the lack of control mechanisms over their representatives.

It is assumed that criminal liability of legal entities will occur in a number of articles of the criminal code. They will include:

- human trafficking (article 127.1);

- the use of slave labor (article 127.2);
- commercial bribery (article 204);
- a terrorist act (article 205);
- mass riots (article 212);
- violation of rules of international flights (article 271);
- illegal access to computer information (article 272);
- an encroachment on life state or the public figure (article 277);
- violent seizure of power or forcible retention of power (article 278);
- public calls for extremist activities (article 280);
- illegal participation in entrepreneurial activity (article 289);
- giving a bribe (article 291);
- organization of illegal migration (article 322.1) [10].

This Law establishes the prerequisites of punish ability, punitive measures and criminal proceedings for criminal offences of legal entities. It is noted that the kind and amount of punishment will be determined by the court taking into account character and degree of public danger of the committed crime, preventive measures and the characteristics of the legal entity (his past criminal record, socially useful activities, etc.)

For the most serious crimes it is suggested to use such penalties as forced liquidation, and for foreign companies — prohibition on carrying out activities on the territory of Russia. A fine can be used for less dangerous crimes. Its size varies from 200 thousand to 30 million rubles, or set at multiples of illegally gained income. The initiative proposes to deprive the organization of licenses, quotas, preferences or privileges, in connection with which the offence was committed and of indefinite duration. The same principle applies to the punishment of deprivation of legal entity the right to engage in certain activities: the limitation will apply to activities in connection with which the offence was committed. However, such punishment will be appointed for a term of six months to three years.

Thus, we have compared criminal law of some European countries and our analysis shows that the type of penalties varies across jurisdictions, but there are some common trends which are outlined in the table. The following punishments can be named as prevailing: fine, deprivation of the right to practice certain activities and liquidation. The level of fines has seen an upward trend in recent years across many jurisdictions and can be very high. In Belgium, it is felt that the level of fines can act as a deterrent for small companies. Several jurisdictions, such as in France and Spain, envisage the dissolution of the corporate entity in certain cases.

We believe that fines should be applied as a main punishment. Moreover, the deprivation of the right to practice certain activities and the liquidation of the legal entity may be applied both as main and complementary punishments.

Amount of a fine for legal entities shall be set depending on the nature and the gravity of the crime committed, the extent of the damage caused, and considering the economic and financial condition of the legal entity. In the case of intended evasion by a legal entity from payment of the fine, the court may substitute the unpaid amount of the fine with a seizure and forced sale of the assets of the evading entity.

It is important to mention that criminal liability for legal entities in Russia should be considered seriously, taking into account the knowledge and experience of the European countries that put it into force years ago. We believe that this topic is very actual and our research is just the first step for further study and development that will help to implement the law concerning liability for legal entities in Russia in the nearest future.

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